

**CAUGHT BETWEEN 'DUBLIN' AND THE DEEP BLUE SEA:
'SMALL' MEMBER STATES AND EUROPEAN UNION 'BURDEN-
SHARING' RESPONSES TO THE UNAUTHORISED ENTRY OF
SEABORNE ASYLUM SEEKERS IN THE MEDITERRANEAN
FROM 2005 TO 2010**

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For Charlotte, with love

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ABSTRACT

The Dublin Regulation determines the Member State responsible for accepting and making a decision on asylum claims lodged in the European Union ('EU'), Norway and Iceland. It aims to ensure that each asylum claim is examined by one and only one Member State, to put an end to the practice of 'asylum shopping' and to prevent repeated applications, both of which have been costly for the receiving Member States and caused severe inefficiencies in the determination processes in the EU in the past.

With the first Member State of entry being the major determinant for the allocation of asylum responsibility under the Dublin Regulation, there has been growing discontent among Member States at the external borders of the EU, particularly the southern Member States in the Mediterranean, over what they see as a system that has unjustly placed disproportionate burdens on them regarding the admission of seaborne asylum seekers and the costs associated with it. As a result of changes in migration rules and consequent adjustments in the entry strategy employed by irregular migrants and people smugglers, the Member States at the EU's 'southern frontline' have unwillingly played the role of reluctant hosts to boatloads of unwelcome asylum seekers.

This thesis aims to examine how the EU has attempted to tackle the challenging situation of the unauthorised migration of asylum seekers into its territory by sea, and in particular, how it has responded to demands from affected Member States for a more equitable system of asylum responsibility allocation in spite of and outside the Dublin framework. It would argue that the 'small' EU Member States in the Mediterranean themselves have, over the last five years at least, become the unexpected drivers of the EU's declared commitment to the principles of 'solidarity', 'fair sharing of responsibility' and 'effective multilateralism'.

'Small' as they may be in terms of resources, size or influence vis-à-vis the larger Member States, the former have been able to create their own mark in a global regime that has traditionally been resistant to the idea of burden-sharing. The measures taken by the EU's 'southern frontline' have collectively changed the landscape of a global protection regime where not only is asylum 'burden sharing' highly elusive – its terms and conditions are also dictated by the more powerful sovereign states. While the theoretical point of departure in this study is the influence wielded by the 'small' EU Member States in the burden-sharing debate, the degree or level of 'influence' small Mediterranean Member States can exercise in pushing for cooperative arrangements is itself determined by a system that is biased towards large states, increasingly securitised, and is therefore limited in both nature and scope. Nevertheless, the experience of 'burden-sharing' in the EU between 2005 and 2010 demonstrates that the Member States at the periphery have proactively taken the responsibility for the operationalisation of the founding values and principles of the EU, and through active norm advocacy and related strategies, have been able to achieve what has eluded the global protection regime so far – a refugee burden sharing scheme.

Chapter 1: Introduction

“Europe cannot look on, without taking political action, at the shocking images of migrants drowning in the Mediterranean and the Atlantic. Desperate people are trying to get to Europe, often exploited by organised gangs of human smugglers. ... we must try to save every human in peril at sea.”

- Frattini (2007)¹

1.1 The Dublin Regulation and ‘Burden-Sharing’ of Asylum Seekers

The Mediterranean Sea is a large body of water enclosed by land on the north by Europe and the south by North Africa. Primarily a source of food and livelihood for the people in the area, historically it was also an important conduit for merchants and travellers alike, facilitating trade and cultural exchanges between communities from within the region and those from outside (Abdulafia, 2011). More importantly, the Mediterranean Sea provided routes for war, colonisation and exploration (ibid.). Therefore, migration within the Mediterranean Sea is a ‘long-established phenomenon with deep historical and socio-political implications’ (Baldwin-Edwards, 2004).

The relevance of the Mediterranean Sea to everyday life in present-day Europe remains strong, with its geographic location as the gateway to the peaceful and prosperous Europe for the poverty and war-stricken African neighbours being a source of much controversy and contention between policymakers, human rights advocates, the media and the general ‘European’ public. In current policy debates, the Mediterranean Sea has emerged from its natural state of being a physical border between Europe and Africa to a conceptual one demarcating one’s own community from that of the ‘Other’². It has also served to highlight the complexities of modern-day migration, the vulnerabilities of migrant populations, the weaknesses of international protection regimes and the glitches in the grand design that is the

¹ Mr Frattini was Vice President of the European Commission and European Commissioner for Justice, Freedom and Security.

² The ‘Other’ was a concept popularised by Said (1978) which draws on the belief that one’s own ethnic, national or cultural group is superior to that of another’s.

‘European Union’ (EU). The enormous power that this body of water wields over the EU is attributed to a phenomenon that straddles a number of sub-policy areas – the ‘unauthorised’, ‘irregular’ or ‘illegal’ entry of asylum seekers by boat, specifically via people smugglers.

Pugh (2001, p. 1) describes the Mediterranean Sea as a ‘Piccadilly Circus of migration patterns’ due to the large numbers of ‘boat people’³ arriving on the southern shores of the EU, and the media are often quick to exaggerate the ‘figures’, which themselves are largely ‘guesstimates’. It has been estimated by the International Centre on Migration Policy Development (ICMPD) that approximately 120,000 third country nationals cross the Mediterranean per year without proper authorisation (cited by European Parliament, 2007). However, the southern EU Member States in the Mediterranean – Spain, Italy and Malta – have been potential ‘targets’ of irregular migration by sea. Estimated figures⁴ for the unauthorised arrivals of third country nationals in the EU’s southern shores in the period covering 2004 to 2009 demonstrate that the ‘burden’ of receiving seaborne illegal migrants have fallen solely on the shoulders of Malta, Greece, Spain and Italy. These southern Member States receive large numbers of boat arrivals particularly in the summer season, when the number of attempts to enter the EU via the Mediterranean waters increases considerably. Nevertheless, such estimates are restricted only to the number of apprehensions carried out by maritime and border control authorities of vessels attempting to enter the EU outside authorised crossing points (Carling, 2007).

The phenomenon of people ‘taking to the seas’ for reasons of economic betterment or protection from harm or persecution is not new, nor unique to the EU (UNHCR, 2002). History bore witness to large-scale sea voyages of Vietnamese nationals escaping Communist-controlled Vietnam in the late 1970s, the mass exodus of 15,000 nationals from Albania following the collapse of the Communist regime in 1991 (Migrants at Sea, 2011), the boat arrivals of over 35,000 Cubans in the United States of America (USA) who escaped the Castro regime between July and August 1994 (Costello, 1995), and the 40,000 Haitians escaping the political turmoil, poverty and violence by boat between 1991 and 1992, many of whom perished at sea (Constitutional Rights Foundation, 1994). In the Mediterranean over the last decade, such sea voyages have been referred to as “voyages of hope” (Frattini, 2007), whereby the promise of either a peaceful and prosperous life in Europe far outweighed the perils associated with such

³ The term ‘boat people’ was commonly used to refer to the mass exodus of Vietnamese nationals from Communist-controlled Vietnam by boat in the late 1970s following the Vietnam War.

⁴Please refer to Chapter 4, Table 5, p. 159.

travels. However, the scale of the crises in Vietnam, Cuba and Haiti was considered to be much greater than that of the boat arrivals in contemporary Europe, and while the situation in the former 'overwhelmingly' involved 'refugees', in the latter, the situation was more 'mixed' (Pugh, 2004, p. 51). This means that migrants other than refugees or asylum seekers took part in such voyages.

The implications of having a heterogeneous mix of migrant populations in boat arrivals are great, particularly from the perspective of international refugee protection. The 'lumping' together of categories for individuals entering the EU waters from its southern 'frontier' in the Mediterranean with the help of people smugglers means that the individual's unique personal circumstances that led her or him to flee are overshadowed by her or his means of travel into Europe. Indeed, nowhere is this more apparent than in the inclusion of people smuggling, under the more generic title of 'irregular migration', in the EU's Directorate-General for Home Affairs, which lists its other policy concerns as including terrorism, organised crime, police cooperation, trafficking of firearms, trafficking in human beings, child sex abuse, sexual exploitation and child pornography⁵. The inclusion of 'irregular migration' in a list of policy areas that are easily identifiable by the element of criminality is indicative of the current wave of thinking equating 'irregularity' with 'illegality'⁶. The maritime aspects of border control have been prioritised in the EU policy agenda in recent years, due primarily to the frequent arrivals of unseaworthy vessels in the Mediterranean. According to Carrera (2007, p. 6):

'The phenomenon of irregular immigration, especially coming from the Southern European borders, represents the target against which "the EU border" and its multilayered components have been conceived [...]. One of the important objectives of EU border management is the building of a common immigration policy which "manages comprehensively" and "fights against" illegal mobility.'

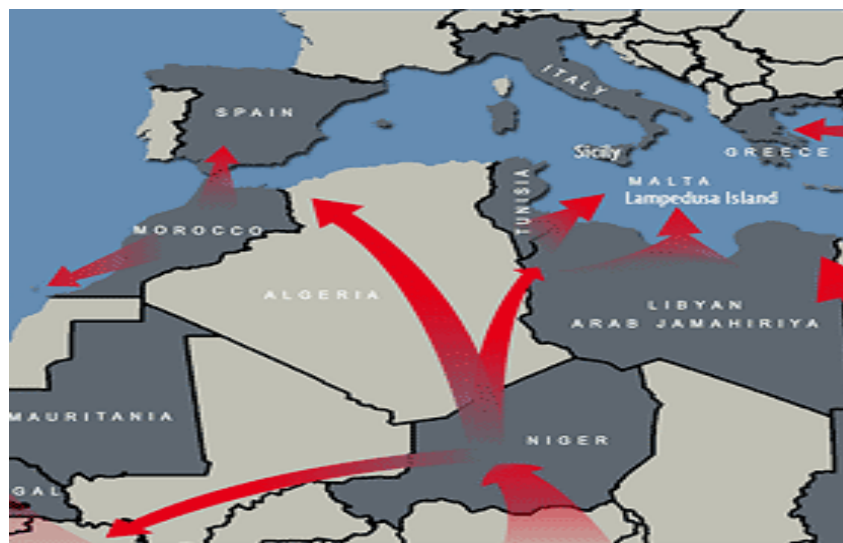
Its proximity to North Africa, which is both a refugee-producing and transit continent, has made the Mediterranean Sea a venue for migration control (Gammeltoft-Hansen, 2008, p. 5). The EU's Southern maritime borders have become a source of 'threat' against which 'all the security

⁵ The Directorate-General (DG) Home Affairs was established on 1 July 2010 'due to the growing importance of this policy area', and was created from the division of what was formerly known as DG Justice, Freedom and Security. Among its directorates and policy concerns are: terrorism, organised crime, police cooperation, trafficking of firearms, trafficking in human beings, child sex abuse/sexual exploitation and child pornography and irregular migration. It is also concerned with the implementation of the EU's Internal and European Security Strategies and the Common European Asylum System (CEAS) (European Commission, 2012).

⁶ The criminalisation of irregular migration is further discussed in Chapter 2: Review of Literature.

means need to be made operation, effective and proactive' (Carrera, 2007, p. 6). Indeed, media images such as those of shipwrecked African migrants and asylum seekers clinging to tuna nets for a number of days in an effort to survive and continue their journey to the EU, of hundreds of others 'crammed like cattle' in appalling conditions hidden in cargo ships, and rescue ships carrying African migrants being refused disembarkation by the border control authorities of the receiving coastal state (BBC, 2007) capture the political contention created by irregular migration in the Mediterranean region. The Member States of the EU have been criticised for their deflection or interdiction policies aimed at preventing or restricting the entry of seaborne asylum seekers into the EU via the Mediterranean, coined as 'burden shirking' measures. Their efforts to shift the responsibility for hosting boat arrivals to third countries, referred to as 'burden shifting' measures, have also received widespread condemnation. Whether the measures employed are designed to shift or shirk their responsibilities to asylum seekers, the utilisation of such measures signals the EU's 'departure from the global refugee protection regime' (Uçarer, 2006, p. 220).

Figure 1: Unauthorised migrants' routes to the EU via the Mediterranean via people smuggling



(UNHCR, 2010: 'Mixed Migration into Europe')

The responsibility for dealing with the issue of boat arrivals rests uncomfortably on the shoulders of the EU's southern Member States, who see themselves as victims of a supranational design that places undue 'burdens' on them by virtue of their geographical location. As a direct result of the implementation of the Dublin Regulation⁷, which is an integral aspect of the

⁷ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the

establishment of the Common European Asylum System (CEAS) and which pronounces the Member State of first entry as the Member State responsible for assessing asylum applications (Council of the European Union, 2003a), the EU's 'southern frontline' in the Mediterranean have had to deal with large numbers of migrants entering EU waters without proper authorisation. The Dublin Regulation, which applies to all 27 Member States of the EU, as well as Norway and Iceland, replaced the Dublin Convention⁸, and aims to ensure that each asylum claim is fairly examined by only one Member State, to prevent repeated applications or 'asylum shopping', and also in order to enhance efficiency. It is linked to EURODAC⁹, a database that stores the fingerprints of undocumented migrants and asylum seekers entering Europe. Under this system, the responsibility for processing an asylum application falls simply and solely on the Member State that 'played the most important part in the entry or residence of the person concerned'¹⁰ (ibid.).

With the first country of entry being the one and only criterion for the allocation of responsibility for receiving asylum seekers, the current system is criticised for a number of different factors, not least of which is the 'burden' shouldered by the southern Member States in the Mediterranean who may have unwillingly acted as entry or transit stops for asylum seekers wishing to seek protection in northern Europe, and who also happen to have less developed asylum systems or which simply cannot afford to admit or 'host' asylum seekers in economic terms. The Dublin system is also marred by inefficiency, which largely results from delays caused by the process of determining the Member State responsible for admission, which can last as long as six months, resulting in the prolonged stay detention of asylum seekers prior to their claims being heard (ECRE, 2008, p. 5). Therefore, the Dublin Regulation is itself the biggest challenge to the EU's grand ambition of achieving an efficient allocation and

Member States by a third-country national ('Dublin Regulation') OJ L 50, 25.2.2003 (Council of the European Union, 2003a).

⁸ Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the Community, Dublin, 15 June 1990, OJ 1997 C 254/1 ('Dublin Convention'). It entered into force on 1 September 1997, and was not EU law (European Union, 1990).

⁹ Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (Council of the European Union, 2000).

¹⁰ Under the Dublin Regulation, the responsibility falls on the Member State through which an asylum seeker first entered the EU. However, if an asylum seeker has a spouse, a parent (if the asylum seeker is a minor child) or is already granted refugee status or with an application pending in another Member State, then that Member State becomes responsible for processing. However, if an asylum seeker holds a permit or visa, then the Member State that issued the document is responsible. If no other criteria apply, the responsible Member State responsible is the country where the asylum application was lodged (Council of the European Union, 2003a).

determination system, which serves the ultimate purpose of preventing unwanted newcomers from entering its territory.

Nevertheless, the question of boat arrivals is one that the EU cannot afford to leave unanswered. First, the EU and its Member States have an obligation to provide protection to those who seek it, and this obligation is enshrined in international law and predates all other obligations imposed on them by present EU legislation. Second, irregular migration brings with it moral, ethical and humanitarian elements that the EU would find difficult to ignore. In particular, the human casualties resulting from such difficult voyages¹¹ made even more difficult and prolonged by much political bickering have been too great to disregard. According to the ICMPD, at least 10,000 have died trying to reach Europe's southern shores over the last decade (European Parliament, 2007). However, these figures could indeed be higher, as some of the unseaworthy vessels used by asylum seekers to travel to Europe often disappear in the water without a trace. Migrant deaths are also difficult to quantify, with estimates of drowning incidents being based only on survivors' accounts of the number of passengers (Jørgen, 2007, pp. 330-331). As Spindler (2007, p. 16) laments, 'the true extent of this global tragedy will never be known'.

The concept of 'burden-sharing' of unauthorised boat arrivals in the Mediterranean region has entered common parlance in the EU in recent years, specifically as the solution to the problems of over-burdened southern Member States who, as a direct result of the Dublin Regulation, were made responsible for hosting unwanted third country nationals. Such calls to redistribute the 'burdens' associated with boat arrivals include sharing the actual costs of admitting asylum seekers, and people-sharing. In the absence of a formal 'burden-sharing' framework, the EU has in the meantime been successful in 'exporting' its protection responsibilities to third countries, including countries of origin and transit. Indeed, the international cooperative agreements¹² forged by the EU with its 'partner states' in the Mediterranean and North Africa is a reflection of the political clout and economic power that the EU continues to wield in the region. Through its humanitarian activities in the European Community Humanitarian Office (ECHO), the EU has also provided funding for humanitarian aid and institution building, with the aim of preventing migrants from leaving their countries of origin and fleeing to the EU (Betts 2006, p. 670). In

¹¹ Most vessels used are considered to be unseaworthy, poorly constructed with insufficient fuel and limited navigation aids, and are often overcrowded. A more in-depth discussion on people smuggling is presented in Chapter 2.

¹² The agreements include cooperation in border control, readmission procedures, developmental and capacity building, and discussions of offshore processing centres (Betts, 2006, p. 653), and involved millions of funds to support the border surveillance systems of its 'partner' states.

addition, the EU's readmission agreements with transit and refugee producing countries via the European Neighbourhood Policy (ENP) ensured that its 'partner' states cooperated in re-absorbing the asylum seekers and migrants expelled or deported by EU border control authorities.

The current situation in the EU regarding boat arrivals has been met with much criticism and indeed condemnation, and repeated calls for a formalised 'burden-sharing' policy have largely been ignored primarily at the Member State level, and specifically by those Member States who are largely unaffected by boat arrivals. However, ignoring the need for cooperation in the area of unauthorised migration and asylum would be impracticable for the EU, and as its success in exporting its deflection policies demonstrates, it is able to establish successful partnerships in this policy area. Given the current absence of formal 'burden-sharing' mechanisms at the EU level, it is important to ask the question of what measures, if any, are being carried out in the EU to as an alternative to an institutionalised form of fair sharing of asylum responsibilities?

The central argument in this thesis is that the lack of a formal asylum burden-sharing system in the EU has resulted in *informal* arrangements fulfilling a burden-sharing purpose being carried out by the EU Member States in the Mediterranean region, specifically those affected by the rules of the Dublin Regulation. Furthermore, cooperative efforts to redistribute the asylum 'burdens' suffered by the EU Member States in the Mediterranean are multi-sited and bilateral in nature and form. In terms of the former, finding solutions to a global phenomenon as irregular migration necessarily requires the engagement of other actors outside the geographical confines of the EU, thereby making asylum governance not only multi-level (Marks, 1996) but also multi-sited and multi-actor as well. However, the EU's unique but complicated architectural design, coupled with the increasing securitisation of the asylum policy field, has led to burden-sharing participants resorting to bilateralism as a mechanism for cooperation. 'Bilateral multilateralism', which implies using bilateral or intergovernmental forms of cooperation to achieve multilateralist goals in the international refugee protection field, has necessarily become the *modus operandi* in the EU. The asylum burden-sharing 'system' resulting from such an arrangement is characterised by the formation of bilateral criss-crossing alliances that are largely outside and independent of the formal EU institutional framework but are nevertheless driven by multilateralist commitments to solidarity and fair sharing of responsibilities. With the discussions and negotiations on introducing a formal EU asylum burden-sharing scheme continuing to be met with opposition particularly from the 'northern' Member States, such an incremental approach as a 'return' to bilateralism as part of

the norm-driven strategy of the 'small' Mediterranean States is what appears to work, at least for the time being.

1.2 Setting the Context of the Study

Scholars of migration studies (Thielemann, 2006; Geddes, 2005; and Czaika, 2005 among others) identify the following as some of the motivating factors influencing the prospective migrant's choice of country of destination: economic factors, cultural linkages, political profile, and costs of travel. The prospects of employment and income maximisation are indeed strong motivating factors for migration for most migrants, including asylum seekers. Migrants also have a natural inclination to migrate to countries where they have cultural networks and language ties as a result of their colonial history, or which have a good human rights record. In regard specifically to asylum seekers escaping persecutory treatment in their countries of origin, countries overseas with a reputation for having 'relaxed' or more lenient asylum regimes may be more appealing than those known for having strict asylum policies. Interviews conducted by Lahlou and Escoffier (2002) with sub-Saharan African transit migrants in Rabat, Tangier and Casablanca waiting for their travel by boat to European shores cited the following as the reasons for their decision to migrate without authorisation to the EU: the Civil War in Sierra Leone, the ethnic and religious conflict in Nigeria, the civil conflict in the Ivory coast, political instability in Liberia and widespread insecurity in the Democratic Republic of Congo.

However, it is also not uncommon for migrants to flee for a combination of the above factors mentioned. Nevertheless, regardless of the 'pull' and 'push' factors for migration making the EU the chosen destination for migrants, it appears that in recent years, with the advent of a stricter visa regime in the EU making it difficult for some third country nationals to enter legally, the most decisive motivating factor for migration via unauthorised means has been the cost of travel and geographical proximity to countries of origin. In regard to the latter, the intention is to travel on rickety, unseaworthy boats that would take them to Europe, with the help of people smugglers¹³. According to Byrne (2003, p. 341), in the case of the southern Member States 'the more geographically proximate states were to countries of origin, the more probable that asylum seekers would succeed in entering their jurisdiction illegally'. The figures presented in Chapter 2 give evidence to the fact that Spain, Greece, Malta and Italy have had to shoulder a

¹³ In most cases, however, people smugglers do charge large fees for their 'services'. Chapter 4 provides an estimate of prices asylum seekers are charged for their unauthorised travel to Europe.

significant amount of the 'burden' of admitting mainly African asylum seekers illegally entering the EU by sea, due to their location on the EU map.

How has the EU, an institution promoting democracy, human rights, freedom of movement, rule of law and 'effective multilateralism' (Council of the European Union, 2003), responded to the multiple arrivals of unwanted migrants and asylum seekers at its southern shores seeking protection but who are inevitably associated with criminality by virtue of their means of entry? In the absence of a formal 'burden sharing' scheme, this thesis will argue that the EU would have needed to devise cooperative solutions to address this problem. The reasons for this hypothesis are outlined below.

First, the problem of unauthorised boat arrivals in EU territorial waters has urgently and necessarily entered the EU policy agenda. This is because the Dublin Regulation itself forms one of the four 'building blocks'¹⁴ of the establishment of the CEAS. The issue of illegal/undocumented migration has also been at the centre of Justice and Home Affairs (JHA) and Common Foreign and Security Policy (CFSP) policies in the EU since 1999.

Second, the EU's identity relies to a considerable degree on the perception that it is a 'guardian of human rights'. According to the 1999 Tampere Conclusions, the European integration process 'has been firmly rooted in a shared commitment of freedom based on human rights, democratic institutions and the rule of law'¹⁵. The obligation to provide access to asylum procedures in spite of the irregular or unauthorised means of entry is protected in the 1951 Refugee Convention, to which the EU Member States are signatory, making refugees an 'exception to States' legitimate pursuit of migration control' (Gammeltoft-Hansen, 2008, p. 10). In 2007, the Vice President of the European Commission and Commissioner for Justice, Freedom and Security on Justice and Home Affairs, Franco Frattini, warned that the continued EU 'apathy' towards boat arrivals in the Mediterranean region constituted a 'collective moral failure' for the 27-member bloc (Bilefsky, 2007).

Third, negotiations for a formal burden-sharing system to be introduced in the EU have been ongoing since 1994, and the principle of solidarity, in the general sense, is fundamental to the EU. 'Solidarity' in the supranational context is based on sharing both

¹⁴ The other three 'building blocks' being the Directives on Reception Conditions, Asylum Procedures and Qualification respectively. The CEAS will be further discussed in the next chapters.

¹⁵ EU Presidency Conclusions, Tampere, 1999 as cited in Morrison and Crosland (2001, p. 71).

'advantages' and 'burdens' 'equally and justly' among its 27 Member States (Eurofound, 2011). In regard to the migration field, until 2009, Article 63 of the Treaty establishing the European Community (TEC) has been the foundation for burden-sharing debates in the EU, specifically stipulating the need to adopt measures 'promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees' (Council of the European Union, 2001).

Fourth, while achieving the reverse of the very objective of sharing refugee 'burdens', the EU has proven capable of entering into cooperative agreements in the related policy area of migration control. The 27-member bloc's capacity and capability to forge such cooperative partnerships are an indication of the potential for the EU to establish cooperative agreements in other related policy areas, including asylum.

Based on the arguments outlined above, this study examines EU responses to the unauthorised arrivals of asylum seekers in EU territorial waters in the Mediterranean region, specifically those fulfilling a 'burden-sharing' purpose. These responses, which primarily focused on internal negotiation processes in the EU attempting to address or resolve the 'refugee problem', were analysed against existing burden-sharing proposals, mainly borrowed from International Relations, in order to discuss the viability and political feasibility of a formal burden-sharing system in the EU. While it is acknowledged that such unofficial and piecemeal responses may not make a significant reduction in the 'burdens' suffered by the Member States in the EU's 'southern frontline', it can be argued that they are an important reflection of what is viable in the EU in terms of an official burden-sharing scheme given the current state of play.

The novelty of this study rests on the fact that despite the extensive literature on unauthorised migration in the EU and the urgent need to 'share the burden' of receiving asylum seekers among the Member States, to date there is a scarcity of academic research focusing on cooperative efforts being carried out outside of the Dublin Regulation framework, despite such efforts receiving occasional media coverage. Related to this issue is the lack of systematic analysis of the EU's relationship with the United Nations High Commissioner for Refugees (UNHCR), which is mandated under its Statute to pursue protection, assistance and solutions for refugees (International Catholic Migration Commission, 2011), and more importantly, the role of the 'small', 'marginal' or less powerful states in the operationalisation of the norms of 'solidarity', 'fair sharing of responsibilities', and 'effective multilateralism'.

1.3 Thesis Objectives

The primary objective of this thesis is to demonstrate that despite the absence of a formal mechanism within which Member States are able to negotiate the redistribution of both tangible and intangible costs associated with receiving asylum seekers entering the EU by boat via people smuggling, there are informal or unofficial processes operating to compensate for the lack of institutionalised ‘burden-sharing’ in the 27-member bloc. It aims to provide an insight into the nature of negotiations in the EU leading to cooperative redistributive agreements, in order to identify components of a blueprint for a more formal ‘model’ that is generated ‘from within’ and therefore more suitable to the circumstances of the EU. Dissected further, this objective has four strands or ‘sub-objectives’, set out below.

First, this study aims to ascertain the actual ‘burden’ experienced by the Mediterranean Member States of Spain, Italy, Greece and Malta in regard to their reluctant hosting of asylum seekers arriving by boat and without proper authorisation, as required by the Dublin Regulation.

Any analysis on asylum ‘burden-sharing’ and discussions on how to share asylum ‘burdens’ would need to specify what exactly those ‘burdens’ are. There is currently a plethora of literature devoted to the issue of asylum ‘burdens’ suffered by EU Member States (Thielemann et al, 2010; Czaika, 2005; UNHCR, 2004; Noll in Byrne et al, 2002), and most point to the financial costs of hosting asylum seekers, and the capacity of Member States in meeting those costs. Member State capacity is calculated using different indicators, or combinations of indicators, including Gross Domestic Product (GDP), population size and population density. Analysing costs against capacity is indeed a difficult task, as agreeing on common indicators for measuring is often subject to politicisation, and indicators are subject to different weightings. The question of ‘costs’ is also difficult to measure, given the lack of consistency among the Member States in regard to what they consider as ‘asylum-related’ costs. In addition, the costs associated with hosting asylum seekers and processing their asylum applications under the Dublin Regulation are also fragmented, given that some of the responsibilities fall under supranational competencies, particularly in areas that require the transposition of three other Directives under the Common European Asylum System (CEAS)¹⁶.

¹⁶ Directives on the Reception Conditions for Asylum Seekers, the Asylum Procedures, and the Qualification for Becoming a Refugee or a Beneficiary of Subsidiary Protection Status.

This thesis takes the view that the only meaningful way to assess the 'burden' on the capacity of Member States to handle the challenge of unauthorised migration flows would be to look at the volume of asylum seekers received. This is in line with calls in the literature for actual numbers of asylum seekers to be assessed in relation to the capacity of Member States to admit them (Thielemann et al, 2010; Czaika, 2005).

Second, this study examines the conflation of different laws governing the rights of migrants to access asylum, in order to determine the legal requirements the EU and the Member States have to comply with in approaching the question of people smuggling and unauthorised migration in general.

The Dublin Regulation currently governs the decision-making processes of Member States in determining whether or not to receive seaborne asylum seekers. However, outside of the EU framework, there exist a number of different laws that apply to the treatment of persons seeking protection, and the obligation of states towards them. The compatibility of EU practices in regard to border control, disembarkation of boats and search and rescue of persons in distress with its internal primary and secondary law, and externally, with international law, should form the basis of any discussions on EU responses to unauthorised migration flows and burden sharing considerations.

This study attempts to establish what rights asylum seekers can claim vis-à-vis Member States at different stages of their journey at sea, in accordance with the area of law applicable. This is indeed a challenging and ambitious exercise, but is nevertheless necessary in the current discussion. The following were examined to obtain a much needed insight into the different legal opinions on the subject of state obligations vis-à-vis seaborne asylum seekers: EU treaty law, EU acts and agreements, cases at both the European Court of Justice (ECJ) and European Court of Human Rights (ECHR), international human rights conventions and instruments, customary and general international law, and UNHCR ExCom Conclusions. The status of asylum seekers and refugee is determined by the interaction of overlapping international orders that are regional and universal in scope (Gíl-Bazo, 2005, p. 2). The findings from this exercise will be used to inform the fourth sub-objective of this thesis, which is to propose a viable EU asylum burden-sharing scheme compliant with the law.

Third, this study analyses available data on EU responses to unauthorised boat arrivals in EU territorial waters from 2005 to 2010, looking specifically for practices performing a 'burden-sharing' a purpose.

What alternative measures are being carried out in the absence of a formal framework for redistributing asylum burdens across the EU-27? According to Durieux (2009, p. 77), what has been far less researched in this policy area is the congruence of inter-state transfers of asylum seekers, including through unilateral decisions. The literature's focus has usually been on deflection policies failing the protection test, despite clear examples of 'burden-sharing' practices being carried out outside of the supranational framework. Most important of these is the case of the *Francisco y Catalina*, hailed as the EU's 'first successful case of burden-sharing'. Moreover, the literature has so far left under-researched the instrumental role played by the Mediterranean Member States themselves in securing cooperative arrangements that resulted the transfer or relocation of their 'asylum burdens' to other Member States.

Fourth, this study attempts to analyse 'small' Member State-led bilateral and informal 'burden-sharing' responses by the EU against existing proposals and models, to see where the EU's responses may fit. If this is not possible, the objective is to identify the components of a system that would be viable and politically feasible in the EU context.

There have been a number of different proposals made as to how to solve the 'asylum burden' not just in the EU but also in the international context (Hathaway and Neve, 1997; Schuck, 1997; Fonteyne, 1978; and Pugh, 2001). This is a result of the intense debates generated by the phenomenon of boat arrivals in a number of different milieus, including policymakers, academics, NGOs and civil society. The foci of such debates are usually centred on what the appropriate responses are in managing such migratory 'flows', and are therefore essentially prescriptive. However, the requirements of the Dublin Regulation, the clandestine entry of asylum seekers into the EU's southern frontline by boat via the Mediterranean Sea, and the overlap of competencies in policy areas between the supranational and intergovernmental institutions are clearly unique to the EU and the current environment within which it operates. Therefore, only those proposals or models taking the EU's unique circumstances and character into account will prove viable. However, designing an ideal 'burden-sharing model' for the EU is beyond the scope of this study, due to time and resource constraints. The focus instead will be on identifying components of a politically feasible 'burden-sharing' framework, based on what has worked well informally in the EU thus far.

1.4 Thesis Delimitations

The following lists the delimitations of this study:

1.4.1 Thematic Scope

While the term ‘burden-sharing’ forms the basis of this study, conceptualising the term has been a challenging endeavour, particularly as the current discussion is essentially focused on human beings – the migrant, the refugee and the asylum seeker. However, the term is malleable enough to be ‘tailored’ to suit the institutional preferences of different actors. For example, the preferred terminology in the European Parliament debates is ‘responsibility sharing’, while academics have been known to use ‘burden’ interchangeably with ‘pressure’¹⁷. Member State governments have, however, a steady preference for the term ‘burden-sharing’, and this is a reflection of their perception of asylum seekers and refugees as a ‘cost category’ (Thielemann et al, 2010, p. 26). Nevertheless, attempts to replace the term¹⁸ in policy discussions have had little impact on the way the public debate has been led. As Fonteyne (1978, p. 185) points out:

‘burden-sharing is at best an ill-defined concept of an essentially *collective* nature. All burden-sharing requires is that the nations of the world, as a group, achieve a given result: the provision of material assistance to, and where necessary the removal of excessively burdensome refugee populations from the territory of, countries of first refuge’ [emphasis added].

The thematic scope of this thesis, therefore, entails an overview and analysis of the capacity of the EU in forging *cooperative agreements* promoting the ‘*burden-sharing*’ slogan in the field of unauthorised migration, which specifically involves the smuggling of asylum seekers into the EU via the Mediterranean by boat. This is designed to make a distinction between the goal (sharing of ‘burdens’) and the process involved in reaching that goal (cooperation).

1.4.2 Temporal Scope

In terms of the temporal scope of the research, the focus is on the first seven years following the Dublin Regulation entering into force, specifically the 2005-2010 period. The Regulation took immediate effect in 2003, but the enlargement process which incorporated new Mediterranean States did not take place until 2004. It is important to declare at this juncture the difficulty

¹⁷ An example is the report produced by Thielemann et al (2010) cited elsewhere in this thesis.

¹⁸ For example, with the terms ‘responsibility sharing’ and ‘equal sharing of responsibilities’.

encountered in obtaining complete, documented data regarding the number of boat arrivals resulting in cooperative agreements of some kind for the time frame examined.

1.4.3 Geographical Scope

The geographical focus of this study is on the territorial waters of the EU's southern Member States in the Mediterranean, particularly Spain, Greece, Italy and Malta. The selection of this region is due to the fact that it is an area of the EU that is most affected by unauthorised migration flows, and constitutes one of the top priorities for Frontex, the EU's border management agency. Entry into Spain is through the Western Mediterranean via the Canary Islands, the route to Malta and Italy is through the Central Mediterranean, and the Eastern Mediterranean route to Greece is via Turkey. The latter route is of particular high importance, given that migration waves have somewhat 'slowed down' recently in the Western and Central Mediterranean (Euractiv, 2010). More importantly for this study is the fact that the responses in this region to unauthorised migration 'highlight the political context where the practices take place', and its location puts into focus 'the interplay of different branches of international law governing search and rescue and refugee protection' (Gil-Bazo, 2005, p. 2).

1.4.4 Categorical Scope

a) 'Unauthorised' Migrants

There is a widespread categorisation of unauthorised migrants as 'illegal', particularly in domestic political discussions on the related issues of asylum and people smuggling. Such categorisations can be particularly problematic in the post-September 11 environment (Brouwer, 2003; Newman, 2003), where national security is an increasing priority, and where fear of terrorism has made populations anxious of newcomers arriving at their borders without authorisation or documentation. Labelling such migrants as 'illegal' criminalises them and 'effectively removes them from the protection of the law' (Morrison and Crosland, 2001, p. 63). Migration experts and human rights advocates, however, prefer the use of the term 'irregular' when referring to these migrants. While such generalisations are an important component of the current discussion on EU responses to 'boat arrivals', and this will be analysed further in the following chapters, this study has a particular conceptual responsibility to use objective categories in its analysis. Therefore, with the general preference to use the terms 'illegal' in political debates and 'irregular' among human and refugee rights advocates, both terms will be used interchangeably in this thesis.

b) Lodgement of Asylum Claims

The migration-asylum nexus has made it increasingly difficult to distinguish between ‘refugees’, ‘asylum seekers’ and other ‘migrants’. The label ‘economic migrants’ is often equated with the label ‘bogus asylum seekers’, meaning that while their real intention for migration is for economic betterment, they use the asylum channels to facilitate their entry into another country. However, while there appears to be a number of different reasons why migrants choose not to enter the EU through regular and official means, in recent years it has become increasingly difficult to distinguish those who need international protection from other migrants due to the similarity in the migratory processes for both groups. This is what is known in the literature as ‘mixed migration’, meaning that migrants and refugees are increasingly making use of the same routes and mode of transport to reach an overseas destination.

Castles and Van Hear (2005) also argue that it has become increasingly difficult to distinguish between economic migrants and asylum seekers or refugees, as they may have a combination of pull and push factors in their decision to migrate. The inter-relationship between poverty, conflict and human rights abuses ‘pushing’ populations to leave their countries of origin makes the classification of individuals into separate migrant categories a challenging exercise. In addition, it is often the case that once interviewed by border control authorities, individuals will jump categories to obtain work or if they receive new information regarding other categories previously not considered, in order to remain. As Betts (2006, p. 656) puts it:

‘The widely accepted synergies between underdevelopment and conflict highlight how many migrants leaving sub-Saharan Africa will have a range of motivations, but that the distinction between the ‘economic’ and ‘political’ is like to be untenable due to the relationship between these underlying causes. The majority of irregular migrants are likely to be moving due to a range of these underlying factors.’

For the purposes of data collection, this study focuses only on those migrants who have entered the EU by boat without authorisation and who have lodged, or have the intention to lodge, asylum claims. It is noted that in most available data calculating budget costs for providing protection to third country nationals in the EU, there is no distinction made between ‘asylum seekers’, ‘refugees’ and ‘other persons deserving of or given subsidiary protection’, as is the case in European Refugee Fund (ERF) statistics (Thielemann et al, 2010, p. 26). Some scholars (Gibney, 2004) even include Internally Displaced Persons (IDP)¹⁹ in the same group. However,

¹⁹ Internally Displaced Persons (IDPs) are those who suffer persecutory treatment but remain in their countries of origin.

the difference between these categories cannot be clearer. The 2010 Report produced by Thielemann et al for the Civil Liberties, Justice and Home Affairs Committee (LIBE) of the European Parliament defines 'asylum seekers' as individuals who:

'move across international borders in search of protection or who have applied for protection as a refugee under the 1951 Geneva Convention and are awaiting the determination of their status.'

According to article 1A (2) of the 1951 Convention and 1967 Protocol relating to the Status of Refugees (UNHCR, 1992), a 'refugee' is an individual who:

'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.'

The EU's Qualification Directive's definition of a 'refugee' is a 'faithful rendition' of Article 1(A) of the Geneva Convention (Balzacq and Carrera, 2005, pp. 47-48). However, the EU also includes in the definition those who have applied for a 'subsidiary' protection status. The European Court of Justice (ECJ)(cited in a report by the Jesuit Refugee Service, 2009) has ruled that unlike 'Convention' refugees,

'applicants for subsidiary protection are not required to establish evidence of a specific threat to their lives. Instead, the existence of such a threat can be considered if the indiscriminate violence reaches such a high level that if an individual is returned to the relevant country or region, he would face a real risk of being subject to a serious and individual threat.'

For the purposes of this analysis, strict focus will be placed on data concerning unauthorised migrants seeking protection or intending to seek protection (either refugee or subsidiary) through lodging an asylum claim in one of the Member States of the EU. They are often characterised by their mode of transport being unseaworthy and over-crowded, such as the wooden *pateras* designed mainly for fishing or inflatable rubber boats known as the 'zodiacs', by their lack of documentation and luggage (Carling, 2007, pp. 20-21), and by their physical appearance being distinctly 'non-European'.

1.5 Research Methodology

In attempting to demonstrate the operation of informal and small-state driven cooperative processes resulting in the sharing of the costs, both tangible and intangible, associated with allowing the entry of boats transporting asylum seekers into the Mediterranean waters as a means to enter the EU from its southern ‘frontline’, this thesis has encountered a number of obstacles. The first and most significant obstacle was the author’s ‘home base’ being situated in New Zealand, which logistically proved challenging and costly in terms of conducting field work in the EU. The second obstacle owes more to the nature of the study rather than the author’s circumstances, in that the policy areas of asylum and ‘illegal’ migration are highly securitised and difficult to access even for research purposes. The third and final obstacle experienced by the author can itself be attributed to the very objective this thesis is aiming to achieve – looking for something that is simply ‘not there’.

Nevertheless, the author was fortunate to have secured an internship at the European Parliament in Brussels in the early stages²⁰ of this thesis, and this proved to be an important resource for gathering information about the negotiations regarding the implementation of the CEAS, as well as for establishing contacts and networking. The author also secured travel grants²¹ that facilitated the fieldwork required in this research. The author was able to present the preliminary findings of the study at a number of academic conferences in New Zealand and overseas, and received useful feedback from experts in the field.

Below lists the overall research design and approaches for data collection and analysis that the present study has employed:

1.5.1 Deductive and Inductive Research Design

Being focused on numbers and costs necessarily dictated using deductive and empirical approaches to addressing the problem of asylum ‘burden-sharing’ in the EU. The data gathered in regard to informal ‘burden-sharing’ efforts was analysed against existing burden-sharing models or proposals, to determine where such efforts may fit. Referred to as ‘theory-testing’, a deductive approach enabled a comprehensive analysis of, and insight into, the asylum situation

²⁰ The author worked as a Parliamentary Intern from August to December 2005.

²¹ Jean Monnet Action Mobility Grant for Young Researchers and International Workshop for Young Scholars (WISH).

in the EU, and in particular, situating its unique internal circumstances within the wider international milieu.

The gaps between the existing literature and empirical evidence were then addressed using an inductive research approach, also referred to as ‘theory-generating’, qualitative research. The nature of people smuggling, asylum and the EU itself is such that classifications and categories are not always clear-cut, and policy developments have a tendency to revise or redesign existing theories.

1.5.2 Mixed Research Method

‘Mixed Research Method’ is described as involving the application of ‘a number of different research strategies related to a complex range of research questions and a complex research design’ (Brannen, 2005). Its usefulness in the present study is due to its applicability to a number of different disciplines, and its compatibility with ‘practical enquiry’ which is relevant to policy-making (ibid.). The study of asylum and people smuggling in the EU straddle a number of different disciplines, including International Law, Political Science, EU Studies and Critical Security Studies. This research is also focused on analysing responses, whether as part of official or unofficial policy, to the need for redistributive asylum arrangements in the EU.

Mixed Research essentially covers a combination of qualitative and quantitative approaches to data gathering and analysis (Brannen, 2005). In this study, a quantitative approach was used in presenting and analysing secondary data regarding the volume of boat arrivals and asylum seekers, and costs calculations for the asylum ‘burdens’ on the southern EU Member States. A qualitative approach was used in presenting and reviewing existing literature in the following areas of inquiry: asylum, international refugee and maritime law, burden-sharing, and Home Affairs decision-making in the EU. This approach also included interviews conducted with EU actors and policymakers, particularly to make sense of unofficial ‘burden-sharing’ responses that are either undocumented or under-reported. Below is an in-depth description of the research processes and methods involved in this study.

1.5.2.1 Quantitative Research Methods

Data regarding cases of boat arrivals and the calculations of the ‘burdens’ borne by southern EU Member States reluctantly hosting seaborne asylum seekers as a direct result of the Dublin Regulation was obtained primarily through desk-based research.

In looking for cases of unofficial asylum burden-sharing in the EU, this study relied on reports published by European and international news agencies²² between 2005 and 2010, as well as reports published on the websites of international organisations devoted to migration and refugee issues²³. Due to the lack of academic attention paid to informal or unofficial burden-sharing responses, any references to such cases in the news media are often short, if they are reported at all. As a result, only a very small number of cases were gathered for content analysis, in complete contrast to the abundance of news reports and academic analyses regarding cases of EU asylum 'burden-shirking'. For completeness and reliability, questions regarding these cases of unofficial burden-sharing were asked at the interviews conducted with UNHCR personnel and EU policymakers, the details of which are further explained in the next section.

This research then looked at the empirical evidence on the value of costs borne by southern EU Member States in hosting seaborne asylum seekers, using the most recent report published on the issue (at the time of writing). This report, entitled '*What System of Burden-Sharing Between the Member States for the Reception of Asylum?*' was produced by Thielemann et al in 2010 for the European Parliament Directorate-General for Internal Policies, and contained both asylum costs calculations and burden-sharing capacity 'rankings'. The report also makes a distinction between costs related to the implementation of EU asylum legislation and those related to national policy measures.

1.5.2.2 Qualitative Research Approaches

Cresswell (1998, p.15) defines 'qualitative research' as an 'inquiry process of understanding based on distinct and methodological traditions of inquiry that explore a social or a human problem'. This involves the researcher building a 'complex, holistic picture', through analysing words, reporting detailed views of informants, and conducting the study in a natural setting'. In this thesis, the following qualitative research methodologies were employed:

a) Desk-Based Research

For the literature review section of this thesis, desk-based research was used. The existing literature on the related fields of refugee protection, asylum, forced migration and unauthorised

²² These included the British Broadcasting Corporation (BBC),

²³ This included websites of the UNHCR, International Organisation for Migration (IOM), Migration Policy Institute (MPI) and Jesuit Refugee Services (JRS).

migration was reviewed to account for the phenomenon of people smuggling, which lies at the heart of this project. Articles and scholarly commentaries published in academic texts and journals dating from the end of the Second World War to the present time were consulted, in order to situate the phenomenon of people smuggling within the wider international refugee protection regime.

Desk research was also used to obtain a comprehensive account of the history of the use of the concept of 'burden-sharing' in the EU and international policy agenda, and this required a review of published works and expert analyses on the sub-fields of International Relations, namely Welfare Economics, Defence and Climate Change. A particular focus was given to the opinions of scholars of Refugee and Forced Migration Studies as regards their opposition to the use of the concept in refugee and asylum matters, and the views representing those of policymakers, which appear to promote the opposite view. The recent agreement between the governments of the US and a number of EU Member States regarding the exchange of Guantanamo political detainees was also looked at, as this agreement is essentially one of 'burden-sharing'. However, as this agreement is relatively recent, there has not been sufficient time for a comprehensive academic analysis, and therefore, the main sources consulted were largely newspaper reports and political opinions.

There is a plethora of academic resources focusing on the EU, its identity and its roles domestically and internationally. As such, selecting the most relevant literature proved to be a challenging task. The main theoretical perspectives analysing the EU as an institution, as well as providing an insight into international burden-sharing cooperation, namely the Realist, Constructivist and Liberal-Institutionalist perspectives, were examined as a starting point. 'Small State' theories, particularly in EU Studies, were also examined. EU and Member State responses to boat arrivals in the case studies, the application of the requirements of the Dublin Regulation across all 27 Member States, and the EU's working relationship with the UNHCR, were then analysed against each of the theoretical frameworks. The EU's official and unofficial, as well as bilateral and multilateral responses to boat arrivals were also examined against the conceptual framework of International Cooperation and Regime Theory as promoted by Betts (2009), and Informal Governance by Vink and Engelmann (in Christiansen and Neuhold, 2012).

The selection of the cases of the unauthorised boat arrivals transporting asylum seekers into the EU involved examining websites and reports, of UNHCR, European Parliament, European Commission and NGOs on the basis of the criteria set out in section 1.4.

b) Key-Informant Interviews

In order to obtain a more complete and comprehensive account of the case studies, as well as to ascertain the roles of different institutions in the EU in regard to responding to needs of unauthorised boat arrivals in the Mediterranean in the first five years following the implementation of the Dublin Regulation, the author sent written requests for face-to-face interviews with EU and UNHCR representatives. The author secured travel grants that facilitated the fieldwork component of this thesis in late 2006 and 2008, and the interviews were arranged in the EU on this basis. The face-to-face interviews with principal actors were particularly important for gathering data and filling the gaps in the literature regarding the *Francisco y Catalina* boat arrival and the events that led to the 'burden-sharing' of asylum seekers.

A total of eleven (11) interview requests were initially made in writing from New Zealand, sent both by email and facsimile to the representatives of the following institutions: the Office of the Commissioner for Justice, Freedom and Security; offices of three Members of the European Parliament who were rapporteurs for asylum directives; the UNHCR Regional Office in Brussels; the Office of the UNHCR in Rome; Agencia de las Naciones Unidas para los Refugiados (ACNUR) in Madrid; the Jesuit Refugee Services (JRS) in Brussels; the Maltese Interior Ministry, the Directorate-General (DG) for Justice, Freedom and Security (Immigration and Asylum Unit), and the office of the Komite Cap Anamur, a non-governmental organisation (NGO) involved in the rescue of seaborne asylum seekers in 2004. Interviews were immediately secured with representatives from the DG Justice, Freedom and Security, UNHCR Brussels, ACNUR, and an invitation to meet for a discussion on asylum issues was received from JRS. Surprisingly, the interview requests from the European Parliament rapporteurs were never acknowledged, despite numerous follow-up requests. The author also did not receive any response from the Maltese Interior Ministry, the Justice Commissioner's Office²⁴ and the Komite Cap Anamur.

In Brussels, through the author's initial meeting with the JRS, a face-to-face interview with a legal representative for the *Francisco y Catalina* from the Asociación Comisión Católica Española de Migración (ACCÉM) was secured. The author also contacted the Dutch Ministry of Immigration and Naturalisation Service in The Hague, who immediately granted the request for

²⁴ Later in the research process, the author was able to make initial contact by telephone with the Justice Commissioner's representative, but was duly advised that the Commissioner was overseas and therefore unable to be interviewed.

an interview. A last-minute request for an interview with a representative from the Civil Liberties, Justice and Home Affairs Committee (LIBE) from the European Parliament was also granted.

A list of questions, some of which were common to all respondents, and others which were tailored to suit their particular roles, were sent to each respondent prior to the interviews being held. Having a list of common questions was designed to facilitate the gathering of comparative data, whilst the non-uniform questions were necessary to gather data that would enhance what already exists in the literature. The list of common questions, which were pre-approved by the respondents, included the following:

- i) The respondent's institutional views on unauthorised migration;
- ii) The respondent's institutional views on the concept of 'effective multilateralism';
- iii) The respondent's institution's working relationship with other institutions on mixed migration and asylum issues;
- iv) The respondent's institution's involvement in drafting the directives for the CEAS, with a particular focus on the Reception and Asylum Procedures Directives;
- v) The respondent's institution's immediate responses to news of boat arrivals in the Mediterranean Sea; and
- vi) The respondent's role in the *Francisco y Catalina* case.

The non-uniform questions were formulated according to the respective roles and positions played by the respondents in regard to the mixed migration question in the EU. Of particular focus were the roles of ACCÉM and the Dutch Ministry of Immigration and Naturalisation Service, who were directly involved in the representation and redistribution ('burden sharing') of some of the *Francisco y Catalina* asylum seekers. Their involvement at the ground-level elucidates a complicated and often classified and highly securitised process.

The author travelled from New Zealand to the respective offices of each of the respondent in the EU to conduct the interviews. The highly sensitive policy area within which the respondents work was highlighted when the author was required for two of the interviews to surrender her passport and European Parliament identification document to the security personnel as a prerequisite for the interviews being held. Not all interviews were recorded on tape, and all but the two resettlement officers from the Dutch Ministry of Immigration and Naturalisation Service ('Dutch resettlement officers') requested anonymity. As a result, most respondents are referred

to in the interview transcripts (see Appendix) according only to their generic, official work titles.

The respondents gave the author a warm reception, but were conscious of the information provided. One respondent invited three other colleagues in the interview room to ensure that all information provided reflected was consistent with the respondent's institution's official stance on the subjects raised. However, when it came to questions related to the case of the *Francisco y Catalina*, most respondents seemed happy to provide both their personal and official views on the events leading to asylum 'burden-sharing'. Three respondents in fact volunteered information contrary to that disseminated in the news media, and saw the interviews as an opportunity to correct erroneous reports.

In addition to the face-to-face interviews, through the JRS Brussels and ACCÉM, the author was provided with the unique opportunity to meet thirteen (13) of the *Francisco y Catalina* asylum seekers at the 'installation centre' known as the El Centro de Acogida de Refugiados, situated in Sigüenza in Castilla-La Mancha. The Centro provides free accommodation, meals, Spanish language lessons and vocational training to both refugees and asylum seekers, to prepare them for a new life in Spain. The author was permitted to speak to the staff about the running of the Centro, but not for interview purposes. The author also did not have access to the individual asylum seekers for security and legal reasons.

1.6 Chapter Synopsis

This chapter provided an introductory background to the issue of mixed migration in the EU, in particular, the requirements of the Dublin Regulation making the first Member States of entry responsible for processing asylum claims, and the 'burdens' these have created for the EU Member States situated at the 'southern frontline' in the Mediterranean region, which is vulnerable to unauthorised boat arrivals from North Africa. It has also provided a comprehensive list regarding the thesis objectives, delimitations and the research methodology employed in the study.

Chapter 2 reviews the existing literature on mixed and forced migration, burden-sharing, international refugee law, EU migration decision-making processes, and existing burden-sharing models and proposals from different disciplines, with the objective of analysing the applicability of available literature on what is a relatively recent phenomenon of migration. The contributions of the EU's burden-sharing experience to the literature are also highlighted.

Chapter 3 sets the conceptual foundations of the study, focusing on the intergovernmental nature of asylum and external migration policy in the EU and the role of 'small' Member States in the asylum burden-sharing debates and processes. It looks at the problem of burden-sharing and cooperation from the Neo-Realist perspective in arguing that the difficulty in achieving both lies in the (large) state-centredness of the global protection regime itself.

Chapter 4 gives an overview of the Dublin Regulation and the costs associated with receiving asylum seekers in the EU, to provide a comprehensive understanding of the 'burdens' debate in the EU. It also provides data regarding unauthorised migration flow into the four Mediterranean Member States of Greece, Spain, Italy and Malta.

Chapter 5 looks at selected cases of boat arrivals in the EU from 2005 to 2010, and examines burden-sharing efforts made at the Member State and the Community levels. Particular attention is paid to the relocation or physical transfer of refugees from the southern EU frontline to the 'north', as an indication of the efficacy of 'small' state norm advocacy.

Chapter 6 addresses the question of what is a viable and feasible in terms of asylum burden-sharing in the EU looking at the EU 'small' Member State experience thus far, and testing its applicability to political developments such as the 'Arab Spring' affair and the Dublin Regulation revision negotiations to analyse the potential institutionalisation of 'small' Member State-driven cooperative arrangements.

Chapter seven summarises the main points raised and concludes the study, with a discussion on the scope for future research on the subject.

Chapter 2: Review of Literature

The question of how best to share the ‘refugee problem’ is one of the few global issues that have occupied the agenda of three distinct fields simultaneously: legal, political and academic. With the Second World War as the starting point, the voluminous literature has continued to evolve and expand to accommodate the political, legal and theoretical developments in the areas of refugee protection and unauthorised migration. Nevertheless, there remains a gap in the literature that needs to be filled. While it is clear that much work has been carried out in developing the literature on the separate but inter-related fields of asylum, burden-sharing and unauthorised migration via people smuggling, in order to adequately address the complex migration situation in the EU, it is necessary for these three areas of inquiry to be merged and discussed at a level of analysis that takes into account the *sui generis* nature of the EU. Therefore, the central contribution of this research to the largely internationally-focused literature is the creation of an additional dimension through which to assess these lines of inquiry – the ‘southern EU dimension’.

First, there is currently a scarcity of research focusing on ‘burden-sharing’ efforts being carried out in spite and outside of the Dublin Regulation framework specifically dealing with ‘boat arrivals’. Much of the scholarly and policy attention is given to the lack of burden-sharing efforts and the need for more cooperation between EU Member States. However, a number of cases demonstrating some degree or level of ‘burden-sharing’ cooperation have received occasional media coverage both in the EU and internationally. Through the data obtained from key-informant interviews, the processes involved in facilitating ‘burden-sharing’ in the EU are identified and explained using available theories on and concepts of burden-sharing.

Second, the experience of asylum seekers who have attempted to enter the EU’s southern waters in the years following the implementation of the Dublin Regulation adds richness to the wealth of literature elucidating the nature and processes of people smuggling and mixed migration in general, as well as the convergence of a number of different areas of law governing a person’s right to access refugee protection. In regard to accessing asylum procedures, while the experiences of asylum seekers in the case studies are consistent with those of most other seaborne asylum seekers outside of the EU, in that the conflation of different areas of

international law often results in a policy impasse accompanied by boatloads of migrants stranded for days or weeks in appalling conditions, the Dublin Regulation operates as an additional layer of rules that further complicates an already protracted situation.

Third, the special and unique status of the EU as simultaneously the receiver of unauthorised migrants, interlocutor for burden-sharing negotiations and most importantly via the Dublin Regulation framework, the protagonist of the actual 'burdens' placed on the southern Member States, makes for a unique and significant contribution to the discourse on the EU's identity as an 'actor'. The EU is essentially a non-State entity functioning as a State in a number of policy areas, which, as a result of the recent changes introduced by the Treaty on the Functioning of the European Union (TFEU Articles 78 and 79, respectively) now also include asylum and illegal immigration.²⁵ However, prior to the TFEU coming into force in December 2009, there was a clear overlap of competencies in these policy areas between the supranational institutions and the Member States. For example, while the 1999 Amsterdam Treaty placed the Justice and Home Affairs 'pillar' within the jurisdiction of the Commission, the European Court of Justice (ECJ) and the European Parliament under Title IV of the Treaty (Geddes, 2001, p. 61), Title VI of the EU Treaty placed 'police and judicial cooperation in criminal matters' firmly within the control of the Member States. Unauthorised migration and people smuggling were included in the list of such 'criminal' matters.

The growing clout of the supranational institutions in the EU's domestic sphere is accompanied by efforts to firmly establish the EU as a 'global actor' in the international sphere (Wouters et al, 2006, p. 2). The EU has officially declared its adherence and commitment to the principle of 'effective multilateralism' in its European Security Strategy, defining it as cooperation for the 'development of a stronger international society, well-functioning international institutions and a rule-based international order' (Jasiński and Kacperczyk, 2005, p. 32), and is the only non-State entity that is signatory to over 50 multilateral United Nations Conventions and Agreements. However, as the case studies and the interviews conducted in this research will demonstrate, in the asylum field, bilateral and unilateral strategies continue to be employed within and outside the EU's institutional framework, and this indeed highlights the peculiarity of the EU's 'hybrid structure' (Lucarelli in Elgström and Smith, 2006, p. 60). The multiplicity of actors participating in the policy-making processes relevant to asylum and unauthorised migration serves to intensify existing debates on whether the EU is an intergovernmental or a

²⁵ TFEU Articles 78 and 79 require decisions to be made by the European Council via Qualified Majority Voting (QMV) and in co-decision with the European Parliament.

supranational institution committed to multilateralism. Central to this question is the process of collective identity formation in the EU, which dominates the debate between the following schools of thought: Realism, Constructivism and Liberal Institutionalism.

Related to the above question is the EU's relationship with the United Nations, with Smith and Laatikainen (2006) lamenting the lack of 'systematic analysis of the EU's approach to the UN's central bodies'. The working relationship between the EU and the UNHCR in dealing with the issue of boat arrivals in the southern Member States is often only discussed superficially in the literature, without any real or meaningful discussion as to the role of the UNHCR in EU asylum 'burden-sharing' negotiations. This research aims to fill this gap through the data obtained from interviews conducted with both EU and UNHCR representatives who played a direct role in the boat arrival cases looked at.

The literature has also not been receptive to the leadership role of the economically and politically weaker Member States who, for reasons of geography, are thrust in the Dublin Regulation muddle, specifically the small island state of Malta. International Relations theory and Realist scholars in particular tend to view external relations and foreign policy as being dominated by larger, wealthier and more powerful states. Within the EU, these powerful states are identified as France, Germany and the United Kingdom (Hill, 2004), forming an exclusive club and 'precooking decisions that are then formally adopted by all member states' (Nasra, 2011, p. 164). Small Member States, who usually have less wealth, are expected to accept the authority and decisions of the more powerful larger Member States. Nevertheless, the literature in the last decade has witnessed a proliferation of ideas in regard to the specific conditions small states are able to pursue their national objectives, with the EU providing an arena for doing so.

Fourth, the present work serves to regenerate and revitalise existing burden-sharing debates which began after WWII, and which reached a crescendo in the international realm during the Vietnam Crisis in the late 1970s. The case studies looked at in this research, which involved situations of boat arrivals in the EU eliciting 'burden-sharing' responses, highlight the growing complexity of the phenomenon of 'mixed' or 'unauthorised' migration in recent years, particularly the characteristics of contemporary cases increasingly moving away from the traditionally held view of people smuggling as a criminal exercise to one that highlights its humanitarian elements, and to the traditional conception of boat arrivals consisting of large

homogenous groups of 'refugees', to one that involves frequent, perilous voyages of smaller mixed groups of 'migrants' and 'asylum seekers' travelling in unseaworthy vessels.

This has significant implications for burden-sharing proposals that would be viable in contemporary Europe, with a growing number of scholars, academics and policy-makers advocating a humanitarian or a 'Convention Plus' approach, thereby also signalling a move away from the traditional conception of 'international protection' within the framework of the 1951 Refugee Convention. This research attempts to identify elements of an EU-specific burden-sharing 'framework', drawing from existing burden-sharing proposals mainly borrowed from International Relations, and taking into account the distinctive characteristics of EU boat arrivals and existing burden sharing' resources available to EU institutions as revealed at the interviews conducted by the author.

2.1 Dublin Boat Arrivals and the 'Mixed Migration' Literature

This section looks at the existing literature on 'burden-sharing', and addresses the gaps that this thesis aims to fill. First, while there is a wealth of literature focusing on the 'burden-sharing' of 'refugees', the link between burden-sharing and asylum 'has triggered comparatively little research' (Noll, 2000, p. 264). The recent shift in policy focus away from international refugee protection to the phenomenon of 'mixed migration', which includes unauthorised migration in the form of people smuggling, has not been accompanied with the same level of attention and interest in the academic field in relation to burden-sharing. Second, while the 'burden-sharing' slogan has been used many times in the EU in discussions regarding boat arrivals and asylum seekers in general, and in regard to the absence of formal redistributive arrangements at the EU level in general, to date there has been very little academic interest in informal arrangements that may amount to 'burden-sharing' in the asylum field.

2.1.1 From 'Refugee' to 'Forced Migration' to 'Mixed Migration' Studies: A Complex Catalogue of Statuses and Rights

The literature on burden-sharing is broad, in that it spans over a number of disciplines, specifically Welfare Economics, defence, the environment, and refugee protection. This uneasy mix of different policy areas means that the burden-sharing literature is rich and varied. The debate on how best to share the 'burden' of 'refugees' began as early as the late 1970s, with the works of Fonteyne (1978) and Grahl-Madsen (1983) pivotal in generating discussions. However, the focus of such debates was strictly on 'refugees', as opposed to any other

classification of 'migrants'. There is a clear distinction between the two categories, and distinguishing one from the other immediately determines the rights and entitlements each may be able to access from the host or receiving state. According to the UNHCR (2008):

'Migrant' is a wide-ranging term that covers people who move to a foreign country for a certain length of time [it is] not to be confused with short-term visitors such as tourists and traders. People migrate for a variety of reasons.

Migrants are fundamentally different from refugees and, thus, are treated very differently under international law. Migrants, especially economic migrants, choose to move in order to improve their lives. Refugees are forced to flee to save their lives or preserve their freedom.'

The refugee burden-sharing literature was born in the inter-war years, covering the period between 1914 and 1945, and focused mainly on the question of the capacity of states to host 'refugees' (Chimni, 2009). The post-war period, beginning in 1945 and ending in the mid-1980s witnessed a voluminous amount of work devoted to the issues of refugees and human displacement caused by the First and Second World Wars. Therefore, when the literature began, the policy and academic focus was specifically on 'refugees', as opposed to all other migrant categories. The formulation of the definition of a 'refugee' by the 1951 Convention served to delineate 'refugees' according to the prescription of international refugee law from all other 'migrants'. As mentioned in Chapter 1, article 1A (2) of the Convention defines a 'refugee' as an individual who has a 'well-founded fear' of persecution on the basis of race, religion, nationality, membership of a social group or political opinion and is living outside his country of nationality due to his or her inability to find protection in it (UNHCR, 1992).

In the post-war period, the works of Petersen (1958) and Kunz (1973) dominated the literature. Both scholars looked at the 'refugee' as a distinct social category, particularly from 'voluntary migrants', on the basis of his or her 'reluctance to uproot oneself and the absence of positive, original motivations to settle elsewhere' (Kunz, 1973, p. 130). Thus, the dominant theme in the literature in the post-war period was the involuntariness of the flight of refugees, as diametrically opposed to the voluntary nature of the migration process for all other migrant categories. The distinction made between 'voluntary' and 'involuntary' migration in this period, according to Chimni (2009, p. 15), has signalled the start of the transition of the literature from being solely focused on refugee research, to that which has a broader focus under the title of 'forced migration'.

The shift of the literature from being purely 'refugee studies' to the much broader 'forced migration studies' covered the period between 1982 and early 2000s (Chimni, 2009, pp. 14-15). This period witnessed significant developments in the field, with the term 'forced migrant' being used to refer to a wider class of migrants from which the legal category of 'refugee' is to be 'extracted' (Turton, 2003, p. 13). Forced migration scholarship aimed to study the diversity and complexity of migration and migrants, and capture the different levels and degrees of the 'voluntariness' and 'involuntariness' of migrants' flight. 'Refugees' and other 'forced migrants' are analysed against 'other migrants' and as part of the wider family of 'migrants', to obtain a more comprehensive and realistic picture of the phenomenon of international migration. Richmond's (1994) study on the choice between 'proactive' and 'reactive' migration, Van Hear's (1998) matrix of voluntary and involuntary inward, outward, return, onward and 'staying put' movements and Joly's (2002) different degrees of 'refugeeness' are representative of the trend in the literature to classify and categorise migrants, and measure their capacity to flee. According to Turton (2003, pp. 9-10), such schemes are:

'thoughtful and ingenious attempts to capture or encapsulate, the 'reality' of the 'real world': to impose order on a jumble of experience, to fit it all together in an orderly and exhaustive fashion that will enable us to think about and understand the causes and consequences of the phenomena in question.'

The use of the term 'forced migration' in studying refugees has indeed been controversial, and has drawn criticism, particularly from scholars of refugee law. The first argument against the label is that it removes 'the most important quality of all migrants', which this is their 'agency', and this results in migrants being dehumanised (Turnton, 2003, p. 10). Even in the most difficult of circumstances, migrants do have a choice, and like all other migrants and human beings, refugees 'make choices and decisions over their own survival and fate' (ibid.). By painting a picture of migrants and refugees not as 'ordinary people' like 'us', it effectively reduces our ability to identify with their plight and suffering (Turton, 2003, p. 5). With language informing practice, reducing the status of a refugee to a dehumanised migrant makes it easy to employ exclusionary measures against the individual.

Second, and perhaps the most compelling argument against refugee studies being merged with forced migration studies, is the fact that the conceptual merger has necessarily shifted the focus away from the unique status of the refugees in international law, and with it their rights. The greatest opposition to this conceptual 'arranged marriage' has come from the 'father' of refugee studies himself, Professor James Hathaway. In a 2007 piece titled *Forced Migration Studies: Could We Agree Just to Date?*, he questions the 'soundness and validity' of subsuming refugee

studies into the broader framework of forced migration studies and the accompanying scholarly shift away from the former in favour of the latter, and laments the weakened status of the refugee in the literature, which fails to take into account the uniqueness of his or her circumstances. According to Professor Hathaway (2007, p. 355):

‘for all of its foundational weaknesses, there is a central value to the notion of refugee studies which I fear has been diluted in the shift to forced migration studies. The real beauty of refugee studies is its unremitting commitment to the centrality of the refugee himself or herself, and consequently to the critical analysis of policy and practice from the optic of the autonomy of refugees.’

Central to the argument against the scholarly shift favouring forced migration is the policy implications for refugees. Advocates for a return to refugee studies point out that the preference for the label ‘forced migration’ is a reflection of the asylum discourse being dominated by the governments of the industrialised North (Turton, 2003, p. 10; Hathaway 2007, p. 350). By treating refugees as any other (forced) migrants, border officials will fail to take into account ‘the specificity of the duties that follow from refugee status’ and render the autonomy of the refugee insignificant against border control requirements (Hathaway, 2007, p. 350). Scholars such as Grahl-Madsen (1983) closely observed the ‘non-entree regime’ slowly being built by industrialised states as they began to impose restrictions on the ability of newcomers as a whole to enter their borders. This ‘new policy landscape’ was explained by Sassen (2000) as resulting from economic globalisation and other transnational processes, making it difficult for states to control their own borders. In an effort to retain control over its territory, considered to be one of the bastions of state sovereignty, developed and Western industrialised states have increasingly imposed stricter entry rules.

Nevertheless, the arguments favouring the conceptual merger are based on the view that both refugees and other forced migrants ‘are first and foremost migrants’, and therefore the study of refugees should be theoretically and practically linked to the study of other types of migration (DeWind’s correspondence with Hathaway, 24 May and 9 June 2006 in Hathaway, 2007, pp. 351-352). Some scholars even went as far as refuting the distinction between voluntary and involuntary movements (Richmond, 1994) and advocating a revision of the 1951 Geneva Convention to include ‘physical security, vital subsistence, liberty of political participation and physical movement’ as criteria for refugee status (Shacknove, 1985, p. 277). There has been an increasing recognition that such classifications or categorisations of ‘refugees’, ‘forced migrants’ and ‘other migrants’ may not be so clear-cut, with motivations for mobility often mixed, that is, both ‘push’ and ‘pull’ factors may both be at play. As a result, analysts, researchers and scholars

in the late 1990s began to move away from such classifications and categorisations in favour of a continuum between 'forced' and 'voluntary' migration (Richmond, 1994; Van Hear, 1998). Migration analysts such as Castles and Van Hear (2005) argue that it has become difficult to distinguish between economic migrants and asylum seekers or refugees, as they may have a combination of pull and push factors in their decision to migrate. There is often an inter-relationship between poverty, conflict and human rights abuses 'pushing' populations to leave their countries of origin. Regardless of the legal status of the individual, the reality of migration is that it usually involves a combination of 'constraints and obstacles, options and choices' (Linde, 2011, p. 95). As Betts (2006, p. 656) puts it:

'The widely accepted synergies between underdevelopment and conflict highlight how many migrants [leaving sub-Saharan Africa] will have a range of motivations, but that the distinction between the 'economic' and 'political' is like to be untenable due to the relationship between these underlying causes. The majority of irregular migrants are likely to be moving due to a range of these underlying factors.'

As a result of such recognition, the literature has undergone yet another scholarly shift, this time, to the concept of 'mixed migration'. The objective of introducing this concept, primarily in the policy arena, was two-fold: to acknowledge both the diversity of migratory populations and the fluidity of the migration process. In addition to the mixed and complex motivating factors for movement, the means of travel itself has garnered much policy and academic attention. 'Mixed migration' is defined by the UNHCR as involving 'migrants' and 'refugees' making use of 'the same routes and means of transport to get to an overseas destination' (UNHCR, 2008). This is what the literature refers to as the 'migration-asylum nexus', and migratory choices are categorised according to whether they are 'authorised' or 'unauthorised'. This is where the phenomenon of 'people smuggling' enters the discussion, as part of the family of unauthorised migration. The dilemma posed by 'mixed migration' to the international refugee protection regime is described by the UNHCR (2011) as follows:

"Mixed movements" involve individuals or groups of persons travelling generally in an irregular manner along similar routes and using similar means of travel, but for different reasons. They may affect a number of countries along particular routes, including transit and destination countries. States faced with mixed movements experience arrivals with varying profiles, including asylum-seekers and refugees, victims of trafficking, unaccompanied or separated children, and migrants in an irregular situation. The ability of refugees and asylum-seekers to access protection may be affected where migration and security strategies adopted by States to protect their borders or to combat trafficking and smuggling are not sufficiently protection sensitive.'

At the end of the Cold War in the 1990s, the opening up of previously closed borders, both physical and political, has resulted in a high level of 'fluidity' in international migration. The period marking the end of political bipolarism witnessed the proliferation of different means of travel and at a cheaper price (Linde, 2011, p. 91). This period, particularly in the mid-1990s, also brought the phenomenon of people smuggling to worldwide attention, along with human trafficking.²⁶ Therefore, the literature has grown and evolved to include not just the diversity and complexity of migratory populations, but also the means of travel for such groups. A plethora of new theoretical considerations accounting for the increasing reliance of migrants, including refugees, asylum seekers and 'other' migrants, on the unauthorised or clandestine forms of travel have entered both the academic and policy discourse on migration.

While 'boat arrivals' are not a new phenomenon²⁷, incidents such as the arrivals of boats carrying asylum seekers in the 1990s from Cuba, Haiti and the Dominican Republic to the US, and Turkey-based Kurdish refugees to Italy in the late 1990s, have placed unauthorised migration at the forefront of the political agenda in industrialised states. The dominant view in the 1990s was that people smuggling was a lucrative 'international business', following the seminal work of Salt and Stein (1997). While the authors used the terms 'trafficking' and 'smuggling' interchangeably, the essence of their theory was that the international movement of people was increasingly managed by 'institutions, agents or individuals' expecting to make commercial gains from the process. In 1999, Schloenhardt added to this nascent literature by linking organised crime with migrant trafficking and smuggling. According to his theory, crime can be considered an illegal economic activity and the perpetrators are rational and calculating beings seeking to obtain profit maximisation (Schloenhardt, 1999, p. 205). His work was based on earlier studies on criminal activities in the United States of America, examining criminal behaviour in light of economic factors. Indeed, research on unauthorised migrants attempting

²⁶ 'People smuggling' and 'human trafficking' are distinct from each other. Art 3(a) of The Protocol Against the Smuggling of Migrants by Land, Sea and Air ('Smuggling Protocol') defines smuggling as 'the procurement [...] of the illegal entry of a person into a State Party of which the person is not a national or a permanent or resident in order to obtain, directly or indirectly, a financial or other material benefit', and this element of 'consent' removes smuggled migrants from the protection of the law. The Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children ('The Trafficking Protocol') defines 'trafficking' as the 'recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation' (UNODC, 2010).

²⁷ Indeed, the 1970s and 1980s witnessed the phenomenon of Vietnamese 'boat people' following the end of the Vietnam War.

to enter the EU in the early 2000s has revealed that between sixty to ninety percent were supported by organised criminal groups in their travel to Europe (Prezelj and Gaber, 2005, pp. 6-7).

The migration-asylum nexus has made it increasingly difficult to distinguish between those who are 'refugees' and those who are not, and the general perception in the 'global North' was that the asylum system was being abused by migrants who do not deserve refugee protection, dubbed by the media as 'bogus asylum seekers', and who use the asylum channels for economic betterment. The use of the term 'illegal' in describing refugees, asylum seekers and 'other' migrants using unauthorised or clandestine means of entry, dominated the discourse, particularly the domestic political discussions on the issue of immigration. Such categorisation was particularly problematic in the post-September 11 environment (Brouwer, 2003; Newman, 2003), where national security became an increasing priority, and fear of terrorism has made populations untrusting of migrants arriving at their borders without authorisation or documentation. The danger of labelling such migrants as 'illegal' is that it effectively criminalises them and 'removes them from the protection of the law' (Morrison and Crosland, 2001, p. 63). Nevertheless, the literature also highlighted the 'regulatory' and 'investor' role of the government in the increasing use of clandestine channels, arguing that undocumented or 'irregular migration' is in essence 'a child of migration control regimes' (Salt and Stein, 1997, p. 469). As will be demonstrated elsewhere in this research, the use of unseaworthy vessels as a mode of transport by third country nationals with the assistance of people smugglers has been a regular feature in the EU migration agenda, particularly since the Dublin Regulation took effect in 2003 and since visa restrictions were imposed on third country nationals as part of the EU's efforts to better manage its borders.

The policy impact of such a conceptual shift to mixed migration was felt most strongly in the refugee field, with refugees and asylum seekers increasingly being viewed by both the governments and the public in the 'global North' as economic migrants abusing the asylum system. To address what it saw as a major crisis in international refugee protection, the UNHCR launched the Global Consultations on International Protection in 2000, and it was at this time that 'mixed migration' as a policy concern took hold. Later, in its 2006 *10-Point Plan of Action on Refugee Protection*, the UNHCR promoted the concept of mixed migration as central to the protection of asylum seekers and refugees within the broader mixed migration framework (Linde, 2011, p. 92), and aimed to help governments to address mixed migration issues in a 'protection-sensitive way' (UNHCR, 2008). It also involved governments and regional and

multilateral institutions such as the EU and the African Union in its Expert Roundtables and Regional Conferences on mixed migration (ibid.). In the 2003 UN General Assembly report, *Strengthening the capacity of the Office of the United Nations High Commissioner for Refugees to carry out its mandate*, the UNHCR (UN General Assembly 2003, para. 36) acknowledged the need for a comprehensive approach to mixed migration, but highlighted the need to recognise the special status of refugees:

‘Although different in scope and nature, efforts to develop better systems for migration and for asylum go hand in hand. Asylum systems cannot function effectively without well-managed migration; and migration management will not work without coherent systems and procedures for the international protection of refugees. Asylum and managed migration systems should, however, be based on a clear distinction between the different categories of persons.’

The existing voluminous literature on ‘refugees’ and ‘forced migration’, which focuses on the factors, usually persecutory in nature, causing refugees and migrants to flee to another country to seek protection, and the current research on ‘mixed migration’, which addresses the mixed and heterogeneous character of contemporary migration flows, are a reflection of the importance of the ‘asylum problem’ in the academic and policy agenda. Academic research has closely followed the asylum situation and any political and legal developments in the area from the time of the two World Wars, and continues to evolve and accommodate innovative and novel lines of thinking which, for the purposes of this study, provide a comprehensive understanding of the unauthorised migration patterns, particularly as regard people smuggling, in the EU.

2.1.2 People Smuggling in the Mixed Migration Discourse

‘Migrants and refugees increasingly make use of the same routes and means of transport to get to an overseas destination. If people composing these mixed flows are unable to enter a particular state legally, they often employ the services of human smugglers and embark on dangerous sea or land voyages, which many do not survive.’

- UNHCR (2007)

The discourse on asylum was traditionally dominated by identity and welfare issues, with asylum seekers, refugees and ‘other migrants’ collectively seen as threats to the ‘community’ on an economic, social and cultural level (Bigo, 1994; Huysmans, 2006; Boswell, 2005; Rudge, 2002). ‘Illegal’ migration and migrants are seen as threats to the independent identity,

functional integrity and political unity of the EU. The literature highlighted the role of the media and the popularity of the Far and Populist Right groups in the construction of negative ideas about refugees and asylum seekers, and in leading the often 'highly mediatised debates' (Huysmans, 2006, p. 46). However, the literature in the post-2000 period experienced yet another transformation, with the development of new theoretical considerations accounting for the increasing reliance of refugees, asylum seekers and 'other' migrants on people smugglers as part of the wider phenomenon of unauthorised or clandestine migration. A major feature of the transformed literature is the inclusion of 'security concerns' in the policy debates and discussions on asylum seekers, refugees and 'other' migrants. This is a reflection of policy informing the literature, as the securitisation of asylum is a product of the political events of the period, the most pivotal of which was the terrorist attacks in the US on 11 September 2001.

In the post- 'September 11' period, the link between unauthorised migration and crime as developed by Schloenhardt in 1999 shifted from one involving commercially interested criminal groups, to one of terrorism and therefore constituted a 'threat or strategic risk to European security' (Pugh, 2001, p. 1). There were fears that among the groups of mixed migrants entering the EU through clandestine channels were terrorists. Migration scholars such as Koser and Newman (in Newman and Van Selm, 2003) highlighted the transformation of the general perception of refugees, asylum seekers and 'other' migrants from being a threat to social cohesion or employment, to being sources of 'insurgency and terrorism'. Newman (in Newman and Van Selm 2003, p. 9) pointed out that this reconceptualisation had to do with the discovery that fundamentalist Taliban members' associations with the Al Qaeda terrorist group began in Pakistani refugee camps.

In the EU, this shift in perception coincided with the construction of both legal and physical barriers against the 'influx' of migrants via visa restrictions, carrier sanctions, and the so-called 'safe third country list', which automatically labelled asylum claims made by nationals of certain countries to be 'manifestly unfounded'. Such 'border management' practices also included detention, expulsion or making agreements with third countries to admit or re-admit migrants wishing to claim asylum in the EU. Nevertheless, while there was a lack of any clear evidence supporting the claimed connection between asylum and terrorism, the events of 'September 11' have enabled policymakers to 'securitise' and tighten their immigration and asylum policies. Data and statistics in relation to the volume of unauthorised migrants entering

the borders of the EU, such as those provided by the European Police Office (EUROPOL)²⁸ informed the policy-making process regarding migration as a whole, and the language of 'security' entered the EU's foreign policy agenda with the adoption of the European Security Strategy (ESS) in late 2003. The ESS identified the key challenges and threats to the security of the Union, listing terrorism and organised crime as areas of priority.

However, commentators such as Bigo (1994) and Huysmans (2000) also attribute the securitisation of asylum policies in this period on the 'purposeful exploitation of the opportunities offered by European policy-making fora of the part of a core group of European interior ministry officials (Maurer and Parkes, 2006). The 'policy venue shopping' approach, as coined by Guiraudon (2000) and which is derived from public policy analysis emphasising the role of institutions (March and Olsen, 1989) and the evolution of agenda-setting and framing processes (Baumgartner and Jones, 1993) posits that competing policy makers seek out the venues most congenial to the realisation of their preferences. Faced with the challenges of unauthorised migration, the interior ministry officials framed changes to their asylum policy in terms of their commitment to European integration, although in reality, this enabled them to regain control of a problem that they are unable to solve on their own. According to this perspective, the Justice and Home Affairs integration was driven by Interior Ministry officials 'exploiting the weakness of democratic mechanisms and political oversight of EU policy making in order to sideline impediments to their agenda' (Maurer and Parkes, 2006, p. 3). The result was a 'security continuum' (Bigo, 1994, pp. 161-173), which involved problems with a transnational dimension being treated as part of the same security threat, namely cross border criminal activity, uncontrolled immigration, terrorism, and presence of non-nationals in the EU Member States.

The concept of 'security' has indeed permeated the asylum debates and discussions in the post-2000 period. In the context of a realist analytical framework, the term 'security' is traditionally associated with threats to the state and is formulated as 'protection' from such threats (Sheehan, 2005, p. 251). However, the concept of a 'state' has become blurred in the EU since the process of European integration began. The state is the traditional source of internal security and welfare for its citizens, and it is the role of the state to protect the economic, social and cultural welfare of its members (Afzal, 2005, p. 30). With the Member States becoming part of a supranational institution with its own immigration and asylum agenda, threats to

²⁸ According to EUROPOL, approximately 50,000 persons annually enter the EU without authorisation. This was cited in the European Commission's *Communication to the Council and the European Parliament on a Community Immigration Policy* (2000, p.13).

traditional notions of 'security' now have two sources: internally, within the EU and externally, with the unauthorised entry of asylum seekers, refugees and 'other' migrants. In terms of the latter, Huysmans' (2006) work was helpful in understanding the securitisation discourse within the EU. Looking at theoretical developments in international relations and security studies, he explored how the asylum issue has transformed into a 'security policy' 'on the basis of the distribution and administration of fear' by policymakers. The securitisation process involved centring attention indirectly on one's 'own' community by locating it in an existentially hostile environment. 'Security' in this case is freedom from the Other, the foreign, those who do not belong in one's 'own' community (Huysmans, 2006, p. 49).

The dominance of state-centred perspectives in the asylum and security debates was later challenged by theoretical developments in the literature proposing a shift in focus and alternative definitions of 'security'. Such developments can be traced to the discipline known as 'Critical Security Studies', which is considered to be 'controversial, somewhat contested and regularly misunderstood' (Booth, 2005, p. 13). Its line of thought can be traced back to the European Enlightenment and classical Greek political theory, but it was in 1981 when Robert Cox's seminal work entitled '*Social forces, states and world order*' made the first major critical theoretical contribution to the study of critical theory in International Relations. According to Cox, social structures are 'inter-subjective' in that they are socially constructed, and that the existing global power structures of the contemporary world 'are contingent and have a history' (Cox, 1981, pp. 128-129). Critical theory argues that claims about value neutrality can conceal the role knowledge plays in reproducing unsatisfactory social arrangements, and that norms, beliefs, identity and practices are inter-subjectively constituted and historically and contextually contingent (Sheehan, 2005, p. 156). The important implication for critical theory's historicist approach is that it accounts for the changing meaning of concepts, such as 'security'.

Cox's work was followed on by Booth (1991), who launched the discipline of 'Critical Security Studies' through this seminal work, *Security and emancipation*, and is responsible for bringing into focus alternative definitions of 'security'. Critical security theory involves two distinct processes: deepening and broadening. The deepening process involves the exploration of the implications of the idea that attitudes and behaviour in regard to security are 'derivative of underlying and contested theories about the nature of world politics' (Booth, 2005, p. 14). The broadening process involves expanding the idea of security studies beyond the militarised and statist foci of traditional realist thinking, and taking into account the perspective of those 'who have been silenced by prevailing structures' (Booth, 2005, p. 5). Booth opposed the intellectual

monopoly of realism in discussions on 'security', and proposed the 'emancipation' of non-state actors by promoting their own definition of 'security'. More specifically for Booth, the security of human beings or individuals should take priority over the security of states, with the latter being used only to enhance the former.

A 'basic rethinking of security', particularly given the changes brought about by the end of the Cold War to the international system, which resulted in the proliferation of non-state actors and a diversity of 'security' threats, was now required. This necessarily involved a reorientation of the focus of security concern away from an *absolute* attention to the needs of the state, and towards those in 'national and international society who had been marginalised and rendered insecure by the existing approach to understanding security' (Sheehan, 2005, p. 153). As Smith (2005, p. 55) contends:

'the concept of security is now genuinely contested; as part of this contestation, it requires that concepts, such as the state, community, emancipation, as well as relationships, such as those between the individual and their society and between economics and politics, are also subject to contestation. In this way, there is now far more debate about the term than ever before.'

In regard to refugees and asylum seekers, the literature has become infused with references to 'human security' (Yuval-Davis, 2004; Nadig, 2002; Afzal, 2005; Van Houtum and Pijpers, 2007; Maurer and Parkes, 2006). The perspective promoted is that while the state remains the central actor in international relations, 'the realm of the political has become more flexible and open to change' (Nadig, 2002). The 'quest for asylum' is essentially a 'quest for security' (Yuval-Davis, 2004), and therefore, it has become a necessity to shift the focus away from the popular representation of refugees and asylum seekers as a major threat to the security of states to that which provides a more ethical representation of their rights. However, the concept of 'human security' as developed in the Post-Cold War era remains a heavily contested term. One definition of the concept was provided by former UN Secretary-General Kofi Annan in the UN 'Millennium Report' (2000):

"Human security" can no longer be understood in purely military terms. Rather, it must encompass economic development, social justice, environmental protection, democratisation, disarmament and respect for human rights and rule of law.'

However, while there is a strong case for treating people smuggling and mixed migration as a humanitarian affair, it is not realistic to expect governments to prioritise the safety of migrants

at sea ahead of their own 'security' and political interests. Linde (2011, p. 90) also points out that humanitarian organisations themselves have at times demonstrated their inability to remain impartial in providing assistance, with a tendency to categorise migrants 'along considerations of status rather than needs'. However, the EU experience as explored in Chapters 3 and 5 would demonstrate that Member States and EU policymakers have indeed been receptive to the humanitarian aspects of mixed migration and this receptiveness has been instrumental in facilitating burden-sharing arrangements in the EU.

2.2 The 'Burden-Sharing' Literature and Mixed Migration

The term 'burden-sharing' is often described as being void of any specific meaning, a 'desideratum at best, a deceptive rhetorical veil at worst' (Noll, 2003, p. 237), and a 'weasel word' without any substantive meaning (Thielemann, 2003, p. 227). 'Burden-sharing' in the context of international organisations was simply defined by scholars as 'the costs of providing collective goods or common initiatives being shared between states' (ibid.). The applicability of the mainly economic concept to human beings and international protection from persecutory acts has indeed been the subject of much debate in the refugee protection field. However, questions of applicability aside, the use of the term serves much to reflect how negatively mixed migration is perceived by policymakers, and how the term informs the policy debate on the subject. Nevertheless, despite frequent references to the term in the EU, which is often used interchangeably with 'solidarity' and 'fair sharing of responsibilities', the idea of burden-sharing in the asylum field has not been properly conceptualised by EU policymakers (Thielemann, 2003, p. 225).

The origins of the policy and academic discussions on the concept of 'burden-sharing' can be traced back to two discourses in International Relations invoking the logic of collective action: welfare economics and military cooperation (Suhrke, 1998, p. 399). The term was first prominently used in the debates about NATO contributions in the early 1950s, and these debates centred on sharing defence costs among the members of the North Atlantic Treaty Alliance (Thielemann, 2003, p. 225). In terms of welfare economics principles, the focus of the debates was on the issue of public goods and the question of who will pay for those goods, and in regard to the principles of military cooperation, the discussions were centred on the questions of how to share the defence burden and who will pay what proportion of the burden. The welfare economics concept of the 'public good' dominated these debates. The term is

characterised by elements of non-excludability and non-rivalry, which means that all actors benefit from it (Thielemann, 2004, p. 12).

The argument that refugee protection has 'public good' characteristics has thus far received weak support from governments. Nevertheless, scholars of refugee protection such as Suhrke (cited in Thielemann, 2004, p. 6) contend that all states benefit from receiving refugees, with 'increased security' as the principal benefit. Receiving and admitting refugees would limit the risk of refugees 'fuelling and spreading the conflict they are fleeing from', and in addition, allows the receiving state to achieve their 'ideological goals' and enhance their status in the international arena. However, the applicability of the 'public good' concept to the refugee protection situation has indeed been questioned in the academic quarters itself, with the acknowledgement that the provision of refugee protection 'is not a simple provision of a public good' (Betts and Durieux, 2007, p. 14).

In terms of the actual provision of a public good, there will be little incentive for states to be the provider if they are to do so individually (Betts, 2009, p. 81). Add to this the absence of a binding institutional framework, and herein lies the problem with the refugee protection regime. Therefore, collaboration and cooperation are necessary. As Betts puts it (2009, p. 80):

'International cooperation is necessary for overcoming the negative consequences of forced migration. No one state acting in isolation is likely to be able to or willing to address a large-scale refugee situation by itself. The costs of addressing mass influx situations, tackling humanitarian emergencies [...] are often higher than a single state is prepared to bear, and the benefits of addressing such situations are often so diffuse that states will only contribute to overcoming crises when they are supported by other states.'

2.2.1 Existing Formal Burden-Sharing Arrangements in International Relations

Unlike the area of international refugee protection, climate change and defence have formalised burden-sharing systems.

a) *Defence Burden-Sharing*

In regard to burden-sharing in the area of defence, the literature covers debates dating back to the 1950s in regard to defence costs in the North Atlantic Treaty Organisation (NATO) alliance.

Arguments by larger Member States that they were being 'exploited' by smaller, 'free-riding' States²⁹ by making them pay for a disproportionately large share of the collective defence costs dominated these debates (Thielemann and Dewan, 2006, pp. 1-4), and the way that negotiations regarding distributing costs were carried out was emotionally charged and involved 'special pleading' from some Member States (Hartley and Sander, 1999, p. 676). Proposals for burden-sharing measures included calculating contributions according to the Member State's Gross Domestic Product (GDP), as well as civil indicators such as contributions to UN humanitarian operations and economic aid provided to other countries. While states would naturally claim an 'unfairly' high share of the costs compared to others in the alliance, it remains a fact that no NATO ally has withdrawn from the club despite claims of being taken advantage of by 'free riders'.

Scholars of refugee protection are wary of the applicability of defence to the question of refugee protection. In particular, Suhrke (1998) questioned the compatibility between the *raison d'être* of defence alliances and a burden-sharing scheme for victims of persecution. The former involves a willingness by members to cooperate in order to enhance their national security against a common potential enemy. However, it is generally believed that any motivation for cooperation in a burden-sharing scheme for refugee protection would largely be for normative and ideological reasons. Nevertheless, it can also be argued that with mixed migration increasingly securitised since the publication of Suhrke's work in the late 1990s, the defence analogy may in fact be applicable to the current debate on how best to redistribute the 'burden' of asylum-seekers. Bretherton and Vogler (2006, p. 189) also remind us that in many ways, the EU from its original conception in the form of the European Coal and Steel Community (ECSC), was 'always in the business of providing security'. However, what makes the defence analogy problematic in regard to the present discussion on the burden-sharing of unauthorised seaborne asylum seekers in the EU is the unpredictability of migration flows, unclear up-front costs and uncertainty of reciprocal benefits. As will be seen in the remaining chapters, the EU has faced great difficulties in calculating the costs of receiving asylum seekers and reaching an agreement on to how to redistribute these costs equitably across the 27 Member States.

²⁹ A study conducted by Shimizu and Sandler (2002) on peacekeeping and burden-sharing confirmed this 'exploitation theory'. The authors found evidence that larger countries contribute a disproportionate number of troops. .

b) *Burden-Sharing and Climate Change*

Climate change has also entered the burden-sharing literature, with efforts to achieve a more equitable sharing of 'collective goods' in the international environment regime occupying an important part of the international agenda. The Kyoto Protocol negotiations discussed the question of distributing the costs of implementing abatement measures across states, and proposed three main approaches (Torvanger, 2001). The first approach involved calculating annual costs as a percentage of the state's Gross National Product (GNP). The second approach suggested a focus on the initial allocation of emissions quotas, and the third approach focused on the fairness of the process of allocation. Ultimately, the distribution of emissions targets was not based on any of the approaches proposed, but was decided by 'what the parties were willing to bring to the table based on their perception of abatement costs and the risks posed by climate change' (Torvanger, 2001). However, in regard to EU greenhouse policy, it is noted that countries with lower standards of living in terms of consumption were assigned 'easier emission change requirements' (Marklund and Samakovlis, 2007, p. 327).

The importance of flexibility in negotiations in the climate change regime may be helpful in the asylum burden-sharing question as it pertains to the EU, particularly in regard to making special allowances for Member States that are most affected by unauthorised migration flows. However, as identified by Suhrke (1998, p. 402), there are critical differences between the two regimes. The first difference is that the international environment regime addresses the *causes* of the problem, for example through regulating emissions of pollutants, while the refugee protection regime deals only with the *consequences* of the problem. Second, it is not possible to control or 'regulate' the causes of flight for refugees, and receiving states do not have the jurisdiction to control or regulate those causes.

c) *Burden-Sharing and Guantanamo Detainees*

The most recent 'burden-sharing' scheme to enter the literature is the redistribution of detainees to a number of different states as part of the US administration's plan to close the Guantanamo Bay detention camp (Thimm, 2010, p. 2). At the time of writing, it was announced that Germany had agreed to accept two inmates as part of the German government's negotiations with the Obama administration (Spiegel, 2010). As this 'arrangement' is indeed quite recent, and negotiations are still being held as to the fate of the other detainees, it is not surprising that there is currently no mention of this in the academic literature. However, it would be interesting to see how this would be treated in the academic literature as the situation

develops, and as the 'distribution keys' used in the negotiations become clearer. There is a degree of similarity between the 'Guantanamo burden' and the 'asylum burden' in the EU, in that both 'burdens' to be shared are seen as a security risk.

2.2.2 Refugee Burden-Sharing Literature

Refugee burden-sharing owes its origins in international law, specifically as one of the three *norms* of refugee protection, and as one of the three *principles* of asylum (Uçarer, 2006). Throughout modern history, formal arrangements to redistribute the costs of refugee resettlement or to grant financial aid to countries facing mass influxes of refugees, particularly during the two World Wars, have been thoroughly documented in a number of different academic disciplines including Law, International Relations and History. Legal opinions formulated by scholars of international law, as well as academic commentaries and proposals for a workable refugee burden-sharing 'model' further add to the richness of the literature. As such, the existing literature on refugee burden-sharing can best be described as 'voluminous'.

The term 'burden-sharing' first entered the realm of the refugee protection regime in the First World War, when international cooperation became necessary to address the situation of the displacement of large numbers of *people* affected by the War. The post-Second World War period witnessed a shift in 'burden-sharing' focus from the redistribution of people to the *costs* 'suffered' by the states giving protection. Despite the difference in foci in refugee burden-sharing arrangements between the two time periods, it is clear that more than just a slogan, 'burden-sharing' was used as a technical term to reflect the need to *share* the actual *burdens* associated with the World Wars at the international level. Boswell (2003, p. 1) notes that even the Preamble of the 1951 Geneva Convention emphasised that granting asylum 'may place unduly heavy burdens' on the receiving state.

Burden sharing is one of the three *norms* of the global refugee protection regime. The first is asylum, which the UNHCR (2006) defines as:

'The grant, by a State, of protection on its territory to persons from another State who are fleeing persecution or serious danger. Asylum encompasses a variety of elements, including *non-refoulement*, permission to remain on the territory of the asylum country, and humane standards of treatment.'

The second norm is assistance, where protection is to be carried out in the form of either repatriation or resettlement in another country (Uçarer, 2006, p. 223). Burden-sharing, the

third norm, ensured that efforts are distributed equally between states, so that ‘no state bears overwhelming financial, political and legal responsibility’ for accepting asylum seekers (*Ibid*). The Final Act to the 1951 Convention, paragraph D (UNHCR, 1992) recommended that:

Governments continue to receive refugees in their territories and that they act in concert in a *true spirit of international co-operation* in order that these refugees might find asylum and the possibility of resettlement [emphasis added].³⁰

Burden-sharing is also one of the three *principles* of asylum, alongside the principle of *non-refoulement*, which prohibits the repatriation of the asylum seekers to a country where his or her life would be in danger (Article 33, 1951 Convention), and *non-penalisation*, which prohibits the penalisation for irregular entry if the reason is to obtain international protection for persecution (Article 33.1, 1951 Convention). Uçarer (2006, p. 223) argues that of the three asylum principles, burden-sharing is the weakest, given that there are no concrete mechanisms in place to carry out any redistribution measures.

It is important to note that the regulatory impact of international law is restricted to dealing with the rights of asylum seekers (Noll, 2003, p. 240). In particular, it imposes limits on the ability of states to renege on their obligations to provide rights and protection to individuals meeting the criteria of a refugee³¹. This may explain the regular attempts of EU Member States to prevent asylum seekers from reaching their respective territories, as once they are physically within the receiving state’s territorial jurisdiction, the states’ obligations to allow them access to the asylum procedures as prescribed by international law are immediately activated. However, more significant to the current discussion is the fact that the very same branch of international law obligating states to give legal access to individuals seeking protection does not impose corresponding obligations on them to share the ‘burdens’ of receiving these individuals.

³⁰ According to Uçarer (2006), burden-sharing was also emphasised in two important documents: Article II(4) of the *1960 Organization of African Unity (OAU) Convention Governing the Specific Aspects of the Refugee Problem in Africa*, stipulating that in the spirit of ‘African solidarity and international cooperation’ Member States shall ‘take appropriate measures to lighten the burden of the Member State granting asylum’; and Paragraph III of the *1987 Addendum to the 1966 Bangkok Principles Concerning the Treatment of Refugees*, adopted by the Asian-African Legal Consultative Committee (AALCC), placing emphasis on the principles of international solidarity and burden-sharing.

³¹ This concerns the definition of a ‘refugee’ provided in Article 1(A) of the 1951 Refugee Convention (UNHCR, 1992). The definition of a ‘refugee’ as provided in the *EU Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* is a ‘faithful rendition’ of the former (Balzacq and Carrera, 2005, pp. 43-45).

Being made a *norm* of the global refugee protection regime and a *principle* of asylum is indicative of the importance of the concept of burden-sharing in both international law and in international relations between States. However, it is important to establish how enforceable they are. First, 'norms' are defined by Tarzi (1998, p. 15) as:

'standards of behaviour defined in terms of rights and obligations. These general obligations and rights are designed to *guide the behaviour* of states in the formulation and implementation of rules. Legal norms vest these rights and obligations in international law. When states formally accept these norms of conduct via bilateral and multilateral treaties [...] and when they are embodied in the Charter of the UN, they become norms of international law.'

Therefore, as a *norm*, the concept of burden-sharing is not binding and merely serves to guide the action of states. The *principle* of burden-sharing, apart from being 'vague', is also not governed by binding legal obligations. In addition, it is not 'supported by clear decision-making principles' (Betts and Durieux, 2007, p. 9). While the UNHCR ExCom Conclusions³² typically list a number of recommendations, they are of a non-binding character. Conclusion No.77 (XLV) 1995, for example:

'Calls on all States to manifest their international solidarity and burden-sharing with countries of asylum, in particular those with limited resources, both politically and in other tangible ways [...] through cooperation in conjunction with UNHCR [...] reiterates the critical importance of development and rehabilitation assistance in addressing some of the causes of refugee situations, as well as their solutions, including voluntary repatriation when deemed appropriate; and also in the context of development of prevention strategies.'

In the history of the EU, the term 'burden-sharing' is often used interchangeably with 'solidarity' and 'fair sharing of responsibilities' (Raspotnik et al, 2012). 'Asylum burden-sharing' is understood as the fair distribution of the 'burdens' resulting from the EU's border control and asylum policies, underpinning the responsibility to provide a collective response and coordinating such a response (Thielemann, 2006, p. 4).

Therefore, the disjuncture between the *non-penalisation* principle and burden-sharing has led EU Member States to enforce policies to prevent unauthorised asylum seekers from arriving, for example via border control, or shift the responsibility of receiving the migrants to another Member State or indeed a third country, as a 'strategy of cost reduction' (Noll, 2003, p. 240). It

³² The following Conclusions make specific references to 'burden-sharing' and 'international solidarity': Nos.15, 22, 52, 61, 67, 68, 71, 74 and 77.

has also meant that any ‘agreements’ or ‘arrangements’ made to share the asylum burden have been conducted on an *ad hoc* basis and involve rigorous bargaining among Member States affected. Indeed, the lack of rules or decision-making procedures governing the principle of burden-sharing in refugee law demonstrates that the refugee regime is ‘half complete’, as argued by Betts and Durieux (2007, p. 2).

2.2.3 Literature on Existing International Refugee Burden-Sharing Arrangements

In the course of modern history, only five cases of formal refugee burden-sharing arrangements have been identified and documented. The first two involved the First and the Second World Wars, and the last three included the Comprehensive Plan of Action (CPA) after the Vietnam War, the Caribbean Plan, and the Pacific Plan (Suhrke, 1998; Kneebone et al, 2006). The CPA in particular represents one of the first attempts to tackle the ‘asylum-migration nexus’ (Betts, 2006, p. 49). However, CIREFCA³³ was also identified by Betts (2006) as a successful CPA.

a) Burden-Sharing in the First and Second World Wars

Burden-sharing arrangements in the First World War specifically involved the redistribution of the mass influxes of the victims of war through ‘population exchanges’ and resettlement schemes (Cook, 2004; Loescher, 1994). Governments who volunteered to receive refugees were facing severe reconstruction problems, and were not necessarily well-equipped to host them and absorb them into their economic life. Therefore, international cooperation was necessary to facilitate these population exchanges. In the Second World War, approximately 30 million people were displaced, and burden-sharing arrangements continued the tradition of the resettlement of refugees. Under the direction of the US-led International Refugee Organisation, 1.3 million refugees and displaced persons were resettled in different parts of the world.

³³ CIREFCA is the Spanish acronym for International Conference on Central American Refugees, a highly successful international effort that spelled hope for hundreds of thousands of refugees, returnees, displaced persons and undocumented aliens in seven Latin American countries. Over 1.9 million people were targeted under the CIREFCA plan in 1989, including 146,400 refugees, 61,500 returnees, 893,000 undocumented Central American aliens, and 872,000 internally displaced people. In 1989, the governments of Mexico, Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua adopted what eventually became a five-year (1989-94) CIREFCA "Concerted Plan of Action" to find solutions to the problems of uprooted people in the strife-torn region (UNHCR, 1995).

According to Cook (2004, p. 340), the sense of ‘humanitarian obligation’ among countries enabled the resettlement of Jewish refugees in the receiving countries, including those in Europe. The resulting redistribution of refugees was as follows:

Table 1: Redistribution of refugees after WWII

United States of America	31.7%
Australia	17.5%
Israel	12.7%
Canada	11.9%
Great Britain	8.3%
Other Western European States	6.8%
Latin America	6.5%

(Loescher, 1994)

It is important to note that what was known as the ‘hard core’ group of refugees, which consisted of the old, diseased or injured, were not included in the above figures (Suhrke, 1998, p. 404). They remained in refugee camps for several years after other refugees were selected for resettlement in the above countries and continents. Only some resettlement countries had special quotas for ‘hard core’ refugees, but the numbers selected were ‘extremely low’ (ibid.). Norway was one of the countries who accepted a small number of refugees from this group. Thus, it appears that despite the humanitarian motivations for redistributing refugees, burden-sharing arrangements did involve an element of selectiveness.

The success of the resettlement process in the post-Second World War period is often attributed to the role of hegemonic powers, such as the US, in taking a lead role (Suhrke, 1998). However, others point to the role of institutions, such as the UNHCR, in facilitating international cooperation (Betts and Durieux, 2007). Nevertheless, regardless of which actor played the leadership role, humanitarian and altruism are major motivating factors (Cook, 2004). The different perspectives on the contributing factors for international cooperation facilitating a burden-sharing agreement are further explored in Chapter 2.4.

b) Burden-Sharing and the Comprehensive Plans of Action (CPA)

The Vietnam War resulted in large refugee flows, principally by sea, in the 1970s and 1980s, but these flows did not attract sufficient international attention or support. The US, as part of the Cold War dynamics, played a leadership role, and was instrumental in facilitating cooperative arrangements which helped resettle refugees in countries willing to accept them (Cook, 2004; Barutciski and Suhrke, 2001). Due to the sudden and large flows of refugees, it became necessary for the US to negotiate the conditionality of permanent resettlement elsewhere after countries such as Malaysia, Thailand and Indonesia granted them first asylum (Cook, 2004, p. 340).

However, due to the continued refugee flows throughout the 1980s, there were concerns among resettlement countries about their own capacity to absorb more refugees. More importantly, there were concerns that the departures increasingly consisted of migrants who do not meet the refugee definition as prescribed by the 1951 Convention. As they began to increase entry restrictions, first asylum countries also decided to stop accepting refugees from Vietnam (Cook, 2004, p. 340). Due to this crisis, an international conference was convened in 1989 with the involvement of the UNHCR, and the CPA was drawn up as a result. Unlike previous international burden-sharing arrangements that involved the two stages of first asylum and resettlement en masse, refugees were now subjected to individual interviews to determine their eligibility for international protection under the 1951 Geneva Convention, and resettlement was no longer permanent. The 'principal solution' as agreed under the CPA was return or repatriation (ibid.). The UNHCR became responsible for monitoring the conditions of the returnees in Vietnam, to ensure that they were returning to a country where state protection was available to them.

The burden-sharing arrangement facilitated by the CPA is indeed quite relevant to the situation of boat arrivals in the EU, in that it is 'one of the first attempts to tackle the asylum-migration nexus' (Betts, 2006, p. 49). Unlike the burden-sharing arrangements after the First and Second World Wars, which redistributed refugee populations with a view to a permanent resettlement in receiving countries, the CPA made refugee status determination (RSD) a prerequisite for resettlement. In other words, in the context of 'mixed migration', the CPA ensured that only those who were in genuine need of protection as defined in the 1951 Convention and 1967 Protocol would be eligible for resettlement.

In terms of the lessons that can be learned from the CPA experience, the contributing factors that led to the success of the burden-sharing arrangements included a lead agency, specifically the UNHCR, a well-defined and coordinated plan, political consensus among the actors involved, clear mandates and responsibilities, as well as a follow-up mechanism for policy adjustment and monitoring. According to the UNHCR, the burden-sharing arrangements were 'tailored to the specifics of each caseload and served as a guarantee of basic protection and respect for minimum rights in asylum, while at the same time permitting the achievement of durable solutions' (ISIL, 2001).

Politics also played an important role in the negotiation process leading ultimately to burden-sharing. For example, Kneebone et al (2006, pp. 492-507) argue that the motives for signing up with the CPA were more to do with security and economic issues than for any altruistic reasons. Countries of first asylum, for example, were particularly concerned about the regional instability from an influx of Vietnamese refugees in the Association of South East Asian Nations (ASEAN) region. Suhrke (1998) also argues that their participation was in part a result of the pressure put on them by the US. However, another account suggests that the US was initially a reluctant participant in the burden-sharing negotiations, and had to be reminded by the UNHCR, under the leadership of Sergio Vieira de Mello, of the overarching interests of the US in the region before it took a more active role (Betts and Loescher, 2011, p. 71). The US' participation was therefore underpinned by the 'structural interdependence' between the refugee crises and its strategic interests in the ASEAN region, which included its reliance on Indonesia's oil supply, its military bases in Thailand and the Philippines, its trading relationship with ASEAN countries and its fight against Communism in Asia (ibid.).

The role of political advocacy networks also needs to be highlighted in contributing to the success of the burden-sharing of refugees from Vietnam. In the early 1990s, when it was becoming more difficult to justify refugee resettlement in light of the changing conditions in Vietnam, the Vietnamese community in the US was able to influence US policy towards refugees from their country of origin. In 1994, 250 Vietnamese-Americans sued the US State Department for repatriating Vietnamese 'boat people' and forcing them to reapply for an entry visa into the US from Vietnam, rather than from Hong Kong (Newland, 1995).

c) The Caribbean and Pacific Plans

Unlike the burden-sharing agreements in the First and Second World Wars and in regard to the Vietnamese 'boat people', the Caribbean and Pacific Plans did not involve any resettlement elements. Rather, the interdiction of asylum seekers at sea and external processing were the main courses of action taken (Kneebone et al, 2006, p. 502). It can therefore be argued that the practices of the Caribbean and Pacific Plans in substance are burden 'shirking' strategies, as opposed to 'sharing', on the part of the host states or potential host states. This demonstrates that the resistance to incorporate formal burden-sharing mechanisms in the CEAS is indeed symptomatic of a much wider trend going beyond the geographic confines of the EU in regard to the general lack of appeal of the prospect of 'sharing' a particular number of unwanted migrants claiming international protection.

In the current discussion on 'burden-sharing' and asylum seekers in the Mediterranean region, the Caribbean and Pacific Plans are relevant to the extent that while the ultimate consequence is interdiction, both demonstrate the need for action at the international level in order for *cooperation* to be achieved. The Pacific Plan targeted mainly Afghani and Iraqi asylum seekers who made secondary movements from Indonesia to Australia, and sought to deter secondary movers en route to Australia from the Middle East. Reminiscent of EU burden 'shifting' strategies, Australia paid poorer Pacific nations to host asylum seekers, and cooperated with the Indonesian police (Kneebone et al, 2006, p. 503), in the absence of any interest from governments of other industrialised countries with whom to enter into a burden-sharing agreement.

The Caribbean Plan, on the other hand, was driven by geopolitical factors between the US and Caribbean states, and accounts for the harsh policy of summary deportation from the US to the latter states (Kneebone et al, 2006, p. 503). The 'Plan' entered into force between the US government and the governments of Caribbean nations, most notably the Haitian government, and continues to this day. Concerns regarding the numbers of Haitian seaborne asylum seekers entering American shores began as early as 1963, and the numbers surged dramatically in the early 1980s (Legomsky, 2006). RSD interviews were conducted either on board the Coast Guard cutters, or at the US naval base in Guantanamo Bay, Cuba.

d) Lessons for the EU?

What lessons can be learned from such 'burden-sharing' examples? It is acknowledged that the conditions which facilitated the collective effort, particularly in the First and Second World Wars, belonged to that particular period in history, and therefore, may not be relevant to the current migration situation in the EU. There are two major differences between the burden-sharing arrangement in the two World Wars, and the EU asylum situation. First, the issue of burden-sharing in both refugee law and history was concerned with situations of 'mass influx' (Noll in Byrne et al, 2002; Hans and Surke in Hathaway, 1997; Fonteyne 1978). As early as 1981, the international discussion on the quantitative and qualitative parameters characterised a 'refugee flow' as 'large scale' or 'massive' (ISIL, 2001). Therefore, the rationale for having a burden-sharing arrangement is due to the heavy burdens placed on receiving countries in relation to the volume of refugees they received.³⁴ The CPA during the Vietnam Crisis also dealt with a massive exodus of displaced people.

In relation to the number of unauthorised migrants received by the southern EU Member States, the numbers range from a small, rickety boat carrying a small number of individuals, to a large overcrowded fishing vessel, and there is also a fluctuation in numbers depending on the season and border control measures enforced at the time of voyage to the EU. However, while a 'mass influx' may require a more urgent need for solidarity and cooperation, Noll (2000, p. 265) argues that:

'the redistribution of responsibility among states will always impact – in one way or another – the remaining parts of the migration and protection systems, irrespective of whether the number of protection seekers is large or small.'

The urgency of collective action in situations of 'mass influx' is referenced in two official EU documents, namely the *1995 Resolution on Burden Sharing* (Council of the European Union, 1995) and the *1996 Council Decision on an Alert and Emergency Procedure for Burden-Sharing with Regard to the Admission and Residence on a Temporary Basis of Displaced Persons* (Council of the European Union, 1996). The latter document specifically described 'mass influx' as involving an 'unusually large inflow of asylum seekers taken out of the conventional asylum

³⁴ The Executive Committee Conclusion No.22 (XXXII) of 1981 on the Protection of Asylum-Seekers in Situations of Large-Scale Influx, which points out that '*States shall, within the framework of international solidarity and burden-sharing, take all necessary measures to assist, at their request, States which had admitted asylum seekers in large-scale influx situations*' (ExCom, 1981). Similarly, Conclusion No.77 (XLVI) of 1995 '*calls on States to manifest their international solidarity and burden-sharing with countries of asylum, in particular those with limited resources, both politically and in other tangible ways which reinforce their capacity to maintain generous asylum policies*' (ExCom, 1995).

determination system and are granted temporary protection status' (Neumayer, 2004, p. 156). Therefore, not only is the 'numbers issue' a specific criteria for 'burden-sharing', but the precondition of providing temporary as opposed to permanent resettlement is also required. This practice is an emergency admission on a provisional basis, solely with a view towards the provision of a safe-haven and without commitment concerning permanent or long-term residence in the host country (Fonteyne, 1978, p. 174).

In addition to the question of numbers, burden-sharing during the First and Second World Wars and during the Vietnam War referred specifically to *refugees*. The situation in the EU at present, however, is concerned with *asylum seekers*, that is, individuals who are seeking international protection but have not yet been recognised or officially declared 'refugees'. It is acknowledged that from the perspective of international refugee protection, being officially recognised as a 'refugee' is irrelevant, in that it is the individual's circumstances that make him or her a refugee. According to the Handbook (UNHCR, 1992, chapter 1, para 28):

'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.'

However, from the perspective of receiving states, such a distinction matters in that states would be more willing to accept *refugees* over *asylum seekers*. First, asylum procedures are costly, and this is one of the main reasons for the lack of an official and enforceable asylum burden-sharing system in the EU. Second, it would be more publicly acceptable for governments to be seen as assisting 'deserving' *refugees* rather than 'bogus asylum seekers'. In the 2006 *Francisco y Catalina* case, the Dutch Government granted Malta's request for 'people sharing', but only after the RSD process, and also on the condition that they would have the right to select refugees based on nationality, to ensure compatibility with the immigration requirements of the Netherlands. In addition, the number of refugees they volunteered to accept for resettlement was also deducted from the annual 'quota' of resettlement refugees that the Dutch Government had previously agreed to accept as part of its bilateral arrangements with the UNHCR (Appendix IV):

'We asked for Eritrean refugees because when we interview people, we also look at the admission policy of the Netherlands. [...] We had to look for that when we knew there were Eritreans. They had quite a favourable approval rate in the Netherlands. It is likely that they would be allowed under our admission policy.'

When the Netherlands accepted the cases, we accepted the asylum seekers under the resettlement programme. We interviewed them in Spain. We made the decision in Madrid. They were all approved [prior to resettlement in the Netherlands].’

The refugee situation as a result of the First and Second World Wars and the Vietnam War was also not concerned with issues of illegality, criminality, people smuggling or mixed migration. Therefore, out of the refugee ‘burden sharing’ examples in modern history, it appears that the Caribbean and the Pacific Plans are most compatible with the situation in the EU. However, as the actual ‘burden-sharing’ strategy employed by both schemes did not involve ‘sharing’ as such, no additional lessons can be learned by EU from these examples, as it is already actively practising such deflection measures. As far as international protection is concerned, such ‘schemes’ may not be useful guides in designing an ideal ‘model’ of asylum burden-sharing for the EU. However, the types and degrees of international cooperation achieved in the Caribbean and Pacific Plans may assist in informing the discussion on the feasibility of burden-sharing arrangements in mixed migration³⁵ situations, in particular, on the question of what kind of arrangement – sharing or shirking – may be useful in different contexts.

2.2.4 EU ‘Burden-Sharing’ Examples in the Literature

In the EU, burden-sharing discussions were initially concerned with contributions of Member States to the common European budget, and later covered areas such as international security, and climate change (Thielemann, 2003). In regard to refugee protection and mixed-migration, the war in Yugoslavia in the 1990s brought the issue of burden-sharing to the forefront of discussions in the legal, political and social milieu, and to this day, it occupies an important place in policy discussions. Images of, and opinions on, ‘boat arrivals’ in the southern shores of the EU dominate newspapers and news websites on a regular basis, and dominate both domestic and supranational debates on whose responsibility it is to admit the unwanted and unauthorised boat arrivals. Indeed, one of the challenges experienced in conducting this study is the fact that there is an over-abundance of literature on the subject. However, while there is a plethora of literature addressing the ‘question’ of how to solve the asylum burden in the EU (Cook, 2004; Noll, 2000; Hathaway and Neve, 1997; Barutciski and Suhrke in Joly, 2002; Thielemann, 2003, 2004, 2005; and Boswell, 2003 among others), there is a scarcity of literature showcasing actual burden-sharing cases in the EU, owing to the fact that the EU has so far failed to establish any formal asylum burden-sharing arrangements.

³⁵ The Pacific Plan and Caribbean Plan specifically targeted boat arrivals.

Nevertheless, one example of a 'loose system' of burden-sharing in the EU is during the Kosovo crisis, and the works of Boswell (2003) and Barutciski and Suhrke (in July 2002) document the political dynamics that led to such an arrangement. Following NATO's air strikes against the Federal Republic of Yugoslavia (FRY) in 1999, a large number of refugees from Kosovo needed resettlement and presented 'an extraordinary challenge' in Europe (Barutciski and Suhrke in July, 2002, p. 79). Macedonia, a neighbouring country, initially rejected appeals to admit the refugees, but with the US taking leadership in preparing an aid package, eventually agreed to accept them. As with the burden-sharing arrangements in the Second World War and the Vietnam War, the active involvement of a hegemonic power was pivotal in facilitating the arrangement. However, the US did have multiple interests in the conflict, the most important of which was 'Macedonia's cooperation to host troops from NATO countries during the conflict with Belgrade' (Barutciski and Suhrke in July, 2002, p. 85). In addition, NATO itself was blamed for causing the crisis in the first place.

As for the EU's role in the refugee situation, the Member States were unable to decide on a fixed distribution criteria, and so ended up with having a system with no pre-fixed quotas (Boswell, 2003, p. 331). The Member States were able to elect the number of refugees they were willing to admit, and the transfer of refugees from the region of conflict to the EU was a relatively simple one, in that they were transferred straight to the Member States admitting them. However, it is important to note that the EU's involvement and cooperation was a self-serving one, in that most Member States are NATO members, and the 'double voluntarism' principle meant that they were free to limit the number of refugees they could accept. As Boswell argues (ibid.):

'in many senses the Kosovo case was unique, with NATO countries displaying an exceptional willingness to admit Kosovo Albanian refugees for the duration of the campaign, for fairly obvious political reasons.'

In contrast, Thielemann (2003) attributed the success of the EU's cooperation in Kosovo to a combination of interests and norms. In regard to the former, it was in the EU's interest to contribute to political stability in the region due to its geographical proximity to, and economic ties, with Eastern Europe. As regards norms, the argument is that the EU is committed to achieving international solidarity, and this commitment is represented by 'proxies' such as the welfare state and the EU's overseas development aid (Betts, 2009, p. 89).

2.3 Dublin Regulation and International Law: Rights, Obligations and Violations

‘Despite the importance of international cooperation, each State needs to meet its international legal obligations towards refugees within its jurisdiction regardless of the existence of mechanisms for cooperation. Cooperative arrangements should not be considered a means for States to divest themselves of responsibility otherwise falling to them under international law.’

- UNHCR (2011, para 11).

Granting refugee status to an individual is essentially a legal act, and therefore, no analysis on asylum is complete without reference to international law. However, in regard to seaborne asylum seekers, an interaction of different legal orders may apply in any given circumstances (Gíl-Bazo, 2006, p. 574). The nature of legal obligations towards boat arrivals vary according to geography, for example, whether the vessel carrying asylum seekers are within the state’s territorial sea, in the contiguous zone or on the high seas, or in the coastal waters of non-EU coastal states (Fischer-Lescano et al, 2009, p. 279). The duties to perform search and rescue operations, disembark and grant access to proceedings and effective legal protection also depend on factual and geographical circumstances. Border management and border control activities require an observation of international law regarding human and refugee rights. They are bound by this legal obligation because their activities have a functional territorial reference point, and consequently, a factual relationship with the sovereign territory concerned.

The debate and the literature on the rights of asylum seekers and state obligations towards them are indeed enriched by a litany of legal obligations and opinions on the subject. However, their contribution to the literature is essentially prescriptive. Sources of obligations in international law are derived from treaty, international customary law, general principles of law and humanity considerations, and these coincide with EU primary law, which includes the Dublin Regulation, and secondary law. In regard to opinions, the most relevant are those issued by the Executive Committee of the UNHCR, also known as ‘ExCom Conclusions’ on International Protection. Although not formally binding, they are expert and specialist opinions relevant to the interpretation of refugee law, and they represent the views of the international community as these ‘Conclusions’ are taken by consensus.

Nevertheless, critics highlight the inadequacies of international law, particularly the Smuggling Protocol, in regard to its lack of consistency with other areas of law, for example the 1951

Geneva Convention and its lack of a protection principle (Morrison and Crosland, 2001, p. 67). The international legal instruments are also criticised for not reflecting 'the contemporary reality of displacement or of protection and asylum needs' (Newman in Newman and Van Selm, 2003, pp. 5-6). These instruments were created in a Cold War context, and therefore do not specifically account for the mixed migration phenomenon that has characterised global migration in recent years, or the phenomenon of unauthorised or illegal migration via people smuggling.

Finally, there is also an increased recognition of the lack of clarity within international law specifically regarding the rescue of asylum seekers. As will be discussed in Chapter 4, this lack of clarity is often manipulated by Member States and used to justify attempts to pass the responsibility of admitting boat arrivals to other Member States, and negotiations usually lasting for several weeks while asylum seekers remain stranded in disease-infected and overcrowded boats. Authors such as Bailliet (2003), who looked at the Australian Tampa case and its impact on burden-sharing at sea, and Morrison and Crosland (2001) attribute this impasse on the 'state of confusion' brought about by the imprecision of international law, in addition to states' lack of political will in assuming responsibility for the determination of the claims of the asylum seekers. Despite these criticisms however, international law remains the authoritative source on the discussions on rights and responsibilities regarding unauthorised migration, and adds considerable weight to the current debate.

2.4 The 'Protagonist', the 'Antagonist' and the 'Interloper': Asylum Burden-Sharing and the EU's Multiple Roles in the Dublin Regulation Process

'Theories are necessary if we are to produce ordered observations of social phenomena. Theory [...] 'helps us to see the wood for the trees'.'

- Rosamond (2000, p. 4).

2.4.1 Introduction

The existing literature is permeated with legal and political analyses from academia, the media and refugee and human rights experts regarding the lack of formal burden-sharing arrangements that would have facilitated the redistribution of asylum responsibilities in the EU. That there is no such system of sharing or redistribution is accepted as the *status quo*, evidenced

by a long list of boat arrivals, specifically in the Mediterranean region, , and the political gridlock characterising the numerous negotiations for the transfer of asylum seekers from the 'EU south' to the 'EU north'. The EU's failure in providing assistance to its Member States in the Mediterranean is often attributed to either the weakness of its supranational structures or the continued dominance of Member States in the policy realm of Justice and Home Affairs. This analytical dichotomy is often represented in the debates between two schools of thought, broadly identified as the 'State-Centric' and 'Post-National' perspectives (Geddes, 2001). The former represent views on the EU through the prism of the nation-state, focusing on the sovereign prerogatives of the Member States in making policy decisions in the highly securitised policy area of 'illegal' or 'irregular' migration, and justifying the reluctance of the same policymakers in adopting a formal system of asylum burden-sharing. The latter perspectives, on the other hand, treat the EU as a 'multi-spaced government' (Antonsich, 2008, p. 507) occupying a borderless continent and imbued with universal and cosmopolitan values that, for the purposes of this study, make burden-sharing possible.

The 'boat arrivals' situation in the EU, including the associated difficulties in introducing a formal system of asylum responsibility-sharing is, however, riddled with complexities, some of which are unique to the EU, and others due to the inadequacies of international law and the international system responsible for its application. In terms of the latter, despite the lack of clarity regarding state responsibility for rescuing and admitting seaborne asylum seekers in international law being manipulated by Member States to work in their favour, the importance of the application of international law in the current discussion cannot be overestimated. Bringing international law into the discussion not only puts into question the lawfulness of EU's responses, but also places the EU and its 'problem' of asylum within an international arena which champions the rights to refugee protection but is also being increasingly monopolised by security concerns. In regard to EU-generated complexities, one can only look at the *sui generis* architecture of the EU to observe that in discussing the lack of and need for a burden-sharing system, the 'EU' simultaneously fulfils three different and opposing roles: the 'antagonist', the 'protagonist' and the 'interloper'.

In stipulating that asylum burden-sharing does, in fact, exist and operate in the EU, this thesis deviates from the common view in the literature regarding the lack of any burden-sharing arrangements in the EU, and revises the theoretical dichotomy limiting the EU's identity as an actor in the asylum burden-sharing field as belonging only to either the State-Centric or Post-National categories. Further, it situates the EU's decision-making processes regarding burden-

sharing within a higher, international arena going beyond the confines of the EU's intergovernmental and supranational framework. However, a more significant departure from both EU studies and international refugee law literature is the leadership role of 'small states' in facilitating burden-sharing in the form of refugee relocation to both EU and non-EU states, with bilateralism as a political platform enhanced by informal mechanisms available to Member States at the intergovernmental level.

2.4.2 The European Union: Towards a Super-State?

To understand the dynamics behind the EU's responses to the problem of the unauthorised migration of asylum seekers and absence of a burden-sharing framework, it is important to have a clear view of how the EU has evolved in history, how it operates and how powers and competencies are distributed among the many actors that work within its structures. Bretherton and Vogler (2006, p. 22) describe the EU as a 'political system under construction', with its internal institutions and practices constantly evolving, and with its membership continuing to expand. The EU is an institution that is unique both in its conception and evolution, and its creation is a reflection of the 'dynamic interaction between innovative political actors and the opportunities and constraints afforded by changing international and domestic structures'.

The evolution of the present-day EU from its smaller beginnings as the European Coal and Steel Community (ECSC) in 1952 as a result of the signing of the Treaty of Paris has been a swift process. It had only six Member States³⁶ participating in the free movement of and access to sources of production of coal and steel. Five years later, the same six Member States signed the Treaty of Rome, officially known as the 'Treaty establishing the European Economic Community' (TEEC), creating the European Economic Community (EEC) (Europa, 2010). It aimed to achieve economic integration through the creation of a common market in goods, services, capital and labour. In 1986, the signing of the Single European Act (SEA) consolidated this objective by providing a 1992 deadline for the establishment of the 'Single Market', defined as 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured' (Article 8A) (ibid.). The EEC then welcomed six additional Member States as a result of two waves of enlargement, the first of which took place in 1973 involving the United Kingdom of Great Britain (UK), Denmark and Ireland in 1973, followed by the 'Mediterranean States' of Spain and Portugal in 1986 and Greece in 1981.

³⁶ These were France, West Germany, Italy, and the 'Benelux' states of Belgium, the Netherlands and Luxembourg, also known as the 'Inner Six'.

In 1993, following the entry into force of the Treaty of European Union (TEU or 'Maastricht Treaty') the EEC became known as the 'European Community' (EC), with the removal of 'economic' in its title an indication of the wider governance remit it now enjoyed (Europa, 2010). With its initial objective of economic integration having been achieved, the EC now looked at political integration as the next step, particularly in the face of political instability resulting from the collapse of communism in Eastern Europe and German reunification (Europa). The Maastricht Treaty created what is presently known as the European Union (EU), and introduced the 'pillar' system of governance, to demarcate between policy areas controlled by the 'supranational institutions' and those by the national governments of the Member States (ibid.). The first pillar was known as the 'European Communities', incorporating the pioneering ECSC and the EC. The nature of decision-making in this pillar was supranational, in that proposals made by the European Commission (Commission) required the adoption by both the European Council and the European Parliament (EP), and were subject to monitoring and review by the European Court of Justice (ECJ). The decision-making process for the second pillar, known as the Common Foreign and Security Policy (CFSP) was, on the other hand, intergovernmental. It allowed Member States to take joint action in the area of foreign policy, with no powers given to the EP, ECJ or the Commission. The third pillar, known as Justice and Home Affairs (JHA), aimed to offer protection to European citizens in the policy areas of freedom, security and justice, and was also intergovernmentally-driven (Europa, 2010). The TEU also incorporated elements of a political union through the creation of an EU-wide citizenship, which made every citizen of all Member States an 'EU citizen', and brought completion to the Single Market project with the creation of a common currency. However, despite these developments pointing towards the creation of a 'super-state', the TEU also established the principle of subsidiarity (Article 5, TEU) 'as a general rule', which stipulates that the supranational institutions may only intervene in areas where they are able to act 'more effectively' than the Member States. (ibid.).

In preparation for future enlargements, the TEU was amended in 1999 by the Treaty of Amsterdam (TEA). The reforms introduced under the TEA were unprecedented, in that it appeared to drive the EU into a supranational direction first with the abolition of all internal borders through the EU-wide application of the Schengen Convention (Europa, 2010), an increased role for the EC institutions in home affairs issues, which will be discussed in more depth in the following sections, and a more transparent decision-making process through an increased use of the co-decision voting procedure, which gave the EP power to adopt instruments jointly with the Council of the European Union (ibid.). In 2003, the Treaty of Nice (TN) brought further reforms, particularly in regard to the institutional composition of the

supranational institutions, with expectations of further enlargements in the near future. It increased the number of Members of the European Parliament (MEPs) from 700 to 732, lowered the number of seats allocated to the existing Member States by 91, set the criteria for 'qualified majority voting' within the Council, adopted formal rules for the application of sanctions against a Member State, and created the Court of First Instance to assist with the case overload faced by the ECJ (Europa, 2010).

In December 2009, the Treaty of Lisbon came into force and amended all previous Treaties which founded the EC and the EU (Council of Europe, 2011). The EC Treaty had now become the 'Treaty on the Functioning of the European Union' (TFEU), and while the impact of the TFEU on the Dublin Regulation and asylum burden-sharing goes beyond the temporal scope of this thesis, it is worth noting that it has steered the EU further into supranationalism. First, it provided the EU with a European Council President and a single legal personality, a status previously reserved for the EC, thereby enhancing its negotiating power internationally and making it a more effective international actor. Therefore, the EU is now able to conclude treaties within its areas of competence. Second, the incorporation in the TFEU of the Charter of Fundamental Rights (CFR), which affects fifty political, legal, economic and social rights, has given the ECJ wide powers to interpret the standards to be applied both by EU and Member State institutions (Fitchew, 2011). Third, the replacement of the pillar system with a clear list of three different types of competences for supranational legislation, namely 'exclusive', 'shared' and 'supporting', has simplified the formerly complicated decision-making process (ibid.). Fourth, in an effort to make the EU more transparent, the TFEU further strengthened the role of the EP by widening the policy scope where it can apply its co-decision authority with the Council, thereby 'representing Member States for the vast bulk of EU legislation' (Europa, 2010). Fifth, under the Lisbon Treaty, the qualified majority voting process³⁷ replaced unanimity voting in all areas of policy, except taxation, foreign policy, security, social security and defence (Fitchew, 2011).

³⁷ From 2014 on, the calculation of qualified majority will be based on the double majority of Member States and people, thus representing the dual legitimacy of the Union. A double majority will be achieved when a decision is taken by 55% of the Member States representing at least 65% of the Union's population (Fitchew, 2011).

2.4.3 Justice and Home Affairs: A Question of *Which* Governance?

Central to the discussion on unauthorised migration is the EU's Justice and Home Affairs (JHA) agenda, more specifically, the question of governance, as the 'problem' of asylum burden-sharing in the EU, or lack thereof, can be attributed to the perplexing overlap of competencies across the EU institutions, as demonstrated above.

Byrne et al (2003, p. 9) refer to three stages of the development of the CEAS as consisting of formative, transformative and reformative phases. The formative phase, which began in the early 1980s, involved the direct vertical transfer of Member State national migration practices into regional standards, starting with the creation of the 'Schengen Zone' in 1985. Signatories to the Schengen Agreement³⁸, which was outside the Treaty structure, were France, Germany, Belgium, Luxembourg and the Netherlands, which are classified as 'northern' Member States in terms of both geography and wealth (Spiegel, 2010), and which had well-regulated migration systems in place. The 'Schengen Zone' was created to remove all internal borders and facilitate freedom of movement for the citizens and workers of the signatory states. Common rules and procedures reflecting the policies of the 'northern' Member States for short-term visas, asylum applications and border controls were applied. Described as a period of state-centrism (Geddes, 2001; Byrne et al, 2003), the asylum 'system' that operated within the Schengen Zone reflected 'burden-shirking' (Uçarar, 2006) practices, particularly with the introduction of the 'safe third country' notion in 1986, which gave receiving Member States the freedom to transfer asylum seekers to other countries 'on grounds that protection could be sought elsewhere' (Byrne et al, 2003, p. 9). Later, Germany introduced the notion of 'safe third country of origin', which enabled Member States to return asylum seekers to countries of origin that were deemed 'safe', after an accelerated airport determination procedure (ibid., p. 11).

The intergovernmentalism and state-centrism of the formative phase was followed by a period in the 1990s where an asylum *acquis communautaire*, the accumulated legislation, court decisions or legal acts making up the body of Community law, began to develop. Known as the

³⁸ The Schengen Agreement was signed in Luxembourg in 1985, and became the Schengen Convention in 1995, creating a single external border. It was intergovernmental in nature and also has non-EU members: Iceland, Norway and Switzerland. Europa Summaries of EU Legislation 'The Schengen area and cooperation' (Europa, 2009).

'transformative phase', or a period of 'informal intergovernmentalism' (Geddes, 2001, p. 60), it was at this time that the Schengen Convention and Dublin Conventions were signed. In regard to the former, the signing of the Schengen Convention consolidated all agreements signed from 1985 and facilitated the 'communitarisation' of border control practices common to the signatories of the Schengen Zone. Therefore, the initial vertical transfer of Member State border control policies to the regional Schengen arrangement has been followed by yet another vertical transfer, this time from Member State to Community legislation. This coincided with the gradual expansion of the 'Schengen Zone' to include new Member States through the EU enlargement processes, while retaining the membership of non-EU countries such as Switzerland, Norway and Iceland.³⁹

With a common internal frontier, 'compensatory measures' were seen as necessary particularly in regard to assigning responsibility for asylum claims. The Dublin Convention was signed in 1990 in conjunction with the Schengen Convention as a means to 'compensate' Member States for relinquishing control of their own borders (Hailbronner and Thiery, 1997). Asylum has also become heavily politicised, due to what was perceived as an uneven distribution of refugees from Bosnia and Kosovo among receiving EU Member States. A set of hierarchical criteria including the Member State of first entry, Member State of first asylum application and family unity were used to allocate responsibility for admitting asylum seekers. Member States also exercised the right to make 'take back' or 'take charge' requests with each other, in situations involving double applications.

However, the most important achievement of the 'transformative period' was the creation of a Justice and Home Affairs pillar⁴⁰ under the Treaty on the European Union ('TEU' or 'Maastricht Treaty'), ratified in 1993. This put an end to the operation of the intergovernmental forum of the national officials from the Justice and Interior Ministries of the Member States, also known as the 'TREVI Group', and put the reinforcement and cooperation of existing actions in this field within the EU's pillar structure. While the framework for cooperation in this area became part

³⁹ At the time of writing, Bulgaria, Cyprus and Romania are not yet members of the Schengen Area. The UK and Ireland are not signatory to the Schengen Convention, despite being EU Member States.

⁴⁰ The Maastricht Treaty saw the creation of the following three pillars: The First Pillar (European Community), which included economic, social and environmental policy fields, and decisions were taken by majority vote; the Second Pillar (Common Foreign Security Policy), covered foreign policy issues and was intergovernmental in decision-making.

of the wider supranational institution, the JHA remained intergovernmental, with decisions remaining within the competence of Member States and made by consensus.

The European Commission's (2001) review of the Dublin Convention pointed at the intergovernmental nature of its system of asylum allocation as the very reason for its inefficacy. The Maastricht Treaty had simply incorporated an entire intergovernmental organ into its pillar structure, specifically leaving its intergovernmental foundations intact, and did not create any balancing powers for either the European Court of Justice or the European Commission to enforce compliance or implement an infringement procedure. More importantly for the purposes of the discussion on burden-sharing, the number of physical transfers made on the basis of the hierarchy of criteria was rather marginal (*ibid.*).

The third phase, known as the 'reformative phase', involved the transposition of pre-existing instruments developed from the formative and transformative phases to new Member States' national law as an important part of the enlargement process. The 1999 Reform of the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC) ('Treaty of Amsterdam') proclaimed the EU to be an 'area of freedom, justice and security', and transferred the Justice and Home Affairs pillar to a new Title IV of the EC Treaty, thereby placing it under the jurisdiction of the European Commission, the European Court of Justice and the European Parliament (Geddes, 2001, p. 61 and Byrne et al, 2003, p. 9). This period witnessed substantial institutional 'upgrading' (Maurer and Parkes, 2007, p. 153; Druke, 2002) for the supranational sphere of the EU. In particular, they were given new powers to develop legislation on immigration and asylum matters, including responsibility allocation, reception conditions, asylum procedures and the definition of 'refugees', and set deadlines for the transposition of measures into national legislation⁴¹. The European Commission was given a shared right of initiative with the Member States, with a shift to a sole right of initiative five years after the entry into force of the Amsterdam Treaty. The European Parliament was made a consultative body within the new Title IV of the TEC covering the 'Area of Freedom, Security and Justice', and from 2004 onwards, was given a co-decision role with the European Council (Maurer and Parkes, 2007, p. 182). Most significantly, Title IV enabled the supranational institutions, pursuant to Article 63(3) and (4), to adopt immigration law measures, which may also be relevant to persons seeking asylum, including irregular or 'illegal' migrants (Peers, 2005, p. 24).

⁴¹ These became the 'directives' forming the 'building blocks' for the achievement of the CEAS.

However, despite these developments, the newly created Title VI of TEU, which contained provisions on police and judicial cooperation in criminal matters, including terrorism, drug trafficking, organised crime, and other forms of ‘international crime’, stayed within the realm of intergovernmental decision-making. Due to the nature of people smuggling involving elements of ‘criminality’ as explained earlier in this chapter, the irregular entry of seaborne asylum seekers was included in the list. Therefore, EU asylum policy as it relates specifically to people smuggling remained under the responsibility of Member States. Furthermore, despite Title IV placing immigration matters within the supranational EC pillar, it was made clear in The Hague Programme that Member States were, in reality, in control of this policy agenda by declaring that ‘the determination of volumes of admission of labour migrants is a competence of the Member States’ (European Council, 2004a, para 3.1.4).

The oscillation between intergovernmentalism and supranationalism continued with the 2001 Treaty of Nice, which stipulated that within five years of its entry into force, the European Council would set the criteria and mechanisms for asylum reception conditions, refugee status determination definition, refugee status procedures, as well as for determining which Member State is responsible for hearing asylum claims (European Parliament, 2011). It also allowed the European Council to consult the European Parliament in setting these measures and criteria, before voting by unanimity. The condition set by the Treaty of Nice was that after this initial phase, the European Council would be able to make decisions using the ‘co-decision procedure’, which meant requiring the approval of the European Parliament before any decision is adopted, and that the European Council would then adopt its decisions by qualified majority henceforth (ibid.). From 2005 onwards, therefore, the codecision procedure has applied, thereby giving the European Parliament equal decision-making powers with the European Council in immigration and asylum matters.

Further *communautarisation* took place when the Treaty of Lisbon entered into force in 2009. From simply establishing minimum asylum standards, the Treaty of Lisbon created a ‘common policy’ comprising of a uniform status of asylum, a uniform status of subsidiary protection, a common system of temporary protection, common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status, reception condition standards, partnership and cooperation with third countries, and finally, criteria and mechanisms for determining responsibility for considering an asylum claim (European Parliament, 2011). Other developments provided by the Treaty of Lisbon reflecting the widening of the powers exercised by supranational institutions include the right define the rights of third country

nationals legally resident in the Member States and their freedom of movement and residence in other parts of the EU, and the 'gradual introduction of an integrated management system for external borders' (Fitchew, 2008). Most importantly, the Lisbon Treaty significantly enhanced the powers of the European Court of Justice, allowing for preliminary rulings to be sought in proceedings before any court in any Member State 'rather than just the national courts against whose decisions there is no right of appeal under national law' (European Parliament, 2011). Applied to asylum law, this would enable the European Court of Justice to develop a larger case law in this field. The restrictions on the Court's jurisdiction over asylum and immigration policy under the Treaty of Amsterdam have also been lifted, allowing cases to be brought before the ECJ without having to take them to the highest court in the Member States (Fitchew, 2008).

Observers of the developments brought about by the Treaty of Lisbon have commented that the Member States have relinquished most, if not all, decision-making powers to the EU regarding asylum and immigration, considering that 'the only major policy decision left in the hands of Member States is that of deciding how many nationals from non-EU countries it is prepared to admit directly from third countries' (Fitchew, 2008). Indeed, the powers to legislate on asylum and immigration given to supranational institutions by the Treaty of Lisbon has been seen as similar to those given to the EU institutions in agricultural matters via the Common Agricultural Policy.

2.4.4 Neither *This* Nor *That*: Theorising EU Asylum Burden-Sharing Policy-Making

It appears that in the last two decades, the EU has undergone significant institutional changes that have given it state-like attributes. However, this does not necessarily imply the weakening of the Member States in terms of both relevance and decision-making authority. Indeed, theoretical frameworks have struggled to account for the EU's institutional, legal and political idiosyncrasies. This is despite efforts by academics and theorists of European integration to closely monitor the evolution of the 'European experiment' and provide an explanation for the directions that different EU policy agendas have taken, using perspectives and approaches from a number of different disciplines. However, the European integration process itself has functioned as a 'pioneering site' for the development of non-state centred theories in International Relations (Rosamond, 2000, p. 10).

In regard to policy-making in the migration field, the literature is awash with different perspectives, however falling under the two main schools of thought: State-centred and Post-National (Geddes, 2001).

2.4.4.1 State-Centred Approaches

The State-centred approach, put simply, implies the continued authority of Member States in making decisions affecting their territorial sovereignty. Such a perspective on EU integration can be traced to the Realist Theory of International Relations, which emphasises the material power and resilience of the State as a sovereign entity. Criticising claims of the EU as being 'post-national' or 'cosmopolitan', proponents of Realist or State-centred approaches (for example: Smith, 1992 and Caporaso, 1996) point out that despite developments in integration, the EU continues to function on an intergovernmental basis.

Neorealist theorists, are, even more explicit in their dismissal of the EU as a 'supranational' institution (Pollack, 2001, p. 223), and one of the most influential of these was Moravcsik's theory of 'liberal intergovernmentalism' (1993). According to Moravcsik, the major intergovernmental bargains in the EU were not driven by supranational forces or unintended spillovers, but rather by a *voluntary* and gradual process of preference convergence among the most powerful Member States, which then formed coalitions or alliances, struck central bargains amongst themselves and offered 'side-payments' to other less powerful Member States. The resulting 'supranational' institutions merely served to provide the Member States with information and reduced transaction costs, and did not lead to the transfer of power or authority to such institutions (Pollack, 2001, p. 226). Indeed, this view is supported by scholars such as Guiraudon (2000) and Geddes (2001) who posit that such vertical transfers of authority were carried out merely as part of a broader intergovernmentalist effort to strengthen migration control. The emerging *acquis communautaire* in asylum and migration was, as Geddes described, an 'intergovernmental fudge' (2001, p. 61):

'The reliance in the post-Maastricht period on intergovernmental cooperation and non-binding instruments impaired the effectiveness of policy cooperation, widened the democratic deficit and was criticised for an emphasis on the lowest common denominator, restriction-oriented policies. [...] they were the outcome of an intergovernmental decision-making environment within which the preferences of the more reluctant member states such as the UK needed to be accommodated and within which the Commission was powerless.'

Conversely, the State-centric perspective also stress the constraints imposed by domestic legal decisions and bureaucratic processes on the direction that the EU policy takes. To them, European integration is merely an arena providing new 'policy venues' where Member States can transfer the responsibility of formulating policies to the EU, in order to avoid domestic legal and political constraints (Geddes, 2001, p. 64). 'Ceding' competency to the supranational system is one of expediency, and is beneficial only to the Member States' executive governments.

Nowhere else is such a mark of state-centrism as clear as it is in the history of policy developments leading to the construction of the CEAS. Despite efforts to communitarise certain policy areas, influential Member States such as Denmark and the United Kingdom, for example, enjoy 'opt-out' arrangements in the application of the Dublin Regulation and the Schengen Convention. On the other hand, 'opting -in' to supranational legislation has been accompanied with questionable practices reflecting the 'lowest common denominator' approach. For example, in anticipating the future operation of the CEAS, some Member States were known to swiftly modify their legislation and push standards down prior to coming to an agreement at the supranational level (Barbou des Places, 2002, pp. 18-24). Examples of Member States 'racing to amend national legislation' included the United Kingdom 1999 Asylum and Immigration Act introducing the compulsory dispersal of asylum seekers and replacing cash welfare benefits with shopping vouchers; the Danish immigration law allowing asylum seekers suspected of criminality to be detained indefinitely, and the Dutch Alien Acts in 2001 introducing a single status and a single set of rights for 'all those in need of protection' (ECRE, 2001, p. 25).

Finally, the restrictive and exclusionary practices committed by Member States in the form of interdiction measures, detention and deportation are a reflection of efforts by Member States to maintain control of what they see as a bastion of their sovereignty. Indeed, the Dublin Regulation and the asylum burden-sharing debates are essentially about borders. The term 'border' is intimately linked with the Westphalian concept of state sovereignty (Wolff, 2008, p. 253). The policy area of 'freedom, security and justice' is traditionally understood as belonging to the jurisdiction of the Member State, given its sovereign responsibilities of providing citizens with internal security, controlling access to national territory and administering justice. These responsibilities and competencies have formed the bastion of sovereign statehood since the emergence of the modern nation-state in the 17th and 18th centuries (Monar, 2005, p. 226). The determination of which third country nationals are entitled to enter and/or reside in the EU has

been consistently defended by the Member States as being part of their exclusive sovereign powers, and following developments in the EU where Member States have no choice but to admit seaborne asylum seekers imputed with criminality through the requirements of the Dublin Regulation, national governments have had to deal with domestic anti-foreigner backlash. The 'extraordinary advance of political parties of the extreme right' (Rudge, 2002) has been seen as a threat to the efforts to harmonise asylum standards and policies in the EU and as influential in the practice of 'burden-shirking' or 'burden-shifting' measures that have characterised the usual responses of Member States vis-à-vis seaborne asylum seekers in the Mediterranean. As Schuster (2005) puts it, such exclusionary measures reflect the ultimate removal of the threat to security, interests and identity of a community and act as 'a signal to the electorate that something is being done about people who do not have a legal right to remain'.

Within this State-centred theoretical framework, therefore, the prospect for the creation of an asylum burden-sharing system in the EU indeed looks grim, and this is supported by the literature in various media, from scholarly articles (Suhrke, 1998) to political speeches and news reports. State-centred theories, particularly Neorealism, argue that states would only cooperate to creating and participating in such a burden-sharing arrangement if it would serve their own interests (Betts, 2009). However, as governments do not see any benefits of cooperation in this area, it is not of interest to those Member States who, for geographic reasons are largely unaffected by the 'flow' of seaborne asylum seekers in the Mediterranean region.

There are a number of reasons explaining the resistance of Member States to adopt a formal and compulsory burden-sharing arrangement in the EU, the most significant of which is the 'thorny question of numbers' (Barbou de Places, 2002, p. 18). These refer primarily to the costs associated with receiving asylum seekers who have entered the EU via irregular or illegal means, which as will be demonstrated in Chapter 5, which the receiving Member States may find difficult to meet. Deciding on 'how many' or 'how much' of the asylum 'burden' to share, contribute or redistribute is therefore bound to be a politically contentious exercise. For example, in the 2002 Commission Communication *'Towards integrated management of the external borders of the Member States of the European Union'*, the European Commission put forward asylum burden-sharing as one of the 'mutually interdependent components of a common policy of border management', and listed fiscal burden-sharing and sharing of human resources and equipment as necessary measures (Wolff, 2008, p. 259). However, such proposals faced significant roadblocks as Member States had divergent conceptions and opinions on how best to share the burdens associated with illegal migration, with a clear

division between 'northern' and 'southern' interests. While the southern EU Member States of Malta, Spain and Italy favoured sharing the burden of illegal migration, including asylum cases and repatriation requests with other EU Member States, northern Member States such as Germany and Sweden⁴² rejected this vision of burden-sharing (ibid.).

Additional challenges to the 'numbers' question are the associated issues of a lack of predictability and 'free-riding'. Without compensation and guarantees of predictability, it would not be possible for Member States to support asylum burden-sharing (Barbou des Places, 2002, p. 19). The magnitude of the asylum 'crisis' is difficult to predict, and the linkage of admission and burden-sharing would require 'an almost perfect system of migration control' (Noll, 2000, p. 308). Second, the potential for Member States to 'free-ride' is another reason for the opposition to the implementation of formal asylum burden-sharing scheme in the EU. For a collectively provided good, which denotes non-excludability, states expect to receive benefits from the over-all supply of the good, but as the NATO experience showed, larger countries are often exploited by smaller countries in the provision of the collective goods, and the latter have the tendency to 'free-ride' on the commitments of the former (Olson and Zeckhauser, 1966, p. 266). Applied to the asylum agenda, resources to be committed to the establishment and operation of a burden-sharing system are expected to fall disproportionately on the shoulders of the more affluent Member States, who argue that they already receive the highest numbers of asylum seekers in the EU. Indeed, in 2006, the top four Member States receiving the highest numbers of asylum claims were the United Kingdom: 27,800; France: 26,300; Sweden: 24,300; and Germany: 21,000 (Eurostat, 2007).⁴³

The lack of predictability coupled with a very low, if any, prospect of reciprocity, makes the concept of burden-sharing unappealing. What makes the idea of asylum burden-sharing even more worrying is the fact that once a Member State commits to receiving asylum seekers, it alone is bound to fulfil its legal obligations, given that the principle of non-reciprocity is actually enshrined in EC law. This necessarily removes any flexibility for Member States to renege on their obligations if other Member States violate their own, and removes any element of 'solidarity' which forms the basis of cooperation in burden-sharing (Barbou des Places, 2002, p.

⁴² Sweden's refusal was due to the fact that it had already committed to receiving 20,000 refugee claims from Iraq in 2007 (Wolff, 2008).

⁴³ The figures for the United Kingdom and Sweden include repeat applications (Eurostat, 2007).

18). This is in stark contrast to international law, where states can justify non-compliance by arguing that other states have also not honoured their legal obligations.

Finally, security considerations, which 'reflect core national interests' (Spolander in Cebeçi, 2011, p. 45), also play an important role in the refusal of Member States to accept a formal asylum burden-sharing system in the EU. Most seaborne asylum seekers employ the services of people smugglers for various reasons, the most significant of which is the strict entry requirements imposed on some third country nationals, which mostly affect regions where protection needs are endemic. Indeed, in the EU, blanket visa requirements and efforts to 'manage' migration have blocked legal channels for labour migration and asylum (Betts, 2006, p. 655). As presented elsewhere in this thesis, the existing literature on people smuggling is also rife with theories that smuggling is an entrepreneurial venture with strong links to organised crime (Schloenhardt, 1999; Salt and Stein, 1997; Prezelj and Gaber, 2005). In fact, it has been reported that approximately 60 to 90 percent of illegal immigrants have been supported by organised criminal groups in travelling to Europe and crossing European borders (Prezelj and Gaber, 2005, p. 6-7).

As far as the EU 'security agenda' is concerned, the 'burdens' associated with mixed migration and unauthorised boat arrivals are to be immobilised and eradicated completely, rather than 'shared'. The power of domestic politics in this sense should not be underestimated. One of the factors accounting for the refusal by Member States to adopt a formal framework of cooperation in dealing with mixed migration is the domestic pressure placed on policymakers, particularly by the popularity of right-wing political parties, who, 'through their traditional role as *leaders* in the European 'harmonisation' debate, also threaten the values underlying efforts of EU States to approximate their asylum and refugee policies (Rudge, 2002).

2.4.4.2 Post-National Approaches

The Post-National perspective stipulates that the traditional international order of sovereign states has been transformed by transnational forces such as globalisation and the development of social and political relations across countries. The EU has been referred to in the literature as 'the first truly postmodern international political institution' (Ruggie, 1993, p. 140), altering the traditional political environment in which Member States operate (Habermas, 1998; Geddes, 2001). The creation of the EU's own political identity, as distinct from those of the Member States, has attracted a considerable amount of scholarly attention, most notable of which was

Ruggie's work (1993), which highlighted the challenges brought about by the EU's construction to the traditional definition of the state as being linked to territoriality and mutually exclusive forms of sovereignty, signalling a move 'beyond modern politics'. Other scholars from a variety of different disciplines see the removal of 'borders' as pivotal in the characterisation of the EU's identity, describing it as either 'shared' (Axford and Huggins, 1999), 'nested' (Herb and Kaplan 1999), 'fluid' or having a number of 'strands' (Neumann, 1998).

The existence of a higher level of identity for the citizens of the EU and the transfer of authority in policy areas traditionally belonging to the governments of the Member States have been attributed by Constructivist scholars to the 'profound and pivotal role' the supranational institutions play in both constituting and socialising the actors within them, celebrating the transformative power of 'EU membership' (Pollack, 2011, p. 237). Indeed, in less than three decades since the introduction of the concept of a 'European identity' at the 1973 EC Summit in Copenhagen (Shore, 2000), the Commission in particular has been successful at constructing a Europe-wide version of belonging and identity, as reflected in the everyday paraphernalia of the 'EU citizens', such as the EU passport or EU driver's permit.

The concept of EU citizenship as being based on 'popular sovereignty' has also been thoroughly discussed in the literature. Habermas (1992, 1998) and Balibar (2004) in particular argue that civic and political values are sufficient in building and maintaining a deliberative form of democracy, relying on the citizens' political engagement as opposed to the traditional forms of membership such as territory, culture or history. Therefore, the legitimacy of both EU identity and citizenship is derived from participatory 'constitutional patriotism' (Habermas, 1992), echoing the notion that sovereignty 'resides in peoples and not in states' (Barnett, 2001, p. 245). Related to this is the concept of the European Union as an additional, higher level of political arena providing structured lobbying opportunities for pro-asylum non-governmental organisations (NGOs) (Geddes, 2001; Soysal, 1994).

The irreversible internal Single Market integration processes have coupled with broader, inevitable changes in the global and political economy, creating a 'higher order' to which Member States are bound, prompting scholars such as Majone (1994) to refer to the EU as a 'regulatory state'. In terms of the institutional and legislative changes introduced in the EU from its inception to the most current reforms under the Treaty of Lisbon, it would appear that the 'higher order', that is, the supranational level of governance, is both widening and deepening its areas of control particularly in asylum and immigration matters. As previously discussed, it has

created uniform criteria and common procedures in terms of the former, and allowed asylum and immigration cases to be brought to the ECJ without the cases being taken to the highest courts in the Member States (European Parliament, 2011; Fitchew, 2008). This is indeed a giant leap from the Schengen Agreement's humble beginnings from being a voluntary intergovernmental arrangement with the simple aim of facilitating freedom of movement for the citizens and workers of the small group of signatory states.

The neofunctionalist theory on European integration developed by Haas (1958) describes this process of integration as a series of 'functional steps' and a group-driven process which through federal institutions, themselves established to facilitate the process of joint governance with national institutions, are empowered to exert influence over the interests of national groups, who themselves opted for increased integration. Consequently, the locus of political authority shifts away from national institutions to the supranational institutions of the EU. As Haas (1958, p. 16) had put it:

'political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institution possess or demand jurisdiction over the pre-existing national states.'

Much scholarly attention has also been given to the notion of the European Union as a 'norm-diffuser'. The inculcation of cosmopolitan values, which include tolerance, inclusion, equality, diversity and the protection of human rights, is seen by Constructivists and Post-National theorists such as Nicolaïdis and Howse (2002) and Soysal (2002) as being specific to the 'transnational normative' identity of the EU. The social and political setting in which the EU operates and where the Member States and EU institutions interact is seen as conditioning them to 'rely on shared values, ideas or knowledge in making their decisions' (Lucarelli in Elgström and Smith, 2006, p. 60, citing ME Smith (2004)). The most prominent example of such 'conditioning' is the requirement that any country seeking membership of the EU must conform to the so-called 'Copenhagen criteria' (Articles 49 and 6(1) of the TEU), which include 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'. Indeed, this is a reflection of the EU's very own existence as a political project aiming to construct and maintain 'peace through cooperation among former enemies' despite cultural or national differences (ibid.).

Perhaps most relevant to the discussion on asylum burden-sharing is the EU's declared commitment to the concept of 'effective multilateralism', which is defined as 'making

international organisations and agreements more effective' (Smith and Laatikainen, 2006, p. 1) through the 'development of a stronger international society, well functioning international institutions and a rule-based international order' (Jasiński and Kacperczyk, 2005, p. 32). The EU itself is considered as the world's 'most successful case of multilateralism' (ibid.), and having a 'multilateral soul' (Jørgensen in Elgström and Smith 2006: 20), with 'multilateralism' forming an integral part of its identity having been itself built on a 'multilateral edifice' (Telò, 2006, p. 48). As Former Commissioner for Justice, Freedom and Security Franco Frattini claimed, 'the multilateral perspective is written into the genetic code of the European Union' (Jørgensen in Elgström and Smith, 2006, p. 31). Although its commitment to 'effective multilateralism' was part of the 2003 European Security Strategy which promoted international cooperation as a means to overcome global security threats such as terrorism, uncontrolled proliferation of weapons of mass destruction and organised crime, it signalled a more formal commitment to its pre-existing relationship with the United Nations.

Such a formal commitment to 'making international organisations and agreements more effective' at the supranational level is seen as an extension of the notion of 'popular sovereignty', with the EU institutions being credited for the greater liberty that UN agencies have to intervene in domestic affairs, 'allowing once shy UN agencies to strut into new domains' (Barnett, 2001, p. 245). The literature also makes reference to European citizens' self perception as 'better peoples of the United Nations' (Wouters, Hoffmeister and Ruys, 2006), and compares the EU's peaceful and cooperative partnership *with* the United Nations against the monopolising and self-seeking leadership of the US *at* the United Nations (Habermas and Derrida 2003, cited in Antonsich, 2008, p. 509).

Nevertheless, despite the Post-National approaches fail to account for the persistent rejection of proposals for a formal asylum burden-sharing system in the EU, specifically the failure of EU institutions in making the principles of cooperation and solidarity operational in the form of a 'fair sharing of responsibilities'. Indeed, critics lament the failure of the European Commission and European Parliament in de-securitising the Common European Asylum System (Maurer and Parkes, 2007), given their potential in fostering a critical mass of either elite-based or bottom-up pressure for a change in focus from its security aspects to one that affirms the EU's international commitments to human rights.

2.4.5 Evidence of Asylum Burden-Sharing

The absence of a formal asylum burden-sharing framework is indeed quite paradoxical given that compared to other areas of migration, the global refugee regime is the only one with a specialised UN agency and a ‘near universally ratified treaty that constrains states’ sovereign discretion in their admissions policies’, making it ‘the strongest form of formalised cooperation on migration’⁴⁴ (Betts in Kunz et al, 2011, p. 26 citing Loescher, 2001 and Loescher et al, 2008). States in general have been, however, ‘very reluctant’ to regulate other areas of international migration through multilaterally binding norms and this is by no means unique to the EU (Kunz et al, 2011, p. 1).

Nevertheless, despite the current literature focusing on the absence of an institutional EU asylum burden-sharing system, some form of asylum ‘burden-sharing’ has been carried out in the EU from the time the Dublin Regulation entered into force. Table 2 below lists the approximate numbers of asylum seekers ‘redistributed’ from a receiving Member State as per the requirements of the Dublin Regulation, via a ‘relocation’ scheme to another Member State as part of ‘burden-sharing’ efforts carried out bilaterally and informally.

Table 2: Relocation of Asylum Seekers in the EU 2005-2010

	MEMBER STATE OF FIRST ENTRY	MEMBER/STATE OF RELOCATION	TOTAL NUMBER OF REFUGEES RELOCATED
2005	Malta	Netherlands	30-38 ⁴⁵
2006	Malta	Lithuania	6 ⁴⁶
2006	Malta	Spain, Portugal, Andorra, Netherlands, Italy	46 ⁴⁷
2007	Malta	US	200-223 ⁴⁸

⁴⁴ The other area of international migration found within a multilateral framework is that governing labour rights and migrant workers.

⁴⁵ Figures obtained from interview with Dutch Immigration and Naturalisation Service (Appendix) and Cassar (2005).

⁴⁶ European Commission DG Home Affairs (2010, p. 13).

⁴⁷ Figures obtained from key-informant interviews conducted by author regarding *Francisco y Catalina* incident (Appendix).

2008	Malta	US	35 ⁴⁹
2009	Malta	France	92 ⁵⁰
2010	Malta	France, Germany	200 ⁵¹

At this juncture, it is important to ask the question of where the *locus of power* is in making decisions in terms of asylum burden-sharing. The current literature appears to match intergovernmentalism with burden ‘shirking’ or ‘shifting’, immersed in the assumption that the difficulty in achieving a common and unitary policy designed to facilitate a ‘fair sharing of responsibilities’ rests on the self-centred and rationalist calculations of Member States. On the other hand, the potential to transform the current situation into one where the EU enjoys a formal arrangement of asylum responsibility-sharing is seen as resting on the supranational institutions being given the exclusive competence to implement such a system. What then, would account for the occurrences of asylum relocation, as seen in the above table? As the concept of an existing asylum burden-sharing in the EU is entirely novel, it is not surprising that gaps abound in the literature in regard to providing an explanation for what can be considered as a clear deviation from the *status quo*.

2.4.5.1 Regime Theory: Burden-Sharing Cooperation from Three Perspectives

To understand the dynamics behind such ‘clandestine’ efforts to relieve Mediterranean Member States of the overwhelming pressure of irregular migration and asylum, it is imperative to situate the Post-National vs State-Centred debates within the wider field of ‘Regime Theory’ (Betts, 2009), a subfield of International Relations which is specifically focused on cooperation. It offers three different perspectives in relation to understanding what conditions and actions ultimately lead to cooperative agreements, and these three perspectives come from the Neo-Realist, Constructivist and Liberal-Institutionalist lines of thought. Indeed, the first approach is

⁴⁸ Figures obtained from Munro (2009) and Lutterbeck (2009).

⁴⁹ Figures obtained from Munro (2009).

⁵⁰ Figures obtained from Malta Star (2009) and Thielemann et al (2010, p. 46).

⁵¹ European Commission DG Home Affairs (2010, p. 13). This represents the number of pledges under EUREMA Programme. Other pledges Slovenia, Slovakia, Hungary, Poland, Romania, UK, Luxemburg and Portugal) each taking 6-10 persons.

compatible with the State-Centred perspectives on EU migration governance, and the latter two approaches can also be considered to match the Post-National perspectives, as presented above.

a) Neo-Realist Perspective on Cooperation

To put it simply, Neo-Realism posits that states would only cooperate if doing so would serve their own interests, and as international cooperation is generally oriented towards the pursuit of mutual gain, it is usually of little interest to states (Betts, 2009, p. 82). It highlights the difficulties encountered in achieving cooperative arrangements to share the responsibilities of receiving asylum seekers and granting them access to asylum procedures, and the literature on state responses to shift responsibilities to other states or prevent the entry of boats into their territorial waters is indeed abundant (Noll, 2003; Gil-Bazo, 2006; Pugh, 2001; UNHCR 2011). One of the main reasons for the failure of collective action highlighted in the literature is the fact that states have little incentive to enter into a cooperative agreement if the benefits expected are non-excludable as there is a tendency for some participants to 'free-ride' on the efforts of others (Suhrke, 1998). Some scholars also question the concept of an 'EU asylum burden-sharing' system, given that the EU's concern with asylum is primarily utilitarian, in that it is not 'derived from the wish to offer better protection' but rather 'from the wish to control who enters the European economic space'(Gil-Bazo, 2005). To avoid an invocation of norms ensuring non-refoulement, states are using migration control, which is their sovereign prerogative, to prevent boat arrivals through interdiction measures. International cooperation, from the perspective of state sovereignty, would either promote a 'strategy of cost reduction' among partner states, or failing that, the 'enforcement of policies to prevent asylum seekers from arriving' (Noll, 2003, p. 240). Indeed, commentators such as Gammeltoft-Hansen (2008, p. 24) looks at the recent 'interest' of EU Member States at sea rescue operations as part of a 'sovereignty game for the purpose of migration control'.

'Game Theory' is often used to analyse the manner in which countries make decisions regarding burden-sharing (Cook, 2004, p. 350). The theory predicts that whatever strategy is chosen, a risk decrease for one party necessarily means a risk increase for another, and the aggregate level of risk will remain the same (Noll, 2003, p. 241). Such is the dilemma faced by EU policy-makers, particularly at the intergovernmental level, in reaching a consensus on the asylum burden-sharing question. While the situation of unauthorised migration is clearly a problem that affects the EU as a whole thereby necessitating a collective response, the rational and

maximalist character of decision-makers, particularly at the Member State level, hinder any cooperative efforts given the perceived risks associated with asylum burden-sharing.

The prospects for cooperation to achieve asylum burden-sharing, from the Neo-Realist perspective, are therefore low. One of the few ways, if not the only way, to overcome this problem, is through the participation of a 'hegemonic leader' in facilitating cooperation through leadership or coercion. A strand within Neo-Realism is the theory of political and economic hegemony, also known as the Hegemonic Stability Theory, as advanced by Modelski (1978) and Gilpin (1981) and Hansenclever (1997) (cited in Betts, 2009). The Hegemonic Stability Theory looks at the rules, institutions and codes of conduct of the international system as a function of the goals, preferences and interests of the dominant actor in the system (Tarzi, 1998). One of the two instances in which a hegemonic state will cooperate to provide an international public good where there would otherwise be failure in achieving collective action is when it has a 'large unilateral interest in providing that good' (Betts, 2009, p. 83). This is also known as the 'benevolent leadership model', which sees the hegemonic state placing a high absolute valuation on the public good and is therefore quite happy to bear the costs, despite the smaller states 'free-riding' on its efforts and contribution. The second instance is when a hegemonic state uses its power to coerce other states into contributing to provide a public good, through the use of instruments such as economic inducements or persuasion. This is known as the 'coercive leadership model' (Betts, 2009, p. 83). In the 1980s, the role of the 'hegemonic leader' was played by the US in facilitating a world-wide burden-sharing of refugees from Vietnam (Suhrke, 1998; Betts, 2009).

b) Constructivist Perspective on Cooperation

Constructivists such as White (2004), Adler (1997) and Risse (2004) (cited by Spolander in Cebeçi, 2011) are interested in the dominant belief systems, conceptions of identity, perceptions, symbols and myths in shaping the action of states. They also look at the role of 'structures' and institutions in norm-diffusion, determining the normative context within which states operate, and influencing the preferences of states (Betts, 2009, p. 86). Norms are seen as regulating the behaviour and constituting the identity of states, and are diffused through institutions, which exercise a certain level of 'moral authority' over sovereign states.

The EU's Common European Asylum System is embedded in the international refugee protection regime, and with burden-sharing being one of the principles and norms of asylum,

the Constructivist perspective assumes an openness and receptiveness by Member States to the idea of cooperation in this policy field. Scholars such as Van der Klaauw (as cited by Druke, 2002) have highlighted the different concentric circles where the EU is situated, absorbing the norms and values of the international protection regime and itself radiating its own norms and values on non-EU Member States along geographical lines. Provisions of international law ensuring the respect of human rights in enacting migration control measures (Weinzierl, 2007) such as the International Convention on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT) are binding on the Member States (ibid.). Internally, EU law also places an obligation on Member States to carry out migration practices while maintaining human dignity and proportionality, such as through Article 6 of the Schengen Borders Code, and violations of these fundamental rights fall under the jurisdiction of the European Court of Justice (ECJ).

The concept of 'multilateralism' is a strand of Constructivism, and is a regular feature of academic analyses of International Relations. In classic International Relations Theory, it is seen as one of the various means of 'managing intergovernmental relations' (Telò, 2006, p. 43) between three or more states, on the basis of generalised principles of conduct' (Lucarelli in Elgström and Smith, 2006, p. 55). These principles of conduct are defined by Telò (2006, p. 43) as specifying appropriate conduct for classes of actions in terms of the 'particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence'. Multilateralism also incorporates the 'ideational factors' of states, which include world views, identities and deep-rooted convictions shared by other states and international organisations. The literature is rife with theories on the role of international organisations and non-governmental organisations, advocacy networks and individuals in diffusing human rights norms and influencing governments (Keck and Sikkink, 1998; Geddes, 2000; Betts and Durieux, 2007; Betts, 2009). In regard to international refugee protection, the UNHCR's role is facilitating international refugee burden-sharing in the International Conference on Refugees in Central America (IREFCA) is often cited as a success story (Betts, 2009, p. 89). Betts and Durieux (2007) also predict that the UNHCR is capable of autonomously influencing the process of norm-creation that 'over time may lead states to change their commitment to burden-sharing'.

The EU's impassioned promotion of the notion of 'effective multilateralism' is also testament to its commitments to international human rights norms and principles. In the last decade, an EU-specific version of 'multilateralism' has attracted a high level of scholarly interest (Cooper, 2003; Telò, 2006; Smith and Laaitakainen, 2006; Jørgensen in Elgström and Smith 2006;

Krauthammer, 2004; Wouters et al, 2006). Cooper (2003) describes EU multilateralism as embodying 'the ideas of democracy and community that all civilised states stand for on the domestic level'. The EU has placed particular emphasis on its altruistic desire to further UN goals and contributing to global solutions (Jørgensen in Elgström and Smith, 2006, p. 37) and multilateralism itself has become part of its identity, indeed a 'value to safeguard' (Lucarelli in Elgström and Smith, 2006, p. 55). While its efforts to play a major role in the multilateral system is 'fairly recent' (Jørgensen in Elgström and Smith, 2006, p. 32), it has proven to be influential in strengthening the binding nature of multilateral rules and procedures, and improve coordination between the UN and international organisations. The EU has also been pivotal in promoting the spread of 'regional multilateralism' in Africa, Asia and Latin America (Telò, 2006, p. 48). In the last decade, EU-UN cooperation has also gained new impetus, accompanying the development of the EU's Common Foreign and Security Policy including such policy areas as trade and development, environmental protection, humanitarian aid, human rights and combating terrorism. In 2003, the EU adopted what it has termed 'effective multilateralism', in the context of the European Security Strategy, declaring that 'strengthening the United Nations, equipping it to fulfil its responsibilities and to act effectively is a European priority' (Wouters et al, 2006, p. 2). Multilateralism, therefore, has become a core principle of the EU's political interaction with its external partners.

c) Liberal-Institutionalist Perspective on Cooperation

The third perspective on understanding the motivations for international cooperation is offered by Liberal-Institutionalists, who view international institutions such as the EU and the UN as contributing to cooperation between states (Sorensen and Sorensen, 2006). It supports the Neo-Realist principle that states act on the basis of state-centric, rational calculations but adds two levels of analysis or 'sub-approaches' in its examination of the processes of international cooperation .

The first of these approaches is the 'top-down norm-creation approach', which involves a UN-led bargaining process leading to formal agreements (Betts, 2009, p. 90). In the context of the EU and mixed migration, this means the UNHCR facilitating cooperation by appealing directly to state interests and transforming those interests into commitments. Norms and values promoted by international institutions, which in the case of the UNHCR and the EU supranational institutions themselves, involve conforming to international law, would then be

internalised by the Member States and shape their behaviour. Indeed, there is a clear link between the constructivist perspective on cooperation, and the liberal-institutional discipline.

The second sub-approach is known as the 'bottom-up norm-creation approach', which posits that norms can be created through a 'good practice model', via a list of criteria, guidelines, mechanisms or modalities of international cooperation or model agreements (Betts, 2009, p. 91). By evaluating examples of good practice, further pilot projects are developed, and norms are then consolidated in formal agreements. Two best known examples are the CPA involving refugees and asylum seekers from Vietnam, and CIREFCA (Conferencia Internacional sobre Refugiados Centroamericanos), both carried out in 1989. The former has particularly been used by the UNHCR as a model for managing boat arrivals, as it made temporary protection and refugee status determination prerequisites for resettlement in third countries, where previously a blanket entry was provided to those leaving Vietnam. In the case of CIREFCA, which involved the integration of solutions for persecuted Colombians into the broader political peace process in the region, the concept of 'internal displacement' was formally recognised by the international community for the first time, and measures to protect Internally Displaced Persons (IDPs) were emulated in the subsequent regional consultations on protection (UNHCR, 2011).

2.4.5.2 EU Asylum Burden-Sharing: Conditions for Cooperation

Regime Theory presents the following three conditions that make 'cooperative outcomes' possible. These conditions are as follows: first, the participation of international institutions in facilitating cooperation between states; second, overcoming problems of coordination and collaboration; and third, the negotiations, monitoring, implementation and enforcement and effectiveness of rules that lead to cooperation (Betts, 2009, p. 81, citing Hansenclever et al 1997). 'Coordination' in this case is defined as the situation in which states 'adjust the means by which they achieve a given end', and 'collaboration' involves states collectively adjusting 'the ends they are working toward'. This is summed up by Keohane's (1984) definition of 'international cooperation' as taking place 'when actors adjust their behaviour to the actual or anticipated preferences of others' (cited in Betts, 2009, p. 81).

What is clearly required in the EU is a framework within which Member States can cooperate based on an agreed set of measures, to guide their responses to 'boat arrivals' and enable them to apply the principles of 'solidarity' and 'fair sharing of responsibilities' associated with asylum.

Put simply, this is the cooperative *arrangement* that the EU is in need of, due to the consequences of the application of the Dublin Regulation placing undue 'burdens' on the Member States in the Mediterranean region. However, in the absence of such a framework, and as demonstrated by the data from the cases examined, adjustments have been made at the *Member State level* to accommodate the need for asylum burden-sharing.

To be sure, all three perspectives on cooperation presented under the Regime Theory can help explain the 'unusual' occurrences of asylum relocation from the receiving Member States to other states, and this will be explained in more depth in Chapter 3. However, the centrality of the Member State in facilitating asylum burden-sharing is fundamental in the current discussion. 'Informal' asylum burden-sharing, to the extent that such practices are not institutionalised in the EU and are carried out against the requirements of the Dublin Regulation, is facilitated by Member States *intergovernmentally* and *bilaterally*. Such practices, contrary to widely held views about the self-centredness and egotism of Member States and indeed states in general, are embedded within a 'regime' that not only promotes asylum burden-sharing as a norm and principle of international law, but also demonstrates the operation of the EU's declared commitment to the principles of 'solidarity' and 'fair sharing of burdens', and 'effective multilateralism'. Indeed, the application of such principles at the level of the Member State is in stark contrast to the frustrated and exhausted efforts at the supranational level to make such principles operational.

2.4.6 Asylum Burden-Sharing in the EU: Gaps in the Literature

The data presented in Table 2 above clearly demonstrates that asylum 'burden-sharing' has operated in the EU in the last decade, since the operation of the Dublin Regulation in 2004. That the current literature is reluctant to explore this further is one gap that this thesis attempts to fill. In analysing this contention further, it is necessary to look at the idiosyncrasies of what this thesis considers as an emerging burden-sharing design in the EU asylum field, and how such idiosyncrasies need to be accounted for in the academic and policy discussions on the subject.

2.4.6.1 Bilateral Multilateralism: Platform for Asylum Burden-Sharing

Achieving burden-sharing, as argued by Betts (2009) and referenced elsewhere in this thesis, is reliant on overcoming two main problems: those of coordination and collaboration. Much of the literature on EU decision-making in asylum and immigration matters falls on one of the two

categories of State-Centred and Post-National approaches, with the former being concentrated on the lack of burden-sharing measures, and the latter on the transfer of power to supranational institutions and with it, the promise or potential of a burden-sharing system grounded on multilateralist ideals, with the EU itself embodying what solidarity and cooperative efforts can achieve.

Between the two schools of thought presented, the State-Centred perspectives better represent the operationalisation of commitments to solidarity and multilateralism which are important in achieving a fair sharing of asylum responsibilities. This would explain the difficulties experienced by policy-makers in formalising a system designed to alleviate the asylum 'burdens' as being created by Member States, who are unwilling to cooperate due primarily to fears of 'free-riding' and the tangible and intangible costs associated with such a system. However, the State-Centred approach also explains the informal operationalisation of the principles of solidarity and burden-sharing, as demonstrated in the relocation of refugees from Malta to other EU Member States and indeed other states outside of the EU framework. The state remains the single most important actor in the international refugee protection regime, particularly in regard to making asylum burden-sharing work.

The centrality of the state is firmly grounded in the norms and principles of the international refugee protection regime, with 'state sovereignty' being one of its main principles (Gordenker, 1987). Asylum is defined as the protection 'granted by a state' (UNHCR, 2006a), and 'burden-sharing' ensures that efforts are distributed equally 'between states' (Uçarer, 2006, p. 223). The international legal system is also state-centred, in that it was created by states themselves, with the adoption of international laws resting on them, and with customary international law norms relying on their conduct (Lewis, 2005, p. 68). It comes as no surprise, therefore, that the responsibility and capacity for cooperation in achieving burden-sharing would also come from the states themselves. In fact, in recent years, the literature has witnessed a reconceptualisation of 'burden-sharing' to include 'national preservation' as a criterion for cooperation (Gibney, 2004) and an alternative definition of 'effective multilateralism' to that promoting 'a system to ensure that at the national level, the state provides to its citizens stability and security, an enforceable legal order, and an open and inclusive economic order' (Biscop 2004 cited in Smith and Laatikainen, 2006).

The concept of bilateralism, or more specifically, bilateral multilateralism, that is, the commitment to international law and norms at the level of the Member State, is an area that has

received little attention in the discussions regarding asylum burden-sharing in the EU. The literature has explored the continued operation of bilateralism and Member State commitment to international institutions and law in the context of supranational commitments to 'effective multilateralism' (Jasiński and Kacperczyk, 2005), and the notion of 'intersecting multilateralisms' has also been widely recognized by scholars studying the EU's role in the United Nations (Smith and Laatikainen, 2006). Bilateral relationships in the context of the EU's foreign policy approach have also received much attention, with scholars such as Joffe (2008) highlighting the increasing importance of the EU's regional relationships, particularly those with countries in the Mediterranean region. However, at present, empirical evidence sourced primarily from the news media, diplomatic press releases and evaluation reports focusing on recent refugee relocation efforts within the EU has not been accompanied with theoretical developments in this area. More specifically, the role of bilateralism, including commitments to multilateralism, in helping overcome the two main obstacles to the achievement of asylum burden-sharing – cooperation and collaboration, is an area that warrants further exploration particularly in the EU context.

2.4.6.2 Small States as 'Hegemonic Leader'?

Closely related to the need for increased attention to Member States' bilateral relationships as a conduit to achieving asylum burden-sharing is the leadership role of the economically and politically weaker Member States who, for reasons of geography, are thrust in the Dublin Regulation muddle, specifically the small island state of Malta. International Relations theory and Realist scholars in particular tend to view external relations and foreign policy as being dominated by larger, wealthier and more powerful states. Within the EU, these powerful states are identified as France, Germany and the United Kingdom (Hill, 2004), forming an exclusive club and 'precooking decisions that are then formally adopted by all member states' (Nasra, 2011, p. 164). Small Member States, who usually have less wealth, are expected to accept the authority and decisions of the more powerful Member States.

Nevertheless, the literature in the last decade has witnessed a proliferation of ideas in regard to the specific conditions small states are able to pursue their national objectives, with the EU providing an arena for doing so. Thorhallsson and Wivel's *Small States in the European Union: What Do We Know and What Would We Like to Know?* (2006) attempted to define what 'small states' are in the context of the EU, explain the behaviour of 'small states' and determine in general terms how such states influence the EU decision-making process. Bunse's work (2009)

looks at the rotating European Council Presidency, allowing small states to shape the EU agenda through what is termed as 'political entrepreneurship', which relies heavily on informal processes. Panke (2011) looks at small Member States' influence in the European Council working parties and Committee of Permanent Representatives (COREPER), and Nasra (2011) looks at foreign policy decision-making in the EU as a system of governance, where the power to govern or 'steer' policy directions is not entirely dominated by traditionally more powerful and larger Member States. Nasra specifically examined Belgium's bilateral relations with the Democratic Republic of Congo and concluded that regardless of size or material resources, the values of commitment, networking and other 'immaterial resources' are vital in states achieving their national objectives within a supranational setting. The work of Jakobsen (2009) provided a number of factors enabling small states to influence EU foreign policy, and these include having a 'forerunner reputation', the ability to provide convincing arguments and build coalitions, and commit sufficient resources to support EU initiatives. Björkdahl (2008) looks at norm advocacy as a 'small state strategy' to influence the policy directions of the EU, particularly the role of Sweden in the EU's conflict prevention policy.

Thus far, the role of Spain, Italy and Malta in attempting to steer the EU into a direction that would enable it to institutionalise a 'fair sharing of responsibilities' in the asylum area has not yet received much scholarly attention. However, policy developments beginning in 2009 have pointed to the concession of larger Member States such as France and Germany into accepting a significant number of refugees from Malta, and more Member States have committed to take part and pledge certain numbers at the time of writing. The absence of any analytical assessments of such developments in either International Relations, EU Studies or refugee law literature may indeed be an indication of its novelty. In terms of the latter, specifically in the Neo-Realist tradition, only 'hegemonic states' such as the US have been identified and recognised as 'leaders' in refugee burden-sharing, with the relocation and resettlement of Vietnamese refugees in the 1980s in different industrialised countries as an example of what power and political influence can achieve. The EU examples would indeed provide an alternative view of 'leadership' in the burden-sharing discussions.

The literature also mainly points to the role of the intangible resource capacity of small states in enabling them to steer policy directions in their favour, primarily in the form of 'norms' (Björkdahl 2008), 'reputation' (Arter, 2000; Kronsell, 2002), 'national interest' (Kronsell 2002) and 'commitment' (Arregui and Thomson, 2009). This study aims to add to this repertoire by arguing that as in the case of Greece, a small state's resource incapacity may also be considered

as a 'resource'. Identified in this study as a 'bail out' strategy, small EU Member States may indeed force other larger Member States to act in solidarity and carry out burden-sharing in emergency situations.

2.4.6.3 A Multi-Actor, Multi-Sited System of Governance

The difficulty in selecting one line of thought out of the two main approaches mentioned above to analyse EU policymaking in terms of asylum burden-sharing is the fact that there are three simultaneous roles the 'EU' is playing in the Dublin Regulation and burden-sharing debate: the 'protagonist', the 'antagonist' and the 'interloper'. These roles are played by different groups of actors with different interests and agenda representing the 'EU', making it difficult to speak of one unitary actor. The 'protagonist' represents Member States who, as a result of the application of the Dublin Regulation requirements, carry asylum 'burdens' disproportionately to those falling on other Member States. This effectively means those Member States in the EU's 'southern frontline' in the Mediterranean who feel aggrieved for being made responsible for receiving groups of seaborne asylum seekers in spite of their lack of capacity to host them. In the discussion on asylum 'burden-sharing' such 'protagonists' are those who repeatedly call for both a recast of the Dublin Regulation and the creation of a formal system of burden-sharing in the EU. The term 'antagonist' represents both the Dublin Regulation itself and those Member States who object to having an institutionalised form of 'responsibility sharing'. The 'interloper' is a term which represents the EU institutions at the supranational level who view themselves as responsible for facilitating actions of solidarity and promoting international law in the Union, including those of asylum and burden-sharing, under the umbrella of 'effective multilateralism'. With the policy area of border management seen as within the jurisdiction of the Member States, the leadership role of the European Commission and European Parliament in the discussions on the need for the 'fair sharing of responsibilities' is considered unwelcome. While these categorisations are indeed rather simplistic, they are important in understanding the differing views in the EU as regard the contention generated by the debates for and against an institutionalised burden-sharing scheme in the asylum field.

Mediating between these two main approaches is an all-inclusive theory which looks at *how* the EU operates in different policy areas, composed of different actors at all levels of interaction. Rather than looking at the EU at the prism of 'government', the focus is instead on the concept of 'governance', which looks at policy directions and competencies. The 'Multi-Level Governance' approach as championed by Marks et al (1996, pp. 41-42) is considered ground-breaking in

that it points to the inherently dynamic arrangements spanning across different levels of analysis in the EU:

‘The point of departure for this multi-level governance is the existence of overlapping competencies among multiple levels of governments and the interaction of political actors across those levels. [...] Instead of the two level game assumptions adopted by state centrists, MLG theorists posit a set of overarching, multi-level policy networks. [...] The presumption of multi-level governance is that these actors participate in diverse policy networks and this may involve sub-national actors – interest groups and subnational governments – dealing directly with supranational actors.’

Other scholars and commentators such as Ruggie (1993) and Kohler-Koch (1999) also conceive of the EU as a ‘multi-perspectival’ polity organised around ‘multiple centres of authority’, and which is characterised by an ‘interpenetrated system of interest intermediation’. These approaches are indeed useful in the sense that they account for the multiplicity of actors *within the EU*. However, the question of burden-sharing in the asylum field is, while state-centred, international in nature. Empirical evidence of refugee transfers in the EU since the application of the Dublin Regulation as well as the rich and long literature on international refugee protection and forced migration illustrate the global, multilateral and international dynamics of cooperation. Noll (2003) characterises asylum burden-sharing as a ‘multi-actor, multi-level game’, and Uçarer (2006) cites the work of Keohane (1983), Aggarwal (1985) and Young (1996) in arguing that many of the issue-specific regimes that result from European cooperation and which usually result in explicit, formal and binding rules exist in an arena that ‘goes beyond the confines on the EU’. Member State arrangements with respect to refugee and asylum issues are examples of a ‘sub-regime’ that is embedded or nested in the broader global refugee protection framework, represented by international refugee law and a United Nations-dominated framework. The need for a ‘multi-sited’ approach to complement and support the ‘multi-level governance’ perspective is needed, as most of the research on the latter is focused only on the internal decision-making processes in the EU (Bagayoko-Penone, 2012). The case studies presented in this thesis suggest that non-EU actors are indeed active participants in the asylum burden-sharing processes in the EU, and should therefore be included in the analysis.

2.4.6.4 ‘Clandestine’ Responses to Clandestine Migration: The Role of Informal Decision-Making

‘The informal sphere has the aura of the ‘irrational and the irregular’.
- Brie and Stölting (in Christiansen and Neuhold, 2012, p. 19)

The central argument in this thesis is that the lack of a formal asylum burden-sharing system in the EU has resulted in *informal* arrangements being carried out. While much of the literature has focused on its formal arrangements and institutions, a conceptual shift has resulted in greater attention being given to the non-formal aspects of politics at all levels of governance. Referred to as the ‘underbelly’ of public policy-making or ‘closed door’ politics (Christiansen and Neuhold, 2012; Piattoni, 2009; Kleine, 2010; Stone 2008), the Informal Governance approach provides valuable insights into the processes leading to the decision by Member States to take part in the relocation of refugees as a means to ease the ‘asylum burdens’ of the Member States in the Mediterranean region.

The Informal Governance literature, although largely focused on the EU, is currently still in its infancy, and is still considered to be under-researched and ‘marginal’ (Christiansen and Neuhold, 2012). In particular, informal governance in the EU’s asylum field has received little systematic analysis, despite empirical evidence of its operation in decision-making processes in the Justice and Home Affairs policy domain. The work of Vink and Engelmann entitled ‘*Informal European asylum governance in an international context*’ (in Christiansen and Neuhold, 2012) is a first analysis in EU asylum governance, but the focus has been on the contribution of informal decision-making arrangements in the intergovernmental exchange of country of origin information (COI). The COI exchanges enabled Member States to return failed asylum seekers to their countries of origin if they believed that it would be ‘safe’ for them to do so. It also builds on the existing literature on informal cooperative arrangements between Member States as the initial stages leading to the formalisation and institutionalisation of such arrangements as the Schengen Convention and Dublin Regulation.

While these exchanges are helpful in understanding how Member States cooperate in an informal setting, the COI context is focused on asylum burden ‘shifting’ or ‘shirking’ strategies. The focus of this thesis is on asylum burden ‘sharing’ measures, which look at, at least in the perspective of international refugee protection, a more positive outcome of cooperation and collaboration. This is more challenging to prove, given the literature being dominated by the more restrictive aspects of EU migration, border and asylum policies.

2.4.7 The Role of Small State ‘Clandestine’ Bilateralism in the Operationalisation of ‘Solidarity’ and ‘Fair Sharing of Responsibilities’ in the Asylum Field

The theoretical foundations of this thesis offer an alternative view of the actors and processes involved in the efforts to operationalise the EU’s commitments to the principles of ‘solidarity’, ‘fair sharing of responsibilities’ and ‘effective multilateralism’. It argues, based on empirical evidence, that asylum burden-sharing does, in fact, exist and operate in the EU, this thesis deviates from the common view in the literature regarding the lack of any burden-sharing arrangements in the EU, situates the EU’s decision-making processes regarding burden-sharing within a higher, international arena going beyond the confines of the EU’s intergovernmental and supranational framework. However, a more significant departure from both EU studies and international refugee law literature is the leadership role of ‘small states’ in facilitating burden-sharing in the form of refugee relocation to both EU and non-EU states, with bilateralism as a political platform enhanced by informal mechanisms available to Member States at the intergovernmental level. While the point of departure is found within the Neo-Realist argument of the continued resilience of the nation-state or EU Member State, alternative views of the influence wielded by small states as well as the efficacy of bilateral relationships within a multilateral framework and informal policy processes within an institutionalised setting offer a better understanding of recent events in the EU swinging the cooperation pendulum between security concerns and altruistic efforts.

2.5 Asylum Burden-Sharing Models in the Literature

‘Without a model or theory, explicit or implicit, it is almost impossible to gain a firm hold of an issue as comprehensive and complex as that posed by refugees.’

- Hakovirta (1993, p. 38)

2.5.1 Literature on Burden-Sharing

The need for a burden-sharing arrangement in the Mediterranean has attracted scholarly debates which have resulted in a plethora of published works (Aubarell and Aragall, 2005; Gil-Bazo, 2006; Bailliet, 2005; Betts, 2006 and Fischer-Lescano et al, 2009 among others). The most relevant to the current study is the journal article published by Kneebone et al (2006), ‘*A Mediterranean Solution? Chances of Success*’, which examined examples of refugee burden-sharing arrangements in modern history and their applicability to the situation in Malta, Spain,

Italy and Greece. However, the article was published in 2006, the same year that the *Francisco y Catalina* affair took place, and made no reference to this particular case in its analysis. Indeed, the inclusion of an analysis of this case would have provided a more comprehensive view of the viability of a burden-sharing arrangement in the EU. Nevertheless, of all of the published work on the subject of the burden-sharing of seaborne asylum seekers in the Mediterranean region, the work of Kneebone et al was most useful, applicable and relevant to the current study.

There is also an abundance of literature on international cooperation in relation to asylum, subsumed under the title 'burden-sharing', and with proposals for 'solutions' and 'models'. Due to the mixed migration situation in the EU's 'southern frontline' in the Mediterranean Sea being a relatively recent phenomenon, the existing proposals and models have not quite captured the unique characteristics of the asylum situation in the EU, as will be discussed in the later sections of this thesis. However, regardless of what 'model' to apply to the EU asylum question, any analysis of burden-sharing cooperation, particularly regarding the conditions facilitating cooperative outcomes, can only be fully understood within the framework of the 'Regime Theory', which is the branch of International Relations that is focused on international cooperation and the provision of 'global public goods' (Betts, 2009, p. 81).

Since the late 1980s, the literature has been inundated with a wide variety of 'models' of refugee burden-sharing derived from different academic disciplines, most notably Economics, Law and International Relations. Conversely, the challenges faced by the EU in establishing formal redistributive mechanisms in response to boat arrivals have also attracted a considerable amount of attention in the academic, legal and political milieu that there is currently an abundance of literature on the subject. Most recently, innovative proposals from different disciplines have also entered the debate, specifically addressing the issue of mixed migration in the Mediterranean region of the EU.

2.5.1.1 Proposals Derived from Economic Models

MA Boyer's 1989 Theory of Comparative Advantage ('Policy Trade Model') is often cited in burden-sharing proposals addressing the problem of 'exploitation' of the large by smaller countries in regard to sharing the costs associated with granting access to asylum procedures (Thielemann, 2009, p. 4). The Policy Trade Model posits that countries have a comparative advantage in providing particular types of collective goods, and can therefore specialise in producing those. Such specialisation allows implicit trades to be made between countries in

the same alliance, removing the incentive for some countries to exploit others. In an alliance that deals with multiple public goods, this model also answers the question of cross-issue burden-sharing. While Boyer's model does not specifically address the issue asylum burden-sharing, it does provide a useful scheme for analysing the viability of trading and exchanging capacities as a means of 'sharing' the costs associated with asylum in the EU.

A related proposal is one presented by Schuck (1997), labelled as the 'Market-Liberal Model' of burden-sharing. Schuck proposes a market-based process for the allocation of asylum burden-sharing responsibilities, taking into account each state's capacity in deciding the quota that would be assigned to them. States are then able to trade their respective quotas in the form of an international stock exchange, trusting in the 'invisible hand' of the market. The process requires the involvement of an international agency such as the UNHCR in determining the number of refugees needing protection and/or resettlement, and with the quotas assigned to each member, countries can then trade with each other to 'buy or sell' their quota obligations (Cook, 2004, p. 348). Such an arrangement is expected to reduce the overall costs of the refugee protection system, with countries facing higher costs being free to trade their quota with countries facing lower costs and the latter being able to provide compensation to the latter for the added 'burdens' on them.

Schuck's market-based model is criticised for its blanket assumptions and generalisations that states would behave the same way in a refugee protection setting as they would in a market setting. More importantly, a market-based arrangement leads to the commodification of humanitarian responsibilities and the protection seekers themselves (Schuck, 1997, p. 269). However, Cook (2004, pp. 349-350) believes that the refugee burden-sharing system would 'fit well within economic theoretical frameworks', given that states are motivated primarily by their own national self-interest and are 'unlikely to consent to any humanitarian policy' that they do not perceive to be compatible with that interest. As markets function by catering to self-interest, employing a market-based scheme would indeed be a sensible solution.

2.5.1.2 Proposals from Refugee Law Scholars

In the late 1970s, a 'soft quota' system was promoted by Grahl-Madsen and other legal scholars (Grahl-Madsen 1983; Cook, 2004, p. 347), involving the allocation of refugees based on indices such as a country's Gross National Product (GNP) and population density. The number of refugees allocated to each country in the North would be calculated on a yearly basis, but this

mechanism would not be activated until countries of first asylum (usually countries in the South) have absorbed their maximum capacity for refugees. If the number of refugees in any given year exceeded the quota allocated to participating countries, the responsibility for the remainder of the refugees would be decided on an ad hoc basis. Indeed, the model proposed offers a relatively straightforward way of apportioning resettlement quotas to industrialised states.

Grahl-Madsen's model continues to be used to this day, particularly in policy discussions and debates regarding the burdens faced by the southern EU Member States in relation to the number of asylum seekers entering their territorial waters with the help of people smugglers⁵². Indeed, in discussing the actual 'burdens' borne by Greece, Italy, Malta and Spain (see Chapters 3 and 4), the soft quota system proposed by Grahl-Madsen is used. As the 'burdens' suffered by these Member States essentially involve 'costs', using a mathematical approach would seem helpful in the discussion.

Related to Grahl-Madsen's model is one proposed by Chimni (1993), which focuses on the size of the receiving states as a distribution key. In considering the possibility of a global burden-sharing scheme of a 'common but differentiated responsibility', Chimni proposed that all states of 'sufficient size', that is, states having an area of 20,000 square kilometres, agree on receiving roughly the same number of refugees for resettlement. The number would then be adjusted by the total land mass and population density, and a limit would be set as to the maximum number of refugees that countries could receive.

In 1995, Einarsen's *Mass Flight: The Case for International Asylum* (cited in Cook, 2004, p. 348) proposed a second protocol to the 1951 Geneva Convention establishing 'International Territories of Asylum'. Such territories, located on land leased by the United Nations in a 'safe neighbouring country', would be created specifically for individuals seeking asylum and eliminate 'many of the problems arising from unclear responsibilities among host states'. The principle of proximity promoted in Einarsen's work echoes the sentiments of Western industrialised states, who argue that asylum seekers should seek protection as close as possible to their countries of origin, and that states 'in the region' should be given primary responsibility for providing asylum to protection seekers from neighbouring countries. According to Durieux

⁵² Following the Yugoslavian crisis, the Germany Presidency of the European Union proposed using indicative figures such as population size, territory size and Gross Domestic Product to calculate the percentage of the number of people from a mass influx of displaced persons each Member State should receive (Thielemann, 2003).

(2009, p. 78), this line of argument is consistent with the refugee protection regime's goal of finding 'durable solutions', which promote the idea that refugees have a better chance being integrated in a country near his or her own, and this also makes the repatriation process easier to facilitate. However, states in the refugee-producing regions see the above proposal as yet another form of 'burden-shifting' on the part of the industrialised states. The model also does not specify how the UN would be funded (Noll, 2000, p. 265).

The 'Interest Convergence Model' advanced by Professor Hathaway and Neve (1997) has commanded 'the most attention out of all normative proposals put forward' (Noll, 2000, p. 264). The model uses a communitarian approach and self-regulatory elements in regard to the deciding who will contribute what and how much, and also acknowledges the tendency of states to form alliances with other like-minded states. To put it simply, the model calls for a system of collectivised responsibility, in which countries could form 'interest-convergence' groups, with member countries of each group allocating refugee protection responsibility among each other. Membership of such groups works as an insurance scheme, in that member countries will assist in sharing the burden in situations of a mass influx of refugees, using criteria that they themselves can determine as a group (Cook, 2004, p. 347). As Hathaway and Neve (1997, p. 188) explain:

'most states belong to a variety of sub-global associations based on such factors as economic and trading relationships, shared religion, common language, shared political and legal traditions, or mutual security concerns. These organizations could be encouraged to expand their traditional mandate where there are important linkages between effective refugee protection and the realization of their broader objectives.'

2.5.1.3 Proposal from International Relations

A proposal by Barutciski and Suhrke (2001, p. 95) is one of the very few proposals in the literature dealing specifically with 'asylum seekers' as opposed to 'refugees'. According to the authors, there is 'a legal case for not considering first asylum as an unconditional obligation on all states in all refugee situations', and that 'there is a moral-political case for encouraging states to share refugees for whom they have a special responsibility'. Looking at the Kosovo crisis as an example, burden-sharing was presented as an imperative and a *precondition* for states to accept refugees, recognising that the mass influx of refugees had the potential to lead to serious destabilisation if no cooperation was achieved. In contemporary Europe, the 'bail out' strategies of Greece and Malta can be considered to be compatible with this model.

2.5.1.4 EU-Specific Proposals

‘Despite frequent references to the term in the EU, the idea of burden-sharing in the asylum field has not been properly conceptualised by EU policymakers.’
- Thielemann (2003, p. 225)

The notion that the Dublin Regulation and the Schengen Visa System⁵³ are European asylum ‘burden-sharing schemes’ (Barbou des Places, 2002, p. 3) is correct to the extent that these systems allocated responsibilities for asylum seekers and migrants on the basis of geography. However, while these responsibilities were delineated, there were no mechanisms put in place to ensure that the spread of these ‘burdens’ was proportional to the capacity of Member States to absorb them.

In the EU, asylum burden-sharing discussions were triggered by the crisis in Yugoslavia in the 1990s, and these discussions focused specifically on the physical and financial aspects of sharing the ‘burden’ of asylum seekers and refugees. The EU’s geographical proximity to Yugoslavia made these discussions necessary, and proposals for calculating the allocation of the ‘burden’ or costs associated with receiving asylum seekers were made. The German Presidency of the European Union in 1994 played a particularly important role, proposing a burden-sharing model which included indicative figures and distribution keys (Thorburn, 1995, p. 476). Following this proposal, calls for a formal and comprehensive burden-sharing system was made more explicit in Article 63 of the Amsterdam Treaty, which stipulated that the European Council shall adopt measures ‘promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons’. The wordings used in other EU texts⁵⁴ also demonstrate that burden-sharing in the field of asylum is increasingly

⁵³ The Schengen Visa System or ‘Schengen *acquis*’ is an agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (Barbou de Places, 2000).

⁵⁴ Article 63 (ex 73k) of the 1997 Amsterdam Treaty Council shall promote ‘*a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons*’ (Council of the European Union, 2001); the *Communication* from the Commission to the Council and the European Parliament in the assessment of the Tampere Programme, the Commission declared that ‘*a better balance between efforts made by the Member States in the reception of refugees and displaced persons will be achieved by means of the principle of solidarity*’ (European Commission, 2004). Other EU texts have also referred to the need for solidarity and burden-sharing, such as the 1995 European Council Resolution on Burden-Sharing with Regard to the Admission and Residence of Displaced Persons. This need was discussed at the Brussels European Council Meeting in November 2004. In their final declaration, EU leaders stressed that the development of a common policy in the field of asylum ‘*should be based on solidarity and fair sharing of responsibility including its financial implications and closer practical cooperation between member states*’ (Council of the European Union, 2004b).

becoming an important issue, which references to ‘balance of effort’, ‘solidarity’ and ‘fair sharing’. Unfortunately, these declarations did not receive any political support from Member States.

Member States appeared content with the existing fiscal burden-sharing under the European Refugee Fund⁵⁵, and they also viewed the harmonisation of asylum legislation as an effective burden-sharing tool (Thielemann, 2008, p. 4). The harmonisation of asylum legislation⁵⁶ is considered as a means of ensuring a more equitable distribution of asylum seekers among states by means of a convergence of laws that would lead to a more ‘fair’ and ‘just’ distribution and reallocation of protection seekers. However, ultimately, policy harmonisation can only address imbalances due to differences in domestic legislation, and as the Dublin Regulation experience shows, this has not solved the question of the disproportionate burdens suffered by the Member States in the EU’s southern borders. Additionally, the ERF also only covers the administrative costs of examining asylum claims and removal.

2.5.2 Inability to Identify Actual ‘Burden’

The debates and discussions on asylum burden-sharing are rendered futile by the inability of both scholars and policy-makers alike to answer the question of ‘what burden’ needs to be shared. As Neumayer states, ‘it is not even clear how the burden of hosting asylum seekers should be measured’ (2004, p. 156), and indeed, international law does not give any explicit prescriptions in regard to how to host protection seekers adequately (Czaika, 2005, p. 104).⁵⁷ The European Centre for Refugees and Exiles (ECRE) also attributes the difficulty in measuring the impact of the Dublin Regulation on Member States to the fact that ‘complete and reliable statistics on its application have not been compiled’ (ECRE, 2009, p. 3). What is clear, however, is that the system is ‘expensive’ (European Commission, 2001 a, p. 18), ‘inefficient’ (European

⁵⁵ The ERF was created on the basis of Article 63(2) (b) of the EC Treaty to allocate resources proportionately to the Member States according to the costs associated with receiving refugees and asylum seekers.

⁵⁶ The policy instruments that the EU has adopted in an effort to create the CEAS are as follows: *Council Decision 2000/596/EC of 20 September 2000 establishing a European Refugee Fund; Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers; and the Council Directive of 9 November 2004 on minimum standards for procedures in member states for granting and withdrawing refugee status.*

⁵⁷ However, the transposition of the provisions of the Reception Conditions Directive into national legislation in each of the Member States does impose some costs, but these fall under Community responsibility and budget.

Commission, 2007, p. 47), and places disproportionate pressures on Member States that make up the EU's external southern and eastern borders.

Given the lack of consensus as to what can be included in the 'burden' calculations, the actual number or volume of asylum seekers is often used as proxy for the 'burden' on host societies. The UNHCR (2004, p. 51) and asylum burden-sharing experts such as Thielemann (2003, pp. 225-227) agree that host states are above all concerned about the absolute and relative numbers of refugees that they have to admit. Looking at the 2008 boat arrivals,⁵⁸ it was reported that 67,400 unauthorised migrants arrived in the Mediterranean, with 15,300 arriving in Greece, 36,000 in Italy, 13,400 in Spain and 2,700 in Malta.

In terms of the actual processing costs, the 'arrival stage' involves general border management costs at the national level, and the report by Thielemann et al (2010) for the European Parliament acknowledged that it has not been possible to collate figures for the costs associated with national border management. Border management costs are also not exclusively related to asylum reception as not all migrants arriving by boat would lodge refugee claims. At the 'responsibility determination stage', where the Dublin Regulation requirements are applied to ensure that the first Member State of arrival is given the responsibility for processing asylum claims, the 'burden on the Member States relate particularly to detention or transfer costs. Once the responsibility for admitting the asylum seeker is ascertained, the Member State responsible is required to provide accommodation, education for minors and health care. Indeed, such costs 'apply all the way up to actual return or approval of asylum applications', but entitlements to these services may vary between Member States (Thielemann et al, 2010, p. 35). Therefore, caution is required when looking at cost analyses regarding Member State asylum-related expenditure.

The next stage in the process relates to the asylum procedures, and Member States bear the general procedural costs related to the interview process, appeals hearings and the use of detention. Some Member States have particularly long assessment periods, which inevitably increase their costs. When an asylum claim is rejected, the Member State pays custody costs until the rejected asylum seeker is repatriated.

Of course, other costs associated with receiving asylum seekers cannot be quantified or measured. As Noll puts it, 'while it is comparatively easy to determine the costs of food and

⁵⁸ For the complete breakdown of the numbers of unauthorised migrants who arrived in the EU by sea from 2005 to 2010, please refer to Chapter 4.

housing in money terms, putting figures on the costs of integration is much more difficult, if not impossible' (1995, p. 244). Such unquantifiable costs are related to the social and political impact on the receiving Member States, and tensions are often capitalised and reinforced by political leaders who expect to benefit from a strict stance towards illegal migration and asylum seekers.

2.5.3 Inability to Measure 'Capacity'?

Questions of capacity also play an important role in the burden-sharing discussions. However, as with the difficulty associated with measuring the actual 'burden' suffered by receiving Member States, it is also difficult to calculate their capacity to admit asylum seekers, and this problem is by no means unique to the EU. As discussed in Chapter 2, existing burden-sharing proposals suggest a number of different indicators such as GDP per capita, population density and land area to be used to calculate a country's capability to provide basic economic resources to protection seekers. However, for the purposes of the requirements of the Dublin Regulation, such indicators do not play any role in the allocation of asylum burdens, as in the EU, this is mainly decided by geography and the first Member State of entry principle.

Indeed, the lack of clarity firstly regarding the costs involved in receiving asylum seekers, and second, the capacity of Member States to meet these costs, is the first hurdle that needs to be overcome by the EU if it is to formalise a burden-sharing system. It is difficult to promote the burden-sharing concept when it is not possible to accurately measure the 'burden' that is to be redistributed or shared in the first place. The second hurdle concerns the question of what mechanisms to use to alleviate the asylum disparities, given that such disparities could be real or perceived (Thielemann et al 2010, p. 26), given the lack of accurate data, and the tendency of Member States to exaggerate the 'burden' placed on them. On this basis, it becomes problematic to reach consensus as to what would amount to a fair and equitable burden-sharing scheme, especially when principles of need, capacity and guilt often enter the debate (Torvanger, 2001). Regarding the actual scheme to be set up, while the financial and administrative aspects of receiving asylum seekers are often referred to in burden-sharing discussions, the question of the physical redistribution of asylum seekers is often omitted. However, physical redistribution is in most cases what is needed to alleviate the asylum problem in the Mediterranean region of the EU.

At present, it would appear that the preference in the EU is a flexible approach to burden-sharing, or 'a la carte'. As Schuck (1997) argues:

'Under the existing regime, after all, states that are not states of origin or of first asylum are entirely free to join in, or refrain from, refugee protection efforts, as their interests dictate. Why then would they choose to surrender that freedom of action and accept a burden-sharing obligation that is likely to be costly, risk domestic political tensions, and probably ratchet upwards overtime?'

In fact, in regard to the management of the EU's external borders, it is noted that membership of the EU border management agency, Frontex, remains voluntary. The legal basis of this agency, according to Article 62 of the EC Treaty, stipulates that Member States remain responsible for the implementation of the external border management, with Frontex merely coordinating their activities (Wolff, 2008, p. 260).

It is also important to mention that scholars (Byrne, 2003; Thielemann, 2003; and Vink and Meijerink, 2003) acknowledge that the EU has been successful to a certain degree in regard to the financial aspect of burden-sharing, particularly in relation to the European Refugee Fund (ERF). The ERF was created on the basis of Article 63(2) (b) of the EC Treaty, with the purpose of allocating resources proportionately to the 'burden' on each Member State by reason of their efforts in receiving refugees and asylum seekers. The 'burden' in this case refers to the costs to the recipient states regarding the administration and examination of asylum claims, temporary housing and legal assistance, as well as the removal of 'bogus' asylum seekers. Noll (2003, p. 244) suggests that the reason financial burden-sharing has been more successful than physical burden-sharing lies in the fact that sharing money is less intrusive compared to 'redistributing people'. However, the ERF, while jointly financed by the Member States, only has a modest budget, and only compensates Member States only according to the absolute numbers of protection seekers they have received, rather than on the overall costs of hosting asylum seekers and processing their claims. The costs associated with the admission of asylum seekers arriving in the EU illegally also only makes up a small proportion of the overall ERF budget, given that it covers all refugee-related costs in general.

2.5.4 Innovative Proposals

In the last decade, the burden-sharing literature has witnessed the proliferation of innovative proposals to resolve the asylum impasse. They are 'innovative' in the sense that they not only

espouse an alternative view of mixed migration from the traditional state-centric perspective, but they also view asylum and people smuggling as deserving of ethical consideration. The 'models' proposed range from providing temporary emergency protection outside the aegis of the 1951 Refugee Convention and 1967 Protocol, to having a strictly maritime focus for cooperation in order to reduce human sufferings at sea.

Gibney's 2004 seminal piece, *The Ethics and Politics of Asylum*, advocates using a 'Convention Plus' approach as a means of sharing the responsibilities for refugees and asylum seekers at the international level. Recognising the conflicting responsibilities states have towards both their citizens and towards 'outsiders' needing international protection, Gibney makes a suggestion to approach the asylum question 'as a matter of humanitarian consideration' (2004, p. 455), to be realised through the provision of temporary protection in the Northern industrialised states and *in situ* in the South, and limited forms of permanent resettlement. His work is considered ground-breaking in the refugee protection and academic circles as it fills the gap in the literature by providing a sustained normative theoretical justification for the usefulness of an approach that steps outside the traditional remit of the 1951 Refugee Convention and 1967 Protocol. However, utilising such an approach also demonstrates the priority placed on the states' sovereign interests vis-à-vis those in need of protection. As Gibney (2004, p. 456) argues:

'even a mere presumptive right of entry on the part of the refugees has the tendency to undermine public confidence in government control over migration, and to create the potential for significant snowball effects.'

Like Gibney, a growing number of scholars in the fields of both international law and social sciences are focusing on the humanitarian aspects of the problem, and are also thus advocating a humanitarian approach, particularly in regard to the role of people smugglers. The increasing concerns about the penalisation of asylum seekers on the basis of their means of flight and travel have led to the literature being revised to account for the 'humanitarian' elements of people smuggling (Brolan, 2003; Kukathas, 2003; Koser in Newman and Van Selm, 2003). Brolan's work focused on the 'virtue' of people smuggling, and was critical of the mismatch between the principle of non-penalisation and the provisions of the Smuggling Protocol⁵⁹. She

⁵⁹ Art 31(1) of the Geneva Convention prohibits the penalisation of refugees for illegal entry or presence, provided they come directly from countries where their life was threatened and show good cause for violating applicable entry laws (UNHCR, 1992). However, Art 3(a) of The Protocol against the Smuggling of Migrants by Land, Sea and Air ('Smuggling Protocol') defines smuggling as 'the procurement [...] of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident

argued that people smuggling, when legitimately used by genuine refugees to seek asylum, should not be treated as a 'criminal' act, and asked whether it could go to the smuggler's mitigation the fact 'that the smuggler knew those being smuggled likely qualified as refugees and were fleeing in human and degrading treatment'(Brolan, 2003, p. 592). Kukathas' *The Strange Virtue of People Smuggling* highlighted the 'strange virtue' of people smugglers by highlighting the similarities between their activities and those of Oskar Schindler during the Second World War in saving lives within a 'corrupt and savage scheme'. While people smugglers are placed 'barely a notch above... the drug dealer, the child molester, or the gangster' in popular media and policy-makers' agenda (2003, p. 40), smugglers take people to safety, across borders and beyond the reach of oppressive rulers. Kukathas also looked at the Australian asylum figures and drew attention to the fact that 80 per cent of migrants brought to Australian shores by people smugglers were found by the Australian Government's own procedures to be genuine refugees (ibid.). Finally, Koser's work (in Newman and Van Selm, 2003) appealed to policymakers not to sacrifice asylum in the anti-smuggling agenda, and to reconcile 'state security' with the individual security of asylum seekers and refugees'. His research involved interviewing smuggled Iranian asylum seekers in the Netherlands, which confirmed the need of asylum seekers to rely on the services of people smugglers in the EU. Koser argued that it is unlikely that penalisation, interception or interdiction measures would put an end to people smuggling (in Newman and Van Selm 2003, p. 184), and the only way to deal with the problem would be to remove the demand for its services.

Indeed, there appears to be a recent trend in the literature regarding a re-conceptualisation of people smuggling. Frost's work entitled *Thinking Ethically About Refugees* and Newman's *Refugees, international security and human vulnerability: Introduction and Survey* (both in Newman and Van Selm 2003) are such examples. Frost (in Newman and Van Selm, 2003, p. 109) advocates a radical analysis of the subject, in suggesting that the problems of refugee, asylum, people smuggling and illegal migration must be understood as 'essentially ethical'. He argues that treating them as merely technical, legal or political issues would be 'missing the point'. Frost uses 'constitutive theory' to explain that all practices have an ethic embedded in them (in Newman and Van Selm, 2003, p. 113), and such ethical values are fundamental to a given practice. He cites the disagreements amongst policymakers in the EU or the UN as an example of participants within a given practice arguing amongst themselves as to the

[in order to obtain, directly or indirectly, a financial or other material benefit], and this element of 'consent' removes smuggled migrants from the protection of the law.

interpretation that should be put on the ethical values of that practice. In the current order, migration, asylum and people smuggling have traditionally been understood from the point of view of sovereign states, in a society of sovereign states. Frost suggests moving away from the status quo and approaching the question of unauthorised or irregular migration using a different, more ethical frame. Newman's work (in Newman and Van Selm, 2003) highlights the inadequacy of the legal, political, institutional and conceptual frameworks through which refugee and displacement issues are addressed in the context of contemporary conflict and international relations. The concept of 'international security' is seen from the perspective of the sovereign state, and in particular, premised on the military defence of territory. According to Newman, what is needed is an inclusion of the notion of 'human security' in the security discourse, a human-centred framework in which to analyse asylum and human displacement issues, but interconnected with other security perspectives.

It is noted that Frost and Newman's argument for a revision of the notion of 'security' to include 'human security' echoes the line of thought advanced by Critical Security Studies (CSS) of the 1980s, particularly Robert Cox's theory of social structures being intersubjective and socially constructed (cited in Sheehan, 2005, p. 156). Critical security theory involves two distinct processes: deepening and broadening. The deepening process involves the exploration of the implications of the idea that attitudes and behaviour in regard to security are 'derivative of underlying and contested theories about the nature of world politics' (Booth, 2005, p. 14). The broadening process involves expanding the idea of security studies beyond traditional realist, state-centred thinking, and taking into account the perspective of those 'who have been silenced by prevailing structures' (Booth, 2005, p. 5). As Smith (2005, p. 55) contends:

'the concept of security is now genuinely contested; as part of this contestation, it requires that concepts, such as the state, community, emancipation, as well as relationships, such as those between the individual and their society and between economics and politics, are also subject to contestation. In this way, there is now far more debate about the term than ever before.'

Indeed, a voluminous amount of work applying the above perspective to the asylum situation in the EU has been carried out, the most notable of which were produced by Nadig (2002), Afzal (2005), Vink and Meijerink (2003), Van Houtum and Pijpers (2007), Maurer and Parkes (2006) and Bigo (1994). It is also important to note that former UN Secretary General Kofi Annan in the Millennium Report (Annan, 2000) declared that the concept of 'human security' in the Post-Cold War era can no longer be understood in the traditional military terms, but must encompass

‘economic development, social justice, environmental protection, democratisation, disarmament and respect for human rights and rule of law’.

Mixed migration and boat arrivals have also attracted proposals from maritime scholars, recognising the urgent need for a solution particularly regarding the asylum situation in the Mediterranean region of the EU. It is important to note, however, that as early as the 1980s, it was EU Member States themselves – the UK, Greece and the Netherlands – who began calling for an ‘equitable burden sharing of asylum seekers rescued at sea’ (Bailliet, 2003, p. 763). Also, in 1982, at the request of the UNHCR Executive Committee, a Working Group⁶⁰ of government was formed, representing maritime states, coastal states and refugee receiving states to discuss the questions of rescue, disembarkation and resettlement of asylum seekers at sea (UNHCR, 1982). Therefore, the recognition of the importance of the sea rescue of asylum seekers is not a recent phenomenon. The Executive Committee suggested that the responsibility was to be ‘shared’ between flag states, coastal states and resettlement states, mainly because if the responsibility fell only on the flag states, ‘rescue-at-sea missions would end’, and if coastal states were solely responsible, ‘they would prevent the entry of ships carrying asylum seekers’ (Bailliet, 2003, p. 762). Indeed, the latter proved true in the case of the EU.

In recent years, there has been a revival of calls for increased maritime cooperation regarding boat arrivals, acknowledging that the situation has multiple implications for asylum seekers, coastal states, seafarers, rescue groups and receiving states. The ‘functional welfare’ approach promoted by (Pugh, 2000 and 2001) highlights the importance of maritime cooperation in the implementation of the Common European Asylum System. According to Pugh (2000, pp. 5-6), Western European maritime forces have had valuable experience of coordination and cooperation in maritime missions, and have already been involved in existing frameworks of cooperation. While there appears to be a certain level of contradiction in using maritime forces to solve refugee-related issues:

‘in terms of experience and maritime institution-building, Europeans have an opportunity to deepen the modalities of cooperation at sea’ that would address transnational security issues such as coping with seaborne asylum seekers.’

⁶⁰ 1982 Report on the Meeting of the Working Group of Government Representatives on the Question of Rescue of Asylum Seekers at Sea (UNHCR, UN Doc.EC/SCP/21 (5-7 July 1982).

The loss of human lives at sea necessitates, at a minimum, the maritime regulation and safety of life at sea (Pugh, 2000, p. 6). As mixed migration is a transnational and global issue, it requires international cooperation and coordination. Pugh suggests that this can be accomplished within the existing Euro-Mediterranean Security framework of cooperation.

Related to the maritime cooperation proposal is providing an emergency humanitarian response to boat arrival situations, highlighting the 'temporal' aspect of the problem (Durieux, 2009, p. 75). According to this approach, refugee situations are exceptional circumstances in international relations, and temporal connotations pervade the regime's norms and processes, such as through the provision of temporary protection and durable solutions. The *status quo* supports an emergency response in situations of mass influx, and therefore, it is possible that this may be applied to boat arrivals, which may not involve the same number of migrants.

Despite the merits of the above proposals from a number of different disciplines, 'none has been applied or has been sustained as a viable, effective solution to the challenges facing the international protection system' (Cook, 2004, p. 349). Nevertheless, the search for an effective and workable solution continues. However, the 'workability' of any proposed burden-sharing 'model' must take into account the nature of international cooperation itself, particularly in an area as contentious as mixed migration. Any burden-sharing 'measure' selected in the Mediterranean context would need clear procedural mechanisms to be adopted.

2.5.5 Towards a Burden-Sharing Framework for the Mediterranean: Procedural Mechanisms for, and Perspectives on International Cooperation

Due to the lack of any burden-sharing frameworks specific to the international refugee protection regime, the literature borrows from International Relations to demonstrate three different methods in which states can contribute to the redistribution and sharing of global refugee responsibilities. While the previous section dealt with proposed *measures* to solve the mixed migration situation through the presentation of existing models in the literature, this section discusses the *processes* and *procedures* leading to the implementation of such measures. In International Relations Theory, Acharya and Dewitt (in Hathaway, 1997) identified three main burden-sharing frameworks relevant to the present discussion: Distributive-Developmental, Multilateral and Alliance.

The Distributive-Developmental burden-sharing framework originates in the literature on North-South relations, in that it focuses on the need for the redistribution of resources from the North to the South to enable the latter to solve its own problems. This approach views the economic and political conflicts that lead to refugee migration as resulting from the structural inequality in the international system (in Hathaway, 1997, pp. 128-129). Burden-sharing, therefore, is a means to remedy this inequality and also as a means for the Western industrialised states to prevent future unwanted refugee entries and arrivals.

In the Multilateral framework, cooperation is based on rules of conduct and an inclusive and equitable relationship between members. This framework echoes the notion of 'collective security' which is associated with the role of the United Nations. The 'sharing' of asylum seekers in this context is a product of cross-border solidarity in accordance with rules, practices and norms that guide the behaviour and decision-making capacities of states. In this burden-sharing framework, the United Nations and its agencies, including the UNCHR, are the principal agents of international cooperation (in Hathaway, 1997, p. 128).

Finally, under the Alliance burden-sharing framework, cooperation is based on having a commonly perceived enemy or external threat, and is centred on the logic of national security (Acharya and Dewitt in Hathaway, 1997, pp. 126-127). The concept of burden-sharing within alliances refers to cooperation of self-interested but like-minded partners, in regard specifically to their ideological and political outlook, norms, values, principles and interests, to ensure a system of a division of labour maximising 'the prospects of deterring and defeating the common enemy'. Contributions from 'partners' or 'allies' would guarantee that the costs are shared and met individually by each member, to ensure the preservation of state sovereignty and national values from external threats. Alliance-based cooperation systems or partnerships also require a strong leader to sustain the cohesive, unified and coordinated policies and other undertakings by the alliance and its members.

The viability of any burden-sharing framework in the Mediterranean context, however, is predicated on what the Member States and the supranational institutions of the EU – the European Commission, the European Parliament and the Council of Ministers – are willing and able to achieve. Such willingness and capacity to enter into a cooperative agreement to share the responsibilities of providing access to asylum procedures and sea rescue operations are also either supported or constrained by the nature of the international refugee protection regime itself, as well as the EU's relations with other states. After all, the challenges posed by boat

arrivals are 'inherently transnational' (UNHCR, 2011) and cannot be solved by the EU in isolation. At the heart of such 'challenges' lies the absence of any agreed standards or parameters for how 'international cooperation' can be implemented or practised between the 27 Member States and within the international protection regime at the global level.

2.6 Chapter Conclusion

The existing literature is rich with theories and proposals regarding burden-sharing, refugees, asylum seekers, mixed migration and people smuggling, but not one theory addresses the unique situation of boat arrivals in the EU. However, different elements of the literature can be put together to provide a mosaic of ideas that would help understand the EU-specific problem. The literature, however, is still evolving, and the complexity of the situation in the Mediterranean region of the EU has begun to capture academic interest, with innovative solution-oriented proposals beginning to enter the discussions. In Chapter 6, such theories and proposals will be reviewed in coming up with a burden-sharing 'model' that would be viable and politically feasible in the EU, based on the case studies compiled and presented in Chapter 5.

Chapter 3: Theoretical Framework

EU 'Small State' Bilateral Multilateralism as Mechanism to Achieve EU 'Solidarity' and 'Fair Sharing of [Asylum] Responsibilities'

'There is no way of transforming a unilateral compulsion into decent responsibility-sharing.'
- Durieux (2009)

3.1 Introduction

The need for a formal system allowing affected Member States to share the costs of receiving asylum seekers arriving in the EU through irregular channels has been the focus of intense debates in recent years. The issue of a lack of a formal asylum burden-sharing system has particularly been highlighted since the 2004 EU enlargement, which incorporated ten new countries into the EU including Malta⁶¹, a tiny Mediterranean island which is arguably the most vocal of all twenty-seven Member States in regard to the EU's 'failure' to facilitate such a system. The intensity of its persistent calls for a formal system of asylum burden-sharing is matched only by those from Spain, Italy and Greece, three other Member States in the Mediterranean region who, like Malta, attribute the upsurge in the number of seaborne asylum seekers in their territories to the formal EU system of asylum allocation, the Dublin Regulation, which pronounces the first Member State of entry to be responsible for hearing the asylum claims of primarily African 'illegal' migrants. The EU's 'southern frontline' have been staunch advocates of a formal burden-sharing system that they hope would put an end to the disproportionate numbers of seaborne asylum-seekers they have been made responsible for but cannot handle on their own.

⁶¹ The other nine new Member States joining the EU on 1 May 2004 were Estonia, Latvia and Lithuania, Poland, the Czech Republic, Hungary and Slovakia, Slovenia and Cyprus (Europa, 2007).

This study argues that 'small' EU Member States, by virtue of their being the 'victims' of the asylum inequalities created both by intensified sea border controls and the Dublin Regulation, have over the last five years at least, taken an informal leadership role in the debates advocating the establishment of a formal asylum burden-sharing system in the EU. 'Small' as they may be in terms of resources, size or influence vis-à-vis the larger Member States, the former have been able to create their own mark in a global regime that has traditionally been resistant to the idea of burden-sharing. While the literature does account for the leadership roles of *states* in forging and implementing cooperative agreements, it mainly only accounts for those of the *large* and powerful states, such as is presented in the Neo-Realism's 'Hegemonic Stability Theory', which argues that the rules, institutions and codes of conduct of the international system reflect the goals, preferences and interests of the *dominant actor* within it (Tarzi, 1998). The measures taken by the EU's 'southern frontline' have collectively therefore, changed the landscape of a global protection regime where not only is asylum 'burden sharing' highly elusive – its terms and conditions are also dictated by the more powerful sovereign states. Nevertheless, such measures can only be made, and understood, within the context of Neo-Realism, which argues for the (large) state-centredness of International Relations in general and international burden-sharing in the refugee field in particular. While the theoretical point of departure in this study is the influence wielded by the 'small' EU Member States in the Mediterranean in spite of the Dublin Regulation framework, the degree or level of 'influence' small Mediterranean Member States exercise in pushing for cooperative arrangements is itself determined by a system that is biased towards large states and one that is increasingly securitised. To put it simply, the systemic refusal at both supranational and international levels to establish a formal system of asylum burden-sharing has necessitated a response from overburdened Member States to carry out unofficial measures fulfilling a burden-sharing purpose, albeit limited in both nature and scope. Therefore, the answer to the question of how to share the 'burdens' of 'irregular migration' in the EU is itself found within the 'irregular' or 'informal' sphere of decision-making.

This chapter looks at cooperative unofficial or informal burden-sharing measures being carried out outside of the Dublin Regulation framework, and examines the processes of cooperation leading to such an outcome through the prism of the Neo-Realist perspective of Regime Theory on international cooperation (Betts, 2009). Available data obtained primarily from official press releases reveals that between 2004-2010, a redistribution of refugees and asylum seekers from the 'small' EU Member States in the Mediterranean to other 'larger' Member States has been taking place, and the processes and negotiations that occurred leading to this redistribution will be analysed using the 'Small State' Theory, a discipline within International Relations

accounting for power relations between sovereign states. It is necessary to situate the EU asylum burden-sharing debates within the wider international refugee protection regime, where 'burden-sharing' remains both an important norm and principle of protection, and an area of legal and political contention. This situation is somewhat mirrored in the EU with the lingering tension between Member States in favour of a formal burden-sharing system, and those who oppose any institutionalised form of asylum burden-sharing, putting into question the EU's declared commitments to the principles of solidarity, 'fair sharing of burdens' and 'effective multilateralism'. Faced with domestic opposition to further asylum admissions amidst exhausted hosting capacities coupled with the increasing securitisation of the asylum field, 'small' Member States in the Mediterranean have become the *de facto* leaders of 'solidarity' and 'fair sharing of responsibilities' in the EU. This is a challenge for both EU studies and International Relations in general, where 'small' states are often seen as having a marginal contribution to decision-making processes.

What form then, would small EU Member State-driven cooperation take? Interviews with key informants and official representatives conducted by the author suggest that cooperative arrangements designed to relieve the southern Mediterranean Member States take a bilateral form, and are based on both respect for international law and principles, and state interests. This is not surprising, given that this aspect of migration decision-making is largely taken out of the supranational and institutional fora. Bilateral relations, therefore, are used by 'small' Member States as a mechanism for burden-sharing, with bilateral multilateralism forming the basis of cooperation at the intra-European and international spheres. Bilateral multilateralism, which implies using bilateral forms of cooperation to achieve both multilateralist and sovereign goals, has necessarily become the *modus operandi* in the EU. The simultaneous operation of this bilateral strategy at the EU and international levels has inevitably resulted in the formation of a number of loose criss-crossing alliances that are temporary, reactive and limited in scope. Nevertheless, recent policy developments suggest that such temporary alliances have formed the blueprint for future asylum burden-sharing negotiations in the EU.

3.1.1 EU Commitment to 'Solidarity', 'Responsibility Sharing' and 'Effective Multilateralism'

'These post-national accounts of Europe are predominantly normative in character. They do not reflect what Europe *is*, but they envision what Europe *should* or *must* be. This normative stance obviously opens up questions related to the extent to which these views are shared by the people.'

- Antonsich (2008, p. 507)

As discussed in Chapter 2, burden-sharing is both a norm and principle in international law stipulating the equal distribution of efforts between states, to ensure that ‘no state bears overwhelming financial, political and legal responsibility’ for accepting asylum seekers or refugee status claimants (Uçarer, 2006, p. 223). The concept of multilateralism, in the context of asylum and refugee protection, implies cooperation among states to promote the implementation of international law, and the EU has been a staunch advocate of burden-sharing as a means to resolve its own ‘asylum crisis’. The EU has itself been described as both ‘the deepest form of institutionalised cooperation to date’ (Kleine, 2010) and ‘the world’s most successful case of multilateralism’ (Smith and Laatikainen, 2006, p. 2). It is surprising therefore, that to this day, the EU has been unable to make a united and unified response to desperate pleas from its Member States in the Mediterranean region for a formal asylum burden-sharing arrangement.

This glaring shortcoming is even more astonishing when looking at the foundational history of the EU. As discussed in Chapter 2, it started with a small group of six Member States⁶² forming the ECSC in 1952, with the intention of strengthening Franco-German solidarity and preventing future wars by pooling the production of coal and steel. Six years later, the TEEC was signed, paving the way for future European integration and successive enlargement processes that are responsible for the creation of a strong and unified bloc of 27 Member States, founded on the values of respect for human dignity, equality, rule of law, democracy lasting peace, unity, freedom, security and respect for human rights (Europa, 2011). Furthermore, the diverse societies making up the EU are characterised by pluralism, tolerance, justice, equality, and most significant to the current discussion, solidarity (ibid.).

3.1.1.1 The EU and the Principles of ‘Solidarity’ and ‘Fair Sharing of Responsibilities’

The principle of solidarity, in the general sense, is fundamental to the EU, and is based on sharing both ‘advantages’ and ‘burdens’ ‘equally and justly’ among its 27 Member States (Eurofound, 2011). In regard to the migration field, until 2009, Article 63 of the TEC was the foundation for burden-sharing debates in the EU, specifically stipulating the need to adopt measures ‘promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees’ (Council of the European Union, 2001). In 2009, the Treaty

⁶² These were Belgium, the Netherlands, Luxembourg, West Germany, Italy and France.

of Lisbon introduced a new article 80 the principle of solidarity and fair sharing of responsibility, including its financial implications, govern all policies in relation to border checks, asylum and immigration (Vanheule et al, 2011).

The operationalisation of 'solidarity' is indeed vital in the achievement of a 'fair sharing of responsibilities' in the asylum field. References to 'solidarity' in the EU's treaties suggest the high value placed on the principle in the day-to-day operation of the EU. It is a 'regular feature in EU law' and its role ranges from 'constitutional-institutional to more substantive functions' (Vanheule et al, 2011, p. 6). The legal basis of solidarity can be found in Article 10 of TEC, which required Member States, by way of a positive obligation, to:

'take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community.'

Article 10 also required Member States 'to abstain from any measures which could jeopardise the attainment of the objectives' of the TEC. In 1993, Article 4(3) of the TEU introduced modifications to Article 10, which included the insertion of 'mutual respect' and 'duty of cooperation', declaring that the Union and Member States shall 'pursuant to the principle of sincere cooperation' and in 'full mutual respect', assist each other in 'carrying out the tasks which flow from the Treaties' (Vanheule et al, 2011, p. 30). At the level of the European Court of Justice (ECJ), solidarity has been understood as being based on 'mutual trust' between Member States, as a principle of 'loyal cooperation' between the EC institutions and the Member States, and as a general principle 'inferred from the nature of the Communities (ibid.).

The need for EU solidarity and collective action in the form of burden sharing, specifically in situations of 'mass influx', is referenced in two official EU documents, namely the *1995 Resolution on Burden Sharing* (Council of the European Union, 1995) and the *1996 Council Decision on an Alert and Emergency Procedure for Burden-Sharing with Regard to the Admission and Residence on a Temporary Basis of Displaced Persons* (Council of the European Union, 1996). The latter document specifically described 'mass influx' as involving an 'unusually large inflow of asylum seekers taken out of the conventional asylum determination system and are granted temporary protection status' (Neumayer, 2004, p. 156).

The principles of 'solidarity' and 'responsibility sharing' were also mentioned in the *1999 Tampere Presidency Conclusions* (Council of the European Union, 1999), the *2004 Hague*

Programme (Council of the European Union, 2005), the *2008 European Pact on Immigration and Asylum* (Council of the European Union, 2008) and the *2009 Stockholm Programme* (Council of the European Union, 2009). The Tampere Conclusions aimed to achieve 'an open and secure European Union, fully committed to the obligations of the 1951 Refugee Convention and other relevant human rights instruments, and *able* to respond to humanitarian needs on the basis of solidarity' through some form of financial reserve available in situation of mass influx of refugees for temporary protection, approximation or harmonisation of national legislations on conditions for admission and residence of third country nationals, including the reception capacity of each Member State, and 'closer cooperation and mutual technical assistance' between Member States' border control services, such as via exchange programmes and technology transfer on maritime borders (Council of the European Union, 1999). However, despite Member States being expected to only 'cooperate' or 'contribute' in this regard, with only a 'modest' level of solidarity and responsibility sharing standard provided (Vanheule et al, 2011, p. 64), the Tampere Conclusions laid the groundwork for the establishment of the CEAS, which is seen by the European Commission as 'a powerful statement of our values, our respect for human dignity and our commitment to shared responsibility' (European Commission, 2009).

In 2004, the Hague Programme built on the priorities of the Tampere Conclusions and was grounded in the 'general principles' of 'subsidiarity, proportionality, solidarity and respect for the different legal systems and traditions of the Member States'. References to 'solidarity' and 'responsibility sharing' in this case implied financial solidarity and 'practical cooperation' (Vanheule et al, 2011, p. 64). In terms of the latter, it was envisaged that after the establishment of the CEAS, a European Asylum Support Office (EASO) 'for all forms of cooperation' relating to CEAS would be established (*ibid.*, p. 65). The Hague Programme was also particularly focused on the issue of irregular migration, and highlighted the need for solidarity and fair sharing of responsibility to protect the EU's external borders through an integrated management system. To achieve this, on 1 May 2005, it created the European Agency for the Management of Operational Cooperation at the External Borders, to be supported by a common border management fund by the end of 2006 (Vanheule et al, 2011, p. 66). With the surveillance and management of external borders falling within the national sphere, Frontex, as the agency is known, has been designed to provide technical assistance to Member States who are confronted with exceptional migratory pressures, particularly those in the EU's 'southern frontline' in the Mediterranean. It is tasked with facilitating practical assistance between Member States by pooling and despatching technical equipment to make risks analyses in cooperation with the Member States' police authorities (Spijkerboer, 2007, p. 132). Four years later, in the *2008*

European Pact on Immigration and Asylum, the European Council recalled that despite having earlier announced in the Hague Programme that the responsibility for the protection of the EU's external borders rested at the national level, Member States 'whose geographical location exposes them to influxes of immigrants' or those with limited resources to cope with such influxes, 'should be able to count on the effective solidarity of the European Union' (Council of the European Union, 2008).

The 2009 Stockholm Programme serves as the roadmap for EU action in the justice, freedom and security field for the period 2010-14, and calls for solidarity between Member States in setting up a humane and efficient system to manage asylum flows (Europa, 2011). It highlights the need to respond to the problems of external border management at the supranational level by calling for 'increased integration of these policies into the general policies of the Union' (Council of the European Union, 2010), by reinforcing the role of Frontex, and supporting the development of the European Border Surveillance System (Eurosur) in the EU's southern and eastern borders (Vanheule, 2011, p. 72). The Eurosur aims to establish uniform border surveillance standards and cooperation between Member States and Frontex to share surveillance data. The Programme pointed at the second generation Schengen Information System (SIS II) and the Visa Information System (VIS) as being essential to reinforcing the system of external border controls and therefore called on them to be made fully operational (Europa, 2010).

Under the Treaty of Lisbon, in addition to article 80, other provisions emphasising the principle of solidarity include Article 67 of the TFEU, which requires the EU to 'frame a common policy on asylum, immigration and external border control, based on solidarity between Member States', and Article 222, famously known as the EU's 'solidarity clause', which requires Member States to 'act jointly in a spirit of solidarity' and assist each other in crises or emergencies, specifically a terrorist attack or a natural or man-made disaster (Vanheule et al, 2011).

3.1.1.2 Effective Multilateralism

Closely related to the EU's commitment to internal solidarity and the related principle of 'fair sharing of responsibilities' is its declared commitment to the principle of 'effective multilateralism', which was introduced to the EU in 2003 as part of the European Security Strategy presented by Javier Solana, the EU's High Representative for the Common Foreign and Security Policy (CFSP). The principle stressed the importance of strengthening global, particularly UN, institutions and international law, and the European Commission cautioned

that an active commitment to it meant ‘more than rhetorical professions of faith’ (Gowan 2008; Europa, 2005). ‘Effective multilateralism’ from 2003 onwards was to be the basis for the EU’s international cooperation and one of its strategic objectives, as a response to security threats and the ‘ineffectuality of the international institutional architecture and the system of collective security’ (Jasiński and Kacperczyk, 2005, p. 30). In the same year, the European Commission also issued a Communication,⁶³ *‘The European Union and the United Nations: The Choice of Multilateralism’*, which proposed the future course of the EU’s relationship with the United Nations as involving placing multilateralism at the centre of the EU’s external policies and focusing on a comprehensive strengthening and mainstreaming of EU-UN relations (ibid.).

Indeed, the last two decades have witnessed a ‘steady increase of interaction and cooperation’ between the EU and the United Nations, largely as a result of Article 11, para. 1 of the TEU, which explicitly stipulates the strict observance of the principles of the UN Charter (Europa, 2005). In relation to human rights issues, the European Commission has been active in providing support to UN efforts in development, food aid and humanitarian assistance (European Commission, 2001 b).⁶⁴ In regard specifically to international refugee protection, the European Commission and the Member States together adopted the UNHCR’s *Agenda for Protection*, where ‘sharing burdens and responsibilities more equitably’ was one of the objectives of its Programme of Action (UNHCR, 2003). The European Union institutions and Member States also engage in policy dialogue with the UNHCR through ‘Agreements and Exchanges of Letters’ (Europa, 2005), with a focus on the commitment to encouraging ‘greater practical cooperation between national asylum services’.

Institutionally, the UNHCR’s role in the development of an EU-wide policy on refugee matters is firmly entrenched in European Community law. In 1999, Declaration 17 of the Treaty of Amsterdam required consultation with the UNHCR on matters regarding asylum legislation, and ensured that asylum laws were adopted in accordance with the 1951 Geneva Convention on the Status of Refugees (HREA, 2005). The UNHCR itself was directly involved in the drafting of the asylum directives, also known as the ‘building blocks’ of the CEAS.⁶⁵ The UNHCR was also explicitly mentioned in the Temporary Protection Directive, the Reception Directive, Dublin

⁶³ Communication for Discussion and Agreement by the Council and the European Parliament

⁶⁴ The European Commission’s support in these areas was communicated in its *Communication on Building an Effective Partnership with the UN in the field of Development and Humanitarian Affairs* (2001).

⁶⁵ As confirmed by a UNHCR Brussels official in an interview with the author (see Appendix).

Regulation, Qualification Directive and the Asylum Procedures Directive, and was tasked with monitoring, providing technical advice and supporting the transposition of EU laws into national legal frameworks with adherence to the spirit of the 1951 Geneva Convention (UNHCR, 2008, p. 309). During the formulation of the Hague Programme at the end of 2004, there was a new emphasis on the consolidation and evaluation of the asylum measures adopted, and the UNHCR was given the task of evaluating the asylum measures with the European Commission. The Commission lacked the capacity to do this on its own (Maurer and Parkes, 2007, p. 202).

3.1.2 Failure to Deliver: The Gap between Commitment and Operationalisation

Despite such grand expressions to commit to the principles of ‘solidarity’, ‘fair sharing of responsibilities’ and ‘effective multilateralism’, the criteria, standards and mechanisms for their operationalisation have been deliberately left undefined (Vanheule et al, 2011, p. 8). To the extent that the ‘fair sharing of responsibilities’ in asylum is generally considered as an expression of ‘solidarity’ and an application of ‘effective multilateralism’, it is not surprising that a formal and EU-wide asylum burden-sharing scheme has not yet been achieved. The gap between what the EU can be expected to achieve, and what it is capable of achieving, can be summed up by the ‘capability-expectations gap’ theory by Hill (1993). Although usually applied to explain foreign policy in the EU, it is applicable in the asylum burden-sharing context in that it provides three main reasons for the EU’s inability to deliver on its ‘promises’. These are: the ability to agree; the availability of instruments; and the allocation of resources.

In terms of the question of the allocation of resources, it can be argued that the structural imbalances created by the Dublin Regulation are the biggest obstacle to achieving an equitable burden-sharing system in the EU. Despite ‘solidarity’ and ‘fair sharing of responsibilities’ being enshrined in the EU treaties, the direct and binding ‘regulation’ status of the Dublin framework means that such asylum resource imbalances are institutionalised in the EU. With the allocation of resources for distributing asylum burdens being enforced by such a legal instrument as a regulation as per Article 288 of the TFEU (formerly Article 249 of the TEC), and with regulations overriding all national laws, it is not surprising that a ‘fair sharing of responsibilities’ through solidarity within such a restrictive framework as the Dublin Regulation has not been achieved.

In terms of the operationalisation of the principle of ‘solidarity’, the lack of both a working definition agreed to and understood by all, as well as the absence of specific guidelines in regard

to its implementation are responsible for its weakness. First, Member State understanding of the term varies considerably from being a 'moral concept' to a 'legal obligation', with some Member States favouring a voluntary form while others, particularly those most affected by the Dublin Regulation, viewing it as necessarily obligatory 'if the very essence of the EU is not to be lost' (Vanheule et al, 2011, pp. 81-83). Some argue that there is no real solidarity presented in voluntary participation, while others argue that solidarity has to come from the genuine good will of Member States to carry out supportive actions, 'where such actions are in the national interest' (ibid.). Commentators such as Wouters et al (2006) have also described the provisions introduced in the TFEU as 'vague', particularly in regard to their specific implementation, which may make a coherent and well-coordinated cooperative arrangement difficult.

The question of how to implement a 'fair sharing of responsibilities' in dealing with asylum seekers is also a difficult one to answer. As illustrated elsewhere in this thesis, past attempts to introduce a formal intra-European asylum burden-sharing system have so far failed, with debates and discussions on the 'distribution keys' proving particularly contentious (Thielemann et al, 2010). However, this is not a problem that is unique to the EU. Indeed, international law and the international refugee protection regime have been vague on standards and mechanisms for the implementation of burden-sharing in the protection field, with the result that the task of 'redistribution' has been delegated to the UNHCR through an international refugee resettlement programme, which is voluntary and reliant on the goodwill of states. As Zieck argues (2011), while the statute of the UNHCR does not imply that resettlement remedies the lack of distributive mechanism that would facilitate an equitable sharing of responsibilities among states, it is considered by the UNHCR as 'an important burden and responsibility sharing tool' (Zieck, 2011).

To this end, therefore, 'solidarity' and 'fair sharing of responsibilities' are made operational in the EU only in the harmonisation of the respective asylum laws of the 27 Member States and in terms of providing financial assistance to 'overburdened' Member States. In regard to the former, the CEAS was established with the intention of creating a 'level playing field' across the EU through harmonisation of legislation, primarily to limit what is known as 'asylum shopping' or secondary movements. It consisted of the the Reception Conditions Directive⁶⁶, which outlined the minimum standards for the reception of asylum seekers; the Qualification

⁶⁶ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers Directive. The UK, Ireland and Denmark were exempt from the transposition of this Directive on to their national legislation.

Directive⁶⁷, which set the definition and content of refugee and subsidiary protection status; the Asylum Procedures Directive⁶⁸, which set minimum standards on the procedures for making decisions on asylum claims; and finally, the Dublin Regulation formed the last ‘building block’ towards the achievement of the CEAS. The notion that the Dublin Regulation is an asylum ‘burden-sharing scheme’ is correct to the extent that it allocates responsibilities for asylum seekers on the basis of geography (Barbou des Places, 2002, p. 3). However, the geographical concentration of asylum responsibilities has not been accompanied with measures or mechanisms to ensure that the spread of these ‘burdens’ is ‘fair’, or otherwise proportional to the capacity of Member States to receive them.

One clear system of EU asylum burden-sharing does exist, however, in the form of the European Refugee Fund (ERF). It was set up on the basis of Article 63(2) (b) of the TEC, with the purpose of allocating resources proportionately to the reception-related ‘burdens’ or costs on receiving Member States. These include costs associated with the administration and examination of refugee claims, temporary housing and legal assistance, and deportation. That the ERF is a ‘burden-sharing’ instrument is acknowledged by scholars (Byrne 2003; Thielemann 2003; and Vink and Meijerink 2003), although its actual impact on recipient Member States is generally considered to be marginal. In 2010, a pilot project involving an intra-EU relocation of refugees and asylum seekers from Malta (EUREMA) began operating, funded by the ERF (Europa, 2011). While this project is relatively new and the real impact of the ERF has thus far not been evaluated, it is a clear indication that first, there has been no opposition to the creation of a financial ‘burden-sharing’ scheme, and second, efforts to achieve asylum ‘burden-sharing’ between Member States are conditional on the availability of EU funding.

In contrast, despite the lack of a working definition, ‘solidarity’ as far as border control and irregular migration are concerned, has swiftly translated into concrete action, without much resistance. A clear example of an EU-wide ‘burden-sharing’ scheme which was itself created out of demands from Member States for an EU-wide cooperative arrangement coordinated at the supranational level is Frontex, the EU’s border protection agency. Frontex assists EU Member States in carrying out border control in accordance with the requirements of the Schengen

⁶⁷ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. The UK, Ireland and Denmark opted out of this directive.

⁶⁸ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

Borders Code⁶⁹ and the rest of the Schengen *acquis*. Its formal legal basis can be found in Articles 62.2a and 66 of the Title IV of the TEC on 'Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons'⁷⁰. It coordinates, using a quasi-military approach, operational cooperation in the externalisation of the 'EU border', which extends from its territorial waters in the southern Mediterranean towards the maritime territories of African countries (Carrera, 2007, p. 2), designed to restrict the mobility of third country nationals into the EU. Planes, boats and rapid response teams have been deployed to act as a deterrent to would-be migrants and asylum seekers. The 'success' of Frontex has been reflected in the number of 'illegal migrants' it has intercepted through the Hera, Agios, Minerva and Poseidon operations, which between 2006 and 2007 totalled 34, 905 migrants (ibid.). Under Operation Nautilus II, Frontex was specifically active in patrolling the waters between Malta and Libya, warning incoming boat arrivals of detention and other criminal procedures if they proceeded to enter Maltese waters (Weinzierl, 2007, p. 30).

The establishment of Frontex is considered as a historical step towards the 'Europeanisation' of the Member States' border security. Nevertheless, while the agency's Centralised Record of Available Technical Equipment (CRATE) lists 21 airplanes, 27 helicopters and 116 boats as being ready at its disposal, in reality it does not have any vessels of its own (Laitinen, 2007). Such limited assets belong to the Member States and their deployment is dependent on the will of their owners, although the deployment of the Border Intervention Teams does receive limited funding from the Community budget (Weinzierl, 2007, p. 11). Nevertheless, the establishment and operation of Frontex illustrates the successful operation of burden-sharing as part of the EU's internal border policy. It shows the coordination of both resources and practices as enabling the 27 Member States to respond in a unified and coordinated fashion against the 'threats' posed by irregular migration from third countries. While it confirms criticisms that the EU asylum policy is inherently defensive and maximises deflection strategies, as presented in Chapter 2, (Byrne, 2003; Nadig, 2002; Khoser in Newman and Van Selm, 2003; Geddes, 2001; Vogel, 2000; Balzacq and Carrera, 2005, among others), it indicates the viability of formal burden-sharing schemes in other policy fields within the 'area of freedom, security and

⁶⁹ Schengen Borders Code (Regulation (EC) 562/2006).

⁷⁰ Frontex was established by the Council Regulation (EC) 2007/2004 of 26 October 2004.

justice'⁷¹. Indeed, this is a reminder that the EU, from its original conception in the form of the ECSC, was 'always in the business of providing security' (Bretherton and Vogler, 2006, p. 189).

Turning now to the EU's declared commitment to 'effective multilateralism' as a reflection of its adherence to international law and institutions, the EU has been criticised for, among others, its poor reception conditions, harsh detention measures, inconsistent standards of asylum procedures and its tendency to shift its asylum responsibilities to third countries. It appears that despite the role of the UNHCR as a 'strategic partner' being provided for in EU law⁷², the EU has not been able to fulfil its obligations under the 1951 Refugee Convention. Indeed, it would appear that in the EU, there 'seems to be serious problems to making effective multilateralism a success' (Jørgensen in Elgström and Smith, 2006, p. 39).

The EU's aspiration to play a leading role in a multilateral international arena has been described as 'fairly recent' (Jørgensen in Elgström and Smith, 2006, p. 32). The timing of its adoption of multilateralism as an official policy in its European Security Strategy programme coinciding with the urgent securitisation of international affairs in the wake of the terrorist attacks in New York in 2001 and Madrid in 2004 has made its commitment to international law questionable. Indeed, among the list of concerns highlighted in the EU's Security Strategy were international terrorism, regional conflicts, organised crime and uncontrolled proliferation of weapons of mass destruction. With 'effective multilateralism' being the basis for international cooperation in facing these challenges, the real motivation for the EU's renewal of its commitment to international law and international institutions in a highly securitised international environment has indeed been questioned, specifically in relation to the compatibility of its multilateral commitments with human rights concerns.

⁷¹ The creation of the area of freedom, security and justice was based on the Tampere (1999-2004), Hague (2004-2009) and Stockholm (2010-2014) Programmes. It derives from Title V of the TFEU, which regulates the 'Area of freedom, security and justice' (Europa, 2011),

⁷² This includes Article 78(1) of the TFEU stipulating that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Geneva Convention; and Declaration 17 of the 1999 Treaty of Amsterdam, which stipulated that consultations on all matters relating to asylum policy shall be established with the UNHCR.

In addition, intergovernmentalist scholars are sceptical of any such grand initiatives at the supranational level, arguing that they mainly reflect supranational self-serving efforts to achieve a sense of legitimacy and bolstering its position and identity in the international arena, where states are key players (Jasiński and Kacperczyk, 2005; Jørgensen in Elgström and Smith, 2006). Along with terrorist events, the timing of such an initiative coincided with the expansion of the EU's supranational portfolio which reflected efforts to establish the European Union as a 'global actor' in the international arena (Wouters et al, 2006, p. 2). While commentators in general do not dismiss the EU's genuine altruistic intentions (Wouters et al, 2006), it is also considered that achieving its multilateral ambitions is also self-serving.

As with the difficulty in operationalising the principles of 'solidarity' and 'fair sharing of responsibilities' resting primarily on Member States' concerns, so too is the difficulty with adopting 'effective multilateralism' as *modus operandi* in the EU. Constructivists view the EU as a 'community of socialised agents' where norms of behaviour which have been embedded in the institutions created by the integration process itself are able to facilitate cooperation and influence Member States' policy directions (Cebeçi, 2011, p. 59; Spolander in Cebeçi, 2011, p. 47). Having been created on shared values, and having operated as an arena for the socialisation of rights-based and cosmopolitan values (Lucarelli in Elgström and Smith, 2006, p. 60), the supranational venue is ideal for promoting 'effective multilateralism' and facilitating asylum burden-sharing. More importantly, it would reduce transaction costs for Member States and shift domestic accountability in the face of national opposition (Guiraudon, 2000; Geddes, 2001), and add much political weight to the southern Member States' plight. However, the experience so far in the EU is that Member States do not speak with one unified voice, rendering the identity of the EU as a 'union' questionable (Kisack, 2003). In addition to tangible and intangible 'costs' to Member States and the difficulties associated with deciding on 'distribution keys', the legitimacy of top-down policy initiatives is not only questioned, but also rejected. As Jørgensen (in Elgström and Smith, 2006, p. 34) argues, it is 'misleading to assume a common EU approach to multilateralism and denigrate the influence of key member states'. Indeed, the receptiveness to the ideas of multilateralism and burden-sharing varies between Member States, and there are differences in regard to asylum processes and the degree of involvement of key non-state stakeholders in their national asylum systems (UNHCR, 1999).

The reality is that in the EU, it is still the Member States that are responsible for decision-making in the field of irregular migration and the 'burden-sharing' of asylum and refugees. There are no requirements under EU law that obligate Member States to share the 'asylum

burden', with the Dublin Regulation envisaged by its architects to be a fair system of 'burden' allocation, putting an end to the practice of 'asylum shopping'. In the wider, international arena, there is also nothing in international law making asylum or refugee burden-sharing obligatory, and certainly international multilateral institutions such as the UNHCR do not have any powers to make burden-sharing binding on signatory states. In fact, UN agencies including the UNHCR are reliant on the goodwill of the EU and its Member States for their existence and operation. In the current state of affairs, the EU Member States collectively contribute no less than 38% of the UN's regular budget, more than two-fifths of the UN peacekeeping budget and around half of all UN Member States' contributions to UN funds and programmes (Wouters et al, 2006, pp. 1-2). More specifically to the area of refugee protection, the European Commission and the EU's 27 Member States provide 'close to half of UNHCR's annual funding' and its top 10 donors in 2008 included its Member States of Denmark, Italy, Germany, the Netherlands, Sweden and the United Kingdom. While this does not necessarily imply exemption from compliance to multilateral rules and norms, it demonstrates the power states have over international institutions.

3.2 Asylum Burden-Sharing and Systems Failure: State-Centrism at the Heart of the International Refugee Protection Regime and EU's Rejection of Institutional 'Fair Sharing of Responsibilities'

In Chapter 2, it was argued that achieving asylum burden-sharing in the EU would require overcoming problems of coordination and collaboration. In International Relations literature, the Regime Theory presented by Betts (2009) offered three different approaches to understanding the conditions and actions that lead to cooperative arrangements fulfilling a burden-sharing purpose – Neo-Realist, Constructivist and Liberal-Institutionalist. To summarise, the Neo-Realist perspective offers a power-based approach and pessimistic outlook, arguing states would only cooperate if it served their own interests, and that the problems of free-riding and lack of mutual trust between participants can only be overcome through the leadership of a hegemonic leader, as was demonstrated by the 'success' of the resettlement of Vietnamese refugees in different parts of the world in the 1980s under the leadership of the US. The Constructivist perspective offers a knowledge and norm-based approach on international cooperation, suggesting that for multilateralism to work, its authority must be seen by its members to be legitimate, as the concept of authority is 'more pertinent than that of power' (Telò, 2006, p. 43). Finally, the Liberal-Institutionalist perspective offers an interest-based approach highlighting the role of institutions in bargaining and presenting the benefits of

cooperation in a way that appeals to the national interests of participant states (Thielemann, 2003).

Applying the sub-approaches of Regime Theory to the questions of 'solidarity' and 'fair sharing of responsibilities' in the EU asylum field is not unproblematic. First and foremost is the difficulty associated with applying theoretical approaches that apply to *states* on what is arguably a *super state*. Second, all three sub-approaches actually do apply to the asylum situation in the EU, and choosing one over another would not adequately provide an understanding of the political dynamics behind the current state of affairs regarding asylum burden-sharing in the EU. That being the case, however, suggests that the literature may be in need of an EU-specific 'perspective' of cooperation in an area that has so far been intentionally removed from the official and supranational policy realm.

It can be argued that the Neo-Realist approach represents the difficulties encountered in achieving cooperative arrangements to share the responsibilities of receiving asylum seekers and granting them access to asylum procedures. The states' interest-based considerations are driven by instrumental rationality, which applies to most security considerations reflecting core national interests, including border control (Cebeçi, 2011: 45; Jervis, 1999). From this perspective, states would only cooperate if doing so would serve their own interests, and as international cooperation is generally oriented towards the pursuit of mutual gain, it is usually of little interest to them (Betts, 2009, 82). Indeed, a vast majority of the literature on asylum burden-sharing and the EU has focused on the Member States' assertion of their sovereign right to control entry to their territories (Gil-Bazo, 2005), as well as their accommodation of domestic concerns, particularly in the face of increasing popularity of right-wing political parties (Rudge, 2002).

Conversely, it can also be argued that the Neo-Realist approach accurately captures the reality of the situation in the EU regarding questions of solidarity and the difficulties in institutionalising a system of responsibility-sharing, and the limits to which Member States are able to cooperate on ventures that have more costs than benefits to them. While opponents of the Neo-Realist tradition reject any questions of compatibility between Neo-Realism and international cooperation, Jervis (1999, p. 46) argues that (Neo-)Realists have never claimed that relative gains were all that mattered, and that many are in fact sensitive to possibilities of *mutual* security. Even Suhrke (1998), who is arguably the most prominent proponent of the Neo-Realist perspective on refugee burden-sharing, has not discounted the possibility of

cooperation in a system dominated by states, particularly since it would represent an insurance scheme or a guarantee that no one state would have to deal with irregular migration on their own (Suhrke, 1998, p. 398). Betts (2009, p. 80) sees a change in states' behaviour as a political strategy to overcome such a systemic constraint and achieving 'a more preferable outcome than would have been possible acting in isolation' (Betts, 2009, p. 80). The state-centrism of this approach also treats both multilateral and supranational institutions of the EU as an arena, 'the focal point for intergovernmental rationalist policymaking in which the impetus is exogenous' (Spolander in Cebeçi, 2011, p. 47). Therefore, in the Neo-Realist tradition, cooperation operates as a tool for the self-advancement of states. However, state-centrism also means that any such burden-sharing arrangements would be limited to narrow and restrictive standards of rights for asylum seekers.

As will be discussed in greater depth in the sections that follow, while the road to EU asylum burden-sharing has been a painful experience particularly for the Member States in the Mediterranean region, the EU has, in recent years, witnessed increasing receptiveness to the idea of asylum-burden sharing, despite concerns of 'free-riding' and exploitation of the 'large by the small' states. Two clear examples are the creation of the ERF in 2000 as a means to share the costs associated with asylum reception, resettlement or voluntary repatriation among Member States⁷³ and is now in its third phase, and the recently introduced intra-EU refugee relocation scheme, known as EUREMA, which involves the *voluntary* transfer of asylum seekers or refugees from Malta to ten Member States, including France. While such efforts may indeed be considered overdue and marginal, the fact that they do operate suggests that the decision to share the 'asylum burden' may be explained by forces beyond the 'logic of expected consequences' (Thielemann, 2001, citing March and Olsen 1998). Indeed, the cost-benefit rationale which justifies non-cooperation from the (Neo-)Realist and rational choice perspective, while providing useful insight into Member State resistance to any institutionalised form of asylum burden-sharing, does not adequately explain why cooperation is chosen over unilateral action, at least as far as these two examples go. In addition, while it is difficult to prove the exploitation of the 'large by the small' free-riding states in the case of the ERF and EUREMA⁷⁴, the fact that this is a possibility has not appeared to deter larger Member States such as France and Germany from taking part in such schemes of financial responsibility-sharing.

⁷³ With the exception of Denmark, which has opted out of the arrangement

⁷⁴ The EU Pilot Project on Intra-EU relocation from Malta involved France, Germany, the UK, Portugal, Luxembourg, Hungary, Poland, Slovenia, Slovakia and Romania (Europa, 2011).

Thielemann (2001) suggests looking at the 'logic of appropriateness' to address the gap between state-centredness and cooperation. Informed by a 'norm-based' rationale in the Constructivist tradition, it argues that motivations, choices and calculated strategies for cooperation are shaped and framed by institutional contexts, which play an important role in diffusing norms and influencing states' preferences in favour of cooperation (Betts, 2009). This logic applies to the EU at two levels of analysis: international and supranational. In terms of the former, the appropriateness logic implies that international norms guiding the practice of international refugee protection and by extension, burden-sharing, would be sufficient on their own to influence Member States to enter cooperative agreements. As all EU Member States are signatory to the 1951 Refugee Convention and with the Common European Asylum System embodying the spirit of this Convention, coming to the aid of Member States affected by boat arrivals would be a natural manifestation of being members of the 'multilateral club'. Indeed, the author's interview with Dutch Ministry of Immigration and Naturalisation Service officials confirmed this notion (Appendix IV). The Dutch Government's decision to assist Malta in 2005 and 2006 by accepting a number of refugees was based simply on Malta's and the UNHCR's 'request' for help.

In regard to the supranational and EU-specific 'system', one can only look at the history of the EU to establish that cooperation and burden-sharing are indeed part of the EU's 'genetic code'. As Chalmers (2000, p. 80 cited in Thielmann, 2001) argues, burden-sharing bargaining between Member States was a 'key element in the survival and development of the EC' and remains 'key to its prospects for future expansion'. At the heart of the history of solidarity and burden-sharing in the EU was the creation of the Common Agricultural Policy (CAP), a formal system of agricultural subsidies providing income for the EU's agricultural sector and which required contributions from Member States based on national Gross Domestic Product (GDP). Despite France having an above-average per capita income, its net contribution to the CAP has historically been relatively low. However, elements of 'free-riding' were overlooked in favour of France joining the EU, as the former made its membership conditional on such a concession (Thielemann, 2001). In terms of migration, the ERF has been vital to the observance of international refugee protection in the EU, allocating primarily financial resources based 'proportionately to the burden on each Member State by reason of their efforts in receiving refugees and displaced persons and bearing the consequences of so doing', as per Article 63(2)(b) para 21 of the TEC. Finally, as mentioned elsewhere in this study, the EU's focus on promoting 'effective multilateralism' in its Security Strategy of 2003, which included adherence to international law and supporting the work of multilateral agencies such as those of the

United Nations, is an example of the Constructivist notion of norm embeddedness in a system where such norms of altruism are more than just values to behold, as they themselves define the relations and rules of interaction between actors in the same system. The CEAS is itself embedded in the international refugee protection regime, and with burden-sharing being one of the principles and norms of asylum, the expectation is at the minimum, general acceptance of the importance of burden-sharing in the asylum field, and at the operational level, agreeing to the creation of a system designed to alleviate the problem of the disproportional distribution of 'asylum burdens'.

Vital to the application of such norms and values and their translation into cooperative ventures are institutions, which, according to the Liberal-Institutionalist perspective, can act as a constraint on states' tendencies to self-aggrandise and pursue unilateral actions contrary to the values and norms of the system in which they are enmeshed. Betts (2009) highlights the pivotal role the UNHCR played in facilitating burden-sharing solutions for Vietnamese refugees and asylum seekers under the 1989 Comprehensive Plan of Action (CPA) in the form of resettlement in third countries, and in the regional protection of 'internally displaced persons' (IDPs) under the CIREFCA programme. The UNHCR also played a leadership role in the *Francisco y Catalina* affair, hailed as the 'first successful' case of burden-sharing in the EU due to the voluntary cooperation of both EU and non-EU Member States to accept a specific number of refugees from a specific boat arrival in the Mediterranean Sea. The ACNUR representative interviewed by the author (Appendix VI) communicated that the success of this particular case was due to the High Commissioner of the UNHCR himself taking a leadership role which 'attracted political attention', and resulting in the transfer of refugees 'through the High Commissioner's intervention'.

The above analysis thus far provides a rather positive picture of the 'system' in which Member States interact, making excellent prospects of cooperation. However, the reality is that the international arena, of which refugee protection is only a small portion, is state-centric, and neither multilateral institutions nor international law can demand states to share the 'burden' of asylum seekers or refugees, nor dictate the form it should take. At the EU level, despite the inculcation of altruistic norms through membership in favour of protection and sharing of burdens, which can arguably be seen as complimenting and supporting each other, Member States are able to act against the prescribed application of such norms, and quite often without any consequences. For example, the Commission official interviewed by the author stated that while the Commission has access to 'infringement procedures' against Member States who do

not follow transposition requirements for the directives under the CEAS, which include conformity to the 1951 Refugee Convention, in reality the process is complicated and intricate, and it has so far not been used despite evidence of infringement (Appendix II). However, a much clearer indication of the Neo-Realist tendencies of the asylum situation in the EU is the absence itself of a formal and institutional mechanism of asylum burden-sharing beyond the confines of the ERF, which owes itself to the continued resistance of primarily larger and 'northern' Member States. As discussed in Chapter 2, discussions on asylum burden-sharing began in the EU in 1994, without any success at formal implementation to date, apart from the financial compensation available through the ERF. While the creation of EUREMA in 2010 has resulted in the transfer of a number of refugees from Malta to ten Member States and shows promise regarding the viability of asylum burden-sharing in the EU, ultimately, the arrangement is voluntary and no binding clauses to date ensure the continued participation of Member States in the scheme.

Indeed, voluntariness is what defines cooperation regarding burden-sharing, both at the EU and international levels. Apart from access to asylum being completely at the discretion of receiving states due to the absence of any conventions in international law codifying the right to asylum (Bostock, 2002, p. 285), the international refugee protection regime also does not provide for the even distribution of asylum or refugee 'responsibilities' (Zieck, 2011, pp. 1-2). The lack of any distributive mechanisms in the 1951 Refugee Convention is indeed perplexing given that when it was drafted after the Second World War, the main mechanism for states to 'share' refugees was through their physical distribution via resettlement in industrialised countries, as demonstrated in Chapter 2. Instead, the responsibility for the resettlement of refugees was given to the UNHCR, a non-state, non-territorial entity, which was and still is completely reliant on the goodwill of states to accept refugees via a resettlement programme.

While it is an important norm and principle of the international refugee protection regime along with the 'asylum'⁷⁵ and 'assistance'⁷⁶, 'burden-sharing' can only operate if signatory states are willing to cooperate to introduce such a system. However, 'state sovereignty' is also one of the main principles of the international regime protecting refugees (Uçarer, 2006, p. 222, citing

⁷⁵ 'Asylum' is defined as *'The grant, by a State, of protection on its territory to persons from another State who are fleeing persecution or serious danger. Asylum encompasses a variety of elements, including non-refoulement, permission to remain on the territory of the asylum country, and humane standards of treatment'* (UNHCR, 2006).

⁷⁶ 'Assistance' can take the form of either repatriation or resettlement in another country (Uçarer, 2006, p. 223).

Gordenker 1997), and outweighs all other norms and principles. Indeed, even if signatory states decide to partake in UNHCR-led resettlement schemes, they have the discretion to make their 'selection' according to their own 'eligibility criteria', which often took into account their own respective immigration requirements, thereby extending 'well beyond protection needs' (Zieck, 2011, pp. 1-2). Such a selectiveness was in fact one of the conditions for burden-sharing cooperation for the Netherlands when the Dutch Government agreed to accept refugees from the *Francisco y Catalina* fishing vessel in 2006. According to the information provided to the author by officers of the Dutch Immigration and Naturalisation Service:

"We asked for Eritrean refugees because when we interview people, we also look at the admission policy of the Netherlands. [...] We had to look for that when we knew there were Eritreans [among those on board]. They had quite a favourable approval rate in the Netherlands. It is likely that they would be allowed under our admission policy. When the Netherlands accepted the cases, we accepted the asylum seekers under the resettlement programme."⁷⁷

Despite Member States sharing norms and values that are compatible with those of the international refugee protection, and solidarity and burden-sharing being at the root of the history of European integration and defining relations between Member States, the interests of sovereign states take priority over and above all other interests due to the state-centrism of the global protection regime, which is emulated at the EU level of decision-making regarding asylum and burden-sharing. While the institutions at both the multilateral and supranational levels are ideal platforms for promoting burden-sharing, they are ultimately and necessarily 'embedded in the varied national interests and values of the societies that form their constituent parts' (Kleine, 2010). Therefore, rather than institutions placing a limit on the self-seeking actions of Member States and their preference for unilateral measures, as is believed by the Liberal-Institutional perspective, (Betts, 2009), the reality is that state-centrism is systemic and all cooperative efforts to achieve burden-sharing are shaped by state interests. In this case, the supranational EU institutions merely operate as a platform for the promotion of intergovernmental interests.

A related feature of the international protection regime is the lack of clarity in regard to rules and guidelines defining state responsibility at the different stages of the 'displacement cycle' (UNHCR, 2011). In coming to a cooperative agreement to 'share' the burdens regarding seaborne asylum seekers, it is first and foremost important to decide whether cooperation is aimed at preventing boat arrivals, conducting sea rescue operations, receiving asylum seekers

⁷⁷ Interview with the author, Appendix IV.

on dry land, or at the 'durable solutions' stage, which includes resettlement or voluntary repatriation. However, international law covering these different stages lacks clarity in determining both the *procedures* to be followed and *responsibilities* for hearing asylum claims. Indeed, there is disagreement among legal scholars, governments, policy-makers, and international organizations regarding 'how far States' obligations go beyond their borders in relation to refugees who have not reached the States' territory' (Gil-Bazo, 2005). As demonstrated in Chapter 2, despite the 'litany' of rights and responsibilities prescribed by international law, the 'exact scope' of state obligations towards seaborne asylum seekers is largely undefined and prone to manipulation by Member States to avoid responsibility for implementing them. The political wrangling between coastal EU Member States over the definition of the 'next port of call' is a clear example, with international maritime law being silent on determining its exact location, leading to such protracted situations as was the case with the *Francisco y Catalina*, when Malta refused to allow the Spanish-owned trawler to dock and disembark on the basis that the vessel was 'picked up' from Libya's Search and Rescue Area (SAR) (Malta Media News, 2006). As disembarkation ultimately determines where the asylum claims are heard, the definition of the 'next port of call' is one of the most controversial in international refugee and maritime law.

Another characteristic of the international refugee protection regime, and one which has the most relevance to the present study, is the absence of any coherent framework addressing the issue of mixed migration and international cooperation in this field. As argued in Chapter 2, the framework that is needed by governments to guide their responses in order to achieve the desired goal of international cooperation in mixed migration situations is currently a work in progress, and is paradoxically reliant on these governments' actual responses to guide its structural design. The UNHCR Discussion Paper on *International Cooperation to Share Burden and Responsibilities* (UNHCR, 2011), which has compiled examples of cooperative arrangements to address the issue of refugee burden-sharing to date, and provided a comprehensive analysis of such arrangements in order to identify common 'building blocks' for a future global framework, has used the *Francisco y Catalina* as an example of what governments can do to achieve cooperation. Therefore, the state-centrism characterising the protection regime also extends to the 'solutions' addressing the problems created by the same system itself. Using the *Francisco y Catalina* as a 'model' of burden-sharing in a mixed migration context is a clear indication of the current low levels and standards of cooperation required of states as a measure of their commitment to the international protection regime.

3.3 Solidarity and Fair Sharing of Asylum Responsibilities: A (Large) State-Centred, (Small) State-Driven Enterprise

In the face of a systemic bias towards state interests and a 'free for all' interpretation of guidelines delimiting asylum responsibility, the Dublin Regulation provides a rather solid picture of an asylum redistribution mechanism that does not leave much room for misinterpretation or manipulation. Adopted in 2003, the redistributive element of the Dublin Regulation rests on placing Member State responsibility for hearing an asylum claim primarily on the basis of it being the first Member State of entry. Under this system, an asylum seeker will only have one chance to make an asylum application and avoid 'asylum shopping'. The Dublin Regulation also rules that if an asylum seeker has *irregularly crossed the border* into a Member State by land, sea or air, that Member State will be 'penalised' and be made to examine the asylum claim. Finally, once an asylum claim has been determined by the responsible Member State, it is not possible for it to be examined by any other Member State (Balzacq and Carrera, 2005, pp. 43-45). That the Dublin Regulation is an institutionalised form of asylum redistribution in the EU is an accepted fact. However, the problem with it as a system of redistribution is that its responsibility criteria are based primarily on geography, and themselves generate disproportional 'burdens' on Member States in the 'EU south' who are unable to afford the costs of asylum.

The gap between the systemic reluctance to institutionalise asylum burden-sharing at both the EU and international levels and the achievement of cooperative burden-sharing measures is argued in this study to be filled by the 'small' EU Member States of the Mediterranean, who enjoy a unique role in what is a highly complex and protracted situation. Their role is unique in the sense that while at the international level, they have sovereign status and belong to an exclusive 'club' of 'northern' industrialised states, at the EU level, they belong to the 'club' at the periphery, both in geographical and resource terms.

3.3.1 Follow the *Small State* Leader?

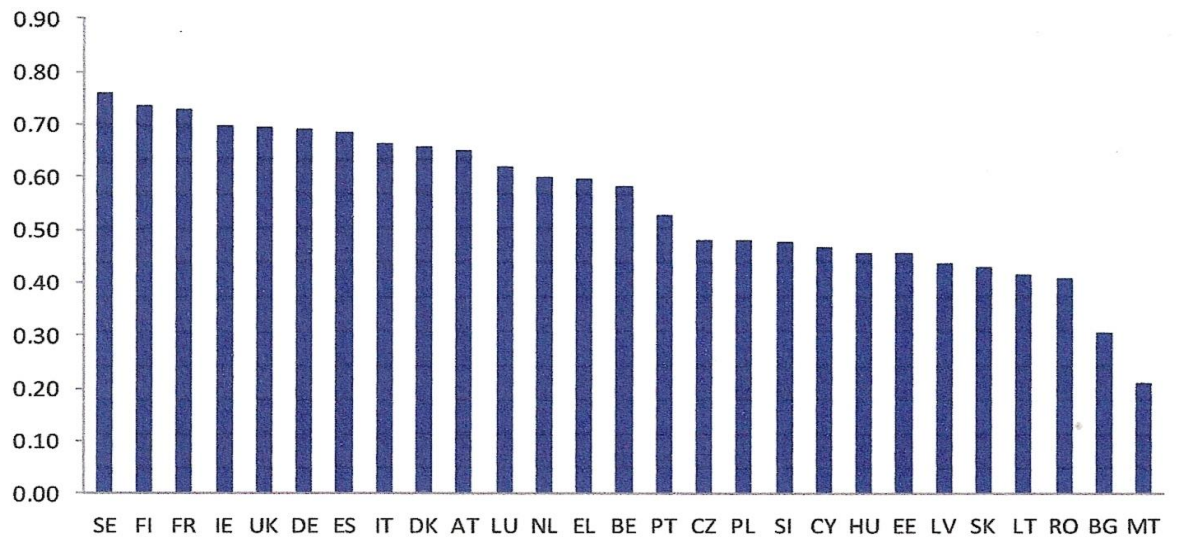
There is currently no consensus in regard to the definition of 'small states', also referred to in the literature as 'micro state' or 'middle power' (Thorhallsson and Wivel, 2006). In International Relations, all states are sovereign and equal before the law, and attempts to distinguish 'small' from 'large' states are often based quantifiable aspects of 'power' such as Gross Domestic Product (GDP), land mass or population size, the latter being the 'most common

yardstick by which magnitude is measured' in the EU (Thorhallsson and Wivel, 2006, p. 653 citing Brown, 2000). Qualitative criteria are also added to the formulation of a 'small state', including a state's 'presence' at the international level, military and administrative capabilities, level of domestic cohesion, the way it is perceived domestically and internationally, its aspirations and diplomatic capacity (ibid.). Having a clear working definition of what is a 'small state' is indeed pivotal in the discussion, as it would elucidate not only their challenges within a large state-centric regime not just supranationally but also at the international level, and also explain their behaviour and strategies to overcome these challenges.

In this study, the southern Member States of Italy, Spain, Greece and Malta are identified as 'small states', using one of two criteria: material and relational. The selectiveness of the use of these criteria is indeed not unproblematic, as it would challenge widely-held notions or conceptions of what is 'small' and what is not in International Relations. However, it is also important to contextualise the debate, and in terms of the Dublin Regulation, itself not immune to criteria-selectiveness, it is these Member States that are mostly affected by the inequalities brought about by such a system. Nevertheless, nineteen of the twenty-seven Member States are today recognised as 'small states' in the EU, including Greece and Malta.

If we are to apply material criteria to the EU Member States in the Mediterranean to calculate their capacity to host asylum seekers as per the requirements of the Dublin Regulation, only Malta would be identified as 'small'. A 2010 study requested by the European Parliament to determine the inequalities between Member States in their respective capacities to admit asylum seekers (Thielemann et al, 2010, pp. 57-59) revealed that using the combined capacity index of GDP per capita, population and population density to calculate EU Member States' absorptive capacity puts Malta at the lowest end of the scale, but the other Member States in the 'southern frontline' of Spain, Italy and Greece occupied the middle ranges, as demonstrated in Figure 2 below (ibid., p. 58)

Figure 2: Combined Capacity Index



(Thielemann et al, 2010)

It is, of course, important to look at the actual data regarding the total number of asylum seekers received by all 27 Member States as was carried out in the above referenced report. However, it does not specify the total number of asylum seekers who arrived in the Mediterranean by boat, which is what this study is focused on. Nevertheless, the same report showed that from an input perspective, Greece had the 4th highest flows of asylum seekers after Sweden, France, and the UK, while Italy had the 6th and Spain 10th highest asylum inflows.

While the data above vaguely demonstrate the degree with which the EU's 'southern frontline' states are able to 'cope' with the asylum or refugee 'burdens', in terms of their 'relational' position within the Dublin Regulation debate, it is clear that they are indeed the lesser 'powers'. Citing Mouritzer and Wivel (2005), Thorhallsson and Wivel (2006, p. 654) suggest coming up with a relational definition of a 'small state' as being those that are unable to change the 'basic contours of a specific spatio-temporal context' and are somewhat 'stuck' with the existing 'power configuration and its institutional expression'. Indeed, two main characteristics of 'small states' to come out of this definition are their interest in developing regional institutions to counter the negative externalities of interdependence, and their persistent advancement of their 'dilemmas and problems' in their interaction with larger states (ibid., citing Wæver 2002).

Malta

Located at the southernmost tip of Europe, Malta has been in the international spotlight as a 'frontline state' for boat arrivals in the EU, which have become a pressing humanitarian challenge for the 'micro state'. Until recently, Malta has been a country of emigration, primarily to Canada, Australia and the UK (Lutterbeck, 2009). Irregular migration by boat is a recent phenomenon, which 'began suddenly in 2002' (ibid.). In 2000, there were 24 reported irregular migrants on the island, and in 2001, there were 57. However, in 2002, the figures multiplied to 1,686, setting in motion what would be a 'regular feature' in Malta (Lutterbeck, 2009). While the Dublin Regulation from 2004 onwards is often considered to be the cause of such migratory patterns, Lutterbeck believes that the reality is more a result of the general rise in irregular migration in the Central Mediterranean, as Sicily also experienced a shock increase in 2002 (2009, p. 122). However, a year after Malta joined the EU in 2004, the number of asylum applications lodged in the country rose by 103% from the previous year (UNHCR Briefing Notes, 2005).

While a great majority of irregular migrants do apply for asylum⁷⁸, only a small number are recognised as refugees according to the 1951 Refugee Convention. However, Malta is also known for providing international protection on humanitarian grounds, and the figures below show the proportion of humanitarian protection awarded against refugee protection to be much higher (Lutterbeck, 2009, p. 125).

Table 3: Refugee Protection vs Humanitarian Protection Status in Malta 2000-2007

<i>Year</i>	<i>Asylum Applications</i>	<i>Refugee Status</i>	<i>Humanitarian Protection</i>
2000	71	28	1
2001	116	39	24
2002	350	29	102
2003	568	49	268
2004	997	49	560
2005	1,166	34	484
2006	1,272	28	522
2007	1,379	7	620

(Lutterbeck, 2009)

⁷⁸ For example, in 2006 and 2007, 70 to 80% of irregular migrants in Malta applied for asylum (Lutterbeck, 2009, p. 125).

Malta has a 'very large' search and rescue zone, which is an important source of revenue⁷⁹, covering some 250,000 square kilometres, which is comparable to the territorial size of the UK (Lutterbeck, 2009, p. 128). The island is considered by the UNHCR to be a 'special case' due to its particular circumstances, and therefore permitted refugees to be resettled in other countries. The only other country to have such a status is Turkey (Sansone, 2011).

A rise in anti-immigrant movements in Malta has accompanied the growth in irregular migration, as is the general trend across the EU (Lutterbeck, 2009, p. 140). Violent attacks against third country nationals as well as organisations assisting irregular migrants and asylum seekers, such as the Jesuit Refugee Service, have been documented and reported.

Italy

Italy supported the 2004 proposal by German Interior Minister Otto Schilly to create a reception centre in North Africa to curb irregular migration to the Mediterranean. Its tiny island of Lampedusa, situated just 290 kilometres off the coast of Libya (UNHCR, 2007), receives large numbers of boat arrivals on a regular basis, and it was not until 2007 that new reception centres were opened with adequate accommodation and medical facilities to help the island cope with the asylum 'burden'.

Italy is known for its restrictive stance on irregular migration, which includes 'outsourcing' its border control to Libya (Joffé, 2008, p. 165), and punishing those rescuing shipwrecked asylum seekers in its sea borders, such as the 2004 case of the *Cap Anamur*, which resulted in the arrest of the ship's captain for 'aiding' the illegal migration of 37 African nationals (UNHCR, 2006).

Spain

Like Malta, Spain has been forced to deal with boat arrivals of irregular migrants, primarily from sub-Saharan Africa. Spain has two enclaves on the Moroccan coast – Ceuta and Melilla. After heightened border security in 2005, people smugglers have resorted to using other North African countries such as Libya as transit points (Mulligan, 2006).

⁷⁹ Malta's SAR also represents its Flight Information Region, which earns the Maltese Government EUR 8 million per year (Lutterbeck, 2009, p. 133).

Until recently, the government's response to irregular migration has been to 'regularise' illegal migrants by way of an amnesty. In 2005, Spain granted amnesty to 700,000 irregular migrants as a means of controlling the growth of the black economy and putting an end to the exploitation of undocumented workers (Tremlett, 2005). Spain also has a generous humanitarian programme, albeit not to the same scale as that of Malta's, as demonstrated in the Table 4 below (Dirdal 2005):

Table 4: Refugee Protection vs Humanitarian Protection Status in Spain 2000-2004

<i>Year</i>	<i>Asylum Applications</i>	<i>Refugee Status</i>	<i>Humanitarian Protection</i>
2000	7926	394	250
2001	9490	298	84
2002	6309	165	68
2003	5918	238	167
2004	5535	174	197

(Dirdal, 2005)

Greece

Boat arrivals in Greece are a recent phenomenon, and are triggered by the tightening of migration controls in Italy, Spain and Malta. As observed by the UNHCR, 'when numbers dropped in Italy, Spain and Malta, they increased significantly in Greece' (Sansone 2011). Since 2004, the Greek authorities have been invoking Article 2(8) of the Presidential Decree 61/99 prohibiting asylum seekers who had been returned to Greece after having transited illegally to other Member States, on the basis of them having 'arbitrarily [left] his/her place of residence'. The Greek Government has also been severely criticised for its failure to meet the harmonisation standards of the CEAS, particularly regarding reception conditions and asylum procedures (ibid.). In 2008, Finland stopped the 'Dublin transfers' to Greece, while Sweden and Germany stopped the transfer of unaccompanied minors, due to the harsh asylum and detention conditions in Greece. The Council of Europe has publicly denounced Greece for its denial of rights to a full and fair determination of asylum claims and basic reception standards (Pop, 2010).

3.3.2 'Small States' as Drivers of 'Solidarity', 'Fair Sharing of Responsibilities' and 'Effective Multilateralism'

It is a general conception of 'small states' membership of the EU to be based on their desire not to be marginalised in an international arena dominated by larger states. The EU, through its institutionalised decision-making structure and reputation as a powerful yet democratic super-state, is expected to provide small states with political opportunities and privileges they would otherwise not enjoy outside of the exclusive club. The findings of this study show the opposite, however. While EU institutions are helpful in supporting the 'small states' drive for the creation of a formal asylum burden-sharing system in the EU, it is the 'small states' themselves that are operationalising the supranational norms and principles of 'solidarity', 'fair sharing of responsibilities' and 'effective multilateralism', and are therefore, through this process, the ones validating the EU's existence and legitimacy.

Under what conditions can 'small states' influence the EU decision-making process? According to Lindell and Persson (1986, pp. 80-85), there are three 'systemic' factors which provide opportunities for small states to wield political influence in the EU. These include the structure of the system, the state of the system and the prevailing norms within the system. In terms of structure, the degree of institutionalisation of the policy area is pivotal. Risse-Kappen (1996) defines 'institutionalisation' as a continuum where one end represents the locus of decision-making and the opposite end there is no EU authority over decision-making. The argument is that the greater the degree of institutionalisation, the greater the possibilities for small state influence. The 'state' of the system is defined as the degree of tension and conflict between dominating actors being a positive situation for small states to gain influence (Lindell and Persson, 1986, pp. 81-83). Finally, prevailing norms allow smaller states to act in accordance to socially constructed roles/behaviour and institutional rules to achieve their goal, with Smith (2004) identifying the following as particularly endemic in the EU: consensus, confidentiality, 'domain réservés' and the avoidance of hard bargaining.

In terms of 'small state' behaviour, Jakobsen (2009) identified the following as the four main factors ensuring its influence vis-à-vis larger states: having a forerunner reputation; use of convincing arguments; engagement in honest-broker coalition building, and backing of initiatives with sufficient material capabilities. Applied to the EU's 'southern frontline' in the Mediterranean, the 'use of convincing arguments' is most relevant to the promotion of the principles of 'solidarity' and 'fair sharing of responsibilities', with the 'small' Member States

having an expert knowledge of irregular migration and asylum by virtue of their role as 'gatekeepers' in the region. Their experience and expertise inform their ability to steer debates towards their position, and provide validity to their plea for the creation of a burden-sharing system. As argued by Ulbert and Risse (2005), for states to be persuasive in negotiations, they should project credibility and truthfulness, and their arguments should resonate with commonly held knowledge, norms, views and principles. More importantly, the high level of commitment small Member States devote to achieving 'solidarity' and the 'fair sharing of responsibilities' in the asylum field is itself an expression of their own national interests. According to Arregui and Thomson (2009) states that attach higher levels of relative salience to a policy issue are likely to display higher levels of activity, allowing them to enhance and strengthen their position in the policy process, and adding to their level of persuasiveness.

3.3.3 EU 'Small' Mediterranean Member States and Norm Advocacy

This study refers to the EU's 'small' Member States in the Mediterranean as 'norm advocates', and their advocacy and promotion of the norms of 'solidarity', 'fair sharing of responsibilities' and 'effective multilateralism' embodied in their repeated pleas for the institutionalisation of asylum burden-sharing in the EU. While few studies have been carried out analysing 'states' as norm advocates (Björkdahl, 2008, p. 137), the small EU Mediterranean states have indeed earned this title. In the face of all systemic bias towards state sovereignty at the supranational and international levels making asylum burden-sharing almost difficult to formalise, these 'small' Member States have emerged as both willing and unwilling champions of burden-sharing. With the EU already receptive to norms of 'solidarity', 'fair sharing of responsibilities' and 'effective multilateralism', the challenge for the 'small' Member States now rests on overcoming an institutional structure that is resistant to the very idea of a formal system of responsibility sharing, and a system that is characterised by high levels of political tension, particularly regarding the issue of irregular migration.

Nevertheless, it is argued, particularly in the case of the EU, that the higher the level of responsibility, the stronger the level of solidarity becomes (Raspotnik et al, 2012). With the establishment of the CEAS and harmonisation of asylum standards and processes between the Member States as both an objective and precondition of the CEAS, one can expect the level of solidarity in the asylum field to be high. However, the real measure of commitments to 'solidarity' rests in its operationalisation.

3.3.3.1 Small Mediterranean States and ‘Normative Power’

In their advocacy for asylum burden-sharing, the ‘small’ EU Member States in the Mediterranean face severe institutional constraints, despite burden-sharing’s related norms of ‘effective multilateralism’, ‘solidarity’ and ‘fair sharing of responsibilities’ characterising the EU’s identity and political aspirations. In addition to this systemic constraint, Malta, Italy, Spain and Greece do not have the material resources that larger Member States enjoy to add weight to their agenda. Nevertheless, the ‘small’ Mediterranean States have ‘normative power’ as their main resource.

The current limited literature on norm advocacy points to ‘normative power’ as being associated with actors ‘with limited traditional power resources’ (Björkdahl, 2008, p. 136). It is often used in value-laden discussions regarding human and minority rights, gender equality and environmental policy (ibid., citing Risse et al 1999), and is defined in the general sense as ‘norm-generating, norm-spreading capability exercised in order to change the normative convictions and to set normative standards through processes of norm advocacy (Björkdahl, 2008, p. 136). The problem with this definition in the context of the EU Mediterranean States is the fact that it is not the objective to generate, spread or change normative convictions to achieve burden-sharing. Such norms are already inherent in the day-to-day operations and relations within the EU framework. Rather, the Mediterranean Member States’ rationale is to operationalise such norms through the *institutionalisation* of asylum burden-sharing, which can be considered to be the next stage up from norm diffusion.

In terms of power relations between ‘small’ EU Member States and the ‘larger’ and more powerful ones, what is being contested is the need for an official, as opposed to an ad hoc response to boat arrivals, specifically in the form of a burden redistribution system. That solidarity, burden-sharing and effective multilateralism is already embraced at all levels in the EU is not at question. The contention lies in making it official.

3.3.3.2 Institutional Resources

The Neo-Realist perspective on cooperation argues that contrary to notions of institutions having a leadership role in international cooperation leading to burden-sharing, as are advanced by Liberal Institutionalists, in reality, institutions operate merely as strategic tools for sovereign states. This argument is also in line with state-centric approaches viewing

supranational institutions as merely an arena for the advancement of Member State interests, as demonstrated in Chapter 2.

In the case of the EU's southern frontline states in the Mediterranean, the UNHCR and the EU's supranational institutions work as important partners in helping them advance their cause. In regard to the former, the UNHCR being the lead global agency for the protection of refugees and itself the agency responsible for the relocation of the world's refugees via a resettlement programme (Zieck, 2011) has given credibility to 'burden' claims by Malta, Italy, Spain and Greece and has added much political weight to their plight, particularly given the institutionalisation of its consultative role in the EU.

UNHCR

The UNHCR is the recognised lead agency in the development of customary international refugee law, with a number of its functions including securing admission and asylum for those needing international protection (UN General Assembly, 1950). Its mandate's two main aims are first, the provision of international protection to those in need of it and second, to seek 'permanent solutions' to the plight of refugees, which may include resettlement, reintegration or voluntary repatriation (Boccardi, 2002, p. 16). The UNHCR's supervisory role, as laid down in Article 35 of the 1951 Refugee Convention, includes the observation and scrutiny of state practice (Kälh, 2003) and its operational role includes providing relief such as food, water and shelter in crises situations (Druke, 2002).

At the international level, one of the most effective means enabling the UNHCR to influence Member States is through its formulation of guidelines, and it can communicate its concerns in numerous Annual Reports submitted to the EXCOM and the General Assembly (Boccardi, 2002, p. 17). The UNHCR, through its Regional Bureaux, also supports and contributes to asylum and migration meetings and processes, and provides reliable statistics on refugees, asylum seekers and other persons of concern through the publication of its Statistical Yearbook. It is seen as an authoritative figure in regard to refugee law and state practice, and its expertise is sought in crises and protracted situations involving migrants in need of protection.

At the EU level, Declaration 17 of the 1999 Amsterdam Treaty formalised the UNHCR's consultative role in the EU, enabling its direct involvement in the drafting of asylum directives in the CEAS (Boccardi 2002; Zwaan 2004). A large proportion of the concerns expressed by the

UNHCR were supported and repeated by the European Parliament during the drafting of the directives. In terms of the Dublin Regulation in particular, the UNHCR was explicitly mentioned. According to Zwaan (2004, p. 21):

‘The fact that the Refugee Convention or the UNHCR are mentioned explicitly implies that Member States are conscious of UNHCR’s supervisory function under the Geneva Convention and respect UNHCR’s supervisory power and to cooperate actively with the UNHCR in this regard in order to achieve an optimal implementation and harmonised application of all provisions of the Refugee Convention and its 1967 Protocol.’

As communicated to the author by a representative from the UNHCR’s office in Brussels (Appendix I), the agency enjoys a privileged position in being able to present its views in the official policy-making quarters in the EU:

‘[We have an] opportunity to put comments to the Commission whilst it is preparing its proposals. And once the Commission’s proposals are adopted, in a discussion in the Council, we always have an opportunity to put forward our views to the Member States, the Presidency particularly with [...] the Justice and Home Affairs Council [where asylum issues] are discussed. [...] We are invited from time to time to discussions by the Commissioner on immigration.’

‘Small’ EU Member State burden-sharing advocacy is therefore given a bigger voice by the UNHCR by virtue of its authority. As Telò observes (2006, p. 43), while the level of authority expressed by international organisations ‘almost always implies a degree of voluntary submission’, the concept of authority is ‘more pertinent than that of power’. Turning now to the question of how this translates to ‘burden-sharing’, the experience of the *Francisco y Catalina* incident clearly indicates that the UNHCR’s intervention is on its own sufficient to persuade other Member States to come to the aid of overburdened ‘small’ Member States, particularly when the former have a history of resettlement arrangements with the UNHCR, as is the case with the Netherlands (Appendix IV; Zieck 2011).

The ‘assistance’ provided by the UNHCR to the EU Member States in the Mediterranean during the *Francisco y Catalina* fiasco was summed up by the views communicated by the ACNUR representative interviewed by the author (Appendix VI):

“The [UNHCR] Commissioner himself took a lot of interest [in the case]. The objective was to have their [asylum seekers] concerns assessed by governments. We were in permanent contact with [the Spanish] MFAt and Ministry of Interior.

For the High Commissioner, one of the objectives is the “prong”, specifically burden-sharing. The UNHCR elaborated the Ten Point Action Plan, which was based on a

worldwide strategy. It attached great relevance to these strategies. Very clear signals, if positively set more structures.

It was something for the High Commissioner to make an assessment [on the issue]. The UNHCR took responsibility for the allocation [of asylum seekers] through the High Commissioner's intervention. The High Commissioner [indicated] that 10 refugees would be allocated to Netherlands and Portugal."

EU institutions

At the level of the EU, the literature identifies a number of institutions that 'small states' can use to advance its goals, specifically through negotiations or deliberations (Romsloe, 2004). Using the EU institutional channels in their burden-sharing norm advocacy would, in effect, 'Europeanise' the goals of the 'small' Mediterranean Member States, with the Europeanisation of policy areas considered to be conducive to small-state influence (Thorhallsson and Wivel, 2006, p. 664). The southern EU Member States' norm advocacy involves bringing the issue of burden-sharing to the forefront of policy discussions in both formal and informal settings, including those held at the European Parliament, the Council Secretariat, the Commission, the European Council, the Committee of Permanent Representatives (COREPER) and Foreign Relations Council. Small Mediterranean states have an expert knowledge of irregular migration and profiles of asylum seekers by virtue of their being hosts to the boat arrivals, and both their experience and expertise then inform their ability to steer debates and highlight the validity to their plea for the creation of a burden-sharing system.

Indeed, the direct involvement of the Commissioner for Justice and Home Affairs himself in the *Francisco y Catalina* incident has been highlighted in media reports to be instrumental in reaching a burden-sharing arrangement. The LIBE Committee representative interviewed by the author (Appendix V) also stated that:

"Mr Frattini had a special role even if it was not the Commission's responsibility [to facilitate cooperation]. Also, the President of the EP [had a role to play]. It happened at the beginning of September holidays.

It was an initiative of Frattini himself. At the beginning, the Member States said no. We didn't want it. It took place in Libyan waters. The initial reaction was to say no, take them back to Libya. Frattini did I [broker an agreement], even though [there was] no institutional means to do it. The emergency was solved by Frattini because of his initiative. We need more legislative initiative to react. We cannot really consider that it was burden sharing."

At the European Parliament, public hearings are effective foras for promoting policy agendas and obtaining support for them. The LIBE Committee has, in recent years, organised public hearings where the need for a redistributive mechanism has been highlighted, most notable of which are the hearings on the Tragedies of Migrants at Sea (2007) and on Fundamental Rights in the EU (2008). Ministers of the European Parliament (MEPs) from different political parties can also use their position to present 'small state' concerns to the European Commission and the European Council, such was the case when MEPs from the European People's Party (EPP), Progressive Alliance of Socialists and Democrats (S&D) and Alliance of Liberals and Democrats in Europe (ALDE) urged the Council to institutionalise asylum burden-sharing (European Commission, 2011). Finally, MEPs representing 'small' states can table proposals for consideration by the Commission and the Council. In 2009, for example, Maltese MEP Simon Busutil, rapporteur on common European immigration policy, tabled proposals to create an asylum burden-sharing scheme in the form of 2009 budget amendments, co-signed by Greek, Spanish and Cypriot MEPs (Malta Media News, 2008). In the same year, the European Parliament called for 'an open debate on the various options available with a view to the establishment of a compulsory mechanism to provide for effective solidarity, in particular by means of internal reallocation' (European Parliament, 2009).

The European Parliament, specifically the LIBE Committee, has been an important power resource for 'small' Mediterranean Member States. With solidarity and human rights two of the organising principles of the work of the Committee, there is a high degree of compatibility between the group's norms and values with those that the Mediterranean Member States wish to promote. As stated by a LIBE representative to the author (Appendix V):

"In the LIBE Committee there are several parties, the majority are Centre-Left, quite stable. The Liberal group always votes with the Socialists, Greens, GUE, stable Centre-Left majority. It is more on the human rights side. It's not on the repressive side. We have adopted a lot of resolutions regarding this subject and always do more for asylum seekers, fight against smugglers and grant asylum to real asylum seekers. There is a clear majority, even if not everyone votes on the same issue."

Björkdahl (2008) and Bunse (2009) refer to the rotating European Council Presidency as an effective forum for 'small state' diplomatic strategy. To Bunse (2009), this involves making use of 'informal powers' in the Council Presidency, where the deep divisions between big and small Member States are deliberated. Member States, regardless of size, are able to take advantage of the Council Presidency where they can shape agenda items, advance or delay legislation and initiate policy debates. For example, solidarity and fair sharing of asylum responsibilities were

highlighted by the French Council Presidency in 2008 during the finalisation of the European ‘Pact on Immigration and Asylum’ (Euractiv, 2008), with the result that the final version made explicit mention of ‘solidarity’ and ‘burden-sharing’, and proposed better relocation of beneficiaries of international protection on a coordinated but *voluntary* basis, in addition to ‘solidarity measures’ such as European Asylum Support Office financial aid and technical assistance, being promoted (Vanheule et al, 2011, p. 70). In 2006, Maltese Minister of Foreign Affairs Michael Frendo presented a Maltese initiative for an EU-Arab summit in Malta, to address burden-sharing and repatriation issues (Malta Media News, 2006).

Panke (2011) also considers the Council Working Parties and the Committee of Permanent Representatives as useful platforms for small state influence. In 2007, Maltese Ambassador and Permanent Representative Richard Caruana wrote to the COREPER Chair to correct some ‘erroneous reports’ regarding Malta’s role in the ‘tuna pen incident’ which involved a group of African asylum seekers being marooned in a tuna pen within Malta’s search and rescue area, and for this issue to be included in the JHA Council’s agenda regarding the asylum situation in the central Mediterranean (European Parliament, 2007).

The European Committee of the Regions has been a staunch supporter of ‘small state’ burden-sharing advocacy. It has presented its views regarding the need, in matters of asylum, for ‘practical solidarity’ between the EU and the Member States, and expressed its concerns without mechanisms in place to take account of the major disparities between the individual Member States in receiving asylum seekers, the ability to provide protection is compromised (Committee of the Regions, 2012).

3.4 Small State Strategies to Achieve Asylum Burden-Sharing

In their advocacy for the institutionalisation of ‘solidarity’ and ‘fair sharing of responsibilities’ in the form of an asylum burden-sharing scheme, the ‘small’ Mediterranean states of the EU use three main strategies to advance their goal. Due to their limited power resource, they are reliant on institutional resources mentioned above to strengthen their influence.

3.4.1 Framing

The ‘framing’ of burden-sharing by the EU’s southern frontline is constructed in such a way as to appeal to other Member States by tailoring it to fit the context of firstly, EU notions of solidarity,

and secondly, the policy agenda on border control and irregular migration, which has gained urgency in the last decade. By framing 'burden-sharing' as a norm that can be linked to issues that affect the EU as a whole, the 'small' Member States have been successful in putting the issue of asylum burden-sharing on the EU's political agenda and maintaining its special place on the agenda. Indeed, Malta has consistently pleaded, urged and demanded other Member States to come to its aid since it joined the EU in 2005, making use of practically all channels available in the EU to highlight its asylum plight. As referenced everywhere else in this study, and as the literature also confirms, Malta as a 'micro state' with limited power resources has one of the lowest capacities in the EU to absorb large numbers of boat arrivals.

The normative appeal of asylum burden-sharing also rests on the humanitarian aspects of irregular migration, which the European Commission has declared to be a 'moral' one, specifying that continued apathy to the fate of African sea migrants in the Mediterranean constituted a 'collective moral failure' for the EU as a whole (Bilefsky, 2007). The effective framing of the asylum burden-sharing problem in the EU is also assisted by the media, academics, legal experts and non-governmental organisations contributing to EU discussions on the incapacity of southern EU Member States to absorb all boat arrivals, particularly at the European Parliament. The humanitarian aspects of irregular migration have, in recent years, gained currency (Brolan, 2003; Kukathas, 2003; Koser, 2003; Gibney, 2004; Pugh, 2004, 2001, 2000; and Linde, 2011) and along with it, the plight of the 'small' Mediterranean States highlighted both within the EU and internationally.

In the case of the *Francisco y Catalina*, media reports mostly celebrated the 'success' of Spanish involvement – with the fishing vessel rescuing the shipwrecked asylum seekers being Spanish-owned – framing it as a feat of altruistic heroism over the evils of both irregular migration and the lack of an EU-wide burden-sharing arrangement. In Spain, in particular, there was a sense of national pride in the case, confirmed by the captain and crew's medal award that was widely documented in newspaper reports. According to the ACCÉM legal representative interviewed by the author (Appendix III):

“The Spanish public is very sensitive. Francisco y Catalina captain and crew received a prize. But the Spanish public is sensitive when the media [gets involved]. The Francisco y Catalina is one of the most 'mediatic' situation that happened. But the problem is the media referred to them as “refugees”, and declared them as refugees [before the process is completed.”

The case was also closely followed in the Netherlands. While the Dutch Government's involvement in the case was purely voluntary, the public reaction was mixed, unlike to mostly positive reaction it attracted in Malta and Spain (interview with officers of the Dutch Immigration and Naturalisation Service, Appendix IV).

The ascendancy of the humanitarian aspects of irregular migration on the EU policy agenda has also been reflected in the inclusion of cases of boat arrivals in Lampedusa in the European Parliament's emergency plenary in 2005, during which a resolution was reached to urge Italy to provide access to MEPs visiting its detention facilities (Appendix V). The same plenary session invited the participation of Captain Stefan Schmidt of the *Cap Anamur* boat incident, who faced charges of 'aiding illegal migration' in Italy for his role in the rescue of African asylum seekers in Italian waters (ibid.).

The framing at the EU level of asylum burden-sharing as an urgent, humanitarian concern affecting the whole of the EU and permeating all areas of border control has attracted a high level of interest from larger Member States and in this sense, has helped to advance the case of the 'small' Member States' for a formal system of asylum burden redistribution. Nevertheless, as will be seen in Chapter 5, such a high level of interest has not quite transformed into 'practical solidarity', as the *modus operandi* of voluntary and ad hoc burden-sharing do not appear to be losing their appeal in the EU either. This is a clear indication of the power relations in the EU between larger, northern and more powerful Member States, and those in the 'southern frontline'.

3.4.2 'Bail-Out'

The recent global financial crisis has witnessed the term 'bail-out' dominating most discussions regarding solutions to the Greek Government's debt crisis (BBC, 2011). 'Bail-out' in this sense refers to financial 'rescue' loans from the Eurozone Member States and the International Monetary fund (IMF) to help Greece recover from its debts. In this study, an 'asylum bailout' is coined as a strategy that the EU's Mediterranean frontline, more specifically Greece, have used as a form of 'forced' burden-sharing in the absence of concrete, practical and formal responses. It involves the responsible Member State for receiving asylum seekers and processing asylum claims violating the requirements of the Dublin Regulation and rejecting both protection seekers and their claims to protection through a denial of access to proper procedures or through inhumane reception and/or detention conditions. In such cases, other Member States

can prevent the transfer of asylum seekers to the Member State responsible for the claim, and in effect, 'bailing' them 'out' of their Dublin Regulation responsibilities.

Article 3(2) of the Dublin Regulation, also known as the 'sovereignty clause', allows Member States to take responsibility for asylum claims outside of the criteria set out by the Regulation. Member States have been known to apply Article 3(2) for a range of different reasons, from 'humanitarian' to 'practical', although they are generally reluctant to voluntarily apply this clause (UNHCR, 2010b). Nevertheless, exceptional humanitarian circumstances such as cases involving unaccompanied children, the elderly, or persons with serious health concerns are enough to convince the Member States to activate the sovereignty clause.

In regard to Greece, the poor reception and/or detention conditions, reported inhumane treatment of asylum seekers and asylum processes violating the provisions of the 1951 Refugee Convention have resulted in some Member States exercising the sovereignty clause to suspend transfers of asylum seekers to Greece, as per the requirements of the Dublin Regulation. The Danish Ministry of Refugees, Immigration and Integration, which began suspending transfers when Greece failed to respond to administrative requests, announced in May 2010 that it would officially cease transfers of vulnerable groups to Greece, particularly where children were involved (UNHCR, 2010b). In Finland, the Finnish Immigration Service began suspending the transfer vulnerable groups to Greece in 2008, and in the Netherlands, regional courts have ruled that transfers to Greece should not take place (UNHCR 2010b). In Romania in 2009, Article 3(2) was invoked as a legal ground in four appeals cases, arguing that the Greek asylum system 'does not offer sufficient safeguards to ensure that persons in need of protection have access to a fair and efficient asylum procedure' (ibid.).

Malta has also been criticised for its detention policy as well as its interception measures against incoming boat arrivals. It refers to its 'overburdened' situation to justify such measures, including how irregular migration affects even its fishing industry as its fishermen are usually the first to discover shipwrecked asylum seekers are therefore made responsible for their welfare (Lutterbeck, 2009, p. 132). Sweden, despite threats to transfer 550 asylum seekers to Malta on the basis of the Dublin Regulation requirements in 2008, had not carried out the transfer by the end of 2009, citing the 'dangerous and unhealthy conditions' in detention centres in Malta as the reason for not doing so (Times of Malta, 2010).

While not ideal in terms of what the CEAS hopes to achieve and involves serious human rights violations, 'bail-out' may be considered an effective strategy for small Member States into activating solidarity and burden-sharing. It can also be argued that in reality, it is simply that the southern EU Member States are just unable to bear further asylum costs to their already burdened asylum systems.

3.4.3 Coalition-Building

A third and possibly the most effective small state strategy to achieve asylum burden-sharing in the EU is through diplomacy. The main objective of norm advocacy is to allow otherwise powerless actors to gain influence (Björkdahl, 2008, p. 138) in policy areas dominated by more powerful actors. Diplomacy, defined as 'the set of norms and rules regulating relations between states' (Camilleri, 2005 citing Batora) can be considered to be an influential and effective tool for small states to highlight the need for a formalised system of asylum burden-sharing. This type of diplomacy attaches great importance to the normative aspect of international relations, particularly at the multilateral level, which has implications on the application of the rule of international law. Small state diplomacy, therefore, is focused on consensus and the rule of law rather than the large state version which is focused on power and dominance (ibid.).

Commitments by small state to norm advocacy can, however, be conceived of as two-sided. One side represents the altruistic aspect, and the other, on the notion of small state security. As Camilleri (2005) further explains:

'[The] intensity and pervasiveness of the commitment that small states can bring to the notion of international legality. They do so out of a deep-rooted and quite logical conviction that therein lie the best long-term guarantees for their own security and autonomy.'

Small states are able to create norm-focused 'networks' and 'alliances' through diplomatic relations to help them achieve their policy objectives. This highlights the interdependence of actors within the international protection regime, of which the EU is just one of the many participants. In the literature, such networks and alliances are identified as the small states' 'network capital', which includes relations with actors that have power resources (Naurin, 2007). Amongst themselves, small states may also form informal or exclusive 'clubs' as a way of strengthening their common objectives, such as the exclusive meetings and gatherings of the Ministers of the Interior of the EU Mediterranean Member States (Cyprus, Malta, Greece, Italy, Spain) prior to meetings with the Council of Ministers leading to the creation of the European

Asylum Support Office (EASO) to help states deal with the ‘burdens’ of irregular migration, among other things. Indeed, Thorhallsson and Wivel (2006, p. 664) consider EU enlargement as having changed the conditions for small-state influence, with increased potential for alliances on issues where small states have common interests. Interestingly, in terms of relative ‘power’, small state membership in the EU originated in the secondary or successive enlargements, with the original founding Member States being identified as ‘large’ and ‘powerful’ in terms of material resources.

Nasra (2011) argues that the ‘governance approach’ is the best framework for examining the mechanisms of policy ‘steering’, particularly in a setting where ‘individual state sovereignty is diluted by collective decision-making’. Foreign policy is an example of a policy area where multiple players coordinate their activities in an environment where there is a high degree of interdependence between actors and policy concerns. The international refugee protection regime is an example of such an environment, characterised by issue-linkages⁸⁰ and relations at both the bilateral and multilateral levels of interaction.

3.5 Bilateral Multilateralism: Platform for Small State Strategy

In this study, it will be demonstrated that with migration decision-making being largely intergovernmental, as argued in the previous chapter, and with both EU and international refugee protection regimes being biased towards the interests of states, it is inevitable that the norm of asylum burden-sharing is best articulated and promoted at the state, bilateral or intergovernmental level. In spite of declared commitments to ‘solidarity’, ‘fair sharing of responsibilities’ and ‘effective multilateralism’ at the supranational level, it is at the bilateral level that the operationalisation of such norms and principles takes place.

Indeed, there is nothing new about the claimed ‘EU cornerstones’ of ‘solidarity’ or ‘effective multilateralism’, as these norms ‘were followed by the Communities and their members long before establishment of the Union (Jasiński and Kacperczyk, 2005, p. 35). Further, the EU continues to make use of bilateral and unilateral strategies, with the multilateral strategy only part of the EU’s foreign policy instruments and objective (Jørgensen in Elgström and Smith, 2006, p. 32). More importantly, multilateralism is not restricted to cooperation in strictly specialised areas or to regional cooperation ((Jasiński and Kacperczyk, 2005, p. 31).

⁸⁰ For example, security and human displacement, migration and border control.

Bilateral relations are indeed an important diplomatic resource for small EU Mediterranean Member States, particularly in convincing other states and EU Member States in accepting a number of Dublin Regulation asylum seekers. Such bilateral agreements were indeed welcomed by the European Commission, in the absence of an EU-wide strategy (Kuchler, 2005). As Camilleri concludes (2005):

[Bilateralism] leads to the emergence of solidarity among smaller states as a way of counteracting the presumed freedom of manoeuvre by the larger and more powerful states. It puts a premium on notions of legitimacy, to which all states, large or small, powerful or weak, attach importance, if only for internal reasons.'

3.5.1 Alliances as Conduit to the Achievement of Asylum Burden-Sharing

Noll (2003, pp. 251-252) describes the asylum burden-sharing regime as a 'multi-actor, multi-level game' consisting of a number of 'criss-crossing alliances'. In spite of the Neo-Realist belief that institutions play a secondary role in achieving international cooperation leading to burden-sharing arrangements, both the EU institutions and the UNHCR are important 'partners' for overburdened Member States in the Mediterranean. As will be discussed in more depth in Chapter 5, all instances of 'burden-sharing' involving the redistribution of asylum seekers from the Mediterranean region to other parts of the EU and non-EU countries involved the participation of such institutions, and in the case of the EUREMA, the International Organisation for Migration (IOM) is specifically involved in the resettlement of Maltese refugees.

Bilateral relations with the UNHCR, however, pre-date the EU institutionalisation of the consultative role of the UNHCR. All EU Member States are signatory to the 1951 refugee Convention, and their recognition of the UNHCR's role leadership role in refugee protection, as well as their obligation to cooperate with the agency in its performance of such a role, is rooted in Article 35 of the 1951 Convention. Such bilateral relations with the UNHCR are also enhanced by resettlement agreements with the agency. Having a resettlement agreement with the UNHCR, for example, has made it possible for the Netherlands to accept 'refugees' from Malta via the resettlement programme (Appendix IV). In 2005 and 2006, the Dutch Government accepted recognised 'refugees' from Malta through the UNHCR's resettlement programme. However, not all EU Member States have a 'quota' agreement with the UNHCR for accepting refugees for resettlement, and the UNHCR can only resettle those who are determined to be refugees from Malta and no other EU Mediterranean Member State to other EU Member and

non-EU states such as the US, as part of its special arrangements. Indeed, only Malta and Turkey have been accorded special status in terms of refugee resettlement to other 'northern' countries, due to their particular circumstances making it impossible for them to absorb the 'refugee numbers'. Note, however, that 'asylum seekers' are not included in such an arrangement, although states can, as will be seen in Chapter 5, demand a repeat of the determination process after having received refugees and asylum seekers from Malta, as was the case in EUREMA.

Bilateral relationships continue to be an important aspect of the EU's engagement with third countries, indeed a clear example of the fragmentation of the EU's foreign policy (Joffé, 2008). Bilateral relations between the EU Member States in the Mediterranean and governments in North Africa are particularly important in the former's drive to secure the EU's borders from unwanted migrants. In the case of Italy, the Italian Government had intensified its relationship with the Libyan Government as a function of its experiences with irregular migration, which usually involved Libya as a transit country prior to arrival in the Mediterranean. France has also engaged with the Maghreb states in regard to border security and repatriation of illegal migrants (*ibid.*, p.165). Spain's bilateral relations regarding security and terrorism mostly involved Morocco and Algeria, and in relation to clandestine sea migration, it established joint naval patrols with Morocco in 2004 and Mauritania in 2006 (Joffé, 2008, p. 165). The European Commission itself provided assistance to Libya in regard to migration issues under the AENEAS programme, amounting to 'no more than a few million euros' (Frattini, 2007).

Bilateral multilateralism, which is defined as 'an institutional form that coordinates relations among three or more states on the basis of generalised principles of conduct' at the level of the sovereign state (Lucarelli, 2006, p. 55), has been instrumental in the achievement of burden-sharing for the EU's southern Member States. The framework within which it operates is the international protection regime, which the EU is but one of the many participants. As will be demonstrated in the next section, bilateral relations as a conduit for achieving the multilateralist goal of asylum burden-sharing involve a number of different actors from outside the EU realm.

3.6 Evidence of Small State-Driven Asylum Burden-Sharing Arrangements in the EU

Turning now to Table 2 presented in Chapter 2, and again presented here, the data compiled clearly indicate that burden-sharing, via relocation from Malta and resettlement in both EU and non-EU states. While the number of those resettled appears marginal in comparison to the actual number of boat arrivals as presented in Chapter 4, it signifies two important developments in the literature. First, in the refugee protection literature, the data demonstrates that even in the realm of irregular migration, burden-sharing norms and principles do have an impact on the decisions of states to accept irregular migrants, whether as asylum seekers, as is their status upon arrival in the Mediterranean, or refugees, as is their status upon relocation for resettlement. This is despite the difficulties and challenges in institutionalising a scheme designed to correct the inequalities between states regarding their intake of asylum seekers. Second, the data offers clear proof that despite claims to the contrary, asylum or refugee burden-sharing *does* exist in the EU and has done so since the application of the Dublin Regulation.

Table 5: ‘Burden-Sharing’ of Refugees and/or Asylum Seekers in the EU 2005-2010

	MEMBER STATE OF FIRST ENTRY	MEMBER/STATE OF RELOCATION	TOTAL NUMBER OF REFUGEES RELOCATED
2005	Malta	Netherlands	30-38
2006	Malta	Lithuania	6
2006	Malta	Spain, Portugal, Andorra, Netherlands, Italy	46
2007	Malta	US	200-223
2008	Malta	US	35
2009	Malta	France	92
2010	Malta	France, Germany	200 ⁸¹

⁸¹ European Commission DG Home Affairs (2010, p. 13). This represents the number of pledges under EUREMA Programme. Other pledges were made by Slovenia, Slovakia, Hungary, Poland, Romania, UK, Luxemburg and Portugal, with each taking 6-10 persons.

'Small' EU Member State norm advocacy has proven effective in facilitating the resettlement of seaborne asylum seekers from Malta to other countries, either in or outside the EU. In 2005, the Netherlands agreed to take refugees from Malta, due to the latter's 'repeated calls' for assistance. Michael Frendo, Maltese Foreign Minister stated that the Netherlands 'have understood our position and have agreed voluntarily to help us without anything in return' (Küchler, 2005).

In terms of bilateral relations, Malta's 'asylum burden' since it became a member of the EU has attracted international attention, and due to the steady flows of unauthorised boat arrivals in Malta and its inability to cope with the numbers of migrants, Malta made an appeal to the US Government, with whom it enjoyed good bilateral relations pre-dating the EU, to come to its aid, leading the US to accept 'Maltese' refugees resettlement in 2007 and 2008. The involvement of Andorra in the *Francisco y Catalina* incident of 2006 was also due to its positive bilateral relations with Spain.

In terms of 'alliances', as will be discussed further in Chapter 5, the Spanish and Dutch bilateral alliances with the UNHCR are part of the global protection framework that ultimately influenced the decisions of Spain and the Netherlands to participate in burden-sharing. In addition, Spain and the UNHCR enjoy a 'special relationship' which gives the latter considerable powers in Spain in situations of 'emergency', as confirmed by the ACNUR representative interviewed by the author (Appendix V). The physical redistribution of refugees and asylum seekers in the *Francisco y Catalina* case was facilitated by the UNHCR, demonstrating that commitments to 'effective multilateralism' at the intergovernmental level can sometimes be more efficient than that at the supranational level, the latter being subject to less simplified processes and more bureaucratic processes.

3.6.1 Small State-Driven Asylum Burden-Sharing: Confirming Neo-Realist Predictions

'The refugee problem is 'perhaps the most complex' of the many issues affecting global society at different levels. It is simultaneously an issue of law, security, resources, and ethics, and is both local and transnational in dimension.'

- (Hakovirta, 1993, p. 35)

'Institutionalisation' is defined in norm advocacy as a norm's 'mainstreaming into an organisation's discourse, procedures and structures', thereby creating policy changes and future practices (Björkdahl, 2002 cited in Björkdahl, 2008, p. 150). It is the expression of a 'small' state's ability to influence and persuade other actors to act in its interest (Nasra, 2011, p. 167). Bunse (2009) defines 'low influence' as being characterised by some issues 'being in line with a member state's interests, but some go against them', and 'no influence' as 'the absence of EU policies' or such policies 'going against a member state's preferences'. It can be argued that with the establishment of EUREMA, the 'small' Mediterranean Member States have jumped from having 'no influence' to having 'low influence' in the ongoing and challenging asylum negotiations.

The only form of asylum or refugee burden-sharing that has been institutionalised to date has been the financial aspect of it, particularly through the ERF. Nevertheless, the implementation of EUREMA, funded by the ERF, may indeed be a positive indication of future institutionalisation of an EU-wide physical burden-sharing scheme.

According to Noll (2003, p. 244), the reason 'financial burden-sharing' has been more successful than 'physical burden-sharing' lies in the fact that sharing money is less intrusive compared to 'redistributing people'. However, the ERF, while jointly financed by the Member States, only has a modest budget, and only compensates Member States only according to the absolute numbers of protection seekers they have received, rather than on the overall costs of hosting asylum seekers and processing their claims. The costs associated with the admission of asylum seekers arriving in the EU illegally also only makes up a small proportion of the overall ERF budget, given that it covers all refugee-related costs in general.

The political and legal arrangements in the EU at present, coupled with the security concerns associated with unauthorised migration and the difficulty to measure the actual 'burdens' borne by affected Member States in the Mediterranean, are indeed not conducive to any cooperative efforts needed to facilitate a formal burden-sharing arrangement. With the larger, more powerful Member States in the 'north' preferring a voluntary scheme at the intergovernmental level, as was confirmed by Belgian and UK officials in an official survey (Vanheule et al, 2011, p. 82), the 'small' Member States of the 'south' have a long way to go to achieving their goal. More importantly, the real source of the 'burdens' suffered by the EU's 'southern frontline', the Dublin Regulation, does not appear to be undergoing any revisions in the near future. This will be analysed in more depth in Chapter 6.

The Neo-Realist perspective on international cooperation predicted that the international arena is dominated by rationalist and calculating sovereign states who will never cooperate unless doing so would be in line with their security interests. When they do cooperate, efforts would be set at the 'lowest common denominator'. This systemic bias towards the preferences of the larger and more powerful states at both the EU and the international levels has been the greatest obstacle in the achievement of a formal asylum burden-sharing system. As states themselves, 'small' states have had a distinct advantage in forging cooperative arrangements in a regime that while largely (large) state-centric, has not been immune to burden-sharing norms and principles, and where institutional resources are available to support their cause. Nevertheless, they are limited in what they can achieve operating within such a resilient system.

3.7 Chapter Conclusion

Despite policy developments incorporating asylum and immigration matters into the supranational realm, the mechanism for cooperation in this policy area remains at the Member State or intergovernmental level. 'Small' EU Member States, by virtue of their being the 'victims' of the asylum inequalities created both by intensified sea border controls and the Dublin Regulation, have taken an informal leadership role in the debates advocating the establishment of a formal asylum burden-sharing system in the EU. The measures taken by the EU's 'southern frontline' have, to a certain degree, changed the landscape of a global protection regime where asylum 'burden sharing' is both highly elusive and subject to the agreement of larger states in order to operate. Nevertheless, the degree or level of 'influence' small Mediterranean Member States exercise in pushing for cooperative arrangements is itself determined by a system that is biased towards large states and one that is increasingly securitised.

Available data reveal that between 2004 and 2010, a redistribution of refugees and asylum seekers from the 'small' EU Member States in the Mediterranean to other 'larger' Member States has been taking place and facilitated through bilateral, as opposed to, supranational or multilateral relations. Cooperative arrangements designed to relieve the southern Mediterranean Member States take a bilateral form, and are based on both respect for international law and principles, and state interests. Bilateral relations, therefore, are used by 'small' Member States as a mechanism for burden-sharing, with bilateral multilateralism forming the basis of cooperation at the intra-European and international spheres. Bilateral multilateralism, which implies using bilateral forms of cooperation to achieve both multilateralist and sovereign goals, has necessarily become the *modus operandi* in the EU.

Chapter 4 provides an in-depth analysis of the Dublin Regulation, its provisions and their impact on the ability and capacity of small Mediterranean Member States to host seaborne asylum seekers. Data in regard to the volume of 'boat arrivals' in the selected Member States of Greece, Italy, Malta and Spain will be presented, along with a list of the 'asylum burdens' borne by these 'small' states, to provide an understanding of the actual 'burdens' generated by the Dublin Regulation and to shed light as to the persistent advocacy of these 'small' states for the creation of a formal asylum burden-sharing scheme in the EU.

Chapter 4: The Dublin Regulation and the Unauthorised Entry of Asylum Seekers into the EU via the Mediterranean

4.1 Introduction to the Chapter

In recent years, the maritime aspects of border control have urgently and unavoidably entered the EU agenda, with the frequent mass arrivals of unseaworthy vessels in the Mediterranean carrying economic migrants and asylum seekers alike. As a direct result of the implementation of the Dublin Regulation, which is an integral aspect of the establishment of the Common European Asylum System (CEAS) and which declares the Member State of first entry as the Member State responsible for determining asylum claims, the EU's 'southern frontline' of Italy, Spain, Greece and Malta have had to deal with large numbers of migrants illegally entering EU waters.

In this Chapter, the Dublin Regulation, its provisions and their impact on the ability and capacity of Member States to host asylum seekers arriving by sea will be analysed in-depth. Data in regard to the volume of 'boat arrivals' in the four selected Member States of Greece, Italy, Malta and Spain will be presented, and a list of the 'asylum burden' by way of costs associated with receiving asylum seekers will be enumerated, to gain a better understanding of the 'burdens' generated by the Dublin Regulation for the more marginal, less powerful Member States.

4.2 The Dublin Regulation: Main Provisions

The Dublin Regulation determines the Member State responsible for processing an asylum claim lodged in the EU, usually the Member State through which an asylum seeker first entered EU territory (ECRE, 2008, p. 4). The Regulation replaced the 1990 Dublin Convention, and aims to ensure that each claim is fairly examined by only one Member State. Allocating responsibility for processing an asylum application is made by determining the Member State that '*played the most important part in the entry or residence of the person concerned*' (European Commission, 2001, p. 756; European Commission, 2007, p. 10). Repeated applications had previously

resulted in asylum backlogs, so to prevent this from happening, the Regulation ensured that one, and only one, Member State is responsible for the claim. It also focuses on illegal entry, and prevents asylum seekers from lodging an asylum claim in a Member State of their choosing, also known as 'asylum shopping'. In regard to transfer requests, compared to the Dublin Convention, the Regulation contains shorter deadlines for countries to facilitate the transfer, thereby reducing the length of time that asylum seekers are left 'in limbo' (UK Refugee Council, 2004, pp. 8-9).

The Regulation and the original Dublin Convention also aimed to:

1. Contribute to the harmonisation of asylum policies (Preamble to the Dublin Convention);
2. Guarantee protection in line with international obligations and humanitarian tradition (Preamble to the Dublin Convention);
3. Promote free movement in an EU without internal frontiers (Preamble to the Dublin Convention);
4. Ensure efficiency through time limits, stipulations on proof required, and rapid processing of asylum applications (Dublin Convention; updated in the Dublin Regulation);
5. Ensure that one Member State examines each application to avoid the 'refugees in orbit' phenomenon (Preamble to the Dublin Convention);
6. Prevent '*multiple applications for asylum submitted simultaneously or successively by the same person in several Member States*' (European Commission, Proposal for Dublin Regulation : 3); and
7. Preserve family unity to the extent that this is compatible with other objectives (Dublin Convention, Recital 6).

In regard to the situation of unauthorised migration, the Regulation stipulates that if an asylum seeker from a third country has *irregularly crossed the border* into a Member State by land, sea or air, that Member State will be 'penalised' and shall then examine the asylum application (Balzacq and Carrera, 2005, pp. 43-45). However, it is by no means a straightforward process, and establishing the Member State responsible relies on a 'long list of criteria' (UK Refugee Council, 2004, p. 4).

The 'family unity' principle, as per item 7 above, has indeed won the support of human and refugee rights advocates. Asylum seekers will be reunited with family members⁸² who have applied for asylum or been recognised as refugees in another EU country (UK Refugee Council, 2004, pp. 8-9). Separated children will have their asylum claim considered in the Member State where a family member is present, or in the country where their application has been lodged. However, this principle is seldom invoked by the Member States.

4.3 Dublin Regulation: Building Block of the CEAS

At the 1999 European Council Summit in Tampere, the Member States decided to establish a common EU policy on immigration and asylum that would include the following elements: partnership with refugees' countries of origin, a common European asylum system, fair treatment of foreign nationals and management of migration flows. These initiatives were designed to create a level playing field across the EU in the area of asylum, and limit secondary movements or 'asylum shopping'.

As mentioned elsewhere in this thesis, the CEAS that ensued consisted of four 'building blocks': the Reception Conditions Directive, which outlined the minimum standards for the reception of asylum seekers; the Qualification Directive which set the definition and content of refugee and subsidiary protection status; the Asylum Procedures Directive, which set minimum standards on the procedures for making decisions on asylum claims; and finally, the Dublin Regulation, which formed the last 'building block' towards the achievement of the CEAS by allocating a system of responsibility for the admission of asylum seekers.

The achievement of the CEAS required a harmonisation of asylum and migration policies across the Member States, to reduce the differences in these policy areas and create a more 'level playing field' across the EU. Once the harmonisation stage is complete, negotiations would then focus on establishing a single asylum system for the bloc. However, as argued in Chapter 3, the Member States have a tendency to aim for the 'lowest common denominator' and then alter their national practices to match them. There were concerns raised by refugee and legal advocates that the Member State standards would be set so low that international human and refugee rights law would be violated. As argued by the UK Refugee Council (2004, p. 3):

⁸² Defined by the Regulation to include spouses, unmarried children and if the asylum seeker is an unmarried minor, parents.

‘During negotiations on the four building blocks of the CEAS member states have substantially watered down the standards contained in the initial Commission proposals. The UK has been instrumental in this process of driving minimum standards down and setting them at as low a level as possible, in some areas even lower than the lowest common denominator.’

It must be noted that while the first three ‘building blocks’, being ‘directives’, needed to be transposed by Member States within a set deadline, the Regulation took immediate and automatic effect.⁸³ The timing of the Regulation is significant, in that the security concerns arising from the terrorist attacks in the early 2000s as well as the flows of boat arrivals linked with organised crime through people smugglers plagued the discussions on asylum and migration in the EU.

4.3.1 EURODAC and the Dublin Regulation

EURODAC is a computerised database storing information and biometric data such as fingerprints belonging to any individual applying for asylum in a Dublin II Member State, or any person found irregularly crossing the Dublin II borders. In addition, it also contains data regarding third country nationals who are found to have irregular immigration status in the Member States. The purpose of the EURODAC is to assist in establishing the Member State responsible for examining an asylum application and to detect multiple applications lodged so as to facilitate relocation to other Member States, also known as ‘Dublin transfers’. All Member States are obligated under the Regulation to collect fingerprints and provide the data to the EURODAC Central Unit, which is under the management of the European Commission Directorate General for Justice, Freedom and Security. Compulsory fingerprinting and registration would mean that asylum seekers and irregular migrants can more easily be identified and monitored if they seek to move from one EU country to another (Balzacq and Carrera, 2005, pp. 45-46).

The accuracy and efficiency of the EURODAC has recently been questioned, as EU officials themselves acknowledged the continued practice of lodging multiple applications, which had been ‘constantly rising since 2007’ (EU Business, 2010). Member State practices of logging

⁸³ EU legislation is made up of directives and regulations which must be implemented by the Member States. ‘Directives’ stipulate the result that must be achieved, but “countries can choose how to transform the directives into national law” (UK Refugee Council, 2004, p. 3). ‘Regulations’ apply directly and are legally binding on all member states as soon as they come into force.

information have also been criticised, given that ‘almost one in four’ rejected asylum seekers lodged further claims in other Member States, and this was detected on EURODAC. The inconsistencies in storing information have inevitably affected the database’s ability to perform its responsibilities efficiently.

4.4 Unauthorised Boat Arrivals in the EU’s Southern Frontline

With the lack of consensus among Member States regarding the question of how to measure or calculate the ‘burdens’ they have suffered as a result of the application of the Dublin Regulation making them responsible for examining the asylum claims of ‘boat arrivals’, the volume or number of actual asylum seekers received can serve as proxy for the purposes of the discussion. Below is a compilation of data regarding the number of unauthorised migrants received by the EU Member States in the Mediterranean from the time the Dublin Regulation took effect to the end of 2009, obtained from a number of different sources:

Table 5. Estimated Number of Boat Arrivals in the EU from 2003 to 2009

YEAR	ESTIMATED NUMBER OF UNAUTHORISED BOAT ARRIVALS IN THE EU (Data for dead or missing not included)	MEMBER STATE OF ENTRY
2009*	27,620	10,165 (2009) – Greece via Turkey 8,700 (2009) – Italy via North Africa 1,470 (2009) – Malta via North Africa 7,285 (2009) – Spain via West Africa
2008*	67,400	15,300 (2008) – Greece via Turkey 36,000 (2008) – Italy via North Africa 2,700 (2008) – Malta via North Africa 13,400 (2008) – Spain via West Africa
2007*	59,600	19,900 (2007) – Greece via Turkey 19,900 (2007) – Italy via North Africa 1,800 (2007) – Malta via North Africa 18,000 (2007) – Spain via West Africa
2006*	64,850	9,050 (2006) – Greece via Turkey 22,000 (2006) – Italy via North Africa 1,800 (2006) – Malta via North Africa 32,000 (2006) – Spain via West Africa
2005	41,822	Not Available – Greece 10,000 (2005) – Italy** 30,000 (2005) – Spain*** 1822 (2005) – Malta~
2004	214,125	Not Available – Greece Not Available – Spain 212,737 (2004) – Italy° 1388 (2004) – Malta ~ Not Available – Greece

2003	14,519	Not Available - Spain 14,017 (2003) - Italy ^o 502 (2003) - Malta ~
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* UNHCR (2010).

**Migration Policy Institute (2005)

***BBC News (2007)

~ Munro (2009, p. 14)

^o Van Selm and Cooper (2006, p.52)

4.4.1 Data Caveats

One of the difficulties experienced in doing this study is the difficulty in obtaining accurate and consistent data in relation to the number of migrants arriving in the EU's southern shores by boat in any given year. Sources of available data also place emphasis on the fact that the figures they have provided are merely 'estimates', and this owes as much to how much information Member State interior ministry officials are willing to provide, as it does to the nature of unauthorised migration being essentially a clandestine affair. Nevertheless, statistics on unauthorised entry are restricted to counts of apprehensions outside authorised crossing points, and are the combined outcome of actual flows and the effectiveness of border control (Carling, 2007).

In regard to official EU data, it was not until July 2007 that the EU Regulation on 'migration and international protection statistics' (Council of the European Union and European Parliament, 2007) entered into force, requiring Member States to provide the Commission through the Eurostat Office with a standardised and comparable set of asylum data. However, the problem with the Dublin Regulation is that it does not make it mandatory for Member States to differentiate new asylum claims from repeat or reopened applications in the data they have to provide to the Commission. For the purposes of calculating asylum 'burdens', this would have the effect of giving an inaccurate representation of the actual costs experienced by Member States in relation to receiving asylum seekers.

4.4.2 Data Analysis

The 2009 data shows a considerable decrease (40%) in the number of illegal migrants arriving in southern Europe, as compared to the previous year. Member State and EU officials argue that the tightening of border controls in Italy and Spain contributed to this reduction (EU Business, 2010). However, the decrease in numbers may also be attributed to the global

financial crisis that year, if the theory on people smuggling as a business is applied. It is assumed that the financial crisis has had a huge impact on the ability of migrants to travel whether via regular means or illegally. As will be seen later in this analysis, prospective asylum seekers employing the services of people smugglers often pay an exorbitant amount of money for these services.

The 2006 data regarding unauthorised migrants received in Spain did not reach mainland Spain but rather disembarked in the Canary Islands. This is because of the increased border control activities in the traditional irregular migrant route to mainland Spain. Therefore, border control measures jointly conducted by Frontex and the Spanish authorities proved effective in this regard (BBC, 2009).

Malta joined the EU in 2004, and the immediate effect of the Dublin Regulation on the volume of unauthorised migrants received in Malta is apparent. There is a 36% increase in the number of migrants between 2003 and 2004, and from 2004 onwards, there was a steady increase in the number of boat arrivals. Being one of the smallest Member States in the EU, the frequent migrant flows to the small island has led to Malta leading the campaign for a redistribution of asylum responsibilities in Europe, as argued in Chapter 3.

There was a scarcity of data regarding unauthorised boat arrivals in Greece until 2006. This is because it is not a traditional destination for 'boat arrivals', but given the increased border control activities at the Spanish and Italian borders, migrants have diverted their route to Greece as a means of entering the EU. In fact, Greece is known for having a 'dysfunctional asylum system' which is under police control and for having the most stringent asylum procedures. The Human Rights Watch (2009) describes the asylum situation in Greece as follows:

'More than 99 percent of asylum seekers are denied after their first interview. In July [2009], the previous government effectively abolished asylum appeal procedures, a standard requirement under European and international human rights law. The action left adults and children alike with no effective remedy and at risk of being deported to places where their lives and safety may be at risk.'

Finally, in regard to the overall data, it must be noted that the proportion of asylum seekers from the 'irregular' migrants category is not indicated. The problem with mixed-migration, as discussed in Chapter 2, is the difficulty of distinguishing 'migrants' from 'asylum seekers' given

the similarity in their mode of transport. While ‘most’ who arrive by boat do apply for refugee protection, without clarification from interior ministry officials, the exact figures cannot be ascertained.

4.4.3 Unauthorised Migration to the EU By Sea: What Costs to the Asylum Seeker?

Before moving to the discussion on the costs borne by receiving Member States justifying the need for a formal burden-sharing scheme, it is necessary to highlight that the journey to the EU for most of the migrants and asylum seekers, apart from being dangerous, is also costly. The most reliable data to date in regard to the amount that migrants and asylum seekers pay people smugglers is provided on the website of BBC News (2007), which acknowledges the UNHCR as the main data source. However, it is important to note that these figures date back from 2007, so it is possible that there have been fluctuations in the data since it was gathered.

Based on interviews conducted by the UNHCR, migrants and asylum seekers pay the following amount to people smugglers for services rendered in facilitating their entry into the EU by boat, as of 2007:

Table 6: Prices Charged by People Smugglers (BBC, 2007)

ROUTE TO EUROPE BY SEA	PRICE CHARGED BY SMUGGLERS
From Africa to Spain via the Canary Islands	€ 1000- 1500
From North Morocco to Spain	€1000
From Libya to Italy (via Lampedusa)	€ 1500-2000

Given the economic situation in the countries of origin⁸⁴ of the majority of the unauthorised migrants entering the EU by sea, it is clear that people smuggling is indeed a costly affair. Here is when the blurring of lines between ‘smuggling’ and ‘trafficking’ takes place. As Morrison and Crosland (2001, p. 61) argue:

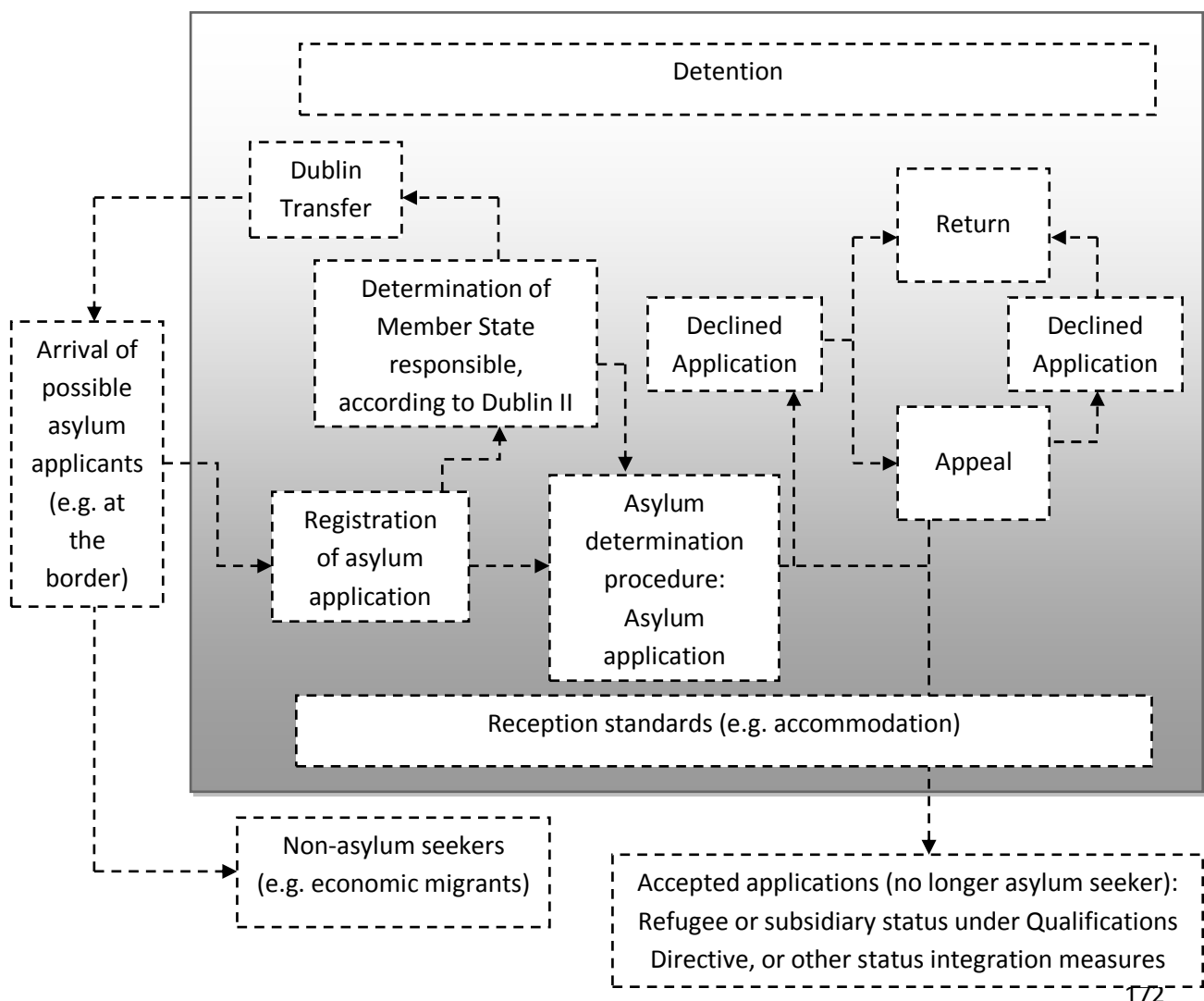
⁸⁴ Countries of origin of the majority of asylum seekers are mainly North and West African countries.

‘Someone can be a smuggled migrant one day and a trafficked victim the next. A migrant may enlist the services of a smuggler for the purpose of illegal entry into a state, but upon arrival be forced into some kind of exploitative enterprise to which they have not consented.’

4.5 Dublin Regulation and the ‘Burden’ on Member States

The problem in designing an asylum burden-sharing system in the EU, apart from its inherently complex legal and political framework and the securitisation of asylum and migration, can be attributed to the difficulty in identifying what the actual ‘burdens’ are and how to measure them. In the course of conducting this study, the 2010 report produced by Thielemann et al for the European Parliament has indeed been invaluable. In this section of the thesis, the data that will be analysed is drawn entirely from this report.

Figure 3: EU Asylum Process and Associated Costs (Thielemann et al, 2010, p. 34)



Prior to any analysis of 'costs' and 'burdens', it is necessary to get an overview of the asylum process in the EU under the Dublin Regulation. In discussing the costs or 'burdens' of the Dublin Regulation process, it is necessary to distinguish between those costs which fall under the responsibility of the Member States, and those which fall under supranational competency. As previously mentioned, the Amsterdam Treaty removed asylum policy from the intergovernmental (Third) 'pillar' and placed it within the supranational (First) pillar, where the European Commission had sole right of initiative and the European Parliament co-decision powers with the Council. However, as mentioned earlier in this study, the Member States have also retained control of their own border management practices. Therefore, there is a fragmentation of responsibilities between competency areas. For example, detention is independent of EU legislation (Thielemann et al, 2010, p. 36) and therefore any cost associated with detention is entirely the responsibility of the Member States. However, centralising functions such as the provision of country of origin information are currently under the European Asylum Support Office (EASO), as is the provision of so-called 'solidarity funds' such as the European Refugee Fund.

4.5.1 The Arrival Stage and Associated Costs

The 'arrival stage', that is, the stage where boats arrive in EU territorial waters, involves 'upstream' border management activities that target migrants who are not asylum seekers, and therefore, it is important to take this into account. Also, the costs associated with interception at sea and customs control are not exclusively related to the costs of receiving and admitting asylum seekers, as not all unauthorised migrants end up claiming asylum. There is therefore an overlap of costs between asylum and border control activities at the arrival stage.

However, the responsibility for EU-wide border control and Member State border management measures is clearly demarcated. The responsibility for the former belongs to Frontex, the European agency responsible for the cooperation in the field of external border control, as well as for facilitating practical assistance between Member States by providing technical equipment to make risks analyses in cooperation with police authorities (Spijkerboer, 2007, p. 132). Under Operation Nautilus II, Frontex patrols the waters between Malta and Libya to prevent the movement of mainly African migrants to Europe. Operating as a 'deterrent force', the navies on patrol have the task of warning incoming boat arrivals that they will face detention and other criminal procedures if they illegally entered the territory of a Member State. The Agency's expenditure in 2009 is set out as follows:

Table 7: Frontex 2009 Expenditure

<i>Expenditure per operation</i>	<i>2009 Budget in Euros (million)</i>
Operations and pilot projects at land borders	4.25
Operations and pilot projects at sea borders	36.00
Operations and pilot projects at air borders	2.65
Return cooperation	2.25
TOTAL: Operational	45.15

(Thielemann et al, 2010)

As Frontex is a border control agency, it does not have any significant impact on asylum burden-sharing. In fact, one can argue the opposite, in that it could be responsible for ‘burdens’ being redistributed to other Member States. For example, increased Frontex surveillance at the Spanish border in 2008 was considered to be responsible for the 64% increase in boat arrivals in Italy in the same period (Thielemann et al, 2010, p. 31).

On the other hand, the fact that Frontex supports and assists Member States to carry out their border control activities through the deployment of the Rapid Border Intervention Teams, and also pays for portions of their financing and equipment costs under the Community budget (Weinzierl, 2007, p. 11) means that it has a ‘burden-easing’ function, at least for the Member State benefiting from its assistance.

At the Member State level, the costs associated with border management are not known. The authors of the 2010 report stated that it has not been possible for them to obtain such data from the Member State authorities (Thielemann et al, 2010, p. 35). However, what is known is that border control at the intergovernmental level has evolved into one of ‘bilateral relations’, particularly between certain Member States and their Mediterranean counterparts. Joffe (2008, p. 165) reports that France, Britain, Spain and Italy have formed bilateral border control arrangements to target unauthorised migration from North Africa. Externally, some Member States have also strengthened links with African states. Spain, for example, has formed bilateral border control alliances with Morocco and Algeria, two countries from which terrorist suspects and unauthorised migrants have come. Regional border control alliances are also now common, as with the Association of European and Mediterranean Police Forces and Gendarmeries (FIEP), originally involving French, Spanish and Italian sea patrols, but gradually

extending to include Portuguese, Turkish, Dutch, Moroccan and Romanian forces (Joffe, 2008, p. 164).

It is likely, however, that the costs associated with border control practices at the Member State level can indeed be quite significant. Spain, for instance, has developed a state-of-the-art surveillance system, the Integrated System of External Vigilance (SIVE), and its technical expertise has attracted praise from the European Commission (Carling, 2007). The SIVE specialises in early detection, and is operated by the Guardia Civil, which is a joint military and civilian police force.

Border control measures are technically distinct from asylum, and therefore, the costs borne by Member States in association with the former should not be included in its 'asylum burden'. However, the reality of mixed migration is that the lines between border control and asylum are now blurred, and therefore, this adds to the problem of deciding what to include in the 'burden' assessment when designing a burden-sharing scheme.

4.5.2 Responsibility Determination Stage and Associated Costs

At the responsibility determination stage, the Community is responsible for the following costs: operation of EURODAC, processing of transfer requests and preparation of proof and evidence for transfer requests, through the European Asylum Support Office. The Member States, on the other hand, are responsible for the costs associated with Dublin 'transfers', which involves the physical relocation of the asylum seeker (Thielemann et al, 2010, p. 35). While asylum responsibility is being determined, Member States also bear the costs for detention, and these costs are applicable all the way up to the determination or repatriation stages. Detention activities and costs are independent of EU legislation and are therefore the complete responsibility of the Member States.

4.5.3 Reception Stage and Associated Costs

At the reception stage, the Community is responsible for costs associated with providing translation services and for monitoring the transposition of the Reception Conditions Directive through the EASO. The Member States are responsible for the provision of reception standards, which, as specified by EU legislation, include housing, health care, education for minors, and special needs assistance for vulnerable groups. Indeed, these costs apply up to the time the

asylum claim is accepted, or the asylum seeker is expelled. As will be shown in Figure 3, such costs are classified by Member States themselves as ‘particularly high’. However, the wide discretion permitted by the Reception Conditions Directive, specifically in areas such as employment, health care, and level and form of material reception conditions, ‘impinge on the creation of a level playing field’ amongst Member States and is therefore problematic (Europa, 2007).

4.5.4 Asylum Procedure Stage and Associated Costs

At the asylum procedure stage, the Community is responsible for the costs associated with translation, preparation of documentation and information materials, as well as the training of EASO staff.

The Member States bear the general procedural costs, which include appeals, hearings and detention costs (Thielemann et al, 2010, p. 37). At this juncture, it is necessary to address the question of ‘efficiency’ against ‘quality’ of procedure. Some Member States have particularly long assessment periods, which have a significant impact on the costs for the provision of reception conditions. However, Member States that use ‘accelerated procedures’ such as the Netherlands are criticised for making unsafe decisions, which usually result in the *refoulement* of the asylum seeker (ibid., p. 38).

4.5.5 Stage of Return and Associated Costs

Costs associated with integrated return, negotiations with third countries, life skills training and financial incentives to return fall under the responsibility of the Community, under the European Refugee Fund. On the other hand, the Member States are responsible for the costs associated with custody, material support, voluntary accommodation and schooling for minors (Thielemann et al, 2010, p. 36).

4.5.6 Integration or Post-Decision Costs

The cut-off point for asylum costs is indeed difficult to ascertain, and is not within the scope of this study. However, ‘integration measures’ may indeed be relevant in the discussion. Once an asylum seeker is granted refugee and residency status, that individual’s integration in EU society also has costs associated with it, such as social security, employment and

accommodation. However, these costs overlap with other policy areas (Thielemann et al, 2010, p. 36).

The EU has the competency to provide financial support for integration measures, and this should help lower the overall costs associated with the integration of third country nationals (ibid.). At the Member State level, in most Member States, it is generally the national public authorities who bear the costs of integration. While ‘burdens’ associated with integration measures may be an issue beyond the scope of the asylum burden-sharing debate, from the point of view of the Member States, the question of how they would be able to absorb third country nationals deserving of protection is relevant to the debate and should be included in the discussion.

Figure 4: Costs Associated with Receiving Asylum Seekers

STAGE OF PROCESS	COSTS UNDER EU RESPONSIBILITY	COSTS UNDER MEMBER STATE RESPONSIBILITY	PARTICULARLY HIGH COSTS⁸⁵
1) ARRIVAL	Coordinated border Management activities	General border Management	Unknown
2) DETERMINING RESPONSIBILITY	<ul style="list-style-type: none"> - Implementation of EURODAC - Processing transfers - Preparation of evidence for transfer requests - Travel costs 	<ul style="list-style-type: none"> - Detention/custody - Transit zones - General return costs 	EURODAC; DETENTION; TRAVEL COSTS
3) RECEPTION	<ul style="list-style-type: none"> - Translation/interpretation - Monitoring transposition of Reception Directive (EASO) - Development of service standards in Reception Directive (EASO) 	<ul style="list-style-type: none"> - General provision of reception standards when not specifically prescribed by EU legislation (Housing; health care; education of minors; other material reception costs) 	HOUSING; FOOD; CLOTHING; HEALTH CARE; TRANSLATION
4) PROCEDURE	<ul style="list-style-type: none"> - Assessment of claims - Preparation of documents - Country information - Negotiations with third countries - Staff training - Translation/interpretation 	<ul style="list-style-type: none"> - General procedural costs (appeals and hearings) - Detention during application assessment 	ASSESSMENT; LEGAL AID; TRANSLATION; APPEALS

⁸⁵ As identified in Thielemann et al, 2010, p. 39.

5) RETURN; or	<ul style="list-style-type: none"> - Integrated return - Financial incentives - Translation/interpretation - Negotiations with third country - Staff training - Life skills training 	<ul style="list-style-type: none"> - Custody - Medical support - Accommodation (Voluntary) - Schooling for minors 	TRAVEL COSTS; ESCORTED RETURN; CUSTODY
INTEGRATION	Financial assistance to support integration measures	(Not specified)	FAMILY REUNION; INTEGRATION; HEALTH CARE

(Thielemann et al, 2010, p. 45)

As can be seen from the above data, the costs associated with the implementation of the Dublin Regulation, particularly as regards taking and storing fingerprints, detention or custody costs, and costs of travel and escorts (Thielemann et al, 2010, p. 39), are classified as ‘particularly high’. This means that Member States receiving large numbers of unauthorised boat arrivals by virtue of their geographic location have to bear these costs, while those who are geographically out of reach of people smugglers and unauthorised migrants do not have to bear such a ‘burden’.

It is important to note that while in most cases, it is the national public authorities who bear the largest burden in terms of reception costs, in some Member States, NGOs shoulder such costs. In Spain, for example, as regard the hosting of the *Francisco y Catalina* asylum seekers while awaiting the determination of their refugee claims in 2006, the regional authorities as Castilla-La Mancha and ACCÉM, an NGO, bore much of the costs associated with their reception and asylum procedures.⁸⁶

In addition, it is necessary to take into account the fact that there may be differences in Member States’ accounting services when reporting costs, and cost categories may differ across Member States. For example, ‘housing’ in one Member State may include only the basic costs, while others may include costs related to building maintenance (Thielemann et al, 2010, p. 82). Therefore, there are limits to the comparability of these costs or ‘burdens’, and as discussed in

⁸⁶ As the author discovered during a visit to the Centro de Acogida Refugiados (‘asylum installation centre’) Castilla-La Mancha, Spain, December 2006.

the literature review in Chapter 2, the difficulty in calculating actual costs lies in the fact that the 'burdens' presented by the Member States may be both real or perceived.

4.6 Burden-Sharing: A Question of 'Capacity'

Proposals have been made to use different indices to measure the actual or relative 'burden' on Member States as regard asylum costs, and also to determine the capacity of the Member States to absorb these cost (Thielemann et al, 2010; Czaika, 2005). A Refugee Burden Index (RBI) is often used as a surrogate measure for the 'burden' on host states, and measures such 'burdens' using different distribution keys or a combination of them (Czaika, 2005, p. 107). However, this methodology has been criticised for its results being largely driven by an applied egalitarian concept, and also for the ad hoc determination of the relative importance of the different economic, political and social indicators for representing a state's hosting capacity (Czaika, 2005, p. 122).

GDP per capita is the most widely used measure for a Member States' ability to cope with asylum seekers. The assumption is that the higher a country's GDP per capita, the higher the capability or capacity to provide basic economic and social resources to a refugee population and the less the burden is per refugee to the host country (Czaika, 2005, p. 107). However, the UNHCR points out that in relation to the southern EU Member States, GDP per capita may not adequately take into account the contribution of the informal or underground economy to the country's wealth (UNHCR, 2005, p. 51).

In addition to the above, a Member States' capacity to absorb asylum seekers is also often calculated against its population size and surface area/arable land. However, these criteria have limitations in that in most cases, asylum seekers are not evenly distributed over the national territory. In addition, surface area does not always determine a state's capacity to host asylum seekers.⁸⁷

Finally, state performance in terms of providing capable democratic processing and efficient governance structures is believed to determine a host state's ability to manage societal stability in times of a large influx of asylum seekers, and an example is the dataset on 'political rights and

⁸⁷ The UNHCR (2005), for example, notes that between 2000 and 2004, in relation to the size of the national territory, it was found that 7 out of 10 countries with the lowest capacity to host refugees were located in Europe: Switzerland, Denmark, Malta, Germany, Serbia, Montenegro, Netherlands and Armenia.

civil liberties' collected by Freedom House (Czaika, 2005). However, this criterion may be redundant in the EU discussions on asylum burden-sharing, given that all Member States operate under a democratic system of government, and democracy, rule of law and recognition of human rights are preconditions for EU membership.

However, for the purposes of this analysis, the findings of Thielemann et al (2010) looking at the Member States' 'capacity' data will be mentioned here. The authors tested a number of indicators (GDP per capita, population size, population density) and combinations of indicators, resulting in different rankings for the EU-27 Member States depending on the combinations of indicators used, with the exception of Malta. When looking at the GDP per capita (50% weighting), population (25% weighting) and population density (25% weighting), Malta came out with the lowest capacity out of all Member States. When assigning equal weighting to GDP per capita and population size, Malta still came out with the lowest capacity. Finally, when combining GDP per capita and population density with equal weighting, Malta also ranked the lowest at 27th place, although Spain, Greece and Italy ranked 8th, 10th and 16th respectively.

The report's data for 'asylum flows' were based on the number of asylum applications received as provided by Eurostat's 2007 figures (Thielemann et al, 2010, p. 60). The figures included asylum applications received from migrants who have entered the EU both through regular or irregular means, and the breakdown of figures referring specifically to seaborne asylum seekers were not distinguished. Nevertheless, Greece ranked 4th highest overall. As previously discussed, the sudden increase in unauthorised migration flows to Greece is believed to have resulted from increased border control activities in Spain, indeed an example of unintentional 'burden shifting'.

4.7 Existing EU Instruments to Assist 'Overburdened' Member States?

The ERF is often cited as an instrument designed to financially compensate overburdened Member States. However, the way it operates is through an ex-post reparative mechanism as opposed to preventive people-sharing mechanism (Barbou de Places, 2002, p. 20). In addition, it has a rather modest budget⁸⁸, and compensates Member States only according to the absolute

⁸⁸ The ERF is in its 3rd round covering the period 2008-2013, with a total budget of €628 million. Of this, €566 million is being distributed among Member States according to 'objective criteria relating to the number of asylum seekers' and integrating persons benefiting from international protection (Thielemann et al, 2010, pp. 46-47). In 2007, the total amount distributed for all target groups to Member States for the 5-year period covered only 14% of the total asylum costs in EU-27.

numbers of asylum seekers received, and not on the overall costs of hosting them and processing their protection claims (Thielemann et al, 2010, p. 46). In addition, the ERF budget covers not just asylum seekers but also those benefiting from international protection. However, the ‘responsibility-sharing’ element of the ERF can be seen in its objective:

‘to support and improve the efforts of Member States to grant reception conditions to refugees, displaced persons and beneficiaries of subsidiary protection, to apply fair and effective asylum procedures and to promote good practices in the field of asylum so as to protect the rights of persons requiring international protection and enable Member States asylum systems to work efficiently.’

Noll (2000, p. 315) refers to the ERF’s financial assistance as merely ‘symbolic’, and according to a report by the European Commission (2009 b):

‘the ERF clearly lacks the resources needed to effectively finance the real efforts made by Member States to implement refugee policy. As an example, the French asylum administration (OFPRA) alone costs approximately €50 million a year, while the total resources of the ERF for 2008, to be allocated to the 27 Member States are approximately €75 million’.

It is important to mention in this study that the *Council Directive on Temporary Protection in the Case of Mass Influx* (Council of the European Union, 2001), which is seen to be a responsibility-sharing mechanism, is already in place. It operates on the principle of double voluntarism, which requires the agreement of both recipient state and individuals before a transfer is arranged. However, it is yet to be invoked, and so it is not possible to assess the impact it would or could have on the asylum burden of the EU Member States in the Mediterranean.

4.8 Dublin Transfers: Relieving the Pressure from the Southern Frontline?

Within the Dublin Regulation system, an instrument which has the responsibility for alleviating the asylum pressures on Member states is the EURODAC, as in theory it guarantees the detection of all multiple applications. Based on the data it receives, it is able to identify asylum seekers who are required to be relocated to other Member States if those Member States these played the most significant role in their entry into the EU. However, its burden ‘easing’ role is indeed limited.

Multiple applications constitute only a small fraction of all asylum applications, and while the EURODAC can *detect* multiple claims, it is often not able to *prevent* the examination of those claims, which increase the costs for Member States. As shown in Figure 3, asylum procedures costs are classified as belonging to the ‘particularly high’ cost category. It is also estimated that only a small proportion of asylum applications result in ‘take charge’ requests (European Parliament, 2009). The UNHCR reported that in 2005, only approximately 30% of transfer requests were effected (UNHCR, 2006, p. 2). Therefore, despite the EURODAC having the potential to prevent unnecessary costs being borne by Member States, in practice, it is not able to assist in redistributing asylum-related costs across the EU. This necessarily means that in the overwhelming majority of cases, the responsibility remains with the Member State of first entry, which is often one of the four Member States in the EU’s ‘southern frontline’.

4.9 Chapter Conclusion

This Chapter looked at the impact of the Dublin Regulation on the distribution of asylum-related costs across the EU27, and its role in the concentration of these costs in the Mediterranean region, affecting mainly Spain, Italy, Greece and Malta. Due to its requirement that the Member State which has played the most significant role in the entry of the asylum seeker to the EU is also the Member State responsible for processing the asylum claim, in the case of unauthorised boat arrivals, it is in most cases the Member State at the sea border that is responsible. The many costs associated with receiving an asylum seeker are high, but those related specifically to processing the asylum applications are considered to be ‘particularly high’. Multiplying these costs with the actual number of asylum seekers received would give an indication as to the magnitude of the issue and urgency of the burden-sharing debate in the EU, particularly for the Mediterranean States. The fact that there is currently a lack of burden redistribution mechanisms in the EU adds to the ‘asylum problem’.

As any discussion on burden-sharing is essentially about costs, it was necessary in this Chapter to look at the costs not just on Member States but also the costs borne at the Community level, and the costs to the asylum seekers themselves.

In Chapter 5, actual cases of boat arrivals will be looked at to determine how the EU has so far tackled the issue of, and calls for, burden-sharing in the absence of any formal redistribution mechanisms. These cases highlight the important fact that asylum and migration-related 'burdens' go well beyond monetary calculations, as well as the instrumental role the 'overburdened' 'small' Mediterranean EU Member States themselves played in facilitating the relocation of asylum seekers to other EU Member States and indeed, to non-EU states as well.

Chapter 5:

Evidence of Burden-Sharing as a ‘Small’ EU Member State Enterprise: Physical Redistribution of Asylum Seekers from the ‘Southern Frontline’ from 2005 to 2010

5.1 Introduction

In the previous chapter, the asylum ‘burdens’ generated by the Dublin Regulation and suffered by the ‘small’ EU Mediterranean Member States were presented and analysed. The present chapter continues the discussion in Chapter 3 in regard to asylum burden-sharing in the EU as driven by both multilateralist goals and national interests of Spain, Greece, Italy and Malta – indeed, the less powerful EU Member States in terms of resources and power capabilities – using bilateral relations as an effective platform for their ‘norm advocacy’ for the creation of an institutionalised system of solidarity and responsibility-sharing in the asylum field. As argued elsewhere in this study, the achievements and limitations of this ‘small’ state-driven enterprise can best be explained by the Neo-Realist perspective on international cooperation, which places emphasis on the ‘system’ itself as the source of constraints for states in reaching cooperative agreements.

The EU has not been very successful in creating and formalising redistributive mechanisms that would ease the ‘burden’ shouldered by Member States receiving hugely disproportionate numbers of unauthorised migrants and asylum seekers on the basis of geography under the Dublin Regulation. Thus far, proposals for a formal and compulsory burden-sharing arrangement have been rejected in the EU by Member States, and the only consensus achieved is in having a limited degree of fiscal sharing through the ERF (Noll, 2003, p. 240). Instead of burden ‘sharing’, the Member States’ usual response to the unauthorised boat arrivals of asylum seekers can be categorised as burden ‘shirking’, which involves preventing the migrants from reaching EU shores at the first instance, or burden ‘shifting’ (Uçarar, 2006), which involves the

deportation of asylum seekers and redirecting the asylum procedures responsibility to third countries, or indeed other Member States themselves, as was the case in Greece after 2006.⁸⁹

The central focus in this Chapter is the absence of formal burden-sharing arrangements in the EU in the fields of asylum and unauthorised migration, and the question of what alternative measures are being carried out in the absence of such a formal framework. After all, the Member States continue to have sovereign control over matters related to security, border management and entry of third country nationals into their territory. In addition, the EU as a whole has obligations to international law and the refugee protection regime, and the assumption is that it abides by those obligations.

As Durieux (2009, p. 77) contends, ‘what has been far less researched is the congruence of inter-state transfers of asylum seekers, including through unilateral decisions’. This chapter seeks to demonstrate that ‘burden-sharing’ arrangements are completely at the discretion of Member States, and some EU responses to boat arrivals have, in fact amounted to some form of ‘burden-sharing’. The leadership role of the ‘small’ EU Member States in the Mediterranean, specifically in their platform of ‘norm advocacy’, will be highlighted in the analysis as being responsible for such developments, with a specific focus on their strategies of ‘framing’, ‘bail out’ and ‘coalition building’.

5.2 ‘Burden-Sharing’ Cases 2005-2010

Table 2 in Chapter 2.4 clearly demonstrated that between 2005 and 2010, physical transfers of asylum seekers and/or refugees from the troubled EU Member States in the Mediterranean to other EU and non-EU states with the aim of helping alleviate the ‘burdens’ suffered by the former due to the requirements of the Dublin Regulation making the Member State of first entry responsible for hearing asylum claims, and due to the phenomenon of people smuggling facilitating the unauthorised entry of asylum seekers into the southern EU Member States in the Mediterranean region. As presented in Chapter 3, with the reluctance and refusal of primarily the ‘larger’ and more powerful Member States in the EU ‘north’ to institutionalise a formal asylum burden-sharing system, the EU’s ‘southern frontline’ states in the Mediterranean have

⁸⁹ Unauthorised migrants began entering the EU through Greece after heightened border control activities made it difficult for boats to travel to Spain, as discussed in Chapters 3 and 4.

had to improvise measures to help counter the asylum burden imbalance. It must be noted that investigating actual cases of EU 'burden sharing' was a challenging task, given that they are limited and are yet to attract academic interest. References to actual cases of physical transfers of asylum seekers are often part of broader (largely media) discussions on 'why' there is a need for formal burden-sharing in the EU, rather than 'how' these were achieved or carried out. The data compiled in this study are presented below.

5.2.1 2005 Relocation of 36-38 refugees from Malta to the Netherlands

In an interview with representatives of the Dutch Ministry of Immigration and Naturalisation Service in 2006 (Appendix IV), the author was informed that the Netherlands was involved in a bilateral burden-sharing scheme with Malta in November 2005. The Netherlands replied to an appeal from Malta to assist the tiny island state by accepting '36-38 refugees' for resettlement in the Netherlands. According to the interview respondents, other Member States rejected the Maltese Government's request for assistance, and the Netherlands was the first Member State to respond.

Despite media claims that asylum burden-sharing did not take place until the *Francisco y Catalina* incident of 2006, the informal agreement between Dutch Immigration Minister Rita Verdonk and Maltese Deputy Minister Tonio Borg was in fact the very first time burden-sharing had taken place involving the relocation of migrants from a 'small' Mediterranean Member State to a 'northern' Member State. It is also important to note that in terms of 'migrants', the Dutch Government selected those who were already recognised to have met the definition of a 'refugee' under the 1951 Refugee Convention. Indeed, in an unusual move, 'persons recognised from a single EU state as *refugees* according to the Geneva Convention were given the right to reside in another EU state' (Cassar, 2005).

The 'framing' of the asylum burden question as an urgent, humanitarian issue by Malta has appeared to have been effective in convincing the Dutch Government to help Malta. Further, Maltese burden-sharing advocacy took place during the Dutch Council Presidency and at the start of the Hague Programme (European Commission, 2010c). Intended to be a 'one-off exercise' and expected to create a 'snow-ball effect' on other Member States to follow the 'Dutch example', the relocation-for-resettlement arrangement was a relatively swift process, given that it followed formal resettlement procedures laid down by the UNHCR. Under the Dutch-UNHCR

bilateral relations, the former has agreed to a yearly quota of 500 resettlement places for refugees in the Netherlands (Zieck, 2011).

5.2.2 2006 Relocation of 6 Asylum Seekers from Malta to Lithuania

Lithuania, one of the newer Member States to have joined the EU, agreed to accept two families from Malta consisting of six members who were *asylum seekers*, their protection claims having not been heard by Malta (European Commission 2010c: 16). The relocation was largely experimental for Lithuania, who did not have a properly working asylum system at the time of its acceptance of the asylum seekers. In fact, its system was adapted to match the needs of the two families and was a costly endeavour (ibid.). While the relocation process itself was voluntary, the lack of information about Lithuania and Malta not enabling the asylum seekers to make an informed decision about their transfer from Malta has been a challenging experience for both the host society and the two families. Lithuania also did not have the ethnic communities needed for the successful integration of the families, resulting in the latter's request to be moved to other Member States where communities of the same national background exist. Nevertheless, the voluntary admission of asylum seekers from Malta by the Lithuanian Government demonstrates the operation of solidarity between two of the more marginal Member States in terms of relative power vis-à-vis the larger ones.

5.2.3 2006 Relocation of 51 refugees from Malta under *Francisco y Catalina*

On 14 or 15 July 2006, the captain of a Spanish fishing trawler, Giuseppe Dura, came upon 51 mainly African migrants, including two women, one of whom was pregnant, 'frantically waiving from a stranded boat 113 miles of the coast of Libya and 100 from Malta', on the line between the Maltese and Libyan Search and Rescue Zone (Bilefsky, 2006). The captain contacted the Spanish Rescue Coordination Centre by radio for assistance on a distress channel, but did not receive any response. Fearing that the migrants could drown, the captain and his nine crew members decided to rescue the migrants themselves.

The Spanish Rescue Coordination Centre later made calls to the sea rescue coordination centre in Malta, and requested that they allow the Spanish trawler to dock and disembark the rescued migrants in Malta. However, Malta refused, and the Maltese Foreign Minister, Michael Frendo, justified this decision by arguing that since the Spanish vessel had 'picked up the illegal

immigrants in Libya's Search and Rescue Area', Malta was under no obligation to receive them. He also added that 'Malta [had] enough burden already' (Malta Media News, 2006). For the next six days, the migrants remained stranded on board the *Francisco y Catalina* under extreme conditions of overcrowding and with some of the migrants falling ill (JRS, 2006). However, two days after the rescue, the Spanish Foreign Ministry sent two Spanish policemen to Malta to help identify the nationalities of the migrants for the purpose of repatriation (Malta Media News, 2006).

With Malta determined not to accept the rescued migrants, the Spanish authorities contacted the UNHCR Headquarters in Geneva to ask for intervention. The UNHCR then contacted the Maltese authorities to express humanitarian concern for migrants whose health was deteriorating at this stage, and underlined the need to disembark them as soon as possible in a place where they can receive assistance. The UNHCR also called on EU Member States to 'work with and support Malta to find an appropriate solution in the spirit of solidarity and burden-sharing' (UNHCR, 2005), and on 20 July 2006, an agreement was reached to arrange the transfer of the 51 migrants to Spain, Italy, Libya, Andorra and Malta. The UNHCR later decided it best not to send 10 of the migrants to Libya, and instead sent 5 of the migrants each to the Netherlands and Portugal, as Libya is not signatory to the 1951 Refugee Convention. After much deliberation, the final 'burden sharing' figures were as follows: Spain (19), Italy (12), Netherlands (5), Portugal (5), Andorra (5) and Malta (5)⁹⁰.

Malta's Interior Minister, Tonio Borg, declared after the negotiations that 'Europe has finally realised that Malta can't handle this strain alone', adding that this incident has been 'the first example of burden-sharing and it must continue' (Woolfs, 2006). The Maltese Foreign Minister, Michael Frendo added that 'Europe has finally realised our limits. This has been an example of collaboration and how such a burden can be shared' (ibid.).

During interviews conducted with a representative from the Justice, Security and Civil Liberties Committee of the European Parliament (LIBE) (Appendix V) and the Madrid-based Office of the UNHCR (ACNUR) (Appendix VI), it transpired that both the European Commission Justice and Home Affairs Commissioner, Franco Frattini, and the UNHCR High Commissioner himself, Antonio Guterres, took a lead role in kick-starting the negotiations for a burden-sharing agreement, contrary to media reports. Such an account is supported by an independent analysis

⁹⁰ UNHCR-Brussels, document untitled and undated provided to the author.

regarding the role of the UNHCR in the transfer of the five *Francisco y Catalina* refugees to the Netherlands under the UNHCR resettlement programme (Zieck, 2011).

This case clearly demonstrates the usefulness of 'small' Member State 'bail out' strategy, as discussed in Chapter 3. By reneging on their Dublin Regulation responsibilities, other Member States, with sufficient persuasion from the EU supranational institutions and the UNHCR, end up admitting a limited number of asylum seekers or refugees. Despite the lack of interest and inclination to share the asylum 'burdens' at the start, references to normative principles which characterise the global protection regime may indeed trigger a sense of solidarity with the smaller Member States in the Mediterranean, such as Malta. The involvement of Italy and Spain, themselves strained by the asylum pressures, is also surprising, but is a clear demonstration of solidarity with their fellow 'small' Mediterranean Member State. Finally, the participation of Andorra, a non-EU European small state and non-signatory to the 1951 Refugee Convention, can be traced to its political relations with Spain, showing the predominance of 'alliances' in the burden-sharing arrangement.

5.2.4 2007 Relocation of 223 African refugees from Malta to the US

Malta's 'asylum burden' since it became a member of the EU has attracted international attention, and due to the steady flows of unauthorised boat arrivals in Malta and its inability to cope with the numbers of migrants, it made an appeal to the US Government to come to its aid. In 2007, the US accepted 223 'refugees' (Munro, 2009; Lutterbeck, 2009).

5.2.5 2008 Relocation of 35 African refugees from Malta to the US

Less than a year after accepting over 200 refugees from Malta, the US accepted a further 35 refugees from Malta, as part of its resettlement programme (Munro, 2009). In fact, it is believed that as a result of US involvement is the resettlement of largely Somali refugees from Malta, more would-be asylum seekers now plan to go to Malta with the intention of being transferred to the US (Malta Star, 2012).

The strategic bilateral relations between the US and Malta are seen as pivotal in the agreement with the former to accept a significant number of refugees from the latter. Both countries have had full diplomatic relations since Malta's independence in 1964, and during the Arab Spring Affair of 2011 which resulted in the mass departures of citizens from the North African

continent following political revolutions and demonstrations in such countries as Libya, Egypt, Tunisia and Yemen, Malta's strategic location between Europe and North Africa has proven useful to the US in coordinating humanitarian aid and providing assistance to the 'forces of nations involved in the enforcement of UN Security Council Resolutions' (US Department of State, 2012). However, the US Government's 'real' motives in its gesture of burden-sharing and solidarity with Malta are seen to lie in the former's intention to obtain a 'Status of Forces Agreement' (SOFA) with the latter (Stagno-Navarra, 2012). A SOFA 'determines what privileges, facilities and immunities will apply to military forces when they are present on Maltese territory' (ibid.).

5.2.6 2009 Relocation of refugees from Malta to other EU countries

There are conflicting reports as to the total number of relocated refugees from Malta to other EU countries in 2009. Maltese Prime Minister Lawrence Gonzi announced that by May 2009, a total of '80' had been transferred from Malta to other EU Member States on a voluntary basis (Malta Star 2009a).

In July 2009, France and Malta reached an agreement under a 'pilot EU relocation scheme' that facilitated the resettlement of 92 recognised refugees from Malta in France (Thielemann et al, 2010, p. 46). A large number of these refugees had been living in Malta 'for years' (Shrago, 2009), and this was the first time that they were properly resettled. The French Immigration Minister declared that France's action demonstrates its solidarity with an EU Member States that was facing 'extreme pressures' of unauthorised migration, and that he came to Malta 'to symbolically send a message to the other EU member states on how burden-sharing can work effectively'. He added further that (Xuereb, 2009):

'Greece, Cyprus, Malta and Italy wanted the pact to be mandatory but there were other states that did not agree. Voluntary is the first step which led to this pilot project and I hope this will develop into other proper mechanisms.'

5.2.7 2010 Relocation of 200 refugees from Malta to France and Germany

As part of a recent, intra-European initiative to help Malta cope with its asylum burdens via the EUREMA programme, 100 refugees were relocated to France, and another 100 were relocated to Germany for resettlement (Malta Star 2009b; Times of Malta 2010b). The move was not only seen as an act of intra-EU solidarity involving the 10 Member States of France, Germany, Luxembourg, Hungary, Poland, Portugal, Slovenia, Slovakia, Romania and the United Kingdom. It was also seen as competing with the resettlement programme Malta has established with the US, which by early 2011, totalled to 500 migrants relocated to the US.

As can be observed, the receiving Member States were accepted migrants who were already given refugee status in Malta, and in this sense, it can be argued that the asylum costs were in fact already borne by Malta itself. Therefore, the 'burdens' that such a relocation arrangement is designed to alleviate are those associated with the resettlement and integration stages of the 'displacement cycle'. Moreover, the requirements of the CEAS and the 1951 Refugee Convention were not the only criteria for selection. France, for example, took consideration of its work requirements, humanitarian policy and family reunification provisions when making their selection.

5.3 Small-State Burden-Sharing Norm Advocacy: Limits and Potential

The southern EU Member States of Greece, Italy, Malta and Spain are indeed disadvantaged by EU primary law, in the form of the Dublin Regulation, and international refugee and maritime law, on the mere basis of their geographical location. Being coastal states, their waters are penetrated by unauthorised migrants claiming protection, and being exposed to water they are bound by maritime law to provide rescue services, disembark the migrants, and once the migrants are in their territory, the obligation to hear their claims under international refugee law is activated. Despite being members of an exclusive bloc where the norms of solidarity, effective multilateralism and fair sharing of burdens dictate the day-to-day operation of the 'super-state' that is the EU, the 'small' and powerless 'Dublin Regulation' states have not been successful in their campaign for the introduction of a formal system of asylum burden-sharing in the EU.

In Chapter 3, the limits of 'small' Mediterranean Member State norm advocacy are attributed to the 'systems failure' of the global protection regime itself, which, in the Neo-Realist perspective on international cooperation, is itself due to the centrality and dominance of larger states in the international arena and their reluctance to institutionalise a responsibility-sharing system. The EU being a part of this regime therefore has to operate within the limitations imposed by this regime, and the large-state centredness of the protection regime is itself mirrored in the current arrangements in the EU where the more powerless states are unable to change the *status quo* through formal and institutional means.

Nevertheless, the EU's southern frontline states in the Mediterranean are able to access institutional resources to help maintain their credibility in their norm advocacy, and have developed their strategies of framing, 'bail-out' and coalition-building or networking. In terms of the latter, bilateral relations at the intergovernmental level have proven to be the most effective burden-sharing resource. While the global protection regime and indeed the EU itself are dependent on the goodwill of the larger or more powerful states, as is demonstrated in the EUREMA relocation programme and the US-Malta resettlement agreement, norms and values do have a role to play in the burden-sharing game. However, 'state sovereignty' being one of the most important norms in international law, as outlined in Chapters 2 and 3, supersedes all other norms, including those of solidarity, burden-sharing and effective multilateralism, all of which characterise the EU's political ambition.

In the next section, the concepts of 'informal governance' and 'bilateral alliances' will be discussed in regard specifically to their role in helping 'small' Member States in the Mediterranean achieve their goal of asylum burden-sharing, as well as their limitations in terms of institutionalising this 'achievement'.

5.3.1 Clandestine Response to Clandestine Migration?

'Small' EU Member State norm advocacy has been argued in this study to be consisted of three strategies of 'framing', 'bail out' and 'coalition-building'. While this study has identified the platform for the application of these strategies and for the achievement of asylum burden-sharing to be that of bilateral alliances, it is also important to acknowledge the role of the 'informal sphere' in helping advance the case for solidarity and fair sharing of burdens in the

asylum field. After all, informal arrangements are 'essential in the functioning even of formal institutions' (Christiansen and Neuhold, 2012).

While much of the discussion on the EU and Member State cooperation is focused on formal institutions and formal arrangements, the informal decision-making arena, described by Brie and Stölting (in Christiansen and Neuhold, 2012, p. 19) as having 'the aura of the irrational and the irregular', also has a role to play. Consultations and negotiations between the Netherlands and Malta in 2005, for example, took place in the informal sphere, with the relocation of recognised refugees between EU Member States having never been carried out prior to this, and therefore, with the absence of any 'blueprints' for such an arrangement, much of the negotiation took place 'behind closed doors'. The interview respondents from the Dutch Immigration and Naturalisation Service described the agreement as having resulted from a 'political decision' by the Dutch Government (Appendix IV).

Most of the events leading up to the creation of criss-crossing alliances in the *Francisco y Catalina* affair of 2006 also took place in the informal sphere, with cultural relations playing an important role in convincing other EU and non-EU Member States to admit a number of the asylum seekers or refugees from the fishing vessel. For example, Spain's cultural relations with Portugal and the UN High Commissioner's Portuguese nationality were instrumental in the redistribution to Portugal of the asylum seekers from the Spanish-owned fishing vessel (Appendix V). In the case of Andorra, which is not an EU Member State nor a 1951 Refugee Convention signatory, the tiny principality's link to the EU is through Spain, which governs it jointly with France.

Even at the formal and institutional level, the 'small' Mediterranean Member States' norm advocacy operated in the informal sphere at the Council of Ministers and the Council Presidency, where informal meetings and negotiations take place. This is not unique to the asylum burden-sharing problem in the EU, but is rather a reflection of the fragmentation of decision-making powers in the EU. The informal sphere is largely intergovernmental, and its design caters to the needs and interests of the Member States, away from the supranational or institutional microscope.

Nevertheless, the degree with which informal influence and relations have contributed to asylum burden-sharing in the form of physical redistribution is difficult to measure or assess. As Auel (2006, p. 264) argues, informal influence 'takes place behind closed doors, which makes it

generally more difficult to assess its 'success rate'. The informal burden-sharing arrangements arise out of the shortcomings of the EU's institutional design, although such responses are largely reactive and carried out only after all means to 'shift' or to 'shirk' have been exhausted.

5.3.2 Bilateral Alliances as Key to Asylum Burden-Sharing in the EU

Coalition-building is one of the key strategies employed by less powerful EU Member States to advance their advocacy for institutionalised asylum burden-sharing in the EU. As argued elsewhere in this study, such 'coalitions' or 'alliances' are carried out at the bilateral or intergovernmental level, with the EU's supranational institutions playing only a 'supporting role'. Nevertheless, as is argued by the Neo-Realist perspective on international cooperation, any cooperative arrangement reached in these alliances is ultimately driven by state interests, which means that the form that asylum burden-sharing would take would be set at the 'lowest common denominator' (Barbou des Places, 2002). In the case of the EU, the role of norms and values - specifically those of 'solidarity', 'burden sharing' and 'effective multilateralism' - cannot be dismissed altogether, given the nature of the asylum situation and given the foundational history of the Union. However, it can be argued that state interests take priority over all other interests, and states' decision to enter into alliances is driven by state interests above all other interests and values.

In International Relations Theory, there are three main burden-sharing frameworks identified by Acharya and Dewitt (in Hathaway, 1997). These are Multilateral, Alliance and Distributive-Developmental. The Distributive-Developmental burden-sharing framework originates in the literature on North-South relations, in that it focuses on the need for redistribution of resources from the North to the South to enable the latter to solve its own problems. This perspective views the economic and political conflicts that lead to refugee migration as resulting from the structural inequality in the international system.

In the Multilateral framework, cooperation is based on rules of conduct and an inclusive and equitable relationship between members. This framework echoes the notion of 'collective security' which is associated with the role of the United Nations. The 'sharing' of asylum seekers in this context is a product of cross-border solidarity in accordance with rules, practices and norms that guide the behaviour and decision-making capacities of states. In this burden-

sharing framework, the United Nations and its agencies, including the UNCHR, are the principal agents of international cooperation (Acharya and Dewitt in Hathaway, 1997, p. 128).

Under the Alliance burden-sharing framework, cooperation is based on having a commonly perceived enemy or external threat, and is centred on the logic of national security (ibid., p. 126). The concept of burden-sharing within alliances refers to cooperation of self-interested but like-minded partners, in regard specifically to their ideological and political outlook, norms, values, principles and interests, to ensure a system of a division of labour maximising 'the prospects of deterring and defeating the common enemy'. Contributions from 'partners' or 'allies' would guarantee that the costs are shared and met individually by each member, to ensure the preservation of state sovereignty and national values from external threats. Alliance-based cooperation systems or partnerships require a strong leader to sustain the cohesive, unified and coordinated policies and other undertakings by the alliance and its members (Acharya and Dewitt in Hathaway, 1997, p. 134).

Two out of the three frameworks provided by Acharya and Dewitt can be applied to the burden-sharing situation in the Mediterranean region. Indeed, the Distributive-Developmental framework, which looks at the redistribution of resources from 'north to south' can be used to describe the physical redistribution of asylum seekers or refugees from Malta to other more powerful and resource-rich Member States, such as France and Germany. The situation in the EU regarding the asylum 'burdens' suffered by the 'small' Member States at the periphery closely mirrors the global north-south situation and the resource imbalance in regard to states' capacity to host refugees. According to the UNHCR (2011), many of the world's poorest countries host the biggest number of refugees both in absolute terms and in relation to their economic capacity.

While the Distributive-Developmental framework may indeed be what is required in the EU and what the 'small' Member States in the Mediterranean would like to be formalised, in terms of what is available at present and what works, the Alliance framework of cooperation provides a better understanding of the southern Mediterranean Member States' responses to the problem of a lack of a burden-sharing system in the EU, and to the 'burdens' imposed on them by the Dublin Regulation. First, it deals with cooperation of self-interested but like-minded partners, which accounts for the 'small' Member States' partnership with other states who share the norms of 'solidarity', 'burden-sharing' and 'effective multilateralism'. These partners extend to those who are signatory to the 1951 Refugee Convention, and more specifically, those who have

a resettlement arrangement with the UNHCR. Second, cooperation within this framework is rooted in the logic of national security, which may result in exclusionary or defensive actions. In terms of the EU asylum situation, the unauthorised mode of travel by the asylum seekers via the help of people smugglers is at the heart of 'national security' concerns, due to their link to criminality, as explored in Chapter 2. Nevertheless, in the interest of cost avoidance and state security, the alliances in the case of the 'small' EU Mediterranean states are focused on sharing refugees as opposed to asylum seekers⁹¹. This implies that the migrants have gone through a security check prior to being recognised as refugees, and are therefore deemed not be a security risk. According to Afzal (2005, pp. 29-30), the development of security discourse in relation to asylum was a 'reaction to the challenge asylum regulation posed on public order and domestic instability'. Migration and refugee flows, particularly the unauthorised kind, are seen to be a threat to the state's independent identity, functional integrity and political unity.

The Alliance framework of burden-sharing is also compatible with the Neo-Realist theory on international cooperation, in that both place emphasis on the benefits of partnership as ensuring the preservation of state sovereignty and national values (Acharya and Dewitt in Hathaway, 1997, p. 127). In terms of the latter, the principles of (effective) multilateralism, fair sharing of burdens and solidarity are both values to protect and promote in the EU at both national and supranational levels, and coming to the aid of Malta, Greece, Italy and Spain would be beneficial to the preservation of such values. In terms of state sovereignty interests, as argued above and elsewhere in this study, the burden-sharing arrangement involving the relocation of Convention refugees as opposed to *asylum seekers* removes asylum processing costs as well as security risks for the receiving states, and particularly to those who have previous resettlement arrangements with the UNHCR, the intake of refugees from Malta is often deducted from earlier agreed 'quota' levels and therefore place no additional 'burdens' to them, as was the case in the Netherlands in both 2005 and 2006.

Finally, Alliance-based cooperation systems or partnerships require a strong leader to sustain the cohesive, unified and coordinated policies and other undertakings by the alliance and its members. In this case, given that the alliances are driven by 'small' Member States, by virtue of their traditional marginal role and power resources, such a 'leadership role' requires the 'supporting role' of institutions, including the EU and UNHCR, in order to be credible. This is where the literature would benefit from learning from the experience of 'small' states. The

⁹¹ With the exception of Lithuania in 2006

(large) state-centric approach of International Relations indeed needs revising, in light of developments in the EU regarding the role of 'small' Member States in attempting to work against and within the restrictive framework of the global protection regime.

In summary, the 'alliances' that have come out of the EU's burden-sharing experience from 2005 to 2010 are as follows: (a) EU-UNHCR 'effective multilateralism' alliance; (b) EU Member State-Non-EU state alliance, representing resettlement partnerships with the US and Andorra; (c) EU Member State-EU Member State alliance, representing Mediterranean partnerships with the EU 'north' and (d) UNHCR-resettlement alliances, representing bilateral resettlement arrangements with the refugee agency. Ultimately, such alliances are reactive and temporary in nature, although recent developments involving EUREMA and the US in Malta suggest that such alliances may indeed be subject to prolongation.

5.4 Chapter Conclusion

The willingness of some Member States to take part in the relocation arrangements indicates that despite the lack of political will in reaching a consensus that would help establish a formal burden-sharing system in the EU, at the bilateral level there is a growing sense of 'solidarity' among the Member States in regard to providing assistance to the 'overburdened' 'small' Member States in the EU's southern frontline. This is a reflection of the efforts of the southern Member States themselves and their norm advocacy, and the efficacy of the three main strategies they employ – framing, 'bail out' and coalition-building.

Nevertheless, such efforts are constrained by the very system the 'small' Mediterranean Member States are working within, with both the global protection regime and CEAS reluctant to institutionalise any form of burden-sharing. For the time being, the 'small' EU Member States in the Mediterranean have to be content with the small numbers of refugee relocation to the 'northern' and more powerful, larger Member States, which is ultimately reliant on the goodwill of the latter.

In Chapter 6, the viability of a formal asylum burden-sharing system in the EU will be discussed, and the features of a workable burden-sharing 'system' identified, based on the findings in this chapter. It will be demonstrated that through a combination of functional necessity, humanitarian norms and self-interest, EU Member States have increasingly become receptive to

cooperative efforts in seeking solutions to the burden-sharing problem in the EU. However, any burden-sharing arrangements reached would only function properly if conducted within the intergovernmental framework and be receptive to the national interests of the Member States.

Chapter 6:

Asylum Burden-Sharing and its Future in the EU

‘On an empirical level, there is no such thing as an equitable sharing of reception burdens in Europe.’

- Noll (in Byrne et al, 2002, p. 214)

6.1 Introduction

In the previous chapters, the necessity for a formal asylum burden-sharing system in the EU, from the perspective of the ‘small’ Mediterranean Member States, has been discussed. The unique political and legal distribution of power in the EU, particularly in the asylum and external migration policy fields, demonstrated that despite recent developments in the EU shifting traditional spheres of Member State power to the supranational institutions, the securitisation of asylum and external migration remained under intergovernmental control. This had a significant impact on the way burden-sharing discussions were handled and received in the EU. However, it was also argued that in the absence of a formal burden-sharing framework, ‘small’ and less powerful Member states, particularly those in the Mediterranean region, have taken a lead role in operationalising the EU’s commitment to the principles and norms of ‘solidarity’, ‘fair sharing of responsibilities’ and ‘effective multilateralism’ to promote the concept of an EU-wide asylum burden-sharing scheme, carried out through norm advocacy and the three ‘small state’ strategies of ‘framing’, ‘bail out’ and ‘coalition-building’.

In this chapter, the concept of a viable and politically feasible asylum burden-sharing system in the EU will be discussed, drawing from the experiences of ‘small’ EU Member States in the Mediterranean and other Member States who have taken part in relocation agreements discussed in Chapters 3 and 5. With the deadline for the completion of the CEAS at the end of 2012 fast approaching, and with recent political events in the EU’s neighbourhood of North Africa resulting in large flows of refugees and asylum seekers into the Mediterranean region (‘Arab Spring’), the question of ‘what model’ of asylum burden-sharing for the EU is increasingly needing urgency.

6.2 Asylum Burden-Sharing: A Functional Necessity for the EU

An asylum burden-sharing system is a necessity for the EU, given that unilateral approaches would no longer be adequate in addressing the problems associated with asylum and mixed migration, particularly in the case of the 'overburdened' Member States in the EU's southern frontline in the Mediterranean. First, unauthorised migration challenges the principle of free movement that has long been the bastion of EU integration. The imbalances in the distribution of asylum seekers have the potential of producing secondary movements within the Schengen Area, and there is a danger that Member States would unilaterally enhance their internal border controls. An associated danger is the potential to shift the asylum pressure on to other Member States. Indeed, a 2008 study revealed that increased Frontex sea controls at the external border of Spain added pressures to other Mediterranean countries (Østergaard, 2008), and the 2009 data regarding the number of boat arrivals in Greece gives evidence to this. Greece is relatively new to the phenomenon of unauthorised boat arrivals from Africa, but due to heightened border control restrictions in traditional destination countries such as Spain, boats carrying asylum seekers have started to arrive there. Indeed, this clearly demonstrates the inability of Member States to insulate themselves from unauthorised or illegal migration. Another example is Spain's mass regularisation of undocumented migrants in 2006, which in effect granted such migrants access to the EU as a whole. Then French Interior Minister and former President Nicolas Sarkozy's criticism of the practice highlighted the interconnectedness of Member State migration policies when he argued that (quoted by Beunderman, 2006, p.1):

"within the Schengen zone, we cannot have moves towards massive regularisation without asking the opinion of our partners."

Second, asylum burden-sharing is also inextricably linked to wider EU objectives, particularly with the economic and social cohesion of the EU. According to the Preamble to the ERF, actions carried out by Member States to promote their social and economic integration should be supported 'in so far as it contributes to economic and social cohesion, the maintenance and strengthening of which is one the Community's fundamental objectives referred to in Articles 2 and 3(1) k of the treaty'. Barbou des Places (2002, p. 12) argues that while this does not impose any obligation of burden-sharing on Member states, 'they do constitute new political and institutional constraints' on them.

Third, the EU is no longer able to insulate itself from worldwide migratory movements, as was the case in the recent wave of boat arrivals resulting from the 'Arab Spring' events in North Africa, where the violent ousting of dictatorial leaders in Yemen, Egypt, Libya and Tunisia forced thousands out of the continent in search of safety elsewhere (Hollis, 2012). As a defender of democracy and human rights, the EU has a global responsibility to respond appropriately to such large-scale human displacement, particularly within its own backyard.

Fourth, legal developments in the EU have made it easier to invoke and make operational the principles of 'solidarity' and 'fair sharing of burdens', specifically via Article 80 of the TFEU. A year after the entry into force of the Lisbon Treaty, affected Member States call on Article 80 'not just in legislative terms but also in order to encourage other Member States to support them in practice' (Vanheule et al, 2011, p. 81). Indeed, the new Article 80 has been used to advocate for relocation schemes or suspension in Dublin mechanism (ibid., 82).

Despite (large) Member State objections to formalising an asylum burden-sharing system, such a system is a functional necessity in the EU. It must be noted that the southern EU Member States that are severely affected by the unauthorised arrivals of asylum seekers in their territorial waters do not share these objections, and their sentiments have in fact been fundamental in putting asylum burden-sharing to the forefront of the EU agenda. A formal burden-sharing system would help relieve the 'burdens' suffered by Malta, Spain, Italy and Greece, and it would guarantee them assistance in future boat arrivals. Therefore, burden-sharing would serve as insurance scheme for these southern Member States against the risk of having to deal with disproportionate asylum pressures on their own (Thielemann et al, 2010, p. 15).

6.3 What Form Should 'Burden-Sharing' Take?

There is currently no coherent global framework in which to address the mixed migration question, and in terms specifically of what asylum or refugee burden-sharing should take, the international protection regime has been silent on the matter. However, it is understood that one of the reasons that resettlement programmes exist is so they could address the refugee burden imbalance between the 'global south' and the 'global north', with the former being the largest recipients of refugees and other migrants in need of protection. The EU being embedded in such a regime has also not been able implement any forms of asylum or refugee burden-

sharing schemes, apart from financial redistribution through the ERF as a compensatory measure for the largest recipients of refugees and asylum seekers.

The international framework that is needed by governments to guide their responses in order to achieve the desired goal of burden-sharing in mixed migration situations is currently a work in progress, and is paradoxically reliant on their actual responses of the governments to guide its structural design. This is most recently reflected in the UNHCR Discussion Paper entitled 'International Cooperation to Share Burden and Responsibilities' (UNHCR, 2011), which has compiled examples of cooperative arrangements to address the issue of refugee burden-sharing to date, and provided a comprehensive analysis of such arrangements in order to identify common 'building blocks' for a future global framework. It is noteworthy that for asylum seekers arriving by sea, the burden-sharing arrangement in the *Francisco y Catalina* case, which is one of the case studies examined in this study, was used as a 'model' response. That the EU's 'first successful case of burden-sharing' now serves as a model for future cases of boat arrivals, which in all likelihood would continue to be concentrated in the Mediterranean Sea, indeed highlights the dire situation that the international protection regime is in.

Burden-sharing is essentially about 'cooperative creation of a sufficient degree of predictability' (Noll, 2003, p. 241). Ideally, an asylum burden-sharing system would allow Member States to calculate risks and costs, agree on what should be included in the costs calculations, and how to redistribute those costs across the EU. However, the reality of the situation with mixed migration and unauthorised arrivals is the fact that it is not always possible to predict when the next boat arrivals would arrive, where they would arrive, how many asylum seekers they would carry, and whether or not these arrivals would involve other migrants not claiming refugee protection.

The literature is rife with proposals on how to approach the problem of burden-sharing, from what distribution keys or indicators to use in calculating burdens, to using market-based trading schemes to facilitate an exchange of responsibilities according to each actor's market specialisation, as was shown in Chapter 2. The literature also provides examples of actual burden-sharing agreements, such as those used during the two World Wars and the crises in Vietnam and Kosovo, as well as border management sharing systems used in the Caribbean and Pacific Plans. However, these theories and examples, with the exception of the Caribbean and Pacific Plans, relate specifically to situations of 'mass influxes' and 'refugees'. As the EU-specific

situation relates mainly to asylum seekers using unauthorised migration as a means to enter the EU, it can be argued that these theories and proposals are only helpful to a very limited extent.

What is required in the Mediterranean region is a framework within which Member States can cooperate based on an agreed set of measures, to guide their responses regarding incidents of boat arrivals and share asylum responsibilities. Put simply, this is the cooperative *arrangement* that the EU is in need of, due to the consequences of the application of the Dublin Regulation placing undue 'burdens' on the 'small' and less powerful Member States in the Mediterranean region.

6.3.1 Burden-Sharing 'Model' from the Perspective of the 'Small' EU Member State

In June 2001, Malta's Minister for Justice and Home Affairs, Simon Busuttil, presented an asylum burden-sharing proposal to the EU's Justice and Home Affairs Council. His proposed 'model' was described as follows (European Parliament, 2007):

'should a vessel save lives of immigrants at sea in a search and rescue area belonging to a non-EU state, and the latter refuses to cooperate in receiving such rescued persons, then any immigrants saved in this operation should be directed to the nearest EU Member State and then be transferred to one of the 27 Member States on a *proportional basis* and according to a system agreed beforehand.'

It can be observed that the above 'model' advocated by Malta reflects ethical and humanitarian considerations going beyond the remit of states' asylum responsibilities, as were advocated in the 'innovative models' of burden-sharing presented in Chapter 2. Such innovative proposals of burden-sharing focus not just on the normative elements of cooperation, but also on the concept of 'human security' as a response to the suffering at sea of migrants in mixed migration situations. These models are a significant departure from earlier models focusing on mathematical and economic approaches for determining state responsibility for asylum. Nevertheless, the redistributive element of Busuttil's proposal, particularly in terms of the 'proportional basis' with which relocation is decided would also need to take into consideration the absorptive capacity of receiving Member States. However, the experience in both the EU and in the wider global protection regime is that questions of capacity are always difficult to answer or indeed measure. While most if not all discussions on calculations to date use Grahl-Madsen's 'soft quota' of combining Gross National Product and population density as a means to determine refugee allocation, none of the burden-sharing 'models' to date has materialised, and

this can be attributed to a 'systems failure' – the failure of the global protection regime itself to cease being dominated by sovereign state interests.

Therefore, an ideal asylum 'burden-sharing' system in the EU would include the more 'innovative' proposals promoting the treatment of boat arrivals as an emergency humanitarian issue (Durieux, 2009), and which suggests a 'functional welfare approach (Pugh 2000) to include the coastal state, receiving state and maritime actors in the system, given the nature of mixed migration. Such an approach would also include 'human security' in the equation, to account for the deaths and dangers⁹² involved in mixed migration, as mentioned earlier in this study. As Durieux argues, while the tension between sharing and shifting runs across the entire regime, 'what is at stake for the refugee or refugees concerned may well be a matter of life or death' (ibid., p. 76).

A 'prescriptive' burden-sharing arrangement for the EU would also involve sharing 'costs' equitably amongst all Member States. However, calculating and measuring 'burdens' is a futile exercise, given that the disproportionate distribution of asylum 'burdens' is largely generated by the Dublin Regulation itself, as well as by the unpredictable navigating tactics of people smugglers. With the continued operation of both in the EU, the 'burden' would remain concentrated in the Mediterranean region, unless new sea routes open up.

6.3.2 Burden-Sharing 'Model' According to the Neo-Realist Perspective on Cooperation

A more realistic burden-sharing model would take into consideration the tendencies of states, particularly the more powerful ones, to opt for voluntary arrangements (Suhrke 1998) and to focus on security concerns (Boswell, 2003). So far, the 'interest convergence' model proposed by refugee law scholars, which highlight the rational and self-serving characteristics of states as argued by the Neo-Realist perspective on international cooperation, matches the 'alliance model' demonstrated in the burden-sharing cases from 2005 to 2010 in Chapter 5.

⁹² More than 10,000 persons have died trying to cross the Mediterranean from 1994 to 2004, as reported by Gammeltof-Hansen (2008, p. 23. citing ICMPD figures).

Voluntariness is what makes burden-sharing an appealing option for EU Member States, and while it can result from normative appeal and altruism, particularly given the importance of the values of 'solidarity', 'fair sharing of burdens' and 'effective multilateralism' in the EU's 'standard operating procedures', it is an indication of Member States' continued resistance to the idea of a mandatory system of refugee-burden allocation. Even if Member States were open to the idea of a formal burden-sharing system:

'the temptation would be to peg commitments at low admission levels and restrictive rights. Ambitious sharing schemes, particularly if they were institutionalised with long-term horizons, might encourage states to define a refugee flow out of existence by declaring it to consist of "migrants"' (Suhrke, 1998, p. 414).

A 'quota system' is a necessity in any formal burden-sharing arrangement, but the probability of the Member States accepting to be bound *in advance* by any precise formula beyond their duty to admit asylum seekers under international law is indeed quite remote. However, even if the Member States do agree to be bound to a fixed number, they are likely to commit to 'very low figures' (Barbou des Places, 2002, p. 18).

Any 'quota system' dictated by 'Brussels' is also likely to be rejected. Boswell (2003, pp. 322-330) argues that the emergence of national migrant dispersal systems in the EU, such as those in the UK and in Germany, 'required a more developed sense of shared responsibility or solidarity':

'The development of such an ethic at national level was achieved through a long and often painful processes of nation-state formation and consolidation. It is open to doubt if the EU is sufficiently developed in terms of its political structures or a sense of common identity for this third type of motive to come into play. [...] Burden-sharing was either imposed by central government with guarantees of financial compensation, or followed by a well-established pattern of redistribution between regions.'

Therefore, while it would benefit the EU to have a system which redistributes costs equitably, provides sea rescue operations leading to the safe disembarkation of asylum seekers on EU territory, and which would guarantee the consistency of standards in reception and asylum procedures across all Member States, such a system is neither viable nor politically feasible. Given the complexity of the asylum issue in the EU, as well as the distribution of power as regard asylum and external migration decisions, it is necessary to look internally into the EU and work within the limits of its large-state centred, intergovernmental framework.

Noll (2000, p. 28) laments that in the absence of a formal system of burden-sharing in the EU, and with the impossibility of borders being 'sealed hermetically', the distribution of asylum seekers would continue to be determined by geography and the 'availability of efficient smuggling routes'. This means that the Member States at the EU's periphery both in terms of power resource and geography would continue to bear disproportional burdens.

Nevertheless, as has been demonstrated elsewhere in this study, the 'small' EU Member States in the Mediterranean have learned to cope with the asylum burdens by working within the limits of the 'system' that has so far failed them. Through norm advocacy and the three strategies of 'framing', 'bail out' and 'coalition-building', the Mediterranean Member States were able to convince the larger and more powerful EU and non-EU Member States to accept some of their refugees as part of a voluntary alliance system where participant states are able to select the number and nationality of refugees based on their own migration requirements. In 2010, such a loose system of alliances was given a more communitarian status through the introduction of EUREMA, which may indeed be a signal of a more institutionalised system in the future.

6.4 The 'Arab Spring' Affair: A Springboard for Burden-Sharing Action

The 'Arab Spring' events of early 2011, which produced thousands of displaced people and refugees seeking protection as a result of the violent removal from power of the government leaders in Yemen, Egypt, Libya and Tunisia, and which led to violent demonstrations and street protests in these countries, presented a great opportunity for the EU to test its commitments to human rights externally, and to solidarity and fair sharing of responsibilities internally.

Formal EU pronouncements characterised the 27 bloc as being welcoming of the political developments of 'Arab Spring' (Hollis, 2012). However, despite such welcoming and supportive pronouncements, internally, the EU began to heighten security controls at its sea borders, including a surge in Frontex activities, in preparation for the interdiction of seaborne asylum seekers from North Africa (Khosler, 2012). In addition, the EU provided training for the coastguard services in Tunisia, and among Member States, discussions were held in regard to the possibility of suspending the Schengen Agreement until the crisis abated, to prevent freedom of movement within the EU for unauthorised migrants.

As was expected, large numbers of boat arrivals entered the Mediterranean sea leading to the territorial waters of Malta and Italy, although the latter was the primary recipient of the majority of the arrivals (Khosler, 2012). With the 'small' Member State authorities assessing and identifying a majority of the migrants to be 'economic migrants', with a significant portion being part of the 'annual flow of sub-Saharan Africans in transit in North Africa' joining Tunisian and Egyptian nationals, a large number of them were subsequently repatriated. Nevertheless, for those who were found to meet the 'refugee' criteria, only 300 were relocated to other Member States from Malta, in a voluntary process that characterised all other 'refugee relocations' thus far.

As with previous instances of 'small' Member State 'bail out', during the Arab Spring fiasco, there was also a clear demonstration of genuine concern regarding the welfare of asylum seekers, particularly in the case of those who were supposed to be returned to Greece on the basis of them having entered the EU through this 'small' Member State. At the level of the ECJ, 2011 witnessed important decisions made in favour of the suspension of the transfer of Arab Spring asylum seekers to Greece, on the basis that they would 'be subject to undignified treatment, possibly detention, and that their claim would not be examined in a fair manner due to systemic failures in the Greek asylum system' (Statewatch, 2012).

The events of the Arab Spring, therefore, maintained the *status quo* and *modus operandi* in the EU in regard to efforts made at the level of the 'small' Member State to redistribute the asylum 'burdens' to other EU Member States who have the capacity to admit them and out of their good will. As in the previous years, asylum burden-sharing continues to be an optional process that Member States are free to join or opt out of, and which continues to be driven by the less powerful Member States in the Mediterranean. No further significant developments occurred, therefore, since the establishment of EUREMA.

6.5 Dublin III Regulation: A Second Chance at Solidarity

In June 2011, during negotiations for the revision of the Dublin Regulation, the 'small' Mediterranean states of Malta, Italy, Greece and Cyprus pleaded for the revised Regulation to include a mechanism suspending the transfer of asylum seekers to Member States 'facing particular pressure' (Statewatch, 2012). However, the provision of the Dublin Regulation stipulating that the first Member State of entry is responsible for determining the asylum claim has 'remained untouched' in the revision negotiations. 'Pressure' on national asylum systems is

still not considered justifiable grounds for suspending a transfer. As demonstrated in the case of Greece, there would need to be proof that ‘systemic flaws would result in human rights violations’ for a transfer to be subject to suspension (ibid.).

Therefore, despite the opportunities to correct the asylum burden imbalance in the revision negotiations for the Dublin Regulation, the larger and more powerful Member States remained silent and non-reactive. The continued refusal among Member States to institutionalise a burden-balancing mechanism is a clear indication to the Member States in the Mediterranean that although there is a degree of willingness to provide assistance to them by accepting some of their refugees, their willingness to do so is conditional on the process remaining to be one of voluntarism.

6.6 Conclusion: Burden Sharing as a ‘Small’ Member State-Driven Enterprise: and Potential for Future Institutionalisation

This study has attempted to demonstrate that current informal and unofficial burden-sharing practices in the EU were largely the project of the ‘overburdened’ ‘small’ Member States who themselves receive the largest numbers of asylum seekers under the requirements of the Dublin Regulation. To date, there is a reliance on ad hoc cooperative responses to ‘small’ Member States’ advocacy for burden-sharing, and recent political events in Europe’s neighbouring continents demonstrate that this would continue to be the case, at least in the near future.

Through a combination of functional necessity, humanitarian norms and self-interest, Member States have increasingly become receptive to cooperative efforts in seeking solutions to the burden-sharing problem in the EU. However, any burden-sharing arrangements reached would only function properly if conducted within the intergovernmental framework. The Neo-Realist perspective offers a pessimistic view of cooperation in the asylum field, attributing this pessimism to the state-centric nature of the global protection regime and international relations in general.

While it is ideal to have a system wherein the interests of all actors involved are given equal weight and international refugee and maritime rights are observed, the security of the Member States (whether refugee-giving or refugee-receiving) remain paramount and therefore, any arrangements designed to alleviate disproportionate asylum burdens should be operated within the intergovernmental framework. As far as Mediterranean Member States are concerned, the

only effective burden-sharing scheme would be one that involves the redistribution of migrants, although receiving Member States prefer migrants already recognised as refugees. Finally, having a voluntary arrangement is more politically feasible than a formal scheme, as it gives receiving Member States the flexibility to leave any informal 'alliances' and associated costs when it suits them.

Chapter 7: Reflections and Conclusions

7.1 Conclusions

This study has looked at the impact of the Dublin Regulation on the distribution of asylum-related costs across the 27 Member States of the EU. The Regulation was implemented to ensure that each asylum claim is examined by one and only one Member State, to put an end to the practice of 'asylum shopping' and to prevent repeated applications, both of which have caused severe inefficiencies in the determination processes in the EU in the past.

As per the requirements of the Dublin Regulation, the first Member State of entry is given the responsibility to receive asylum seekers and process their claims. However, given the nature of unauthorised migration which in recent years has penetrated the sea route to the EU via the Mediterranean, there has been growing discontent among Member States at the external borders of the EU over what they see as a system that has unjustly placed disproportionate burdens on them regarding the admission of unauthorised seaborne asylum seekers and the costs associated with receiving them.

'Burden-sharing' is used in the current debates about perceived and real inequalities in the distribution of costs associated with receiving unauthorised boat migration into the EU by sea. However, proposals for a formal burden-sharing arrangement in the asylum field have thus far been rejected, and this owes as much to the political and legal arrangements in the EU placing the locus of asylum and external migration control at the hands of interior ministry officials, primarily those of the 'larger' and more powerful Member States, as it does to the difficulty in calculating the costs associated with an 'enterprise' that is increasingly being associated with criminalisation. More importantly, the rejection of any formalised system of asylum or refugee burden-sharing is symptomatic of the weakness of the global protection regime where the CEAS is embedded, in overcoming its own (large) state-centric tendencies.

With the EU's apparent failure in putting in place formal redistributive mechanisms that would allow a more equitable distribution of asylum seekers and costs among the 27 Member States, alternative measures amounting to 'burden-easing' are being carried out at the intergovernmental and bilateral levels, primarily by the 'overburdened' Member States themselves at the EU's periphery both geographically and in terms of power resource. Such informal arrangements demonstrate the necessity of finding a solution to the asylum 'burden', initiated by those Member States most affected by the problem. Member States have resorted to forming informal, bilateral 'alliances' with countries within and outside the EU, including the US, highlighting the fact that the plight of the Mediterranean Member States has attracted not just transnational attention, but also solidarity and compassion. However, within an 'alliance framework', the interests of the receiving states also take priority, and therefore, the extent of the burden-sharing negotiations is limited to the relocation of a limited number of migrants that have already gone through the asylum procedures to fill the resettlement quota of the receiving state. 'People-sharing' appears to be the preferred option over costs-sharing, as far as affected Member States are concerned.

This study examined how the EU has attempted to tackle the challenging situation of the unauthorised migration of asylum seekers into its territory by sea, and in particular, how it has responded to demands from affected Member States for a more equitable system of sharing the costs of hosting asylum seekers in spite and outside of the Dublin framework. It showed that despite being known for its deflection policies, the EU has not been completely immune to cooperative efforts, although any burden-sharing schemes implemented are limited to being of a voluntary and temporary nature.

7.2 Scope for Future Research

The abundance of literature on unauthorised migration, asylum seekers and burden-sharing highlights the growing importance of these policy areas, and the amount of academic research they attract. However, this study has discovered that in relation to EU studies, these are treated as separate policy areas. There is a clear need to develop EU-specific research in regard to the combined issues of mixed migration and burden-sharing, to account for the changing character of migration world-wide, and to represent the phenomenon of mixed migration as it is being played in the Mediterranean region of the EU.

The theoretical foundations of this thesis offer an alternative view of the actors and processes involved in the efforts to operationalise the EU's commitments to the principles of 'solidarity', 'fair sharing of responsibilities' and 'effective multilateralism'. Based on empirical evidence, it has demonstrated that asylum burden-sharing does, in fact, exist and operate in the EU, deviating from the common view in the literature regarding the lack of any burden-sharing arrangements in the EU. This consequently positions the EU's decision-making processes regarding burden-sharing within a higher, international arena going beyond the confines of the EU's intergovernmental and supranational framework, highlighting the need for a more 'multi-sited' approach to studying EU migration policy governance. The need for 'burden-sharing' debates to focus more on what is feasible and less on what form it *should* take has also been underlined in the case studies.

A more significant departure from both EU studies and international refugee law literature is the leadership role of 'small states' in facilitating burden-sharing in the form of refugee relocation to both EU and non-EU states, with bilateralism as a political platform enhanced by informal mechanisms available to Member States at the intergovernmental level. While the point of departure is found within the Neo-Realist argument of the continued resilience of the nation-state or EU Member State, alternative views of the influence wielded by small states as well as the efficacy of bilateral relationships within a multilateral framework and informal policy processes within an institutionalised setting offer a better understanding of recent events in the EU swinging the cooperation pendulum between security concerns and altruistic efforts. At present, there is a limited interest on 'small state' power both in EU Studies and International Relations. However, the findings in this study may indeed renew and broaden this interest.

While much work has been carried out in developing the literature on the separate but inter-related fields of asylum, burden-sharing and unauthorised migration via people smuggling, in order to adequately address the complex migration situation in the EU, it would indeed be a welcome development in the literature if these three areas of inquiry are merged and discussed at a level of analysis that takes into account the *sui generis* nature of the EU. What the literature needs, and what this study has attempted to address, is the creation of an additional dimension through which to assess these lines of inquiry – the 'southern EU dimension'.

This study has also attempted to regenerate and revitalise existing burden-sharing debates which began after WWII, and which reached a crescendo in the international realm during the Vietnam Crisis in the late 1970s. The case studies looked at in this research, which involved situations of boat arrivals in the EU eliciting 'burden-sharing' responses, highlight the growing complexity of the phenomenon of 'mixed' or 'unauthorised' migration in recent years, particularly the characteristics of contemporary cases increasingly moving away from the traditionally held view of people smuggling as a criminal exercise to one that highlights its humanitarian elements, and to the traditional conception of boat arrivals consisting of large homogenous groups of 'refugees', to one that involves frequent, perilous voyages of smaller mixed groups of 'migrants' and 'asylum seekers' travelling in unseaworthy vessels. This has significant implications for burden-sharing proposals that would be viable in contemporary Europe, with a growing number of scholars, academics and policy-makers advocating a humanitarian approach to the debates. This signals a significant departure from the traditional conception of 'international protection' within the framework of the 1951 Refugee Convention.

The issue of asylum burden-sharing will remain a source of great contention in the EU in the foreseeable future, with the continued unauthorised migration flows into the Mediterranean, as demonstrated in the 'Arab Spring' affair. A change in conceptual focus may indeed be needed in future debates, away from 'burden-sharing' to an angle that would have a more positive appeal to the Member States' cooperative tendencies, thereby avoiding the cost category calculations that have mired the debates thus far.

APPENDIX:

INTERVIEW TRANSCRIPTS

APPENDIX I.

Transcript of Interview with UNHCR, Brussels

Interview with UNHCR Regional Representation [REDACTED]
Date: 7 November 2006 11:00 am, Rue Van Eyck (Brussels)

TRANSCRIPT:

Q: Good morning [REDACTED] and thank you for granting my request for an interview. This interview is for a doctoral thesis that I am working on, and this thesis focuses on the working relationship between the EU and the UNHCR in responding to the illegal entry of seaborne asylum seekers into the EU. I would appreciate any information you can provide in your capacity as Senior European Affairs Officer. However, if there are any questions you would not be comfortable answering, please let me know. The interview will run for approximately 40 minutes. However, if for any reason we are unable to do all the questions in the time allocated, would it be possible for me to send the rest of the questions by email?

A: By all means
[...]

Q: Academics and migration theorists argue that restrictive Member States' immigration policies are responsible for the rise in illegal migration and increase in the use of people smugglers by third country nationals wishing or trying to enter the EU. What are Your Office's view on illegal migration?

A: Well the UNHCR's mandate relates specifically to [providing] international protection to refugees in the 1951 Convention definition, but by implication the UNHCR considers asylum seekers to be persons of concern [...] UNHCR believes that people who can't actually [enter] the signatory states' territorial jurisdiction, or have the opportunity to have access to asylum procedures show that there are protection needs [...] UNHCR doesn't have a position as such in regard to illegal migration. [...] measures to manage illegal migration have to have protection safeguards [...]

Q: The European Union claims to be committed to “effective multilateralism”, which basically means giving priority to international treaties, membership in international organisations such as the UNHCR. Would the UNHCR consider the EU as an “effective” partner in the areas of migration and asylum?

A: Yes. [would not know what precisely the definition of “effective” partner]. We work closely with the EU. By that I mean both European Union institutions and Member States [...] It’s a good thing to develop.

Q. Was the UNHCR involved in the drafting of the Asylum Directives in any way?

We were in a sense that [we have an] opportunity to put comments to the Commission whilst it is preparing its proposals. And once the Commission’s proposals are adopted, in a discussion in the Council, we always have an opportunity to put forward our views to the member states, the Presidency particularly with [...] the Justice and Home Affairs Council [where asylum issues] are discussed. HCR does not participate in negotiations as such [...] in official negotiator role, but we are invited from time to time to discussions [chaired by] Commissioner on immigration [...]

Q. Is the UNHCR consulted by the Member States in regard to the transposition of directives into national legislation?

Yes, but that differs from state to state. With some states, HCR has been sent copies of the draft for official comment [...] HCR has been involved in sitting down with legislators [...] prepare initial drafts. Some Member States are a bit more sensitive towards UNHCR [...] particularly some new Member States who have the whole issue of changing asylum laws as soon as [membership] negotiations begin. But the accession of new member states would have to take time. Once again, UNHCR are given an opportunity to express our views. These are listened to but not necessarily always followed.[...] Indeed the negotiations are [imbued] with political imperatives which Member States are prone to [...] restrictions. This is one of the concerns on the part of states who follow HCR’s advice to try to transpose the rules [...] and establish minimum standards [...] [However states are fearful that refugees would go to states that offer] better conditions to asylum seekers. So states [fearful of neighbours’ policy feel] they do not necessarily have to abide by standard of protection unless they absolutely have to.

Q. How would you describe the UNHCR’s working relationship with the European Commission, Parliament and Council of Ministers?

Okay, we’ll start with the Commission but with all of them [we have] a [good] working relationship. Commission? There’s a lot of receptiveness to what we have to offer. They, we are in contact with them very frequently with regard to a whole range of issues, with a whole range of services, but mainly Justice and Home Affairs. Having said that, the Commission also [is affected by] political imperatives [...] now at the end of the first phase of asylum harmonisation in the EU and a lot of the tasks of the Hague Programme [...] a lot of which perhaps are more political in nature. It talks about the broader responsibilities of

migration and border management [...] so yes, we have a lot of opportunities to put our views forward to the Commission. [...]

With regards to the Parliament, there, we work mainly with Parliamentarians who are interested in asylum issues and they are concentrated in the Civil Liberties and Justice Committee [...] It is logistically impossible to work with 732 MEPs. We have to concentrate our energies and efforts to those most receptive to us. [...] But we would like to see our contacts there expanding.

In terms of the Council, that's a bit more challenging and sensitive in the sense that there are formal Council working group structures which are not necessarily [receptive] but [...] with rotational presidency when we raise a particular issue to speak to Council working groups and experts, [...] recently on [the issue of the EU dealing] with third countries on the areas of asylum and immigration. It is perhaps the least frequent set of contacts and formal chance [to get involved]. The Member States together make up the Council, some of those are more receptive to UNHCR's views than others [...] We have contacts with all of them. Elke particularly needs some help in circulating systematically [position papers] to EU institutions [...] but from time to time I do get phone calls or letters. [...] signifies that our materials are useful [...] and taken on board by the institutions and states.

Q. In regard to boat arrivals, when a boat carrying asylum seekers arrives in any part of the EU, what is the first thing your Office does?

Well, we try to find out as much information as possible. There is not a systematic response that we have in place. The challenge there is that some of the numbers that arrive are very large. In UNHCR there is no big distinction in principle if you arrive on the seashore or if you arrive in-land [so long as the] entry is in a Geneva signatory state. People who [are in need] of international protection should have their [status] stressed. I should say too [...] there is no systematic EU response at this time.

Q. What is the primary concern of the UNHCR when news regarding "boat people" is reported?

Well, news regarding boat arrivals, that of course depends if manifestly seeking asylum we might have protection [concerns], that is when we have a responsibility to intervene should there be a suggestion or fact [that there are refugees involved] UNHCR requests states to fulfil their Geneva Convention responsibilities. What we hope is states [fulfil] their Geneva Convention responsibilities to ensure that people who arrive are [given access] to protection and an opportunity to [claim protection]. It's the state's responsibility to [...] grant them protection in theory. So yes, if we were aware of a situation [of boat arrivals] when people seem to be, if [their request for protection the authorities are] not hearing it, you can say it is one of our primary concerns [...] about that. They are all very different situations. We don't have a typical response.

Q. When the receiving Member State refuses to allow asylum seekers to land, what does the UNHCR do at this stage, once it has become known that the migrants are actually seeking asylum?

Okay, again I think it would be better to look at particular cases than discuss the matter in abstract. Perhaps in general, what we can say is HCR does argue that states have an implied obligation to fulfil their obligations to let people gain access, territorial access to [...] international protection. In any case it's the state's responsibility to allow people entry [...]

But we can talk about a specific situation. The Francisco y Catalina is, actually we pulled out a short summary/report. What happened with Francisco y Catalina is as far as we know [...] there's still some confusion around the actual practice [...] when boats are intercepted. There are questions about where interception took place, whether in Libyan waters or international waters. It seems it was in international waters not far from Libyan territories. So it was in international waters, a Spanish fishing boat. There was then a question of who was responsible. So, in that case, the Spanish boat had to take people on board after rescuing them in distress. There is an obligation at sea to rescue people and transfer them to the nearest port. The Spanish boat approached Malta, the nearest port of embarkation. Malta was reluctant to [let them in]. [...] The UNHCR in that situation was forced to contact the Spanish authorities [...] to broker a solution.

Our concern then was to find a place where they could disembark safely as soon as possible. Malta was reluctant [to accept them]. They were concerned that this would lead to Malta being required to provide protection. Malta's position was that you don't necessarily take on the responsibility. Now, what the HCR believes is that once state's responsibility has been engaged, then it should not be refusing others access to territorial procedures [to international protection under the Geneva Convention]. [Malta's argument was] Spain has flagship of fishing boat [...] UNHCR's only concern was to get the people to disembark as soon as possible. [...]

Q. So why was there a change of heart, a few days later, with some Member States offering to accept some of the asylum seekers?

Well the change came about [when] agreement was reached with the European Commission and UNHCR and a number of states, specifically Malta. For the UNHCR such an arrangement is perfectly acceptable. We can argue that Malta [...] was in the best position to accept [the asylum seekers]. [...] What we were concerned about was there was always a reason not to disembark [...] [The group] included pregnant women and child increasingly in need of hospital care.

Q. Libya being an option, is that problematic given that it is not signatory to the [Geneva] Convention?

That is one difficulty for it. It is signatory to the OAU Convention, so it is signatory to [relevant treaties] but the concern is it does not actually have an asylum system in place.

[...] HCR is also concerned in some instances in the past where asylum seekers were sent to Libya without access to asylum procedures. [...]

Q. The interview has been going for 35 minutes now, so I have one last question. The rest of the questions, can I email to you?

Alright. How many more questions do you have?

Q. I have quite a few. Maybe a question on a particular case. The arrival of Kurds in Italy, this is a case which has very limited information on the internet. Are you familiar with the case?

I must say I am not.

Q. Is there anyone in your Office who is familiar with the case?

Well [name] was working in public information records at the time, dealing with statistics.[...] Maybe you should try getting information from her.

Q. Would it be possible to discuss the situation of the *Cap Anamur*, which is quite controversial?

Okay.

Q. If the captain and crew are found guilty, as they are currently facing legal proceedings in Italy, this could potentially set a precedent for all ships rescuing asylum seekers and illegal migrants. What are the UNHCR's views on the criminalisation of sea rescue?

*Well, I don't know that we have a formal position on this. UNHCR is aware that, we know that it is vitally important for boats to [come to the rescue]. I think we strongly approve of the criminalisation of rescue at sea. As to whether this would constitute a precedent I'm not sure about that. The actions of the captain of the *Cap Anamur* were surrounded by, there was a lot of unclarity as to what was done. I should say UNHCR specifically does not defend all of the actions of the ship and its crew [...] but as a matter of principle [...] and I think the whole system of maritime law has a lot of problems. [...] But I think this case has to be looked at in its special circumstances.*

[...] Where things stand [in EU] at the moment, there isn't a unified position on how to handle the question of irregular arrivals, the hot political topic at the moment [...] I would suggest you look at Commission Communication paper [released] in the next few weeks [...] What we expect is that's going to increase practical arrangements.

Now, where does UNHCR stand in all of that? Well, we appreciate states need to find ways to manage their borders better, but we firmly believe that border measures [should also contain] protection safeguards [...] complementary mechanisms that [ensure] people are not sent back. [...] We've got projects on the way at the moment with the Italian Ministry of

the Interior, Red Cross, IOM, regarding reception in Lampedusa. But we are worried that in trying to find solutions so much of the focus would be put on agencies of internal borders such as Frontex [...] We must ensure that [measures] must be accompanied by consideration for the needs of refugees.

APPENDIX II.

Transcript of Interview with European Commission DG Justice, Freedom and Security (Immigration and Asylum Unit)

Interview with Representative of DG Justice, Freedom and Security (Immigration and Asylum Unit)

Date: 11:00 am, 21 November 2006, Rue du Luxembourg, Brussels

TRANSCRIPT:

Q: Good morning and thank you for granting my request for an interview. The purpose of this interview is for a doctoral thesis that I am working on, and this thesis focuses on the working relationship between the European Union and the United Nations High Commissioner for Refugees in responding to the illegal entry of seaborne asylum seekers into the EU. I would appreciate any information you can provide in your capacity as Representative/Official of the Immigration and Asylum Unit of DG Justice, Freedom and Security. However, if there are any questions you would not be comfortable answering, please advise.

I will be taking notes while you provide your responses and comments to my questions, and a complete transcript of your answers will be sent to you for changes or corrections prior to incorporating them in my thesis.

[Indicated preference not to be named, only as 'Representative', and preference not to use audio recording].

Q: There is much concern regarding the compatibility of the emerging EU common asylum policy with the UNHCR refugee regime. The European paradigm of asylum appears to have shifted from one based on the Convention to one that is concerned with establishing an "area of freedom, security and justice". The consensus is that "security" only takes into account the security of member states and citizens such as against terrorism; however, "human security" of asylum seekers are not taken into account.

What are the Commission's views on striking the right balance between EU security and the security of asylum seekers?

There is balance seen in the acquis. [...] The 1st phase of asylum (CEAS) [has been] achieved. The adopted directives all show that they are not aimed at security first, but

international security protection, but also concern with border security just like in any other entity. The EU aims also at securing the entity but securing the entity at the same time [with] international protection, on an equal footing. While securing the internal border, international security/protection must also be observed.

Q: The European Union claims to be committed to 'effective multilateralism' (i.e. in 2003, the Commission adopted a *Communication on "EU-UN Relations: The choice of multilateralism"*; 'effective multilateralism' is also one of the central pillars of the *European Security Strategy*, adopted in Dec 2003).

What does the Commission mean by "effective multilateralism"?

If you ask me, actions are driven by commitment. What we are doing with our contact with UNHCR because of growth of competence of the Amsterdam Treaty, the UNHCR is a really good partner. Certain promises of directives are repeating the Geneva Convention. We respect the UNHCR as a valid partner. Since we got this competence, we are focused on improving relations. We see it as a fruitful cooperation to implement and observe international obligations.

Q: The EU's commitment to its partnership with the UNHCR was formally stipulated in Declaration 17 of the 1999 Amsterdam Treaty, as well as in the Reception, Qualification and Asylum Procedures Directives. Have there been any changes in the UNHCR's involvement in EU asylum practices since Amsterdam?

For example, has there been any increase in activities by the UNHCR? Any increase in UNHCR consultations by the EU? More/heightened UNHCR presence in Commission, Council and EP? More freedom for UNHCR to carry out its role without much interference from Member States?

In practice, even though the Amsterdam Treaty was 10 years old, but competence is still new; it was supposed to be transposed only 10 months ago, it is still in process. After Amsterdam, cooperation on an institutional basis, communautaire competence. European Commission-UNHCR could really give something to EU policy.

There is also an exchange of letters, even though this is not institutional. We are always meeting regarding proposals. The Commission consults with the UNHCR, involves them in the implementation of directives. There is also consultation with transposition. UNHCR is invited to express their views, and the same in regard to country information. We always work with UNHCR. It is not institutional, but practical.

I think we gained competence and independence. Cooperation has more substance. At the end, [...] but gained more substance.

Q: Has the UNHCR been given more access to asylum seekers?

In terms of the Amsterdam Treaty, the acquis was achieved. UNHCR is explicitly mentioned in reception conditions directive, but also for the procedures directive. Contact was guaranteed. Thanks to Amsterdam Treaty, we have an acquis reflecting the UNHCR position.

Q: How would you describe the UNHCR's working relationship with the European Commission?

[Good]. Yes, also at the level of practical cooperation. Maybe not expressly on a policy level, i.e. when UNHCR sees problems with our acquis, it gets a lot of strength, observation. We would consider requests put forward by the UNHCR. i.e. private complaints. The arguments of the UNHCR [are given weight].

Q: The Commission concluded strategic partnerships in the field of development and humanitarian aid with several UN agencies, funds and programmes, including the UNHCR (UNDP, WHO, FAO, ILO, UNHCR) with the aim of further developing policy dialogue and cooperation.

What is a "strategic partnership" and how is it established?

There is no institutionalised strategic partnership, but reflected in practice. We only expressly mention the UNHCR. It is "strategic" because we rely on cooperation, regarding programmes run by the UNHCR. Other entities are free to apply, but the UNHCR is best placed to [contribute] so the projects are done.

Therefore, it is not institutional as such, but in practice. It counts much more than nicely written words.

If it's the UNHCR we are open to cooperate. The policy of UNHCR is Brussels deals with Community affairs. But if we need the expertise of field offices, we ask Brussels office to provide contact for us.

Q: With regard to Member States who have not notified any implementing measures until the date of the expiry of the deadline for transposition, the Commission is empowered to take appropriate procedural steps, according to Article 226 of the Treaty establishing the European Community.

What steps are available to the Commission in this regard?

"Infringement procedure" – our own investigation, complaints, etc. We examine it and if we see a problem, we start the infringement procedure. At the administrative stage, letters are sent to Member States asking for clarification. If it's not enough, we reach the judicial phase – letter of formal notice; opinion, court proceedings. Article 226 prescribes the judicial part. The first stage is practice i.e. if we ask Member States to provide clarification, it may not be a problem.

If there is a ruling, Art.228 – procedure on application or Art.266 where fines may be imposed.

How are fines calculated?

According to GDP, number of votes in the Council; per day of the infringement, very complicated. We have not done it yet. Certain elements must be taken into consideration.

Q: The Group of Migration issues, Frontex, ARGO, HERA and JASON programmes appear to focus primarily on the illegal aspect of migration. Are the authorities responsible for carrying out these programmes also trained in refugee and human rights law?

UNHCR is always welcome to participate in proposals. We are one of the biggest donors of UNHCR. ARGO is financial. HERA/JASON: Not ours. Dealing with border. Handled by Frontex together with Member States.

Is UNHCR involved?

The issue of mass arrivals is not an old issue (Lampedusa, Canaries).

There is a Communication in the end of November, on the global approach to immigration. There is also a Communication on Maritime Borders. There may be UNHCR involvement for protection reasons, with ideas to provide to Member States. UNHCR is one of the major organisations mentioned [in these Communication documents].

Q: At the Rabat Ministerial Conference, the Commission participated in the conference alongside member states such as France, Finland, Greece, Netherlands, etc. What views did the Commission put forward at the conference? Were the views put forward by the Commission consistent with those of the Member States or were they divergent?

It depends how deep in detail you go. If you go into detail, that's where the problem starts. The political climate is very good for this part of the policy. I can imagine concrete opinions will be developed. Member States won't be able to handle the issues on their own. A cohesion of views is needed.

Q: When a boat carrying asylum seekers arrives in any part of the EU, what is the first thing that your Office does? (send representatives? Contact UNHCR? Contact host state?, etc)

The Commission is not an institution which deals directly with asylum applications. What we do is "guardia de trete" in a higher theoretical level. The Community has competence to grant refugee status, as with Member-State competence.

Q: When the receiving Member State refuses to allow the asylum seekers to land, what does the Commission do?

If the Member-States do not cope, that's when we are involved. They are infringing Community law. For example in Lampedusa – it is important to strike a balance. Also the subsidiarity principle is important. We cannot tell them what they should do. What we expect is observation, observing the EU acquis, guaranteeing access to procedures.

In Lampedusa, it is good practice to have a point where everyone comes. First screening, people are selected, divided according to economic vs those [deserving of] international protection. Then if they fall under our acquis, get proper reception conditions.

Next year, we also prescribe to M-S reception procedures to be handled [correctly]. We expect vulnerable asylum seekers are recognised, a small number of real asylum seekers. The strategy is not to say anything so they are not considered as asylum seekers. In the Canary Islands, the situation is not asylum as such but humanitarian. They are not able to handle the cases.

Q: Could it be that it is a question of language or access to interpreter?

[The lack of interpreting facilities] is a major constraint, but I haven't heard about a single case where somebody was not absolutely understood. It is not a problem of translation. I have not heard of a single case where asylum seekers are treated as illegals after a few days. They are treated as asylum seekers. But now we are aware there are problems linked also to this. This is to be treated in the Communication [for release end of November]. Also included are specialists for international protection and translators.

Q: When the UNHCR amended Maritime Conventions to facilitate search-and-rescue at sea in July 2006, was the Commission involved in any way? For example, did it give its opinion, etc) (as Signatory States to the 1974 International Convention for the Safety of Life at Sea; and the 1979 International Convention on Maritime Search and Rescue)

I am not sure. I know we were working on it from our side. There was some discussion on it, but at the desk level, they were probably approached by the UNHCR.

End of interview.

A copy of the transcript was sent to the respondent by email for changes, additions and deletions. No changes were made.

APPENDIX III.

Transcript of Interview with ACCEM, Madrid

Interview with ACCEM Legal Representative of *Francisco y Catalina* asylum-seekers
Date: 1:00 pm, 27 November 2006, Madrid

(Prior to interview being held, the respondent indicated her preference to be quoted, but not to be tape-recorded.)

Q: Good afternoon and thank you for granting my request for an interview. I understand that the issue of the detention of asylum seekers is a sensitive one, and because the *Francisco Y Catalina* incident is currently still ongoing/not completed, it is completely up to you to provide information you wish to provide, and you can refuse to answer any of the questions I will ask.

I will also provide to you by email a complete transcription of the interview. You may correct, delete or add information to the transcript and I will only use it once you have seen it. I plan to send the transcript to you after Christmas (2006).

We are happy to help.

Q: What is ACCEM and what does it do?

The Asociacion Comision Catolica Espanola de Inmigraciones was created in 1951 to help families of immigrants staying in Spain. Spaniards used to go to France, Sweden, Germany. ACCEM helped the rest of the family who stayed in Spain.

Now, it was created an NGP in 1991. The name remained the same. It is a well-known organisation in an institutional way. It is secular, non-political. It has different programmes [designed to] help immigrants, asylum seekers and refugees. It is one of the biggest organisations in Spain in the asylum sector.

Q: How did ACCEM become involved in the *Francisco Y Catalina* case?

ACCEM runs reception centres. [13] of these asylum seekers when they arrived were not asylum seekers at the beginning. Several lawyers talked to them then made a formal request. They went from Barcelona to Madrid. In Madrid, ACCEM took them. When they arrived, urgent procedures began because they were not asylum seekers. [It was] a humanitarian case. The migrants were sent to the Installation Centre, not a detention centre [in Sigüenza]. Lawyers went there to meet with them. In Spain, the formal request [was lodged] and individual interviews with interpreters and lawyers were arranged. ACCEM had 13 lawyers present. After 60 working days, all 13 were admitted as asylum seekers. Now this means that the Asylum Office will study deeply their case. Interviews will

be held and after how many months, I don't know [the outcome will be known]. It could take 4 months to 1 year. They go through the CIAR (Comite Internal Refugio), which gathers once a month. Then the Home Office will sign the resolution.

Asylum seekers are issued cards, and allowed to work. They [are entitled to] the right to accommodation and food since the first day of their arrival. If not admitted, they go out of the refugee centre. After 6 months, [they are given] the right to work, 6 months after the application [was lodged] and can work in any job anywhere in Spain. The right of accommodation and food is very important. They make a big difference in Europe. They also receive education. Asylum seekers pay tax, and it is compulsory for minors to go to school. They have the right to sanitary living conditions.

In Sigüenza, inside the centre is the ACCEM office. The rest of the centres are regular flats like villas. Usually they share, i.e. sharing flats with other people [open arrangement]. Sigüenza is different. It's a reception centre, a place for 60-80 people. They have rooms, double or single rooms. There are also apartments for families. With the Francisco y Catalina, the 13 asylum seekers all single. Food is rationed, and they cater for special needs (vegetarian, etc). They receive Spanish lessons, and [practical skills such as] gardening. They [engage in] labour mediation to help them find a job after 6 months. They have the right to get out whenever they want. Since the centre is responsible for them, there are rules they have to follow. They can go out voluntarily, their status is maintained, but living conditions become your responsibility.

UNHCR has access to the Centre. In every decision of the Asylum Office, UNHCR has to see it and sign. UNHCR is always involved.

Among the asylum seekers, there is 1 Pentecostal [case].

Q: What relationship does ACCEM have with UNHCR Field Office in Madrid?

It is a good relationship; always in contact. We help each other.

Q: What relationship does ACCEM have with UNHCR Brussels?

None. (The respondent explained that the first port of call is UNHCR Madrid even if you want to contact other UNHCR field offices).

Q: Did ACCEM and UNHCR work together in Francisco y Catalina case?

Yes.

Q: How did the Spanish Government or the public receive the news that the government would be taking some of the Francisco y Catalina asylum seekers?

Positively. When this happened, the media talked about it. The Spanish public is very sensitive. *Francisco y Catalina* captain and crew received a prize. But the Spanish public is sensitive when the media [gets involved]. The *Francisco y Catalina* is one of the most 'mediatic' situation that happened. But the problem is the media referred to them as "refugees", and declared them as refugees [before the process is completed].

Q: What are the procedures in Spain for receiving asylum seekers? Do the reception procedures meet the minimum criteria according to the Directive?

More than the minimum. Better than the minimum conditions written in the Directives.

Q: What information can you provide about the *Francisco y Catalina* asylum seekers in Spain?

- a. **Country of origin :** *11 men, 2 women*
- b. **Have they had interviews?** *Initial interviews*
- c. **Have they had access to interpreters?** *Yes*
- d. **Are the captain and crew not facing the same problems as Cap Anamur?**

Not at all. They received a prize.

Q: What is the nature of ACCEM's relationship with EU institutions?

The relations are formed through ECRE, ECRAN usually. Sometimes we have conferences in the European Parliament.

END OF INTERVIEW.

Thank you for your responses to my questions. I do not have any more to ask. Is there anything you would like to add that would help in my research?

[The respondent provided instructions for visiting the installation centre in Sigüenza]

Thank you once again for your very kind assistance.

End of interview.

APPENDIX IV.
**Transcript of Interview with the Netherlands Ministry of Immigration
and Naturalisation Service**

Interviews with [REDACTED] [REDACTED] (Resettlement Officers)
Date: 5 December 2006 11:00 am, The Hague

Q: Good afternoon and thank you for granting my request for an interview. As you know, I am a doctoral student from NZ studying the reception conditions for asylum seekers entering the EU by sea, and am specifically looking at how the EU handled the *Francisco Y Catalina* incident.

If there are any questions you do not wish to answer, please let me know and I will cross them out. What I'm going to do after the interview is I'm going to write a complete transcript of everything that is said, and I'm going to email it to you for corrections, additions or deletions.

[The respondents confirmed their willingness to participate, to be identified by their names and roles, and for the interview to be tape-recorded.]

[Some questions had to be repeated due to loud background noise]

Q: Do the Netherlands receive a large number of asylum seekers who have arrived illegally?

RS: Arrive illegally? Well the numbers from the last year were?

MD: 6,000 to 7,000

Q: Six to seven thousand asylum seekers?

MD: Yes for the last few years. The numbers were different 8-10 years ago when they arrived 40,000-50,000. And because of some measures of the Dutch Government and several governments have put in place, it declined to 7,000. So we have we call it, we have a restrictive policy.

RS: In 2001, a new Immigration Act entered into force.

Q: Did that make a difference in terms of the numbers?

RS: Yes.

Q: The asylum seekers arriving here illegally, what is their most common mode of transport?

MD: I think they come by air, by airplane. I don't know the exact number.

RS: *We have a Reception Centre at the airport and we have a reception centre somewhere in the country [accepting asylum claimants] travelling overland.[...]*

MD: *We also take applications from abroad so we don't know much about the transport and measures taken and the figures of asylum seekers from countries [other than the Netherlands who are dealt with] by our colleagues.*

RS: *But if you want there are some statistics from last year and every month*

Q: Are they publicly available?

RS: *No, no, public, but they are sent to the member countries*

Q: So you can request [access]?

RS: *Yes.*

Q: Is it quite common for the Netherlands to “share” asylum seekers with other EU countries such as the *Francisco y Catalina* incident?

MD: *No.*

Q: Was that the first time it happened?

MD: *No, the second time.*

RS: *Last year in November, we went to Malta and because of the influx in Malta, we took, agreed to take, we were petitioned to take 36-38 refugees from Malta.*

MD: *Because the Maltese made a request to all nations in Europe for burden sharing,*

Q: How do asylum seekers usually enter the Netherlands?

6,000-7,000 (2005). It was different 8-10 years ago (40,000-50,000). There are measurements in place. Declined to 7,000. In 2001, new Immigration Act affected numbers.

Q: What is the most common mode of transport used?

RS: *By air. There are reception centres at airport and by land. But the numbers are unknown. Take in a lot from abroad. (There are some statistics, requestable).*

Q: Is it common practice for the Netherlands to “share” asylum seekers (i.e. burden sharing) with other EU Member States as per the *Francisco Y Catalina* incident? Or was it the first time?

No. Francisco Y Catalina was the second time it happened. In Nov 2005 in Malta, because of the influx, took in 36-38 refugees. Maltese made a request for burden sharing in Europe. I think we were the first, the British refused. Madrid Mission was the second one. There are efforts made in Europe gradually for a European asylum policy. Asylum is part of that agreement.

Q: How did the Netherlands become involved in the *Francisco Y Catalina* incident? Why/How did the Netherlands become responsible for 5 of the 51 asylum seekers from this ship?

Through the UNHCR. The people on the boat were discovered in Maltese waters. It was a Spanish boat. They were not allowed in Maltese waters. Italy didn't want them. The UNHCR most of the time is not interfering in individual cases but [in this case] it intervened. Solutions had to be made. Malta agreed. They made the application there. Agreements were made by a number of countries to divide the refugees. UNHCR made request to other EU countries to take part in division. Finally we accepted 10. We were supposed to interview in Madrid. When we arrived in Madrid we heard Portugal would take 5. So from 10 to 5. It was a stalemate.

Q: Did you choose those you would take in?

We asked for Eritrean refugees because when we interview people, we also look at the admission policy of the Netherlands. Admission policy i.e. The UK had one two years ago. In Germany it's ad hoc. We had to look for that when we knew there were Eritreans. They had quite a favourable approval rate in the Netherlands. It is likely that they would be allowed under our admission policy.

When the Netherlands accepted the cases, we accepted the asylum seekers under the resettlement programme. We interviewed them in Spain. We made the decision in Madrid. They were all approved (political grounds, 1 x Pentecostal).

Q: How long did the interviews take?

Two hours per person.

Q: Who conducted the first interviews?

MD: I don't know where they did it, but [...] whether done by Maltese or Spanish authorities, not sure.

Q: Were the 5 represented by a lawyer?

When you're dealing with resettlement with UNHCR, [you] do not deal with lawyers.

In the Netherlands, there can be legal representatives with them.

Q: Were they accepted with a view to resettle?

Yes. Otherwise we'd be taking from another European state, [and this is] not according to Dublin.

Q: In its dealings with the *Francisco Y Catalina* incident, did the Dutch Government/Immigration Service enter into discussions or consultations with the UNHCR? If so, what issues were covered in the discussions?

Yes, because we don't have a uniform asylum policy (i.e. vs the US) No agreement working that like in Europe. Dublin, etc. So if you make an agreement with the UNHCR, you have to place it in a programme, resettlement programme. Decisions are made by politicians in the Netherlands.

Q: Why is that?

Because it was an emergency situation and because the UNHCR made an appeal because of the emergency situation and needed help.

Q: How was the admission of 5 asylum seekers received by the Dutch public? Was the public favourable or opposed?

There was a small item in the newspapers. It was a mixed reaction. People are saying people are coming. Some say it's good, helping in emergency situation. It wasn't a big issue. In Spain and Malta, it was a big issue. So it was both positive and negative reaction.

Q: Have The Netherlands transposed the Directives on a) Reception Conditions and b) Asylum Procedures into national law?

Yes, a month or 2 months ago. There was a kind of investigation from our Ministry to look if the Directives were implemented in the Netherlands.

How did it affect the work of your Office?

Last year for refugees resettled in the Netherlands, after [some time] they were put in reception centres. For resettled refugees, there is [only] one reception centre now.

Q: Can you please explain what happened after the Netherlands accepted the 5 asylum seekers?

a. How were they transported to The Netherlands?

By plane.

b. Where were they housed?

Reception Centre.

c. Were they subjected to detention?

No. No situation of detention.

d. When were they interviewed?

Madrid.

e. Was the UNHCR involved at any stage of the process?

They will be staying between 3-6 months, Dutch lessons and the integration and cultural programmes, doctors' visits, Dutch customs, how to deal with emergencies, some nationalities you have to learn.

f. At what stage of the process were they given access to housing/accommodation, health care, education, etc?

The moment they arrived in The Netherlands. Gradually.

g. Are the *Francisco y Catalina* asylum seekers at risk of being penalised for having entered the EU without documentation?

They have not entered illegally because when we admitted them in Madrid, they entered Holland with a valid visa. Our office gave within 24 hours notification that they are refugees with a permit to stay. The decision was made by the INS which normally takes weeks. Visas also normally take 8 days. Notification and decision, the ticket they used to enter the Netherlands, was provided in Madrid. They never illegally entered the Netherlands. That's the good thing about the Dutch resettlement programme. We interview in receiving countries. We can organise everything, at the reception centres.

Q: In general, would you say that the political developments or decision-making process in Brussels/EU affect your work directly or indirectly? i.e. specifically in terms of asylum developments? Is there an EU focus on the work of the UNDS or is it very much a Dutch Government area?

We are slowly moving towards a European policy, resettlement policy, but individual member states have their own admission policies. So the one that affects our work most is the UNHCR. That's what we work with. Only on ad hoc basis i.e. Malta, Madrid, Kosovo, they make an appeal to us.

Please clarify which UNHCR office you are referring to.

Geneva.

Do you have any dealings with the UNHCR in Brussels?

It's our addressing point. It's the regional office for the Benelux. Also the UNHCR Representative in the Netherlands [is important]. That person is stationed here, a kind of listening/monitoring post to monitor the general admissions policy. Also we have contact with Brussels and Geneva. We work with her and Brussels but we mainly get stuff from Geneva.

2005 Moroccan Case: [Madrid?] took all 5. The UNHCR [only gets involved] when special interests take place. They interview because we don't.

Q: Has there been an increase in UNHCR presence in the Netherlands or involvement in the work of the INDS in the past 10 years? What could explain this?

It has been diminishing. For 3 years, there has been 1 representative of the UNHCR, but before that there was one office.

Q: What are the reasons for this?

Budget costs. Secondly, their presence is no longer needed. We have adequate and efficient alien laws. Every asylum seeker turned down can go to a judge. Where there is a decent procedure for refugees, the UNHCR will withdraw. No resettlement between those countries. [i.e. resettlement of refugees for ___ to Netherlands]

We are one of the 4 biggest contributors/donors for the UNHCR. 1) US 2) Sweden 3) Netherlands.

END OF INTERVIEW.

I don't have any more questions. Is there anything else you would like to provide that would help me with my research?

Statistics to be sent. In the 1980s, the UNHCR was always asked to give an opinion. 1990s, large number too much for the UNHCR to give opinion on individual cases.

I will send you a complete transcript of the interview for additions, deletions or corrections and of course, you ultimately decide as to what can and cannot be used in my research.

Thank you for your time.

A copy of the transcript was sent to the respondent by email for changes, additions and deletions. No changes were made.

APPENDIX V.

Transcript of Interview with the EP LIBE Committee

Interview with LIBE Parliamentary Official

Date: 11:00 am, 8 November 2006, European Parliament, Brussels

Q: Good morning and thank you for granting my request for an interview. The purpose of this interview is for a doctoral thesis that I am working on, and this thesis focuses on the working relationship between the European Union and the United Nations High Commissioner for Refugees in responding to the illegal entry of seaborne asylum seekers into the EU.

The interview will run for approximately 40 minutes.

[The respondent consented to the interview being tape-recorded. She also confirmed her willingness to be cited or quoted, but only as 'Parliamentary Official'].

Q: Academics and migration theorists argue that restrictive Member State immigration policies are responsible for the rise in illegal migration and increase in the use of people smugglers by third country nationals wishing or trying to enter the EU.

What is the general consensus in the LIBE Committee regarding the illegal migration or smuggling of asylum seekers into the EU?

In the LIBE Committee there are several parties, the majority are Centre-Left, quite stable. The Liberal group always votes with the Socialists, Greens, GUE, stable Centre-Left majority. It is more on the human rights side. It's not on the repressive side. We have adopted a lot of resolutions regarding this subject and always do more for asylum seekers, fight against smugglers and grant asylum to real asylum seekers. There is a clear majority, even if not everyone votes on the same issue.

Q: In regard to boat arrivals (arrival of boats carrying asylum seekers), is the Parliament/LIBE involved in the admission/reception procedures in the receiving M-S? If so, in what way?

The legal base for asylum, according to the Treaty, is until the procedure to have directive is adopted, under unanimity. The Qualification Directive and minimum procedures have been adopted unanimously by the Council with consultation with the European Parliament.

For the Reception Directive/Procedures Directive, our amendments were completely different from what the Council retained. The Council did not adopt EP amendments at all. It just adopted without any change, always ready without EP opinion.

In future, we will have the co-decision procedure. For the Procedures Directive, the EP appealed to the ECJ. The Directive says in 'consultation with Parliament', so it should be co-decision. It is difficult to say when. We asked for the abolition of the article on the 'safe country list'. We do not know if the Council is in conformity. We have again to go back to consultation procedures.

Q: Does the European Parliament/LIBE consider the UNHCR as an "effective partner" in the areas of migration and asylum?

Yes, absolutely. We have been working with them for 3 years. In all our pieces of legislation, the procedure directive, the text of the EP is in agreement with the text of the UNHCR. 90% of their concerns were well received in our report. We are in close partnership with them, at least between the EP and the UNHCR absolutely. We cooperate also in all things we have made in Malta, Lampedusa, Ceuta-Melilla and Canary Islands.

For the Return Directive, we have good cooperation with the UNHCR. It depends on the Rapporteur on the report, if the Rapporteur is open to the UNHCR. For example Wolfgang Krassin Doffler, Mrs Jean Lambert (Greens).

Q: The EU's commitment to its partnership with the UNHCR was formally stipulated in Declaration 17 of the 1999 Amsterdam Treaty, as well as in the Reception, Qualification and Asylum Procedures Directives.

Have there been any changes in the way the UNHCR and EP/LIBE work together since Amsterdam?

Yes, one of the concerns of the Head of Unit of LIBE is to invite UNHC i.e. Frattini in Lampedusa. UNHCR was invited. Usually, it is not possible to invite an NGO but UNHCR was considered at the level of EU institution as being at the same level [as the European Parliament].

Q: Are these changes positive? Is there more collaboration/increased cooperation between the EU (EP/LIBE) and the UNHCR?

If the NGO is sending me a paper, I cannot just give to members, not to everybody, a paper coming from outside. That is not the case for the UNHCR. I cannot be accused as a partisan. We have to pay attention to everything we do. Official partnership we have with them. i.e. MigEurope (French) she asked me to send to everybody, to an MEP. We cannot do it. The UNHCR is the official institution.

Q: What is the level of interaction between the LIBE and the UNHCR in regard to dealing with boat arrivals?

In Malta, the Canaries, Lampedusa, Ceuta-Melilla. Before going there, we have a briefing with UNHCR. If the UNHCR have questions, we follow up the questions. We also give them background papers, suggestions, comments also for authorities there.

Q: When the UNHCR amended Maritime Conventions to facilitate search-and-rescue at sea in July 2006, was LIBE involved in any way?

No, not at all.

Q: How often does the Committee meet?

Normally 1 x a month, plus Strasbourg, so you can say 2 x a month. 7 hours. 2 middle day everytime 3-6:30 pm, next day 9-12:30.

Q: Is the UNHCR present in such meetings?

When we discuss issues [of concern to the UNHCR] i.e. asylum

Q: Does the Committee also call for emergency meetings? Would boat arrivals be considered an “emergency”?

Yes. “Emergency” [refers to] deadline with the Council. Will be in Strasbourg, just a vote. Emergency is more work of the plenary. Lampedusa – new point was included in emergency plenary. We had a resolution on Lampedusa prepared by political groups for the plenary.

Q: I would now like to ask you some questions about specific cases involving the arrivals of seaborne asylum seekers into the EU. Most of the questions I will ask are in regard to the procedural aspects of sea rescue, admission/reception and determination of asylum claims. Information regarding the details of the cases is scarce, so your assistance would be very helpful indeed.

Was the EP involved in the administration/reception and determination procedures in the December 1777 arrival of a Turkish-registered ship carrying Kurdish asylum seekers in Calabria?

No. I don't know anything about it.

Q: In June 2004, the German-flagged vessel carrying 37 asylum seekers it had rescued was initially not permitted to disembark at any port in the Mediterranean. However, “following the intervention of UNHCR and a number of NGOs, the boat was finally allowed to let its rescued passengers off in Sicily on humanitarian grounds” (UNHCR State of the World’s Refugees 2006 Chapter 2).

Did the EP/LIBE intervene? If so, how?

Not LIBE, but again it was an urgent procedure in plenary. We had a hearing in Strasbourg organised by Greens. Captain Stefan Schmidt was invited.

Q: The captain and crew of the Cap Anamur were arrested and charged with aiding illegal migration/people smuggling by the Italian court. If the captain and crew are found guilty, this could set a precedent for all ships rescuing asylum seekers and illegal migrants. What are the LIBE’s views on the criminalisation of sea rescue?

There’s also a case in this source.

There is no formal comment by LIBE, but in the debates, it was always critical of the criminalisation because they do the work that Europe should do.

Q: What are LIBE’s views on Francisco y Catalina?

We hold the same views. We don’t have a resolution [...] but there is the general view of the Committee.

Mr Frattini had a special role even if it was not the Commission’s responsibility [to facilitate cooperation]. Also, the President of the EP [had a role to play]. It happened at the beginning of September holidays.

Q: Compared to previous cases of boat arrivals, most notably, the Cap Anamur incident of July 2004 as well as the recent arrivals in the Canaries, the response of Member States (Spain, Italy and Malta) – which involved these states “offering to take some members of the group” (UNHCR News Stories 21 July 2006), was indeed unexpected (and with Spain currently facing massive arrivals!!) and is in line with the EU’s burden-sharing strategy.

What can explain the behaviour/responses of these coastal states?

I don’t see it as positive. It was an initiative of Frattini himself. At the beginning, the Member States said no. We didn’t want it. It took place in Libyan waters. The initial reaction was to say no, take them back to Libya. Frattini did I [broker an agreement], even though [there was] no institutional means to do it. The emergency was solved by Frattini

because of his initiative. We need more legislative initiative to react. We cannot really consider that it was burden sharing.

Q: Where are the asylum seekers at the present time?

I have no idea, sorry.

In terms of Frontex and the Canary emergency, Mrs Fernandez de la Vega spoke with Frattini and Borelles. She wanted [the asylum seekers to go] to Spain. Problem solved. Then we found out Frontex alone cannot do anything. It has 61 employees, does not have boats or any other means. It is just a coordination agency. There is a need for logistical help for Member-States.

Italy and Finland reacted. The means [and resources] are not enough. The Spanish press also reacted [and declared that] Frontex does not work. But that is not the case. There just is no burden sharing. The European Parliament asked to activate Article 7 of Frontex.

Q: Is it a good relationship between LIBE and Frattini?

Yes, very good. Even if he's coming from EPP Party vs LIBE Centre-Left. There is very good cooperation. It is clear there have been some problems on some issues, but [in terms of Frattini's background] he used to be a civil servant.

END OF INTERVIEW

Thank you very much for your participation.

IS THERE ANYTHING ELSE ON THE SUBJECT THAT YOU WOULD LIKE TO ADD TO HELP ME WITH MY RESEARCH?

EP reports publicly accessible.

A copy of the transcript was sent to the respondent by email for changes, additions and deletions. No changes were made.

APPENDIX VI.

Transcript of Interview with ACNUR

Interview with ACNUR Protection Officer

Date: 3:00 pm, 27 November 2006, Madrid

Q: Good afternoon and thank you for granting my request for an interview, regarding the UNHCR's working relationship with the EU in the reception and determination procedures for seaborne asylum seekers. Given the sensitivity of issues of asylum and illegal migration, it would be completely understandable if you wish not to be named or identified.

[The respondent confirmed his willingness to be tape-recorded and quoted, but did not wish to be identified by his name.]

A complete transcript of the IV will be sent to your Office for corrections before being incorporated into my thesis.

Q: Does the UNHCR office in Madrid deal with any of the EU institutions in Brussels, or are your concerns and interests put forward/represented by the UNHCR office in Brussels? If so, what is the level of interaction between the Madrid Office and the Brussels Office?

No, we have a regional office in Brussels. We related to the EU only when Spain is involved. [The issues are] addressed at the local level. We normally deal with Brussels for consistency and also for interaction with the Commission. [This avoids] answering left and right.

Q: Would it be fair or correct to say that the UNHCR field offices are concerned with protection and the Brussels office with policy?

No, it is more a geographical division, competency-based only as much as it deals with the EU. The UNHCR-Madrid [deals with] Spain. For policy, we refer to the 'Europe Bureau'. The UNHCR is structured regionally, part of which is in Brussels, and one in Madrid.

Q: How would you describe your working relationship with the Spanish Interior Ministry?

It is very good, very positive. For both ways, it is positive. The UNHCR is considered [to be in a] greater position from the perspective of the Spanish. [We work with] several ministers in Spain, the most relevant of whom are the Interior and Labour. [We work with] the Interior Ministry [regarding] reception, access to procedures. [We work with] the

Labour Ministry [regarding] reception conditions, local integrations, funding Sigüenza, and NGOs. [We also work with] the Ministry of Foreign Affairs and also Ministry of Justice.

[We have] relevant contact with the Government. The priority for foreign policy of the Spanish Government, the focus is on multilateral [relations]. It attaches great relevance to UNHCR's work and also worldwide. The High Commissioner is in a greater position to supporting the Spanish Government. There are good relations both ways, there are no mean differences in opinion. We listen to each other, find consensus. The UN agency [...] listens to the opinion of States. International protection belongs to international.

Q: Have the good relations always been there?

It depends periodically. The [UNHCR] Commissioner is Portuguese, knows Spain very well. This further contributes to the partnership.

Q: What is the first thing your Office does when you receive news that a boat of refugees arrived on Spanish territory?

We do not receive news of every boat that comes. We have partners with several organisations based in the 'hotspots', the main arrival points. If there is anything particular to give an arrival, we'd know about it. Otherwise, it takes around 10 days i.e. for specified concerns [to be communicated to ACNUR]. In the Canaries, [it happened] several times, in Ceuta/Melilla, Andalusia. We don't have a field office, but extensive field presence. We meet authorities and NGOs. We meet with arrivals. We try to get sense of profile of those arriving. With the support of the government, we monitor [the situation] with full support of the government. They listen carefully to our observations. Discussions emerge from such missions.

The overall assessment [of the Spanish response to boat arrivals] is quite positive. The Spanish Government have [got] out of their way [to ensure our involvement] and we are given access to detention centres.

Q: In terms of the Francisco Y Catalina, did ACNUR have a role to play?

We had a role to play in general, whether here, Rome, Brussels, etc. It attracted political attention. The [UNHCR] Commissioner himself took a lot of interest. The objective was to have their [asylum seekers, fishing boat crew] concerns assessed by governments. We were in permanent contact with MFAt and Ministry of Interior [and so were aware of the events].

For the High Commissioner, one of the objectives is the "prong", specifically burden-sharing. The UNHCR elaborated the Ten Point Action Plan, which was based on a worldwide strategy. It attached great relevance to these strategies. Very clear signals, if positively set more structures.

It was something for the High Commissioner to make an assessment [on the issue]. The UNHCR took responsibility for the allocation [of asylum seekers] through the High Commissioner's intervention. The High Commissioner [indicated] that 10 refugees allocated to Netherlands and Portugal.

Q: Would you be able to provide further information regarding the High Commissioner's 'intervention'?

I cannot comment on what the High Commissioner did. The dialogue was kept at policy level. There were different levels of action [carried out].

Q: It was reported that a UNHCR representative boarded the ship to ascertain the conditions. Was this representative from the Madrid office?

No, we were present on the ship not to ascertain conditions but to determine whether prima facie refugees or not. They went and interviewed the people. The Spanish media went in as well.

Q: How many were identified as prima facie refugees?

Two at the preliminary assessments. When these people came to Spain, they formalised their asylum claims. It was the correct assessment.

Q: What is UNHCR Madrid's level of interaction with NGOs such as ACCEM? JRS?

JRS not concerned with refugees in Spain.

Q: How closely do you work together on the F/C cases?

[Quite closely]. Yes, we work together not only on the subject of irregular migration. We also work together on the organisation [of reception], such as regarding accommodation, etc. This normally has a legal component, so we speak with lawyers. There are intense consultations also from time to time.

There used to be formal coordination mechanisms with NGOs. But the reduction of [ACNUR] staff affected this. But we intend to retain this coordination. NGOs value meetings positively.

Q: Does UNHCR-Madrid have any involvement in the reception/determination procedures for asylum seekers illegally in Spain? How is it involved?

We are involved formally in the determination procedures, not reception. But we try to see situation for reception, we always try to assess reception conditions. But our formal position is in the determination procedures, every step of procedure, which is the responsibility of the legal team).

[We are not] physically present. Our opinion is given at the border. Spain has a 2-phase asylum procedures i.e. the Dublin case or if not related to the Convention (manifestly unfounded). We gave our opinion at the border. We give our opinion on those 'inadmissible' cases.

The UNHCR keeps a very high role in Spain. If Spain declares asylum claims to be inadmissible, and UNHCR thinks they should be admitted, we appeal at the High Court. If we consider an inadmissible asylum seeker should be admitted, [then they are] admitted. In terms of admissibility, there was one case at the border. All other cases involved a dialogue. The particularities of the cases [are considered] to reach unanimous decisions. 27% to 60% admissibility. [For] every case we are members of the Interministerial Conference. We have no vote, but we bring our concerns to members of commission.

It involves labour-intensive work: 5 lawyers, 1 administrative assistant, and the counterpart of asylum office. We also write reports containing opinions to the High Court.

Whether jurisprudence or administrative criteria, the High Court and Supreme Court give value to UNHCR opinion. The UNHCR is seen as an independent broker.

The UNHCR has no funding because of worldwide priorities. If counties need UNHCR, [they] need to fund [it]. UNHCR Madrid is funded by the Spanish Government, which also deals with legal assistance. It [UNHCR] has a rather small presence. There is transparency in terms of funding.

Among persons arriving illegally in Spain, only a handful request asylum. UNHCR is not concerned with non-refugee problems. Their profile is basically that of economic migration. We do not encourage person who may not have a claim to seek asylum. But the concern is for people in need of international protection to get as much help as possible.

Leaflets are given to asylum seekers i.e. regarding differences in asylum vs refugee. The contents of leaflets not grasped fully by those who are not literate, so the help of NGOs and lawyers is employed in internment camps.

In total, there were 30,000 unauthorised arrivals in the Canaries. Out of this number, only 180 were asylum applications. We find that some persons are told by smugglers not to say anything to the authorities on arrival.

In previous years in Ceuta/Melilla, it depends on year and place. There were high numbers claiming international protection problems.

Those coming from non-refugee producing countries i.e. Mali are claiming asylum. In the case of Spain, we do not have a concern that gates are close. But overall approach is to solve overall problems. The Spanish Government is open to what we [UNHCR] have to say.

END OF INTERVIEW.

A copy of the transcript was sent to the respondent by email for changes, additions and deletions. No changes were made.

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