Convergence against the odds – the development of safe country of origin policies in EU member states (1990 – 2013)

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Abstract

Safe country of origin (SCO) policies have become very popular in many of the European countries. Scholars however disagree whether this leads to policy convergence or divergence. Based on the absence of a comprehensive dataset from which to make such a convergence/divergence observation, this paper consequently describes the development of SCO policies in depth, and their variation over time and across member states. It is observed that SCO policies adopted at the domestic level are becoming increasingly similar across EU member states, especially with regard to certain regions (the Western Balkans and West Africa). Following from these observations, several mechanisms behind the established trends are discussed. The paper is based on an original dataset of the SCO designations for all EU member states over the time period 1990-2013 as well as on interviews with ministry officials in several EU member states.

Keywords:

EU asylum policy, safe country of origin, convergence

1. Introduction

Asylum policy is essentially about whether or not an individual is allowed to remain in the territory of a state in the light of persecution. Until very recently, the policy field of asylum remained firmly in the hands of member states, with limited competences for supranational institutions. European cooperation on this matter is a rather recent phenomenon. The ball was set rolling by the Single European Act of 1986 and member states' agreement on the free movement of goods, capital, services and, most importantly, people. Policymakers from London, Paris or Berlin acknowledged that cooperation on asylum was in their interest and built up a now complex European asylum governance structure.[1] Tension between the need for supranational cooperation, on the one hand, and the prevalence of state sovereignty, on the other, accounts for a complex institutionalization of European asylum governance. Formal institutions coexist with informal ones, soft rules complement hard law, and commitment does not necessarily follow cooperation.[2] While these institutional complexities have been discussed before, their consequences for national asylum policies still remain to be thoroughly analyzed.

This paper looks at one particular element in the field of asylum policies, namely safe country of origin (SCO) policies. These policies exemplify the core dilemma of modern asylum administration, namely adhering to international refugee law by thoroughly

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[1] Lavenex, S. (2010). Justice and Home Affairs: Communitarization With Hesitation, in: *Policy-Making in the European Union.* H. Wallace, M.A. Pollack, A.R. Young (Eds.), 6 ed., pp. 457-480, OUP, Oxford, UK; Monar, J., 2001. The dynamics of Justice and Home Affairs: laboratories, driving factors and costs. *Journal of Common Market Studies, 39(4)*, pp. 747-764.

[2] Vink, M., and Engelmann, C. (2012). Informal European Asylum Governance in an International Context. In: *International Handbook on Informal Governance.* T. Christiansen & C. Neuhold (Eds.), pp. 690-718), Cheltenham, Edward Elgar.

examining whether or not it is safe for an asylum seeker to go back to his or her country of origin while at the same time thinking about strategies for processing asylum claims more efficiently. The tension between national needs for cooperation and hesitance to commit to supranational norms has resulted in the institutional complexity which has become so familiar in many aspects of European asylum governance. In the case of SCO policies, it meant that a need for cooperation and common rules was acknowledged in the early 1990s, followed by some minimum standard legislation in the form of the original Asylum Procedures Directive[3], and its revised version adopted in June 2013.[4] Parallel to this rather typical development of European asylum governance, the national level is also interesting to look at. Member states are very active in pursuing SCO policies and thus challenge, according to many critics, the core principles of international refugee law. It is questionable whether this policy is consistent with the non-refoulement principle and with article 3 of the Refugee Convention (providing for access to asylum procedures without discrimination as to race, religion or country of origin). Critics also frequently stress that the SCO practice rests upon several controversial assumptions in the asylum determination procedure, such as the availability of sufficient and verified information.[5] Given this substantive criticism, it is important to investigate whether and how SCO policies have developed over recent years. This analysis is a necessary step before a possibly profound criticism of the current situation could take place.

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[3] Council (2005), *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (*Asylum Procedures Directive), Council of the European Union, Brussels.
[4] European Union (2013), *Directive 2013/32?EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, Official Journal of the European Union, Brussels.
[5] Byrne, R. and Shacknove, A., 1996. The Safe Country Notion in European Asylum Law. *Harvard Human Rights Journal, 9,* pp. 185-228: Goodwin-Gill, S., 1992. Safe Country? Says Who? *International Journal of Refugee Law, 4(2)*, pp. 248-250.

However, there so far exists little analysis of the European impact on domestic SCO policies. No comprehensive overview exists that captures variation across member states and time since the first introduction of these policies in the early 1990s. Existing overviews at best cover a selection of member states or time periods.[6] The most recent documentation of national SCO policies was compiled by the ELENA project in 2005.[7] Nevertheless, despite its significant merits this study did not cover all the EU member states. Most importantly, none of the above-mentioned collections give a temporal overview of the development of SCO policies and therefore do not provide any ground for discussing possible convergence of SCO policies across EU member states.

Based on the absence of such an overview, it is not surprising that authors who have discussed the convergence/divergence question regarding SCO policies have come to very different conclusions. While some argue that the application of the SCO concept and national SCO lists diverge[8], others observe convergence.[9] Both camps provide little systematic evidence to support their claims. This disagreement illustrates the core puzzle

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[6] European Parliament (1996), *Asylum in the European Union: The "Safe Country of Origin Principle"*, European Parliament Directorate General for Research; Martenson, H. and McCarthy, J., 1998. 'In General, No Serious Risk of Persecution': Safe Country of Origin Practices in Nine European States. *Journal of Refugee Studies, 11(3)*, pp.304-325; Council of Europe (2005), *Accelerated Asylum Procedures in the Council of Europe Member States,* Committee on Migration, Refugees and Population.

[7] ELENA, European Legal Network on Asylum (2005). *The application of the safe country of origin concept in Europe*: ECRE, European Council of Refugees and Exiles.

[8] ECRE, European Council of Refugees and Exiles (2010), *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Asylum Procedures Directive, a*vailable at http://www.ecre.org/topics/areas-of-work/protection-in-europe/162.html, accessed July 2011, p. 49; European Commission (2009), *Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council on Minimum Standards on Procedures in Member States for Grating and Withdrawing International Protection. Impact Assessment,* SEC (2009) 1377, p. 18.

[9] Costello, C. (2006), *The European Asylum Procedures Directive in Legal Context*, UNHCR - New Issues in Refugee Research Research Paper No. 134, p. 3; Costello, OSTELLO, C., 2005. The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection. *European Journal of Migration and Law, 7*, pp. 35-69.

which drives the present analysis. On the one hand, divergence might be expected because there is no formal harmonization at the EU level; on the other hand, one would expect convergence because countries seem to orientate their own policies in line with those of others.[10] Consequently, the very first task of the researcher is to empirically analyze the SCO policies of each member state in order to make a qualified statement about convergence or divergence. Based on the results of such an examination, I will discuss several mechanisms accounting for the patterns observed.

The paper proceeds as follows: Section 2 clarifies the terms used, most importantly *safe country* and *safe country of origin*. Section 3 outlines the start of intergovernmental cooperation and developments at the EU level. Sections 4 and 5 present national-level data and suggest mechanisms that can explain the observations. The national-level analysis will focus on several aspects of the SCO notion, namely its formalization in national asylum law, the number of SCO lists and designations (all section 4) and the composition of SCO lists (section 5).

2. The notion of safe country of origin

Safe country of origin belongs to a concept family which has existed since the early 1990s and includes a number of notions. 'Safe country' refers to 'countries which are determined either as being non-refugee-producing countries or as being countries in

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[10] Byrne, R., Noll, G. and J. Vedsted-Hansen, 2004. Understanding Refugee Law in an Enlarged European Union. *European Journal of International Law, 15,* pp. 355-379.

which refugees can enjoy asylum without any danger'.[11] Notions subsumed under this concept are generally dealt with through an accelerated asylum procedure, and declared manifestly unfounded or inadmissible (depending on the legal basis). All states have obligations under the Geneva Convention. The key principle in asylum law – and very relevant for any safe country notion – is the principle of non-refoulement. It means that no state can return a refugee to her country of origin in case her life or freedom would be threatened on account of her race, religion, nationality, membership of a particular social group or political opinion (article 33). Due to the different administrative and judicial traditions of State parties to the Geneva Convention, the Convention allows much discretion for states on how to shape asylum procedures.[12] However, soft law, regional human rights conventions and national law spells out the obligation of states regarding asylum procedures in general, and safe country notions in particular, in much more detail.

Changing migration patterns and an increase in numbers of asylum seekers have fuelled new, often contested, ways to process asylum claims. Asylum authorities deal with a large backlog of applications and safe country declarations help to speed up the asylum procedure and, arguably, reduce administrative costs.[13] The safe country notion rests on a number of assumptions that have been questioned by Byrne and Shacknove (1996), including the availability of sufficient information to determine that a country is safe;

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[11] UNHCR (1991), *Background Note on the Safe Country Concept and Refugee Status*, available at http://www.unhcr.org/refworld/docid/3ae68ccec.html, accessed 2 March 2012.
[12] Vedsted-Hansen, J. (2012). Common EU Standards on Asylum - Optional Harmonisation and Exclusive Procedures?, in: *The First Decade of EU Migration and Asylum Law*. E. Guild & P. Minderhoud (Eds.), pp. 255-271, Martinus Nijhoff, Leiden, The Netherlands.
[13] For an opposing view see Oakley, S. (2007). *Accelerated Procedures for Asylum in the European Union. Fairness versus Efficiency*. Sussex Migration Working Paper No. 43, available at www.sussex.ac.uk/migration/documents/mwp43.pdf, accessed 10 April 2012; Human Rights Watch (2003). *Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy*.

cultural affinities with regions of origin; and the ability of countries to firmly distinguish between genuine and fraudulent asylum seekers. Martenson and McCarthy (1998) point to the danger of declaring countries of origin to be safe due to the susceptibility of the practice to political manipulation. As will be shown in the analysis later, this is likely to happen because EU member states use their SCO lists to whitewash the human rights records of some countries of origin.

A safe country of origin is a country in which there is generally and consistently no risk of persecution. Definitions in national and European law are often more specific, but the core idea is the same: the situation in the country of origin in general is safe enough to presume that an asylum seeker is *not* entitled to international protection in another country. Normally, national asylum authorities examine an asylum claim with regard to the general situation in the country of origin *and* with regard to the claimant's individual grounds. When applying the safe country of origin notion, the individual part is reduced and often linked to fewer procedural safeguards (i.e. limited possibilities for appeal). The essence of the safe country concept is the reverse of the burden of proof. While the collection of evidence is a task normally shared between the official assessing the claim and the asylum seeker, the burden of proof is now entirely placed on the claimant. He is presumed to have arrived from a safe country and he himself has to prove that this is *not* the case.

Types of SCO policies vary considerably across EU member states. Comparative overviews of the procedural dimension of SCO policies – although not complete and

somewhat dated – have been provided by others.[14] However, a comprehensive and comparable overview (a typology, so to say) is still lacking. What follows is a general overview of how SCO policies are understood and applied in national legislation.

- General application: The SCO notion can be applied in a formal way, with a prescribed list of SCOs (France, UK) or an informal way (Hungary, Netherlands).

- Legal basis for SCO designations: SCO designations need to be established by law (Austria, UK), or by the government directly through a ministerial order (Denmark, Germany). Several countries require parliamentary approval of the list (UK); others do not (Luxemburg).

- Scope of designation: It is possible to limit SCO designations both geographically and population-related. Whereas there are no cases known where SCO designation is limited to only a part of the country (though many national laws and the 2005 Asylum Procedures Directive allow to do so), the limitation of SCO rules applying to only men from a specific country is quite common (for example in the UK related to Malawi and Luxembourg related to Ghana).

- Criteria for considering a country of origin to be safe: The criteria are generally quite similar. They include a functioning democracy, independence of the judiciary, a state of the rule of law, observance of the 1951 Refugee Convention, and ratification and compliance with other human rights treaties, including the European Convention on Human Rights (where relevant). Whether the number of

[14] European Parliament 1996; Martenson and McCarthy 1998; ELENA, European Legal Network on Asylum (2005). *The application of the safe country of origin concept in Europe*. ECRE, European Council of Refugees and Exiles; Hailbronner, K., 1993. The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western European Perspective. *International Journal of Refugee Law, 5(1)*, pp. 31-65.

asylum applicants in relation to the number of recognized refugees coming from the country under consideration should also be a valid criterion to be taken into account is contested. It is informally practiced in many EU countries, but it has been declared unlawful in Irish and Belgian law.[15]

- Right of appeal: Rules on the possibility and extent of an appeal vary greatly. For example, appeals from applicants having arrived from a safe country of origin can have a suspensive effect (Latvia) or not (Austria, UK).

- Institutional and juridical oversight: In some countries, SCO designation is not a matter for national governments alone but involves additional bodies, such as NGOs (Denmark).[16] Increasingly national courts have also been involved in invalidating procedural standards[17] or SCO designations as such.[18]

Further procedural differences relate to a regular review of the SCO lists, information used to assess safety in a country of origin, and the standard of proof required from asylum seekers. In summary, the safe country of origin notion is applied differently in different member states. However, the main idea of SCO policies remains similar across all national legislations: there are countries that are presumed to be safe for returning

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[15] Constitutional Court of Belgium, 4 March 1993, no 20/93. Retrieved 7 February 2014, from http://www.const-court.be/public/d/1993/1993-020d.pdf

[16] The Danish Refugee Council is involved in the setup of the Danish SCO list as well as in the manifestly unfounded procedure. Also regarding institutional oversight, the UK has created a body that is unique within the European Union: The Advisory Panel on Country Information is mandated to review country of origin information on which refugee status determination is based. It is, however, explicitly not mandated to review the SCO designations as such.

[17] The Belgian Constitutional Court declared a rule void that would declare applications inadmissible if the applicant originated from a countries which had accounted for 5% of asylum seekers in the previous year and where less than 5% of the applicants had been granted refugee status: Constitutional Court of Belgium, 1992

[18] The French Supreme Court judged in 2012 that neither Kosovo nor Albania can be declared as safe countries of origin: Conseil d'Etat, 26 March 2012, n° 349174. Retrieved 4 February 2014, from http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT00002 5580451&fastReqId=993169916&fastPos=1

asylum seekers (being citizens of the country in question), and applicants from these countries can be considered through an accelerated procedure, often with fewer procedural safeguards.

The following section illustrates how difficult it is for EU member states to agree on an EU-wide common legal framework for SCO policies, and why it is nevertheless interesting to have a closer look at the (failed) common SCO list and its proponents.

3. European cooperation on safe country of origin policies

3.1. The start of intergovernmental cooperation on SCO

The possibility of accelerated procedures was first discussed by UNHCR in the context of manifestly unfounded asylum applications. In 1983 UNHCR acknowledged the fact that there are some asylum applications from individuals who clearly have no valid claim, so-called manifestly unfounded or abusive applications.[19] These applications could be processed through an accelerated procedure. Acceleration was limited to cases which are clearly fraudulent or do not relate to the grounds of international protection. However, the idea of processing some applications faster than others remained rather general and, importantly, was still very much linked to procedural safeguards.[20] The concept of safe

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[19] UNHCR (1983), *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum. Executive Committee Conclusion No. 30.* available at http://www.unhcr.org/refworld/docid/3ae68c6118.html, accessed 2 March 2012.
[20] Oakley 2007, p. 3.

countries was not explicitly mentioned in this context, but it may easily be subsumed into the category of claims having no ground for protection.[21]

In the early 1990s, the idea of accelerated procedures was further fuelled by a massive influx of asylum seekers in several European countries. It did not take long before the first countries (Switzerland and Belgium) picked up on the idea of accelerated procedures and started listing so-called safe countries. Here, we can already see an early pattern of list compilations, which will be discussed in more detail in section five: national lists were *not* compiled because certain countries were presumed to be safe, but because there was a considerable (and unwanted) number of asylum seekers from countries with generally low asylum acceptance rates. In 1992, the ministers of the member states of the European Communities agreed to formalize the concept of accelerated procedures. The so-called London Resolutions presented the first European agreement on asylum-related issues. [22] This set of soft rules defined *manifestly unfounded applications* for asylum as not meeting the substantive criteria of the Geneva Convention because 'there is clearly no substance to the applicant's claim to fear persecution in his own country'.[23] A decision on unfoundedness would be made on the basis of a general safety assessment of the country of origin. Criteria for such a safety assessment included previous numbers of refugees and recognition rates; observance of human rights; democratic institutions; and stability.[24] With the London Resolutions, the European ministers not only stressed the

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[21] Hailbronner 1993, p. 34.
[22] Council (1992a), *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum (London Resolution).* Council of the European Union, Brussels; Council (1992b), *Council Conclusion of 30 November 1992 on countries in which there is generally no serious risk of persecution (London Resolution).* Council of the European Union, Brussels.
[23] Council 1992a, article 1
[24] Council 1992b

possibility of an accelerated processing of asylum claims; they also emphasized the need for harmonized action: 'Member States have the goal to reach common assessment of certain countries that are of particular interest in this context'.[25] The London Resolution can be marked as the birth of cooperation on SCO policies for two reasons: on a substantive level, it is the first intergovernmental agreement (though non-binding) allowing for manifestly unfounded applications on the basis of a general assessment of the country of origin. On a procedural level, it is the first expression of a common will of EU member states to agree on such an assessment, or to work towards a common list of safe countries of origin.

3.2. EU policy and the Asylum Procedures Directive

The first binding agreement on countries to be considered safe was made in 1999. With the Treaty of Amsterdam, member states agreed to consider all EU member states safe countries of origin (Protocol on Asylum for Nationals of Member States of the European Union). In 2002, the JHA Council went one step further and declaring all (then) accession countries safe countries of origin from the date of signature of accession treaties. Subsequently, asylum applications from Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia would be considered manifestly unfounded.[26]

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[25] Council 1992a, article 8

[26] Council (2002), *Declaration by the Ministers of Justice and Home Affairs of the Member States of the EU on Asylum on 15 October 2002*; for a critique see Statewatch (2002), *EU Ministers declare applicant countries "safe" to send back asylum-seekers*, available at http://www.statewatch.org/news/2002/oct/05safe.htm, accessed 4 June 2012.

The original Asylum Procedures Directive (APD) of 2005 was the first instrument at the European level providing binding regulation on the asylum procedure in general and on the application of the SCO concept in particular. The Directive was one of several asylum-related instruments adopted between 2001 and 2005. Compared to agreements on more substantive standards (as for example agreed on in the Refugee Qualification Directive (2004/83/EC) or the Temporary Protection Directive (2001/55/EC)), agreement regarding procedural standards did not go beyond minimum norms.[27] The Council laid down rules for the grounds for designating countries of origin to be safe and who is mandated to do so. To make such a SCO assessment, several criteria should be taken into account, including legislation in the country of origin, observance of rights laid down in the main human rights documents, respect of the non-refoulement principle, and a system of effective remedies against violations of these rights and freedoms (ibid.).

Regarding procedural standards, Articles 29 and 30 of the original Directive foresaw two avenues for SCO designations – via an EU-wide common list and via a national list. A common list might be adopted by qualified majority of the Council, on a proposal by the Commission and after consultation with the EP. Contrary to the initial draft as suggested by the Commission, member states would have been required (instead of having an option) to adhere to that common list. However, article 29 was never put into practice. Discussion on the common SCO list delayed the adoption of the original Asylum Procedures Directive (eventually adopted in 2005) and as a result the common list was de-linked from it and supposed to be agreed on at a later point in time. In 2006, the EP,

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[27] For a discussion of the regulatory differences between the various asylum instruments, see Vedsted-Hansen 2012.

supported by the Commission, asked the ECJ for an annulment of article 29(1) of the original Directive on the Council's mandate to create such a list. The complainants argued that by agreeing on this rule the Council had adopted Community legislation and consequently the co-decision procedure was applicable. The ECJ supported this argumentation and declared article 29(1) annulled.[28] Article 30 of the original Directive still allowed member states to designate countries of origin as safe by national legislation.

3.3. The proposed EU-wide common list on safe countries of origin

Although there will be no common list of safe countries of origin, the negotiations arising around that list-to-be in 2005 are interesting for this analysis. Already since 1992, there had been an interest on the part of some member states to agree on such a common list of safe countries of origin.[29] The list proposed by the JHA Council in March 2004 included the following countries: Benin, Botswana, Cape Verde, Chile, Costa Rica, Ghana, Mali, Mauritius, Senegal, and Uruguay. It was already then clear that a possible list should not be a collection of any safe country in the world but a useful list, meaning that there needed to be considerable numbers of asylum seekers from the countries included. This becomes obvious when looking at the Draft Council Conclusions of the Dutch presidency: Chile, Costa Rica and Uruguay were not included in the agreed list 'due to

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[28] The EP appeal and the subsequent ECJ decision only relate to procedural grounds; no assessment was made about the SCO notion as such and its normative implications. See ECJ (2006), *European Parliament v. Council of the European Union.* European Court of Justice. Case C-133/06.

[29] Joly, D., 1994. The Porous Dam: European Harmonization on Asylum in the Nineties. *International Journal of Refugee Law, 6*, 159-193, at p. 170; Statewatch (2004), *EU divided over list of "safe countries of origin" - Statewatch calls for the list to be scrapped*, available at http://www.statewatch.org/analyses/no-38-safe-countries.pdf, accessed 2 March 2012, pp. 2-3.

the generally small number of asylum applications of South and Central American

nationals in the European Union'.[30]

Significant disagreement among the member states' assessment of the safety situation in

the countries of origin accounts for a common list not being further pursued in the revised

Asylum Procedures Directive. However, a closer look at the list, its proponents[31], and

national designations of safe countries of origin in this time period, is worthwhile.

Several member states (such as Slovakia and Sweden) who in 2004 (and some even by

2013) *had no SCO policy at all* were not only in favor of a common list, but also in favor

of including most of the proposed countries on that list. Thus, they would have agreed to

European legislation lower than their own national standard. What was criticized by

NGOs and international organizations throughout the negotiation process[32] becomes

obvious here: adopting the provision would have resulted in lowering national standards.

A revised version of the Asylum Procedures Directive has been agreed upon in June

2013.[33] The recast was also explicitly targeted towards reaching more convergence on the

application of SCO practices.[34] The recast of the Directive still includes the SCO notion

as a valid case for accelerated procedure.[35] The possibility of a common list of safe

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[30] Council (2004), *Report from the Presidency of the Council of the European Union (Netherlands) to the Asylum Working Party on 17 September on Minimum Common List of Safe Countries of Origin*, 12118/1/04 REV 1. Brussels, JHA Council of the European Union, p. 4.
[31] Statewatch 2004.
[32] Statewatch (n.d.), *EU law on asylum procedures: An assault on human rights?*, available at http://www.statewatch.org/news/2003/nov/04asylum.htm, accessed 5 August 2011; Casciani, S. (2004), *UN warns over EU asylum rules*. BBC News, available at http://news.bbc.co.uk/2/hi/europe/3580665.stm, accessed 10 April 2012.
[33] European Union 2013
[34] European Commission 2009, p. 25.
[35] For a discussion see ECRE 2010, p. 32.

countries of origin is, however, no longer mentioned. Consequently, possible revisions can only work towards more convergence in procedural matters (but not substantial ones, meaning actual SCO designations) for which the Commission proposal[36] foresaw two minor additions: a regular review of national SCO designations (new article 27(2)); and that information required upon which to base SCO designations shall include information from the European Asylum Support Office (new article 37(3)). Both minor changes were adopted. Ultimately, nothing really has changed. It is thus difficult to see how the recast of the Asylum Procedures Directive will contribute towards more convergence on SCO procedures.

4. The national regulation of SCO policies

As discussed above, common criteria for which countries can be designated safe were established with the adoption of the Asylum Procedures Directive in 2005. However, no attempt at creating rules beyond this point has been successful. It is difficult to assess whether this is a good or a bad development. On the one hand, clear EU-wide rules could give a wrong signal in the sense of "normalizing" a practice that is considered by many to weaken the notion of non-refoulement. On the other hand, common rules could possibly avoid member states experimenting individually with SCO rules. The current situation is determined by developments in *national* asylum law and practice, despite the halt in supranational formalization of SCO rules.

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[36] European Commission (2011), *Amended proposal for a directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (recast)*, COM (2011) 319 final.

4.1. Data

The following analysis of national SCO policies is based on an extensive data collection.

SCO policies for all 27 EU member states have been collected for the time period 1990 to

2013. The data collected include the legal basis for SCO designations as well as any

entries and exits of countries of origin on SCO lists during the period. The data has been

collected by means of both desk research and enquiries for information to national

ministry officials, NGOs and other experts. A complete overview of the sources used can

be found in an Annex which is provided at the author's website.[37] Since national SCO

policies are not equally formalized and accessible for each member state, some

information might be incomplete. For example, Denmark has an SCO policy and the

legal framework is accessible, but SCO lists are compiled informally and are not publicly

available. The author is only in possession of two lists (2005 and 2011), whereas there

might have been changes (meaning more lists) in between. However, even if the history

of SCO designations cannot be verified for all states, there is one fact that makes the data

quite reliable: few countries of origin ever exit any national SCO list. Thus, the limited

data reliability relates solely to the *year of list entry*. The current data is, however, much

more comprehensive (in spatial and temporal terms) than older attempts and captures the

basic pattern, namely that SCO lists have grown immensely and become more and more

similar over recent years. The dataset has been supplemented by interviews with ministry

officials from seven EU member states based in the policy directorates and who are thus

involved in policymaking regarding SCO policies.

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[37] http://www.maastrichtuniversity.nl/web/Profile/c.engelmann.htm

4.2. Introduction of SCO policies

This part of the analysis shows that there is convergence regarding the existence of the SCO notion in domestic asylum law and discusses two possible explanations. By 2006, nearly all member states had introduced the possibility of designating countries of origin as safe in their national asylum law. Figure 1 shows the years in which member states introduced the SCO notion into their national asylum law.
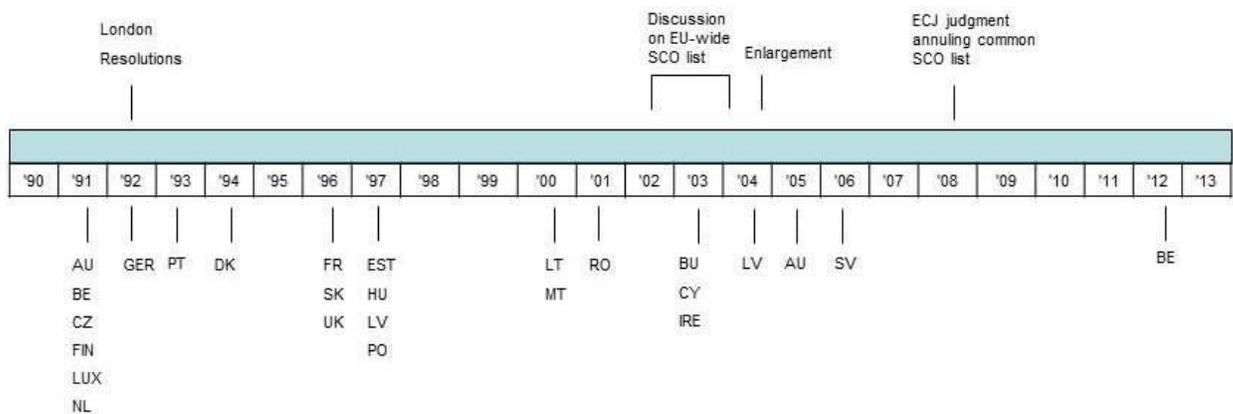

Figure 1: *Introduction of SCO notion in domestic asylum law*

Source: own compilation

The number of EU-27 countries with a SCO policy has greatly increased over time. While in 1991 only five EU member states had SCO policies in their domestic asylum law and most of the current EU-27 countries had no reference to SCO whatsoever, the picture has now completely changed. In 2013, only four EU member states had *no* SCO policy (ES, GR, IT, SE). Thus, there is a clear trend towards convergence of national asylum laws regarding the formalization of the SCO notion.

There are a number of explanations why the SCO notion has spread so rapidly in domestic asylum law. Most of the EU-15 introduced SCO notions into their national asylum law in the 1990s. At that time, the break-up of the Soviet Union and Yugoslavia led to large streams of refugees trying to claim asylum in one of the old member states. As a consequence thereof, Germany, Austria[38] and the Netherlands changed their national asylum laws and also included the notion of SCO. Subsequently, two parallel mechanisms can possibly account for the proliferation of the SCO rule: a European factor and sub-regional dynamics. Let us focus on the European factor first. In addition to the London Resolutions, two further landmarks could have had an influence on the introduction of SCO notions into national asylum laws: discussions on the Asylum Procedures Directive and the 2004 enlargement. During the years 1999 to 2005, the EU-15 negotiated several asylum-related directives, including the Asylum Procedures Directive. During these negotiations EU member states discussed which countries should be considered safe. These discussions could account for the introduction of SCO notions across Europe. One could argue that old member states (Ireland, Austria) introduced SCO during this time because EU negotiations sent the message that SCO notions belonged to every national asylum policy; and the new member states introduced the notion because they had to bring their asylum laws into line with European regulations before entering the club (Malta, Bulgaria). It is important to remember that discussions at the EU level were not concerned with whether or not an SCO notion conforms with the principle of non-refoulement, but rather with *how*. Whether an SCO practice is an accepted part of a

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[38] Austria abolished the notion in 1997, only to re-introduce it in 2005. See Fassmann, H. and Reeger. U. (2008), *From Guest Worker Migration to a Country of Immigration*, IDEA Working Paper, available at http://www.idea6fp.uw.edu.pl/pliki/WP1_Austria.pdf, accessed 10 April 2012., p. 24.

toolbox for dealing with unwanted immigration was no longer questioned and this signal was sent to member states-to-be and those that had not yet introduced the notion.

However, blaming solely Brussels (or London) for national policy developments would oversimplify the matter. Several countries, including Austria, Germany and the Netherlands, introduced the notion before the London Resolutions were adopted and the majority of EU member states followed long before discussions at EU level picked up speed. Rather than top-down, a bottom-up explanation seems logical: Byrne et al. (2004) indeed show that domestic and sub-regional dynamics also accounted for the introduction of SCO policies. Closely mirroring the German legislation, Poland included the SCO notion into national asylum policy in 1997.[39] The same accounts for Hungary, which saw the introduction of safe country rules in Germany 'as a confirmatory license to introduce safe country rules'.[40] Similar arguments could be made for Ireland and Austria, which (re-) introduced the SCO notion in 2003 and 2005 respectively as a reaction to policy changes in neighboring countries – the UK in 1996 (for the case of Ireland) and Germany in 1992 and Hungary in 1997 (for the case of Austria).

The data in Figure 1 only shows that the *possibility of applying the notion* has been formalized. This does not, in fact, say anything about the actual application. One could argue that this does not become an issue until there is actually practice following the law.

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[39] Ibid., p. 361.
[40] Nagy, B. (2002). Hungary, in: *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union*. R. Byrne, G. Noll and J. Vedsted-Hansen (Eds.)Kluwer Law International, The Hague, The Netherlands, pp. 138-199, at p. 165.

However, most states that have introduced the notion have also used it in the longer run, as the next section shows.

4.3. Introduction of SCO lists and number of designations

Many member states have designated countries of origin as safe and have thus contributed to a trend towards more lists and more designations. Figure 2 shows the growth in the number of lists in the EU-27. While at the end of the 1990s only six EU member states had SCO lists, by 2013 the picture had changed with 11 out of 27 EU member states having an SCO list.
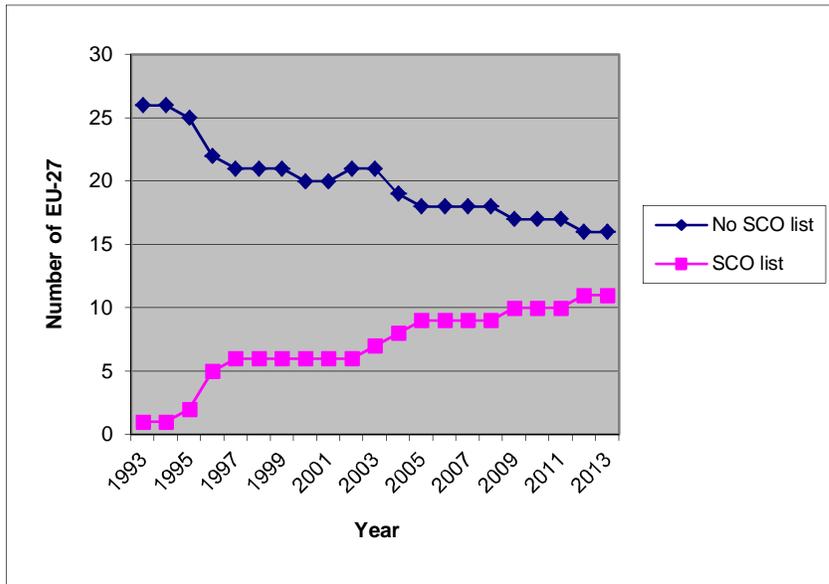

Figure 2: *Presence of SCO lists in EU-27 (1990-2013)*

Source: own compilation

SCO lists are defined as actual designations of countries of origin as safe at the national level. In 1999 and 2002, EU member states agreed on designating all EU member states and accession countries as safe. This agreement is not taken into account in Figure 2. The lists themselves differ greatly regarding, inter alia, their level of formality, length and frequency of modification (and of course composition, which will be discussed in the next subsection). Whereas most of the member states with a SCO list have created it in a formal way (by ministerial order, such as in France or the UK) others have an informal list (Denmark). The level of formality is related to the accessibility of the list. As the author has experienced herself, informal lists are hard to get hold of. There is also the possibility that some states listed here as *not* having a list do in fact have one – but on an informal basis. For example, the Hungarian authorities currently do not operate a SCO list, but are presumed to process some countries faster than others.[41] There are also big differences regarding the number of countries designated as safe. While in 2013 the UK authorities had declared 26 countries to be safe, Germany had done so for only two. Germany and the UK also serve as examples when assessing the durability of the lists: the UK list is frequently changed, while the German list has not been changed since 1996.

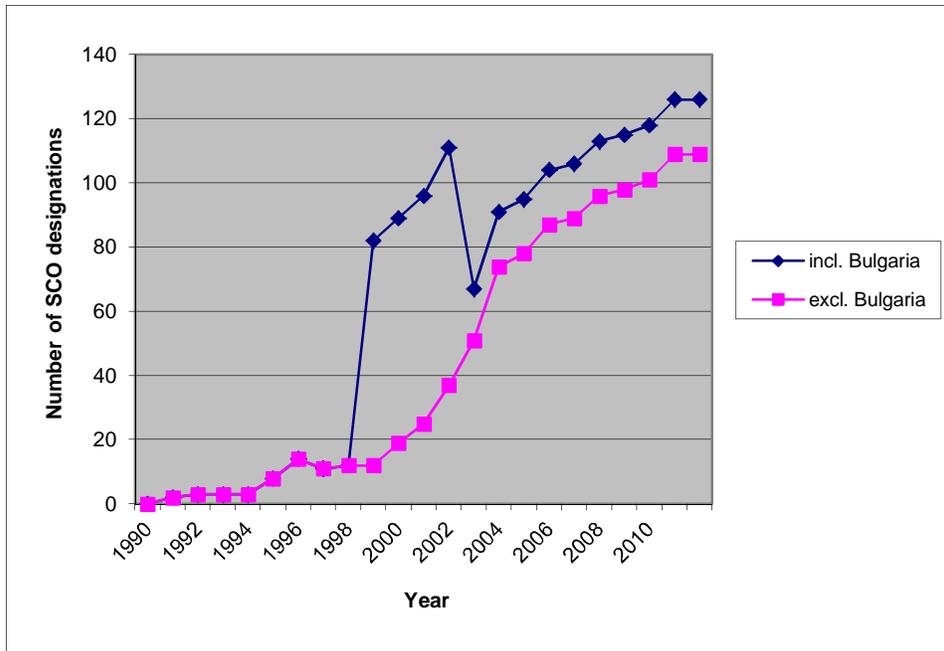[41] Communication #1, email exchange with NGO representative, June 2011.

Figure 3: *Total number of SCO designations in EU-27 (1990-2013)*

Source: own compilation

However, the actual number of designations (Figure 3) is probably the most striking

development. Figure 3 shows the total number of SCO designations for all EU member

states over time. Before discussing the data, two remarks on the scope of the dataset are

necessary. First, the designations counted omit certain countries, including EU member

states as well as Croatia, Andorra, Australia, Canada, Iceland, Japan, South Korea,

Liechtenstein, New Zealand, Norway, San Marino and Switzerland. These countries are

excluded because there is hardly any disagreement on the safety situation in these

countries. Nevertheless, some EU member states have – on a unilateral basis – also

declared these countries safe too. These designations are irregular (meaning that it can be

assumed that all EU member states see Iceland as a SCO, although not all have declared

it as such) and mapping them in the analysis would distort the results unnecessarily.

Second, Figure 3 shows the total both including and excluding Bulgaria because it

weights the results in an unwanted way. During the years 2000-2003 Bulgaria had the impressive number of 70 countries on its SCO list, including countries like Yemen and the Peoples' Republic of Korea. However, most of these countries were removed from the list in 2003 (between 2003 and 2004 Bulgaria cut its SCO list from 74 to 17 countries).

The total number of SCO designations for all EU member states has significantly increased over the last two decades. While during the 1990s the total number remained under 12, by 2013 it was 126. This does not mean that a total of 126 countries of origin had been declared safe, but rather that overall EU member states had issued a total of 126 SCO designations (with some countries of origin being on several lists and thus counting multiple times). There was a slight but steady increase in SCO designations from the mid-1990s and dramatic growth after 2002. The increase might be explained by developments at the EU level during this time: the negotiations on the original Asylum Procedures Directive and a common list. It is interesting, however, that after the stalemate at the EU level in 2005/2006 (no agreement on the list; the EP appeal before the ECJ), the growth continued. This suggests that factors other than the European one account for policy changes. Martenson and McCarthy (1998) label one explanation the copycat game. They argue that member states copy each other's lists in order not to be the weakest link in the asylum chain. The convergence literature calls this mechanism *imposition*, referring to a constellation of events in which countries (or rather their policy decisions) force other countries to adopt certain (similar) policies.[42] If this is indeed the

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[42] Holzinger, K. and C. Knill, 2005. Causes and conditions of cross-national policy convergence. *Journal of European Public Policy, 12(5)*, pp. 775-796.

underlying mechanism, it provides a worrying picture, because it would lead to a race to the bottom, since no country wants to be the weakest point of entry: any SCO designation in one country would trigger similar policy changes in other countries. This could be an explanation for the tremendous growth in SCO designations seen in this section. However, we can only confirm this copycat or imposition argument if we look at the content of the lists – the actual countries of origin declared safe.

5. The content of national SCO lists

Up to this point, the paper has discussed the bigger picture of SCO policies in Europe, the presence of such policies and lists, their implications, and the number of designations. The analysis will now zoom in on the actual composition of the SCO lists. Where these lists exist, they have become more similar over time. In spite of a large but decreasing number of unilateral decisions on SCO designations, member states nowadays agree on their safety assessments of two parts of the world, the Western Balkans and West Africa. After presenting the data, several explanations will be discussed, including the above-mentioned copycat game and also the nature of the countries of origin and, most importantly, the ratio of the number of asylum seekers from a certain country of origin to the acceptance rates of them.

What countries of origin are we actually talking about when discussing SCO policies? The simple answer to this question is *nearly all countries*. Almost any country one can

think of – from Albania to Zambia – has been declared safe by one or several EU member states at some moment in time. The more precise answer is, of course, not that simple. There are big differences with regard to how many EU member states have declared a certain country of origin as safe. For example, whereas only one state (Bulgaria) ever declared Zambia to be safe for a certain period of time (2000-2003), Albania has already been considered safe for some years (since 2000) by six EU members (Austria, Belgium, Bulgaria, Denmark, Luxembourg and the UK). Nevertheless, considerable agreement on the safety situation in countries of origin and consequently the way of handling the claims of asylum seekers from these countries can be seen for several Western Balkan and West African countries (Figures 4 and 5).
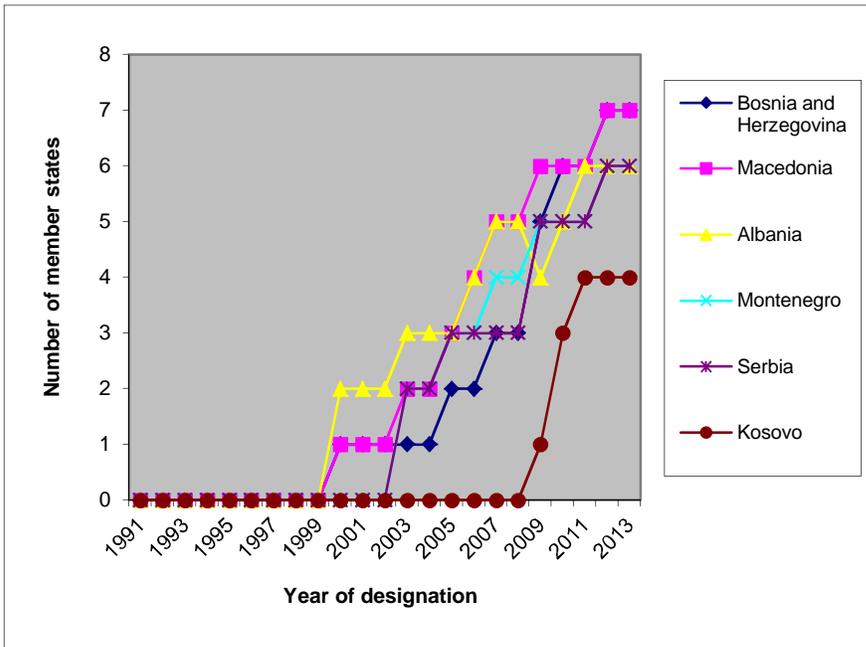

Figure 4: *Number of EU member states that have designated certain countries as safe (Western Balkan)*
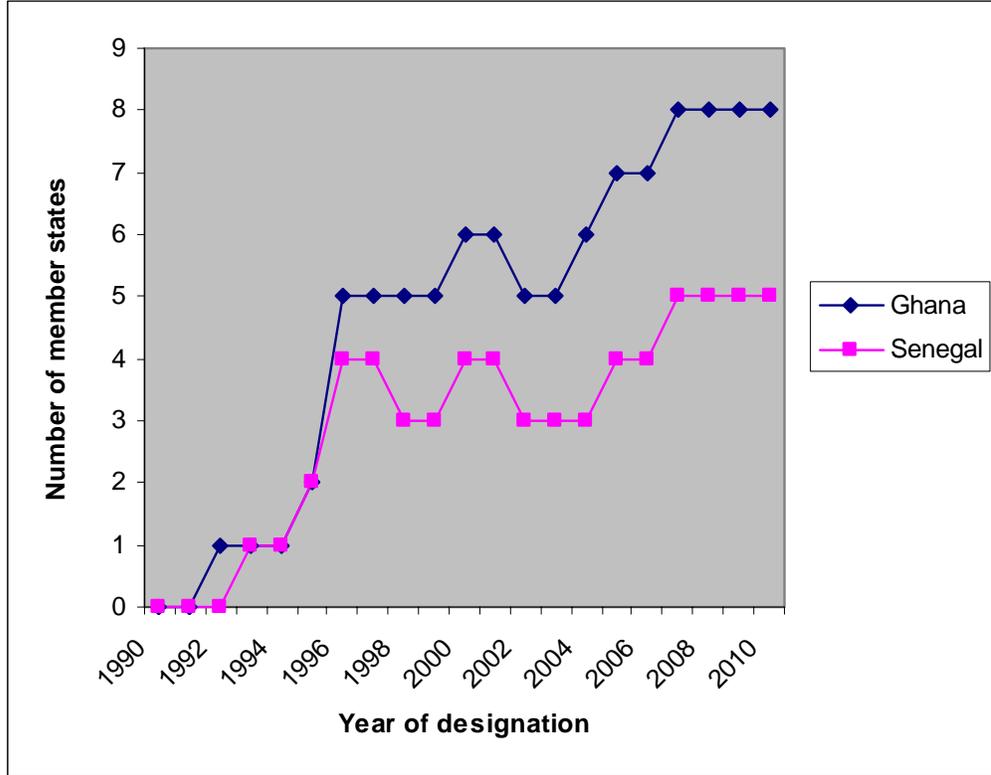
Sources: own compilation

Figure 5: *Number of EU member states that have designated Ghana and Senegal as safe*

Source: own compilation

Figure 4 shows a whole region for which EU member states seem to share their safety assessment. All the Western Balkan countries score high for the number of member states that have designated them as safe. They are only outnumbered by Ghana (Figure 5). On Ghana, member states reach their maximum similarity in assessment. In 2013, eight member states agreed that Ghana was a safe country of origin. The only other country coming close to this level is Senegal. Below, I will discuss a number of explanations for these signs of convergence. For the case of West Africa, I will focus on the copycat

argument; for the Western Balkans I argue that prospective EU membership and the numbers of asylum seekers can explain the SCO designation.

5.1. The copycat game

In previous sections I have suggested that the copycat game (rather than EU developments) is a convincing explanation for the spread of SCO policies across Europe. Martenson and McCarthy (1998) argue that member states copy each other's lists in order not to be the weakest link in the asylum chain. The convergence literature calls this mechanism *imposition*, referring to a constellation of events in which countries (or rather their policy decisions) force other countries to adopt certain (similar) policies.[43] Related terms used in the academic literature are lesson-drawing or (horizontal) policy transfer.[44]

If this explanation is to hold for the actual content of the lists, a pattern over time needs to be seen, with a designation in one country being followed by a similar policy in another (neighboring) country. Ghana and Senegal were declared safe by the following European countries (year of designation in parentheses):

- Ghana: Germany (1993), Netherlands (1995), UK, Slovakia and Denmark (all 1996), Bulgaria (2000), Malta (2004), France (2005), Luxembourg (2007).

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[43] Holzinger, K. and C. Knill, 2005. Causes and conditions of cross-national policy convergence. *Journal of European Public Policy, 12(5)*, pp. 775-796.
[44] For an overview see Holzinger and Knill 2005; Dolowitz, D.P. and Marsh, D. 2000. Learning from Abroad: The Role of Policy Transer in Contemporary Policy-Making. *Governance, 13(1),* pp.5-23).

- Senegal: Germany (1993), Netherlands (1995), Slovakia and Denmark (1996), Bulgaria (2000), France (2005), Luxembourg (2007).

Two years after the German government declared Ghana and Senegal safe, the Netherlands did the same. Vink (2002) shows that it did so because of the policy change in Germany.[45] The Luxembourgian list suggests similar developments, having declared both countries safe two years after its larger neighbor, France, did so. One can expect that the consideration of not wishing to be the weakest link in the region plays an important role here. A similar argument has been made by Martenson and McCarthy (1998) for an entirely different country of origin, namely Pakistan. Following the British designation of Pakistan as an SCO in 1996, Denmark discussed whether or not to also designate it as a SCO.[46] My interviews confirm that when considering introducing or changing their SCO list policy directorates observe very closely what happens in other European countries.[47] If this is indeed the underlying mechanism, it provides a worrying picture, because it would lead to a race to the bottom, since no country wants to be the weakest point of entry: any SCO designation in one country would trigger similar policy changes in other countries.

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[45] Vink, M. P., 2002. Negative and Positive Integration in European Immigration Policies. *European Integration Online Papers, 6(13).*
[46] Martenson and McCarthy 1998, p. 309.
[47] Interview #1, senior ministry official, September 2011; interview #2, member of national parliament, September 2011; interview #3, senior ministry official, September 2011;; interview #5, senior ministry official, March 2012; interview #6, senior ministry official, June 2012.

5.2. Ratio of numbers of asylum seekers to acceptance rates

Independently of the country of origin, a crucial role for national asylum policy

directorates considering using SCO policies seems to be played by the ratio of numbers

of asylum seekers coming from a certain country of origin to the actual acceptance rate

(i.e. how many claimants are granted protection). Though this rule had been declared

void in Belgian law[48], it seems to be common practice in many EU member states.

Consider the example of Serbia. The numbers of Serbian asylum seekers were always

high but skyrocketed with the launch of the visa liberalization process for the Western

Balkans in 2008 (agreements between the EU and Serbia, Montenegro and Macedonia

were made in 2010). This process had an immediate influence on asylum application

numbers. Whereas in 2009 5,235 people from Serbia claimed asylum in an EU member

state, these numbers more than tripled (to 17,715) in 2010 (Eurostat). In addition,

protection rates for Serbian asylum seekers are among the lowest of all countries of

origin. Consequently, there is a disproportionate ratio between (very high) application

rates and (very low) acceptance rates. Anticipating these increases in Serbian asylum

applicant numbers, several member states added Serbia to the list of safe countries of

origin: Austria and France in 2009; Luxembourg in 2011, and Belgium in 2012.[49] The

German government has agreed to do so in the coalition agreement of November 2013.[50]

Interviewees based in the national ministries and involved in the designation of countries

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[48] Constitutional Court of Belgium, 4 March 1993.

[49] Also the UK and Bulgaria see Serbia as a safe country of origin though their designation (both in 2003) predates the visa liberalization process.

[50] p.109 in: CDU, CSU und SPD (2013). *Deutschlands Zukunft gestalten. Koalitionsvertrag zwischen CDU, CSU und SPD. 18. Legislaturperiode*. Retrieved 5 February 2014, from http://www.bundesregierung.de/Content/DE/_Anlagen/2013/2013-12-17-koalitionsvertrag.pdf;jsessionid=24FC947FB7ED90177468E94B5F363550.s2t1?__blob=publicationFile&v=2

of origin as safe explicitly confirmed that these policies are used as a mean to deter certain asylum seekers from certain countries of origin, in this case from Serbia.[51] The two most recent examples in this regard have been statements from the Belgian and the German authorities aiming to stop the misuse of asylum procedures by Serbian asylum seekers by means of declaring Serbia a safe country of origin.[52]

These examples illustrate the most worrying aspect of the SCO policy. In many, if not most cases, it has been introduced as a measure to deter asylum seekers from countries that are considerably safe, and to make sure that if these asylum seekers enter the territory of the state of asylum, they can be processed faster than their 'more genuine' counterparts from, e.g., Somalia, Afghanistan or Iran. What, however, tends to be ignored by policy-makers is the fact that pull factors, and restrictive policy measures in particular, play only a very limited role in determining the asylum seeker's choice of country of host.[53] It can also be doubted whether SCO designations indeed speed up the refugee status determination procedure, or only postpone a more thorough check of the asylum application to the appeals stage. No data exists on the success of appeals of SCO cases. However, the growing case law related to safe country of origin designations in general, may suggest that SCO designations do not speed up but prolong the asylum procedure.

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[51] Interview #1; interview #4, senior ministry official, March 2012; interview #5

[52] EMN Belgium (2012). List of safe countries of origin approved by Council of Ministers.   Retrieved 4 February 2014, from http://www.emnbelgium.be/news/list-safe-countries-origin-approved-council-ministers; Bundesministerium des Inneren (BMI). (2012). *Press statement of 12 October 2012*. Retrieved 5 February 2014, from http://www.bmi.bund.de/SharedDocs/Pressemitteilungen/DE/2012/10/asylzahlen_oktober.html

[53] Thielemann, E. (2006). The Effectiveness of Governments' Attempts to Control Unwanted Migration, in: *Immigration and the Transformation of Europe*. C. A. Parsons & T. M. Smeeding (Eds.), pp. 442-472, Cambridge University Press, Cambridge, United Kingdom.

5.3. Political considerations concerning the nature of the country of origin

The Western Balkans also serve as an example to illustrate the final explanation. As has been anticipated by critics many times, SCO policies can be susceptible to political manipulation. Martenson and McCarthy[54] stress that there is a high risk that policies are adopted which aim at pleasing close allies and important trading partners by including their country on the list. Ultimately, deciding that a country is unsafe has foreign policy implications.[55] Following this argument, convergence in safety assessment could be explained by an attempt on the part of EU member states to glorify the human rights situation in specific countries, for example (potential) candidate countries. It was already argued in 1998 that East European countries about to join the EU had been declared to be safe countries of origin to a surprisingly similar extent by old EU member states. This behavior suggested

> 'an inclination of the EU to ignore current human rights abuses and reach a consensus that any serious human rights violations in this region disappeared with the end of communism'.[56]

The same reasoning could apply to the Western Balkans nowadays. The countries showing up on most if not all SCO lists drawn up by EU member states are either candidate countries to the EU (Macedonia and Montenegro) or listed as potential

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[54] Martenson and McCarthy 1998, p. 305.
[55] Byrne, R., & Shacknove, A. 1996. The Safe Country Notion in European Asylum Law. *Harvard Human Rights Journal, 9*, 185-228, p.223.
[56] Ibid., p. 310.

candidate countries (Albania, Bosnia and Herzegovina, Serbia, Kosovo). This is a worrying development, not only because it could help governments in the region to whitewash their human rights records, but also because it tends to downplay the human rights problems of these countries in the long term. Interviewees confirm that politicians from the Western Balkans and beyond have an interest in seeing their own country on European SCO lists, and have explicitly asked to do so.[57] A similar argument can be made for other countries, such as Ghana and Senegal, which are high on the development aid agenda of many EU member states. However, what contradicts this line of argumentation is the continuing lack of transparency regarding safe country of origin lists of *some* EU member states, such as Denmark. It seems to be the case that the political susceptibility of SCO lists encourages some countries to publish these lists, whereas it discourages others.

In sum, there are three explanations for the convergence of SCO policies across Europe: a) the copycat game as a way of imposing policies on neighboring countries who want to avoid being the weakest link in a certain sub-region of Europe, b) the ratio of numbers of asylum seekers coming from countries of origin to their acceptance rate, and c) political considerations, most importantly of enlargement prospects, as a way to whitewash the human rights record of countries or origin. The ratio explanation is important because it accounts for both convergence and divergence of SCO policies: convergence with regard to the countries of origin analyzed in this article, and divergence regarding countries of origin beyond the Western Balkans and West Africa. The key determining factor for national policymakers of whether or not to include a country on the list is this ratio. If it

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[57] Interview #1

is equally disproportional (high application rates, low acceptance rates) in several European countries (as in the case of Serbia because of the visa liberalization process), convergence is likely to occur. But if the numbers of asylum seekers from a certain country of origin are unequally distributed across European countries (which is the case for the majority of countries of origin), only those receiving relatively high numbers will introduce the policy. This is a crucial point, because it explains the remaining divergence of SCO lists across Europe: countries of origin of asylum applicants look very different in each member state. Interviews with ministry officials involved in setting up or changing their country's SCO list confirm that the exercise is not aimed at compiling a list of all safe countries in the world, but at having a 'useful' list. A list is only of use if it focuses on countries from which the country of asylum actually has many asylum seekers but low acceptance rates, all other factors for SCO designation being subordinate.

5. Concluding remarks

This paper has discussed European and national developments regarding safe country of origin policies. The governance pattern at the European level is symptomatic of other asylum issues too. Starting with intergovernmental cooperation between those states being pressured by large influxes of asylum seekers, the discussions soon reached the European level. European countries acknowledge a need to adopt a common approach towards SCO policies in order to avoid a potpourri of 27 different SCO practices.

However, commitment did not follow cooperation. SCO regulations in the revised Asylum Procedures Directive remain general and with little practical relevance.

Parallel to this reluctant and cumbersome process at the European level, something interesting happened at the national level. Most European countries pursued national policies on SCOs. A high level of convergence regarding the existence of SCO notions in national legislation can be seen. Similarity also occurs when it comes to the actual designations of countries of origin from certain regions, namely the Western Balkans and West Africa. Although decreasing, there remains much divergence when it comes to the actual countries of origin declared safe beyond these two regions. Three mechanisms explain these developments. The copycat game accounts for similar policies across Europe because policymakers aim to avoid being the weakest link in the (sub)region. The enlargement prospects of some countries of origin create ambitions by old member states to whitewash the human rights record of the country under question, for which SCO policies are an appropriate tool. And finally, the ratio of asylum applications to acceptance numbers: if there is a high influx of asylum seekers from a certain country paired with a low acceptance rate, the country is likely to be put on the SCO list. Consequently, this will not happen to the classic asylum-producing countries, such as Afghanistan, Iran or Somalia, but it has happened to many countries 'in between'– not failed states but also not consolidated democracies (offering protection to vulnerable groups) – such as Serbia, Senegal, The Ivory Coast, Mali, India and Chile. The example of Serbia featuring prominently on the SCO lists of many EU member states shows that the SCO notion is first and foremost a tool to curb numbers of asylum seekers from the

listed country. This argument has been confirmed by ministry officials in several European countries who are involved in these policy decisions. It is *not* the purpose of policymakers to create a list of safe countries per se, but to have a workable list that can help cut asylum applications by processing claims faster or even deterring potential claimants from coming to the country.

It comes as no surprise that the national growth in SCO policies has been viewed with skepticism by many stakeholders. More convergence does not seem to have benefitted substantive protection of asylum seekers. Instead, many European countries have been active in establishing country-specific measures, SCO policies being one of them, as legitimate tools to accelerate the asylum procedure. In many cases, this may have come at the expense of the principle of non-refoulement. This is even more worrying as these policies are pursued outside the EU policymaking process. Difficulties encountered by the author while collecting data highlight the lack of transparency in relation to these policy measures. The present analysis has prepared the ground for action and further in-depth research by providing a detailed spatial and temporal analysis of SCO policies in Europe, as well as by discussing several explanations accounting for SCO policy-making.