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Master's thesis

**Legal and safe pathways in the EU, a  
double commitment: Protection of  
asylum seekers and women's rights.**

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Master in European and Global Law.

July 2021.

## Abstract

The purpose of this paper is to show how by creating safe and legal pathways for asylum seekers to reach the European territory, the EU would commit with the protection of both, asylum seekers and women's rights. The analysis from a gender perspective of the current obstacles and risks that asylum seekers tackle to access in "The fortress of Europe" would prove the need for legal channels of entry given its tight relation with gender-based violation of rights.

## Table of content.

<b>1. Introduction</b> .....	3
<b>2. The existing obstacles for asylum seekers to reach EU territory</b> .....	5
<b>2.1. The Schengen Borders Code (SBC)</b> .....	5
<b>2.1.1. Third countries residents in need of a visa or the "BlackList" of countries</b> .....	6
<b>2.1.2. Legal and physical barriers for the obtention of the visa</b> .....	7
<b>2.2. The privatization of borders control</b> .....	8
<b>2.3. The externalisation of borders control</b> .....	10
<b>2.4. Consequences</b> .....	12
<b>2.4.1. Illegal entries, risky routes</b> .....	13
<b>2.4.2. The construction of "the other"</b> .....	14
<b>3. Which impact for women?</b> .....	15
<b>3.1. The Special Vulnerability</b> .....	16
<b>3.2. Gender-Based violence. (GBV)</b> .....	17
<b>3.3. Human Trafficking</b> .....	19
<b>3.4. Women's rights violation during the journey, could it be prosecution?</b> .....	20
<b>4. The European Union's position</b> .....	22
<b>4.1. The Gender Mainstreaming</b> .....	22
<b>4.2. The New Pact on Migration and Asylum. 2020</b> .....	25
<b>a) Pre-entry screening</b> .....	27
<b>b) Legal Pathways</b> .....	28
<b>5. Conclusions</b> .....	30
<b>6. List of references</b> .....	34
<b>A. Bibliography</b> .....	34
<b>B. Regulatory Frameworks</b> .....	35
<b>B.1. International Regulatory Framework</b> .....	35
<b>B.2. European Regulatory Framework</b> .....	35
<b>C. Reports</b> .....	36
<b>D. Online sources</b> .....	37

## 1. Introduction

Since the last ten years there has been an increasing number of people seeking for international protection in the world with currently 26.4 million refugees in the world, the highest ever seen according to the UNHCR<sup>1</sup> and, even though it is hard to find precise gendered data, several scholars have pointed out a rise on women fleeing<sup>2</sup> and have denominated this as a “feminisation” of migration. However, although changing over the last years, little attention has been given to women and girls in the academia and in the migration and asylum policies.<sup>3</sup> Forgetting women’s experiences has negative consequences for the protection of human rights and does not allow to tackle the specific sources of risks for women and girls. In Europe’s case, we can see how the European Union has embraced the *gender mainstreaming* as a strategy to reach gender equality by adopting a gender perspective in all policies and institutions.<sup>4</sup> Nevertheless, this strategy poorly reaches the asylum policies, the Gender Equality Strategy 2020-2025 from the Commission hardly mentions the situation of women asylum seekers and, no reference to the risk they suffer in their transit to the EU is founded.<sup>5</sup> In fact the *gender mainstreaming* becomes hard to combine with the process of securitization and externalisation of borders that the EU has been implementing over the last years. The construction of what has been denominated as the “Fortress of Europe” through several mechanisms such as the cooperation agreements with third countries to avoid migrants to reach the EU territory or the privatisation of the border control through the carrier’s sanctions, has brought with it the exacerbation of the vulnerability of those who seek for international protection and, more specifically, women and girls who are exposed to gender-based violence all along the journey as well as are more predisposed to be victims of human trafficking.

In this work, through a multidisciplinary approach which combines legal studies with sociology, political sciences and gender studies, a general approach to the securitization actions that the EU has been developing over the last years to blind its borders and to construct the

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<sup>1</sup> UNHCR. “Global Trends At-a-Glance” *Refugee Statistics*. [Refugee Statistics | USA for UNHCR \(unrefugees.org\)](https://www.unrefugees.org/) Last accessed June the 30<sup>th</sup>.

<sup>2</sup> Freedman, Jane. *Gendering the International Asylum and Refugee Debate*, Palgrave Macmillan, 2007, p. 14. ISBN-13: 978-0-230-00653-9

<sup>3</sup> Ibid, p.

<sup>4</sup> European Institute for Gender Equality. “Gender Mainstreaming”. [Migration | European Institute for Gender Equality \(europa.eu\)](https://www.eige.europa.eu/migration). Last accessed June the 30<sup>th</sup>.

<sup>5</sup> European Commission (COM). *Communication from the Commission to the European Parliament, The Council, The European Social and Economic Committee and the Committee of the Regions: A Union of Equality: Gender Equality Strategy 2020-2025*. 5th March 2020. COM (2020) 152 final.

assimilation of “illegal” immigrants to refugees and asylum seekers will be presented. It will be argued that these strategies erase the possibility of accessing the EU territory through safe and legal pathways and therefore, people in need of international protection must opt for illegal, dangerous routes where several human rights violations are committed systematically. A specific regard will be taken in relation to the risks existing for women in transit and their gendered dimension. It would be upheld that there is a link between the lack of safe and legal pathways to claim for asylum in Europe and exposing women to risks and violations of their rights, defending the need for these legal tools and more specifically, for the humanitarian visas to guarantee a protection according to the international and regional instruments for the protection of refugees and women. It would also be questioned if these gendered violations of rights during the journey shall be considered as prosecution and could be taken into account to grant the international protection once in a safe territory since no other alternatives are given to these women. The transcendence of this work resides in its specific gender approach which points out women’s experiences during the transit and how these should be treated from the international protection regime, being this one of the realities of the asylum process that generally is less confronted from a gender perspective by the doctrine, in comparison with others such as the reception modes or the delimitation of the refugee status in relation to gender-based prosecutions.

The work’s main objective is to show how by not providing legal and safe pathways, violations of fundamental rights are committed systematically for those in transit, being women and girls the most affected because of their special vulnerability. The *gender mainstreaming* strategy should be for every woman and shall be effectively translated to the asylum policies being one of its pillars the creation of legal tools to grant the access to a safe territory without having to suffer the risky journey, as could be done with the humanitarian visas.

For the execution of this work primary sources has been consulting coming from international and European legal texts, rulings, and opinions. In addition to that, a bibliography with the secondary sources consisting in legal articles, books, and reports has been used to support the objectives of the work. To finish, several interviews have been carried out with the tutor to monitor the content and coherence of the thesis. Furthermore, a gender perspective is adopted through all the study. The approach to gender could seem very binary, not considering the wide gender spectrum enough, fact that I acknowledge but which I expressly accepted because of methodological reasons.

## **2. The existing obstacles for asylum seekers to reach EU territory.**

Reaching the EU for those who seek for international protection has become a risky challenge that many people are not able to accomplish. Since the creation of the Schengen Space and, its main consequence, the right of free movement within the borders of the Union, the top priority of the EU is the protection and securitization of the external borders. Through the Security component of The Area of Freedom, Security and Justice of the EU, numerous initiatives have been taken regarding migration and borders control<sup>6</sup> and, as Jane Freedman points out, these are characterised by the ‘migration-insecurities nexus’<sup>7</sup>. This one consisting of, under the idea of security and protection of States and those who resides within the European borders, there is a demonization of those who are outside this space who are seen as a menace to national economies and culture<sup>8</sup> and therefore, measures to prevent them to enter shall be developed. This, at the end, creates a lack of security for migrants and asylum seekers during the whole transit process, showing the paradoxical nature of security understood as such<sup>9</sup>. As Morgades highlights, this can be seen through the numerous and diverse obstacles existing from a legal, operational, and physical perspective which prevent asylum seeker to have legal and safe access to the ‘fortress of Europe’.<sup>10</sup> In this section, these obstacles are going to be addressed in order to understand the impact that they have on asylum seekers and the consequences that they bring. Furthermore, a gender perspective will be applied in the analysis to show the special vulnerability of women asylum seekers when facing these obstacles.

### **2.1. The Schengen Borders Code (SBC)**

The first big obstacle which people in need of international protection face for their legal access to the EU territory is the one imposed by the Visa Policy of the Union. This latter constitutes one of the four pillars of the Integrated Border Management System<sup>11</sup> which components are listed in Article 4 of the Regulation (EU) 2016/1624 and include border control, prevention of cross border crime or “the referral of persons who are in need of, or wish to apply for,

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<sup>6</sup> Morgades Gil, Silvia. “Humanitarian Visas and Discretionary Choices in the EU: Policies on Visas and on International Protection.”, *The Spanish Yearbook of International Law*, 2019, pp. 273-284.

DOI:10.17103/sybil.23.17

<sup>7</sup> Freedman Jane. “Analysing the Gendered Insecurities of Migration” *International Feminist Journal of Politics*, vol. 14, no. 1, 2012, pp. 36-55.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Morgades Gil, Silvia. “Humanitarian Visas and Discretionary Choices in the EU: Policies on Visas and on International Protection”, p. 284.

<sup>11</sup> Moreno-Lax, Violeta. “Common Visa Policy: Bordering from Abroad— Applying Admission Criteria before Departure.” *Accessing Asylum in Europe*, First Edition, Oxford University Press, 2017, p. 81

international protection”.<sup>12</sup> Which characterises the visa policy is that it is the first layer of this integrated system and visas would have the power to make the distinction over legal and illegal migrants, having a negative impact on those who, in need of international protection, do not access the territory legally and, therefore are being assimilated to “illegal migrants” whose entries must be avoided<sup>13</sup> under the logic of the securitization of the Schengen Space. In this section, I will present why this layer is damaging for asylum seekers based on the works of Violeta Moreno-Lax and Ángel Legido.

### **2.1.1. Third countries residents in need of a visa or the “Blacklist” of countries.**

The first controversial point is the one referred to the “white” and “black” lists of countries. The Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018<sup>14</sup> have listed those third countries nationals who would need a visa in order to have access to the Schengen Area and those who would not. The criteria to decide which country goes to each list is based on several factors related to the illegal immigration, public policy, and security, as well as the diplomatic relations with the European Union, all of them being applied to a case-by-case analysis.<sup>15</sup> These criteria have received several critiques, being maybe the most flagrant one the ambiguity of these terms which could lead to discrimination towards nationals of poorer countries.<sup>16</sup> But not only that, regarding the subject of this thesis, it has been highlighted the tight link between countries that appear in the blacklist and refugees’ main countries of origin. Indeed, all nationals from main major refugee-producing countries such as Syria, Afghanistan, and South Soudan<sup>17</sup>, are required a visa to enter the EU territory.<sup>18</sup> There is not any special provision referring the asylum seekers, only recognised refugees would be exempted of this requirement and the ‘residence’ criteria would be taken into account for them.<sup>19</sup> This leads to the second issue which is the specific requirements

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<sup>12</sup> European Commission. “European Integrated Border Management” in *Migration and Home Affairs*.

[European integrated border management | Migration and Home Affairs \(europa.eu\)](#) . Accessed April the 11<sup>th</sup>

<sup>13</sup> Moreno-Lax, Violeta. “Common Visa Policy: Bordering from Abroad— Applying Admission Criteria before Departure” p. 82

<sup>14</sup> European Parliament and Council Regulation (EC) No 2018/1806 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. (2018) OJ L 303/39.

<sup>15</sup> Ibid, p. 89.

<sup>16</sup> Ibid.

<sup>17</sup> UNCHR. “Figures at a glance”. 18<sup>th</sup> of June 2020. [UNHCR - Figures at a Glance](#). Accessed April the 11<sup>th</sup>

<sup>18</sup> Moreno-Lax. “Common Visa Policy: Bordering from Abroad— Applying Admission Criteria before Departure” p. 100.

<sup>19</sup> Ibid. 102

needed for a visa to be granted and, the legal and physical barriers that people seeking for international protection confront to accomplish them.

### **2.1.2. Legal and physical barriers for the obtention of the visa.**

Regarding the legal barriers, article 14 of the Regulation N° 810/2009 of the European Parliament and The Council of 13 July 2009 establishing a Community Code on Visas (CCV)<sup>20</sup> enumerates the supporting documents needed when applying for the visa, including documents to prove the sufficient means of subsistence during the time of the stay in the territory as well as to come back to their country of origin, insisting on the importance of the *return* by asking for sufficient information to assess that the person's intent is to leave the country before the visa is expired. Another requirement is the one regulated in article 15 referring to the travel medical insurance that will cover any unanticipated medical expenses. These are just some of the conditions to obtain a visa and which, from the point of view of people in need of international protection would be almost impossible to comply as Sánchez Legido has claimed.<sup>21</sup>

In relation to the physical barriers, Moreno-Lax has pointed out how the lack of obligation by EU law for States Members to have consulates or embassies in all countries (being this left to their own sovereignty) has an important impact on accessing these by asylum seekers.<sup>22</sup> Under these circumstances, it is not hard to imagine that in front of an armed conflict Member States can decide to close their embassies based on security reasons as the ECRE has reported<sup>23</sup>, with the clear example of the closing of France and UK embassies in Sanaa, capital of Yemen, in 2015 during the Yemen crisis.<sup>24</sup> This can be seen by a complete closing down as it is the case with the embassies of Sierra Leone or Somalia or, as stated by Moreno Lax, the decision to close just the visa sections, as happened with the embassies of Syria and South Soudan<sup>25</sup> both among the top five countries of origin of refugees. Indeed, as she indicates, since the beginning

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<sup>20</sup> European Parliament and Council Regulation (EC) No. 810/2009 *Regulation establishing a Community Code on Visas (Visa Code)*. 13 July 2009. OJ L 223/1.

<sup>21</sup> Sánchez Legido, Ángel. "El arriesgado acceso a la protección internacional en la Europa fortaleza: la batalla por el visado humanitario europeo" *Revista de Derecho Comunitario Europeo*, vol. 57, 2017, pp. 433-472. doi: <https://doi.org/10.18042/cepc/rdce.57.02>

<sup>22</sup> Moreno-Lax. "Common Visa Policy: Bordering from Abroad-Applying Admission Criteria before Departure" p.115

<sup>23</sup> European Council of Refugee and Exile & EU Red Cross. *Disrupted Flight: The realities of separated families in the EU*. Edited by Anne Bathily and Anaïs Faure Atge, p. 18 [https://www.ecre.org/wp-content/uploads/2016/07/ECRE-and-Red-Cross-EU-Disrupted-Flight\\_November-2014.pdf](https://www.ecre.org/wp-content/uploads/2016/07/ECRE-and-Red-Cross-EU-Disrupted-Flight_November-2014.pdf).

<sup>24</sup> BBC News. "Yemen crisis: US, UK and France close Sanaa embassies" *Middle East. BBC News*. 11<sup>th</sup> February 2015. [Yemen crisis: US, UK and France close Sanaa embassies - BBC News](https://www.bbc.com/news/middle-east-2015-02-11). Accessed May 28<sup>th</sup> 2021.

<sup>25</sup> Moreno-Lax. "Common Visa Policy: Bordering from Abroad- Applying Admission Criteria before Departure" p.115.

of the civil in Syria the visas issued to their citizens has dropped from 30.000 in 2010 to 0 in 2013.<sup>26</sup>

Another layer of complexity can be added to this situation given that, with the physical impossibility to access to these embassies and, the latter legal hindrances to actually demand the visa and succeed, the access through a safe path to the EU seems quite impossible. This forces asylum seekers to opt for other ways of entry to the territory but with the carriers' sanctions currently existing, this goal turns out unreachable.

## **2.2. The privatization of borders control.**

With the creation of the Schengen Area and the intensification of the duality of *securitization vs freedom* mentioned above, the measures to control “illegal immigration” were encouraged. In addition to visas, which would be the first wall of the fortress of the EU, another important measure to avoid “illegal” migrants to have access to the European territory are the sanctions recognised for crossing borders carriers.<sup>27</sup> Already in article 26 of the Schengen Acquis<sup>28</sup> it was contemplated the responsibility of the carrier for transporting persons without the legal travelling documents, meaning the carrier shall cover the costs of the devolution of them to the third country. Interestingly and coherently, an exemption was added when the person is subject to the Refugee Convention<sup>29</sup> and the principle of *non-refoulement*, remarking that the question of asylum must be considered. Nevertheless, instead of developing a conscious regulation on this topic, the path followed was the one of the securitization in detriment of those looking for international protection. In connection to this article, the Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985<sup>30</sup> is created. The objectives of this Directive, as stated in the preamble, are: “combating illegal immigration effectively” and “curbing migratory flows”, all of that “without prejudice to the obligations to the Geneva Convention [...]”. Related to this, Chapter 7 of the directive deepens on the responsibility to process the asylum

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<sup>26</sup> European Union Agency for Human Rights. *Legal entry channels to the EU for persons in need of international protection: a toolbox*. (02/2015), p.2.

<sup>27</sup> Sánchez Legido, Ángel. “El arriesgado acceso a la protección internacional en la Europa fortaleza: la batalla por el visado humanitario europeo” p. 440.

<sup>28</sup> The Schengen acquis. Convention implementing the Schengen Agreement of 14 June 1985 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. 22 September 2000. OJ L 239.

<sup>29</sup> UN General Assembly. “Convention Relating to the Status of Refugees” *United Nations, Treaty Series*, vol. 189, 28 July 1951, p. 137.

<sup>30</sup> Council Directive (EC) no. 2001/51 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985. 28 June 2001. OJ L 187.



claims by the Member States considering this an obligation under the GC'51 (article 28) but, “reserving the right to expel asylum seekers to a third State” (article 29.2), statement that could be in conflict with the *non-refoulement* definition. The chapter define some rules in orders to know which will be the State which will process the asylum claim based on a very similar criteria that the one developed by the Dublin System. There are some interesting points to highlight related to this. First, the directive already makes a connection between the country which has issued a visa to the asylum seeker and its responsibility to process the asylum claim. This link could be of an interest for the subject of the thesis, since after granting the visa for no matter which reasons, the State would have to study the asylum claim, idea that follows the logic of the humanitarian visa proposal. Second, the concept of asylum as a “burden” is present in the redaction on the chapter and the “punishment” logic similar to the one of the Dublin System where the States that did not avoid the “illegal” entry of the person in the territory of the EU would have the charge of processing the asylum claim (article 30.e). So, either asylum seekers are assimilated to all the rests of “illegal” immigrants, either they are seen as a burden that Member States have and need to take in charge. Nevertheless, the provisions of Chapter 7 would be very hard to apply in practice given that, because of the astronomical economic sanctions provided by this normative, it would be very hard that carriers take the risk of transporting those in need of international protection. Indeed, the directive imposes to the Member States not only to make the carrier covers the cost of devolution of the person to the third country, but also to impose effective and dissuasive sanctions over them which amount will be between 3000 and 5000 euros by person transported (article 4). As the carriers do not know if the person would be admitted or not in territory and their main goal is to create profit, they would prefer to avoid taking any risks and therefore, not accepting “undocumented” people<sup>31</sup>. This presents, of course, serious implications for asylum seekers in their quest to reach the European Union given that, without the correspondent visa they would not even be able to have access to legal transportation. But behind this, as Rodenhauser has studied, lays a deeper problem which is the privatization of the immigration control. As he points out, carriers would *de facto* be confronted to evaluate if the person could make a valid claim for international protection in the country of destiny. These personnel who are not trained nor skilled for this mission would therefore use the documentation requirement to take a final decision which is not in line with the provisions for the special protection of refugees<sup>32</sup>. This can be interpreted

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<sup>31</sup> Rodenhauser, Tilman. “Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control” *International Journal of Refugee Law* 26, no. 2, 2014, pp. 223-247

<sup>32</sup> *Ibid*, p. 230.

as a transferral of immigration responsibility to non-State agents which have been gravely criticized given the consequences that it has regarding the risk for an effective protection of rights and how to address the possible international responsibility.<sup>33</sup>

To all these barriers that I have briefly presented above, and which are representatives of the difficult access to legal and safe paths for asylum seekers, another bigger and more political issue shall be added, and it is the one of the externalisation of the EU borders, topic which has been largely studied and criticized in the academic literature and that I will briefly develop to close this section.

### **2.3. The externalisation of borders control**

Under this logic of “securitization” in the last past years, the EU have carried out a strategy of externalisation of its borders by completing several agreements with non-EU frontier States to reduce and limit the arrival of asylum seekers to the Union’s territory. The external dimension of the EU’s borders regime is based on agreements with States outside the Schengen zone to the control of borders and irregular migration.<sup>34</sup> Even though, the European Union has been emphasizing on this cooperation since 2011 with the ‘Global Approach to migration and Mobility’.<sup>35</sup> It is in 2015 during the Refugee “crisis” where bigger steps were taken in order to favour this strategy as can be seen in the Commission’s release ‘Addressing the Refugee Crisis in Europe: the Role of EU External Action’.<sup>36</sup> As Ryan detailed in his paper, several ways of cooperation have been carried out with African and Asian States as a result of this strategy. One of the most controversial joint actions developed during the last years is the one adopted with the State of Libya, through the assistance of Libyan authorities on borders control through the ‘EUBAM Libya’ mission or the Operation Sophia to control immigration though international waters of Libya,<sup>37</sup> among others. For the thesis’ purpose this cooperation is of interest since it shows perfectly the securitization paradox: to “prevent” illegal migration to reach Europe, some other international obligations regarding asylum seekers are forgotten, having in mind that Libya has not even recognised the Geneva Convention of 1951.<sup>38</sup>

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<sup>33</sup> Rodenhauer, Tilman. “Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control” p. 30.

<sup>34</sup> Ryan, Bernard. “The Migration Crisis and the European Union Border Regime” *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law*, ed. Marise Cremona and Joanne Scott. Oxford University Press, 2019, p. 198.

<sup>35</sup> Ibid, p. 216

<sup>36</sup> Ibid, p. 217.

<sup>37</sup> Ibid, p. 219.

<sup>38</sup> Hamood, Sara. “EU-Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants” *Journal of Refugee Studies* 21, no. 1, 2008, pp. 19-42

Therefore, people who look for international protection would be blocked in a country where they would not be able to claim asylum nor transit through it to reach one country part of the Convention, and added to that, they would be at risk of *refoulement* violating one of the cornerstones of refugees and asylum seekers' protection. Another problematic agreement is the one adopted between Turkey and the European Union during the "crisis" of 2015 and, applicable over Syrian refugees and fourth-countries nationals named 'EU-Turkey joint action plan'.<sup>39</sup> This consisted on the EU providing financial support to Turkish authorities to control migrant smuggling to the Union and to allow the readmission of Syrian refugees into Turkey in exchange of some benefits on visa liberation for Turkish citizens and the resettlement of Syrian nationals and, the most important, the reactivation of Turkey's accession to the Union.<sup>40</sup> Again, this agreement undermines asylum seekers' rights, not only because those who reached the EU and have demanded protection are taken away from the EU territory while they wait for the answer, but also, as with the Libyan case, The Refugee Convention would not be applied to those transferred to Turkey, given that this country have not ratified the extension to non-Europeans.<sup>41</sup> Furthermore, given the gendered perspective adopted in this thesis, Turkey's announce of the 20<sup>th</sup> of March on its withdrawal from the Council of Europe Convention on preventing and combating violence against women and domestic violence also known as The Istanbul Convention, it's of a big importance since it's a clear message than the country does not only ignore refugees' rights but also women's rights.<sup>42</sup>

To this, it must be added the geopolitical implications these agreements have. Their negative impact goes beyond the protection of human rights, affecting the political strength and position of the EU and the Member States. Indeed, by delegating the protection of its external borders to other States, the European Union loses autonomy and is more exposed to risks. An illustrative example could be the recent Ceuta Crisis of May 2021, where the Kingdom of Morocco used immigration as a way of pressure to make Spain and the EU to respond to Morocco's political interests in relation to the Western Sahara.<sup>43</sup> Since the EU "need" these

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<sup>39</sup> Ryan, Bernard. "The Migration Crisis and the European Union Border Regime" p. 223

<sup>40</sup> Ibid.

<sup>41</sup> Ibid. p. 224

<sup>42</sup> Council of Europe. "Turkey's announced withdrawal from the Istanbul Convention endangers women's rights". [Turkey's announced withdrawal from the Istanbul Convention endangers women's rights - View \(coe.int\)](#). Accessed April the 12<sup>th</sup>.

<sup>43</sup> Martín, Maria. "Explainer: How did the migrant crisis in Spain's city of Ceuta occur and what is going to happen now?". *El País*. 19<sup>th</sup> May 2021. [Ceuta: Explainer: How did the migrant crisis in Spain's city of Ceuta occur and what is going to happen now? | Spain | EL PAÍS in English \(elpais.com\)](#). Accessed May the 28<sup>th</sup> 2021.

third countries in order to protect its fortress, there are more of risk of suffering from extortions and pressures by States which commitment with Human Rights leave much to be desired.

Apart from these cooperation agreements, for the external action of the EU the action of FRONTEX, the European Border and Coast Guard Agency, is essential. Its main role is the coordination of operational cooperation between the Member States with a view to reinforce the monitoring of external borders.<sup>44</sup> Nevertheless, the main problem with this agency, as Moreno-Lax points out, is its carelessness towards the international protection element. Since no legal paths exist for those in need of asylum, these are obliged to take the same routes where Frontex concentrates its action and thus, the agency's goal of 'preventing and discouraging' migrants from reaching the EU external borders does not fit with the main principles of the international protection.<sup>45</sup>

These are just some examples the European Union external action during the last decade which reflect its priorities when approaching immigration and its impact on the asylum regime. The intentional misconception of illegal immigration and international protection put in risk asylum seekers who, because of fear of prosecution, torture or death are obliged to leave their country and find themselves without any legal alternatives to do so and, therefore, being labelled as 'illegal' migrants with the negative consequences which that entails.

#### **2.4. Consequences.**

The impact of these measures is significant. Through the armour-plating of the Area of Freedom, Security and Justice of the EU under the securitization paradigm and the construction of "the other" as a threat, lives of people in need of international protection are at risk and the asylum system which shall be universal and protected, becomes dependent of the regional and national legislation. The obstacles created to avoid people to reach the European Union's borders do not prevent them to come, the conflict, the prosecution is still there, so those in need in protection opt for dangerous routes as their last hope.

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<sup>44</sup> Moreno-Lax, Violeta. "Frontex: Joint Maritime Interdiction of Undifferentiated Flows—Operationalizing Pre-emptive Controls." *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*. Oxford University Press, 2017 doi: 10.1093/oso/9780198701002.003.0006.

<sup>45</sup> Moreno Lax, "Frontex: Joint Maritime Interdiction of Undifferentiated Flows—Operationalizing Pre-emptive Controls." p. 198.

### 2.4.1. Illegal entries, risky routes.

The supposed goals of all these measures as we mentioned before were to control illegal immigration, trafficking and smuggling without any impact on the international obligations of the States related to asylum.

Nevertheless, the reality is far from this. It has been estimated that the 90% of refugees enter in the EU through illegal means.<sup>46</sup>In FRONTEX statistics of 2021, it can be seen the main transited routes to Europe, the number of illegal



arrivals to them and, the main countries of origin of those using these routes. These will briefly mention together with the available data related to the arrivals of the year 2021 to illustrate the quantitative importance of the issue and how this “illegal” immigration can easily mask people in need of international protection. First, there is the Mediterranean Route, that can be divided in three<sup>47</sup>: The Western Mediterranean route which number of “illegal arrivals” is of 3167 persons which main countries of origin are Mali, Sub-Sahara, Algeria, Morocco, and Guinea<sup>48</sup>. Then, The Central Mediterranean Route with 11602 arrivals from Tunisia, Côte d’Ivoire, Bangladesh, Guinea, and Soudan; The Eastern Mediterranean with 4828 people coming from Turkey, Syria, Congo, Afghanistan and finally, The Western Balkan Route with 11606 mainly coming from Syria, Afghanistan, Morocco, Libya, and a large number of people from unknown origin (3085). So, only in four months, the total sum of people arriving to EU by illegal routes increases to 31203 and not only that, even though considered as “illegal immigrants”, it can be seen that many comes from, either countries with ongoing conflicts such as Syria, Soudan, or Afghanistan, either countries that are considered of “transit” such as Morocco or Libya. Therefore, as it can be observed from this data, people are still coming to the EU and the dissuasive strategies to prevent them to come, just create more danger and risks. In fact, these are the numbers of those who actually achieved to arrive to the European territory. Sadly, there is another side of the story, and it is the one of those who never made it. To date, this year the International Migration Organisation has reported that 606 migrants have died in the

<sup>46</sup> Italian Council Refugees. *Exploring avenues for protected entry in Europe*. Edited by Laura Facchi, 2012, p. 17.

<sup>47</sup> Idemudia, Erhabor; Boehnke, Klaus. “Travelling Routes to Europe” *Psychosocial Experiences of African Migrants in Six European Countries*. Social Indicators Research Series, vol 81. Springer, Cham, 2020, p. 33-49.

<sup>48</sup> FRONTEX. *Migratory Map*. [Migratory Map \(europa.eu\)](https://frontex.europa.eu/migratory-map/). Accessed April the 20<sup>th</sup>.

Mediterranean.<sup>49</sup> Already more than the double of last year's number but less than the highest peak during the refugee "crisis" of 2015, where 2041 persons lost their lives in the sea.<sup>50</sup> That is why the Mediterranean route has been qualified as one of the most dangerous of the world.<sup>51</sup> This tremendous risk is just intensified by the illegal operations carried out by Member States to push back migrants trying to attempt the coasts. As the journal *The Guardian* has reported at least 2000 of the deaths in the Mediterranean are linked with the methods carried out by the European States to push back migrants.<sup>52</sup> Nevertheless, the problem does not stop here, since the legal alternatives are closed or heavily restricted for asylum seekers, the proliferation of smugglers and human traffickers have become a reality and a profitable business. The UNCHR has stated the special vulnerability of refugees and people in transit towards trafficking<sup>53</sup> being the lack of access to safe routes one of the main reasons for it as the ICAT reported.<sup>54</sup> This issue will be treated more in detail in the next session, given its enormous impact on women.

#### **2.4.2. The construction of "the other"**

To end with this part and to shift the regard towards a more sociological or political view, the strategy of assimilation of refugees fleeing from their countries for their right to international protection to be recognised, and the homogeneous and scary mass of "illegal immigrants" have a big impact on society and increases the paradox of security. These policies focusing on proving that people inside the Schengen area need to be protected from the outsiders, bring with them the reinforcement of the idea of *the other* and of the dichotomy of *them vs us*. As the European Social Survey has pointed out, the public opinion towards the reception of refugees it is not directly related to the economic situation of the country nor to a big number of refugee population. These considerations of refugees as a threat are short-lived.<sup>55</sup> Nevertheless, what does have an impact is the media discourse and the political ambient. According to this study, it would be the media and the political parties who plays a powerful role on "shaping attitudes towards immigrants".<sup>56</sup> The EU vision on immigration just fuels this

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<sup>49</sup> OIM. *Missing Migrants*. [Missing Migrants Project \(iom.int\)](https://iom.int/). Accessed April the 20<sup>th</sup>.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Lorenzo Tondo. "Revealed: 2,000 refugee deaths linked to illegal EU pushbacks". *The Guardian*. 5<sup>th</sup> May 2020. [Revealed: 2,000 refugee deaths linked to illegal EU pushbacks | Global development | The Guardian](https://www.theguardian.com/global-development/2020/may/05/revealed-2000-refugee-deaths-linked-to-illegal-eu-pushbacks). Accessed April the 20<sup>th</sup>

<sup>53</sup> UNCHR. *Trafficking in persons*. <https://www.unhcr.org/human-trafficking.html>. Accessed April the 20<sup>th</sup>

<sup>54</sup> ICAT. *La Trata de Personas y la Condición de Refugiado. Resumen Informativo 03, 09/2017*.

<sup>55</sup> Van Hootegem, Arno. "Asylum Seekers and Immigrant threat". *European Social Survey*, October 29<sup>th</sup>, 2019. [ESS Blog | European Social Survey \(ESS\)](https://www.europeansocialsurvey.org/blog/2019/10/asylum-seekers-and-immigrant-threat/). Accessed April the 20<sup>th</sup>.

<sup>56</sup> Ibid.

vicious circle which does not allow to implement external policies in agreement with asylum law and human rights.

### **3. Which impact for women?**

Added to the problematic described in the previous section, there is another one which shall be discussed: the gender impact and the specificities existing for women asylum seekers. Even though the asylum journey is dangerous, painful, and even lethal for both men and women, the latter are exposed to certain risks that need to be considered. This idea has been characterised as the “migration-violence” nexus by Marchand and supported by Jane Freedman who defends a gendered regard over migration given that “the various types of insecurity and violence for men and women would depend on their social and economic position and mainly the *relations of power between them*”.<sup>57</sup> Considering that in the recent years, there is a rise of women migrating and asking for international protection, tendency that has been denominated as a “feminisation” of migration,<sup>58</sup> it is of a great importance to adopt this perspective to understand all the layers of the problem and not only the ones already existing in the discourse. In addition to this, analysing this subject from a gender perspective would allow to continue digging into the concept of *the other* and how in the EU, gender considerations differ among internal and external policies stressing the differences with European women and *other women*, as Freedman has pointed out.<sup>59</sup>

The idea of this section is to highlight the main gender-based risks existing for women asylum seekers in their journey to Europe to later analyse the possible legal implications existing for the EU regarding the protection of women’s rights. It is also important to precise that more than a half of the Member states do not carry out gender-differentiated statistics about the asylum claims made in their territory<sup>60</sup> making hard to provide official numbers on the subject. So, without further delay, I will start by focusing on the concept of “special vulnerability” and what does it entail.

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<sup>57</sup> Freedman, Jane. “Engendering Security at the Borders of Europe: Women Migrants and the Mediterranean Crisis.” *Journal of Refugee Studies* vol. 29, no. 4. 2016, p. 568-582

<sup>58</sup> Freedman, Jane. *Gendering the International Asylum and Refugee Debate*, Palgrave Macmillan, 2007, p. 13. ISBN-13: 978-0-230-00653-9

<sup>59</sup> Ibid.

<sup>60</sup> Crawley, H. and Lester, T. *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe*, Geneva: UNHCR. 2004.

### 3.1. The Special Vulnerability

The concept of vulnerability that is adopted in this paper follows the vision of Jane Freedman. In the context of migration, certain situations and patterns can be perceived in the majority of women's journey, finding its explanation on the way gender power relations shape them.<sup>61</sup> Gender roles historically and culturally assigned to men and women affect both in a different ways. As very accurately stated by Freedman: "gendered relations of power within the migratory process create different forms of violence and vulnerability for men and women"<sup>62</sup> meaning that by the traditional subordinated position attributed to women and by the construction of the concept of "femininity", women *are made* vulnerable and therefore this specific kind of violence would be justified under these given roles.<sup>63</sup> Women are not vulnerable, it is the existing discourse and power dynamics, which intensified under a context of exile, construct them as such. Indeed, as it has been highlighted by Bauman: "borders operate in highly gendered, racialized and classed ways"<sup>64</sup>, idea supported by Pickering and Cochrane, who claimed that "it is at the frontiers that the deaths of women are heavily clustered".<sup>65</sup> In fact, gender roles affect even in the way women cross borders impacting on their security, threatening their lives. Women would be more driven to use maritime routes facing greater risks given the places assigned to them in the vessels or because of their role as caregiver they carry their own or other children with them.<sup>66</sup>

If to that, it is added that in the securitization phenomena, these patterns are also exacerbated, either by presenting women asylum seekers as a threat (wearing a hijab is an alert sign), either as a justification for the system when presenting them as vulnerable "mothers, girls" who are in need of help, being this "weakness" the perfect excuse to erase the threatening message.<sup>67</sup> Furthermore, from a legal perspective, the concept of vulnerability is part of the Human Rights definition itself and it is needed to understand which level of protection and to which extent there is a positive obligation to guarantee rights.<sup>68</sup> Indeed, according to Samantha Besson, the

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<sup>61</sup> Freedman, Jane. *Gendering the International Asylum and Refugee Debate*. p. 20.

<sup>62</sup> *Ibid*, p. 40.

<sup>63</sup> Freedman, Jane. *Gendering the International Asylum and Refugee Debate*, p. 20.

<sup>64</sup> Bauman, Zeiman. *Wasted Lives: Modernity and Its Outcasts*, Cambridge: Polity Press. 2004.

<sup>65</sup> Pickering, Sharon and Cochrane, Brandy. "Irregular Border-Crossing Deaths and Gender: Where, How and Why Women Die Crossing Borders" *Theoretical Criminology*, vol. 17, no. 1. February 2013, pp. 27–48. <https://doi.org/10.1177/1362480612464510>.

<sup>66</sup> Migreurop. "Women at the external borders of the EU." *Migreurop Brief*, First Edition, n.8. November, 2018.

<sup>67</sup> Freedman, Jane. *Gendering the International Asylum and Refugee Debate*, p. 20.

<sup>68</sup> Besson, Samantha. « La vulnérabilité et la structure des droits de l'homme : L'exemple de la jurisprudence de la Cour européenne des droits de l'homme. » Laurence Burgorgue-Larsen. *La vulnérabilité saisie par les juges en Europe*, Pedone, pp.59–85, 2014, Cahiers européens.



concept of vulnerability would not be only a descriptive one, but it will also bring with it a prescriptive element for those responsible for the protection of human rights. These need to consider the special vulnerability and how there are some individuals, groups or collectives which are going to be more exposed to what the author refers as “standard threats”.<sup>69</sup> Therefore, in order to give the most effective and wide protection of human rights, it is fundamental to keep in mind this vulnerability. In the case of refugee women this come by firstly, understanding the specific risks and threats they suffer to, secondly, give a coherent answer to grant them a level of protection in compliance with human rights.

Having in mind the intending meaning of the concept of vulnerability and its importance when debating about human rights and protection, I will focus now on two of the main and gendered risks for women asylum seekers: sexual violence and prostitution, and its connection with human trafficking and smuggling.

### **3.2. Gender-Based violence. (GBV)**

Even though this concept has found several definitions by a variety of international organisations and scholars, in this paper I will use the definition given by the UNHCR which states that “Gender-Based violence refers to harmful acts directed at an individual based on their gender. It is rooted in gender inequality, the abuse of power and harmful norms”.<sup>70</sup> Not only that, but it is considered a human right violation and “and a life-threatening health and protection issue” which threat increases during the displacement for women and girls.<sup>71</sup> This gender-based violence can be manifested as sexual, physical, mental and economic harm inflicted in public or in private as well as threats of violence, coercion and manipulation.<sup>72</sup> For women asylum seekers, this violence exists in all the phases of the journey, before even leaving their country, once they fly and even in the host country.<sup>73</sup> In this work, I will focus mainly on the risks of suffering gender-based violence during the asylum journey.

As already mentioned above, the asylum journey’s characteristics have been highlighted as factors which exacerbate the risks of suffering gender-based violence and sexual violence.<sup>74</sup> If the **dependency** that the refugee situation brings with it already leaves those in transit

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<sup>69</sup> Ibid, p. 60.

<sup>70</sup> UNHCR. “Gender-Based Violence”. *Protection*. UNHCR. [UNHCR - Gender-based Violence](#). Accessed May the 10<sup>th</sup>

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Freedman, J. *Analysing the Gendered Insecurities of Migration*, p. 37.

<sup>74</sup> Thomas, Siân; Darkal, Hoayda; Goodso, Lisa. “Monitoring and reporting incidents of sexual and gender-based violence across the refugee journey” *IRIS WORKING PAPER SERIES*, No. 29/2019, University of Birmingham. 2019, p. 6.

vulnerable to abuse,<sup>75</sup> as for women and girls this dependency is intensified, major risks can exist. In fact, as presented by the IRIS report, following Rebecca Horns' research, during the journey and encampment the increase and normalisation of violence together with an attempt to restore the hegemonic masculinity as an answer to changing social status present a danger for women and girls.<sup>76</sup> If to that, it is added the importance of the intercultural factor and its major role on the understanding of what is exactly gender-based violence in relation to certain cultural and social norms, the possibility of women adopting a dependent and submissive position increases. Furthermore, it is inevitable to ignore that because of the inexistence of legal paths of entry, smugglers have proliferated and have become necessary for those who do not have another way, producing the paradoxical effect of increasing their participation on the migration whereas this is exactly what the EU claim to be fighting for when restricting the enter of "illegal migrants."<sup>77</sup> For Freedman, the need to use smugglers to fly from the conflict and prosecution directly translates for women into sexual assault or rape<sup>78</sup> and moreover, given that women are aware of this risk, they may find a travel partner for their protection intensifying their dependence towards him, "some even marrying out of desperation" as stated by Vincent Cochetel, the director of the UNHCR's Bureau for Europe.<sup>79</sup> So, if the latter is abusive or have a violent behaviour, this dependency would lead the woman to tolerate and suffer this just to avoid travelling alone.<sup>80</sup> In addition, it exists what has been denominates as "transactional sex", considering that travel costs are exorbitant, women are forced to swap sexual relations in return for their passage to Europe.<sup>81</sup> Of course this is not something that uniquely arrive to women, minors and teenagers may face this harsh reality too,<sup>82</sup> but there is a clear gender bias as pointed out by Freedman or Pickering and Powell. Apart from the serious consequences that this have for the physical and psychological health of the victims, there is another fatal consequence that comes with the insecurity of the journey, and this is the risk of being trafficked and trapped in prostitution networks even when they arrive to Europe.<sup>83</sup>

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<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Freedman, J. *Analysing the Gendered Insecurities of Migration*, p. 40.

<sup>78</sup> Ibid. 45.

<sup>79</sup> UNHCR-UNFPA-WRC. "Report warns refugee women on the move in Europe are at risk of sexual and gender-based violence". *Press Releases. UNHCR*. [UNHCR - Report warns refugee women on the move in Europe are at risk of sexual and gender-based violence](#). Accessed May the 12<sup>th</sup>

<sup>80</sup> Ibid.

<sup>81</sup> Freedman, Jane. "Sexual and gender-based violence against refugee women: a hidden aspect of the refugee "crisis"". *Reproductive Health Matters*, Elsevier, vol.24, 2016, p.21.

<sup>82</sup> Thomas, Siân; Darkal, Hoayda; Goodso, Lisa. "Monitoring and reporting incidents of sexual and gender-based violence across the refugee journey"

<sup>83</sup> Freedman, Jane. *Gendering the International Asylum and Refugee Debate*. p. 149.

### 3.3. Human Trafficking.

Trafficking is defined in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol)<sup>84</sup> and it is considered as a transnational crime.<sup>85</sup> The main purpose of it is the “exploitation” which can consist of several types of criminal acts: prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>86</sup> Trafficking is a huge and important issue, especially when talking about the need for safe pathways to Europe. Indeed, as a UN survey has affirmed around the 70% of migrants who arrive to the EU by boat from Africa has been trafficked or exploited.<sup>87</sup> (An important detail to highlight is that most of the cases occurred in Libya, country with which the EU have cooperation agreements in terms of immigration as it has been already mentioned). So, even though the EU is engaged in fighting against trafficking and smuggling and justifies its restrictive policies towards refugees and people in need of international protection based on this argument,<sup>88</sup> this is not coherent with the reality.

Victims exploited while fleeing conflict areas



Global Report on Trafficking in person 2018. UNODC.

Focusing on women, as the Global Report on Trafficking in person stated, “most of the victims detected across the world are women and girls” representing a 72% of them.<sup>89</sup> Even if the type of exploitation and victims could vary depending on the geographical area the report stated that still,<sup>90</sup> “trafficking of females – both women and girls - for sexual exploitation prevails”.<sup>91</sup> This

<sup>84</sup> UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000

<sup>85</sup> Macklin, Audrey. “Legal Aspects of Conflict-Induced Migration by Women” in *Women, Migration and Conflict*. Ed. Susan Forbes Martin, John Tirman. Springer, 2009, p. 36. DOI 10.1007/978-90-481-2825-9.

<sup>86</sup> Macklin, Audrey. “Legal Aspects of Conflict-Induced Migration by Women” p. 37.

<sup>87</sup> Kelly, Annie. “Survey finds 70% of migrants arriving in Europe by boat trafficked or exploited”. *The Guardian*. [Survey finds 70% of migrants arriving in Europe by boat trafficked or exploited | Global development | The Guardian](#) Accessed May the 13<sup>th</sup>.

<sup>88</sup> Freedman, J. *Gendering the International Asylum and Refugee Debate*.

<sup>89</sup> United Nation Office on Drugs and Crime. *Global Report on trafficking in persons 2018*, United Nations publication, Sales No. E.19.IV.2, p. 10.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

data is of not surprise when connected with the idea of special vulnerability and gender based violence already introduced before.

Moreover, it has been proved that the longest and the more complex the transit is, the more the risks increase, as can be seen in the IOM survey where 79% of migrants who spent at least a year in a country different from their origin have suffered of trafficking whereas those who have not represent a 68%.<sup>92</sup>

Nevertheless, in terms of policies and awareness, human trafficking in the asylum context is not very well developed and several critiques has been made about the treatment of victims. It has been criticised that there is an “invisibility” of women who have been trafficked, given that the focusing it is not on the protection of women but mostly on the prosecution of traffickers. Connecting this very well with the security paradox mentioned in the first section.<sup>93</sup> In addition, in relation to the asylum claim, as the refugee definition only focus on the facts occurred in the country of nationality of the asylum seeker, the harms and possible prosecution that takes place during the journey and in other countries are not considered to grant the person the international protection.

### **3.4. Women’s rights violation during the journey, could it be prosecution?**

As can be seen many are the risks which arise from the journey: deaths, sexual violence, force labour... These resemble to the very same dangers which are the cause of flight from refugees’ own countries, bringing to the table the question if these harms experienced during the journey could equate the “persecution” element needed to be considered as a refugee.<sup>94</sup> Since no legal alternatives exist to exercise the right to claim for asylum and the 90% of arrivals to the EU are made through illegal pathways, seems like it is a natural part of the asylum process to be exposed to these risky routes and to suffer terrible harms and experiences in order to reach a real safe country. Author Maja Grundler has studied if there is a possibility to claim for the refugee status based on their fear of having to recreate another journey in the future.<sup>95</sup> For that, she acknowledges that in order to be considered a refugee under Article 1A(2) of the Refugee

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<sup>92</sup> OIM. *Analysis: Flow Monitoring surveys the human trafficking and other exploitative practices prevalence indication survey*. Flow Monitoring Data Analysis, October 2016.

<sup>93</sup> Freedman, Jane. *Gendering the International Asylum and Refugee Debate*. p. 150.

<sup>94</sup> Grundler, Maja. “Refugee Status for Survivors of Dangerous Journeys? Establishing a nexus to nationality” in *Deadly Voyages: Migrants Journeys across the Globe*, edited by Veronica Frynn and Steven W. Bender, Lexington Books, 2020, pp. 55-7. ISBN 978-1-4985-8468-5

<sup>95</sup> *Ibid*, 57.

Convention (RC)<sup>96</sup> there must exist a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, so a nexus between the persecution and one of the reasons mentioned shall exist to be subject of this definition. First, for the harm to be considered as persecution, this must be serious and severe. In order to know which harms fit into this category, Grundler uses the dispositions of the European Convention of Human Rights to connect them with the risks that these journeys entail such as the risk of being subject of torture and human treatment (article 3) or the prohibition of forced labour (article 4) in relation to sexual exploitation and other practices<sup>97</sup> all of these milestones in the protection of human rights' system armoured by the Courts. Second, and following the analysis of Grundler, once these harms could be understand as serious and therefore, as a form of prosecution, they shall be connected to one of the grounds of the Refugee Convention.<sup>98</sup> In the case of women, the Refugee Convention do not expressly acknowledge gender-based violence as a form of persecution, nevertheless both, the case law and the academia have developed the concept of "gender specific" harms and have connect it with the "membership of a particular social group" for the grounds of the RC.<sup>99</sup> Indeed, following the Guidelines on international protection of the UNHCR<sup>100</sup> gender-based persecutions could go from human trafficking to a cumulative pattern of discrimination and the agents of prosecution could be the State of origin, the individuals and even the authorities if these are tolerating over the harms.<sup>101</sup> So, if the element of a well-founded fear of suffering a serious harm is present and it could be connected with one of the grounds of the Convention, in our case, belonging to a particular social group, why is it hard to consider the harms lived during the journey for the asylum claim? A problem derives from the essence of the refuge itself. Since this is created to replace the State of origin's lack of protection by offering it from another State, in this case where the harming actions are produced in different territories about the journey and outside of the borders of the State of origin, it becomes hard to delimitate the failure of this to grant the

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<sup>96</sup> UN General Assembly. "Convention Relating to the Status of Refugees" *United Nations, Treaty Series*, vol. 189, 28 July 1951, p. 137.

<sup>97</sup> Grundler, Maja. "Refugee Status for Survivors of Dangerous Journeys? Establishing a nexus to nationality"

<sup>98</sup> *Ibid*, p. 61

<sup>99</sup> Hathaway, James C., and Michelle Foster. *The Law of Refugee Status*. 2nd ed. Cambridge: Cambridge University Press, 2014. doi:10.1017/CBO9780511998300.

<sup>100</sup> UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01

<sup>101</sup> *Ibid*.

protection and its scope.<sup>102</sup> Regarding this issue, two observations could be made. First, by adopting the predicament approach of the causal connection, the intention of the prosecutor is not needed and only the exposure to risk is considered to create the causal link.<sup>103</sup> This approach allows to connect the incapability of the State to offer protection to its nationals by, for example, making impossible for those who need to flee to get a visa due to their citizenship and therefore, having to opt for dangerous routes.<sup>104</sup> Second, not taking into account the violations of rights occurred during the journey have very negative implications, specially if the claim is denied. If the country is considered safe for the person and that no risk of persecution exists, she would be returned, but since no consideration has been made about the *route* that the person would need to take if she wants to try to flee again from the persecution, the risk of being exposed to these harms is still there, idea which could be linked to the poor rate of returns after a refusal of the asylum claim.<sup>105</sup>

In summary, if no safe ways of accessing to the international protection are created by those who receive every year a great number of people fleeing from danger and conflict, at least the dramatic events these experienced during the journey and the violations of rights they suffer, shall be taken into account in order to grant the international protection. In a Europe where women's rights are defended and promoted through a strategy of gender mainstreaming and an adhesion to the Istanbul Convention these gender-based violations cannot rest unaddressed and invisible anymore.

#### **4. The European Union's position.**

After presenting the existing problem of the externalisation of borders and the securitization strategy followed under the Area of Freedom, Security and Justice of the EU and, consequently showing the direct impact this have over women and girls in transit, I will focus now on the position that the European Union has adopted in relation to such issue, and I will argue that this is not enough to tackle the suggested problems.

##### **4.1. The Gender Mainstreaming**

As mentioned in the introduction around a decade ago the concept of gender mainstreaming jumped into the political arena as a strategy that proposes a shift in concepts underlying the

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<sup>102</sup>Grundler, Maja. "Refugee Status for Survivors of Dangerous Journeys? Establishing a nexus to nationality" p.57

<sup>103</sup> Ibid, p. 63

<sup>104</sup> Ibid.

<sup>105</sup> Eurostat. *Enforcement of immigration legislation statistics*. July 2020. [Enforcement of immigration legislation statistics - Statistics Explained \(europa.eu\)](https://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&plugin=1). Last accessed June the 30<sup>th</sup>.

policy-making process,<sup>106</sup> the focus would not be only on women but more on gender in a wider sense and how this creates unequal relations of power in all the spheres.<sup>107</sup> The European Institute for Gender Equality defines this concept as an strategy to reach gender equality through “the integration of a gender perspective into the preparation, design, implementation, monitoring and evaluation of policies, regulatory measures and spending programmes, with a view to promoting equality between women and men, and combating discrimination.” Being those responsible for its promotion and implementation the EU institutions as well as the Members States.<sup>108</sup> Implementing this regard in the policies shall be done through four phases categorised as Define-Plan-Act-Check. The first category, *Define* would correspond to gathering information and data through gender statistics or gender impact assessment for example<sup>109</sup>. *Plan* is focus on the budget or more specifically, *gender budgeting* which is needed to identify how budget allocation would contribute to gender equality.<sup>110</sup> In the *act* phase the policy would be implemented and all who participate in it shall be aware of the gender objectives and plans.<sup>111</sup> And, finally the *checking* phase would be applied both, during the act phase through a monitoring of the actions and after, as an evaluation of its implementation.<sup>112</sup> Under this strategy 19 areas of the EU institutional action have been identified where among them, belong the area of migration and international protection. In its report of 2020, in reference to the international protection, it is acknowledged that there are specific gendered risks for women asylum seekers and refugees as the one that have been mentioned in this work, and that there are challenges persisting for the EU in this field. Nevertheless, it can be seen how the gender issues arising from the dangerous journey to get the asylum, even though mentioned as a problem, is disregarded in terms of specific policies, and the main focus is made on the reception conditions and the integration process of these women which, although extremely necessary, should be complementary with a concern over their transit experiences. For this work, I will focus mainly on the gender measures taken which affect these women in transit.

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<sup>106</sup> Lombardo Emanuela, Meier Petra. “Gender Mainstreaming in the EU: Incorporating a Feminist Reading?” *European Journal of Women's Studies* n.13, 2006, p. 153.

<sup>107</sup> Ibid.

<sup>108</sup> European Institute for Gender Equality. “Gender Mainstreaming”. [Migration | European Institute for Gender Equality \(europa.eu\)](https://migration.eige.europa.eu/). Last accessed June the 30<sup>th</sup>.

<sup>109</sup> European Institute for Gender Equality. *Gender Mainstreaming. Sectoral Brief: Gender and Migration*, 2020, p. 14

<sup>110</sup> Ibid, p.17

<sup>111</sup> Ibid, p. 18

<sup>112</sup> Ibid, p.19

It is true that the operational branch of borders control, FRONTEX, has adopted specific trainings and gender guidelines to identify victims of trafficking and gender-based violence.<sup>113</sup> Nevertheless, when taking a look to the Fundamental Rights Training for Borders Guards<sup>114</sup> where these guidelines are compiled, it can be seen how the question of gender is superficially treated and not specific definitions are given. There is only one concrete section about gender when talking about possible factors which affect the communication, and this gets even less detailed when talking about transgender people and people belonging to the LGBT+ community who only get a few lines in this guideline. Therefore, we can see how in reality these guidelines are not having the impact they should. According to Human Rights NGOs, security officers ignore this information and practices, and even are part of the problem, being source of physical and verbal violence towards refugees and asylum seekers as reported by Amnesty International.<sup>115</sup> Indeed, its supposedly approach to gender follows the same securitization rationale than borders. A very illustrative example can be found in the video released for the International Women's Days on the 8<sup>th</sup> of March 2021 where the main slogan was "Security Has No Gender" and which depicts female border guards working for the agency with an action music on the background presenting several statements such as "preventing terrorism" or "protecting Europe." Hence, not only this is a clear statement of the ignorance of how gendered security and borders are<sup>116</sup>, but also it perpetuates this idea of the "the other" affirming that gender equality and its protection has only place inside the borders of Europe and everything which happens outside them is menacing thus not deserving of protection.

Furthermore, the European Union cooperation agreements for the strategy of deterrence are another example of how the gender element is not present in the external action of the EU. Countries with which these agreements have been made are known for their blameable treatment over women and their old-fashioned legislation regarding women emancipation. Turkey, which has recently withdrawn from the Istanbul Convention,<sup>117</sup> act that ironically has

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<sup>113</sup> Ibid.

<sup>114</sup> FRONTEX. *Fundamental Rights Training for border guards*. 2017.

<sup>115</sup> Amnesty International. "Female refugees face physical assault, exploitation and sexual harassment on their journey through Europe". *News. Amnesty International*. <https://www.amnesty.org/en/latest/news/2016/01/female-refugees-face-physical-assault-exploitation-and-sexual-harassment-on-their-journey-through-europe/> Accessed May the 16<sup>th</sup>.

<sup>116</sup> Achilleos-Sarll, Columna; Sachseder, Julian and Stachowitsch, Saskia. "#SecurityHasNoGender. Frontex, border security, and the politics of gender-neutrality." *The London School of Economics Women, Peace and Security blog*. 31<sup>st</sup> March, 2021. [#SecurityHasNoGender. Frontex, border security, and the politics of gender-neutrality | LSE Women, Peace and Security blog](#). Last accessed June the 30<sup>th</sup>.

<sup>117</sup> Council of Europe. "Turkey's withdrawal from the Istanbul Convention - an inadmissible regression in women's rights in Europe". *Newsroom*. [Turkey's withdrawal from the Istanbul Convention - an inadmissible regression in women's rights in Europe - Newsroom \(coe.int\)](#) Accessed May the 16<sup>th</sup>.



been highly criticized by the EU, with Ursula Von Der Leyen herself giving a speech to show her disagreement,<sup>118</sup> has been denounced several times because of its neglected position on women's rights and its authoritarian policies.<sup>119</sup> Or Morocco, where the criminalisation of migration has derived into high levels of violence and several women denounce being victims of sexual harassment by the police or army officers.<sup>120</sup>

Following this idea, it could be highlighted the contrast between the “gender mainstreaming” position adopted in all the EU action fields and its policies referring to the asylum. Indeed, these policies of securitization and illegalisation of migration and transit only increase the problems mentioned above<sup>121</sup> and proves how the gender perspective which has gained a special place in the latest years in internal EU legislation lacks an intersectional approach and ignores migrant women.

Which is clear is that these strategies are in contraposition with an EU which promotes fundamental rights and gender equality. A change of direction is needed, and several propositions are on the table coming from scholars, NGOs, and human rights advocates. Of course, among them, is the need to create safe and legal pathways in order to avoid women, and asylum seekers in general, to see their human rights violated in their transit.<sup>122123124</sup>

#### **4.2. The New Pact on Migration and Asylum. 2020.**

It has been argued that the gender mainstreaming strategy intends to reach all policies of the EU. In the sphere of the asylum nevertheless, it seems this strategy has failed to permeate as could be seen through the examples mentioned above. In this section, it is going to be analysed if the New Pact on Migration and Asylum presented by the Commission in September 2020

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<sup>118</sup> European Commission. “Speech by President von der Leyen at the European Parliament Plenary on the conclusions of the European Council meeting of 25-26 March 2021 and the outcome of the high-level meeting between the EU and Turkey.” [Speech by the President: EUCO and EU-Turkey meeting \(europa.eu\)](#). Accessed May the 16<sup>th</sup>.

<sup>119</sup> Human Rights Watch. “Turkey: Erdoğan’s Onslaught on Rights and Democracy”. [Turkey: Erdoğan’s Onslaught on Rights and Democracy | Human Rights Watch \(hrw.org\)](#). Accessed May the 16<sup>th</sup>.

<sup>120</sup> Freedman, Jane. *Analysing the Gendered Insecurities of Migration*, p.48

<sup>121</sup> Freedman, Jane. “Sexual and gender-based violence against refugee women: a hidden aspect of the refugee “crisis””

<sup>122</sup> Freedman, Jane. “Sexual and gender-based violence against refugee women: a hidden aspect of the refugee “crisis”” p. 24.

<sup>123</sup> Amnesty International. “*Europe’s Borderlands. Violations against refugees and migrants in Macedonia, Serbia and Hungary*” Amnesty International, 2015, p. 68.

<sup>124</sup> Nobel Women’s Initiative. “Women Refugees at risk in Europe” *Nobel Women’s Initiative*, March 2016, p. 10.

offers some new light to this issue and if new elements towards the creation of legal pathways to the EU and/or the protection of women asylum seekers are considered.

The 23<sup>rd</sup> of September of 2020 the European Commission presented The New Pact on Migration and Asylum<sup>125</sup> arguing that the old system no longer works bringing this Pact, common European solutions to a European Challenge.<sup>126</sup> Although it is clear that a change in the CEAS is necessary, the pact has been criticized for not being able to shift to a solidarity model and to confront the shortcomings of the system.<sup>127</sup> These critiques can also be expanded to the field of gender. One of the thing that is quite surprising is the absence of recognition of women and girl in this Pact,<sup>128</sup> the only reference that can be founded is precisely regarding the risk of trafficking during the journey where the Pact assumes it exists a very gendered dimension.<sup>129</sup> The pact approaches the question of asylum seekers in general, forgetting the intersection of gender and migration and the specificities of women and girls. Instead of considering them as a group alone, these are being categorised under the generic label of ‘vulnerable’ persons,<sup>130</sup> a blurry category which encourages an individualised vision of a systemic and collective issue. It is true that the Commission also released as a complementary strategy to the pact, The Action Plan for Integration and Inclusion 2021-2027 where gender issues are more acknowledged, and a strategy of gender mainstreaming is applied in the actions proposed by the plan. Although positive, as the European Network of Migrant Women has reported, these propositions mainly focused on integration, are in disconnection with the rest of the proposal of the pact and in general the migration regulation creating therefore an incoherence which is harmful.<sup>131</sup> Indeed, the problem of accessing the EU through safe

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<sup>125</sup> European Union: *European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration*, 13 May 2015, COM (2015) 240

<sup>126</sup> European Commission. *A fresh start on migration: Building confidence and striking a new balance between responsibility and solidarity*. 23<sup>rd</sup> September 2020. [New Pact on Migration and Asylum \(europa.eu\)](https://european-council.europa.eu/media/en/press-room/default.aspx?id=14484). Last accessed July the 1<sup>st</sup>.

<sup>127</sup> European Council of Refugees and Exiles. “Joint Statement: The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded” *News*, 6<sup>th</sup> October 2020. [Joint Statement: The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded | European Council on Refugees and Exiles \(ECRE\)](https://ecrefugees.org/en/press-releases/joint-statement-the-pact-on-migration-and-asylum-to-provide-a-fresh-start-and-avoid-past-mistakes-risky-elements-need-to-be-addressed-and-positive-aspects-need-to-be-expanded). Last accessed July the 1<sup>st</sup>.

<sup>128</sup> European Network of Migrant Women. *EU Migration & Asylum Pact. Through the Eyes of a Woman*. 18 December 2020. [\\*MIGRATION PACT THROUGH THE EYES OF A WOMAN \(migrantwomennetwork.org\)](https://migrantwomennetwork.org/en/2020/12/18/eu-migration-and-asylum-pact-through-the-eyes-of-a-woman)

<sup>129</sup> European Commission (COM). *Communication from the Commission to the European Parliament, The Council, The European Social and Economic Committee and the Committee of the Regions on a New Pact on Migration and Asylum*. 23 September 2020. COM(2020) 609 final.

<sup>130</sup> European Network of Migrant Women. *EU Migration & Asylum Pact. Through the Eyes of a Woman*.

<sup>131</sup> European Network of Migrant Women. *EU Migration & Asylum Pact. Through the Eyes of a Woman*, p. 2

pathways for these women is still unaddressed being the proposals that the Pact makes in this field problematic.

#### **a) Pre-entry screening.**

At the external borders of the EU territory, a three phases process (pre-entry screening, asylum procedure and a return if needed) where kick evaluations would be carried out to determine if the person could grant for a refugee status and which kind of procedure would be applied. All third countries nationals would have to be submitted to this pre-entry screening which include identification, health and security checks, fingerprinting and registration in the Eurodac database.<sup>132</sup>In this phase, those asylum claims which are believed have little chances to be accepted would be examined at the border, rapidly which would allow an immediate return if these were rejected.<sup>133</sup>

The first critique that can be made to this mechanism is in deep connection with what have been mentioned before relating to the assimilation of asylum seekers to illegal migration. The need of protection of asylum seekers thank to the principle of *non refoulement* is over any entry requirement. This analogy perpetuates the idea of refugee= irregular migrant and creates stereotypes that can be easily applied by guards at the border.<sup>134</sup> Following with this idea, concerns exist about the right of information and legal access during these pre-screening at the border.<sup>135</sup> From a gender perspective, it is also problematic who are going to be those in charge of assessing these first claims given that, without the necessary training on fundamental rights and gender issues, the probabilities of accessing to asylum for these women could be affected. As have been mentioned before, board guards and security staff have little knowledge about gender issues and sometimes they are even the perpetrators of gender-based violence over these women. The rapidity with which this process is carried out, does not allow to deploy the legal, linguistic or psychological support needed to give women a safe environment to express their

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<sup>132</sup> European Commission (COM). Communication from the Commission to the European Parliament, The Council, The European Social and Economic Committee and the Committee of the Regions on a New Pact on Migration and Asylum, p. 4.

<sup>133</sup> Ibid.

<sup>134</sup> Jakulevičienė, Lyra. "Re-decoration of existing practices? Proposed screening procedures at the EU external borders." *EU Immigration and Asylum Law and Policy*. 27 October 2020. [Re-decoration of existing practices? Proposed screening procedures at the EU external borders – EU Immigration and Asylum Law and Policy \(eumigrationlawblog.eu\)](#) Last accessed July the 1<sup>st</sup>.

<sup>135</sup> European Council of Refugees and Exiles. "Joint Statement: The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded" *News*, 6<sup>th</sup> October 2020. [Joint Statement: The Pact on Migration and Asylum: to provide a fresh start and avoid past mistakes, risky elements need to be addressed and positive aspects need to be expanded | European Council on Refugees and Exiles \(ECRE\)](#). Last accessed July the 1<sup>st</sup>.

claim.<sup>136</sup>In the Pact, an exemption from this procedure is presented for those who are *most vulnerable* and whose *necessary guarantees* could not be respected, but since the concept of vulnerability is not harmonised in the CEAS it remains really blurry and undetermined when and how this vulnerability is going to be taken into consideration. Those asylum claims which are considered with low chances to be accepted are those “originating from countries with low recognition rates likely not to be in need of protection”<sup>137</sup> or basically, originating from a “safe country”, the concept of safe is relative for women as stated by the Committee on Women’s Rights and gender equality of the European Parliament : “even in countries deemed safe, women may suffer gender-based persecution, while LGBTI persons may also suffer abuse, *thus having a legitimate request for protection.*” Not having in mind a gender perspective when assessing these claims could lead to “persecution, exploitation, sexual violence and femicide”<sup>138</sup> leaving void the principle of *non refoulement*.

#### **b) Legal Pathways.**

If as have been stated before, several scholars and NGO’s have pointed out the creation of legal pathways as a way to avoid women’s rights violations, the New Pact on Migration and Asylum do not delve into its development and adopts a very self-interested position.

The Pact main measure to entering the EU in a legal way is through the **resettlement** which consist of “the transfer of refugees from an asylum country to another State, that has agreed to admit them and ultimately grant them permanent residence.”<sup>139</sup> In the EU resettlement is initiated by a petition of the UNHCR to a Member State that will accept the refugee in its territory.<sup>140</sup> Albeit this figure is necessary, specially as a measure of solidarity among States which host a high level of refugees in their territory, it is important to highlight that this only suits those who already got a international protection status, meaning that, it would not be a legal pathway for asylum seekers whose status has not been recognised yet. Furthermore, the number of resettlement places offered in Europe are not at the least comparable with the demand for protection.<sup>141</sup> In 2019, Eurostat reported that 21.295 resettlements were carried out

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<sup>136</sup> European Network of Migrant Women. *EU Migration & Asylum Pact. Through the Eyes of a Woman*, p.4

<sup>137</sup> European Commission (COM). Communication from the Commission to the European Parliament, The Council, The European Social and Economic Committee and the Committee of the Regions on a New Pact on Migration and Asylum, p.4

<sup>138</sup> European Network of Migrant Women. *EU Migration & Asylum Pact. Through the Eyes of a Woman*, p.5

<sup>139</sup> UNHCR. “Resettlement” *Solutions*. [UNHCR - Resettlement](#). Last accessed July the 1st.

<sup>140</sup> European Asylum Support Office. *EASO Asylum Report 2020. Annual Report on the Situation of Asylum in the EU*. 2020.

<sup>141</sup> Fratzke, Susan and Salant, Brian. *Tracing the Channels Refugees use to seek protection in Europe*. Migration Policy Institution Europe, 2017, p. 13

in the EU,<sup>142</sup> in contrast with the 63.1300 asylum claims that were made in the territory<sup>143</sup> that represents more than the double. On the other hand, this mechanism has been criticized for promoting a “cherry-picking” system where criteria other than the one of the UNCHR is used and pre-screening strategies are carried out to determine which person “gets” the place.<sup>144</sup> This latest idea, fits perfectly with the Plan insistence on attracting “high skilled” and “qualified” migrants to the EU.

The Pact also proposes that Member states willing to develop community or private sponsorship would get a support from the EU since it would promote a better integration in a long term.<sup>145</sup>

So, what happens with the other possible humanitarian channels of entry? What happens with those who still have not a recognised status? How women who seek for asylum in Europe can avoid a journey full of hazards? The figure of the humanitarian visas has been discussed in Europe around more than a decade now but in the latest years after several attempts of the European Parliament to introduce its use in the CEAS, and the closing doors by the CJEU and the ECHR, this figure is being forgotten. From this work’s perspective, the debate about this figure should be revitalised given its utility to, together with some other legal and political strategies, overcome this EU politics of “deterrence”. Humanitarian Visas are a mechanism which “allow asylum seekers to legally access a third country and/or apply for asylum following expedited asylum procedures, with the merit of the application examined in situ”.<sup>146</sup> They are an additional pathway to the already existing ones, and some Member States already have implemented this kind of visas based on international protection needs through Limited Territoriality Validity Visas (LTV) or the national long-stay visas type D.<sup>147</sup> An harmonised regulation over these kind of visas would allow to the EU to introduce a new and effective entry channel where solidarity could be developed to equilibrate the charges of the different

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<sup>142</sup> Eurostat. *Resettled persons- Annual Data*. Last updated 10/06/2021. [Statistics | Eurostat \(europa.eu\)](https://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&plugin=1) Last accessed July the 1st.

<sup>143</sup> Eurostat. Asylum Statistic. [Asylum statistics - Statistics Explained \(europa.eu\)](https://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&plugin=1). Last accessed July the 1st.

<sup>144</sup> de Boer, Tom and Zieck, Marjoleine. “THE LEGAL ABYSS OF DISCRETION IN RESETTLEMENT OF REFUGEES: Cherry-picking and the Lack of Due Process in the EU”. *Amsterdam Law School Legal Studies Research Paper*, No. 2020-48.

<sup>145</sup> European Commission (COM). Communication from the Commission to the European Parliament, The Council, The European Social and Economic Committee and the Committee of the Regions on a New Pact on Migration and Asylum, p.23

<sup>146</sup> European Union: European Parliament, *Towards an EU humanitarian visa scheme?* 2016, PE 556 950.

<sup>147</sup> Fratzke, Susan and Salant, Brian. *Tracing the Channels Refugees use to seek protection in Europe*. Migration Policy Institution Europe, 2017, p.16.

Member States.<sup>148</sup> Furthermore, the person in need of international protection would play an active role in the asylum process facilitating her later integration, since normally its decision on the reception country is made based on reasons of family or friends connections, knowledge of the language or employment opportunities.<sup>149</sup> Additionally, it would allow to make an individual and previous assessment pre-departure on the situation of the asylum seeker<sup>150</sup> which could correspond to the logic of the pre-screening of the New Pact on Migration and Asylum but respecting the guarantees and avoiding risky journeys for the asylum seekers. Through the gender lens, this figure has also been praised as positive since it would allow women to claim for asylum from an autonomous position, women who otherwise, because of economical dependency, family charges, fear of the journey, would never have done it or would have to be exposed to the threats of the illegal routes. The Committee on Women's Rights and Gender Equality in his opinion on humanitarian visas<sup>151</sup> pointed out that these address a pressing need highlighting at the same time the current paradoxical situation in EU asylum law where there are not any provisions of how a refugee should actually arrive to the territory, condemning those who do it to irregular routes.<sup>152</sup> Humanitarian visas would be a way to avoid gender-based violence and the threat of being trafficked for these women and are a step further to the deconstruction of the current Fortress of Europe.

## 5. Conclusions.

1.- The current configuration of the Common European Asylum System gravitates around the securitization strategy developed through the Security component of The Area of Freedom, Security and Justice of the EU. Through an assimilation of asylum seekers and refugees with “illegal migrants”, legal, operational, and physical barriers have been developed to prevent their entry to the EU’s territory.

2.- These barriers have been categorised as three main obstacles which refer first, to the obligation for third nationals coming from “Blacklist” countries, list which not by chance

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<sup>148</sup> Sánchez Legido, Ángel. “El arriesgado acceso a la protección internacional en la Europa fortaleza: la batalla por el visado humanitario europeo” p.471.

<sup>149</sup> UNHCR. *From a refugee perspective. Discourse of Arabic speaking and Afghan refugees and migrants on social media from March to December 2016*. April 2017.

<sup>150</sup> Sánchez Legido, Ángel. “El arriesgado acceso a la protección internacional en la Europa fortaleza: la batalla por el visado humanitario europeo” p.471.

<sup>151</sup> Committee on Women's Rights and Gender Equality. “OPINION OF THE COMMITTEE ON WOMEN'S RIGHTS AND GENDER EQUALITY for the Committee on Civil Liberties, Justice and Home Affairs with recommendations to the Commission on Humanitarian Visas” *European Parliament*. 10<sup>th</sup> September 2018. [REPORT with recommendations to the Commission on Humanitarian Visas \(europa.eu\)](#) Last accessed July the 1<sup>st</sup>.

<sup>152</sup> Ibid.

contains all major refugee-producing states, to obtain a visa to enter in the EU territory and the almost impossible quest this implies for asylum seekers given the legal and physical barriers existing to their access. Second, the privatisation of the external borders control through the astronomical sanctions existing for carriers who transport “illegal” migrants act as an obstacle to prevent many asylum seekers to reach the EU through a legal way. Finally, the EU has been carrying out over the last years a strategy of externalisation of its borders to prevent “illegal” migration through cooperation agreements with third countries such as Turkey and Libya, countries which respect over fundamental and women’s rights is questionable. This strategy reinforces the *security paradox* exposing asylum seekers to the violation of its rights and putting the EU in a fragile geopolitical position given its dependency with this States for the external border control.

3.- All these obstacles create a politics of “deterrence” where the construction of *the other* and its threat to the European security is encouraged. This, together with the lack of legal pathways, force asylum seekers to opt for illegal and risky routes known for its danger in light of the systemic violations of fundamental rights which take place during the journey.

4.-In these dangerous journeys, women and girls face particular gendered risks which need to be addressed in order to attend to their specific needs. Their special vulnerability created by the gender power dynamics is exacerbated by the exile process, the securitization strategy and the border controls put these women in a vulnerable position which shall be considered to give the most effective and wide protection of human rights. During the journey, women are exposed to gender-based violence given its situation of dependency. Many depend on a male travel partner either because of economic reasons or as way to protect themselves for the abuse of other men. This dependency creates vulnerability and submission. Furthermore, the lack of safe pathways incites the proliferation of smugglers which also are a source of danger for women and even encourage a model of *transactional sex* for those who do not have the economic resources to pay for the journey. Besides, in this context of insecurity, migrants are highly exposed to human trafficking, being women and girls the most affected representing a 79% of people trafficked in 2018. Therefore, it can be concluded that the lack of legal and safe pathways to claim for asylum in Europe are directly related with women’s rights abuses.

5.-This situation of systemic violation of women’s rights during the journey has led to question if these dangers could be considered as persecution under the Refugee Convention thus used to support the asylum claim given that they are almost a natural part of the asylum process.

Although this question is still not clear, the work of Maja Grundler has been taken to justify a possible positive approach to this question. First, the assimilation of these dangers to serious harms could stand as persecution. Second, the consideration of women in transit as a ground for the RC through the category of “membership of a particular social group” allows to make the link between this and the persecution element. Third, the connection with how to prove the failure of protection of origin State is a bit more challenging but a possible answer has been given in relation with the predicament approach of the causal connection. Furthermore, it has been argued that not considering the dangers of the journey when assessing an asylum claim could, if there is a refusal of the claim and they are sent to a “safe country”, lead to expose these women to suffering these harms again when trying to reach the EU for a second time.

6.- Then, the EU’s position on the lack of legal safe pathways to claim for asylum and the consequences this have for women in transit has been analysed. First, regarding the *gender mainstreaming* strategy it has been stated that this has failed to permeate into the asylum policies and although some improvements have been made in the reception and integration phases, concerning the transit and the access to Europe no work has been done. Indeed, the very same strategy of securitization is incompatible with a gender approach. FRONTEX action has been criticized for perpetuating gender-based violence at the borders proving how the guidelines and trainings about gender received by the border guards are not applied in practice. The agreements carried out with countries accused of not respecting women’s rights such as Turkey show the little importance gender has in EU’s external action, all this proving how this gender mainstreaming is not for *the other* women.

7.-Second, the New Pact on Migration and Asylum has been analysed to see if new considerations have been made regarding either gender or safe pathways or both, reaching to the conclusion that it fails to provide solutions for these issues. Among other measures, the Pact introduces pre-screening procedures at the external borders of the EU that would allow for a quick assessment of the asylum claim which, if believed to have few chances to succeed would be refused and the asylum seeker returned to the third “safe” country. It has been criticized the negative impact this could have, especially for women and people of the LGBTQ+ community. The concept of “safe” country is relative for these people who would be exposed to risks if returned to this supposedly no risks countries. Furthermore, the rapidity of this process would not allow to address the specific needs of women in transit who, because of the hard journey experienced, could find themselves in a very vulnerable and disoriented position. Moreover, the Pact considers resettlement as the main legal way of entry in the EU for refugees. This



figure although positive and necessary, has its shortcomings since only those with a recognised status could opt for it. In addition, the number of resettlement places do not in the least correspond to the number of international protection claims made in the EU. Finally, it has been criticised the lack of mention by the Pact of the figure of humanitarian visas, figure which debate should be revitalised in the EU since it allows people who want to claim for asylum in Europe to avoid the dangerous journey and to travel safely to the European territory to submit their claim. It would allow to make a previous assessment of the claim with more guarantees, and it would make asylum seekers active subjects of the asylum process, all of this having a positive impact from a gender perspective since women and girls would not need to be exposed to the risk of the journey.

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