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**The protection of refugees and their right  
to seek asylum in the European Union**

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## Abstract

Refugee protection has been of great concern to the international community ever since the creation of the United Nations. By means of the asylum channel, refugees and others in need of protection could gain access to the assistance the States were providing them with. But sometimes, these national asylum systems were inefficient and provided unequal access to the asylum procedures. In order to solve this problem, the European Union, has been struggling to develop a Common European Asylum System, intended to harmonize the asylum systems and procedures of its Member States and to facilitate the examination of asylum claims. To do so, it relied on the pre-existing international legal framework, governed by the provisions of the 1951 Refugee Convention and the principle of non-refoulement. The European law on asylum which thus emerged, was not an independent legal framework, but one closely connected with the international law on refugees.

This paper is structured around the following research question: what are the procedures and minimum conditions for granting asylum in the European Union and how are the refugees protected under EU law? To answer this question, the paper traces the developments of the European asylum law, in with respect to two key principles: the right to asylum and the principle of non-refoulement. After a theoretical examination of these concepts, both at the international and the European level, the research continues its analysis by investigating the role played by the European Court of Justice and the European Court of Human Rights in the application and interpretation of these terms.

After thoroughly analyzing these concepts, the paper concludes that after crossing European borders, and gaining access to the asylum procedures and systems, an asylum seeker can be granted two types of protection: international protection (refugee and subsidiary protection status under the Qualification Directive) and national humanitarian protection, according to the national legislation of each Member State. Moreover, an asylum seeker must also be protected against refoulement and against any treatment contrary to Article 3 ECHR (torture, inhuman or degrading treatment or punishment).

But even with this system in place, other issues still linger. With its harmonization not yet completed and with the emergence of new refugee situations (such as climate refugees) Europe will have to readapt its practices to respond to the new challenges of the 21<sup>st</sup> century.

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## Acronyms and Abbreviations

CFSP	Common Foreign and Security Policy
e.g.	exempli gratia ( <i>for example</i> )
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ESDP	European Security and Defence Policy
etc.	et caetera
EU	European Union
i.e.	id est ( <i>that is</i> )
OAU	Organization of African Unity
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

# Introduction

## Refugees and Asylum at a glance

For centuries, people have been discriminated and forced to flee their homes because of conflict, political, racial and religious persecutions, natural disasters and inhuman treatments that took place in their societies. In exile, they sought either refuge or the protection of other countries.

Human beings have migrated since the earliest societies. The first migrants were tribal people in search of food, water and resources. They were not yet refugees or asylum seekers; they were mere gatherers or hunters who began exploring new lands to settle. The land, provided for much of their basic needs and soon, “*territory became associated with property*”<sup>1</sup>. Conflicts emerged in order to gain or protect one’s territory, just like governments were created to organise and defend this very territory. In those early years, governments instituted laws and policies for security reasons in order to guard their natural resources. Not much has changed since then. The migration regulations that exist today were also introduced to enforce security throughout countries, as well as to fight terrorism or illegal traffic of people, drugs or weapons.

But what happens should governments fail to protect their citizens and if people become displaced for any reason? In such a case, they become refugees, asylum seekers, stateless or internally displaced persons.

The first refugees abandoned their homes due to religious persecution or conflicts that emerged in their societies. But the highest number of refugees ever recorded, was produced during and after the two world wars. This led to the necessity of creating a structure that could help these people. In the 1950s, the United Nations High Commissioner for Refugees was created, replacing the previous refugee agencies that existed under the League of Nations. Its mandate was to provide refugees with international protection, as well as to seek “permanent solutions for the problem of refugees by assisting governments and [...] private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities”<sup>2</sup>.

Today, there are 43.3 million displaced people worldwide, of which 15.2 million are refugees, 27.1 million are internally displaced persons, and 1 million are waiting for their asylum application to be adjudicated, according to UNHCR’s 2009 report on refugees, asylum seekers, returnees, internally displaced and stateless persons<sup>3</sup>. Many of them flee to neighbouring countries to find protection. However, others, attracted by a higher standard of living, prefer western countries as destinations. The number one refugee hosting country in the western world is Germany, followed by the United States, the United Kingdom, France and Canada<sup>4</sup>. Europe hosts a mere 16% of the world’s refugees, most of whom come from Afghanistan, Iraq, Serbia or Turkey<sup>5</sup>. In terms of asylum applications, however, the European Union receives almost 200 000 asylum claims per year, becoming the main destination for asylum seekers in the western world and in second position after South Africa<sup>6</sup>. This means that the European Union is playing a major role in deciding the fate of refugees and asylum seekers from all over the world.

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<sup>1</sup> Daniel Warner, “Migration and Refugees: a challenge for the 21<sup>st</sup> century”, in Jean-Yves Carlier, Dirk Vanheule, *Europe and Refugees: a challenge?*, Kluwer Law International, The Hague, 1997, p. 58.

<sup>2</sup> Chapter 1, par.1 of the *Statute of the Office of the United Nations High Commissioner for Refugees*, available at <<http://www.unhcr.org/3b66c39e1.html>> [accessed on 8 August 2010].

<sup>3</sup> UNHCR, *2009 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, Division of Programme Support and Management, 15 June 2010, p.2, available at <<http://www.unhcr.org/4c11f0be9.html>> [accessed on 8 August 2010].

<sup>4</sup> See Annex 1: *Total population by category, end-2009*.

<sup>5</sup> UNHCR, *2009 Global Trends*, p.6.

<sup>6</sup> *Ibidem*, p.17.

But how is Europe dealing with these migrants? Is it welcoming them or is it restricting their right to seek asylum? Why did migration become a problem for many European States?

Since its beginnings in the early 1950's, the European Union has merely tried to defend itself against any threat that could come from outside its frontiers. One of these threats was illegal migration, phenomenon thought of causing political, economical, social and cultural instability, as well as provoking conflict among European countries. The measures taken to prevent illegal migration, range from controlling outside borders to engaging in civilian and military operations in conflict zones. In terms of controlling the borders, several agencies were created, such as Europol (the European Police Office), Eurojust (the European judicial cooperation body), to deal with immigration, terrorism, human trafficking, organised crime and any other international crime. Additionally, Frontex, the European Agency for the Management of Operational Cooperation at the External Borders, was entitled with border security.

Besides controlling and securing the borders, other measures in the field of foreign and security policy were intended to prevent illegal migration. The idea was that by engaging itself in civilian and military operations in conflict regions around the world, the ESDP (European Security and Defence Policy) would be able to reduce the number of refugees and asylum seekers that were trying to cross the European borders.

All these instruments were intended to control migration and had an indirect effect on refugees and asylum seekers, in terms of restricting their access in the European Union. But even if migration restrictions were introduced, the European Union has also developed a series of political and juridical instruments to protect these very refugees and asylum seekers, showing its strong commitment to the respect of human rights and the international treaties.

For those who succeed in crossing the European border, the procedures to be granted refugee status in one of the EU countries were sometimes troublesome and lasted a relatively long time. This was due to the large number of asylum systems and policies that existed among Member States. Over the last years, however, the European Union has taken important steps towards the harmonization of asylum procedures and has agreed on a set of regulations and principles to diminish the disparities between Member States, in the field of asylum. This has led to the incorporation of the topic of asylum into the European Union legal framework, as well as to the development of a European Refugee and Asylum Law. Moreover, the transposition of the entire asylum *acquis*, has become a prerequisite for countries if they were to become members of the European Union.

The introduction of common regulations and asylum procedures has shown that the European Union has been struggling to find solutions to deal with its refugees and asylum seeker. At the same time, the European Union has been trying to carry out a minimal control at its borders to prevent illegal immigration and international crime.

## **Research question**

This paper focuses on the protection of refugees and their right to seek asylum in the European Union. More specifically, it covers the following research question:

*What are the procedures and the minimum conditions for granting asylum in the European Union and how are the refugees protected under EU law?*

By answering this question, we seek to provide an overview of the key concepts and issues on the development of a European asylum law, which often interferes with different national systems and with international norms. The European Union's law on refugees and asylum seekers has known a constant change and evolution. The main challenge for the European Union in the field of asylum was the creation of a Common European Asylum System that needed to reconcile the different legal systems of the Member States and the international principles of refugee protection, drawn by the 1951 Refugee Convention. Two of these principles will be thoroughly discussed in this paper: *the right to asylum* and *the principle of non-refoulement*. All the European Union's Member States have signed the 1951 Refugee

Convention and they also comply with the EU asylum law. The right to asylum in the European Union revolves around the interpretation of article 63 of the Treaty Establishing the European Community. As for the key principle of international refugee law, non-refoulement, it was first formulated under EU law at paragraph 13 of the Presidency Conclusions of the Tampere European Council in October 1999.

In an attempt to analyze these two principles, this research will be structured around the following ideas and questions:

What is a “refugee”, an “asylum seeker”, a “person eligible for subsidiary protection” and an “economic migrant”?

What is “the right to asylum”? Is there a right to asylum in the European Union? And if yes, is it compatible with national and international norms?

What is “the principle of non-refoulement”? Is this a *jus cogens* norm in the European Union?

For a further understanding of the development of the right to asylum and the principle of non-refoulement in the European Union, the jurisprudence of the European Court of Justice and the European Court of Human Rights will be examined, in the form of the following case study: *the role of the European Court of Justice and the European Court of Human Rights in the development and application of the right to asylum and the principle of non-refoulement among Member States*.

## **Choice of subject**

Immigration and asylum have been a hot topic on the European agenda ever since the end of the Second World War and mainly after the fall of communism. Faced with more and more people seeking refuge in democratized countries, western governments had to reach an agreement on lodging and protecting those migrants. In an attempt to create an area of freedom, security and justice, the European Union has started addressing the problem of refugees and asylum seekers who were constantly crossing the European borders. On one hand, it has tried to control the flow of people seeking international protection in the EU, but, on the other hand, it has also strived to protect their rights such as the right to asylum and the principle of non-refoulement. Moreover, the EU is set on implementing a Common European and Asylum System, intended to harmonise the different asylum policies and legal systems of Member States. The continuous change and evolution in this area, starting with the development of European norms on asylum and continuing with the different case laws judged by the European Court of Justice and the European Court of Human Rights, have made it a good topic for research. This subject has, without doubt, been discussed before and many interdisciplinary approaches have been covered. But, the recent development in the ECJ and ECtHR jurisprudence, which will be analyzed as a case study in this paper, has still remained an unexplored area. This is due to the increased number of case laws brought before the European Court of Justice and the European Court of Human Rights recently.

What is more, in the following years, we could witness a rapid emergence of new types of refugees, such as climate refugees, who could seek more environmentally stable areas such as Europe. The question whether the European Union will behave like a fortress or like a host for these new migrants will still remain open to further discussions.



## Methodology

This paper presents a legal approach to the protection of refugees and asylum seekers in the European Union. The legal argument will be built around a comparative method, pointing towards the disparities and similarities between the International Refugee Law (including the United Nations and the Council of Europe legal framework) and the European Asylum Law. The final goal is to see how the European Asylum Law has been shaped and defined as a compromise between the conflicting views of Member States, but also in reference to international norms. The literature used to support this method consist of doctrine, jurisprudence and other legal documents, such as the applicable Conventions, Treaties, Directives, Regulations, Conclusions etc.

Even if the legal aspect will prevail, it is also necessary to briefly analyze other aspects of the problem, so as to bring out the essential elements that support the research.

The history of refugees, for example, could be helpful in determining the reasons why people have chosen Europe as a destination and how Europe dealt with different flows of people in the past, compared to the present. This approach is usually used to introduce the subject and present its historical development.

The historical approach could be then linked with the geographical approach, raising questions like: “Where do refugees come from?” and “Where do they finally settle?” Maps and statistics could be used to compare and read into the practises of different countries regarding the protection of migrants.

From a sociological and cultural point of view, it would be interesting to see why refugees choose Europe as a destination, and how it responds to the cultural mix-up. For many refugees and asylum seekers, Europe is an example of economical development, democracy and respect for human rights. But, from the European point a view, migrants can be an economical and cultural burden. The asylum country has to provide refugees and asylum seekers with social assistance, housing and even employment. Moreover, it has to face cultural challenges like the integration or assimilation of migrants, sometimes reluctant to adapt to the new culture. To analyse the sociological and cultural approach, we can look over the actions of various agencies and organization in this field, as well as over the initiatives taken by the media<sup>7</sup>.

As for the political aspect of the problem, which has already been briefly discussed in the introduction, we have noted that the European Union has developed two types of policies intended to control the refugee flows, and at the same time, to protect those who have already crossed the European border. To control the refugee flows, the EU has relied on its foreign and security policy and has participated in a number of civil and military operations around the world. To protect the refugees, the European Union relies on international instruments like the 1951 Refugee Convention and its Protocol, which offer a definition to the notion of “refugee”, as well as on international principles for the protection of refugees, like the principle of non-refoulement. It should be noted that the harmonization of different asylum systems was not intended to protect the refugees, at first, but to find common grounds of addressing and dealing with the flows of people crossing the European borders.

The political approach must be linked with the economical approach. Facing the financial crisis, some European countries could easily change their view on asylum. On one hand, the financial crisis could determine Member States to strengthen restrictions on immigration policies, due to their economic inability to sustain both migrants and an increased number of unemployed nationals. On the other hand, the financial crisis could facilitate immigration by providing States with cheap skilled workforce. In this way, disadvantaged groups such as refugees and asylum seekers would cease to be a burden for countries, but an important economic resource. Which option the countries will chose remains to be seen.

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<sup>7</sup> Fernard Melgar, the director of a documentary movie, *La Forteresse*, observes the life of asylum seekers and economic migrants in the processing centre of Vallorbe, Switzerland. The movie offers an overview on how asylum seekers are dealt with in Switzerland, and how they wait in processing centres like Vallorbe for the authorities to decide their fate.

This paper will thus emphasize on the importance of the right to asylum and non-refoulement in the European Law and on the jurisprudence of the European Court of Justice and the European Court of Human Rights on this topic. However, throughout this paper, some references to other aspects of the problem will be made, in order to provide a better understanding of the subject being discussed.

In terms of composition, the paper will be structured in four main parts. The first chapter contains the definitions of the main concepts used throughout the research, such as *refugee*, *asylum seeker*, *person eligible for subsidiary protection* and *economic migrant*. The aim of this chapter is to see how these concepts have evolved and how they relate to one another.

The second chapter examines the right to asylum, as defined by international norms and by the European Union. The right to asylum will be then linked with the European mechanisms for the protection of refugees and asylum seekers and the minimum conditions for receiving refugee status in one of the EU Member States.

The third chapter defines the principle of non-refoulement and seeks to identify its application in EU law.

In the fourth chapter, the theory will be put into practice by studying the jurisprudence of the European Court of Justice and the European Court of Human Rights on the right to asylum and the principle of non-refoulement.

# Chapter I

## Main concepts – pertinent definitions

“An aggravating feature of the changing reality has been the growing movement of refugees from their regions of origins to Europe and North America, as part, sometimes even a minority, of a larger movement of migrants escaping poverty. I would like to emphasize that refugees and migrants are distinct categories, requiring different responses. In the case of migrants there is an element of choice and planning in their movement. A refugee on the other hand is forced to flee from political conflict to save his life and freedom, and therein lies his need for protection, even if he does not fear persecution in terms of the 1951 Convention on Refugees.”

(Sadako Ogata, United Nations High Commissioner for Refugees from 1991 to 2001)<sup>8</sup>

What is a refugee? What is an asylum seeker? What is a person eligible for subsidiary protection? How about an economic migrant? Are these four concepts linked somehow?

Over the years, the number of people seeking refuge or asylum outside their country of residence or nationality has highly increased. More and more governments found themselves in the situation of having to determine the status, even the fate of these migrants. What were they? Refugees, Asylum Seekers, Persons Eligible for Subsidiary Protection or Migrants? Whether or not a certain status was granted, there had to be a universally accepted definition of these concepts to help countries determine what kind of protection to provide.

This chapter offers a clarification of these four concepts before proceeding to a further examination of the right to asylum and non-refoulement at the international and European level.

Emphasis is placed on the definition of a refugee, because it serves as basis for the other three definitions, of asylum seeker, person eligible for subsidiary protection and economic migrant. The divergent debates and questions raised over the interpretation of Article 1 A (2) of the 1951 Refugee Convention have been associated with the difficult conditions of receiving refugee status in a foreign country. The terminology of the refugee definition makes it difficult for many applicants to prove that they are indeed refugees. Some, are categorized as refugees, asylum seekers or economic migrants, while others, unable to meet the Convention’s criteria may become “persons eligible for subsidiary protection” or receive protection on humanitarian grounds. The problem with the 1951 Refugee Convention is that it lacks specific mention of asylum seekers, persons eligible for subsidiary protection and economic migrants. Therefore, other sources must be used in defining these categories of people.

Only after seeing what these concepts mean and in which way they are related, we might be able to appreciate the conditions which need to be satisfied in order to enjoy asylum in a host country. This is important in constructing the ideas that govern the protection of refugees and asylum seekers outside their country of residence or nationality.

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<sup>8</sup> Sadako Ogata, “Refugees in the 1990s: Changing Reality, Changing Response”, lecture at Georgetown University on 25 June 1991, in Eduardo Arboleda, Ian Hoy, “The Convention Refugee Definition in the West: Disharmony of Interpretation and Application”, in Selina Goulbourne, *Law and Migration*, Edward Elgar Publishing, Cheltenham, 1998, p. 77.

## 1.1 Refugee

### 1.1.1 In search of a definition from antiquity to present times

In an attempt to analyze the complex definition of a *refugee*, we have to go back to its origins and see how it has evolved from a person seeking sanctuary in the past, into what is known today as a person fleeing home due to a well-founded fear of persecution, resulting into his inability or unwillingness to return.

Etymologically speaking, the word *refugee* is linked to the Latin word *refugium*, meaning *refuge* or to flee back, from *re-* “back” and *fugere* “to flee”<sup>9</sup>. As for the word *asylum*, this was originally derived from the Greek word *a*, meaning “not”, and *sulon*, “right of pillage”. By putting these two words together, the Greek referred to a place where pillage was forbidden<sup>10</sup>.

In antiquity, this was understood as protecting, un-harming or helping those who sought refuge to escape from danger. For early societies, the idea of protecting refugees and offering them sanctuary was seen as an essential condition of well-being, like Philip Marfleet remarks: “the obligation to protect certain displaced people, fugitives and those abandoned by communities of origin has often been seen as a social priority and has been closely associated with the well-being of the wider society”<sup>11</sup>. Sanctuary or refuge evolved into becoming a place of protection and those fugitives who claimed sanctuary enjoyed immunity from punishment, violence or persecution. Consequently, medieval churches were converted into *sanctuaries*, “shrines”, or sacred places<sup>12</sup>, for those in need.

The *right of sanctuary* was first codified by king Ethelbert of Kent who “drew up the earliest known Anglo-Saxon code of laws, and in the first of these laws he provided that the violation of the church (gryth) was to be punished by a penalty twice of that exacted for an ordinary breach of peace (fryth)”<sup>13</sup>. In other words, these laws acknowledged the right of sanctuary as being inviolable and under royal protection. This first reference to the right of sanctuary would evolve into what is known today as the right to asylum.

From churches, the protection of refugees would be transferred to entire regions or even countries. This also meant that the religious asylum would become a state asylum. As Prakash Sinha in *Asylum and International Law* carefully observes: “the basis of asylum was found in the sovereignty of the city or state, instead of the religious sanctity of the places of refuge”<sup>14</sup>. In her view, sovereign States offered refuge to people who by any reason, were persecuted by their own State. Therefore, the *territorial asylum* could be traced back to the 1648 Treaty of Westphalia which recognized the sovereignty<sup>15</sup> of States within their territories.

In the modern history of Europe, two types of refugees can be distinguished: religious (e.g. Protestant refugees) and political refugees (e.g. French Revolution refugees), who fled their homes due to religious and political persecution, and war refugees, who sought refuge to escape wars, more exactly the two

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<sup>9</sup> Walter W. Skeat, *The concise dictionary of English etymology*, Wordsworth Editions, Ware, Hertfordshire, 1993, p.164.

<sup>10</sup> Ebenezer Cobham Brewer, *The Wordsworth Dictionary of Phrase and Fable*, Wordsworth Editions, Ware, Hertfordshire, 2001, p.70.

<sup>11</sup> Philip Marfleet, “Refugees and History: why we must address the past”, in *Refugee Survey Quarterly*, vol.26, issue 3, 2007, p.138.

<sup>12</sup> Skeat, *The concise dictionary of English etymology*, p.411.

<sup>13</sup> Prakash Sinha, *Asylum and international law*, Martinus Nijhoff Publishers, The Hague, 1971, p.14.

<sup>14</sup> *Ibidem*, p.15.

<sup>15</sup> The concept of sovereignty was laid down by the Treaty of Westphalia, which put an end to the European Thirty Years War of religion, and created a new European order in which all States were governed by a sovereign, who was assigned with independent powers within the territory of its country (See Stephen D. Krasner, *Sovereignty: Organized Hypocrisy*, Princeton 1999, pp.43-72 discussing the different forms of sovereignty, including Westphalian sovereignty, See Paul D’Anieri, *International Politics: Power and Purpose in Global Affairs*, Cengage Learning, 2009, p.28, presenting the Westphalian system).

world wars. What is more, Europe has evolved from a refugee producing continent into a place of asylum for refugees coming from conflicting areas.

This change, urged the need to lay down a coherent definition for *refugees*, in order to provide these people with the necessary protection. After replacing the League of Nations and being handed over its responsibilities, the United Nations began developing a set of juridical documents in various fields of international law, including the protection of refugees. The protection of refugees under international law, culminated with the 1951 Refugee Convention relating to the status of refugees, which also outlines the definition of a refugee in its Article 1A, paragraph 2. According to the 1951 Refugee Convention a refugee is any person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”<sup>16</sup>.

This definition is applicable to those having a nationality, as well as to those without a nationality. Being shaped in the aftermath of the Second World War, “*as a result of events occurring before 1 January 1951*”<sup>17</sup>, the Convention was first intended to protect the European refugees fleeing the atrocities of the war. But due to the rapid emergence of new refugee situations, many people could not satisfy the required criteria to receive protection under the Convention. Therefore, its application would be expanded to all the refugees around the world, by the 1967 Protocol relating to the status of refugees that “shall be applied by the States Parties hereto without any geographic limitation”<sup>18</sup>.

Considering the annotations made by the 1967 Protocol to the Article 1A (2) of the 1951 Refugee Convention, the definition of the term *refugee*, outlined in this article, has to be fully discussed. The interpretation of Article 1A (2) will contain the analysis of its key elements contained in the definition, such as well-founded fear, persecution, outside the country of nationality or habitual residence, unable or unwilling to avail of state protection, not having a nationality and being outside the country of his former habitual residence is unable or unwilling to return.

#### *1.1.2 Interpretation of Article 1A (2) of the 1951 Refugee Convention, defining the term refugee*

##### Theoretical interpretation of terms

To give a better insight into the key elements outlined in Article 1A (2) we will proceed to an ad litteram interpretation of the aforementioned article. As a whole, the purpose of this definition is to set out guidelines for determining refugee status. What should be clarified from the beginning is that whenever an asylum application is introduced, it should be examined on an individual basis, meaning that the asylum States should analyse the background situation of each applicant in the view of the current definition.

The definition of the term “refugee” set out in the 1951 Refugee Convention can be broken down, as follows:

- a) a person outside his country of origin or residence
- b) for what reason may a person find himself outside his country of origin or residence: due to a well-founded fear of persecution
- c) what types of persecution: for reasons of race, religion, nationality, membership of a particular social group or political opinion
- d) thus, owing to such fear he is unable or unwilling to return

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<sup>16</sup> Article 1 A (2) of the *Convention relating to the Status of Refugees*, United Nations, Treaty Series, vol.189, p.152.

<sup>17</sup> *Ibidem*, p.152.

<sup>18</sup> Article 1 (3) of the *Protocol relating to the Status of Refugees*, United Nations, Treaty Series, vol.606, p.270.

a) A person outside his country of origin or residence

In order to be entitled to refugee status, a person must be *outside the country of nationality or habitual residence*. If a person suffers a well-founded fear of persecution for any of the reasons enumerated in the Convention, but is still in his country of residence, then he is not a refugee, but an internally displaced person. Even if an internally displaced person cannot be protected by the same legal instruments as a refugee, he still falls under humanitarian protection and becomes a person of concern for UNHCR, because just like a refugee, he suffers a similar violation of his human rights.

A person may become a refugee, outside the country of nationality or habitual residence in two situations: either he abandoned his home because he himself suffered a well-founded fear of persecution, or he was already outside his country, as a student, traveller etc. when an event happened that made him fear persecution, torture or inhumane treatment, if he were to return to his home country<sup>19</sup>. In the second situation, that person is qualified as a *refugee sur place*.

It should be noted, from the beginning, that “*country of origin*”, means according to the definition, “*country of nationality*”, while “*country of residence*” means “*country of former habitual residence*”, referring to people without a nationality.

The last part of the definition, *or* “who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it”, refers to aliens or stateless persons or to people with no nationality, meaning that the persecution takes place in the country of his *habitual residence* instead of the *country of his nationality*.

In the second paragraph of the same Article 1A (2), the Convention clarifies the situation in which a person can have multiple nationalities, stating that in this case, he can become a refugee only after proving that he cannot avail himself of the protection of one of the countries of nationality. If he can be protected by one of the countries where he has a nationality, this means he cannot be granted refugee status, because he can flee from one country of nationality where he is persecuted to the other. In order to receive refugee status, he has to satisfy the conditions laid down by the definition in all the countries of nationality<sup>20</sup>.

b) For what reason may a person find himself outside his country of origin or residence: “due to a well-founded fear of persecution”

The first thing an applicant should do in order to receive refugee status is to prove he has a good reason for fleeing his home. This reason is stated in the definition in the form of a “*well-founded fear of being persecuted*”. However, this expression is far from being clear, hence it must be broken down for a detailed examination of its constituent elements.

Thus, the *well-founded fear* is made up of two parts *well-founded* and *fear*, one objective and one subjective, as outlined by the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status. In order for a person to seek refugee status, it must subjectively perceive the threat of persecution to be real (thus inducing “fear”). However, due to the fact that different people perceive fear in different ways, the threat of persecution must also be real from an objective point of view (“well-founded”)<sup>21</sup>.

Even if *persecution* has not yet been defined in legal terms, it might be understood as the act of abusing, ill-treating or harassing a person especially because of race, religion, nationality, political views etc.

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<sup>19</sup> UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, p.9, available at <<http://www.unhcr.org/refworld/pdfid/3b20a3914.pdf>> [accessed on 14 August 2010].

<sup>20</sup> Article 1 A (2) of the *Convention relating to the Status of Refugees*, United Nations, p.152.

<sup>21</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, p.9, available at <<http://www1.umn.edu/humanrts/instree/refugeehandbook.pdf>> [accessed on 14 August 2010].

The reason why the drafters of the 1951 Convention did not define this term may be found in the ongoing development and emergence of new types of persecution and to avoid excluding any, they “intended that all future types of persecution should be encompassed by the term”<sup>22</sup>. Nevertheless, the interpretation of *persecution* may be extended to Article 33 of the 1951 Refugee Convention<sup>23</sup>. This article emphasizes on the principle of non-refoulement. But the prohibition of refoulement might be attributable to a *threat to life or freedom or to danger to the security*, which could, to some extent, be qualified as a form of persecution. All these, together with human rights violations might constitute persecution<sup>24</sup>. If human rights abuses, threat to life, freedom or security are considered types of persecution, what about discrimination or punishment? Can they be also qualified as persecution?

Discrimination is not necessarily a form of persecution, but in some circumstances, like imposing restrictions that could infringe human rights such as the right to work, freedom of religion or access to education, it might be considered persecution. As for punishment, this cannot be recognized as a form of persecution, because persecution implies victims of any kind, while punishment refers to fugitives from justice, who are not victims<sup>25</sup>.

The interpretation of discrimination as a form of persecution might be seen as an extension of the refugee definition.

- c) What types of persecution: for reasons of race, religion, nationality, membership of a particular social group or political opinion

A person may experience a well-founded fear of being persecuted for various reasons, of which the Convention enumerates: *race, religion, nationality, membership of a particular group or political opinion*, also known as the Convention grounds. If a person does not fear persecution for one of these reasons, he might not fall under the refugee definition and might not receive refugee status.

- d) Thus, owing to such fear he is unable or unwilling to return

In any of these cases, this person has become *unable or unwilling to avail himself of state protection* and does not want to return. The terms *unable* and *unwilling* have to be discussed separately. A person can be *unable* to avail himself of state protection, because his country of residence is not able to provide him with the protection he needs to return and puts him under serious threat. This “*implies circumstances that are beyond the will of the person concerned*”<sup>26</sup>, like a war, conflict or revolution. As for *unwilling*, this has been clarified by the Convention itself, linking it with *owing to such fear*, more precisely to the well-founded fear of persecution that makes a person “refuse to accept the protection of the Government of the country of their nationality”<sup>27</sup>.

Use in practice

Besides the analysis of article 1A (2) made by UNHCR in the 1979 Handbook on procedures and criteria for determining refugee status, the aforementioned article was also reviewed by the jurisprudence. The reference to the *well-founded fear of persecution* can be found in various judgements like *Immigration and Naturalization Service v. Cardoza-Fonseca* (1978, US Supreme Court) or *R v. Secretary of State for the Home*

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<sup>22</sup> UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, p.5.

<sup>23</sup> Article 33 of the *Convention relating to the Status of Refugee*, p.176.

<sup>24</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugee*, p.10.

<sup>25</sup> *Ibidem*, p.11.

<sup>26</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugee*, p.16.

<sup>27</sup> *Ibidem*, p.16.

*Department, Ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening)* (1988, UK House of Lords)<sup>28</sup>.

In *Cardoza-Fonseca* case, the American Immigration and Naturalization Service refused to grant asylum to a Nicaraguan woman, for the reason that she could not demonstrate a *clear probability of persecution* if she were to be deported to her home country. Even if she resided illegally in the United States, the respondent tried to apply for asylum and withhold deportation owing to a *well-founded fear of persecution* related to the political activities of her brother in Nicaragua. Judging the situation, the US Supreme Court arrived to the conclusion that “the well-founded fear standard which governs asylum proceeding is different, and in fact more generous, than the clear probability standard which governs withholding of deportation proceedings”<sup>29</sup>. According to the US Supreme Court there should be made a clear distinction between *the well-founded fear of persecution*, the ground for granting asylum and *the clear probability of persecution*, the ground for withholding deportation. In this case, the Nicaraguan woman applied for both asylum and withholding deportation on the same basis, *a well-founded fear of persecution*, without taking into account the fact that the two claims were different and demanded different motivations.

In the *R v. Secretary of State for the Home Department* case, the House of Lords established how the expression well-founded fear of persecution had to be interpreted: “there had to be demonstrated a reasonable degree of likelihood that he would be so persecuted, and in deciding whether the applicant had made out his claim that his fear of persecution was well founded the Secretary of State could take into account facts and circumstances known to him or established to his satisfaction but possibly unknown to the applicant in order to determine whether the applicant’s fear was objectively justified”<sup>30</sup>. This meant that there had to be a real risk of persecution in the home country that could determine a person to fear returning there and apply for asylum. What is more, when examining an asylum application, the asylum State has to verify if the applicant’s fear was objectively justified.

A relevant case law on the acts of persecution is *Korablina v. Immigration and Naturalization Service* (1998, US Court of Appeals of the 9<sup>th</sup> Circuit), which describes the situation of a Jewish Ukrainian woman who suffered continuous acts of religious discrimination in her country of nationality. What is to be judged here is whether the discrimination she endured can amount to persecution. The Court arrives to the conclusion that “persecution may be found by cumulative, specific instances of violence and harassment toward an individual and her family members not only by the government, but also by a group the government declines to control”<sup>31</sup>. In this case, the Court recognizes that Korablina does have a well-founded fear of future persecution due to the continuous discrimination she suffered in the past.

Another pertinent case on the liaison between discrimination and persecution is *A and Another v. Minister for Immigration and Ethnic Affairs and Another* (1997, Australia High Court), unfolding the case of a Chinese couple with one child, who applied for asylum in Australia on the grounds of being members of a social group and could suffer persecution and forced sterilisation if they were to be returned to the People’s Republic of China. When discussing the meaning of “membership of a particular social group”, the case deals with the interpretation of the refugee definition, taken as a whole: “when the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be the victims of international discrimination of a particular kind. The discrimination must constitute a form of persecution, and it must be discrimination that occurs because the person concerned

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<sup>28</sup> UNHCR, *Compilation of Case Law on Refugee Protection in International Law*, available at < <http://www.unhcr.org/refworld/pdfid/47dfc8e32.pdf> > [accessed on 15 August 2010].

<sup>29</sup> United States Supreme Court, *Immigration and Naturalization Service v. Cardoza-Fonseca*, available at < <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b68d10> > [accessed on 15 August 2010].

<sup>30</sup> United Kingdom House of Lords, *R v. Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening)*, available at < <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b67f40> > [accessed on 15 August 2010].

<sup>31</sup> United States Court of Appeals for the Ninth Circuit, *Korablina v. Immigration and Naturalization Service*, available at < <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47baf7292> > [accessed on 16 August 2010].



has a particular race, religion, nationality, political opinion or membership of a particular social group”<sup>32</sup>. This extension of the Refugee Convention associates discrimination with persecution, in the sense that both rely on common grounds such as race, religion, nationality, political opinion or membership of a particular social group.

The reference to the state protection is made in a 1993 case law judged by the Supreme Court of Canada, *Canada (Attorney General) v. Ward*. What is revealed in this case is that if a state fails to protect its citizens, they might suffer a well-founded fear of persecution and seek the protection of other countries: “if the claimant’s fear has been established, is entitled to presume that persecution will be likely and that the fear is well-founded if there is an absence of state protection”<sup>33</sup>.

As we have seen until now, the refugee definition has been in continuous change and development, caused by the emergence of new refugee situations. Besides the 1951 Refugee Convention, the jurisprudence, together with national evaluations, has played an important role in interpreting the definition of refugee in various refugee plights.

### 1.1.3 Regional definitions based on the 1951 Refugee Convention

Following the well-known definition of a refugee, found in the 1951 Refugee Convention, different countries have chosen to formulate their own definitions in accordance with their needs in terms of refugee protection. Some countries, like the United States adapted their previous definitions to that of the United Nations, while others, which did not sign the 1951 Refugee Convention<sup>34</sup>, had to develop their own legal instruments for refugee protection.

For example, the United States, in the 1980 *Refugee Act* accommodated the definition of “refugee” to the Convention, emphasizing on the fact that a person, who participated in the persecution of another person, cannot be entitled to refugee status<sup>35</sup>. In the Refugee Convention, this could have been written at paragraph c of Article 1 (F), in the following form: “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that [...] he has been guilty of acts contrary to the purposes and principles of the United Nations”<sup>36</sup>, including the persecution of another person among these acts.

In the *Immigration and Refugee Protection Act*, Canada resumes the Convention definition of a refugee and then extends it to persons in need of protection, who could be subject: “to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture, or to a risk to their life or to a risk of cruel and unusual treatment or punishment”<sup>37</sup> if they were to be returned to their country of nationality or former residence. The notion of “persons in need of protection” is referred to as “persons eligible for subsidiary protection” under European law. According to this act, Canada becomes a safe heaven, not only for refugees, but also for persons being subjected to torture or inhumane treatment, internationally protected by the United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

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<sup>32</sup> Australia High Court, *A and Another v. Minister for Immigration and Ethnic Affairs and Another*, 24 February 1997, available at: <<http://www.unhcr.org/refworld/docid/3ae6b7180.html>> [accessed on 17 October 2010]

<sup>33</sup> Canada Supreme Court, *Canada (Attorney General) v. Ward*, available at < <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b673c> > [accessed on 18 August 2010].

<sup>34</sup> There are 147 states parties to one or both the 1951 Convention relating to the Status of Refugees and the 1967 Protocol. The signatory states have to comply with the dispositions of these documents, while non-signatory states should act in accordance with other humanitarian instruments.

<sup>35</sup> Maurice A. Roberts, “The US and Refugees: the Refugee Act of 1980”, in *A Journal of Opinion*, vol.12, no.1/2, African Refugees and Human Rights, Spring-Summer, 1982, pp.4-6, available at <<http://www.rcusa.org/uploads/pdfs/The%20US%20and%20Refugees%20by%20Maurice%20Roberts,%20A%20Journal%20of%20Opinion%20Spring%201982.pdf>> [accessed on 19 August 2010].

<sup>36</sup> Article 1 F (c) of the *Convention relating to the Status of Refugees*.

<sup>37</sup> Article 97 (1), a,b of the *Immigration and Refugee Protection Act (2001, c.27)*, available at < [http://laws.justice.gc.ca/eng/I-2.5/page-4.html#anchorbo-ga:l\\_2](http://laws.justice.gc.ca/eng/I-2.5/page-4.html#anchorbo-ga:l_2) > [accessed on 19 August 2010].

At the European level, the Council of the European Union adopted, in 1996, a joint position on the basis of Article K.3 of the Treaty of Maastricht/Treaty on European Union on the harmonised application of the definition of the term “refugee” under the 1951 Refugee Convention. The aim of this document was to ensure that Member States process an asylum application in compliance with Article 1A (2) of the 1951 Refugee Convention and with its interpretation found in UNHCR’s documents<sup>38</sup>.

All 27 EU Member States are also parties to both the 1951 Refugee Convention and the 1967 Protocol. Article 78 of the *Consolidated Versions of the Treaty on the Functioning of the European Union*, emphasizes on the creation of a common European policy on asylum in accordance with these two documents: “the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”<sup>39</sup>. This means that when examining a refugee application, the Member States act in accordance with the Convention definition. What the European Union adds to the 1951 Refugee Convention is the notion of subsidiary and temporary protection, another way of offering protection to those who do not qualify as refugees on the basis of the refugee definition set out in the Geneva Convention.

In other regions of the world, such as Africa or Latin America, other key documents govern the refugee definition, like the *Convention Governing the Specific Aspects of Refugee Problems in Africa* or the *Cartagena Declaration on Refugees* in Latin America. Article 1 of the African Convention defines the term refugee, following the 1951 Refugee Convention provisions, but also adds, that “the term «refugee» shall apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”<sup>40</sup>. This refers to refugees from violence who may suffer from conflict, occupation, external aggression or other acts and leave their countries due to such sufferings. What is more, the African Union Convention does not apply to claimants who have committed crimes against humanity<sup>41</sup>. This disposition is similar to Article 1 (F), paragraph a of the 1951 Refugee Convention, stating that: “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes”<sup>42</sup>.

The Cartagena Declaration on Refugees reiterates the UN refugee definition, but also considers it necessary to enlarge the concept of a refugee to “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”<sup>43</sup>. It also extends the term persecution to life threats, generalized violence, foreign aggression, internal conflicts, public order disturbances or massive violation of human rights.

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<sup>38</sup> *Harmonised application of the definition of the term “refugee” under the Geneva Convention*, available at < [http://europa.eu/legislation\\_summaries/other/l33060\\_en.htm](http://europa.eu/legislation_summaries/other/l33060_en.htm) > [accessed 29 August 2010].

<sup>39</sup> Article 78 (1) of the *Consolidated version of the Treaty on the Functioning of the European Union*, O.J. C83, vol. 53, 30 March 2010, pp.47-199.

<sup>40</sup> Article 1 (2) of the *Convention Governing the Specific Aspects of Refugee Problems in Africa*, available at < [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Refugee\\_Convention.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf) > [accessed on 19 August 2010].

<sup>41</sup> Not only the African Convention, but also the 1951 Refugee Convention excludes applicants who are taking part in military operations. This means, that a soldier who is still exercising his activity, cannot apply for refugee status. However, if he becomes a civilian or ends his military activity, he might fall under the 1951 Refugee Convention provisions and become a refugee.

<sup>42</sup> Article 1 F (a) of the *Convention relating to the Status of Refugees*.

<sup>43</sup> Part 3, paragraph 3 of the *Cartagena Declaration on Refugees*, available at < <http://www.unhcr.org/basics/BASICS/45dc19084.pdf> > [accessed on 19 August 2010].

All these extensions of the 1951 Refugee Convention definition were due to the emergence of refugee situations that needed special attention in different parts of the world. Therefore, the enlargement of the concept of refugee in the future, so as to comprise new refugee situations and new types of refugees, like climate refugees for example, would be likely.

## 1.2 Asylum Seeker

Individuals, who seek international protection (refugee status or subsidiary protection status) are called *asylum seekers*. For many countries, the distinction between a refugee and an asylum seeker is still ambiguous. This is due to the lack of a clear definition of an asylum seeker in the 1951 Refugee Convention. For that reason, each country may set out the guidelines for granting asylum to those in need of protection. However, an internationally accepted definition of an asylum seeker may be found in various UNHCR documents, as asylum seekers are recognized as persons of concern for UNHCR. According to UNHCR, “asylum seekers are individuals who have sought international protection and whose claims for refugee status have not yet been determined”<sup>44</sup>. Thus, a refugee is initially an asylum seeker, as he originally applies for asylum in the host country, but an asylum seeker is not necessarily a refugee at the beginning, but can become one if he falls under the provisions of the 1951 Refugee Convention definition. However, certain provisions of the 1951 Refugee Convention may also apply to asylum seekers, like the principle of non-refoulement.

Just like UNHCR’s definition on asylum seekers, the European Union has developed a similar view. In the *2003/9/EC Directive laying down minimum standards for the reception of asylum seekers*, the Council of the European Union defines an “applicant” or an “asylum seeker” as “a third country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken”<sup>45</sup>. This definition has been unanimously accepted in the European Union and has been reproduced in all the European directives on the topic of asylum.

In addition to these legal definitions, many authors identify the distinctions between the notions of refugees, asylum seekers and economic migrant. Liza Schuster in the *Use and abuse of political asylum in Britain and Germany*, considers that asylum seekers are the largest group that comprises refugees, a much smaller sub-group, and the economic migrants, a much larger sub-group than that of refugees<sup>46</sup>.

In conclusion, an asylum seeker has been generally defined as a person who seeks asylum or shelter in other country than his country of origin, for a series of reasons like persecution, aggressions, conflicts, human rights abuses, threats to life etc, and who is waiting for his application to be examined. After applying for asylum, this asylum seeker may become a refugee or an economic migrant in the host country. However, sometimes, an asylum seeker may not meet the Refugee Convention criteria and may not be entitled to refugee status, but may suffer persecution if he were to be returned to his country of origin. In this case, he may be granted “de facto” legal status to be able to enjoy the protection of the asylum country<sup>47</sup>. This type of status was defined, under European law, in the form of “subsidiary protection”.

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<sup>44</sup> UNHCR, *2009 Global Trends*, p.23.

<sup>45</sup> Article 2 (c) of the *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, O.J. L31, 6 February 2003, pp.18-25 (hereinafter *Council Directive 2003/9/EC*).

<sup>46</sup> Liza Schuster, *The use and abuse of political asylum in Britain and Germany*, Frank Cass Publishers, London, 2003, p.3.

<sup>47</sup> Eduardo Arboleda, Ian Hoy, “The Convention Refugee Definition in the West: Disharmony of Interpretation and Application”, in Selina Goulbourne, *Law and Migration*, Edward Elgar Publishing, Cheltenham, 1998, p. 72.

### 1.3 Person eligible for subsidiary protection

After having his application examined, an asylum seeker may be entitled to refugee or subsidiary protection status. A great number of asylum seekers, who do not qualify as refugees, fall under the second category and become “persons eligible for subsidiary protection”. In international law, this type of obligation to protect people who do not satisfy the 1951 Refugee Convention definition, is known under the name of *complementary protection*. However, there is no universally accepted definition of this concept.

For the Council of Europe, complementary protection is identified as *de facto refugee status*. In its non-legally binding Recommendation 773 (1976), the Council of Europe defines the term “de facto refugees” as “persons not recognized as refugees within the meaning of Article 1 of the Convention relating to the Status of Refugees of 28 July 1951 as amended by the Protocol of 31 January 1967 and who are unable or unwilling for political, racial, religious or other valid reasons to return to their countries of origin”<sup>48</sup>.

In Canada, in the Immigration and Refugee Protection Act, a person in need of complementary protection is known as *a person in need of protection*, who cannot be returned to his country of nationality or habitual residence if there is a risk of torture, cruel and unusual treatment or punishment<sup>49</sup>.

Other regional instruments, such as the African Union Convention or the Cartagena Declaration on Refugees deem the principle of non-refoulement as humanitarian basis for granting complementary protection to those who cannot be returned to their country of origin or former residence.

The European Union codifies complementary protection in the form of *subsidiary protection*. Thus, a person eligible for subsidiary protection was defined in the *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* as follows: “a third country national or stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 and to whom Article 17 (1) and (2) do not apply, and is unable, or owing to such risk, unwilling to avail himself or herself of the protection of that country”<sup>50</sup>. According to Article 15, serious harm refers to: death penalty, execution, torture, inhuman or degrading treatment, punishment, threat to life or violence in the event of an armed conflict<sup>51</sup>. This means that in the European Union, the notion of *subsidiary protection* is very generous and applies to many categories of people, not only to those who may be subjected to torture. In the above mentioned definition, the reference to Article 17 was made in order to exclude from the subsidiary protection status those persons who have committed or participated in crimes against peace or humanity, war crimes, have undertaken activities contrary to the principles of the United Nation, constituted a danger to the community or the security of Member States of the European Union or have committed any other crimes in the Member State responsible for analysing their asylum application<sup>52</sup>.

In brief, subsidiary protection, complementary protection or de facto status have been developed by countries to offer an alternative protection to various categories of people who were excluded from the Refugee Convention definition, but who if returned, removed or expelled from the host country, could

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<sup>48</sup> Parliamentary Assembly of the Council of Europe, *Recommendation 773 (1976) on the situation of de facto refugees*, 26 January 1976,

<<http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta76/EREC773.htm>>, [accessed on 19 October 2010].

<sup>49</sup> See Article 97 of the *Immigration and Refugee Protection Act (2001, c.27)*.

<sup>50</sup> Article 2 (e) of the *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, O.J. L304, 30 September 2004, pp. 12-23 (hereinafter *Council Directive 2004/83/EC*).

<sup>51</sup> See Article 15 of the *Council Directive 2004/83/EC*.

<sup>52</sup> See Article 17 of the *Council Directive 2004/83/EC*,

suffer serious harm. Why couldn't they be removed? Hopefully for humanitarian reasons, with respect to the principles formulated in the Universal Declaration of Human Rights and other Human Rights instruments.

## 1.4 Economic migrant

The movement of people or migration have always been a distinguished trait of mankind. A *migrant* was a person who moved from one place to another, usually having a good reason for leaving<sup>53</sup>. Hence, an economic migrant can be defined as a person who leaves his home for economic purposes in order to achieve a high standard of living.

To enter a foreign country, these migrants normally need a visa. If they cross the border illegally they are categorized as illegal immigrants and may risk being arrested or deported to their home country.

The main distinction between refugees, asylum seekers and economic migrants, is that refugees and asylum seekers flee their homes for a “well-founded fear of persecution”, while economic migrants do not normally suffer persecution, even enjoy the protection of their governments, but simply want to escape poverty, improve their financial situation or seek a better life. However, sometimes, those who flee famine and poverty may not be simply economic migrants, but also refugees from hunger, if their economic reason is linked with a political reason, even persecution. This means that “they are fleeing out of a state of necessity, not out of choice”<sup>54</sup>. What is more, “an economic migrant may, for example, become a «refugee sur place», when there is an armed conflict or violent change of regime in that person’s country of origin, or when the government or other actors in that country begin to inflict human rights violations on the community of which the migrant is a member”<sup>55</sup>.

Wendi Adelson in *Economic Migrants and Political Asylum Seekers in the United Kingdom*, distinguishes between people who migrate for economic reasons and become economic migrants, and people who leave their homes for political reasons, categorized as political asylum seekers: “the economic migrant is viewed as migrating out of personal preference and the potential for economic gain, rather than out of necessity inspired by persecution or life-threatening circumstance”<sup>56</sup>.

There is no reference in the 1951 Refugee Convention to economic migrants. This may be due to the fact that migration regulations and policies are often considered a state right, implying that each country can decide on the amount of people to accept as migrants. But whether a country chooses to accept, detain or deport a migrant, its responsibility is to judge the situation with full respect for human rights.

In a European perspective, there have been many debates on the harmonization of the immigration policy. The legal basis in the field of EU migration policy is Article 79 of the *Consolidated Version of the Treaty on the Functioning of the European Union*, stating, at paragraph 1, that: “The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings”<sup>57</sup>. The measures that Member States have to adopt towards the development of a common immigration policy relate to conditions of entry and residence for third-country nationals residing legally in a Member State and to dispositions for those residing illegally in a Member State in order to combat illegal immigration and trafficking in human beings. However, these measures do not constrain Member States to adopt their

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<sup>53</sup> Reader’s Digest, Wordpower Dictionary, The Reader’s Digest Association Limited, London, 2001, p.611.

<sup>54</sup> United Nations General Assembly, *The right to food – note by the Secretary General*, A/62/289, 22 August 2007, p.20, available at < <http://www.righttofood.org/new/PDF/A62289.pdf> > [accessed on 22 August 2010].

<sup>55</sup> UNHCR, *Refugee Protection and International Migration*, 17 January 2007, p.5, available at < <http://www.unhcr.org/refworld/docid/462f6d982.html> > [accessed on 22 August 2010].

<sup>56</sup> Wendi Adelson, “Economic Migrants and Political Asylum Seekers in the United Kingdom: crafting the difference” in *The Michigan Journal of Public Affairs*, vol.1, summer 2004, p.1, available at < [http://www.mjpa.umich.edu/uploads/2/9/3/2/2932559/volume\\_1\\_migrants\\_article\\_final.pdf](http://www.mjpa.umich.edu/uploads/2/9/3/2/2932559/volume_1_migrants_article_final.pdf) > [accessed on 22 August 2010].

<sup>57</sup> Article 79 (1) of the *Consolidated version of the Treaty on the Functioning of the European Union*.

own legislation on the admission of economic migrants, such as indicated by paragraph 5 of the abovementioned article: “this article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed”<sup>58</sup>.

To sum up, economic migrants often abandon their homes for financial purposes and rely on the host country for acceptance. Nonetheless, many developed countries view migration as a negative phenomenon, even if it is universally accepted that economic migrants can contribute to the prosperity of their destination countries<sup>59</sup>.

### **1.5 Conclusion: finding the link between refugees, persons eligible for subsidiary protection, asylum seekers and economic migrants**

In this chapter, we have tried to find a pertinent definition for refugees, persons eligible for subsidiary protection, asylum seekers and economic migrants to gain a better understanding on how States deal with these people and how they entitle them to a certain status. For the asylum State it is often difficult to decide what protection to grant under certain circumstances, mostly because of the ambiguity around these concepts. Since it's not always possible to distinguish between a refugee, a person eligible for subsidiary protection, an asylum seeker and an economic migrant, we have to determine in what way they are connected.

Thus, a refugee was internationally defined by the 1951 Refugee Convention as a person seeking refuge in a foreign country due to a well-founded fear of persecution. When arriving in the host country, the procedure is to first apply for asylum and wait for the claim to be examined. When applying for asylum this person becomes an asylum seeker. Once his asylum claim has been accepted, he may be entitled to refugee status if he meets the criteria of the 1951 Refugee Convention definition. If he does not meet the required criteria for refugee status, he may either be returned to his home country if there is no serious harm he may face, or become a person eligible for subsidiary protection. In order to qualify for subsidiary protection, the asylum seeker must run the risk of suffering serious harm in his country of origin or former habitual residence. Serious harm as defined by the Council Directive 2004/83/EC at Article 15 consists of: death penalty or execution, torture or inhuman or degrading treatment or punishment or threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict<sup>60</sup>.

From the point of view of the Member State, when dealing with an asylum application, the principle of non-refoulement applies from the beginning, because of its nature as fundamental principle in international law. After examining the application, the Member State may entitle the asylum seeker to three types of status: refugee status, subsidiary protection status (both known as *international protection*, under EU law) and humanitarian status (a national protection offered to migrants who do not qualify for refugee or subsidiary protection status, but who are allowed to remain in the host country for humanitarian reasons).

When applying for asylum, the asylum seeker has to enjoy a minimal protection in the Member State, protection that comes from its international obligations (e.g. the principle of non-refoulement). According to the 1951 Refugee Convention, Member States have to define their asylum procedures in full respect with Human Rights. Even the delaying of an asylum application, may be considered a form of protection, as the asylum seeker continues to stay and enjoy rights in the country where he has applied for asylum.

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<sup>58</sup> Article 79 (5) of the *Consolidated version of the Treaty on the Functioning of the European Union*.

<sup>59</sup> UNHCR, *Refugee Protection and International Migration*, p.7.

<sup>60</sup> See Article 15 of the *Council Directive 2004/83/EC*.

While both a refugee and a person eligible for subsidiary protection are first asylum seekers and then receive the legal refugee recognition, an economic migrant “uses asylum channels to seek economic improvement”<sup>61</sup>. As a result, a refugee, a person eligible for subsidiary protection, an asylum seeker and an economic migrant are linked through the asylum channel since they all apply for asylum to receive a certain status.

Although, these concepts can sometimes be misleading, there is no doubt that they are fully interconnected. The great challenge for the asylum State, however, is to establish a set of conditions to filter the number of migrants crossing its borders through the asylum process.

In terms of the number of people being granted protection in the European Union, the statistics show that out of 260 000 applications registered in 2009, only 27 630 (12%) were granted refugee status, 26 200 (11%) were granted subsidiary protection status and 8 900 (4%) were granted authorization to stay on humanitarian grounds<sup>62</sup>. Other statistics, on the number of positive decisions regarding asylum applications and the number of people being rejected, as well as on the type of protection being granted at the first instance level of the asylum procedure, will be further examined in Annex 2, country by country.

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<sup>61</sup> Wendi Adelson, “Economic Migrants and Political Asylum Seekers in the United Kingdom: crafting the difference”, p.1.

<sup>62</sup> Eurostat Newsrelease, *Asylum in the EU27: Around 260 000 asylum applicants registered in 2009*, 64/2010, 4 May 2010, available at < [http://epp.eurostat.ec.europa.eu/cache/ITY\\_PUBLIC/3-04052010-BP/EN/3-04052010-BP-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-04052010-BP/EN/3-04052010-BP-EN.PDF)> [accessed on 6 December 2010].

## Chapter II

### The right to asylum under EU law

“The EU has been at the forefront of refugee law developments. In its quest to harmonize the asylum laws and procedures of its Member States, the Union has developed what is in effect a regional asylum system. [...] The EU has gone one step further and set an example by in effect codifying a legal framework on asylum applicable to the Member States, despite different legal traditions and systems.”

(Volker Türk, Director of International Protection UNHCR)<sup>63</sup>

The origins of the right to asylum can be traced back to ancient times, when Greek and Roman cities offered sanctuary to anyone in need of a safe place to hide. Today, this right has become part of the fundamental rights and freedoms to which all humans are entitled to without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status<sup>64</sup>. At the international level, this right has been codified in article 14 of the Universal Declaration of Human Rights, stating that:

“1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.  
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations”<sup>65</sup>.

Asylum may be thus defined as a form of protection granted to people who flee their homes for fear of persecution or for being at risk of suffering serious harm. These people have then the right to *seek* and *enjoy* asylum in any country willing to protect them. The protection offered by countries to these people, may be in the form of "refugee status", "subsidiary protection status" or "on humanitarian grounds" (an authorization given by countries, under their national laws, to individuals who cannot be removed for humanitarian reasons, such as unaccompanied children, for example). Furthermore, under international law, people applying for asylum, also called asylum seekers, should also be protected from refoulement in a country where they could suffer persecution, torture, inhuman or degrading treatment or punishment.

The legal basis for the right to asylum, at the European level is article 78 of the *Consolidated Treaty on the Functioning of the European Union*, providing an overview on the protection of asylum seekers and the principle of non-refoulement in the view of developing a common policy on asylum throughout the European Union. Moreover, the right to asylum has been recognized as part of the objective of the European Union to establish an area of freedom, security and justice. Article 3, paragraph 2 of the *Consolidated Version of the Treaty on European Union*, states that: “The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”<sup>66</sup>. As a human right, the right to asylum was set out in article 18 of the *Charter of Fundamental Rights of the European Union*: “The right to asylum shall be granted with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967

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<sup>63</sup> Volker Türk, *The Common European Asylum System – a vision for the future*, Conference on “The Common European Asylum System: Future Challenges and Opportunities”, Stockholm, 3 November 2009, available at <<http://www.unhcr.org/refworld/docid/4af15b672.html>> [accessed on 24 August 2010].

<sup>64</sup> See article 2 of the *Universal Declaration of Human Rights*, UN General Assembly, 10 December 1948, 217 A (III), available at <<http://www.unhcr.org/refworld/docid/3ae6b3712c.html>> [accessed on 24 August 2010].

<sup>65</sup> Article 14 (1,2) of the *Universal Declaration of Human Rights*.

<sup>66</sup> Article 3 (2) of the *Consolidated version of the Treaty on European Union*, O.J. C83, vol. 53, 30 March 2010, pp. 13-45.



relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union”<sup>67</sup>.

In this chapter we will examine the European legislative framework on the right to asylum and the protection of refugees in order to see whether there truly exists a European refugee and asylum law. In this regard, we will try to see how a Member State shall deal with those who cross their borders, either asylum seekers or people in need of international protection, as well as to identify the minimum standards for granting refugee protection and asylum in the European Union to have a glimpse on the conditions an asylum seeker has to meet in order to be granted refugee status in one of the EU Member States. This will lead us to the latest development in the European asylum law, the Common European Asylum System, a method intended to harmonise the reception conditions for asylum seekers through an enhanced cooperation among Member States.

## 2.1 Is there a European refugee and asylum law?

Before proceeding with the substance of this chapter, it would be pertinent to explain what the European refugee and asylum law means and why we have chosen to put these two terms together. Because asylum is a state right, dealt with differently by each Member State, the European Union was rather concentrated on the harmonization of the asylum system, than on the protection of refugees. However, the protection of refugees is an international responsibility that every State party to the 1951 Geneva Convention and the human rights instruments should respect. Accordingly, we will discuss the European asylum law and the European refugee law together, because we want to incorporate in a sole concept both the European asylum instruments, and the international instruments on the protection of refugees, to which the European Union and its Member States are parties and should therefore respect.

In order to answer the question whether there is a European refugee and asylum law, we have to go back to the origins of the EU single market and see what changes it has brought for the entire European Union. With the abolition of internal borders and the creation of a single external border, Member States had to come to an agreement on how to harmonize different national policies which have now become of great interest for the European Union. One of these policies covered the area of migrations, including the right to asylum. But how did the right to asylum evolve from a state right into a harmonized concept throughout the European Union?

Before the creation of the single European market, the right to asylum was a state right, meaning that it was the responsibility of each Member State and not of the European Union, to set out measures on migration control and to define conditions for the reception and return of migrants, including asylum seekers and refugees. In this early stage, the right to asylum was understood as the competence of each individual State.

Maria-Teresa Gil-Bazo in *The Charter of Fundamental Rights of the European Union and the right to be granted asylum in the Union's law*, goes to the heart of the problem analysing whether the right to asylum in the European Union is an individual right, the right of the individual to seek asylum or more of a state right, to right of the asylum State to grant it. She reaches the conclusion that after the creation of the European Charter of Fundamental Rights, the right to asylum was conceived as the right of an individual to apply for asylum, but also as the right to be granted it<sup>68</sup>.

To illustrate the evolution of the right to asylum from a state right into a harmonized principle throughout the European Union, we will analyse the development of the European refugee and asylum law through the treaties.

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<sup>67</sup> Article 18 of the *Charter of Fundamental Rights of the European Union*, O.J. C83, vol.53, 30 March 2010, pp.389-403.

<sup>68</sup> Maria-Teresa Gil-Bazo, “The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law”, in *Refugee Survey Quarterly*, vol.27, issue 3, 2008, pp.33-52.

### 2.1.1 The State responsible for processing an asylum application: Schengen and Dublin

One of the first steps in the development of the European refugee and asylum law was undertaken by the Schengen Agreement, first created outside the European Community and then incorporated into the European Union's legal framework by the Treaty of Amsterdam. The Signatory States of the Schengen Agreement set out a Schengen Area without internal borders and with a single external frontier<sup>69</sup>. With the existence of a single external frontier, new border control procedures, such as conditions of entry, visa requirements or rules on asylum, were needed. On the topic of asylum, the 1985 Schengen Agreement formulated a set of rules to identify the state responsible for processing an asylum application. In its chapter 7, *Responsibility for processing applications for asylum*, the Contracting Parties agreed on examining an asylum application under their national law (article 29, paragraph 2), but in accordance with the Refugee Convention and UNHCR's recommendations (article 28). According to article 29, the Contracting Parties have the obligation "to process any application for asylum lodged by an alien within any one of their territories"<sup>70</sup>. In other words, they are obliged to process all applications but not bound to grant protection to anyone who applies for asylum. The Contracting Parties have thus the right to authorise, refuse entry or expel the asylum seekers. However, "only one contracting party shall be responsible for processing that application, this shall be determined on the basis of the criteria laid down in article 30"<sup>71</sup>. The state responsible for processing an asylum application will be the one that issued the asylum seeker with a visa or residence permit with the longest duration or if the asylum seeker doesn't possess any of these documents, the country across whose external borders the asylum seeker entered the Schengen area<sup>72</sup>. The Schengen Agreement makes also reference to the right to family reunification of an asylum seeker who has been entitled with refugee status and the right of residence. According to article 35: "the Contracting Party which granted an alien the status of refugee and right of residence shall be obliged to take responsibility for processing any application for asylum made by a member of the alien's family provided that the persons concerned agree. For the purposes of paragraph 1, a family member shall be the refugee's spouse or unmarried child who is less than 18 years old or, if the refugee is an unmarried child who is less than 18 years old, the refugee's father or mother"<sup>73</sup>. To sum up, the Schengen Convention was intended to safeguard the right of individuals to seek asylum in no more than one of the Schengen countries which should be determined rather upon the Convention standards than the preference of the asylum seeker.

Following the Schengen Agreement, the asylum provisions will be then revised and replaced by the Dublin Convention, which suggested that the asylum application be examined in the Member State from where the applicant first entered the European Union (article 7), or where he has a valid visa or residence permit (article 5) or where one of his family members has been recognized as having refugee status (article 4)<sup>74</sup>.

The main idea behind the Schengen and Dublin Conventions was set out in the preamble of the latter: "aware of the need, in pursuit of this objective, to take measures to avoid any situations arising, with the result that applicants for asylum are left in doubt for too long as regards the likely outcome of their applications and concerned to provide all applicants for asylum with a guarantee that their applications will be examined by one of the Member States and to ensure that applicants for asylum are not referred successively from one Member State to another without any of these States acknowledging itself to be

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<sup>69</sup> The first "Schengen Area" has been created by France, Luxembourg, Germany, Belgium and the Netherlands in 1985, with the aim of abolishing all internal borders and facilitating the free movement of people.

<sup>70</sup> Article 29 (1) the *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*, O.J. L 239, 2000, pp.19-62 (hereinafter *the Convention implementing the Schengen Agreement*).

<sup>71</sup> Article 29 (3) of the *Convention Implementing the Schengen Agreement*.

<sup>72</sup> See Article 30 of the *Convention Implementing the Schengen Agreement*.

<sup>73</sup> Article 35 of the *Convention Implementing the Schengen Agreement*.

<sup>74</sup> *Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities* ("Dublin Convention"), 15 June 1990, O.J. C254, 1997, pp.1-12.

competent to examine the application for asylum”<sup>75</sup>. What the signatory States aimed with these Conventions was to ensure that all the asylum applications are examined by the Member State responsible, thus relieving all the others of this work and avoiding that multiple applications are presented simultaneously or consecutively in the European Community<sup>76</sup>.

What is more, the Schengen and Dublin Conventions have established the first European asylum system, based on the identification of the State responsible for examining an asylum application. However, according to these Conventions, the examination of the asylum application will still be done under the national legislation and the international obligations of the Member State in question. Even if a certain harmonization on the topic of asylum was undertaken by these two Conventions, there would still be a long way to go to the harmonization of the right to asylum and the protection of refugees throughout the European Union.

### 2.1.2 “Unfounded applications”, “host third countries” and “safe countries”: Maastricht and the London Resolutions

The Treaty of Maastricht links the asylum policy with the cooperation in the field of justice and home affairs (Articles K.1, K.3) and even if it doesn’t provide with a thorough explanation on the right to asylum inside the European Union, it does however enclose a *Declaration on asylum*, stating that: “The Conference agrees that, in the context of the proceedings provided for in Articles K.1 and K.3 of the provisions on cooperation in the fields of justice and home affairs, the Council will consider as a matter of priority questions concerning Member States’ asylum policies, with the aim of adopting, by the beginning of 1993, common action to harmonize aspects of them, in the light of the work programme and timetable contained in the report on asylum drawn up at the request of the European Council meeting in Luxembourg on 28 and 29 June 1991”<sup>77</sup>. To fulfil this declaration, the Council of the European Union would adopt by the beginning of 1993, the so called *London Resolutions*, in the view of harmonizing some of the aspects on asylum:

*Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum (“London Resolution”)*, stating at paragraph 1, that “an application for asylum shall be regarded as manifestly unfounded if it is clear that it meets none of the substantive criteria under the Geneva Convention and New York Protocol for one of the following reasons: there is clearly no substance to the applicant’s claim to fear persecution in his own country or the claim is based on deliberate deception or is an abuse of asylum procedures”<sup>78</sup>. Dealing with an increasing number of asylum applications, the Council of the European Union decided to adopt this first resolution in order to eliminate those asylum applications that are not genuine and do not fall under the refugee definition of the 1951 Refugee Convention as well as those asylum applications introduced abusively.

*Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries (“London Resolution”)* was intended to formulate the conditions for sending or expelling an asylum applicant to a host third country (not a member of the European Union) where his life or freedom should not be threatened, he should not be exposed to torture or inhuman or degrading treatment and where the principle of non-refoulement should be respected<sup>79</sup>.

*Conclusions on Countries in Which There is Generally No Serious Risk of Persecution (“London Resolution”)* aimed to define what a country in which there is no serious risk of persecution is: “this concept means that it is a country which can be clearly shown, in an objective and verifiable way, normally not to generate refugees

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<sup>75</sup> See *Preamble of the Dublin Convention*.

<sup>76</sup> Philippe De Bruycker, “D’un Système Européen d’Asile vers un Droit Européen des Réfugiés”, in Carlier, Vanheule, *Europe and Refugees: a challenge?*, p.161.

<sup>77</sup> *Declaration on Asylum* in “Treaty on European Union”, O.J. C191, 29 July 1992.

<sup>78</sup> Paragraph 1 of the *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum (“London Resolution”)*, available at < <http://www.unhcr.org/refworld/docid/3f86bbcc4.html> > [accessed on 28 August 2010].

<sup>79</sup> *Council Resolution of 30 November 1992 on a Harmonized Approach to Questions concerning Host Third Countries (“London Resolution”)*, available at < <http://www.unhcr.org/refworld/docid/3f86c3094.html> > [accessed on 28 August 2010].

or where it can be clearly shown, in an objective and verifiable way, that circumstances which might in the past have justified recourse to the 1951 Geneva Convention have ceased to exist”<sup>80</sup>, in order to clear up the asylum system from all unnecessary applications. According to these conclusions, the applicants that come from “safe countries” might not meet the required criteria for refugee status. The Ministers of the Member States responsible for Immigration, who drafted these conclusions, have also formulated the basic elements that define a “safe country” as a country where there is no risk of persecution. These elements refer to: previous numbers of refugees and recognition rates, observance of human rights, democratic institutions and stability. However, a list of such countries have not been drafted on this occasion, but the Ministers agreed on exchanging information on this topic and on recognizing the Member States of the European Union as “countries in which there is generally no serious risk of persecution”. Nevertheless, if there is an application from a “safe country”, Member States should not automatically refuse it, but analyse it on an individual basis to see whether the applicant can provide any evidence “which might outweigh a general presumption”<sup>81</sup>.

Besides the London Resolutions, the Council has decided to set up two additional instruments on the topic of asylum: CIREA (Centre for Information, Discussion and Exchange on Asylum), charged with the research, exchange of information and the preparation of documentation on questions relating to asylum and EURODAC (European Dactyloscopy), created to ensure the effective application of the Dublin Convention and entrusted with the comparison of fingerprints of asylum seekers and immigrants<sup>82</sup>.

### 2.1.3 Towards a Common European Asylum System: Amsterdam, Tampere and Lisbon

In the Treaty of Amsterdam asylum is referred to as one of the measures to be taken in order to ensure the EU objective: “to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”<sup>83</sup>. The Treaty also includes a new chapter on visas, asylum, immigration and other policies related to free movement of persons, inviting the Council to adopt different measures in these areas in order to progressively establish an area of freedom, security and justice. To best implement the provisions of the Treaty of Amsterdam on the creation of this area of freedom, security and justice, the Council together with the Commission have adopted an Action Plan on 3 December 1998. The main actions in the field of asylum considered by the Vienna Action Plan include defining minimum standards on the granting and withdrawing refugee status and the reduction of the duration of asylum procedures, on the reception of asylum seekers, on the qualification of nationals of third countries as refugees and on subsidiary protection<sup>84</sup>. The Action Plan also notes that “the areas of visa, asylum, immigration and other policies related to free movement of persons, like judicial cooperation in civil matters, are transferred from the EU's third pillar to its first pillar”<sup>85</sup>.

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<sup>80</sup> *Conclusions on Countries in Which There is Generally No Serious Risk of Persecution* (“London Resolution”), available at < <http://www.unhcr.org/refworld/docid/3f86c6ee4.html> > [accessed on 28 August 2010].

<sup>81</sup> Paragraph 3 of the *Conclusions on Countries in Which There is Generally No Serious Risk of Persecution* (“London Resolution”).

<sup>82</sup> See *Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of “Eurodac” for the comparison of fingerprints for the effective application of the Dublin Convention*, O.J. L316, 15 December 2000, p.1-10.

<sup>83</sup> *Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts*, O.J. C340, 10 November 1997 (hereinafter *Treaty of Amsterdam*).

<sup>84</sup> See Part II (B) of the Justice and Home Affairs Council, *Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice*, 3 December 1998, available at < [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999Y0123\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999Y0123(01):EN:HTML) > [accessed on 21 October 2010] (hereinafter *Vienna Action Plan*).

<sup>85</sup> See Part I (1) of the *Vienna Action Plan*.

These measures anticipated by the Vienna Action Plan in the field of asylum, were first formulated in the Treaty of Amsterdam, in accordance with the Refugee Convention and its Protocol, at Article 73k (1), also Article 63 (1) of the Treaty Establishing the European Community<sup>86</sup>, as follows:

(a) Criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States. Following the indications of the Treaty of Amsterdam and those of the European Council in Tampere on 15 and 16 October 1999 on the establishment of a Common European and Asylum System, the Council has adopted in 2003 the *Council Regulation no. 343/2003 of February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, also called Dublin II Regulation because it reviews and replaces the 1990 Dublin Convention. In addition to the 1990 Dublin Convention, the Dublin II Regulation inserts a hierarchy of criteria for determining the Member State responsible in processing an asylum application and establishes the following order: the responsible Member State will be that where the asylum seeker has family members residing legally, having refugee status or waiting for his application to be examined, that issued a valid residence document or visa for the asylum seeker, that where the asylum seeker has illegally entered or stayed, that where the asylum seeker has legally entered and stayed, that where the application for asylum is made in an international transit area of an airport<sup>87</sup>. The Dublin II Regulation also includes a humanitarian clause according to which a Member State may be requested by another Member State to examine an asylum application on humanitarian grounds based on family and cultural consideration, with the consent of the persons concerned<sup>88</sup>. The Member States are also obliged to take charge or take back an asylum seeker if proven that they are responsible for examining its application<sup>89</sup>. The administrative cooperation between Member States when processing an asylum application is also discussed in this regulation, encouraging Member States to exchange information on asylum seekers respecting certain rules on the protection of personal data and also informing the asylum seeker about this exchange<sup>90</sup>.

(b) Minimum standards on the reception of asylum seekers in Member States – this measure is linked with the *Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, considered a constituent part of the Common European Asylum System, just like the previous. The directive includes provisions on the documentation of asylum seekers (issuance of a document certifying his status), the residence and freedom of movement, family reunion, education, employment, vocational training and health care<sup>91</sup>. Member States may reduce, withdraw or refuse reception conditions when the applicant does not comply with its obligations that come with his asylum application<sup>92</sup>. A special attention is given to persons with special needs such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents and victims of torture and violence in order to provide them with the appropriate care and protection<sup>93</sup>.

(c) Minimum standards with respect to the qualification of nationals of third countries as refugees – this measure was reinforced by the *Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* (also called the Qualification Directive), a constituent part of the Common European Asylum System too. In addition to the provisions laid down in article 73k (1,c), the directive assimilates not only third country nationals but also stateless persons and

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<sup>86</sup> See Article 73k of the *Treaty of Amsterdam*.

<sup>87</sup> See Chapter III, “Hierarchy of Criteria” of the *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, O.J. L 50.1, 25 February 2003, available < <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:050:0001:0010:EN:PDF> > [accessed on 29 August 2010] (hereinafter *Council Regulation No 343/2003*).

<sup>88</sup> See Chapter IV, “Humanitarian Clause” of the *Council Regulation No 343/2003*.

<sup>89</sup> See Chapter V, “Taking Charge and Taking Back” of the *Council Regulation No 343/2003*.

<sup>90</sup> See Chapter VI, “Administrative Cooperation” of the *Council Regulation No 343/2003*.

<sup>91</sup> See Chapter II, “General Provisions on Reception Conditions” of the *Council Directive 2003/9/EC*.

<sup>92</sup> See Chapter III, “Reduction or Withdrawal of Reception Conditions” of the *Council Directive 2003/9/EC*.

<sup>93</sup> See Chapter IV, “Provisions for Persons with Special Needs” of the *Council Directive 2003/9/EC*.

qualifies them either as refugees or as persons eligible for subsidiary protection. The directive defines the rules for granting international protection, either in the form of refugee status or in the form of subsidiary protection status. The difference between a refugee and a person eligible for subsidiary protection is that the latter cannot fall under the definition of the Geneva Refugee Convention, but if returned to his country of origin or former habitual residence, would face violence, torture or other inhuman treatments<sup>94</sup>. The international protection granted to both refugees and persons eligible for subsidiary protection comprises the right to non-refoulement, family unity, issuance of residence permits and travel document, access to employment, education, accommodation, social assistance, health care and freedom of movement within the Member State's territory<sup>95</sup>. However, this international protection as defined by the said directive is also separated from humanitarian protection which may be granted to persons on humanitarian grounds according to the national legislation in force. Furthermore, the directive provides that: "those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive"<sup>96</sup>. On other words, the provisions set out in the directive, only apply for cases of international protection, meaning for refugee or subsidiary protection status. Other type of protection, be it humanitarian or not, granted by Member States falls outside the scope of this Directive. In one of the cases brought before the European Court of Justice on the interpretation of Council Directive 2004/83/EC (see *Bundesrepublik Deutschland v. B and D*<sup>97</sup>), the Court stated that: "Directive 2004/83, like the 1951 Geneva Convention, is based on the principle that host Member States may, in accordance with their national law, grant national protection which includes rights enabling persons excluded from refugee status under Article 12 (2) of the directive to remain in the territory of the Member State concerned"<sup>98</sup>. This means that both the 1951 Refugee Convention and the Directive 2004/83/EC allow Member States to grant asylum under their national law to a person who was excluded from refugee status pursuant to Article 12 (2) of the Qualification Directive, with the condition that this national protection is not confused with refugee status under the said directive<sup>99</sup>. The Court was asked to provide interpretation on provisions of the 2004/83/EC directive in other rulings such as:

*Elgafaji v. Staatssecretaris van Justitie* – interpretation of Article 15 (c) – on the granting of subsidiary protection to civilians who were subject to indiscriminate violence if returned to their country of residence;

*Salahadin Abdulla and Others v. Bundesrepublik Deutschland* – interpretation of Article 11 (1) (e) – on the cessation of refugee status if the circumstances which led to the granting of refugee status have ceased to exist;

*Bolbol v. Bevándorlási és Állampolgársági Hivatal* – interpretation of Article 12 (1) (a) – on the exclusion from refugee status of persons protected by organs or agencies of the United Nations, other than UNHCR.

All these cases will be thoroughly discussed in the chapter on The role of the European Court of Justice and the European Court of Human Rights in the development and application of the right to asylum and the principle of non-refoulement among Member States.

(d) Minimum standards on procedures in Member States for granting or withdrawing refugee status – another constituent part of the Common European Asylum System is the *Council Directive 2005/85/EC of 1 December 2005 on minimum standards and procedures in Member States for granting and withdrawing refugee status* (also called the *Asylum Procedures Directive*), which demands Member States to examine all asylum

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<sup>94</sup> See Article 2 of the *Council Directive 2004/83/EC*.

<sup>95</sup> See Chapter IV, "Content of International Protection" of the *Council Directive 2004/83/EC*.

<sup>96</sup> See Recital 9 of the *Council Directive 2004/83/EC*.

<sup>97</sup> This case-law is discussed in the Case Study at the *Asylum Acquis and the European Court of Justice* subchapter.

<sup>98</sup> Recital 117 of *Bundesrepublik Deutschland v. B and D*, C-57/09 and C-101/09, European Union: European Court of Justice, 9 November 2010, available at: < <http://www.unhcr.org/refworld/docid/4cda83852.html> > [accessed on 1 December 2010] (hereinafter *Bundesrepublik Deutschland v. B and D*).

<sup>99</sup> See Recital 119 of *Bundesrepublik Deutschland v. B and D*.

applications within a short period of time and inform the applicants of the decision taken. During the examination of their application, the applicants are given the right to remain in the Member State where the procedure is taking place, to communicate with the competent authorities in a language they understand and to contact UNHCR<sup>100</sup>. In terms of obligations, the applicants have to cooperate with the competent authorities to provide them with the necessary information and documents<sup>101</sup>. What is more, to support their application, the applicants have the right to a personal interview, as well as to a legal adviser or counsellor on matters relating to their application, even during their personal interview<sup>102</sup>. An applicant may also enjoy the right to appeal and to legal assistance and representation in the Member State where the asylum procedure is taking place. Compared to the previous directives, the aforementioned allows UNHCR to have access to information regarding an asylum application, as well as to present its views during the procedure<sup>103</sup>. The consultation with UNHCR and other relevant organizations has been previously mentioned in the *Declaration on Article 73k of the Treaty Establishing the European Community*<sup>104</sup>. The directive also introduces new concepts like: *first country of asylum* (where an applicant has been recognized as a refugee and enjoys protection, as well as the right to non-refoulement)<sup>105</sup>, *safe third country* (according to national provisions, Member States can send an applicant to a safe third country defined as a place where his life and liberty are not threatened, the principle of non-refoulement is respected, there is no risk of torture, cruel or degrading treatment and where the Geneva Refugee Convention is respected and the possibility of requesting refugee status exists)<sup>106</sup> and *safe country of origin* (a country that is presumed to be safe and that does not produce refugees, so that all applications that come from that country are considered unfounded). As for the withdrawal of refugee status, it may be applied when there has been a change of situation and the refugee status is no longer necessary<sup>107</sup>.

Article 73k (2) of the Treaty of Amsterdam (also Article 63 (2) of the Treaty Establishing the European Community) invites the Council of the European Union to adopt specific measures on refugees and displaced persons in the following areas:

- (a) Minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection
- (b) Promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons

Both these measures were incorporated in one single directive: Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. This directive was adopted in the context of the Kosovo crisis that produced a mass influx of displaced persons in need of temporary protection. “Displaced persons”, as defined by this directive designate all those who have left their country or have been evacuated due to a conflict, violence or serious violation of their human rights and, for all of this, are unable to return<sup>108</sup>. Thus, they find themselves in need of “temporary protection”, “a procedure of

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<sup>100</sup> See Articles 7 and 10 of the *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, O.J. L 326, 13 December 2005, pp.13-34 (hereinafter *Council Directive 2005/85/EC*).

<sup>101</sup> See Article 11 of the *Council Directive 2005/85/EC*.

<sup>102</sup> See Articles 12, 13, 14, 15 and 16 of the *Council Directive 2005/85/EC*.

<sup>103</sup> See Article 21 of the *Council Directive 2005/85/EC*.

<sup>104</sup> “Declaration on Article 73k of the Treaty establishing the European Community”, annex to the *Treaty of Amsterdam*.

<sup>105</sup> See Article 26 of the *Council Directive 2005/85/EC*.

<sup>106</sup> See Article 27 of the *Council Directive 2005/85/EC*.

<sup>107</sup> See Chapter IV, “Procedures for the Withdrawal of Refugee Status” of the *Council Directive 2005/85/EC*.

<sup>108</sup> See Article 2 (c) of the *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*, O.J. L. 21, 7 August 2001, pp.12-23 (hereinafter *Council Directive 2001/55/EC*).

exceptional character to provide, in the event of a mass influx [...] of displaced persons from third countries who are unable to return to their country of origin”<sup>109</sup>. The duration of temporary protection is of maximum one year<sup>110</sup> and Member States have the obligations to provide the person enjoying temporary protection with residence permits, to engage in employed activities, to have access to accommodation, education, social assistance and medical care and to facilitate family reunification<sup>111</sup>. Any time during the period of temporary protection, a person has the right to apply for asylum. If he is not granted asylum, he is still able to remain in the Member State until the period of temporary protection comes to an end<sup>112</sup>. When the temporary protection ends, Member States “shall take the measures necessary to make possible the voluntary return of persons enjoying temporary protection [...] and facilitate their return with respect for human dignity”<sup>113</sup>.

Points 3, measures on immigration policy and 4, measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States, of Article 73k of the Treaty of Amsterdam (also Article 63 of the Treaty Establishing the European Community) do not relate specifically to refugees and asylum seekers, but more to legal and illegal immigrants. However, in some cases, refugees and asylum seekers may be concerned of one of these provisions, relating to conditions of entry and residence, issuance of visas and residence permits, family reunion or repatriation of illegal residents<sup>114</sup>.

With respect to family reunion, the *Council Directive 2003/86/EC* of 22 September 2003 gives special attention to the family reunification of refugees, acknowledging the situation that led them to flee their country and separated them from their families<sup>115</sup>.

The *Protocol on asylum for nationals of Member States of the European Union*, annexed to the Treaty of Amsterdam, invites all countries that want to become members of the EU to respect the principles on asylum. The aforementioned protocol recognizes the Member States as safe countries of origin, and in the same time, points out certain conditions for analysing the application of a national of a Member State by another Member State, if there is a breach of the common principles on which the Union is founded: liberty, democracy, respect for human rights and fundamental freedoms, the rule of law and other principles which are common to the Member States<sup>116</sup>.

All the directives above mentioned, were adopted following the provisions of the article 73k of the Treaty of Amsterdam (also Article 63 of the Treaty Establishing the European Community), and represent the willingness of the Member States to incorporate the right of asylum into the right of the European Union.

Following the Treaty of Amsterdam, the Tampere European Council, called for the development of a Common EU Asylum and Migration Policy, which in the area of asylum, should be build on partnership

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<sup>109</sup> See Article 2 (a) of the *Council Directive 2001/55/EC*.

<sup>110</sup> See Article 4 of the *Council Directive 2001/55/EC*.

<sup>111</sup> See Chapter III, “Obligations of the Member States towards persons enjoying temporary protection” of the *Council Directive 2001/55/EC*.

<sup>112</sup> See Chapter IV, “Access to the asylum procedure in the context of temporary protection” of the *Council Directive 2001/55/EC*.

<sup>113</sup> See Article 21 of the *Council Directive 2001/55/EC*.

<sup>114</sup> See Article 73k, points 3 and 4 of the *Treaty of Amsterdam*.

<sup>115</sup> See *Council Directive 2003/86/EC* of 22 September 2003 on the right to family reunification, O.J. L 215, 3 October 2003, pp.12-18.

<sup>116</sup> “Protocol on asylum for nationals of Member States of the European Union”, annexed to the Treaty Establishing the European Community as amended by the *Treaty of Amsterdam*, reference to Articles 6 (ex Article F) and 7 (ex Article F.1).



with the countries of origin and the Common European Asylum System, and in the area of migration, on fair treatment of third-country nationals and more efficient management of migration flows<sup>117</sup>.

The Treaty of Nice widened the decision-making process inside the European Union, to qualified majority voting. Therefore, in some areas, including asylum and immigration policies, the qualified majority voting would replace unanimity. According to the Treaty of Nice, when passing a law on asylum, visa, immigration or the free movement of people, the Council would have to act in codecision with the Parliament. The codecision procedure has now become the rule in the European Union, because it requires the equal share of legislative power between the Parliament and the Council, thus enhancing the cooperation between these two institutions and making the decision-making process more efficient.

The Treaty of Lisbon, which recently entered into force, has maintained the provisions relating to the extension of the qualified majority to certain areas, including asylum or immigration. With Lisbon, the Member States have envisioned the creation of an area of freedom, security and justice of which asylum is a constituent part. The provisions on the harmonization of the asylum process inside the European Union and the creation of a common asylum policy set out in Article 63 of the Treaty Establishing the European Community, have been reproduced in the Treaty of Lisbon, at Article 63 (1), under the chapter, *Policies on Border Checks, Asylum and Immigration*, and in the Treaty on the Functioning of the European Union at Article 78<sup>118</sup>. The steps to be taken towards the establishment of a Common European Asylum System, laid down in Article 63 (2) comprise<sup>119</sup>:

(a) a uniform status of asylum for nationals of third countries, valid throughout the Union – this measure was meant to harmonize the asylum procedures of Member States. By recognizing the asylum status throughout the Union, Member States would be able to cooperate and exchange information on the asylum procedure. In relation with a previous directive, aimed at realizing the measures proposed by the Treaty Establishing the European Community as amended by the Treaty of Amsterdam, this first proposal made by the Treaty of Lisbon towards the realization of the Common European Asylum System, may be associated to the Council Directive 2004/83/EC. The expression “uniform status of asylum for nationals of third countries” is not explicitly formulated in this directive, which speaks about refugee status rather than asylum status. However, what we may observe in the Treaty of Lisbon is that there is no reference to refugee status but to asylum status, compared to the previous treaties, directives and regulations. We may assume that the Treaty of Lisbon incorporates in the notion of “status of asylum” both refugees and asylum seekers. In other words, a person who crosses the European borders is first an asylum seeker who follows the asylum procedures and then he may become either refugee, if he falls under the definition of the Refugee Convention (receiving refugee status according to previous directives or asylum status according to the Treaty of Lisbon), or a person eligible for subsidiary protection (receiving subsidiary protection status).

(b) a uniform status of subsidiary protection for nationals of third countries who without obtaining European asylum, are in need of international protection – the notion of “subsidiary protection” was defined in European law by the directive 2004/83/EC. This directive defines “subsidiary protection” as the status granted to a person who does not qualify as refugee according to the definition found in the 1951 Refugee Convention, but who cannot be returned to his country of origin, where he may face serious harm, torture, inhuman or degrading treatment or serious violations of his human rights. “Subsidiary protection” was intended to cover new situations faced by refugees or asylum seekers that

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<sup>117</sup> See point A of the *Tampere European Council 15 and 16 October 1999, Presidency Conclusions*, available at <[http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm)> [accessed on 21 October 2010] (hereinafter *Tampere European Council*).

<sup>118</sup> The Treaty of Lisbon has amended the Treaty on European Union or the ancient Treaty of Maastricht and the Treaty of Rome (renamed Treaty Establishing the European Community) and has replaced the latter by the Treaty on the Functioning of the European Union.

<sup>119</sup> See Article 63 (2) of the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007*, O.J. C 306, 17 December 2007, pp.1-271 (hereinafter *Treaty of Lisbon*).

were not included in the 1951 Refugee Convention. However, “subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention”<sup>120</sup>.

(c) a common system of temporary protection for displaced persons in the event of a massive inflow – this measure relates to the Council Directive 2001/55/EC defining the notion of “mass influx” and the procedures to be followed during such an event. The notion of “mass influx” or massive inflow as formulated by the Treaty of Lisbon, “means arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme”. As for the procedures to be followed during a massive inflow of displaced persons, the directive mentions the conditions of reception and residence, the granting of temporary protection and the right to apply for asylum.

(d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status – the Council Directive 2005/85/EC refers to the conditions for granting and withdrawing refugee status and says nothing about the subsidiary protection status. According to this proposal made by the Treaty of Lisbon, new procedures have to be laid down including both asylum status and subsidiary protection status.

(e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection – just like the previous measures introduced by the Treaty of Lisbon, this one was also extended to subsidiary protection status. The Council Regulation 343/2003 only mentions the criteria and mechanisms for examining an asylum application, and doesn’t make any reference to the subsidiary protection status.

(f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection – this measure was developed, in the past, in the Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers. According to the Treaty of Lisbon, the provisions formulated in this directive have to be further extended to subsidiary protection status.

(g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection – the administrative cooperation between Member States on the asylum, subsidiary and temporary protection procedure has already been incorporated in the aforementioned directives. However, the partnership and cooperation with third countries has not been mentioned in any of the previous directives and it may be seen as a new instrument aimed at preventing the flows of people from reaching Europe.

The proposals made by the Treaty of Lisbon towards the establishment of a Common European Asylum System have already been envisioned in the Treaty of Amsterdam that suggested the creation of a Common European Asylum System, even before Lisbon. The reason why Lisbon has assumed the responsibility to adopt measures for a Common European Asylum System, besides the measures put forward by the Treaty of Amsterdam, may be found in the literal interpretation of Lisbon measures, put side by side with the Amsterdam measures. As we have seen above, what is called *status of asylum* in the Treaty of Lisbon was referred to in the Treaty of Amsterdam as *refugee status*. Probably, this was done as a way to enlarge the notion of status of asylum, to both asylum seekers and refugees. In contrast to the extended notion of status of asylum, the expression refugee status normally includes applicants that have been recognized as refugees in the host country. What is more, the Treaty of Lisbon distinguishes between three types of protection an applicant can be entitled to: *status of asylum*, for those who have applied for asylum in a Member State and may become refugees according to the conditions advanced by the 1951 Refugee Convention; *subsidiary protection*, for those who need international protection but may not be qualified as refugees according to the 1951 Refugee Convention; and *temporary protection*, for those who have fled, in the event of a massive inflow, their country of origin or residence and are unable to return. As for the content of the Amsterdam measures, we have observed that they have almost entirely been assimilated by the Treaty of Lisbon, either for further development or revision.

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<sup>120</sup> Preamble of the *Council Directive 2004/83/EC*, paragraph 24.

On asylum, visa, immigration and other measures relating to the free movement of people, as formulated by the Treaty of Amsterdam, and on the area of freedom, security and justice, as formulated by the Treaty of Lisbon, some Member States like the United Kingdom, Ireland and Denmark enjoy opt-out clauses. However, they have the right to participate in the adoption of specific measures on these issues, whenever they express their wish to do so. It has been the case with the United Kingdom that wanted to participate in the adoption of the following directives: Council Directive 2001/55/EC on giving temporary protection in the event of a massive inflow of displaced persons, Council Regulation 343/2003 on the conditions for determining the Member State responsible for examining and asylum application, Council Directive 2003/9/EC on the reception of asylum seekers, Council Directive 2004/83/EC on the qualification of third country nationals or stateless persons as refugees and Council Directive 2005/85/EC on the conditions for granting and withdrawing refugee status. Ireland has not expressed its wish to participate in so many directives, like the United Kingdom. However, Ireland has adopted the Council Regulation 343/2003, the Council Directive 2004/83/EC and the Council Directive 2005/85/EC. On the contrary, Denmark was more resistant to all of these measures, and did not want to participate in any of them, meaning that its national law provisions would still apply in these areas. As for the Council Directive on family reunion, none of the above mentioned countries, wanted to take part in its adoption.

## 2.2 Conclusion

Going back to the question we tried to answer in this chapter, *Is there a European refugee and asylum law?*, we can draw the conclusion that while the majority of Member States have adopted the European *acquis* on refugee and asylum matters, others have been more reluctant to the harmonization of the European asylum system and preferred to guide themselves by their national law, when dealing with refugees, asylum seekers, migrants, displaced persons or people in need of international protection. Moreover, asylum and policies in the area of freedom, security and justice, are qualified as shared competences between the Union and the Member States, meaning that Member States have the right to “exercise their competence to the extent that the Union has not exercised its competence” or “Member States shall again exercise their competence to the extent that the Union has decided to cease existing its competence”<sup>121</sup>. In other words, even if the Union has adopted a series of measures on the topic of asylum, in the areas where it did not do so, the Member States have the right to take the appropriate measures on their own.

By incorporating the topic of asylum in the major European Treaties and by taking a series of measures towards the establishment of a Common European Asylum System, we may certify that a European refugee and asylum law is undoubtedly, in the making.

Furthermore, this European refugee and asylum law should be built on the main purposes and principles of the European Union, which in the area of asylum reflect two tendencies: on one hand, the European Union has to protect the asylum seekers, according to its international commitments in relation to refugees, human rights and asylum, and on the other hand, it has to make sure that the flows of migrants do not affect the peace and security inside its borders. These two tendencies were best illustrated at the Tampere European Council, which aimed at creating a Union of Freedom, Security and Justice: "the aim is an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity".

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<sup>121</sup> Article 2(2) of the *Consolidated version of the Treaty on the Functioning of the European Union*.

## Chapter III

# The principle of non-refoulement under EU law

“We cannot accept *refoulement*, we cannot accept that people’s lives are put at risk. And we hope for strong messages from the European Union on this.”

António Guterres, United Nations High Commissioner for Refugees)<sup>122</sup>

Mr. Mahmoud Mohammed Said is an Eritrean national who fought in the war against Ethiopia from 1998 to 2000. When the war ended, the commanders accused some of the soldiers of not fighting well, including Mr. Said. In response to this accusation, Mr. Said had the courage of voicing criticism against this practice of blaming soldiers for bad performance during the war. For this reason, he has been followed by army authorities and then detained in an underground cell for five months. Mr. Said managed to escape to Sudan and fled to Belgium, from where he took the train to the Netherlands. After arriving in the Netherlands, he applied for asylum. However, his application for asylum has been rejected due to the lack of documents that could establish his identity, nationality and the plausibility of his statements and a decision has been taken for his expulsion to Eritrea. Mr. Said declared that he would be exposed to torture and inhuman or degrading treatment if returned to Eritrea, which would be contrary to Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms. After examining the case, the European Court of Human Rights, taking into account information provided by Amnesty International, held that there would indeed be a breach of Article 3, if he were to be expelled to Eritrea<sup>123</sup>.

We have chosen to discuss this judgement because it deals with the protection against expulsion/refoulement<sup>124</sup> of an asylum seeker under Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In fact, this Article stands as the legal basis for the principle of non-refoulement under European law. Breach of Article 3 – prohibition of torture, inhuman or degrading treatment - may constitute a violation of the international principle of non-refoulement, a fundamental principle in international customary law.

But what is the principle of non-refoulement and how is it protected under international and European law?

The principle of non-refoulement can be defined as the prohibition to expel or return a person to a place where he could face persecution, torture or inhuman treatment. The legal basis for this principle is Article 33 of the 1951 Refugee Convention and Article 3 of the UN Convention against Torture, under international law and Article 3 of the European Convention on Human Rights, under European law.

In this chapter, we will explore the application of the principle of non-refoulement in International and then European law, to see how these two approaches have evolved and how the Member States of the European Union respect the prohibition of expulsion or refoulement of asylum seekers and refugees.

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<sup>122</sup>Remarks by Mr. António Guterres, United Nations High Commissioner for Refugees, on the occasion of the European Union Council of Ministers of Justice and Home Affairs, Luxembourg, 12 October 2005, available at < <http://www.unhcr.org/435612ec4.html> > [accessed on 23 October 2010].

<sup>123</sup> See *Said v. The Netherlands*, 2345/02 Council of Europe, European Court of Human Rights, 5 July 2005, available at < <http://www.unhcr.org/refworld/docid/42ce6edf4.html> > [accessed on 24 October 2010].

<sup>124</sup> See the judgement of the European Court of Human Rights, *Cruz Varas and Other v. Sweden*, where the Court establishes that both expulsion and extradition may give rise to an issue under Article 3 ECHR (recitals 69 and 70).

### 3.1 Non-refoulement as a fundamental principle in international law

“Refugee law imposes a clear and firm obligation on States: under the principle of non-refoulement no refugee should be returned to any country where he or she is likely to face persecution. This is the cornerstone of the regime of international protection of refugees”<sup>125</sup>. Accordingly, the principle of non-refoulement was internationally recognized as one of the rights to which refugees are entitled. But what about asylum seekers, are they also protected by the principle of non-refoulement? Before being granted refugee status, a person is first and asylum seeker who turns to the asylum process to receive protection. After having his asylum application examined, this person may be granted either refugee status if he qualifies as a refugee under the 1951 Refugee Convention definition or subsidiary protection status if he doesn’t qualify as a refugee, but if returned to his country of nationality or former habitual residence could face serious persecution.

A binding principle in international customary law, the principle of non-refoulement compels all States, even those that are not party to the 1951 Refugee Convention, to respect it from the very moment a person claims protection. “It is also commonly held that this principle applies independently of any formal determination of refugee status by a State. Rather, the principle of non-refoulement applies as soon as an asylum seeker claims protection”<sup>126</sup>. Then, the answer to the above question whether an asylum seeker may benefit from the right to non-refoulement, should be affirmative. If the right to non-refoulement must be respected by States from the moment a person claims protection or applies from asylum, then an asylum seeker as well as a refugee or a person in need of protection should be entitled to this right.

Etymologically, the word *refoulement* comes from the French word “*refouler*” (*return*), meaning “retourner vers l’endroit d’où l’on était parti”<sup>127</sup> or forcing a person to return to the place where he had left from. The idea of non-refoulement is relatively new, and in the 19<sup>th</sup> century could be associated with the State practices to protect those fleeing despotic governments such as the Russian or the Ottoman Empires<sup>128</sup>.

References in international law about non-refoulement first emerge during the inter-war period. In 1933 the League of Nations adopted the Convention relating to the International Status of Refugees, containing an explicit reference to non-refoulement at Article 3:

“Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement) refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order.

It undertakes in any case not to refuse entry to refugees at the frontiers of their countries of origin.

It reserves the right to apply such internal measures as it may deem necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorisation and visas permitting them to proceed to another country”<sup>129</sup>.

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<sup>125</sup> Reinhard Marx, “Non-refoulement, Access to Procedure and Responsibility for Determining Refugee Claims” in Selina Goulbourne, *Law and Migration*, Edward Elgar Publishing, Cheltenham, 1998, p. 96.

<sup>126</sup> *Ibidem*, p.96.

<sup>127</sup> *Dictionnaire de l’Académie Française*, Cinquième édition, Tome premier A-K, Dupont, Paris, 1832, p.447, available at <[http://books.google.ch/books?id=uao\\_AAAAcAAJ&printsec=frontcover&hl=en&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](http://books.google.ch/books?id=uao_AAAAcAAJ&printsec=frontcover&hl=en&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false)>, [accessed on 23 October 2010].

<sup>128</sup> Guy S. Goodwin-Gill, *The Refugee in International Law*, Second Edition, Clarendon Press, Oxford, 1996, pp.117-118.

<sup>129</sup> Article 3 of the League of Nations, *Convention Relating to the International Status of Refugees*, 28 October 1933, Treaty Series Vol. CLIX No.3663, available at <<http://www.unhcr.org/refworld/docid/3dd8cf374.html>>, [accessed on 23 October 2010].

The initial signatories of this Convention were Belgium, Bulgaria, Egypt, France and Norway, to which Czechoslovakia, Denmark, Italy Great Britain and Northern Ireland later adhered<sup>130</sup>. The reason why this Convention was adopted by the League of Nations in the aftermath of the First World War was to assist the Russian, Armenian and assimilated refugees, fleeing the Russian Civil War (1917-1923)<sup>131</sup>.

By virtue of this Convention, non-refoulement would become a fundamental principle in international law. The article applies to refugees who “have been authorised to reside there regularly”, meaning that only after receiving the authorisation to stay in that country, the refugee could be entitled to the right to non-refoulement. Two exceptions to the right to non-refoulement were formulated by Article 3 of the 1933 Convention relating to the International Status of Refugees: national security and public order. Accordingly if the refugees became a threat to the security of the host country and the local population, they could be expelled, only after receiving “the necessary authorisation and visas permitting them to proceed to another country”. The second paragraph of Article 3 brings up a very interesting point that refugees who wanted to go back to their countries of origins should not be refused entry. Among the Contracting Parties, only the United Kingdom did not accept the provisions set out in the second paragraph<sup>132</sup>.

The necessity of creating an international refugee regime during the inter-war period came as a response to the great number of refugees fleeing the Russian Revolution, Germany, Italy, Spain or the Ottoman Empire: “between 1919 and 1939 violent conflicts and political turmoil uprooted over five million people in Europe alone, including Russians, Greeks, Turks, Armenians, Jews and Spanish Republicans”<sup>133</sup>.

However, the Second World War produced even a greater number of refugees: “in May 1945, over 40 million people were estimated to be displaced in Europe”<sup>134</sup>. This situation led to the necessity of improving the refugee regime and readdressing the issues raised by the League of Nations’ instruments on the protection of refugees. It was in this context, that the 1951 Convention relating to the Status of Refugees has been created. The principle of non-refoulement was formulated at Article 33, *Prohibition of Expulsion or Return (“Refoulement”)* stating that:

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country<sup>135</sup>.

### 3.1.1 Interpretation of Article 33 of the 1951 Refugee Convention

Article 33 of the 1951 Refugee Convention is the primary source of definition of the principle of non-refoulement. It comprises two paragraphs: the first one outlines the prohibition of refoulement, while the second contains the exceptions to the principle, such as threat to the security or the community of the host country. In an attempt to read between the lines of the first paragraph we may acknowledge that the Contracting States i.e the parties to the Convention, are not allowed to expel or return a refugee to another country where he may suffer persecution. Just like the title suggests, both refoulement and expulsion fall within the scope of Article 33 (1).

<sup>130</sup> See Appendix of the *Convention Relating to the International Status of Refugees*.

<sup>131</sup> See Article 1 of the *Convention Relating to the International Status of Refugees*.

<sup>132</sup> Guy S. Goodwin-Gill, *The Refugee in International Law*, p. 118.

<sup>133</sup> UNHCR, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action*, Chapter 1: The early years, 1 January 2000, p.15, available at < <http://www.unhcr.org/3ebf9ba80.html>>, [accessed on 24 October 2010].

<sup>134</sup> *Ibidem*, p.13.

<sup>135</sup> Article 33 of the *Convention relating to the Status of Refugees*.

Who is protected from non-refoulement?

The Article clearly states that “no Contracting State shall expel or return a *refugee*”. One may believe that Article 33 only applies to those who have been already recognized as refugees. However, the term *refugee* in this context, refers to the definition formulated by Article 1A (2) of the same Convention, describing a refugee as someone who “owing to a well-founded fear of being persecuted” leaves his home and is unable to return. Thus, a refugee is a person fleeing persecution, without necessarily having a legal status. The same interpretation is given by UNHCR in the chapter, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, taken from *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, stating that: “the principle of non-refoulement will avail such persons irrespective of whether or not they have been formally recognized as refugees. Non-refoulement under Article 33 (1) of the 1951 Convention will therefore protect both refugees and asylum seekers”<sup>136</sup>. Any person, who may run the risk of persecution in a country, cannot be sent to that country in view of the principle of non-refoulement.

Forms of refoulement

According to the interpretation given by UNHCR to Article 33 of the 1951 Geneva Convention, the expression, *in any manner whatsoever*, allows for the extension of the principle of non-refoulement to other forms of removal such as extradition, expulsion, deportation, rejection or even refusal of entry into an international zone.

Where is the principle of non-refoulement prohibited and for what reasons?

Furthermore, the expression *to the frontiers of territories* contains a reference to the places where the principle of non-refoulement is prohibited. These places may not only include the country of origin of the applicant, but also any country where he may be transferred or expelled. If transferred to any of these countries, the applicant may face threat to life or freedom, which could be perceived as persecution. Therefore, the expression, *where his life or freedom would be threatened* “must therefore be read to encompass territories in respect of which a refugee or asylum seeker has a well-founded fear of being persecuted”<sup>137</sup>, or where he may be persecuted, according to Article 1A (2) defining a refugee. The same reasons for persecution, defined in Article 1A (2) have been formulated under Article 33 (1) for the threat to life or freedom, namely *on account of race, religion, nationality, membership of a particular social group or political opinion*.  
*Exceptions to the principle of non-refoulement*

As for the exceptions to the principle of non-refoulement, *danger to the security of the country or to the community of that country*, they have been formulated following the same patterns as the 1933 Convention, the first to bring into discussion the issue of national security, in relation to the rights of refugees and asylum seekers. Nevertheless, in its *Note on the Principle of Non-Refoulement*, UNHCR clarifies that criminal offences may not always be threats to national security. As for the *particular serious crime* exception to apply, in UNHCR's view, “the crime itself must be of a very grave nature”<sup>138</sup>. In *Chahal v. The United Kingdom* and *Abmed v. Austria*, discussed in the case study, we will examine these exceptions to the principle of non-refoulement in order to see if a person can be expelled (“refouler”) just because he committed a serious crime or he poses a threat to the national security. These judgements will show that even if a person has committed a serious crime or poses a threat to the national security, he cannot be expelled in a country where he may face treatment contrary to Article 3 ECHR.

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<sup>136</sup> Sir Elihu Lauterpacht, Daniel Bethlehem, “The scope and content of the principle of non-refoulement: Opinion” in Erika Feller, Volker Türk, Frances Nicholson, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press, 2003, p.118, available at < <http://www.unhcr.org/refworld/docid/470a33af0.html> > [accessed on 24 October 2010].

<sup>137</sup> *Ibidem*, p.123.

<sup>138</sup> UNHCR, *UNHCR Note on the Principle of Non-Refoulement*, Prepared for the EU Seminar on the Implementation of the 1995 EU Resolution on Minimum Guarantees for Asylum Procedures, Luxembourg, November 1997, available at: < <http://www.unhcr.org/refworld/docid/438c6d972.html> > [accessed on 25 October 2010].

### 3.1.2 Torture and non-refoulement

The principle of non-refoulement was also codified in various Conventions and assimilated with the notions of torture, inhuman or degrading treatment, punishment, or other forms of persecution that could be seen as reasons for not expelling or returning a refugee to a country where he may face such treatments. Under the international law, non-refoulement was thus codified in the Article 3 of the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights<sup>139</sup>.

According to this article, if a person is likely to face torture in another country, then he cannot be expelled, returned or extradited to that country. But how is torture defined? How can we determine if there is a risk of torture in another country? The article doesn't offer an answer to these questions, but only notes that host countries should not expel or return a person to a country where there is a *pattern of gross, flagrant or mass violations of human rights*. Consequently, if a country massively violates the human rights of its citizens, then it may very well torture a person that was expelled or returned.

Under European Law, non-refoulement was associated with torture on the basis of Article 3 of the European Convention on Human Rights. Various interpretations of the European Court on Human Rights on Article 3 have made it relevant for cases of extradition (see *Soering v. the United Kingdom* judgement) or expulsion (see *Cruz Varas and Others v Sweden, Vilvarajah and Others v. The United Kingdom*), both forms of refoulement.

### 3.1.3 Non-refoulement under regional refugee law instruments

Just like the definition of a refugee, the principle of non-refoulement can also be found in various regional instruments, such as the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa, the Cartagena Declaration on Refugees or the American Human Rights Convention. Regarding the OAU Convention, the principle of non-refoulement was set out at Article II (3): "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraph 1 and 2"<sup>140</sup>. The reasons set out in Article I (1 and 2), defining the term "refugee", comprise any forms of persecution, external aggression, occupation, foreign domination and other events disturbing public order. In contrast with Geneva's Convention on Refugees, the OAU Convention does not indicate any exceptions to the principle of non-refoulement.

The Cartagena Declaration, also contains a reference to the principle of non-refoulement, stating at paragraph 5 (Part III) the importance of the principle of non-refoulement in international law: "to reiterate the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. The principle is imperative in regard to refugees and in the present state of the international law should be acknowledged and observed as a rule of jus cogens"<sup>141</sup>. Even if it strongly reaffirms the fundamental nature of the principle in international law, the declaration does not define "non-refoulement", but only extends its

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<sup>139</sup> Article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Adopted by General Assembly resolution 39/46 of 10 December 1984, available at <<http://www2.ohchr.org/english/law/cat.htm>> [accessed on 25 October 2010].

<sup>140</sup> Article II (3) of the *Convention Governing the Specific Aspects of Refugee Problems in Africa*.

<sup>141</sup> Part 3, paragraph 5 of the *Cartagena Declaration on Refugees*.



application to prohibition of rejection at the frontier. In other words, according to the principle of non-refoulement as set out in the Cartagena Declaration, a person cannot be rejected at the frontier of a country, if he is at risk of facing persecution, torture or any other threats owing to this rejection.

The right to non-refoulement was also mentioned in the American Convention on Human Rights, at Article 22 (8): "in no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinion". As a matter of fact, this is only a reiteration of Article 33 (1) of the UN Refugee Convention.

In conclusion, even if the principle of non-refoulement has been formulated under different forms in the aforementioned Conventions, its substance has remained the same. Hence, no person can be expelled or returned to a country where he may face serious persecution, threats to life or freedom, or where he may be subjected to torture, punishment, inhuman or degrading treatment. But for reasons, such as public order or national security, the principle of non-refoulement may not apply, and the person concerned may be sent to a "safe third country" in which there is no risk of persecution or torture.

### 3.1.4 Non-refoulement as a peremptory norm of general international law

In its conclusions No.6 (XXVIII) - 1977, the Executive Committee of UNHCR recognizes the nature of the principle of non-refoulement as a fundamental principle in international law, accepted by all States: "recalling that the fundamental humanitarian principle of non-refoulement has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States"<sup>142</sup>. In other words, UNHCR describes non-refoulement as a *peremptory norm of general international law* ("*jus cogens*"), i.e. a principle that should be respected by all governments, including the EU Member States. According to Article 53 of the 1969 Vienna Convention on the Law of Treaties, a peremptory norm of general international law "is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"<sup>143</sup>. Furthermore, Article 64 stipulates that "if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates"<sup>144</sup>, meaning that a peremptory norm prevails over treaty provisions.

On the breach of a State obligation under customary international law, the International Court of Justice has noted in the *Nicaragua v. the United States* (1984) case that: "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule"<sup>145</sup>. In other words, the Court acknowledged that States should not act against a peremptory norm of international law. Moreover, Jean Allain, in the *Insisting on the*

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<sup>142</sup> UNHCR, EXCOM, *Non-Refoulement*, Conclusions No.6 (XXVIII), 1977, available at: <[http://www.en.refugeelawreader.org/index.php?option=com\\_docman&task=doc\\_view&lang=en&gid=123&ml=5&m1t=system&tmpl=component](http://www.en.refugeelawreader.org/index.php?option=com_docman&task=doc_view&lang=en&gid=123&ml=5&m1t=system&tmpl=component)>, [accessed on 31 October 2010].

<sup>143</sup> Article 53 of the United Nations, *Vienna Convention on the Law of Treaties*, 1969, Treaty Series, vol.1155, p.331, available at <[http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)>, [accessed on 30 October 2010].

<sup>144</sup> Article 64 of the *Vienna Convention on the Law of Treaties*.

<sup>145</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, International Court of Justice, Judgement of 27 June 1986, p. 98, para.186, available at: <<http://www.icj-cij.org/docket/files/70/6503.pdf>> [accessed on 21 December 2010].

*Jus Cogens Nature of Non-refoulement*, reaches the conclusion that not only States, but also a collection of States forming an intergovernmental organization could violate a peremptory norm<sup>146</sup>.

The jus cogens nature of non-refoulement was also recognized by the General Assembly resolution A/51/614, calling upon States “to respect scrupulously the fundamental principle of non-refoulement, which is not subject to derogation”<sup>147</sup>.

Not only the principle of non-refoulement, but also the prohibition of torture has become a peremptory norm: “the prohibition of torture is also part of customary international law, which has attained the rank of a peremptory norm of international law or jus cogens. It includes, as a fundamental and inherent component, the prohibition of refoulement to a risk of torture, and thus imposes an absolute ban on any form of forcible return to a danger of torture which is binding on all States, including those which have not become party to the relevant instruments”<sup>148</sup>. This means that States, either parties or not to the legal instruments prohibiting torture and refoulement, have to protect people in danger of being sent to places where they may be subjected to torture. This obligation arises from the jus cogens nature of non-refoulement, as well as the prohibition of torture. The prohibition of refoulement of a person facing a real risk of torture or ill-treatment in violation of Article 3 ECHR has been affirmed by the ECtHR in the *Chahal v. the United Kingdom* judgement.

### 3.2 The Council of Europe and the principle of non-refoulement

The link between non-refoulement and the prohibition of torture, found at Article 3 of the UN Convention against Torture, was also codified under European law at Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, noting that: “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”<sup>149</sup>. Even if there is no specific mention to non-refoulement in this Article, the European Court of Human Rights has interpreted Article 3 to include the prohibition of refoulement.

The principle of non-refoulement was first discussed by the European Court of Human Rights in *Soering v. the United Kingdom* judgement. The applicant, Jens Soering, was a German national who had lived in the United States since the age of eleven. At university he fell in love with Elizabeth Haysom, a Canadian national. Because Elizabeth’s parents were against their relationship, Soering together with his fiancée took the decision to kill her parents. To escape punishment they fled to the United Kingdom, where they were later arrested for cheque fraud. Having admitted the killings, the United States requested their extradition. Elizabeth was sent to the US and was sentenced to 90 years imprisonment. Fearing he would be sentenced to the death penalty, Mr. Soering claimed there would be a violation of Article 3 ECHR if he were extradited to the United States. Even if Mr. Soering was not an asylum seeker in Britain, but a German citizen being detained in the United Kingdom on murder charges, this case remains important for the analysis of the applicability of article 3 in extradition cases. In this regard, the Court noted that “the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture

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<sup>146</sup> Jean Allain, “Insisting on the Jus Cogens Nature of Non-refoulement” in Von Joanne van Selm, *The Refugee Convention at Fifty: a view from forced migration studies*, Lexington Book, 2003, p. 86.

<sup>147</sup> General Assembly, *Resolution adopted by the General Assembly on the report of the Third Committee, A/51/614*, 12 February 1997, para.2, available at: <<http://www.un.org/documents/ga/res/51/ares51-75.htm>> [accessed on 21 December 2010].

<sup>148</sup> UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, Geneva, 26 January 2007, p.11, available at: <<http://www.unhcr.org/refworld/pdfid/45f17a1a4.pdf>>, [accessed on 30 October 2010].

<sup>149</sup> Article 3 of the Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No.11 and No.14*, Rome, 4 November 1950, available at <<http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>>, [accessed on 30 October 2010] (hereinafter *Convention for the Protection of Human Rights and Fundamental Freedoms*).

or to inhuman or degrading treatment or punishment in the requesting country”<sup>150</sup>. The idea developed in the *Soering* case is that the Contracting States have the responsibility of protecting a person from extradition if he may face inhuman treatment or punishment in a third country, irrespective of his conduct. Furthermore, the Court had to examine if the applicant’s extradition to the United States would expose him to the death penalty and consequently to inhuman and degrading treatment or punishment. On this issue, the Court concluded that “having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant’s extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3”<sup>151</sup>. The Contracting States are thus, responsible for any ill-treatment committed against a person as a result of his extradition to another State.

There have been many judgements of the European Court of Human Rights on the principle of non-refoulement (covering also expulsion cases, not only extradition cases), but we will discuss the most important ones in the following chapter on the Role of the ECJ and ECtHR in the development and application of the right to asylum and the principle of non-refoulement among EU Member States.

### 3.3 How is the principle of non-refoulement respected under EU law?

“Our asylum policy is our opportunity to stand up for and demonstrate and in the most tangible way our values of human dignity and collective solidarity. I am therefore committed to developing Europe into a single area of protection for those fleeing persecution and injustice. We must develop a common policy on temporary protection and asylum based on solidarity, predictability and shared responsibility. Europe must be able to offer protection for those most in need, in compliance with the Geneva Convention and the principle of non-refoulement”<sup>152</sup>. In her opening remarks at the European Parliament Hearing in the Committee on Civil Liberties, Justice and Home Affairs, the Commissioner designate for Home Affairs, Cecilia Malmström recalled the importance of creating a Common European Asylum System that should allow those in need of protection to benefit from a coherent asylum system within the European Union, to receive legal status such as status of asylum or subsidiary and temporary protection, as well as to benefit from the right to non-refoulement.

The first reference to the principle of non-refoulement dates back to the Tampere European Council of 15 and 16 October 1999, noting at paragraph 13 that: “the European Council reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum. It has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement”<sup>153</sup>. Nevertheless, the Tampere European Council is not defining non-refoulement, but just affirming that EU Member States should comply with their international obligations, including the prohibition of refoulement, recognized as a peremptory norm. This may result from the language used in the above quotation, application of the Geneva Convention, [...] maintaining the principle of non-refoulement, meaning that non-refoulement was universally recognized by all States.

This idea that Member States should comply with their international obligations in relation to non-refoulement, has been reinforced by the *Council Directive 2004/83/EC* also called the *Qualification Directive*. At its Article 21, Protection from refoulement, the EU directive states:

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<sup>150</sup> See Recital 91 of *Soering v. the United Kingdom*, 1/1989/161/217, Council of Europe, European Court of Human Rights, 7 July 1989, available at: < <http://www.unhcr.org/refworld/docid/3ae6b6fec.html> >, [accessed on 31 October 2010] (hereinafter *Soering v. the United Kingdom*).

<sup>151</sup> See Paragraph 111 of *Soering v. the United Kingdom*.

<sup>152</sup> Cecilia Malmström, *Opening remarks at the European Parliament Hearing in the Committee on Civil Liberties, Justice and Home Affairs (LIBE)*, Strasbourg, 19 January 2010, p.3, available at: <[http://ec.europa.eu/commission\\_2010-2014/malmstrom/archive/malmstrom\\_introduction\\_en.pdf](http://ec.europa.eu/commission_2010-2014/malmstrom/archive/malmstrom_introduction_en.pdf)>, [accessed on 30 October 2010].

<sup>153</sup> Paragraph 13 of the *Tampere European Council*.

“1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:

(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or

(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State”<sup>154</sup>.

The first paragraph of this article may be seen as a reference to the definition of the principle of non-refoulement, found in various international treaties, like the UN Refugee Convention or the UN Convention against Torture. As for the second paragraph, it explicitly notes the two exceptions to the principle of non-refoulement: national security and particularly serious crime, similarly formulated at Article 33 of the UN Refugee Convention.

Article 78 of the Consolidated version of the Treaty on the Functioning of the European Union, as amended by the Treaty of Lisbon, invites Member States to develop a Common European Asylum System, “ensuring compliance with the principle of non-refoulement”<sup>155</sup>. Just like the Tampere European Council, the Treaty of Lisbon quotes the principle of non-refoulement without defining it.

Therefore, the ECtHR jurisdiction and its interpretation of article 3 of the Council of Europe’s Convention on Human Rights, in relation with the principle of non-refoulement, has become relevant under EU law. As we have already seen, the principle of non-refoulement is a fundamental principle in international law, thus universally accepted by all States, including EU Member States. Moreover, EU Member States are both parties to international instruments on human rights and the protection of refugees and are also members of the Council of Europe. This means that any development on the principle of non-refoulement under international law, including the Council of Europe’s law, should be implemented and respected under EU law, as well.

### 3.3.1 *Subsidiary protection and the principle of non-refoulement*

As we have already noted in the previous chapters, when a person applies for asylum he may be entitled to either refugee status, if he qualifies as a refugee according to the definition found in the 1951 Geneva Convention, or subsidiary protection status, if he does not qualify as a refugee but, if returned to his home country, he could run the risk of suffering serious harm, including torture, inhuman or degrading treatment and punishment. Why are States unable to return a person who does not qualify as a refugee but who may face torture or ill-treatment in another country? This incapacity to return a person on such conditions, finds its roots in the obligation of States to comply with their international obligations, including the prohibition of refoulement. Due to its nature as a peremptory norm of international law, the principle of non-refoulement must be respected by all States from the moment a person crosses their borders. This means, that the right to non-refoulement is one of the rights to which asylum seekers are entitled to.

The great advantage of subsidiary protection status is that it does not eliminate refugees, but creates new categories of unprotected people<sup>156</sup>. Even if, in some cases (e.g. if he has committed a crime against peace, a serious crime, acts contrary to the purposes and principle of the United Nations or if he

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<sup>154</sup> Article 21 of the *Council Directive 2004/83/EC*.

<sup>155</sup> See Article 78 of the *Consolidated version of the Treaty on the Functioning of the European Union*.

<sup>156</sup> Jane McAdam, “The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime” in *International Journal of Refugee Law*, 2005, 17 (3), pp.461-516, available at:

<<http://ijrl.oxfordjournals.org/content/17/3/461.full.pdf+html>> [accessed on 31 December 2010].

constitutes a danger to the community or the security of the Member State<sup>157</sup>) a person is excluded from subsidiary protection status, he should still be protected from refoulement to a country where he could be subjected to torture or ill-treatment (e.g. *Chahal v. The United Kingdom* and *Abmed v. Austria*, discussed in the following chapter).

The same reasoning applies for the temporary protection status. The difference between subsidiary and temporary protection is that the former refers to individual applications, while the latter is relevant for mass influxes of people.

The link between non-refoulement and temporary protection was formulated, under EU law, at Article 3 of the Council Directive 2001/55/EC: “Member States shall apply temporary protection with the respect for human rights and fundamental freedoms and their obligations regarding non-refoulement”<sup>158</sup>. Whether dealing with mass influxes of people (temporary protection) or individuals (subsidiary protection), Member States should respect the principle of non-refoulement. In its comments on the Council Directive 2001/55/EC, UNHCR noted that the principle of non-refoulement should also include non-rejection at the frontier<sup>159</sup>. What is more, article 6 of the same directive states that a Member State may return an applicant to its country of origin only after making sure that the situation in that country has highly improved and that there is no risk of torture, inhuman or degrading treatment and punishment<sup>160</sup>.

Both subsidiary and temporary protection are alternatives to the 1951 Refugee Convention and represent a method used by Member States to grant protection for a limited period of time, until the situation in the country of origin or former habitual residence has changed, and thus avoid that the applicants concerned don't ask for permanent residence permits and become a burden for the host country.

### 3.3.2 *Is the European Union endangering the principle of non-refoulement?*

Besides the subsidiary and temporary protection status that are often used to avoid the permanent residence of applicants in the Member State concerned, another way of undermining the principle of non-refoulement is *the safe third country* concept. This is used under EU law, as a way “to prevent asylum seekers from shopping for asylum, that is, being denied in one country, and then trying again in another”<sup>161</sup>. The safe third country rule has been a method used by European States to reduce the number of asylum seekers receiving asylum status in the European Union by sending them back to countries where they have spent time before arriving in the EU.

*The London Resolution on a Harmonized Approach to Questions concerning Host Third Countries (1992)*, designates a host third country as a country where the life and freedom of the applicant are not threatened, where he is not exposed to torture, inhuman or degrading treatment, where he is protected from refoulement or where he has already been granted protection<sup>162</sup>. “If two or more countries fulfil the above conditions, Member States may expel the asylum applicant to one of those third countries. Member States will take into account, on the basis in particular of the information available from the UNHCR, known practice in the third countries, especially with regard to *the principle of non-refoulement before considering sending asylum*

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<sup>157</sup> See Article 17 of the *Council Directive 2004/83/EC* highlighting the subsidiary protection exclusion clauses.

<sup>158</sup> See Article 3, paragraph 2 of the *Council Directive 2001/55/EC*.

<sup>159</sup> UNHCR, *UNHCR Annotated Comments on Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof*, 19 May 2003, p.6, available at < <http://www.unhcr.org/refworld/docid/3ecdeebc4.html> > [accessed on 31 October 2010].

<sup>160</sup> See Article 6 of the *Council Directive 2001/55/EC*.

<sup>161</sup> Matthew J. Gibney, Randall Hansen, *Immigration and asylum: from 1900 to the present, Volume 1*, ABC-CLIO, 2005, p.549.

<sup>162</sup> See paragraph 2 (a,b,c,d) of the *Council Resolution of 30 November 1992 on a Harmonized Approach to Questions concerning Host Third Countries (“London Resolution”)*.

applicants to them"<sup>163</sup>. Therefore a requirement for a country to be considered safe to send an asylum application is its respect towards the principle of non-refoulement. The London Resolution on Host Third Countries does not use the word *safe*, but replaces it with *host*. Even if the language is different, the idea behind the definition of a host third country and a safe third country is the same.

The safe third country concept, using the word *safe*, was defined under EU law by the *Council Directive 2005/85/EC*. In comparison to the London Resolution on Host Third Countries, the 2005 directive adds to the definition of a safe third country, the condition of having an asylum system in place: "the possibility exists to request refugee status, and if found to be a refugee, to receive protection in accordance with the Geneva Convention"<sup>164</sup>. In sum, we can designate a country as being safe if it complies with the 1951 Geneva Convention, including the refugee definition and the principle of non-refoulement, with the Convention against Torture and with other relevant human rights instruments.

The directive also invites the Council to adopt a common list of third countries, considered safe only if they meet the following conditions:

- "a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;
- b) it has in place an asylum procedure prescribed by law;
- c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies."<sup>165</sup>

If we were to apply this definition to EU Member States we could say that all of them fulfil the required conditions and are *safe third countries*.

Another concept, developed under EU law is the *safe country of origin* concept. The reasoning behind this concept, is that any person coming from a safe third country who tries to apply for asylum in another country, will have his application rejected ("unfounded application") on the grounds that he is coming from a *safe country of origin*, where there is no serious risk of persecution.

The problem with safe third countries and safe countries of origins is that they are presumed as *safe*, in theory, but they may not truly be *safe*, in practice. Consequently, there is a great possibility that asylum seekers are sent to "safe" third country, where they may suffer persecution. For this reason, we are interested in finding out whether EU countries, by using these practices, are violating the fundamental principle of non-refoulement.

The concept of *first country of asylum* is also worth mentioning. The idea behind this concept is that if an asylum seeker first applies for asylum in an EU Member States, but then decides to introduce another asylum application in another Member State, either because the previous application has been rejected or for any other reason, then, he will be sent back to the first country of asylum to have his application examined. This concept is closely related to the issues raised by the Dublin Convention, determining the State responsible for examining an asylum application.

A good example dealing with these issues around the safe third country concept, is the *T.I v. the United Kingdom* judgement. Concerning the facts, T.I. is a Sri Lankan national, who first came to Germany to claim asylum and to escape the inhuman treatment and torture he suffered in his home country. After examining his application, Germany reached to the conclusion that there were no substantial grounds for believing that he had been tortured or that he had a well-founded fear of persecution and decided to send him to the South of Sri-Lanka, where, compared to the situation in the rest of the country, he would be safe. In Germany's view "the entire presentation of the applicant was a completely fabricated tissue of

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<sup>163</sup> Paragraph 2 of the *Council Resolution of 30 November 1992 on a Harmonized Approach to Questions concerning Host Third Countries* ("London Resolution").

<sup>164</sup> Article 27 (d) of the *Council Directive 2005/85/EC*.

<sup>165</sup> Article 36 (2) of the *Council Directive 2005/85/EC*.

lies"<sup>166</sup>. For all these reasons, a deportation order has been issued in his name. To escape deportation, the asylum seeker decided to flee to Italy and then to the United Kingdom, where he applied for asylum. The United Kingdom, respecting the Dublin regulations regarding the country responsible for examining an asylum application, sent the applicant back to Germany, as it was there that he first lodged his application for asylum. Disagreeing with this decision, the applicant made a complaint against the United Kingdom, saying that his removal was contrary to Article 3 of the European Convention on Human Rights and that if returned to Sri Lanka he could face treatment contrary to this Article, seen also as a breach of the principle of non-refoulement.

The Court had to deal with the issue of sending an applicant to a safe third country, Germany in this case, which was complying with its international obligations on the prohibition of refoulement, but could from its side, remove the applicant to another country where he may face persecution.

The United Kingdom's decision for sending the applicant back to Germany relied not only on the necessity of applying the Dublin Regulations but also on the fact that there was no risk of persecution in Germany as it was fully complying with the European Convention on Human Rights and other international instruments.

However, from the applicant's point of view, both the United Kingdom and Germany have failed to offer him protection against removal. He noted that Germany did not take into account the new materials he submitted regarding his injuries and continued to believe that he was telling lies. He feared that if returned to Germany he would be certainly expelled to Sri Lanka as Germany wouldn't change its initial view regarding his application.

UNHCR also submitted an intervention in this case, questioning the effective application of the Dublin Convention that "was seriously hampered by diverging interpretations by States of the 1951 Convention, in particular concerning the issue of the source of persecution"<sup>167</sup>. And this could lead to a similar situation as the one presented in this case, a person who is sent back to the first country where he applied for asylum may not be granted asylum status there because once rejected it would be difficult to reconsider its application without taking into account the previous application. In UNHCR's view, "a person whose asylum claim has already been rejected in the safe third country will be unable to obtain an effective legal remedy when returned there. Indirect removal in those circumstances could violate the non-refoulement principle"<sup>168</sup>. Thus, there is a possibility that if sent to the safe third country, the principle of non-refoulement might not be respected. The intervention submitted by UNHCR can also be seen as a criticism of the Dublin system, sometimes unable to provide fair and efficient protection (e.g. detention of asylum seekers while determining the Member State responsible for examining their application, procedural delays, family separation etc.).

Taking into consideration, all these arguments, the Court reached to the conclusion "that it is not established that there is a real risk that Germany would expel the applicant to Sri Lanka in breach of Article 3 of the Convention. Consequently, the United Kingdom have not failed in their obligations under this provision by taking the decision to remove the applicant to Germany"<sup>169</sup>. In the Court's view, the United Kingdom did not violate Article 3, nor its European obligations arising from the application of the Dublin Convention. Thus, there was no violation of the principle of non-refoulement in relation with the safe country concept. It would be Germany's final decision to deal with the asylum application and either accept it or reject it. In the latter case, if Germany would take the decision to expel the applicant, we cannot just assume that it would violate the principle of non-refoulement. The applicant could easily be

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<sup>166</sup> See 2 (Asylum proceedings) of *T.I. v. The United Kingdom*, Appl.No.43844/98, Council of Europe, European Court of Human Rights, 7 March 2000, p.3, available at: < <http://www.unhcr.org/refworld/docid/3ae6b6dfc.html> > [accessed on 1 November 2010].

<sup>167</sup> See the intervention submitted by the United Nations High Commissioner for Refugees, *T.I. v. The United Kingdom*, p.14.

<sup>168</sup> *Ibidem*.

<sup>169</sup> See *T.I. v. The United Kingdom*, p.18.

expelled to a country (a safe third country) where he would not face persecution and where he would be protected from refoulement.

The application was therefore rejected by the Court as manifestly ill-founded.

But what would have happened if another country (other than Germany) would have not complied with its legal obligations, including the principle of non-refoulement. Would the Court adopt the same reasoning? If we take Greece as an example, we can see that in a number of cases, it failed to provide adequate protection to asylum seekers, undermining the Dublin regulations. It is assumed, that under the Dublin system, all Member States provide similar protection to people crossing their borders. However, this is not the case in practice. We have taken Greece as an example because there have been many cases when Member States (e.g. Finland or Germany) have suspended the Dublin transfers to Greece, after receiving criticism from the UN, condemning the inhuman detention conditions faced by asylum seekers in Greece<sup>170</sup>. It is most likely that the Court would change its mind, if instead of Germany, an asylum seeker would risk being transferred to Greece, where the principle of non-refoulement might not be respected.

Going back to our question, whether the European Union is endangering the principle of non-refoulement we may say that it has indeed taken some measures to simplify the asylum process (the first country of asylum notion and the rule of determining the Member State responsible for examining and asylum application) on one hand, and to prevent asylum seekers from choosing their destinations and not to make abuse of the European asylum system (safe third country concept), on the other hand. These measures, however, should not be seen as contrary to the principle of non-refoulement. Even if the European States have committed themselves to respect the *jus cogens* nature of non-refoulement, it is often hard to predict if the chain of removals from one safe third country to another will lead the asylum seeker to a country where he could face persecution. If something like this would happen, then the responsibility should be borne by all States that took part in this chain of events.

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<sup>170</sup> Leigh Phillips, *Finland halts migrant transfer to Greece after UN criticism*, available at <<http://euobserver.com/?aid=26016>> [accessed on 31 December 2010].



### 3.4 Conclusion

Under refugee law, the principle of non-refoulement plays an important part. It is the main right to which both refugees and asylum seekers are entitled to. It applies from the very moment a person claims protection and must be respected by all States, whether parties or not to the international refugee instruments. Because of its *jus cogens* nature, the principle of non-refoulement binds States to take measures on protecting people who run the risk of being tortured or ill-treated if returned to their country of nationality or former habitual residence.

On the part of the European Union, the measures of protecting people from torture or ill-treatment comprise the subsidiary and temporary protection status and the safe third country rule. Even if these measures may present an alternative to the protection offered by the 1951 Refugee Convention and may provide a safe shelter inside the European Union for those in need of protection, their inefficient application may endanger the principle of non-refoulement. Both the subsidiary and temporary status provide asylum seekers with a form of protection for a limited period of time. When the circumstances that led the asylum seeker to leave his country change, the Member State that offered him protection may consider it safe to return him to his country of residence, without fully analyzing if his country is indeed safe in practice and not only in theory. If a situation like this arises, the asylum seeker may, thus, be sent back to unsafe countries in breach of his right to non-refoulement.

In conclusion, the greatest challenge for the EU Member States towards the efficient application of the principle of non-refoulement is to take into account reports made by UNHCR or other international and non-governmental organizations before taking the decision of sending a person to another country. The country, to which a person is expelled to, must be safe not only in theory, but also in practice, for the principle of non-refoulement to be fully respected and efficiently applied.

## Chapter IV

### *Case study: The role of the European Court of Justice and the European Court of Human Rights in the development and application of the right to asylum and the principle of non-refoulement among Member States*

“We must take into account the *case-law of the European Courts*, both in Strasbourg and in Luxembourg and the Charter on Fundamental rights. I know that for Member States, it does sometimes represent a real challenge as practice and legislation must be modified in certain cases. But it is the choice also made by the EU, in particular with the Lisbon Treaty. It is particularly relevant for all matters related to the concepts of effective remedies, non-discrimination and protection against *refoulement*”

(Cecilia Malmström, Member of the European Commission responsible for Home Affairs)<sup>171</sup>

The European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) have played an important role in the development of the European refugee and asylum law. It is therefore essential to study the rulings of these two Courts to see how they are coping with different cases relevant to the right to asylum and to the principle of non-refoulement, as well as how they contribute to the harmonization of the European legal systems in the field of asylum.

The European Court of Justice is the judicial authority of the European Union, whose mission is to “ensure that in the interpretation and application of the Treaties the law is observed”<sup>172</sup>. As the harmonization of the European refugee and asylum law is relatively recent, there have been few cases on the ECJ agenda in this area, and they mostly covered the interpretation and application of the Council Directives or their non-transposition within the prescribed period. A lot of cases brought before the Court dealt with the interpretation of the *Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive)*. And this is not surprising knowing that the majority of asylum seekers having their asylum application rejected at the first instance of the asylum procedure or fearing expulsion, request the application of this Directive hoping they will be entitled to either the refugee or subsidiary protection status after a further examination of their claim.

Because the harmonization of the asylum systems throughout Europe is an ongoing process and the few cases of the European Court of Justice do not cover fundamental issues surrounding the refugee and asylum law (e.g. the principle of non-refoulement) we have chosen to dedicate this chapter, not only to the examination of the cases brought before the ECJ, but also before the European Court of Human Rights.

The European Court of Human Rights was established “to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto”<sup>173</sup>. In other words, the ECtHR was constituted as a way to guarantee the application of the rights set forth in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols.

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<sup>171</sup>Cecilia Malmström, *Establishing the Common European Asylum System by 2010 – an ambitious but feasible target*, Ministerial Conference “Quality and Efficiency in the Asylum Process”, Brussels, 14 September 2010, available at < <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/425&type=HTML> > [accessed on 24 November 2010].

<sup>172</sup> Article 19 (1) of the *Consolidated version of the Treaty on European Union*.

<sup>173</sup> Article 19 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*.

Even if the Convention does not contain any explicit reference neither to the right to asylum nor to the principle of non-refoulement, these rights have resulted from the Court's various interpretations of Article 3 (prohibition of torture, inhuman or degrading treatment and punishment).

The rulings of the European Court of Justice analysed in this chapter will be presented chronologically and divided into themes:

1. procedural aspects of asylum law: such as identifying the Member State responsible for examining an asylum application (Dublin II Regulations):  
*Migrationsverket v. Petrosian and Others*
2. substantive aspects of asylum law: such as granting and withdrawing of refugee and subsidiary protection status (Qualification Directive):  
*Elgafaji v. Staatsecretaris van Justitie*  
*Salahadin Abdulla and Others v. Bundesrepublik Deutschland*  
*Bolbol v. Bevándorlási és Állampolgársági Hivatal*  
*Bundesrepublik Deutschland v. B and D*

As for the European Court on Human Rights we will only examine the rulings we consider relevant to asylum law, such as those dealing with:

1. procedural aspects of asylum law: such as the conditions of detention of asylum seekers:  
*Amuur v. France* (ECtHR)  
*S.D. v. Greece* (ECtHR)
2. the principle of non-refoulement under Article 3 ECHR:  
*Soering v. the United Kingdom*  
*Cruz Varas and Others v. Sweden*  
*Vilvarajah and Others v. the United Kingdom*  
*Chahal v. the United Kingdom*  
*Ahmed v. Austria*  
*Saadi v. Italy*

#### **4.1 The asylum acquis and the European Court of Justice**

In the European Union, the right to asylum was laid down at Article 18 in the Charter of Fundamental Rights and it allows those in need of protection to access the asylum system of the European Union and to be granted refugee or subsidiary protection status. Therefore, the rulings of the ECJ on the right to asylum, relate to the transfer of asylum seekers in the State responsible for examining their application, to the conditions for granting and withdrawing refugee and subsidiary protection status, and to the transposition of directives in national law.

##### *4.1.1 Procedural aspects of asylum law: Dublin II Regulations*

The first case examined by the European Court of Justice on the right to asylum, covered the application of the Dublin II Convention establishing the Member State responsible for examining an asylum application. According to this Convention, the asylum seeker must have his application examined by the State where he first applied for asylum. In the *Migrationsverket v. Petrosian and Others*, the applicants of Armenian and Ukrainian nationality, lodged their application for asylum in Sweden, after first having been refused asylum in France. Or the very scope of the Dublin II Convention (Regulation EC No.343/2003) was to ensure that asylum seekers do not shop around for the best destination but have their asylum application examined in one of the Member States of the European Union. This case however, did not deal with the problem of determining the Member State responsible for examining the asylum application,

but with the administrative time limits necessary for the transfer of the applicants to the Member State where they first lodged their application<sup>174</sup>.

#### 4.1.2 Substantive aspects of asylum law: Qualification Directive

Following the *Petrosian* case, the Court discussed a case dealing with the interpretation of Article 15 (c) of the Council Directive 2004/83/EC on the granting of subsidiary protection status to civilians subject to indiscriminate violence in the event of an armed conflict. The *Elgafaji v. Staatssecretaris van Justitie* is the first ruling of the Court on the account of the provisions of the Qualification Directive.

The appellants were both Iraqi nationals who were refused temporary residence permits in the Netherlands. The State Secretary of Justice rejected their application on the grounds that they didn't prove, in their individual circumstances, that they would be exposed to serious harm if returned to their home country. The appellants called for the application of the Council Directive 2004/83/EC as legal basis for being granted residence permits under the subsidiary protection status, even if the Netherlands had not transposed this Directive in its national legislation, prior to this case.

Article 15 of the Council Directive, entitled "Qualification for subsidiary protection", defines *serious harm* that could be faced by a person, if returned to his country of residence, as:

- a) death penalty or execution; or
- b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict<sup>175</sup>.

The first question posed to the Court was to determine whether Article 15(c) corresponded to Article 3 of the European Convention on Human Rights or if it offered supplementary or other type of protection. In that regard, the Court reaches to the conclusion that it is rather Article 15(b) of the Directive which corresponds to Article 3 of the ECHR and that Article 15(c) must not be interpreted in conjunction with Article 3 ECHR<sup>176</sup>. This first question was pertinently posed to the Court, knowing that the Netherlands did not transpose the Directive in its national legislation, and that it examined the Elgafaji situation within the scope of Article 29(1) (b) of the Vw2000, which associated the subsidiary protection status with the protection from torture and inhuman or degrading treatment, derived from Article 3 ECHR.

Therefore, the second question that the Court had to answer was whether Article 15(c) should be read in conjunction with Article 2(e) of the Directive, defining the concept of "person eligible for subsidiary protection". It should be noted from the beginning that Article 2(e) already makes reference to Article 15 in its content. This second question aims at finding out if, serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict (Article 15(c)), amounts to serious harm so that the person concerned be entitled to subsidiary protection status on the basis of Article 2(e). The final conclusion of the Court is that a civilian who faces a high degree of violence in his home country and for that reason, fears of returning there as he may face a real risk of being subject to that threat, may be eligible for subsidiary protection even without adducing evidence that, in his personal circumstances, he is specifically targeted by such a risk<sup>177</sup>. Therefore Article 15(c) is closely linked with Article 2(e) in the qualification of serious harm as one of the reasons for not returning a person to a place where he could suffer such a threat and, thus giving him the right to apply for subsidiary protection status.

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<sup>174</sup> *Migrationsverket v. Petrosian and Others*, Case C-19/08, European Union: European Court of Justice, 29 January 2009, available at <<http://www.unhcr.org/refworld/docid/498964e32.html>> [accessed on 28 November 2010].

<sup>175</sup> Article 15 of the *Council Directive 2004/83/EC*.

<sup>176</sup> See Recital 28 of *Elgafaji v. Staatssecretaris van Justitie*, C-456/07, European Union: European Court of Justice, 17 February 2009, available at: <<http://www.unhcr.org/refworld/docid/499aace52.html>> [accessed on 28 November 2010] (hereinafter *Elgafaji v. Staatssecretaris van Justitie*).

<sup>177</sup> See Recital 43 of *Elgafaji v. Staatssecretaris van Justitie*.

This case is important for the analysis of the conditions required for determining who qualifies for subsidiary protection status. It deals, in particular, with the subsidiary protection status granted to civilians who escape an armed conflict for reasons of indiscriminate violence. In such a circumstance, according to the Court the applicants don't have to provide specific proof to show that they are individually concerned by such a threat. Why? Because they are civilians suffering indiscriminate violence in an armed conflict, violence that directly or indirectly affects them and deprives them of their human rights.

What is more, in *Elgafaji*, the Court also noted that its interpretation of the Qualification Directive on subsidiary protection was fully compatible with the case law of the European Court of Human Rights relating to Article 3 ECHR<sup>178</sup>, and particularly with the *NA v. the United Kingdom* ruling. In this case, the ECtHR had to analyse whether the applicant's expulsion to Sri Lanka would constitute a breach of Article 3 ECHR. The applicant was an ethnic Tamil who had fled from Sri Lanka for reasons of ill-treatment, and claimed asylum the moment he arrived to the United Kingdom. After examining his application, the Home Secretary found that the applicant's fear of ill-treatment was unjustified, mentioning that there was no true evidence that he will be personally ill-treated upon his return. Questioning this decision, the applicant alleged that there would be a violation of Article 2 (right to life) and Article 3 (prohibition of torture, inhuman or degrading treatment and punishment) if returned to Sri Lanka. The Court would thus study the supposed violation of Article 3 by examining the situation in Sri Lanka and the risk to the applicant. Analysing the degrees of violence in Sri Lanka the Court found that there are cumulative factors for believing that if returned to his country of residence, the applicant would be of interest to the Sri Lankan authorities in their efforts to combat the Tigers<sup>179</sup>. The Court concluded by saying that there was indeed a violation of Article 3 ECHR in this case.

There is a link between the *Elgafaji* case and the *NA v. The United Kingdom* judgement in the interpretation provided by the two Courts on the degrees of violence that an applicant could face upon his return in his country of residence. In *Elgafaji*, the ECJ found that where a high degree of indiscriminate violence exists, the applicant does not have to provide individual evidence of showing that he is specifically affected by such violence in order to be protected against forced return to such a place. Thus, in *Elgafaji*, the applicant was granted the right to apply for subsidiary protection in the European Union and not to be expelled to Iraq, where he feared serious harm resulting from the violence existing in his country. In *NA v. The United Kingdom*, the ECtHR acknowledged that there would be a breach of Article 3 ECHR only "in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return"<sup>180</sup>.

Subsequent to *Elgafaji*, other rulings dealt with the interpretation of asylum provisions of the Qualification Directive, based on the 1951 Refugee Convention provisions. These cases are a good example of identifying the connection existing between the European refugee and asylum law and the international law on refugees.

The first of this sequence of cases is the *Salahadin Abdulla and Others v. Bundesrepublik Deutschland* case, dealing with the interpretation of Article 11(1) (e) of the Council Directive 2004/83/EC, on the revocation of refugee status because the initial circumstances which led to the granting of refugee status have ceased to exist, in conjunction with Article 2(e) of the said Directive, defining a refugee. In this case, the Court clearly indicates that the Qualification Directive has been derived from international law and "must for that reason be interpreted in the light of its general scheme and purpose, while respecting the Geneva Convention and the other relevant treaties referred to in point (1) of the first subparagraph of Article 63 EC"<sup>181</sup>. At recital 54, the Court also states that the provisions of the Qualification Directive

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<sup>178</sup> See Recital 44 of *Elgafaji v. Staatssecretaris van Justitie*.

<sup>179</sup> See Recital 147 of *NA v. The United Kingdom*, Application No. 25904/07, Council of Europe: European Court of Human Rights, 17 July 2008, available at: < <http://www.unhcr.org/refworld/docid/487f578b2.html> > [accessed on 29 November 2010] (hereinafter *NA v. The United Kingdom*).

<sup>180</sup> Recital 115 of *NA v. The United Kingdom*.

<sup>181</sup> Recital 53 of *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, European Union: European Court of Justice, 2 March 2010, available at :

must also be interpreted "in a manner which respects the fundamental rights and the principles recognized in particular by the Charter"<sup>182</sup>.

The appellants are Iraqi nationals who fled their home country due to a well-founded fear of persecution and were granted refugee status in Germany. However, after some time, Germany revoked their refugee status as a result of the changed circumstances in Iraq.

On the cessation of refugee status, the Court notes that the change of circumstances, which led to such a decision, must be *significant and non-temporary*<sup>183</sup>. Subsequently, in order to revoke the refugee status, the Member State in question must make sure that in his home country, the former refugee will not be persecuted, that an effective legal system is in place and that he will be protected against any type of persecution. This protection may even be ensured by international organisations or multinational forces present in the State.

If the applicant may prove on the scope of Article 4(4) of the Directive 2004/83/EC that there are still reasons for believing that he may be persecuted if returned to his home country, the Member State which granted him protection would not be able to revoke the refugee status.

What should be noted from this case, is that "the possible cessation of refugee status occurs without prejudice to the right of the person concerned to request the granting of subsidiary protection status"<sup>184</sup>. In other words, a person who was revoked refugee status still has the right to apply for subsidiary protection status, within the system of the Council Directive 2004/83/EC.

On the qualification of third country nationals and stateless persons as refugees a particular case was *Bolbol v. Bevándorlási és Állampolgársági Hivatal* where the Court was asked to provide guidance on the interpretation of the second sentence of Article 12 (1) (a) of the Council Directive 2004/83/EC, regarding the exclusion from refugee status of persons protected by organs or agencies of the United Nations, other than UNHCR. It should be noted from the beginning that Article 12 (1) (a) of the said Directive corresponds to Article 1(D) of the 1951 Refugee Convention, another example showing how the European law has been derived from the international law on refugees.

The applicant in this case, was a stateless person of Palestinian origin, who escaped the Gaza Strip and applied for refugee status in Hungary on the basis of Article 1(D) of the Geneva Convention. In Ms. Bolbol's view she was eligible to apply for refugee status because she has not availed herself of the protection and assistance of UNRWA (United Nations Relief and Works Agency for Palestine Refugees in the Near East) and even if she had done so, if the protection and assistance of such an agency ceased to exist because she was outside its area of operations she should automatically be granted refugee status by any State Member of the 1951 Refugee Convention<sup>185</sup>.

Hungary however, rejected her application for refugee status, stating that she had not fled her country of residence due to a well-founded fear of persecution, but could neither be expelled due to the precarious situation in the Gaza Strip, where she could face serious risk of being tortured or ill-treated.

The Court judged this case on the interpretation of Article 12 (1) (a) of the Council Directive 2004/83/EC in order to find out whether Ms. Bolbol should be excluded from refugee status just because she would be eligible for assistance and protection provided by UNRWA or because she had

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< <http://www.unhcr.org/refworld/docid/4b8e6ea2.html> > [accessed on 28 November 2010] (hereinafter *Salabadin Abdulla and Others v. Bundesrepublik Deutschland*).

<sup>182</sup> See Recital 54 of *Salabadin Abdulla and Others v. Bundesrepublik Deutschland*.

<sup>183</sup> See Recital 76 of *Salabadin Abdulla and Others v. Bundesrepublik Deutschland*.

<sup>184</sup> See Recital 80 of *Salabadin Abdulla and Others v. Bundesrepublik Deutschland*.

<sup>185</sup> See Recital 31 of *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, European Union: European Court of Justice, 17 June 2010, available at < <http://www.unhcr.org/refworld/docid/4c1f62d4.html> > [accessed on 28 November 2010] (hereinafter *Bolbol v. Bevándorlási és Állampolgársági Hivatal*).

already availed herself of UNRWA's assistance and protection<sup>186</sup>. The Court's conclusion is that it is not sufficient for a person to be just eligible for assistance and protection from a UN agency, other than UNHCR to be excluded from refugee protection status. But to be excluded from refugee status, that person should actually avail himself of such a protection or assistance.

What should be noted from this case is that a person who did not receive protection or assistance from a UN agency, other than UNHCR, is still eligible to apply for refugee status within the European Union system.

Another case of the European Court of Justice on the relation between EU law and the international law on refugees is *Bundesrepublik Deutschland v. B and D*, compiling the cases of two Turkish nationals of Kurdish origin who were excluded from refugee status on the basis that they constituted a danger to the community of the host country or committed acts contrary to the purposes of the United Nations. In this case, the Court was asked to provide guidance on the interpretation of Article 12 (2) (b) and (c) of the Council Directive 2004/83/EC, derived from Article 1F of the 1951 Geneva Convention. Article 12 (2) defines two reasons for excluding a person from refugee status: "he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee"<sup>187</sup> or "he or she has been guilty of acts contrary to the purposes and principles of the United Nations"<sup>188</sup>.

Germany referred this case to the Court to find out if B and D could be excluded from refugee status, given that they could otherwise receive protection on the grounds that it would be unsafe for them to return to Turkey. According to the Court, the fact of only being a member of an organisation which committed terrorist acts does not constitute a serious non-political crime or any reason for excluding a person from refugee status<sup>189</sup>.

In this case, the Court also provided an explanation for the introduction of the exclusion clauses in the Qualification Directive: to avoid granting protection to those undeserving it and to prevent that those who have committed serious crimes escape criminal liability<sup>190</sup>.

Another important point to note from this case is that Member States can grant asylum, under their national law, to a person who was excluded from refugee status under Article 12 (2) of the Qualification Directive, "provided that that other kind of protection does not entail a risk of confusion with refugee status within the meaning of the directive"<sup>191</sup>.

## 4.2 The applicability of the European Convention on Human Rights to asylum cases

Contrary to the EU Charter of Fundamental Rights, the European Convention on Human Rights doesn't contain any explicit reference to the right to asylum. In *Lilia, Julia and Eleonora Alimzhanova and Alexjjs Lisikov v. Sweden* the Court held that "the Convention does not guarantee a right to asylum or refugee status but only prohibits the expulsion of persons to a country where they may be subjected to treatment contrary to Article 3"<sup>192</sup>. Even if the applicants can only complain about a matter being regulated by the Convention, a number of case-laws have claimed the applicability of the Convention on asylum situations, like the detention or the expulsion of asylum seekers which will be further examined in this subchapter.

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<sup>186</sup> See Recital 49 of *Bolbol v. Bevándorlási és Állampolgársági Hivatal*.

<sup>187</sup> Article 12 (2) (b) of the *Council Directive 2004/83/EC*.

<sup>188</sup> Article 12 (2) (c) of the *Council Directive 2004/83/EC*.

<sup>189</sup> See Recital 99 of *Bundesrepublik Deutschland v. B and D*.

<sup>190</sup> See Recital 104 of *Bundesrepublik Deutschland v. B and D*.

<sup>191</sup> See Recital 121 of *Bundesrepublik Deutschland v. B and D*.

<sup>192</sup> *Lilia, Julia and Eleonora Alimzhanova and Alexjjs Lisikov v. Sweden*, 38821/97, Council of Europe: European Court of Human Rights, 24 August 1999, available at <<http://www.unhcr.org/refworld/docid/3ae6b6f3c.html>> [accessed on 2 December 2010].

At first sight, the Convention may seem like not covering asylum cases, but through the various interpretations of Article 3 provided by the European Court on Human Rights, the Convention has now become one of the most important juridical instrument to protect asylum seekers throughout Europe. Apart from cases dealing with the protection from refoulement, raised under Article 3 ECHR, the Court was requested to consider whether other articles could apply to asylum situations too. In the rulings that follow we will discuss the protection provided to asylum seekers under Article 3 ECHR, as well as under other articles relevant to asylum or expulsion cases.

#### 4.2.1 Procedural aspects of asylum law: the detention of asylum seekers

With respect to the detention of asylum seekers in an international transit zone, an important case is *Amuur v. France*. Even if it does not rely on the interpretation of Article 3 ECHR, this case deals with the deprivation of liberty of asylum seekers, under Article 5 (1) ECHR.

The applicants, a group of Somali nationals, arrived at the French airport Paris-Orly, via Syria, claiming that “they had fled Somalia because, after the overthrow of the regime of President Siyad Barre, their lives were in danger and several members of their family had been murdered”<sup>193</sup>. Even if they fled their country of nationality due to a well-founded fear of persecution, they could not apply for asylum straight away and were detained by the French police for having fake passports. They were confined in a hotel near the airport for a period of 20 days. After 20 days in detention, France rejected their asylum application and decided to send them back to Syria. Even if in Syria they were recognized as refugee by UNHCR, the applicants claimed that their detention in the international zone was unlawful and constituted a deprivation of liberty contrary to Article 5 (1) ECHR.

The European Commission of Human Rights which referred the case to the Court considered that there was no deprivation of liberty as defined under Article 5 (1) in this case, because the applicants were not deprived of the right to leave to another country and claim asylum there. The Commission’s view which was also supported by the French government<sup>194</sup>, was considered deficient by the Court since it could not exclude the possibility of imposing restrictions on the liberty of an asylum seeker, while waiting for his asylum application to be examined. Furthermore, if a person, who has fled his country of origin due to a well-founded fear of persecution, is detained in the country where he intends to apply for asylum, “such confinement must not deprive the asylum seeker of the right to gain effective access to the procedure for determining refugee status”<sup>195</sup>. Finally, the Court established that there was indeed a breach of Article 5 (1) by the French government, which “did not sufficiently guarantee the applicant’s right to liberty”<sup>196</sup>.

Going beyond the simple analysis of the circumstances and the Court’s decisions, it would be pertinent to enquire if an issue under Article 3 ECHR could have been raised in this case. At the time when the case was referred to the Court (1996), the European States were confronted with an increasing number of asylum seekers, crossing their borders each year. Thus, the decision of the French authorities to send the applicants back to Syria could be seen as a mere response to this situation. But did France take the right decision of sending the applicants back to Syria, knowing that it was not bound by the 1951 Refugee Convention and was, then, not a “safe third country”? There was no way of knowing that the applicants wouldn’t have been subjected to torture in Syria or, even worse, wouldn’t have been returned to Somalia. In this case, the fact that Syria accepted to take the applicants back and grant them refugee status only became possible after intense negotiations between the French and the Syrian authorities<sup>197</sup>. Even if Syria was not a State party to the 1951 Refugee Convention, France sent the applicants there only after obtaining guarantees that the UNHCR office in Damascus would consider their case. In the end, they

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<sup>193</sup> See Recital 7 of *Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996, available at: <<http://www.unhcr.org/refworld/docid/3ae6b76710.html>> [accessed on 2 December 2010] (hereinafter *Amuur v. France*).

<sup>194</sup> See Recital 46 of *Amuur v. France*.

<sup>195</sup> See Recital 43 of *Amuur v. France*.

<sup>196</sup> See Recital 54 of *Amuur v. France*.

<sup>197</sup> See Recital 48 of *Amuur v. France*.



were granted refugee status in Syria and were not in danger of being returned to their country of origin<sup>198</sup>. For this reason, an issue under Article 3 could not have been raised, seeing that the applicants were granted refugee status and were protected from refoulement.

Nevertheless, a violation of Article 3 ECHR is likely to occur when an asylum seeker has been detained in unacceptable conditions amounting to degrading treatment. This is the case of *S.D. v. Greece*, where the Court was asked to determine whether there was a breach of Article 3 for the reason of holding an asylum seeker in a detention centre where he lacked physical activity, contact with the outside world or medical attention<sup>199</sup> and of Article 5 (1) and (4) for the unlawfulness of the detention while an asylum seeker<sup>200</sup>. After examining the findings of the European Committee for the Prevention of Torture, which visited the Greek detention centre and found that the conditions of detention were unacceptable<sup>201</sup>, the Court established that the poor conditions of detention of asylum seekers, combined with the duration of detention of two months, could constitute inhuman and degrading treatment contrary to Article 3 ECHR. Regarding the unlawfulness of the detention, the Court also held that there was a violation of Article 5 (1) and (4) in the case of *S.D.*

There is no surprise that Greece failed to provide protection to *S.D.* in the detention centre. Moreover, the European Commission has even notified Greece of the failure to transpose the 2003/9/EC Directive laying down minimum standards for the reception of asylum seekers, within the prescribed period<sup>202</sup>. There have been many press releases and Amnesty International or Human Rights Watch reports with regard to the inhuman treatment and human rights abuses of asylum seekers and migrants in Greece<sup>203</sup>. In March this year, Amnesty International even called the States parties to the Dublin Regulation to suspend all transfers to Greece, after having examined the situation in the country, where asylum seekers were unlawfully detained in inadequate conditions at the airport, had difficulties in accessing the asylum procedures or were not protected against refoulement (particularly Turkish nationals)<sup>204</sup>. This decision was taken after UNHCR submitted a report in 15 April 2008 and in December 2009, advising Member States to interrupt transfers to Greece under the Dublin II Regulation until the reform of the Greek asylum system was implemented<sup>205</sup>. Although there were about 15.000 asylum claims in Greece in 2009, according to Eurostat, the rate of recognition was one of the lowest in Europe, of around 1%<sup>206</sup>. And this will probably not improve until Greece takes the necessary actions to protect asylum seekers under its asylum system and facilitates their access to fair asylum procedures while fully ensuring the respect of their human rights.

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<sup>198</sup> See Recital 11 of *Amuur v. France*.

<sup>199</sup> See Recital 41 of *S.D. c. Grèce*, Application no. 53541/07, Council of Europe: European Court of Human Rights, 11 June 2009, available at < <http://www.unhcr.org/refworld/docid/4a37735f2.html> > [accessed on 2 December 2010] (hereinafter *S.D. c. Grèce*).

<sup>200</sup> See Recitals 55 and 68 of *S.D. c. Grèce*.

<sup>201</sup> See Recital 51 of *S.D. c. Grèce*.

<sup>202</sup> See *Commission of the European Communities v. Hellenic Republic*, C-72/06, 2007/C/96/26, European Union: European Court of Justice, 19 April 2007, available at < <http://www.unhcr.org/refworld/docid/472051192.html> > [accessed on 2 December 2010].

<sup>203</sup> For more information on this subject see: BBC News, *Asylum seekers "abused" in Greece*, 11 June 2008, available at < <http://news.bbc.co.uk/1/hi/7445665.stm> > [accessed on 2 December 2010], Amnesty International, *No place for an asylum-seeker in Greece*, 28 February 2008, available at < <http://www.amnesty.org.au/news/comments/9711/> > [accessed on 2 December 2010], Human Rights Watch, *No Refuge: Migrants in Greece*, available at < <http://www.unhcr.org/refworld/docid/4aeea91c2.html> > [accessed on 2 December 2010].

<sup>204</sup> Amnesty International, *The Dublin II Trap: Transfers of Asylum-Seekers to Greece*, 10 March 2010, p.5, available at < <http://www.unhcr.org/refworld/docid/4c7f69362.html> > [accessed on 2 December 2010].

<sup>205</sup> UNHCR, *Observations on Greece as a country of asylum*, December 2009, available at < <http://www.unhcr.org/refworld/pdfid/4b4b3fc82.pdf> > [accessed on 2 December 2010].

<sup>206</sup> Eurostat Newsrelease, *Asylum decisions in the EU27: EU Member States granted protection to 78.800 asylum seekers in 2009*, available at: < <http://europa.eu/rapid/pressReleasesAction.do?reference=STAT/10/89&f> > [accessed on 20 November 2010]

#### 4.2.2 Non-refoulement under Article 3 ECHR

Other than rulings on the conditions of detention of asylum seekers, the majority of cases of the European Court of Human Rights have dealt with the application of Article 3 to refoulement situations. In the cases that follow, we will see how the European Court of Human Rights, through its interpretation of Article 3 has enlarged the application of the principle of non-refoulement to extradition and expulsion cases.

The landmark judgement on refoulement was *Soering v. The United Kingdom*, where the Court had to handle the case of a German national, convicted for capital murder in the United States. Even if Mr. Soering was neither a refugee nor an asylum seeker, his extradition to the United States, where he could suffer degrading treatment awaiting execution of the death penalty, would constitute a breach of Article 3. In the Court's view, other means of punishing him could be found "which would not involve suffering of such exceptional intensity or duration"<sup>207</sup>. After *Soering*, the Member States of the Council of Europe had to make sure that when returning an individual to a third country; he would not be subjected to torture, inhuman or degrading treatment, contrary to Article 3. The *Soering* judgement is extremely important because it enlarges the application of the principle of non-refoulement to extradition cases.

Subsequent to the *Soering* case (1989), the Court had to deal with two other cases on expulsion (*Cruz Varas and Others v. Sweden*, 1991, *Vilvarajah and Others v. the United Kingdom*, 1991) and see whether there has been a violation of Article 3 or not.

In *Cruz Varas and Other v. Sweden*, the Court was asked to say whether the expulsion of an asylum seeker may give rise to an issue under Article 3 ECHR. Mr Varas, was a Chilean citizen, opponent of the General Pinochet regime, who fled to Sweden, not due to a well-founded fear of persecution, but owing to his poor financial situation, according to his first declaration. On the basis of this declaration, Sweden decided to expel the applicant and his family back to Chile, as there was not enough proof to grant them asylum. To avoid expulsion, Mr. Varas would change then its declaration and present new reasons for not being expelled, including medical certificates showing that he was suffering of a "post-traumatic stress disorder", linked with the persecution and ill-treatment he suffered while he was living in Chile<sup>208</sup>. However, according to the Swedish authorities, even if he was interrogated on a number of occasions, Mr. Varas provided contradictory information. He would, therefore, be expelled to Chile, while his wife and son would go into hiding in Sweden. Would his expulsion imply a breach of Article 3, due to the fact that he could be subjected to torture on his return and could also suffer a trauma from going back to a country where he was tortured in the past?

On the alleged breach of Article 3, the first question raised by the Court was to see whether this article could apply in expulsion cases. In *Soering*, the Court had already established that the extradition of a fugitive may raise an issue under Article 3. The Court would hold to the same reasoning like in *Soering* and establish that Article 3 may apply to cases of extradition, but also expulsion. Another important point made by the Court was that "ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3"<sup>209</sup>.

In the circumstances of the case, however, the Court would reach to the conclusion that there was no breach of Article 3, due to the contradictory declarations provided by the applicant. Furthermore, the political and human rights situations in Chile had also improved, and thus, there was no evidence of believing that through expulsion, the applicant would be exposed to torture, inhuman or degrading treatment, contrary to Article 3 ECHR.

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<sup>207</sup> See Recital 111 of *Soering v. the United Kingdom*.

<sup>208</sup> See Recital 44 of *Cruz Varas and Others v. Sweden*, 46/1990/237/307, Council of Europe: European Court of Human Rights, 20 March 1991, available at <<http://www.unhcr.org/refworld/docid/3ae6b6fe14.html>> [accessed on 3 December 2010] (hereinafter *Cruz Varas and Others v. Sweden*).

<sup>209</sup> See Recital 83 of *Cruz Varas and Others v. Sweden*.

Another complaint of interest to us covered the alleged breach of Article 8 ECHR (right to respect for private and family life), on the grounds that the expulsion of Mr. Varas had resulted in a separation from his family. In recital 88, the Court expresses the same view as the Swedish Government and the European Commission of Human Rights by noting that Sweden ordered the expulsion of all three applications. It was the choice of the wife and the son of Mr. Varas to go into hiding, instead of returning to Chile with him. Therefore, no violation of Article 8 was found in this case<sup>210</sup>.

In the second case, *Vilvarajah and Others v. The United Kingdom*, the Court was requested to say whether the United Kingdom had violated Article 3 of the Convention by ordering the expulsion of all five applicants back to Sri Lanka. The five applicants, all Sri Lanka citizens of Tamil ethnic origin, had similar stories: they all escaped from Tamil areas in Sri Lanka, areas under guerrilla attacks, and claimed asylum in the United Kingdom. In all cases, the United Kingdom found that the five applicants did not provide sufficient proof for considering that they had a well-founded fear of persecution. Moreover, the incidents they described were all random and were part of the army's general activities to identify Tamil extremists. In the United Kingdom's view, the applicants were only victims of generalized violence as the army's activities did not specifically target any of them. For this reasons, the United Kingdom would issue an order of expulsion for all five applicants. But, after their return to Sri Lanka, all five applicants were either ill-treated or tortured for being Tamils. Consequently, they were all allowed to return to the United Kingdom and stay for a limited period of 12 months.

On the applicability of Article 3 ECHR in expulsion cases, the Court as in its Cruz Varas judgement, acknowledged that the expulsion of an asylum seeker may give rise to an issue under Article 3<sup>211</sup>. Furthermore, the Court also noted that "the right to political asylum is not contained in either the Convention or its Protocols"<sup>212</sup>.

According to the British government, if the Court were to find a violation of Article 3, then the Contracting Parties of the Convention would have to grant asylum to all Tamils who were fleeing their country, even if they were not individually targeted by the guerrilla. And this could cause social and economic consequences in the host country<sup>213</sup>. The Court reached to the same conclusion as the British government, stating that the applicants would not be at risk if expelled to their country of residence and thus, their expulsion won't lead to a violation of Article 3 ECHR by the government. But could the Court have adopted another position? If the Court had found a breach of Article 3, then it would have acknowledged that any Tamil living in an area controlled by the guerrilla forces would be eligible for political asylum inside Europe. If it had adopted this view, the Court would have recognized the right to political asylum to a group for the single reason of being part of a minority.

Even if in both *Cruz Varas and Other v. Sweden* and *Vilvarajah and Others v. The United Kingdom* cases, the Court did not find a violation of Article 3, these two cases remain important as they enlarge the application of the principle of non-refoulement to expulsion cases.

Another case, which was already discussed, *T.I v. the United Kingdom*, raised the question of chain refoulement and the expulsion of an applicant to a safe third country.

On the applicability of the principle of non-refoulement in deportation cases and on the exceptions that may justify the return or the expulsion of a person to a receiving State (national security and danger to the community of the host country) two judgements of the ECtHR will be presented: *Chahal v. The United Kingdom* (1996) and *Ahmed v. Austria* (1996).

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<sup>210</sup> See Recital 88 of *Cruz Varas and Others v. Sweden*.

<sup>211</sup> See Recital 103 of *Vilvarajah and Others v. The United Kingdom*, 45/1990/236/302-306, Council of Europe: European Court of Human Rights, 26 September 1991, available at < <http://www.unhcr.org/refworld/docid/3ae6b7008.html> > [accessed on 3 December 2010] (hereinafter *Vilvarajah and Others v. The United Kingdom*).

<sup>212</sup> See Recital 102 of *Vilvarajah and Others v. The United Kingdom*.

<sup>213</sup> See Recital 105 of *Vilvarajah and Others v. The United Kingdom*.

The first case, *Chahal v. The United Kingdom*, raised a number of issues under Articles 3, 5, 8 and 13 ECHR, however we will put an emphasis on the alleged violation of Article 3, as this is the main subject of this subchapter.

Mr. Chahal is a Sikh from India who first arrived in the UK as an economic migrant and not as an asylum seeker. While living in the UK, he visited India once and because he supported the resistance in Punjab, he was detained and tortured in response to his political activities. Back to the UK, he became involved in political and religious activities organised by the United Kingdom Sikh community. After some terrorist disturbances in London, the British authorities suspected Mr. Chahal of terrorist activities, also in connection with him being part of a conspiracy to assassinate the Indian Prime Minister. For these reasons, the United Kingdom considered that he represented a danger to the national security and decided to deport him back to India. To avoid deportation, Mr. Chahal applied for asylum in the UK under the 1951 Geneva Convention, saying that if returned to India he would be persecuted, tortured and ill-treated. His asylum application was, however, rejected by the British authorities. Therefore, the applicant would claim a breach of Article 3 by the UK, complaining that his deportation to India would expose him to real risk of torture, inhuman and degrading treatment.

On the alleged violation of Article 3, the Court recalled the cases of *Soering* (extradition), *Varas* and *Viharajah* (expulsion). The question raised before the Court was to see whether the applicant posed such a serious threat to the national security to justify his deportation. In recital 79 of the said case the Court noted that “the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct”<sup>214</sup>. In other words, even in the circumstances of the case, if the applicant faced torture, inhuman or degrading treatment or punishment if deported, there would be a violation of the Convention’s provisions. On the supposed terrorist activities of the applicant, the Court found that “the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration”<sup>215</sup>. The conclusion of the Court is extremely important as it acknowledges that “the protection afforded by Article 3 is thus wider than that provided by Article 32 and 33 of the United Nations 1951 Convention on the Status of Refugees”<sup>216</sup>.

Why does Article 3 offer a protection wider than that provided by Article 32 and 33 of the 1951 Refugee Convention? Because even if the individual in question poses a threat to the national security (Chahal) or a threat to the community of the host country (see *Ahmed v. Austria*), his deportation or expulsion would not be justified if it put him to a risk of torture or ill-treatment in the receiving State.

In the circumstances of the case, Mr Chahal, a Sikh separatist, would still be a target of interest to the security forces, even if deported to other parts of India than Punjab. Even if the Court welcomed the assurances provided by the Indian government that Mr. Chahal would be protected against any degrading treatment, the Court was not fully convinced that this would indeed happen. The conclusion of the Court was that the deportation of Mr. Chahal would give rise to a violation of Article 3, as he was likely to be tortured or ill-treated as a Sikh separatist, if returned to India.

In *Ahmed v. Austria*, the European Commission of Human Rights referred the case to the Court following a complaint of a Somali national convicted of criminal offences, who claimed that his deportation to Somalia would constitute a violation of Article 3 ECHR by the Austrian authorities.

Mr. Ahmed arrived to Austria as an asylum seeker and was granted refugee status on the account that he might have been persecuted if returned to Somalia, as a result of his activities in an opposition group. However, he lost his refugee status after being accused of attempted robbery (which constituted “serious crime” in Austria’s view) and was issued an expulsion order. According to the Austrian authorities, Mr.

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<sup>214</sup> See recital 79 of *Chahal v. The United Kingdom*, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, available at < <http://www.unhcr.org/refworld/docid/3ae6b69920.html> > [accessed on 3 December 2010] (hereinafter *Chahal v. The United Kingdom*).

<sup>215</sup> See Recital 80 of *Chahal v. The United Kingdom*.

<sup>216</sup> *Ibidem*.

Ahmed could become a future danger to the community taking into account his past aggressions and criminal convictions.

As to the Court, Mr. Ahmed would still be a refugee if not for his criminal convictions, owing to the persecution he could face in Somalia, where the situation was still unstable. The Court reiterates its findings in *Chahal* and reaches the same conclusion that his deportation would violate Article 3 for as long as he is at risk of being tortured or ill treated<sup>217</sup>.

We have chosen to discuss the cases of *Chahal* and *Ahmed* together, because they dealt with the exceptions to the principle of non-refoulement (threat to national security in *Chahal* and danger to the community of the host country in *Ahmed*), as formulated by Article 33 (2) of the 1951 Geneva Convention. In these two judgements, the conclusion of the Court on the alleged violation of Article 3 is extremely important as it recognizes that Article 3 ECHR offers a wider protection than Article 32 and 33 of the 1951 Refugee Convention. According to the Court, an individual cannot be removed, deported or expelled even if he constitutes a threat to the national security or to the community of the host country, for as long as he is at risk of torture, inhuman or degrading treatment in the receiving State.

Following the *Chahal* judgement, the Court had to decide in *Saadi v. Italy* whether to change its interpretation of Article 3 in view of protecting the States of the threats posed by international terrorism. Mr. Saadi was a Tunisian national who received Italian residence permit after starting a family in Italy. However, after some years of living in Italy, he was arrested on suspicion of involvement in terrorist activities. Subsequent to this decision, he was also sentenced in Tunisia, in his absence, to 20 years imprisonment for being a member of a terrorist organisation operating abroad. Because Mr. Saadi was considered a threat to national security, Italy also decided to issue a deportation order in his name. But, in Mr. Saadi's view, he would be at risk of suffering ill-treatment as a suspected terrorist, if returned to Tunisia, which would constitute a violation of Article 3 ECHR.

In the *Chahal* case, the Court alleged that States are prevented from removing a terrorist if he is at risk of suffering ill-treatment in the receiving state. In the present case, the Court did not follow the argument of the United Kingdom, as a third-party intervener, also supported by Italy to reconsider its judgement made in *Chahal* and allow States to deport terrorists: "even if, as the Italian and United Kingdom Governments asserted, the terrorist threat has increased since that time (the Court refers to the time of the *Chahal* judgement), that circumstance would not call into question the conclusions of the *Chahal* judgement concerning the consequences of the absolute nature of Article 3"<sup>218</sup>. Furthermore, the Court reached to the same conclusion as in the *Chahal* ruling that the protection against torture and inhuman or degrading treatment or punishment provided by Article 3 is absolute, irrespective of a person's behaviour be it terrorist or not<sup>219</sup>.

### **4.3 Other forthcoming issues on the agenda of the ECJ and ECtHR relevant to Refugee Law: the fight against terrorism and climate refugees**

Besides the classical cases brought before the Courts, other forthcoming issues on the agenda of the ECJ and ECtHR relevant to refugee law, may comprise the fight against terrorism or climate change.

On the fight against terrorism, both the ECJ and the ECtHR have already dealt with cases concerning the exclusion of a suspected terrorist from refugee status (*Bundesrepublik Deutschland v. B and D*) or from the principle of non-refoulement for being a person who poses a threat to the national security of the host

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<sup>217</sup> See Recital 47 of *Ahmed v. Austria*, 71/1995/577/663, Council of Europe: European Court of Human Rights, 17 December 1996, available at < <http://www.unhcr.org/refworld/docid/3ae6b62f2c.html> > [accessed on 3 December 2010] (hereinafter *Ahmed v. Austria*).

<sup>218</sup> See Recital 141 of *Saadi v. Italy*, Application No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at: < <http://www.unhcr.org/refworld/docid/47c6882e2.html> > [accessed on 17 December 2010] (hereinafter *Saadi v. Italy*).

<sup>219</sup> See Recital 127 of *Saadi v. Italy*.

country (*Chahal v. The United Kingdom* and *Saadi v. Italy*). The approaches of the Courts, in both cases, showed that even if a person is suspected of terrorism, Member States should not just ban him from their territory without analyzing all the circumstances of the case. On one hand, a person can only apply for refugee status if he has a well-founded fear of persecution. If he had committed crimes putting people's lives in danger, then he may be an agent of persecution, not eligible for refugee status. On the other hand, if that person is at risk of being subjected to treatment contrary to Article 3 ECHR if removed to another country, than he cannot be deported to that country, as this would give rise to a breach of Article 3 ECHR. The options for the host states, in this case, would be either to detain the suspected terrorist or to send him to another country (with the condition that that country would take him) where he wouldn't be at risk of suffering torture, inhuman or degrading treatment or punishment.

With respect to climate change, this would give rise to new challenges under refugee and asylum law both at the international and European level, with the emergence of a new type of refugees, *climate refugees*.

In a statement made in 2008, the UN High Commissioner for Refugees, António Guterres, noted that: "Although there is a growing awareness of the perils of climate change, its likely impact on human displacement and mobility has received too little attention"<sup>220</sup>. With the sudden climate changes and the occurrence of natural disasters, many people will be forced into displacement. But will these people become climate migrants or climate refugees? In the current status of Refugee and Asylum law, the notion of climate refugees may pose some legal problems.

In the first place, a refugee, as defined by the 1951 Geneva Convention, is a person who flees his home owing to a well-founded fear of persecution. If we extend the notion of refugee to climate refugee, then we could define a climate refugee as a person who flees his home owing to a natural disaster, not a well-founded fear of persecution. Therefore, a climate refugee would not be protected by the 1951 Refugee Convention. But then how could States assist these people?

In the European Union, Member States have agreed upon granting a new type of protection, to people who do not qualify as refugees under the 1951 Geneva Convention. This was called, subsidiary protection or temporary protection, in the event of a mass influx of people. But could climate refugees qualify for such a protection? As defined by the Qualification Directive, subsidiary protection applies to persons who do not qualify as refugees but who cannot be returned to their country of origin as this could put them at risk of suffering serious harm. Serious harm is thus the basis of granting subsidiary protection status. But could a natural disaster be qualified as "serious harm"? If a natural disaster is seen like a "serious harm"<sup>221</sup> then a climate refugee could be granted subsidiary protection under the Qualification Directive. However, in the current state of the asylum law, a natural disaster is not considered "serious harm", thus a climate refugee cannot be granted subsidiary protection status. The only protection that could be given to climate refugees, in the current state of the asylum law, remains then the *national protection* provided by States, according to their national legislation.

In conclusion, for a climate refugee to be granted international protection, either the definition of a refugee, under the 1951 Refugee Convention would have to be reformulated to include new types of refugees, including those abandoning their homes owing to a natural disaster, either the alternative of subsidiary protection would have to be revisited to include natural disasters on the list of serious harms a person could be exposed to. In any case, the interpretations provided by the two Courts on this matter will be crucial to determine which option is the best.

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<sup>220</sup> Antonio Guterres, "Millions Uprooted: saving refugees and the displaced" in *Foreign Affairs*, September/October 2008, cited in UNHCR, *Climate change, natural disasters and human displacement: a UNHCR perspective*, October 2008, p.1, available at <[http://www.globalmigrationgroup.org/pdf/UNHCR\\_Policy\\_Paper\\_Climate\\_Change.pdf](http://www.globalmigrationgroup.org/pdf/UNHCR_Policy_Paper_Climate_Change.pdf)> [accessed on 4 December 2010].

<sup>221</sup> Margit Ammer, *Climate change and Human Rights: The Status of Climate Refugees in Europe*, June 2009, pp.61-64, available at < <http://www.pro-qualifizierung.de/data/climatechangepaper0609.pdf> > [accessed on 4 December 2010].

## 4.4 Conclusions

The idea behind this case study was to enforce the legislation presented in the previous chapters on the right to asylum and the principle of non-refoulement and see to what extent the European Court of Justice and the European Court of Human Rights have applied and interpreted the law in a joint manner and have developed new approaches on the matter.

While the European Court of Justice was mostly confronted with cases dealing with the right to asylum, the European Court of Human Rights was mostly confronted with cases on the principle of non-refoulement. For the majority of cases on the right to asylum, the ECJ was asked to provide guidance on the interpretation of the Qualification Directive. As for the ECtHR it was only able to provide interpretation of the provisions laid down in the European Convention on Human Rights. Even if they relied on the interpretation of different legal documents, the findings of the Courts offered new means of improving the asylum system and procedures throughout Europe. What is more, the judgements of the two Courts will become even more connected in the following years, with the European Union being able to become part of the Convention, after the entry into force of the Treaty of Lisbon.

The findings of the Courts in the cases discussed were the followings:

- In *Elgafaji v. Staatssecretaris van Justitie*, the European Court of Justice clarified the relation existing between Article 15 (c) and Article 2 (e) of the Qualification Directive and noted that an individual, victim of indiscriminate violence in his country of residence may be granted subsidiary protection status, even without providing specific evidence that he is individually targeted by such a risk;
- In *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, the ECJ indicated that the Qualification Directive had been derived from international law. Furthermore, the Qualification Directive gives the right to a person whose refugee status has been revoked, to apply for subsidiary protection status;
- In *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, the ECJ noted that in order to be excluded from refugee status, a person should actually benefit from the protection of a UN agency, other than UNHCR;
- In *Bundesrepublik Deutschland v. B and D*, the ECJ stated that simply the fact of being a member of an organisation which committed terrorist acts didn't constitute a serious non-political crime for excluding a person from refugee status. Furthermore, Member States can grant asylum, under their national law, to a person who was excluded from refugee status under Article 12 (2) of the Qualification Directive, if this protection is not confused with the refugee status defined in the said Directive;
- In *Lilia, Julia and Eleonora Alimzhanova and Alexijs Lisikov v. Sweden*, the European Court on Human Rights held that applicants can only complain about a matter covered by the ECHR. In the particular circumstances of the case, the Court stated that the Convention doesn't guarantee a right to asylum or refugee status, but only prohibits the expulsion of a person to a country where he may be subjected to torture, inhuman or degrading treatment or punishment (as defined by Article 3 ECHR);
- In *Amuur v. France* the ECtHR recalled that the confinement of a person should not deprive him of the right to apply for asylum;
- In *S.D. v. Greece*, the ECtHR noted that the poor conditions of detention of asylum seekers could constitute inhuman and degrading treatment contrary to Article 3 ECHR;
- In *Soering v. the United Kingdom*, the ECtHR enlarges the application of Article 3 ECHR to extradition cases;
- In *Cruz Varas and Others v Sweden* and *Vilvarajah and Others v. The United Kingdom*, the ECtHR enlarges the application of Article 3 ECHR to expulsion cases;

- In *Chahal v. The United Kingdom* and *Ahmed v. Austria*, the ECtHR stated that Article 3 ECHR provides a wider protection to asylum seekers than Article 32 and 33 of the 1951 Refugee Convention. Furthermore, the deportation of a person posing a threat to the national security or the community of the host country would constitute a breach of Article 3 for as long as the person faces the risk of being tortured in the receiving State;
- In *Saadi v. Italy* the Court recalled that the protection against torture and inhuman or degrading treatment or punishment provided by Article 3 is absolute, irrespective of a person's behaviour be it terrorist or not.

In summary, the Courts noted that subsidiary protection status is a type of protection covering new categories of unprotected people, including victims of indiscriminate violence (*Elgafaji*) or people having their refugee status revoked (*Abdulla*).

They also concluded that the European law and international law are connected and the former has been derived from the latter. Under European law, the Qualification Directive is the most important document setting up the legislative framework for granting international protection (refugee and subsidiary status). Besides this international protection, Member States also have the possibility of granting national humanitarian protection, under their national legislation (*Bundesrepublik Deutschland v. B and D*).

After crossing the European borders, asylum seekers have to first comply with the conditions of access to the asylum system and procedures (procedural aspects of asylum law) and then be granted protection (substantive aspects of asylum law). If they are at risk of refoulement (extradition, expulsion, deportation), the ECtHR asserted that Member States have to first identify whether the applicants could suffer treatment contrary to Article 3 ECHR in the receiving State, before actually sending them to that State.

It is clear that in the future new issues will be raised before these Courts. But the cooperation between the ECJ and ECtHR in defining joint approaches on refugee and asylum law, will be crucial.



# Final Conclusions and Remarks

## Main findings

The aim of this study was to see how the European Union responds to the growing and multifaceted problem of migration, and in particular how it deals with the flux of people who are seeking refuge inside its borders. In this sense we have tried to answer the following research question: *What are the procedures and the minimum conditions for granting asylum in the European Union and how are the refugees protected under EU law?*

Regarding the first part of this question, we have shown that the *asylum procedures* often refer to the Dublin II Regulations establishing the Member State responsible for examining an asylum application and to the Asylum Procedures Directive (2005/85/EC) highlighting the obligation of States to conduct a fair and efficient examination of an asylum claim, as well as the rights and obligations of asylum seekers.

On the *minimum conditions for granting asylum in the European Union*, we have shown that in order to be granted asylum in the European Union, an asylum seeker:

- has to have a well-founded fear of persecution from fleeing his home, in order to receive *refugee status* (according to the definition found in the 1951 Refugee Convention and the Qualification Directive);
- or if he doesn't satisfy the refugee conditions, but cannot be returned to his country of nationality or former habitual residence as he may be at risk of suffering serious harm then he may qualify for *subsidiary protection status*.

As for the second part of the research question: *how are the refugees protected under EU law*, it has been pointed out that refugees are protected against refoulement, under international law, but also under European law. Moreover, refugees are also protected against any treatment contrary to Article 3 ECHR (torture, inhuman or degrading treatment or punishment).

We were able to answer the research question by analyzing the interconnectedness between the international law and the European law on the right to asylum and the principle of non-refoulement and also by explaining the approaches taken by the European Court of Justice and the European Court of Human Rights on asylum matters, including the right to asylum and the principle of non-refoulement.

The following schema will synthesize the main findings of this research and will clearly explain how the system works:

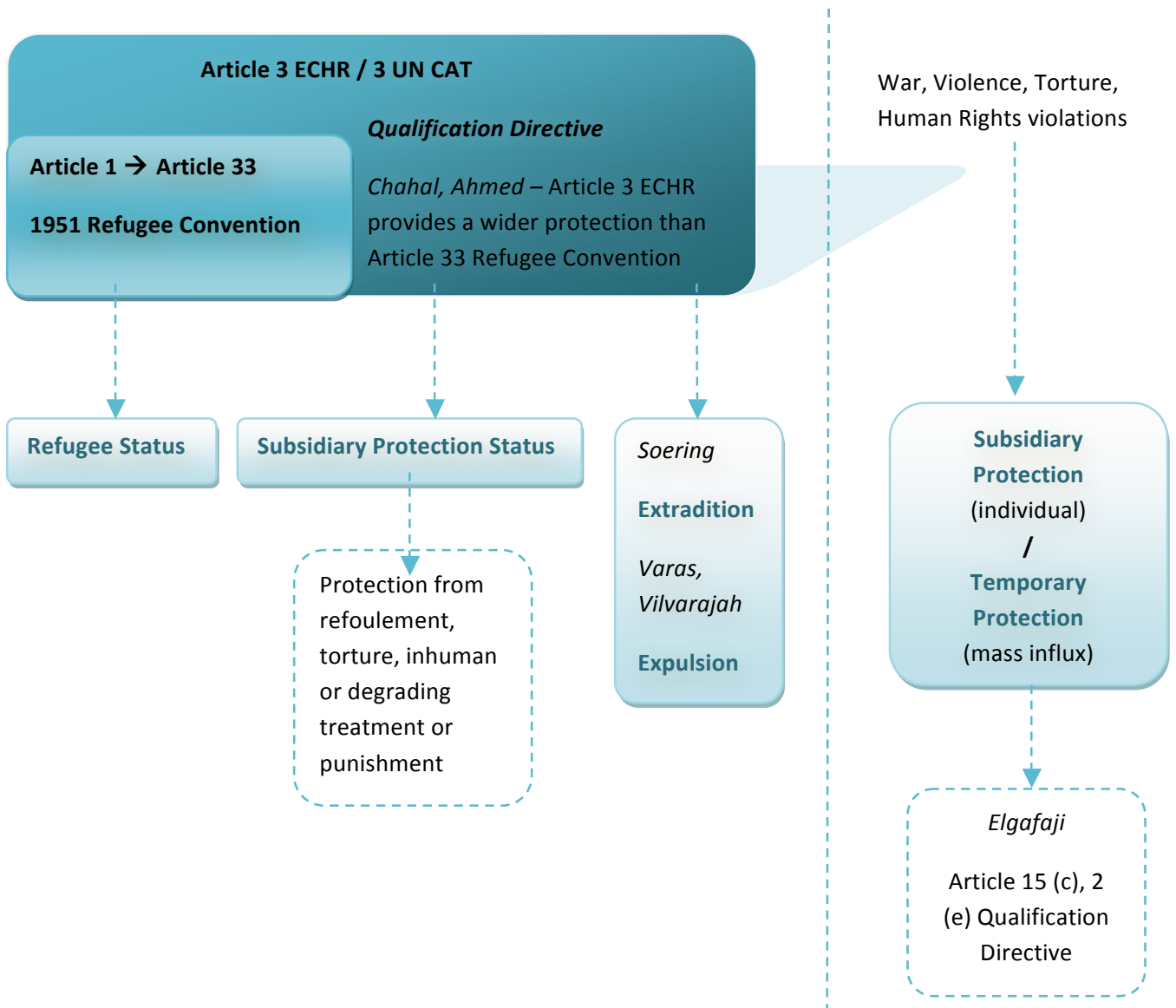


Figure 1 - The European Asylum System

The 1951 Refugee Convention constitutes the cornerstone for the international protection of refugees, as it provides the guidelines for defining a “refugee” (Article 1) and formulates the rights to which a refugee is entitled to, such as the right to non-refoulement (Article 33). Thus, the Convention prohibits the expulsion or return (“refoulement”) of a refugee only: “no Contracting State shall expel or return (“refouler”) a refugee”<sup>222</sup>. The problem with this Convention is that sometimes it may not offer protection to a person who does not qualify as a refugee, but who if returned to his country of origin may be at risk of suffering *serious harm* (Qualification Directive), torture, inhuman or degrading treatment (Article 3 ECHR).

If a person is at risk of facing torture, inhuman or degrading treatment or punishment then he may be protected under Article 3 ECHR. In the *Chahal* and *Abmed* judgement, the European Court of Human Rights noted that Article 3 ECHR provides a wider protection than Article 33 Refugee Convention. Why? Because it doesn’t protect only refugees (like Article 33 Refugee Convention) but anyone who may be subjected to torture, inhuman or degrading treatment or punishment (“no one shall be subjected to

<sup>222</sup> Article 33 (1) of the *Convention relating to the Status of Refugees*.

torture or to inhuman or degrading treatment or punishment<sup>223</sup>), including refugees, persons eligible for subsidiary protection and even persons who if extradited or expelled could face treatment contrary to Article 3 ECHR (*Soering* - extradition, *Varas*, *Vilarajah* - expulsion).

As for Article 3 of the UN Convention Against Torture (CAT), it prohibits the refoulement, expulsion or extradition of a person who could be tortured in the receiving State (“no State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture<sup>224</sup>). Therefore, Article 3 ECHR is even more inclusive than Article 3 UN CAT, as it prohibits the refoulement, expulsion or extradition of a person who could be tortured, but who could also suffer *inhuman or degrading treatment or punishment*.

In the European Union, this system has been codified by the Qualification Directive. Under the provisions of the Qualification Directive, two types of protection may be granted to an asylum seeker:

*refugee status* – if he qualifies as a refugee under the 1951 Refugee Convention definition;

*subsidiary protection status* – if he does not qualify as a refugee, but cannot be returned to his country of residence where he would be at risk of suffering serious harm. Serious harm, as defined by Article 15 of the Qualification Directive consists of: death penalty or execution, torture or inhuman or degrading treatment or punishment, serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict<sup>225</sup>.

Moreover, Member States can grant protection to a person on a discretionary basis, on compassionate or *humanitarian grounds*, with the condition that this national protection is not confused with the refugee status within the scope of the Qualification Directive (*Bundesrepublik Deutschland v. B and D*). This *humanitarian protection* is different from international protection. International protection, as defined by the Qualification Directive, only refers to refugee and subsidiary protection status.

On some occasions, like in the event of a war, indiscriminate violence or human rights violations, people may still be eligible for subsidiary protection (individual) or temporary protection status (mass influx). This means that subsidiary protection, as defined by the Qualification Directive, goes beyond the scope of Article 3 ECHR. Subsidiary protection status may be granted to a person who if removed may be at risk of suffering not only treatment contrary to Article 3 ECHR, but also death penalty, human rights violations owing to a state of war or violence in his country of residence (*Elgafaji*). In the event of a mass influx of people, all fleeing the same threat or persecution such as war or violence, they may be granted temporary protection status.

In conclusion, what the schema above clearly illustrates is that the European asylum system had to be built in a pre-existing international legal framework, governed by the provisions of the 1951 Refugee Convention and the fundamental principle of non-refoulement.

## Final remarks and considerations for future research

Even if the most recent statistics provided by Eurostat (see Annex 2) show that the number of asylum applicants has remained stable over the last few years, there is no way of predicting the evolution of these figures in the future. By analyzing the current situation, some extrapolations can be made, however. Conflicts, which will continue to exist between and within nations, will no longer be the main source of refugees in the future. Global warming, growing population, water scarcity or depletion of resources are new challenges for the peoples of the 21<sup>st</sup> century and they will surely add to the number of alyssum seekers. Climate change is already altering habitable areas and is putting people on the move. There is a widespread belief among Western nations that climate or development refugees will become one of the greatest challenges of our century. But how will States address the refugee problem in the future? How

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<sup>223</sup> Article 3 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*.

<sup>224</sup> Article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

<sup>225</sup> Article 15 of the *Council Directive 2004/83/EC*.

will climate refugees be protected? Will they be eligible for refugee or subsidiary protection status? Will they be granted protection for humanitarian reasons? These questions don't have an answer yet and they will need to be addressed in the future.

At its current state, the 1951 Refugee Convention fails to cover all refugee situations. Developed after the World Wars, the Convention may not be relevant for future refugee situations. To widen the protection of refugees, States will have to either review the Convention and its 1967 Protocol or develop new methods to facilitate the asylum process.

At the European level, Member States are already struggling to implement a Common European Asylum System to harmonize the asylum procedures throughout the Union. Even if the first steps towards the development of a Common European Asylum System have already been taken, there is no way of knowing how this system will evolve. What benefits will it bring to refugees? Will it facilitate or hinder the asylum seekers' access to asylum procedures? Will it facilitate or hinder the way Member States grant protection? Until the system is fully in place, we would not be able to weight its full effectiveness. For the time being, the Qualification Directive has proved efficient in defining the access to refugee or subsidiary protection status. Dublin II Regulations have proved efficient as well in clarifying which State is responsible for examining an asylum application.

In addition to studying climate refugees and the emergence of new refugee situations, further research could be made on the way Member States respond (politically, economically, socially and legally) to the influx of asylum seekers and migrants, as well as on the future development of the Common European Asylum System. Furthermore, the protection of refugees, their right to asylum or to non-refoulement will definitely remain a challenging issue on the agenda of the European Court of Justice and the European Court of Human Rights as new asylum situations will continue to emerge.

It is unlikely that Europe will produce refugees in the future, but it will undoubtedly continue to receive refugees. In a highly globalized world, migration and refugees will continue to be an issue for countries in the coming years.

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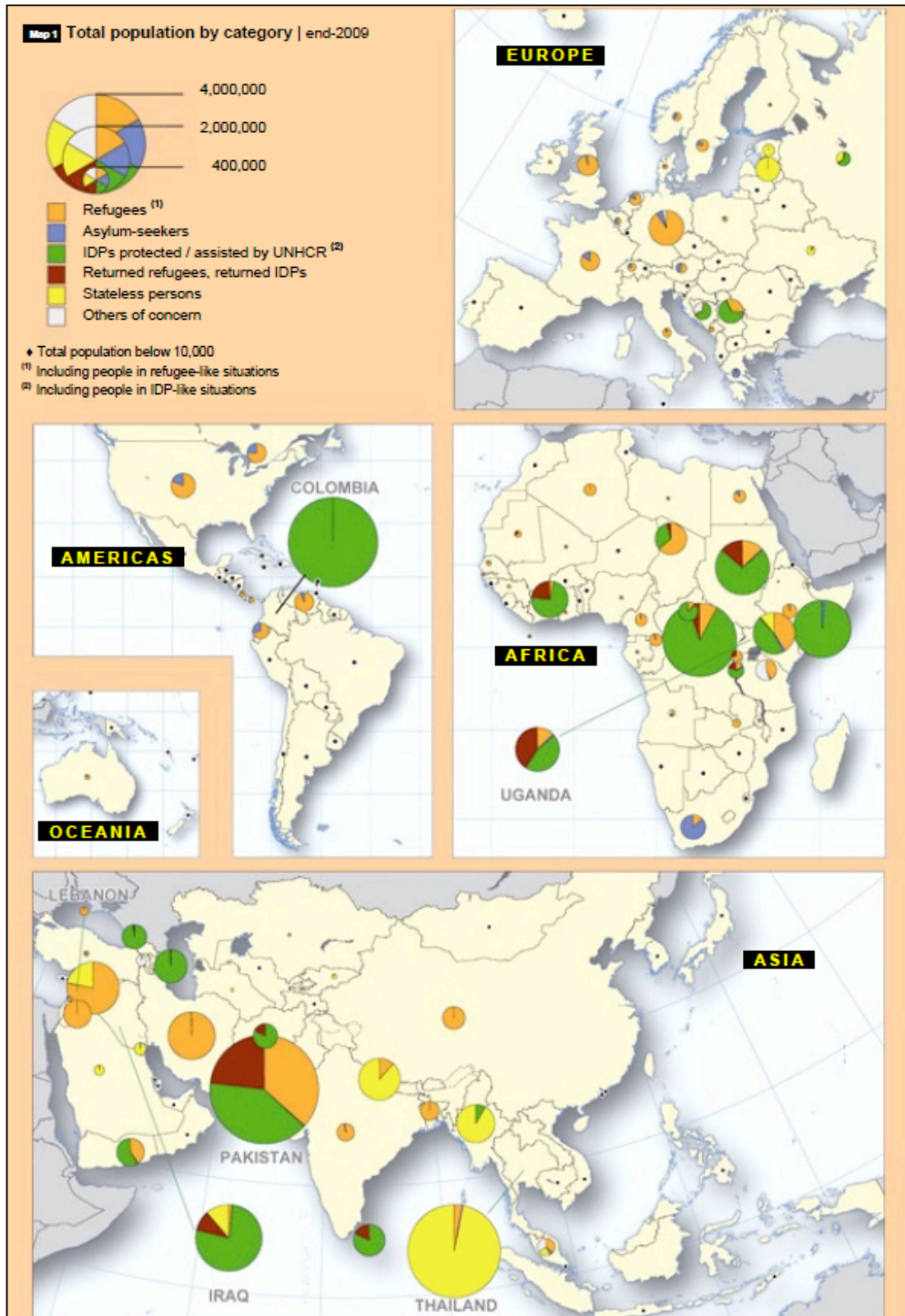
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# Annexes

## Annex 1 – Total population by category, end 2009 <sup>226</sup>



<sup>226</sup> UNHCR, 2009 *Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, p.5.

## Annex 2 – Statistics

To better understand the current situation in the European Union on asylum matters, we will further analyze the most recent statistics on *asylum decisions* published by Eurostat, the statistical office of the European Union. In these statistics, *Asylum decision in the EU 27* and *Asylum applicants and first instance decisions on asylum applications*, we will look at the number of asylum seekers being granted protection: refugee status, subsidiary protection status or on humanitarian grounds, at the first and final instance level of the asylum procedure, as well as at the number of rejected applications.

According to Eurostat, 78.820 asylum seekers were granted protection in one of the 27 Member States of the European Union, in 2009<sup>227</sup>, compared to 76.320 in 2008<sup>228</sup>.

The tables below show the number of *decisions* (by decisions we understand the number of administrative decisions rather than the number of individuals) regarding asylum applications in 2008 and 2009, made at the first instance and the final instance level of the asylum procedure.

Decisions on asylum applications in 2008

	Decisions*			Positive decisions**				
	Total	First instance	Final decisions on appeal	Total	First instance		Final decisions on appeal	
					#	Rate of recognition (%)	#	Rate of recognition (%)
<b>EU27***</b>	<b>281 120</b>	<b>209 230</b>	<b>71 890</b>	<b>76 320</b>	<b>59 305</b>	<b>28.3</b>	<b>17 015</b>	<b>23.7</b>
BE	18 860	13 620	5 240	3 905	3 505	25.7	395	7.6
BG	700	670	25	305	295	43.8	10	33.3
CZ	2 880	1 400	1 480	260	215	15.5	45	3.1
DK	1 725	1 250	480	890	730	58.3	165	34.3
DE	30 405	19 330	11 070	10 650	7 870	40.7	2 775	25.1
EE	15	10	0	5	5	33.3	0	0.0
IE	7 250	4 790	2 460	1 760	1 465	30.6	295	11.9
EL	30 915	29 580	1 340	415	55	0.2	360	26.8
ES	6 250	5 130	1 120	290	275	5.4	10	1.1
FR	56 115	31 765	24 350	11 470	5 150	16.2	6 320	25.9
IT	20 260	20 225	30	9 740	9 740	48.2	0	0.0
CY	:	:	2 845	:	:	:	35	1.3
LV	25	10	15	5	5	25.0	0	0.0
LT	140	105	35	65	65	64.1	0	2.8
LU	965	485	480	240	185	38.4	55	11.5
HU	965	910	55	400	395	43.7	0	1.8
MT	2 915	2 685	230	1 410	1 410	52.4	0	0.4
NL	11 725	10 925	800	6 090	5 675	52.0	415	51.6
AT	13 705	5 905	7 795	5 675	3 640	61.6	2 035	26.1
PL	4 425	4 245	185	2 800	2 770	65.3	30	15.8
PT	105	105	0	70	70	64.2	0	0.0
RO	715	675	45	150	110	16.0	45	:
SI	260	160	100	5	5	2.5	0	0.0
SK	445	370	70	100	90	24.0	10	12.5
FI	1 770	1 675	95	740	655	39.1	80	87.2
SE	31 220	29 545	1 680	8 670	7 845	26.6	825	49.0
UK	33 525	23 665	9 865	10 190	7 080	29.9	3 115	31.6
IS	65	55	10	10	10	17.0	0	10.0
NO	10 325	9 015	1 310	3 710	3 050	33.9	655	:
CH	13 805	7 550	6 255	5 725	4 830	64.0	895	14.3

**Table 1: Decisions on asylum applications in 2008**

Eurostat, *Asylum decisions in the EU 27, EU Member States granted protection to 76 300 asylum seekers in 2008*

(Reference STAT/09/175, Date: 08/12/2009)

<sup>227</sup> Eurostat Newsrelease, *Asylum decisions in the EU27: EU Member States granted protection to 78.800 asylum seekers in 2009*.

<sup>228</sup> Eurostat Newsrelease, *Asylum decisions in the EU27: EU Member States granted protection to 76.300 asylum seekers in 2008*, available at: <<http://europa.eu/rapid/pressReleasesAction.do?reference=STAT/09/175&type=HTML>> [accessed on 20 November 2010].

### Decisions on asylum applications in 2009

	Decisions*			Positive decisions**				
	Total	First instance	Final decisions on appeal	Total	First instance		Final decisions on appeal	
					#	Rate of recognition (%)	#	Rate of recognition (%)
<b>EU27</b>	<b>317 505</b>	<b>228 610</b>	<b>88 895</b>	<b>78 820</b>	<b>61 750</b>	<b>27.0</b>	<b>17 075</b>	<b>19.2</b>
Belgium	21 700	14 365	7 335	3 190	2 910	20.2	280	3.8
Bulgaria	695	645	50	280	270	41.7	10	21.6
Czech Republic	950	530	415	125	100	18.8	25	6.0
Denmark	2 095	1 650	440	920	790	47.9	130	29.7
Germany	33 505	26 780	6 730	12 055	9 765	36.5	2 295	34.1
Estonia	25	25	0	5	5	17.4	0	0.0
Ireland	6 560	3 135	3 420	395	125	4.0	270	7.8
Greece	16 480	14 350	2 105	210	165	1.2	40	2.0
Spain	6 195	4 480	1 710	380	350	7.8	30	1.8
France	54 840	35 295	19 545	10 415	5 050	14.3	5 365	27.4
Italy	22 875	22 000	875	8 550	8 440	38.4	110	12.5
Cyprus	6 515	3 855	2 660	1 210	1 130	29.3	80	3.0
Latvia	55	40	15	10	10	19.0	5	20.0
Lithuania	195	145	55	45	40	29.4	5	9.3
Luxembourg	670	465	205	140	110	23.6	30	15.3
Hungary	1 960	1 805	150	395	390	21.5	10	5.3
Malta	3 050	2 575	475	1 690	1 690	65.7	0	0.0
Netherlands	17 000	16 355	645	8 120	7 905	48.3	220	33.8
Austria	26 665	14 815	11 850	4 995	3 220	21.7	1 775	15.0
Poland	6 680	6 580	100	2 615	2 525	38.4	95	92.1
Portugal	95	95	0	50	50	51.1	0	-
Romania	1 210	540	670	210	115	20.8	95	14.2
Slovenia	200	130	70	20	20	15.2	0	0.0
Slovakia	355	315	35	195	180	56.2	15	41.7
Finland	2 715	2 650	60	1 010	960	36.2	50	80.6
Sweden	39 350	23 930	15 420	9 085	7 095	29.6	1 990	12.9
United Kingdom***	44 890	31 040	13 850	12 510	8 350	26.9	4 155	30.0
Iceland	80	25	30	5	5	11.5	5	12.5
Norway	23 180	14 700	8 480	4 935	4 510	30.7	430	5.1
Switzerland	19 345	12 695	6 650	6 665	6 025	47.5	640	9.6
Liechtenstein	155	80	75	5	0	2.6	0	2.7

**Table 2: Decisions on asylum applications in 2009**

Eurostat, *Asylum decisions in the EU 27, EU Member States granted protection to 78 800 asylum seekers in 2009*

(Reference STAT/10/89, Date: 18/06/2010)

We understand by *first instance level of the asylum procedure*, those applications that were examined by the Member States, in accordance with the basic principles and guarantees, listed under the 2005/85/EC Directive. Among these basic principles and guarantees formulated by the directive, the most important are: access to the asylum procedure, right to remain in the Member State during the examination of the asylum application, right to legal assistance and representation or the right to a personal interview<sup>229</sup>. On the other hand, the *final decision on appeal*, refers to a decision taken by the highest national court regarding an asylum application (only if all the preceding appeals have been exhausted) that was previously rejected in the other stages of the asylum procedure<sup>230</sup>.

In the European Union, the majority of asylum applications (about three quarters) are examined in the first instance level of the asylum procedure, out of which only a quarter are accepted. Even if the number

<sup>229</sup> See Chapter II (Basic Principles and Guarantees) and III (Procedures at First Instance) of the *Council Directive 2005/85/EC*.

<sup>230</sup> Eurostat Newsrelease, *Asylum decisions in the EU27: EU Member States granted protection to 76.300 asylum seekers in 2008*.

of asylum applications has increased in 2009 (317.505), in comparison with 2008 (281.120), the rate of recognition has rather decreased (24.8% in 2009 compared to 27.1% in 2008)<sup>231</sup>.

In Switzerland, far more asylum applications are examined and accepted in the first instance level of the asylum procedure, than in the final decision of appeal. Switzerland grants protection to a great percentage of asylum seekers (about 35%), nearly the same number as the most welcoming States of the European Union, such as Germany, Italy, the Netherlands or the United Kingdom.

The numbers found in the *positive decisions* columns, include all types of protection that asylum seekers could receive: refugee status, subsidiary protection and humanitarian reasons. In other studies on *Asylum applicants and first instance decisions on asylum applications*, conducted by Eurostat for each quarter of a year, these terms are defined in the following way:

- *Refugee status*, “means status defined in Art.2 (d) of Directive 2004/83/EC within the meaning of Art.1 of the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967”<sup>232</sup>. The definition offered by the 2004/83/EC Directive has been derived from the definition found in the 1951 Refugee Convention.
- *Subsidiary protection status*, “means status as defined in Art.2 (f) of Directive 2004/83/EC”<sup>233</sup>. This type of protection covers all those who do not qualify as refugees under the 1951 Refugee Convention, but who if returned to their country of origin could suffer serious harm.
- *Humanitarian reasons*, may relate to the protection given to a person in view of the principle of non-refoulement and other principles of international humanitarian law. “It includes persons who are not eligible for international protection [...] but are nonetheless protected against removal under the obligations that are imposed on all Member States by international refugee or human rights instruments or on the basis of principles flowing from such instruments. Examples of such categories include persons who are not removable on ill health grounds and unaccompanied minors”<sup>234</sup>.

In order to see the number of positive decisions (refugee status, subsidiary protection status and humanitarian protection), we will examine and compare the numbers provided by Eurostat for first instance decisions during the fourth quarter of 2009 and the first quarter of 2010.

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<sup>231</sup> Because these rates do not appear in the two tables on asylum decisions in the EU27, we have calculated and rounded them to the nearest decimal.

<sup>232</sup> Eurostat, *Asylum applicants and first instance decisions on asylum applications in Q4 2009*, p.9, available at < [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-QA-10-018/EN/KS-QA-10-018-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-10-018/EN/KS-QA-10-018-EN.PDF) > [accessed on 21 November 2010].

<sup>233</sup> *Ibidem*, p.9.

<sup>234</sup> *Ibidem*, p.9.

	Total decisions	Total positive decisions	Refugee status	Subsidiary protection	Humanitarian reasons	Rejected
EU-27 <sup>1)</sup>	56,670	15,485	6,735	6,705	2,045	41,185
Belgium	3,860	870	680	190	-	2,985
Bulgaria	150	65	15	50	-	85
Czech Republic	100	20	10	*	5	85
Denmark	855	375	200	145	25	480
Germany	6,470	2,085	1,605	125	355	4,390
Estonia	10	5	*	0	-	5
Ireland	1,060	410	25	25	360	650
Greece	1,815	25	5	20	0	1,790
Spain	955	95	45	50	*	860
France	9,590	1,290	1,030	260	-	8,300
Italy	4,125	1,855	735	770	350	2,265
Cyprus	670	300	*	285	10	375
Latvia	15	5	*	5	-	10
Lithuania	10	5	*	0	-	10
Luxembourg	145	40	40	0	-	100
Hungary	405	115	35	15	65	285
Malta	700	565	0	560	5	140
Netherlands	3,575	1,650	160	960	530	1,920
Austria	3,815	825	490	335	-	2,990
Poland	1,545	115	15	85	20	1,425
Portugal	15	5	0	5	-	5
Romania	120	20	10	0	15	95
Slovenia	25	15	15	*	-	10
Slovakia	70	30	5	20	5	40
Finland	955	400	30	340	35	555
Sweden	7,490	2,495	485	1,785	220	5,000
United Kingdom	8,120	1,800	1,090	665	40	6,320
Iceland	15	-	*	0	0	10
Liechtenstein	45	0	0	-	0	45
Norway	4,605	980	420	345	210	3,625
Switzerland	4,075	2,000	805	240	960	2,075

Table 3: First instance decisions by outcome, 4th quarter 2009 (rounded figures)

Eurostat, *Asylum applicants and first instance decisions on asylum applications in Q4 2009*<sup>235</sup>

	Total decisions	Total positive decisions	Refugee status	Subsidiary protection	Humanitarian reasons	Rejected
EU-27 <sup>1)</sup>	48,590	13,030	5,945	5,310	1,780	35,560
Belgium	-	-	-	-	-	-
Bulgaria	140	35	5	30	-	100
Czech Republic	120	25	15	10	5	95
Denmark	650	240	110	110	25	410
Germany	8,115	2,270	1,670	120	475	5,845
Estonia	15	0	0	0	-	15
Ireland	510	15	15	*	-	495
Greece	1,000	40	15	5	20	965
Spain	490	100	60	40	*	390
France	9,295	1,425	1,165	260	-	7,870
Italy <sup>2)</sup>	3,280	1,425	595	470	360	1,860
Cyprus	680	260	15	245	0	420
Latvia	15	5	5	0	-	10
Lithuania	30	0	0	0	-	30
Luxembourg	155	25	20	5	-	130
Hungary	350	75	25	25	25	270
Malta	210	135	5	120	10	75
Netherlands	4,185	1,815	195	980	640	2,370
Austria	3,735	780	510	270	-	2,955
Poland	1,170	130	25	80	30	1,040
Portugal	35	15	0	15	-	20
Romania	120	15	15	0	0	105
Slovenia	20	*	*	0	-	20
Slovakia	50	30	*	25	5	20
Finland	1,340	485	45	410	35	855
Sweden	5,835	2,060	405	1,535	125	3,770
United Kingdom	7,040	1,615	1,035	560	25	5,420
Iceland	-	-	-	-	-	-
Liechtenstein	50	0	0	-	0	50
Norway	4,450	1,205	525	430	250	3,245
Switzerland	5,305	2,785	1,125	325	1,340	2,515

Table 4: First instance decisions by outcome, 1st quarter 2010 (rounded figures)

Eurostat, *Asylum applicants and first instance decisions on asylum applications in Q1 2010*<sup>236</sup>

<sup>235</sup> *Ibidem*, p.7.



Comparing the data from these two tables we observe that in three months, the European Union deals with about 50 000 applications, out of which only a quarter have positive outcomes. Out of this quarter, nearly 90% of applicants are entitled to either refugee status or subsidiary protection. The rest, 10% of applicants are granted protection on humanitarian grounds. The tables also show the number of decisions being rejected over a period of 3 months. Sadly, this number is greater than the number of positive decisions, which may be due to the fact that many people apply for asylum without actually providing enough proof for being entitled to any of these types of status. Some of them may even become economic migrants who use the asylum channel to obtain financial or social gain in the host country.

In Switzerland, out of 4.075 applications in the 4<sup>th</sup> quarter of 2009, only 2.000 received positive outcomes at the first instance level of the asylum procedure. Even if the numbers have increased in the 1<sup>st</sup> quarter of 2010 with nearly 1.000 applications, the percentage of people being granted protection has remained stable, at around 50%.

After a closer look at the data provided by these two tables, we observe that the highest number of persons being granted protection was registered in Switzerland, Sweden, the Netherlands and Germany. However, in these countries, the rate of recognition (% of total positive decisions out of total decisions) was not always the highest. It is the case with Germany: even if it grants protection to more than 2.000 people, Germany has a rate of recognition of only 30%. Other countries, such as Switzerland, Italy, Cyprus, Malta or the Netherlands have a rate of recognition of around 50%. The lowest rate of recognition has been registered in Greece (around 1%). The studies also explain this trend: “*the rate of recognition varies considerably among Member States, which is partly due to the differing citizenships of applicants in each Member State*”<sup>237</sup>.

On the type of protection being granted, the majority of EU states turn to the refugee and subsidiary protection status, while the humanitarian status remains less common. In Switzerland however, the situation is completely different, as more people are entitled to humanitarian protection than to refugee protection status. This shows the willingness of the country to grant national protection on a humanitarian basis to those who do not qualify as refugees, but can neither be returned to their country of residence.

By analyzing these statistics we observe that the numbers of asylum applicants remained stable in 2009, compared to 2008 and that more than one quarter of asylum decisions at the first instance level of the asylum procedure have resulted in protection status<sup>238</sup>.

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<sup>236</sup> Eurostat, *Asylum applicants and first instance decisions on asylum applications in Q1 2010*, p. 7, available at < [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-QA-10-032/EN/KS-QA-10-032-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-10-032/EN/KS-QA-10-032-EN.PDF) > [accessed on 21 November 2010].

<sup>237</sup> See *Asylum decisions in the EU27: EU Member States granted protection to 78.800 asylum seekers in 2009*.

<sup>238</sup> *Ibidem*.

### Annex 3 – Common grounds between the European and the International Law on Refugees

Subject	United Nations	Council of Europe	European Union
<i>Right to Asylum</i>	<p><b>Universal Declaration of Human Rights</b><sup>239</sup>, of 10 December 1948</p> <p><i>Article 14: right to asylum</i></p> <p><i>“1. Everyone has the right to seek and to enjoy in other countries asylum from persecution. 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”</i></p>	<p>No reference to the right to asylum in the ECHR.</p>	<p><b>Charter of Fundamental Rights of the European Union</b>, drafted in 2000, reference to it in the Treaty of Lisbon which entered into force on 1 December 2009.</p> <p><i>Article 18: right to asylum</i></p> <p><i>“The right to asylum shall be granted with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union”</i></p> <p>Opt-outs: United Kingdom, Poland<sup>240</sup>, Czech Republic<sup>241</sup></p>
<i>Refugees</i>	<p><b>Convention relating to the Status of Refugees</b>, of 28 July 1951</p> <p><i>Article 1 - definition of the term “refugee”</i></p> <p><i>“owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is</i></p>	<p>All the treaties developed by the Council of Europe have been drafted in accordance with the Convention relating to the Status of Refugees.</p> <p>There is no specific document relating to the protection of refugees.</p>	<p><b>Council Directive 2004/83/EC</b> of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.</p> <p><i>“Refugee” means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;</i></p>

<sup>239</sup> The Universal Declaration of Human Rights, adopted by the General Assembly, is not a legally binding document. Even if it has the status of a declaration, it formulates universal principles and standards that should be respected by all States.

<sup>240</sup> *Protocol no.30 to the Treaty of Lisbon on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom*: the rights contained in the Charter would apply to Poland and the United Kingdom only if they are also found in the laws and practices of these two countries, the Charter would not extend the powers of the European Court of Justice over the British and the Polish law. The United Kingdom was concerned that the Charter would enforce the social rights of its citizens, as well as the right of the European Court of Justice to intervene in these matters. As for Poland, it wanted to have national control over moral and family issues, such as same-sex marriages or abortion.

<sup>241</sup> Presidency Conclusions, Brussels European Council 29-30 October 2009, Protocol on the Application of the Charter of Fundamental Rights of the European Union to the **Czech Republic**: the Protocol No.30 will be modified in the next Accession Treaty in order to apply to the Czech Republic, in the same manner and in the same terms as it applies to Poland and to the United Kingdom. The motivation for the Czech Republic to negotiate this opt-out may be found the euroscepticism of its President Vaclav Klaus who wanted to avoid that Germans expelled from Czechoslovakia after the Second World War, claim their properties before the Court of Justice of the European Union.

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	<p><i>unable or, owing to such fear, is unwilling to return to it."</i></p> <p><b>Protocol relating to the Status of Refugees,</b> of 31 January 1967</p> <p><i>Extension of the refugee definition to new refugee situations, without geographical limitations.</i></p> <p>All 27 EU Member States are parties to this Convention and its Protocol.</p>		<p><i>«Person Eligible for Subsidiary Protection» means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;</i></p> <p>Member States not taking part in the adoption of this directive: Denmark</p>
<b>Non-refoulement</b>	<p><b>Convention relating to the Status of Refugees,</b> of 28 July 1951</p> <p><i>Article 33 - prohibition of expulsion or return ("refoulement")</i></p> <p><i>"1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.</i></p> <p><i>2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."</i></p> <p><b>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,</b> of 10 December 1984</p> <p><i>Article 3 : "1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.</i></p> <p><i>2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations</i></p>	<p><b>Convention for the Protection of Human Rights and Fundamental Freedoms,</b> of 4 November 1950</p> <p>- no reference to non-refoulement, but the European Court on Human Rights has enlarged the application of <i>Article 3- prohibition of torture</i></p> <p><i>"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."</i></p> <p>to extradition (<i>Soering v. the United Kingdom</i>) or expulsion (<i>Cruz Varas and Others v. Sweden, Vilvarajah and Others v. the United Kingdom</i>) cases. Furthermore, in <i>Chahal v. the United Kingdom</i> and <i>Abmed v. Austria</i> the Court held that Article 3 provides a wider protection than Article 33 of the 1951 Refugee Convention.</p> <p>All 27 EU Member States are parties to this Convention</p>	<p><b>Council Directive 2004/83/EC</b> of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.</p> <p><i>Article 21 - Protection from refoulement</i></p> <p><i>"1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.</i></p> <p><i>2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:</i></p> <p><i>(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or</i></p> <p><i>(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.</i></p> <p><i>3. Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to whom paragraph 2 applies."</i></p>

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	<p data-bbox="398 260 878 331"><i>including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."</i></p> <p data-bbox="398 371 853 427">All 27 EU Member States are parties to this Convention.</p>		