Asylum Law in the European Context:

The Contribution of the European Court of Human Rights to the Legal Standards of Asylum Protection

by

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ABSTRACT

The thesis aims to investigate the active role of the European Court of Human Rights (Court) in the interpretation and application of the fundamental rights and principles in the field of asylum law. This research framework focuses on the question: To what extent has the Court contributed to the legal standards of asylum protection?

The study examines, firstly, fundamental rights and principles set out in the main international instruments in order to explore the legal bases of asylum law. Then, it analyses the EU asylum acquis based on its background and its legal context with the aim of tracing the development of the Common European Asylum System (CEAS). This analysis aims to explore the rights and procedures presented in the EU secondary legislation establishing the CEAS. In light of these examinations, finally, the study focuses on the related articles of the European Convention on Human Rights (ECHR) and their applicability to asylum cases. Based on the assessment of the Court's case-law, the thesis presents its findings in the area of the Dublin procedure, non-refoulement principle, collective expulsion and detention to argue for the contributory role of the Court to asylum law. The thesis shows how the Court has interpreted the ECHR and improved the legal standards of the common principles in asylum law.

Further, the study provides a comparative chart which lists the rights and principles presented in international law, European Union law and the ECHR law as well as the leading cases of the Court.

Keywords: Asylum law, Common European Asylum System, European Convention on Human Rights, European Court of Human Rights.

ÖZ

Bu tez, sığınma hukuku alanındaki temel hak ve prensiplerin yorumlanmasında ve uygulanmasında Avrupa İnsan Hakları Mahkemesi'nin (AİHM) aktif rolünü araştırmayı amaçlamaktadır. Araştırma, AİHM'in bu alandaki hukuki standartlara ne ölçüde katkı yaptığı sorusuna odaklanmaktadır.

Sığınma hukukunun hukuki temellerini tespit etmek için öncelikle başlıca uluslararası belgelerde yer verilen temel hak ve prensipler incelenecektir. Ardından, Ortak Avrupa Sığınma Sistemi'nin (OASS) gelişimini izlemek amacıyla Avrupa Birliği'nin (AB) bu konudaki müktesebatı, arka planı ve hukuki içeriği temel alınarak analiz edilecektir. Bu analizin amacı, OASS'yi kuran ikincil mevzuatta düzenlenen hak ve prosedürlerin araştırılmasıdır. Son olarak, bu incelemelerin ışığında, Avrupa İnsan Hakları Sözleşmesi'nin (AİHS) ilgili maddeleri ve bu maddelerin Mahkeme'nin sığınma konusundaki davalarına uygulanması üzerinde durulacaktır. Mahkeme'nin sığınma hukukuna katkı sağlayan rolüne yönelik bulgular, içtihat hukukuna dayanılarak dört başlık ("Dublin" prosedürü, geri göndermeme ilkesi, toplu sınır dışı ve alıkoyma) altında sunulacaktır. Böylece, Mahkeme'nin AİHS'yi nasıl yorumladığı ve sığınma hukukunun temel prensiplerini nasıl geliştirdiği açıklanacaktır.

Ayrıca, uluslararası hukukta, AB hukukunda ve AİHS'te düzenlenen hak ve prensipleri, Mahkeme'nin önde gelen davaları ile listeleyen karşılaştırmalı bir tablo bu çalışmanın ekinde sunulmuştur.

Anahtar Kelimeler: Sığınma hukuku, Ortak Avrupa Sığınma Sistemi, Avrupa İnsan Hakları Sözleşmesi, Avrupa İnsan Hakları Mahkemesi.

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I. Introduction

The history of asylum gained pace with the codification of human rights in international law by the United Nations (UN) as well as the Council of Europe. Three main instruments, the Universal Declaration of Human Rights (Declaration), the 1951 Geneva Convention Relating to the Status of Refugees (Geneva Convention) and the Charter of Fundamental Human Rights of the European Union (Charter) are significant to understand the main principles and rights constituting the basis of the asylum law, which also serve as primary measures for the judicial review of the EU legislation.

The exercise of the right to asylum was considered in relation to sovereignty of states in its traditional sense. The evolution of an individual right of asylum in conjunction with the protection of human rights was developed under the European Convention on Human Rights (ECHR) through the active role of the European Court of Human Rights (Court). Particularly, the interpretation of Article 3 of the ECHR by the Court to broaden the implementation of the principle of non-refoulement beyond the narrow scope of the Geneva Convention reinforced the individualistic side of the right of asylum. While such development increased the importance of the asylum law in the context of international law, it was also supported by the EU law, especially starting from the signing of the Treaty of Maastricht and later, the establishment of the Common European Asylum System (CEAS).

This study focuses on the question to what extent the Court, as a monitoring mechanism, has contributed to the legal standards of asylum protection. To answer this question, starting from the international legal framework, the paper traces the developments of the European asylum law on the basis of fundamental asylum rights and the main principles. It concentrates on these three main overlapping legal regimes (the Geneva Convention, the EU law, and the ECHR law) with regard to international protection of asylum seekers. It examines the fundamental rights of asylum seekers offered by these regimes. After such legal examination of these rights and principles both at the international and the European levels, the study continues its analysis by investigating the role played by the Court in the application and interpretation of the rights and principles.

The study is comprised of three chapters. In the first chapter, three main instruments, the Declaration, the Geneva Convention and the Charter set out the main principles and rights of the international asylum law, such as the right to asylum and the principle of non-refoulement. The assessment of the first generation of asylum instruments shows the evaluation process of

the right to asylum. This evaluation process is helpful for understanding the main parameters on which the EU law as well as the ECHR law in the fields of asylum are based.

The second chapter analyses the asylum acquis together with its background and its legal context with the aim of specifying the rights granted to asylum seekers. The first key principle of the EU asylum law was officially formulated by the Presidency Conclusions of the Tampere European Council in October 1999. The right to asylum started by revolving around the interpretation of Article 63 of the Treaty Establishing the European Community (TEC), and later, the Treaty of Lisbon paved the way for an improvement of the asylum policy. Article 78 of the Treaty provided a special legal basis for the creation of a new evaluating mechanism, the CEAS. Based upon this background, examining the recent developments in the EU asylum policy is important to reveal the scope of these rights and their practice. Many scholars have argued that the EU asylum policy has been restrictive and has aimed to keep people away from the EU territory.[1] On the other hand, in certain aspects, the legal standards have been formed by means of the EU cooperation on the asylum system. Such approach has affected the nature and the practice of the asylum law. Creating an area of freedom, security and justice, the EU strived to determine and legally protect the rights of the asylum seekers. To this end, harmonising the international principles of refugee protection as well as different legal systems and policies of the member states of the EU (Member States) under the CEAS paved the way for the development of European norms on asylum. This chapter provides an insight into the legal structure of the CEAS formed by the EU secondary legislation (Dublin Regulation, Asylum Procedures Directives, Reception Conditions Directive and Qualification Directive). On the other hand, it also shows that the harmonisation has limited the European level for strengthening and guaranteeing fundamental rights for asylum seekers. The weak protection of these rights in practice is subject of the increased number of case laws brought before the Court.

The third chapter addresses the case law of the Court on asylum. It examines how rights and obligations, and so the system has been implemented by the Member States of the EU. Furthermore, although the ECHR does not include any right to asylum, the applicability of the ECHR on asylum cases is one of the main topics of the chapter. The chapter provides an

[1] D. Joly, *The Porous Dam: European Harmonization on Asylum in the Nineties*, INTERNATIONAL JOURNAL OF REFUGEE LAW 6(2), 159–193 (1994). V. Guiraudon, *European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping*, JOURNAL OF COMMON MARKET STUDIES 38(2), 251–27 (2000). E. Guild, *International Terrorism and EU Immigration, Asylum and Borders Policy: The Unexpected Victims of 11 September 2001*, EUROPEAN FOREIGN AFFAIRS REVIEW 8(3), 331–346 (2003).

insight to how the rights and safeguards presented in the EU law take form in the case law of the Court. The interpretation of the ECHR by the Court requires its case law to be categorized such as cases related to the Dublin system, non-refoulement, collective expulsion and detention. Each category focuses on the interpretation of the related articles of the ECHR from the point of asylum procedures. Also, leading legal cases chosen from the large number of judgments are presented together with facts and assessment of the Court to manifest the level of protection provided. Such research will show how overlapping rights and obligations of the EU legislation and the ECHR have been interpreted by the Court.

Finally, the conclusion summarizes the aim of the thesis and presents the main findings by explaining to what extent the Court has contributed to the legal standards of asylum protection in terms of fundamental rights. To this end, how asylum rights are regulated both under the EU law and the ECHR, whether or not the case law of the Court improved the understanding of common principles while assessing the facts are the inquiries presented.

This study presents a legal approach to the protection of asylum seekers in the EU. The legal argument is also built around a comparative method, pointing towards the European asylum law and the case law of the Court. In this sense, the main research materials are the primary sources of the asylum law which are the Declaration, the Geneva Convention, the Charter as well as the EU law instruments such as the EU treaties, the official texts of EU legislation in the field of asylum by its institutions (Conventions, Resolutions, Conclusions, Decisions, Recommendations and Resolutions), and other documents, statements and reports released by the EU, the UN and their institutions. The case law database of the Court (HUDOC) was also used to determine the leading cases. In addition, this study also benefits from secondary sources, namely the literature on EU asylum law and the ECHR law.

It is important to state that the present study will merely include the rights and procedures of asylum seekers who are third-country nationals coming to the EU territory from outside. Therefore, refugees or European citizens claiming asylum are out of topic. Many official documents of the EU use the term “asylum seeker” as a synonymy of the term “refugee”. However, the following definition of asylum seekers given by the United Nations High Commissioner for Refugees (UNHCR) is adopted herein:

> “asylum seekers are individuals who have sought international protection and whose

claims for refugee status have not yet been determined"[2]

Therefore, rights and procedures provided after refugee status gained as well as beneficiaries of subsidiary or temporary protection will not be covered herein.

[2] UNHCR, *Global Trends: Forced Displacement 2015*, p. 37. Available at: http://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html (last accessed on June 3, 2017).

II. Analysis of the Legal Framework on Fundamental Rights of Asylum Seekers

The starting point of the international asylum law revolves around the main legal framework formed by the Declaration, the Geneva Convention, and the Charter. This analysis, therefore, focuses on the asylum seekers' fundamental rights as well as principles stipulated in these international instruments and their relation with the concept of the right to asylum. In this regard, recognition of the three-faceted understanding on the right to asylum including the right of the state to grant asylum, the right of an individual to seek asylum, and the right of an individual to be granted asylum bears a particular importance to consider the evolution of the international law on the practice of asylum.[3] This analysis also aims to draw the framework for the EU asylum law which should be read into the formulated rights pronounced in such international instruments. The main rights and principles in these international instruments constitute the basis of the EU law, and so the CEAS.

A. The Universal Declaration of Human Rights[4]

The primary document concerning the fundamental rights of an asylum seeker is the Declaration which regulates "the right to seek and to enjoy asylum" in Article 14 and "the right of an individual to leave his country" in Article 13, which constitute the starting point of the right to asylum in the international context.

1. The Right to Seek and to Enjoy Asylum

The first paragraph of Article 14 of the Declaration sets forth the right as follows:

> (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

The article only deliberates the right to seek and to enjoy asylum. Instead of granting a right to asylum to a non-national individual, this paragraph only provides an individual right to escape from prosecution, to leave the country and to seek asylum in other countries. However, the desired state of refuge does not have to accept to grant asylum. In fact, the right of an individual to be admitted to any country is not provided in any international instrument. Therefore, the right to seek and to enjoy asylum can be claimed by an asylum seeker against his/her own country in order to leave the country and seek asylum in other countries, rather than the desired state of refuge. The right to seek asylum is generally defined as the right of

[3] For more information on the three-faceted conception of the right of asylum, please see: ATLE GRAHL-MADSEN, TERRITORIAL ASYLUM, (Almqvist & Wiksell, 1980).
[4] The Declaration was adopted by the United Nations General Assembly on 10 December 1948 in Paris.

persons fearing persecution to benefit from "the right to leave a country" (Article 13(2) of the Declaration) for trying to obtain asylum.[5]

Notwithstanding this general definition, there is no common understanding on the right to seek and enjoy asylum in international law and also no codification on this right in the binding human rights treaties of the UN and other regional organizations.[6] Discussions on the draft Declaration in 1949 mostly focused on the right of political asylum and extradition due to the status quo at that moment and the historical aspect of the issue.[7] During these discussions, the right was considered as a creation of customary international law, which highlights the 'political' dimension of the asylum due to the historical exercise by the countries.[8] Later discussions concerned whether or not the right of an individual to be granted asylum by another state (the desired state of refuge) should have been recognised by the state of which the asylum seeker is a national (the state of origin). It is important to note that similar understanding is also reiterated in the Declaration on Territorial Asylum[9] and other regional instruments[10]. Article 1(1) of the Declaration on Territorial Asylum includes that asylum to be granted by a state in the exercise of its sovereignty shall be respected by the other states.[11]

Finally, discussions were concluded according to the traditional principle in international law, which denoted that every sovereign state had its exclusive control over its territory and

[5] The Council of Europe Commissioner for Human Rights, *The right to leave a country*, Issue Paper, 2013, p. 25. Available at: http://www.coe.int/t/commissioner/source/prems/prems150813_GBR_1700_TheRightToLeaveA Country_web.pdf (last accessed on 3 June 2017)

[6] The only exception is Article 12(3) of the African Charter on Human and Peoples' Rights, as follows: "Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions. It is also important to note that even the right was included in the draft of the International Covenant on Civil and Political Rights, the proposal was rejected due to the sovereign power of state to resolve to admit or exclude third countries' citizens to their territories."

[7] UN Doc. A/CN.4/SR.6, (May 5, 1949), paras. 5–13. *See* also UN Doc. A/CN.4/SR.33, (May 5, 1949).

[8] Ibid.

[9] The Declaration on Territorial Asylum was adopted by the General Assembly of the United Nations in 14 December 1967 with its resolution numbered 2312 (A/RES/2312 (XXII)). Available at: http://www.refworld.org/docid/3b00f05a2c.html (last accessed 3 June 2017)

[10] *See* Article II (1) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969; Article 1 of the Convention on Territorial Asylum, adopted by the Organization of American States, 1954; Article III (1) of the Principles Concerning Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee, 1966; Article 2 of the Declaration on Territorial Asylum, adopted by the Committee of Ministers of the Council of Europe, 1977.

[11] Article 1 of the Declaration on Territorial Asylum: "1. Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States.
2. The right to seek and to enjoy asylum may not be invoked by 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.
3. It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum."

persons existing in its territory.[12] Such states had no obligation to admit these persons, referring to the right to grant or deny asylum of the state. Therefore, the right to asylum was generally interpreted in its traditional sense as the right of every state to offer asylum and to refuse extradition,[13] as also stated by the UK delegation to the United Nations during the preparation of the Declaration.[14] Thus, the word 'enjoy' denotes that the individual right of asylum is subject to approval of the desired state of refuge, and the state of origin is under a corresponding obligation to respect the asylum granted by the desired state of refuge and not to consider it an unfriendly act.[15]

In this line, the International Court of Justice (ICJ) also recognized the right to asylum as a part of the exercise of the territorial sovereignty as follows:

> In the case of extradition, the refugee is within the territory of the State of refuge. A decision with regard to extradition implies only the normal exercise of the territorial sovereignty. The refugee is outside the territory of the State where the offence was committed, and a decision to grant him asylum in no way derogates from the sovereignty of that State.[16]

Interpretation of the right to asylum as a right to a state to grant asylum constitutes the main understanding in the Declaration as the part of the traditional international asylum law. The same understanding is also valid for today's international law. An individual has no absolute right to asylum applicable vis-à-vis a state due to the state territorial sovereignty. However, considering today's practice, this right also forms the basis for individual claims. For instance, the right to seek asylum may be violated by a state when an asylum seeker is returned to his origin country without any opportunity to present his or her case. Hence, the prohibition of refoulement has become central point in interpretation of the right to seek asylum. Likewise, the right to enjoy asylum may be violated by a desired state of refuge in case of implementation of unreasonable detention to an asylum seeker.[17]

[12] UN Doc. A/C.3/253, (November 10, 1948). UN Doc. A/C.3/SR.121 (November 3, 1948).
[13] UN Doc. E/CN.4/184, (May 13, 1949), para. 6.
[14] UN Doc. A/C.3/SR.121, (November 3, 1948), p. 328.
[15] UN Doc. A/CN.4/SR.16, (May 5, 1949), paras. 67–75.
[16] Colombia v. Peru, *I.C.J. Reports*, 1950, p. 274.
[17] Richard Plender and Nuala Mole, *Beyond the Geneva Convention: constructing a de facto right of asylum from international human rights instruments*, in Frances Nicholson and Patrick Twomey (eds.), REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES (Cambridge University Press, 1999), p. 83.

Concerning the limitation on the application of this right, the second paragraph of Article 14 of the Declaration is as follows:

> (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.

This paragraph constitutes an exclusion provision which covers persons involved in war crimes, crimes against humanity, crimes against peace or acts contrary to the purposes and principles of the United Nations. Considering the date of the Declaration, the extradition was especially attributed to individuals involved in criminal activities during the Second World War. However, such limitation of the right to asylum has also become a part of the international refugee protection regime.[18]

2. The Right of an Individual to Leave His Country

Article 13(2) of the Declaration enshrines the right of an individual to leave his country as follows:

> (2) Everyone has the right to leave any country, including his own, and to return to his country.

This right is a component of the concept of the asylum. Although it does not entail a right to enter other states, the right to leave the state of origin should be granted in order to exercise the right to seek asylum. Furthermore, the right to seek asylum under Article 14 does not include more than the right to leave any country as guaranteed by Article 13(2).[19] However, considering both articles, it can be perceived that this right claims that asylum seekers shall not be prevented from travelling to another country and seeking asylum there. In this vein, while the General Assembly adopted the Declaration on Territorial Asylum, it recalled both Article 14 and 13(2) together as the basis.[20] Accordingly, persons fearing persecution invoke their right to leave a country for the purpose of obtaining asylum, so exercising their right to seek asylum.

[18] *See below* note 31.
[19] Atle Grahl-Madsen, THE STATUS OF REFUGEES IN INTERNATIONAL LAW, (Leyden: A.W. Sijthoff, 1972), p. 26. [hereinafter Grahl-Madsen 1972]
[20] *See supra* note 10.

Being referred to first in the Declaration, the right was also proclaimed in other United Nations human rights instruments.[21] According to the guidance on the meaning of the right released by the UN Human Rights Committee, the scope of the right is not limited to any specific purpose or the period of time an individual prefers to stay out of his state of origin.[22] It also embraces the right to obtain the necessary travel documents, in particular a passport since it facilitates the crossing of the borders. Accordingly, a state of origin has a positive duty, which is issuing a passport or prolonging its validity, as well as a passive duty, which is not to put obstacles on individuals seeking to leave.

The UN Human Rights Committee proclaimed the following list of practices and rules in application of the right to obtain necessary travel documents as well as various legal and bureaucratic barriers which infringe the right to leave according to state practice:

> lack of access for applicants to the competent authorities and lack of information regarding requirements; the requirement to apply for special forms through which the proper application documents for the issuance of a passport can be obtained; the need for supportive statements from employers or family members; exact description of the travel route; issuance of passports only on payment of high fees substantially exceeding the cost of the service rendered by the administration; unreasonable delays in the issuance of travel documents; restrictions on family members travelling together; requirement of a repatriation deposit or a return ticket; requirement of an invitation from the State of destination or from people living there; harassment of applicants, for example by physical intimidation, arrest, loss of employment or expulsion of their children from school or university; refusal to issue a passport because the applicant is said to harm the good name of the country.[23]

Another dimension of the concept of this right is its relation with the right to enter. The refusal of entry of a refugee by a desired state can render the right to leave his/her state

[21] The right to leave a country is also proclaimed in Article 12(2) of the International Covenant on Civil and Political Rights; Article 2(2) of Protocol 4 of the European Convention of Human Rights; Article 22 of the American Convention on Human Rights; Article 8 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 10 of the Convention on the Rights of the Child; Article 5 of the General Assembly's Declaration on the Human Rights of Individuals Who are Not Nationals of the Country in Which They Live.

[22] UN Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, para. 8. Available at: http://www.refworld.org/docid/45139c394.html (last accessed 3 June 2017) [hereinafter CCPR General Comment]

[23] CCPR General Comment, para. 17.

meaningless in practice. Therefore, it is argued that the right to leave may imply obligation on a desired state of a refuge not to refuse entry to their territories.[24] However, the unwillingness of a state to allow entry does not affect the right to leave in principle. A person can still exercise this right to leave and enter a desired state illegally, which is a fact for most of the asylum seekers, particularly in the cases of entering EU territory illegally with the aim of making a legal asylum application. The principle of non-refoulement is important to be considered in this regard.

B. The 1951 Geneva Convention Relating to the Status of Refugees[25]

Grounded in Article 14 of the Declaration, the Geneva Convention, together with the 1967 Relating to the Status of Refugees[26] is the first internationally recognized treaty for international protection of refugees. This treaty, which is not binding, introduces the notion of 'refugee' status[27], establishes the universally acknowledged basis of the refugee law and constitutes a starting point for the EU law, as evidenced by the references made in the documents of EU institutions.[28] Therefore, the main framework of the Geneva Convention, as a status and rights-based instrument, has an importance to identify basic rights on the matter.

The Geneva Convention does not oblige the states to give the status of 'refugee' and thus the rights associated with this status. Also, it does not specifically deal with the asylum procedures or standards of proceedings for refugee status determination, or explicitly mention the treatment to asylum seekers. Its key principles such as non-refoulement and non-penalization apply also to asylum seekers before formally having refugee status. And, the Geneva Convention is also relevant for the interpretation of particularly the Qualification Directive and the Reception Conditions Directive in the EU law in terms of the criteria for

[24] J.A.R. Nafziger, *The General Admission of Aliens Under International Law*, AJIL 77, p. 842 (1983).
[25] The Geneva Convention consisting of 46 articles was signed on 28 July 1951 in Geneva and entered into force on 22 April 1954. It has 147 parties including all 28 members of the European Union. Available at: http://www.unhcr.org/3b66c2aa10.html (last accessed on 3 June 2017)
[26] The Protocol was signed on 31 January 1967 and entered into force on 4 October 1967. It has 146 parties including all 28 members of the European Union. Available at: http://www.unhcr.org/3b66c2aa10.html (last accessed on 3 June 2017)
[27] Article 1(A)(2) of the Geneva Convention provides a definition of the term "refugee" at the international level as follows: "As a result of events occurring before 1 January 1951 and owing to 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."
[28] One of the main references is incorporated into Article 63(1) of the former EC Treaty and Article 78 of the Treaty on the Functioning of the European Union as well as the preamble and the text of the directives establishing the Common European Asylum System, to be detailed below.

qualification of an asylum seeker as a refugee during the asylum procedure. Moreover, in this vein, the exclusion criteria from refugee status in the Geneva Convention are interpreted as the exceptions for the right to asylum and the prohibition on refoulement.[29]

1. Main Principles and the Right to Asylum

An important dimension of the Geneva Convention is the establishment of various fundamental rights and safeguards at the international level for refugees.[30] From the perspective of asylum law, the granting of asylum is not approached in the Geneva Convention, and it does not grant a right to asylum to an individual.[31] A person can enjoy this right only in the case of positive assessment of a desired state of refuge. On the other hand, the key principles proclaimed in the Geneva Convention, not connected to lawful stay or residence, may also be applicable for asylum seekers who are not yet formally recognized as refugees by states.[32] Besides the enjoyment of basic human rights, these main principles are accepted as 'non-refoulement' and 'non-penalization for illegal entry or stay'. [33]Accordingly,

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[29] The exclusion criteria from refugee status can be found in Article 1(F) of the Geneva Convention, as follows: The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) 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; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.
See also UNHCR Executive Committee, *Conclusion No. 82 (XLVIII)*, 1997, para (d)(v): "(v) the need to apply scrupulously the exclusion clauses stipulated in Article 1 F of the 1951 Convention and in other relevant international instruments, to ensure that the integrity of the asylum institution is not abused by the extension of protection to those who are not entitled to it;"

[30] Non-discrimination (Art 3), religion (Art 4), rights granted apart from this convention (Art 5), the term "in the same circumstances" (Art 6), exemption from reciprocity (Art 7), exemption from exceptional measures (Art 8), provisional measures (Art 9), continuity of residence (Art 10), refugee seamen (Art 11) under Chapter I titled 'General Provisions'; personal status (Art 12), movable and immovable property (Art 13), artistic rights and industrial property (Art 14), right of association (Art 15), access to courts (Art 16) under Chapter II titled 'Juridical Status'; wage-earning employment (Art 17), self-employment (Art 18), liberal professions (Art 19) under Chapter III titled 'Gainful Employment'; rationing (Art 20), housing (Art 21), public education (Art 22), public relief (Art 23), labour legislation and social security (Art 24) under Chapter IV titled 'Welfare'; administrative assistance (Art 25), freedom of movement (Art 26), identity papers (Art 27), travel documents (Art 28), fiscal charges (Art 29), transfer of assets (Art 30), refugees unlawfully in the country of refugee (Art 31), expulsion (Art 32), prohibition of expulsion or return (Art 33), naturalization (Art 34) under Chapter V titled 'Administrative Measures'.

[31] However, in its preamble, the grant of asylum is mentioned, and the international co-operation is highlighted in order to avoid heavy burden on states. The related part of the preamble of the Geneva Convention is as follows: "considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,"

[32] These key principles are non-discrimination (Art 3), freedom of religion (Art 4), rights granted apart from the Convention (Art 5), exemption from reciprocity (Art 7), exemption from exceptional measures (Art 8), personal status (Art 12), access to courts (Art 16), rationing (Art 20), public education (Art 22), non-penalization for illegal entry or stay (Art 31), and non-refoulement (Art 33).

[33] UN General Assembly, *Note on international protection: report of the High Commissioner*, 28 June 2011, A/AC.96/1098. Available at: http://www.refworld.org/docid/4ed86d612.html (last accessed 3 June 2017)

these principles have direct reflections on the practice of the right to asylum directly in any case.

a) Non-refoulement

Non-refoulement, which constitutes the main idea of the refugee protection, is regulated in Article 33(1) of the Geneva Convention titled "Prohibition of Expulsion or Return" as follows:

> 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.

The Executive Committee of the UNHCR describes the non-refoulement in its conclusions and manifests the place of the principle in asylum law as follows:

> (d) (i) the principle of non-refoulement, which prohibits expulsion and return of refugees in any manner whatsoever to the frontiers of territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion, whether or not they have been formally granted refugee status, or of persons in respect of whom there are substantial grounds for believing that they would be in danger of being subjected to torture, as set forth in the 1984 Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment;[34]

Although the Geneva Convention does not cover the right to asylum or the right to obtain refugee status or any obligation imposing on states to grant an asylum seeker refugee status, it compels the states to not remove them from their territory or border to a state where they would be at risk of persecution. The non-refoulement principle does not include the "right to admission", and is not inclusive as the right to asylum since the notion of 'asylum' embraces admission, residence and protection. However, the principle leads to an important conclusion regarding the admission and access to asylum procedures. Thus, it is recognized as a de facto duty to admit asylum seekers, since admission is the only way to avoid the risk of

[34] UNHCR Executive Committee, *Conclusion No. 82 (XLVIII)*, 1997, para (d)(i).

persecution.[35] At the end of the asylum procedures to be established by each state according to their structure, the state resolves either to provide international protection or to remove the person. Therefore, the prohibition of refoulement constitutes the fundamental basis not only for recognized refugees but also for asylum seekers whose refugee status has not been formally declared.[36]

With regards to the scope of this principle, it prohibits states from removing, expelling, deporting, returning, or non-admission, or extraditing a person to a country where they would be at risk of persecution. One of the main debates is whether or not rejecting an asylum seeker at the frontier of a state is under the scope the application of non-refoulement. In the early years of the Geneva Convention, it was generally understood that persons who had not yet entered the territory of a desired state did not fall within the scope of the application of this principle.[37] Thus, rejection at the frontier by states continued. However, after many years, in line with the rationale of the Geneva Convention, a broader concept has paved the way for the admission of asylum seekers at the frontiers without entry into territories.[38] Therefore, in order to apply the non-refoulement principle, an asylum seeker does not need to be present in the territory of a desired state. Rejection of such persons at the frontier before entering a territory violates the principle.

The non-rejection at the frontier is also mentioned as under the scope of the non-refoulement principle in several documents of the UNHCR. The relevant parts from the conclusions of the Executive Committee are as follows:[39]

> II. Measures of Protection
>
> A. Admission and Non-Refoulement
>
> 2. In all cases the fundamental principle of non-refoulement – including non-rejection at the frontier – must be scrupulously observed.[40]

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[35] J. C. HATHAWAY, THE RIGHS OF THE REFUGEES UNDER INTERNATIONAL LAW, (Cambridge University Press, 2005), p. 301.

[36] *See Supra* note 30.

[37] According to one of the authoritative writers, Grahl-Madsen, Article 33 could be applied only to persons who were legally or illegally present in the territory of a state, and there was no requirement for a state to admit any person who had not set foot in its territory. Thus, the only persons determined to be refugees under the Geneva Convention may have benefited from Article 33(1), and it provided no right of admission for the purpose of seeking asylum. *See supra* note 3.

[38] FRANCESCO CHERUBINI, ASYLUM LAW IN THE EUROPEAN UNION, (Routledge, 2015), p. 48 [hereinafter CHERUBINI].

[39] Besides conclusions mentioned herein, *see* also: UNHCR Executive Committee, *Conclusion No. 81 (XLVIII)*, 1997, para. (h); UNHCR Executive Committee, *Conclusion No. 99 (LV)*, 2004, para. (1).

[40] UNHCR Executive Committee, *Conclusion No. 22 (XXXII)*, 1981.

(iii) the need to admit refugees into the territories of States, which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs;[41]

(q) Strongly deplores the continuing incidence and often tragic humanitarian consequences of refoulement in all its forms, including through summary removals, occasionally en masse, and reiterates in this regard the need to admit refugees to the territory of States, which includes no rejection at frontiers without access to fair and effective procedures for determining their status and protection needs;[42]

Deeply preoccupied by current and persistent protection problems of persons of concern, including the rejection of refugees and asylum-seekers at frontiers without examination of claims for asylum or safeguards to prevent refoulement, long-term detention, continuing sexual and gender-based violence and exploitation, and manifestations of xenophobia, racism and related intolerance,[43]

Moreover, Article 3(1) of the Declaration on Territorial Asylum is as follows:

1. No person referred to in Article 1, Paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.

Another important discussion in this respect is about its extraterritorial application. Most states tend to allege the territorial limitation due to operations carried out beyond their territorial waters. However, according to the cases of the Court[44] and the Human Rights Committee under the International Covenant on Civil and Political Rights,[45] the prohibition on refoulement also applies outside the territory of the states. Also, the UNHCR pronounces that Article 33(1) has no geographic restriction for the place where an asylum seeker is sent from as follows:

[41] UNHCR Executive Committee, *Conclusion No. 82 (XLVIII)*, 1997.
[42] UNHCR Executive Committee, *Conclusion No. 85 (XLIX)*, 1998.
[43] UNHCR Executive Committee, *Conclusion No. 108 (LIX)*, 2008.
[44] *See Chapter* IV(C).
[45] The Human Rights Committee, *Sergio Euben Lopez Burgo v. Uruguay*, Communication No. R.12/52, 1981.

> The obligation set out in Article 33(1) of the 1951 Convention is subject to a geographic restriction only with regard to the country where a refugee may not be sent to, not the place where he or she is sent from.[46]

Accordingly, a state can remove an asylum seeker only if this measure is not under the scope of the prohibition of refoulement. Thus, until a final determination whether or not the territory of the destination in case of refoulement would put an asylum seeker at risk of persecution in his/her country, he or she must not be removed. So, during the determination process on granting asylum, an asylum seeker must have the right to stay.[47] According to the UNHCR, this responsibility to admit "derives from the broader obligations towards refugees, which depend, for their fulfilment, on the person being admitted and having his or her status determined".[48] The right to stay is necessary to be provided during the determination process.

Temporary admission of asylum seekers to their territory during such determination process may take place without the presentation of an official application and entry documents.[49] The underlying reason for this principle is to promote asylum seekers the access to asylum procedures for international protection. Therefore, the right to access to asylum procedures of the asylum seeker is complementary for the principles. The refoulement of an asylum seeker also constitutes the violation of this right.

b) Non-penalization for Illegal Entry or Stay

Article 31(1) of the Geneva Convention implies that an asylum seeker has the right to enter and temporary stay as follows:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

This article requires states not to impose any penalties on refugees who entered a desired state

[46] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligation under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 2007, para.26. [hereinafter UNHCR Advisory Opinion on Non-refoulement]
[47] UNHCR Advisory Opinion on Non-refoulement, p. 49.
[48] UNHCR Report, 1 September 1989, A/44/12
[49] *See* CHERUBINI, p. 49. Even though the Geneva Convention has no explicit provision, the Court has ruled on this concern in judgment of Hirsi Jamaa et al. V. Italy, to be detailed in Chapter IV(C) below.

of refuge illegally in case they come from a state in where there is a risk of persecution. The provision applies to the broadest concept of the 'refugee', since the determination procedure does not create refugee status but declares that the status exists.[50] Therefore, the provision can be applied to asylum seekers who entered a country for international protection.

The provision applies to the persons who directly arrive from the country in where they are at risk of persecution. They are required to present themselves to the authorities without delay with a good reason for their illegal entry or stay. In practice, most asylum seekers are required to appear at the frontier or enter into a territory illegally where they desire to make their asylum application. Due to such requirement for submitting the application, non-penalization for illegal entry or stay offers an asylum seeker to make the application before the authorities.

It is important to note that a state has no legal obligation to admit anyone who has not entered its territory. Under customary international law, states are free to admit or not admit aliens due to their territorial sovereignty, as stated above. The Geneva Convention only prohibits states from imposing penalties for illegal entry. An asylum seeker has officially no right of admission or right to enter to a territory of state. However, considering non-penalization together with non-refoulement, states have an obligation to not return or reject asylum seekers at borders or within the territory of states and not to penalize in case of illegal entry or stay. An asylum seeker has a right to entry and temporary residence during his/her determination process.

2. Right to Fair and Effective Procedure

Although the Geneva Convention does not contain any provision on the process of determination on the refugee status, it is instrumental for the achievement of the general purpose. Determination of the refugee status therefore requires a procedure as per due process of law. States should observe all the information in order to comply with the principle of non-refoulement and justification of a possible removal. In its conclusions, the UNHCR Executive Committee reiterates the importance of the access to fair and efficient asylum procedures for the determination of refugee status as follows:[51]

> (i) Reiterates the importance of establishing and ensuring access consistent with the 1951 Convention and the 1967 Protocol for all asylum-seekers to fair and efficient

[50] *See* CHERUBINI, p. 96.
[51] Apart from the above-mentioned conclusions, *See* also UNHCR Executive Committee, *Conclusion No. 74 (XLV)* 1994, *Conclusion No. 85 (XLIX)* 1998, *Conclusion No. 87 (L)* 1999, *Conclusion No. 100 (LV)* 2004.

> procedures for the determination of refugee status in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted protection;[52]
>
> (d) Reiterates, in light of these challenges, the need for full respect to be accorded to the institution of asylum in general, and considers it timely to draw attention to the following particular aspects:
> (…)
> (ii) access, consistent with the 1951 Convention and the 1967 Protocol, of asylum-seekers to fair and effective procedures for determining status and protection needs;[53]

In its Handbook on Procedures and Criteria for Determining Refugee Status, the Executive Committee of the High Commissioner denotes the procedures to be satisfied; i.e., basic requirements such as competent official, the necessary guidance given to the applicant as to the procedure to be followed, existing of a clearly identified authority to examine applications and make a decision in the first instance. In addition, the applicant should be given the necessary facilities. There should be an opportunity to contact a representative of UNHCR. The applicant should be informed when recognized as a refugee, and the related documentation should be provided accordingly. Otherwise, there should be a reasonable time to appeal the decision. Finally, the applicant should have right to remain in the country pending a decision on his initial request or on appeal.[54]

Fair and efficient asylum procedures necessitate the requirements above to be fulfilled by the states for the duly application of the Geneva Convention.[55] According to such mentioned

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[52] UNHCR Executive Committee, *Conclusion No. 71 (XLIV)*, 1993.
[53] UNHCR Executive Committee, *Conclusion No. 82 (XLVIII)*, 1997.
[54] UNHCR Executive Committee, *Conclusion No. 8 (XXVIII)*, 1977.
[55] 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*, 2007, para. 8. Available at: http://www.unhcr.org/refworld/docid/45f17a1a4.html (last accessed on 3 June 2017)
See also: UNHCR Executive Committee, *Conclusion No. 8*, 1993, para (i): "(i) Reiterates the importance of establishing and ensuring access consistent with the 1951 Convention and the 1967 Protocol for all asylum-seekers to fair and efficient procedures for the determination of refugee status in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted protection;"
UNHCR Executive Committee, *Conclusion No. 82*, 1997, para (d)(ii)&(iii): "(d) Reiterates, in light of these challenges, the need for full respect to be accorded to the institution of asylum in general, and considers it timely to draw attention to the following particular aspects: (ii) access, consistent with the 1951 Convention and the 1967 Protocol, of asylum-seekers to fair and effective procedures for determining status and protection needs; (iii) the need to admit refugees into the territories of States, which includes no rejection at frontiers without fair and effective procedures for determining status and protection needs;"

requirements, each state establishes identical procedures as per its structure.[56] As mentioned above, two important rights come to prominence as important aspects of fair and effective procedure. These are the right to remain or stay in the territory of the state which includes an asylum seeker be allowed to stay in the territory of the state to where the application is made during the execution of the determination procedures[57], and the right to appeal a negative decision or right to effective remedy.

C. The Charter of Fundamental Rights of the European Union[58]

The Charter of Fundamental Rights of the European Union was adopted on 2 October 2000 and proclaimed on 7 December 2000. However, it gained its full legal effect when the Treaty of Lisbon entered into force on 1 December 2009. According to Article 6 of the Treaty of European Union (TEU), the EU recognizes the Charter, and acknowledges that it has the same legal value as the treaties.[59] Therefore, the Charter is the primary legislation within the EU legal order. As regards to the relation of the Charter with the ECHR, the Preamble of the Charter reaffirms the case law of the Court[60]. Paragraph 3 of Article 52 of the Charter titled "Scope and interpretation of rights and principles" is as follows:

> In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

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[56] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, 2011, p. 192.
[57] UNHCR Executive Committee, *Conclusion No. 8*, 1993, para E.
[58] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 2000 OJ C 364/1, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT (last accessed on 3 June 2017)
[59] Paragraph 1 of Article 6 of the TEU: "1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties." "The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties." "The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions."
[60] Paragraph 5 of the Preamble of the Charter: "This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case law of the Court of Justice of the European Communities and of the European Court of Human Rights."

Most of the rights granted by the Charter are also encompassed by the ECHR. However, it is important to note that two prominent articles of the Charter, the "right to asylum" in Article 18 and "Protection in the event of removal, expulsion or extradition" in Article 19, are not included in the ECHR. Hence the connection between the Charter and the ECHR is possible in this sense. The right to asylum was initially combined with the prohibition of the collective expulsion in one article. Later, two different articles dealing with the right to asylum (Article 18), the prohibition of collective expulsion (Article 19(1)) and refoulement (Article 19(2) were created.

1. The Right to Asylum

Article 18 titled "Right to Asylum" is created in the Charter's original version dated 2000 as follows:

> The right to asylum shall be guaranteed with due respect for the rules of the Refugee Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

The scope of the article is wider than the scope of any international human rights instrument. The right was not guaranteed in such terms in any other related European legislation. As evident in the travaux préparatories of the Charter, the wider formulation was chosen in order to not restrict the scope of the provision.[61] The effectiveness of the article arises from the provision regulated as "the right to asylum" instead of "the right to seek asylum". As discussed above, the meaning of the right to seek asylum has been associated with the principle of non-refoulement. However, in the Charter, the existence of the right to asylum in the Charter, in addition to the prohibition of refoulement (Article 19(2)), bears particular importance in respect of the scope and nature of the right. It clearly shows that the scope of the asylum institution goes beyond the non-refoulement principle. Accordingly, as per the UNHCR's statement on the right to asylum, Article 18 of the Charter includes the following elements:

> (i) protection from *refoulement*, including non-rejection at the frontier; (ii) access to territories for the purpose of admission to fair and effective processes for determining status and international protection needs; (iii) assessment of an asylum claim in fair and efficient asylum processes (with qualified interpreters and trained responsible

[61] *See* Travaux Préparatoires to the Convention, available at: http://www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf (last accessed on 3 June 2017)

> authorities and access to legal representation and other organizations providing information and support)) and an effective remedy (with appropriate legal aid) in the receiving state; (iv) access to UNHCR (or its partner organizations); and (v) treatment in accordance with adequate reception conditions; (vi) the grant of refugee or subsidiary protection status when the criteria are met; (vii) ensuring refugees and asylum-seekers the exercise of fundamental rights and freedoms; and (viii) the attainment of a secure status.[62]

In this regard, the right to asylum is commonly defined as including a range of various rights such as allowing the asylum seekers to enter into a territory and admitting them for a status determination procedure.

Two important references in respect to the EU asylum acquis are noted in the wording of Article 18. The references in its wording of the principles and standards of the Geneva Convention and the requirements of the TEC aim to establish a connection between the right to asylum and the existing EU asylum acquis.

The first reference is the guarantee of the right of asylum with due respect for the rules of the Geneva Convention and the Protocol. The Charter acknowledges the right to asylum in the EU asylum acquis in line with the structure of the Geneva Convention. Accordingly, the substantive provisions and its principles of the Geneva Convention must be followed for the application of the right to asylum. The preambles of these secondary legislations also reference giving effect to right to asylum stated in Article 18 of the Charter. The reference to this Article also takes place in the context of these legislations with regards to full observance of the right to asylum and other obligations. This reference also acknowledges observing the provisions of Geneva Convention as well as substantive and procedural standards regulated in the EU secondary legislation.

The second reference is the guarantee of the right to asylum in accordance with the TEC. Based on former Article 63 of the TEC incorporated by the Amsterdam Treaty in 1997 which o respects the Geneva Convention and aims to adopt minimum standards for asylum

[62] UNHCR, *UNHCR Statement on the right to asylum, UNHCR's supervisory responsibility and the duty of States to cooperate with UNHCR in the exercise of its supervisory responsibility*, 2012, para. 5(a), available at: http://www.refworld.org/pdfid/5017fc202.pdf (last accessed on 3 June 2017) [hereinafter UNHCR Statement on the right to asylum]

procedure,[63] the article recognizes the right to asylum also as an individual right and a part of human rights instrument. After the EU expressed its initiative to work on a common asylum system by the Amsterdam Treaty in 1997, incorporation of the right of asylum as an individual right, instead of a state right as in traditional international law, into the EU acquis by the Charter constitutes an important dimension for the framework of the modern institution of asylum.

When the Charter was implemented in 2009 by the Treaty of Lisbon amending the TEC, the text of the article changed to "…in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union…".[64] Therefore, Article 63 of the TEC was replaced by Article 78 of the Treaty on the Functioning of the European Union (TFEU). Article 78 of the TFEU explicitly states the aim of the EU for developing a common policy on asylum, requiring a series of Regulations, Directives and other instruments to be adopted by the European Parliament and the Council.[65] With respect to the wording of Article 18, the right to asylum shall be guaranteed in line with Article 78 of the TFEU and its intended aim. Therefore it requires the secondary legislation to cover this right in its scope.[66] Within this

[63] The former Article 63 of the TEC is as follows: "The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt: (1) measures on asylum, 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, within the following areas: (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, (b) minimum standards on the reception of asylum seekers in Member States, (c) minimum standards with respect to the qualification of nationals of third countries as refugees, (d) minimum standards on procedures in Member States for granting or withdrawing refugee status; (2) measures on refugees and displaced persons within 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; (3) measures on immigration policy within the following areas: (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion, (b) illegal immigration and illegal residence, including repatriation of illegal residents; (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. Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements. Measures to be adopted pursuant to points 2(b), 3(a) and 4 shall not be subject to the five year period referred to above."

[64] The full text of Article 18 changed is as follows: "The right to asylum shall be guaranteed 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 (hereinafter referred to as 'the Treaties')."

[65] For the full text of Article 78 of the TFEU, *See below* page 43.

[66] The preambles of directives of the Common European Asylum System contain the following wording: "This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly."

framework, states have the following obligations:

> (…) an asylum-seeker (i) has access to and can enjoy a fair and efficient examination of his or her asylum claim and/or an effective remedy in the receiving state, (ii) is treated in accordance with adequate reception conditions, and (iii) is granted asylum in the form of refugee status or subsidiary protection status when the criteria are met.[67]

In brief, Article 18 of the Charter incorporates the rights, standards and entitlements of Geneva Convention as well as the requirements of both treaties which are the Treaty on European Union and the Treaty on the Functioning of the European Union.

2. Protection in the Event of Removal, Expulsion or Extradition

Article 19 of the Charter titled "Protection in the event of removal, expulsion or extradition" emanates from collective expulsion and non-refoulement. The first paragraph of Article 19 is as follows:

1. Collective expulsions are prohibited.

Prohibition on the collective expulsion introduces the right to an individual consideration before expulsion. Accordingly, every asylum seeker should be assessed as per their person's circumstances. Claims and facts to remain on the territory for each case must be taken into account before expulsion. Article 19(1) has the same scope with Article 4 of Protocol No 4 to ECHR[68], adopted on 16 September 1963. This prohibition covers a safeguard against the expulsion of a substantial number of persons from the same nation without a specific individual examination for each individual to be expelled. The Court defines the collective expulsion referring to Article 4 of Protocol No 4 to ECHR as follows:

> [A]ny measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.[69]

The meaning of "collective" is a prominent issue in its interpretation by the ECHR. The main understanding was expulsion of people who applied for asylum. However, the ECHR, in its

[67] UNHCR Statement on the right to asylum, para 2.2.7.
[68] The Protocol 4 is adopted to the ECHR in 16 September 1963. Article 4 of Protocol No 4 of the ECHR titled "prohibition of collective expulsion of aliens": "Collective expulsion of aliens is prohibited".
[69] *See* ECHR, *Factsheet – Collective expulsive of aliens*, February 2017, available at: http://www.echr.coe.int/Documents/FS_Collective_expulsions_ENG.pdf (last accessed on 3 June 2017)

judgment in 2012, ruled to violate this probation in case of interdiction on the high sea.[70]

Pursuant to Article 52(3) of the Charter[71], since Article 19(1) has a counterpart in the ECHR, which is Article 4 of Protocol No 4, the jurisprudence of the ECHR on this issue is a determinant. The ECHR has a substantial and rich jurisprudence on Article 19(1), to be held at the third chapter herein.

The second paragraph of Article 19 on non-removal is as follows:

> 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Torture and inhuman or degrading treatment or punishment are prohibited by Article 4 of the Charter[72]. With regards to lex specialis of the general prohibition in Article 4 of the Charter, Article 19 puts obligation on states not to send a person to a country where there is a real risk of torture, inhuman or degrading treatment or punishment. Article 3 of the ECHR[73] is also an equivalent provision of Article 4 of the Charter, and provides the basis for the wording of Article 19(2) of the Charter. The Court has interpreted Article 3 of the ECHR that a person shall not return to a country where there is a real risk of torture, inhuman and degrading treatment or punishment. Therefore, the prohibition against refoulement in international law is complemented by international human rights law developed by the case law under Article 3 of the ECHR.[74] Article 19 of the Charter is also related to the application for international protection regulated under Article 18 of the Charter. Besides avoiding expulsion, Article 19 of the Charter also gives the right to remain in the territory of the host state to claim international protection. According to EU law, the Charter bears a particular importance as the secondary legislation which constructs the CEAS refers to it. All the EU asylum measures are complied with the Charter according to their preambles. So, many measures are engaged by Article 19 of the Charter, particularly the Returns Directive, which stipulates the terms for the expulsion of asylum seekers, which is to be applied according to the Charter. Thus, Article 19 of the

[70] *See Chapter* IV.C.3.
[71] Article 52(3) of the Charter: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."
[72] Article 4 of the Charter titled "Prohibition of torture and inhuman or degrading treatment or punishment": "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
[73] Article 3 of the ECHR titled "Prohibition of Torture": "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."
[74] *See Chapter* IV.C.2.

Charter must be taken into consideration in terms of the objective of the CEAS in relation to the determination of an asylum claim as well as border controls and surveillance.

D. Evaluation

The starting point of the asylum legislation as analysed above is constructed for the benefit of the states rather than individuals. There is no right to asylum granted in treaty law. Even the asylum legislation developed towards recognizing the right of individuals does not still completely suggest the right to asylum for the asylum seekers due to jurisdiction of the sovereign states. Therefore, the scope of the right is determined according to the interpretation of the international legislation and its developments as well as the judgments of the Court.

Article 14 of the Declaration provides the right to seek asylum; however, the scope of this right is open for discussion. Some perceive that it does not contribute more than the right to leave any state already regulated in Article 13 of the Declaration, while others relate both articles with receiving a proper status determination in and from the desired state of refuge[75]. It is also considered as the right to persons escaping from persecution but subjected to deterrent mechanisms preventing them from reaching and successfully claiming asylum in the desired state of refuge[76]. The status-quo of the drafting period indicates that it is more probable that the right to leave and seek asylum were given the asylum-seekers in order to enable them to assert these rights vis-à-vis the country from which they attempt to flee rather than the desired state of refuge. Therefore, these rights would also constitute the basis for the desired state's right to offer asylum to a non-national person. This right can also be claimed by the desired state of refuge vis-à-vis the state of origin to protect the asylum seeker. But this was mostly applied for the cases of political asylum rather than providing international protection.

The non-refoulement principle together with non-penalization for illegal entry or stay regulated in the Geneva Convention bears a particular importance since the principles offer the closest situation for an individual approach to a right to asylum in international law.[77] International customary law allows specific conducts such as admit a person to a territory, allow the person to sojourn the desired state of refuge, refrain from expelling and extraditing the person, prosecuting, punishing, or otherwise restricting the person's liberty, which builds

[75] For the discussions on this issue, *see* Grahl-Madsen 1972, p. 101.
[76] Ibid.
[77] Roman Boed, *The State of the Right of Asylum in International Law*, 5 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW, p. 1-34 (1994).

the applicable scope of the right to asylum in practice.[78]

In this respect, due to the discretionary exercise of state sovereignty, the desired state of refuge has no duty to admit persons fleeing persecution. However, the non-refoulement principle has put responsibility onto those states in practice during the determination process of the asylum status. The principle is also related to the right of asylum seekers to enter and stay in the territory until the completion of the procedure. Moreover, it considers only the destination of the asylum seekers in return as well as whether or not removal is attributable to the desired state of refuge in accordance with the rules of the international law.[79]

In addition to the right to leave his country to seek and enjoy asylum in other countries, in other words, the right to escape from persecution as deliberated in the Declaration, the institution of asylum should cover following main safeguards according to Executive Committee Conclusion resolved in 1997: the principle of non-refoulement, the right to enter and stay in the countries they desire to apply for asylum; the access of asylum-seekers to fair and effective procedures for determining status and protection needs, in line with the Geneva Convention and the Protocol; no rejection of refugees at frontiers of states without the said procedures; rapid, unimpeded and safe UNHCR access to persons of concern; implementation of the exclusion clauses stated in Article 1F of the Geneva Convention; the obligation to treat asylum seekers and refugees in line with applicable human rights and refugee law standards; a host state's responsibility to safeguard the civilian and peaceful nature of asylum; and the duty of refugees and asylum seekers to respect and abide by the laws of this state.[80]

The concept of the asylum law has been changing within the framework of the EU law. Having been established on the legal base of the Declaration and the Geneva Convention, EU law brings the right of an individual into the forefront. Articles 18 and 19 of the Charter are the first examples of such approach. However, the right to asylum in Article 18 of the Charter is not mentioned in a sophisticated manner. While European states improve procedures for deterring asylum claims, the law should provide access to an asylum process as well as the protection necessary for the asylum seekers.

The provisions of the Charter make no reference to the role of the Court or the case law of the ECHR. However, Article 52(3) of the Charter aims to ensure the necessary consistency

[78] Tom Clark, *Human Rights and Expulsion: Giving Content to the Concept of Asylum*, 4(2) INTERNATIONAL JOURNAL OF REFUGEE LAW 189, p. 190 (1992).
[79] CHERUBINI, p. 58.
[80] UNHCR Executive Committee, *Conclusion No. 82 (XLVIII)*, 1997, para. (d).

between the Charter and the ECHR, and the scope of the guaranteed rights in the Charter are assessed also by the Court by referring to related articles of the ECHR. The ECHR stresses the fundamental nature of these main principles and rights. Hence, the Court plays a key role in a view of ensuring effective protection of asylum seekers' rights especially when taking into account the insufficient reform of EU asylum law to make real progress as will be discussed below.

In this regard, the role of the Court is significant in terms of its response to violations encountered in the asylum process together with rights determined within the framework of the ECHR. The development of the case law of the Court put important limitations on the sovereignty of states to take actions in respect of asylum. Therefore, an analysis of the Court's standards to respond to obstacles encountered in the process while the ECHR also lacks the right to asylum or other significant rights in terms of asylum seekers is addressed in the following chapters.

III. Common European Asylum System

A. Background

The fundamental divergence in the political perspective of the states has impeded the achievement of the desired level in harmonisation. However, increased cooperation among the states on asylum policy has presented initiatives on harmonisation which are open to debate on their sufficiency. In order to reveal such confusion prevailing in asylum policy, also its reflection on the level of the harmonisation of the CEAS, this part outlines the development of the European instruments under three terms. The first term is the developments until 1999 when the European Council resolved to work towards the CEAS at the summit in Tampere. The second term is the progress until the first phase of the related secondary legislation was enacted. The last term is the second phase of the secondary legislation. Finally, the latest developments on the CEAS is also presented in this section.

1. Road to Tampere

The Treaty of Rome, officially named the Treaty establishing the European Economic Community (1957), which established the European Economic Community (EEC), includes no provisions on the right of asylum. The first intention towards the harmonization of asylum policies was brought to the agenda with a view to harmonise foreign policy as part of the completion of the single market, necessitating a single external frontier without internal border controls and policies on the entry and residence of third-country nationals pursuant to the Single European Act of 1986 revising the Treaty of Rome.[81] Abolition of the internal borders triggered the establishment of common controls at the external borders of the EU and cooperation in the fields of asylum and immigration. This matter was also acknowledged in the "Completing the Internal Market: White Paper from the Commission to the European Council" published in 1985 by the European Commission, which is also the basis of the Single European Act.[82]

A conflict occurred in terms of abolishing borders over the desire of the states to maintain

[81] The Single European Act was adopted by nine Member States in Luxembourg on 17 February 1986, and then three more Member States signed at Hague on 28 February 1986, and entered into force on 1 July 1987. It was the first major amendment of the Treaty establishing the European Economic Community. The text is available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:xy0027&from=EN (last accessed on 3 June 2017)

[82] European Commission, *Completing the Internal Market: White Paper from the Commission to the European Council*, 1985, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A51985DC0310 (last accessed on 3 June 2017)

their control over third-country nationals entering their territory. Accordingly, the Single European Act mentioned the immigration issue in general terms and declared the right of Member States to control immigration from third countries. However, it served the rationales for harmonization which are to regulate the access of third-country nationals to a territory and to avoid irregular secondary movements. In this respect, the first attempt of the states, according to the Presidency Conclusions dated 6 December 1986, was to give asylum as per their national legislation and treaty commitments, and to eliminate abuse of the right of asylum with the actions by the relevant ministers.[83] In fact, at the informal meeting of interior ministers in London on 20 October 1986, with the resolution to set up an ad hoc working group on immigration, ministers aimed to achieve a common policy on the abuse of the right of asylum in consultation with both the Council of Europe and the UN High Commission for Refugees.[84]

Another significant step is the adoption of the Palma Document in June 1989 by the European Council. The Document establishes the measures necessary for creating an area without internal frontiers which requires the harmonisation of national laws including those in asylum. Accordingly, some aspects draw the framework of the common policy, based on the obligations as per the Geneva Convention. These aspects are as follows:

> 1. the acceptance of identical international commitments with regard to asylum; 2. the determination of the state responsible for examining the application for asylum; 3. simplified or priority procedures for the examination of clearly unfounded requests; 4. the conditions governing the movement of the asylum seekers between the Member States; and 5. a study the need for a financing system to fund the economic consequences of implementing the common policy.[85]

In despite of requests for the harmonization, the conflict caused the discussions on immigration and other issues related to asylum to be executed among inter-governmental

[83] European Union: Council of the European Union, *Presidency Conclusion*, London, 6 December 1986, available at: http://www.consilium.europa.eu/en/european-council/conclusions/1992-1975/ (last accessed on 3 June 2017)
[84] *See* Bulletin of the European Communities, *Informal Meeting of the Ministers Responsible for Immigration, Counterterrorism and Drugs*, No. 10, 1986, p. 75-78, available at http://aei.pitt.edu/65686/1/BUL298.pdf (last accessed on 3 June 2017)
[85] Elspeth Guild, The Impetus to Harmonise: Asylum Policy in the European Union, in Frances Nicholson and Patrick Twomey (eds.), REFUGEE RIGHTS AND REALITIES: EVOLVING INTERNATIONAL CONCEPTS AND REGIMES (Cambridge University Press, 1999), p. 316.

cooperation between 1986 and 1993.[86] Such cooperation occured among the Member States instead of within the framework of the European Community. The European Council concluded in its Presidency Conclusions on 14 and 15 December 1990 on how intergovernmental activities in the area of asylum could be involved in the competence of the EU.[87]

Especially one of the main instruments concluded as intergovernmental cooperation is the Schengen Agreement[88] signed in 14 June 1985. The Schengen Convention implementing the Schengen Agreement[89] was adopted on June 1990, and resulted in the creation of the Schengen Area on 26 March 1995. One of the priorities of the Schengen Agreement is the determination of the asylum procedures and a state responsible for the asylum applications. Accordingly, Articles between 28 and 38 of the Schengen Agreement under Chapter 7 titled "Responsibility for processing applications for asylum" stipulates how a state is responsible for the processing applications for asylum.[90]

The following instrument as the part of the intergovernmental fora is the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (97/C 254/01) (Dublin Convention). [91] In the conclusion dated 8 and 9 December 1989 under the sub-title "Free movement of persons and People's Europe", an inventory of national policies on asylum to achieve harmonization and conclusion of the conventions which are under examination on the right of asylum were requested by the European Council by the end of 1990 with a view to making the single act and the EU a reality.[92] With regards to this objective fixed by the meeting, the Dublin Convention was signed on 15 June 1990. Thus the first concrete step was taken towards harmonization on asylum procedures following the Schengen Agreement, and qualified as the

[86] Examples of inter-governmental for were Trevi Group established in 1976, the Ad Hoc Group on Immigration in 1986, the horizontal Group on Data Processing, and the Customs Mutual Assistance Group.
[87] European Union: Council of the European Union, *Presidency Conclusion*, Rome, 14 and 15 December 1990, available at: http://www.europarl.europa.eu/summits/rome2/default_en.htm (last accessed on 3 June 2017)
[88] Full title of the Schengen Agreement is as follows: "Agreement between the governments of the States of the Benelux economic union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders"
[89] Full title of the Schengen Convention is as follows: "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"
[90] *See* Articles 28 to 38 of the Schengen Agreement, available at: http://www.consilium.europa.eu/uedocs/cmsUpload/SCH.ACQUIS-EN.pdf (last accessed on 3 June 2017)
[91] *See* Official Journal C 254 , 19 August 1997, p. 0001 – 0012, available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41997A0819(01)&from=EN (last accessed on 3 June 2017)
[92] European Union: Council of the European Union, *Presidency Conclusion*, Strasbourg, 8 and 9 December 1989, available at: http://www.europarl.europa.eu/summits/strasbourg/default_en.htm (last accessed on 3 June 2017)

first major legal instrument to ensure the free movement of people. It also superseded the part related to the refugees in the Schengen Agreement. It came into force on 1 September 1997 following the completion of the ratification procedures.

Both the Dublin Convention and Schengen Agreement include the objects of state acts, and do not offer effective rights or protection. These determine the combination of the responsibilities of the Member States towards asylum applicants in the event of rejection. Accordingly, in case an asylum seeker is rejected by a Member State, such rejection is valid for all the Member States. Also, an asylum seeker cannot determine the Member State in which the application for asylum is made. Therefore, family links or job prospects are not considered by these instruments. Moreover, if a Member State accepts an application of an asylum seeker to arrive in the EU, all burdens as regards the consequences of this application is borne by the Member States.

Following the 1991 Work Programme on asylum and immigration aiming for a harmonized policy on the right of asylum, new hybrid measures were adopted by the European Council on 30 November 1992 at the Ministers' London meeting.[93] These less-binding instruments as classic forms of inter-governmental agreements were the Resolution on manifestly unfounded applications for asylum, the Resolution on a harmonised approach to questions concerning host third countries and Conclusions on countries in which there is generally no serious risk of persecution. All three instruments have unclear legal status, and are not part of the EU law.

The constitutional basis for the intergovernmental cooperation in the field of asylum was built with the Maastricht Treaty or the Treaty on European Union which was signed on 7 February 1992 and entered into force on 1 November 1993.[94] The Treaty of Maastricht, amending the Treaty of Rome, paved the way for the birth of the EU, transformed of the EEC into the European Community (first pillar) and introduced two pillars, the 'Common Foreign and Security Policy'[95] and 'Justice and Home Affairs'[96]. Thus, certain powers were introduced to the EU under the pillars, and so the common asylum policy became a part of the framework of the EU under the third pillar articulated under "Title VI Provisions on Cooperation in the

[93] Council of the European Union, *Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries* ("London Resolution"), 30 November 1992, available at: http://www.refworld.org/docid/3f86c3094.html (last accessed on 3 June 2017)
[94] Official Journal of the European Communities, *Treaty on European Union* (adopted Maastricht 7 February 1992), C 191, 35, 29 July 1992, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1992:191:FULL&from=EN (last accessed on 3 June 2017)
[95] Title V of the Treaty on European Union, titled "Provisions on a common foreign and security policy"
[96] Title VI of the Treaty on European Union, titled "Provisions on cooperation in the fields of justice and home affairs"

Fields of Justice and Home Affairs". By means of cooperation in the fields of Justice and Home Affairs under such a pillar system, the EU pursued the coordination and harmonisation of asylum law by retaining the intergovernmental decision-making process which largely relies on unanimity. Thus, it was the first time that the immigration, asylum and borders issues were to be considered in common under the EU. In addition, Article K.2 states that the ECHR and Geneva Convention shall be observed for the matters to be dealt with. The important matter is that the reference to the Geneva Convention appeared in the provisions for the first time.

The main obstacles arising from the Maastricht Treaty for the harmonisation initiatives were the limited authority of the institutions of the EU -for instance the lack of parliamentary oversight and limited judicial control- and the usage of the non-binding instruments as regards asylum policy. In this regard, this three pillar structure was modified by the Treaty of Amsterdam[97], which was the result of the intergovernmental conference in 1997, due to the necessity of a full role of the European Parliament and review jurisdiction of the European Court of Justice (ECJ). The Treaty of Amsterdam moved the asylum and immigration issues from the intergovernmental third pillar to the Community first pillar by which new legislative competences were introduced to the EU institutions in the area of asylum.[98] The purpose of the new Title IV, acquired by the EC Treaty, is progressively to create an "Area of Freedom, Security, and Justice". According to Article 63, a series of measures on asylum, which must be in accordance with the Geneva Convention and its Protocol and other relevant treaties, required adoption under this area within five years. The first paragraph of Article 63 of the Treaty of Amsterdam is as follows:

> "The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:
>
> (1) measures on asylum, 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, within the following areas:

[97] Official Journal of the European Communities, *Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts* (adopted Amsterdam 2 October 1997), C 340, 10 November 1997, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1997:340:FULL&from=EN (last accessed on 3 June 2017)

[98] The relevant provisions with regard to this area were laid down in Title IV of Part Three of the former EC Treaty (Articles 61 to 69).

(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,

(b) minimum standards on the reception of asylum seekers in Member States,

(c) minimum standards with respect to the qualification of nationals of third countries as refugees,

(d) minimum standards on procedures in Member States for granting or withdrawing refugee status;"

In this regard, the Amsterdam Treaty concerns the setting of minimum standards. Therefore Article 63 provides procedural provisions rather than human rights or high-level common substantive standards. Accordingly, the analysis of the CEAS requires a consideration of the differences between the standards and rights.

The starting point of the idea for the development of a common EU policy was identified by the Treaty of Amsterdam amending the Treaty Establishing the European Community, and also by the Vienna Action Plan[99] on how best to implement the provisions of the Treaty of Amsterdam. Later, in its special meeting on 15 and 16 October 1999 in Tampere in Finland, the European Council adopted secondary legislation in the areas of freedom, security and justice in the EU.[100] In order to realize this objective, the European Council agreed on various policies including a common EU asylum and migration policy. Accordingly, a common EU policy shall include partnership with countries of origin, a common European asylum system, fair treatment of third-country nationals and management of migration flows. Thus the Tampere conclusions of the European Council put the creation of a common European asylum system at the top of the political agenda of the EU and attached importance to the right to seek asylum. Accordingly, this area was shaped by two principles. The first point is the harmonisation of asylum law at a common minimum standard level, and the second point is the principle of mutual recognition of acts of states.

The reason to develop common policies on asylum and immigration is based on the right for persons to move freely throughout the EU who might justifiably seek access to the EU's territory or protection there. Thus, respecting the right to seek asylum, the European Council

[99] In the Vienna Action Plan adopted in 1998, implementation of the Eurodac Convention and spread of the financial burden of receiving asylum seekers between the member states were also mentioned. *See* http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:l33080&from=EN (last accessed on 3 June 2017)

[100] European Union: Council of the European Union, *Presidency Conclusion*, Tampere, 15 and 16 October 1999, available at: http://www.europarl.europa.eu/summits/tam_en.htm (last accessed on 3 June 2017)

took note that the obligations of the Geneva Convention and other relevant human rights instruments shall be fully committed for an open and secure EU and the ability to respond to humanitarian needs. This statement of the European Council intended to respond to the criticisms on the Kosovo refugee crisis and a fortress Europe.

The European Council evaluates the system on short and long terms. In the short term, the European Council outlines the content of the system as follows: "a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status".[101] In the long term, common asylum procedures and a uniform status for persons gained asylum throughout the EU should be provided.

2. The First Phase

The main aspects of the CEAS are allocating responsibility for asylum seekers within the Member States, creating common standards for the process of the asylum seekers, providing reception conditions and qualification of these asylum seekers as a refugee in the Member States. Accordingly, the main objective of the first phase was the determination of the minimum standards for the CEAS, and the first phase of set and standards was to be adopted by May 2004 according to the Tampere. The legislation as regards the first phase was proposed by the Commission in the years 2000 and 2001.

The first two steps were taken concerning Article 63(1)(a), and accordingly, "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" (Eurodac Regulation)[102] was adopted. In December 14 and 15, 2001, the European Council meeting in Laeken, under the title of "Strengthening the Area of Freedom, Security and Justice", the European Council made its conclusions on a true common asylum and immigration policy. The European Council emphasizes the need for a new approach since the progress goes slow. It reiterates a common policy on asylum and immigration which serves as the balance between the protection of refugees, the legitimate aspiration to a better

[101] European Union: Council of the European Union, *Presidency Conclusion*, Tampere, 15 and 16 October 1999, available at: http://www.europarl.europa.eu/summits/tam_en.htm (last accessed on 3 June 2017)
[102] Official Journal of the European Communities, *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*, L 316, 15 December 2000, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2000:316:TOC (last accessed on 3 June 2017)

life and the reception capacities of the EU and its Member States.[103] Accordingly, the European Council determines the instruments for a true common asylum and immigration policy. One of these instruments was "the development of a European system for exchanging information on asylum, migration and countries of origin; the implementation of Eurodac and a Regulation for the more efficient application of the Dublin Convention, with rapid and efficient procedures", and also "the establishment of common standards on procedures for asylum, reception and family reunification, including accelerated procedures where justified."[104] Also, in June 2002, at a European council meeting in Seville, under the title "Speeding up current legislative work on the framing of a common policy on asylum and immigration", the European Council determined time frame for the Council to adopt specific legislations such as the Dublin II Regulation (by December 2002), the minimum standards for qualification for refugee status and the content of refugee status and the common standards for asylum procedures (by the end of 2003).[105] Accordingly, "Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers" (Reception Conditions Directive) was adopted on the basis of Article 63(1)(b). Moreover, "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" (Dublin Regulation) was adopted referring to Article 63(1)(a).

Later, in March 2003, in its report on the common asylum policy and the Agenda for protection, the European Commission identified a "growing malaise in public opinion", and the increasing "abuse of asylum procedures". Accordingly, in order to preserve Europe's humanitarian traditions, together with a more ambitious vision of harmonisation, it highlighted the requirement to "better manage the asylum system in general and to offer effective and appropriate protection solutions on the basis of mastering and regulating asylum-related flows in their European territorial dimension and in regions of origin".[106]

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[103] European Union: Council of the European Union, *Presidency Conclusion*, Laeken, 14 and 15 December 2001, available at: http://www.refworld.org/docid/3ef2ceb44.html (last accessed on 3 June 2017)

[104] Ibid. Others were "the integration of the policy on migratory flows into the European Union's foreign policy", especially focusing on European readmission agreements, and calls for "an action plan on illegal immigration and the smuggling of human beings" and "the establishment of specific programmes to combat discrimination and racism."

[105] European Union: Council of the European Union, *Presidency Conclusions*, Seville, 21 and 22 June 2002, available at: http://www.refworld.org/docid/3f4e45154.html (last accessed on 3 June 2017)

[106] *See* Communication from the Commission, *The Common Asylum Policy and the Agenda for Protection*, March 2003, COM (2003) 152, 26 March 2003.

Article 63(1)(c), "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" (Qualification Directive) was adopted.

Besides these five instruments implementing Article 63(1), the European Council also took necessary steps towards the adoption a Directive setting out a model temporary protection system in July 2001 and subsidiary protection system in 15 July 2004, the establishment of a European Refugee Fund system in September 2000, and the absorption of CIREA (Center for Information, Discussion and Exchange on Asylum) by the European Commission.

3. The Second Phase

In its conclusion dated 4-5 November 2004, the European Council announced its new five-year plan to be known as the Hague Programme titled "Strengthening Freedom, Security and Justice in the European Union".[107] Thus the second phase of the development of a common policy officially started on 1 May 2004. The European Council reiterated the developments made in this area from the beginning of the Tampere Conclusion in 1999 until the Hague Programme, and stated that however the original aims had not been achieved, progress was described as comprehensive and coordinated.[108] Through the Tampere Conclusions in the first five-year period, the European Council underlined following developments:

> "the foundations for a common asylum and immigration policy have been laid, the harmonisation of border controls has been prepared, police cooperation has been improved, and the groundwork for judicial cooperation on the basis of the principle of mutual recognition of judicial decisions and judgments has been well advanced."[109]

From this development, the objective of the Hague programme was determined by the European Council as follows:

> "to improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice, to provide protection in accordance with the Geneva Convention on Refugees and other

[107] Official Journal of the European Union, *The Hague Programme: strengthening freedom, security and justice in the European Union*, C 53, 3 March 2005, p. 1, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2005:053:TOC (last accessed on 3 June 2017) [hereinafter Hague programme]
[108] *See* Hague Programme, Introduction.
[109] Ibid.

international treaties to persons in need, to regulate migration flows and to control the external borders of the Union, to fight organised cross-border crime and repress the threat of terrorism, to realise the potential of Europol and Eurojust, to carry further the mutual recognition of judicial decisions and certificates both in civil and in criminal matters, and to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications"[110]

With a view to achieve such objectives, the European Council pointed out the necessity for the development of a Common Asylum System along with access to the courts, practical police and judicial cooperation, the approximation of laws and the development of common policies.[111] It is noteworthy to state that the European Council held the "Asylum, migration and border policy", "A Common European Asylum System" and "the external dimension of asylum and immigration" under separate titles. Accordingly, "asylum, migration and border policy" requires a common analysis of migratory phenomena in all their aspects.[112]

In the second phase, the establishment of a common asylum procedure and a uniform status for people granted asylum or subsidiary protection in accordance with the Geneva Convention and other Treaties and by taking into account the legal instruments adopted in the first phase is the main aim of the CEAS.[113] Calling for full implementation of the first phase and adoption of the Asylum Procedures Directive, the European Council set the time initially as the end of 2010, but was later extended to 2012,[114] for the Commission to present the second-phase instruments and measures.[115] The draft of the directive on asylum procedures had been criticised by the UNHCR due to its risk for breaches of international law in practice since the pressure to speed up the procedures causes an application of an asylum seeker or an appeal right in case of rejection to not be effectively considered.

Accordingly, in December 2005, the European Council adopted the "Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures for granting and

[110] *See* Hague Programme, Introduction.
[111] Hague Programme, III.1.3.
[112] Hague Programme, III.1.2. Reinforcing the collection, provision, exchange and efficient use of up-to-date information and data on all relevant migratory developments are of key importance.
[113] Hague Programme, III.1.3.
[114] The Council of the European Union, *Council Conclusions on Borders, Migration and Asylum, Stocktaking and the way forward*, 3096th Justice and Home Affairs Council meeting Luxembourg, 9 and 10 June 2011, 4.
[115] Official Journal of European Union, *Council and Commission Action Plan implementing the Hague Programme on strengthening, freedom, security and justice in the European Union*, C 198, 12 August 2005, p. 1, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2005:198:TOC (last accessed on 3 June 2017)

withdrawing refugee status" (Asylum Procedures Directive). Although the first phase was completed with the adoption of the Asylum Procedures Directive, the general situation on implementation of the Hague Programme was not entirely satisfactory according to the European Commission, which presented its first report on evaluation of the legislation of the first phase in 2006.[116]

Moreover, works required to be completed as regards the existing legislation was concluded in the Green Paper on a common asylum system in 2007. These works include decreasing the discretion of the Member States on procedural rules to develop a uniform procedure and also on different interpretations on the norms of asylum and subsidiary protection, improving the status of persons in ill-health and unaccompanied minors, increasing the level of harmonisation of conditions, working on possible ad hoc measures for vulnerable people, managing the separation of illegal immigrants and people in need of protection.[117] Thus, the Commission states that this paper aims to start a wide-ranging debate on the CEAS.[118]

The Asylum and Immigration Pact is committed to construct the "Europe of Asylum", and aims to establish the European Asylum Office and create a single asylum procedure.[119] Later in its Policy Plan on Asylum, the European Commission determined three points for the improvement of the CEAS, which are more harmonisation to standards of protection, practical cooperation, increased solidarity and sense of responsibility.[120] This policy plan was needed because there were the problems on the application of the common asylum system and the provision of the same level protection for the asylum seekers. According to its policy plan including proposals prepared after monitoring the application of the existing legislation, the Commission resolved to postpone the adoption of the proposals until 2012 due to the preparations for the Treaty of Lisbon. These proposals were based on a partial recasting of existing legislation such as a Reception Conditions Directive, an Asylum Procedures Directive, Qualification Directive, Dublin system and Eurodac. Accordingly, the substantial

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[116] European Commission, Communication from the Commission to the Council and the European Parliament of 28 June 2006, *Report on the implementation of the Hague Programme for 2005*, COM (2006) 333 final.
[117] European Commission, *Green Paper on the future Common European Asylum System*, Brussels, 6 June 2007, COM(2007) 301 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0301:FIN:EN:HTML (last accessed on 3 June 2017)
[118] Ibid.
[119] *See* The European Pact on Immigration and Asylum (Doc. 13440/08) attached to the Conclusions of the Presidency of the Brussels European Council of 15 and 16 October 2008.
[120] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions Policy Plan on Asylum an Integrated Approach to Protection Across the EU*, COM(2008) 360 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF (last accessed on 3 June 2017)

amendments in terms of rights for the Reception Conditions Directives include subsidiary protection, material reception conditions, access to the labour market and employment, procedural guarantees on detention, and the special needs of vulnerable persons; the Asylum Procedures Directive include enhancing gender equality, providing additional safeguards for vulnerable applicants, establishing obligatory procedural safeguard for the equal access to procedures, examining protection needs under both the Geneva Convention and the EU's subsidiary protection regime. Also, for the Qualification Directive, recasting includes clarifying the eligibility conditions for subsidiary protection and criteria for assessing the capacity to provide effective, accessible and durable protection. Better compliance and uniform application of the Dublin Regulation and the efficiency of the system also requires strengthening and clarifying several provisions in the recasting.

The Treaty of Lisbon was enacted on 1 December 2009, and communitarised the field of asylum. In this vein, the provisions with regard to the area of Freedom, Security, and Justice was gathered in Title V so that the transition launched with the Treaty of Amsterdam was completed in the Treaty of Lisbon, and the pillar system was abolished. The creation of a common system to ensure uniformity in terms of procedures and status in the area of asylum became a priority. Chapter two of Title V of the TFEU (Articles 77 to 80) constitutes the legal basis to develop a common policy on asylum. In the adoption of the measures, Article 78 of the TFEU amended Article 63 of the TEC.[121] When compared with Article 63 of the TEC, Article 78 of the TFEU has a broader content. Also, it does not mention "minimum standards". Therefore, the objective of the second phase, which was launched before the Treaty of Lisbon, was acknowledged as achieving a higher level of harmonization. Furthermore, through the Treaty of Lisbon, the Charter became the part of the Treaties

[121] 1. 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. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system comprising: (a) a uniform status of asylum for nationals of third countries, valid throughout the Union; (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection; (c) a common system of temporary protection for displaced persons in the event of a massive inflow; (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection; (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection; (g) partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection. 3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

pursuant to Article 6 of the TEU.[122] Besides, the fundamental innovation introduced by the Treaty of Lisbon in terms of human rights is by Article 6(2) of the TEU. According to this provision, the European Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, the accession to the Court affects the formal relationship between the EU law and the Court.

Later, the Council of the European Union adopted its new five-year plan, the Stockholm Programme for the years 2010-2014, aiming at a uniform status for those under international protection, and also a common asylum procedure for a common area of protection and solidarity together with high standards of protection, fair and effective procedures for preventing abuse and a higher level of harmonization. The Council of the European Union determines the challenge as ensuring respect for fundamental rights and freedoms and integrity while guaranteeing security in Europe. The Plan further states law enforcement measures and measures to safeguard individual rights, that the rule of law and international protection rules are important to be coherent and mutually reinforcing. Thus, all Member States are required to offer an equivalent level of treatment in terms of procedural rules and status determination. Therefore, similar cases should result in a similar manner according to the Stockholm Programme.[123] In this regard, one of the priorities of the programme is "a Europe of responsibility, solidarity and partnership in migration and asylum matters". Under this chapter, "the objective of establishing a common asylum system in 2012 remains and people in need of protection must be ensured access to legally safe and efficient asylum procedures."

The Council and the European Parliament adopted the new Asylum Package which includes the recast Asylum Procedures Directive,[124] Qualification Directive,[125] Reception Conditions

[122] *See above* note 59.
[123] The Stockholm Programme (n 42), para 6.2.
[124] Official Journal of European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection*, L 180, 29 June 2013, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0032&from=EN (last accessed on 3 June 2017)
[125] Official Journal of European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted*, L 337, 20 December 2011, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0095&from=EN (last accessed on 3 June 2017)

Directive,[126] and the new Dublin System.[127] Thus, the second phase has been completed.

4. Latest Developments

On April 6th, 2016, the European Commission announced that the options for reforming the CEAS and developing safe and legal pathways to Europe was submitted.[128] And therefore, a new process has started. The aims in this regard are presented as follows:

> (…) options for a fair and sustainable system for allocating asylum applicants among Member States; a further harmonisation of asylum procedures and standards to create a level playing field across Europe and thereby reduce pull factors inducing measures to reduce irregular secondary movements; and a strengthening of the mandate of the European Asylum Support Office (EASO). At the same time, the Commission is setting out measures to ensure safe and well-managed pathways for legal migration to Europe (…)[129]

The problem is that the states still conduct different treatments of asylum seekers, and the recognition rates also vary within the Member States. Therefore the number of secondary movements is high. The Member States have a lot of discretion in applying the current common system in practice. Starting from early 2015, the large-scale migrants and asylum seekers arriving at the borders of the EU put lots of pressure on the Member States and their asylum systems. Therefore, two main objectives were presented: building a fair and sustainable common asylum policy system as well as ensuring and enhancing safe and legal migration routes.[130]

For the first objective, the priorities identified by the European Commission to improve the structure of the CEAS are establishing a sustainable and fair system for determining the Member State responsible for asylum seekers, achieving greater convergence and reducing asylum shopping, preventing secondary movements within the EU, a new mandate for the

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[126] Official Journal of European Union, *Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection*, L 180, 29 June 2013, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2013:180:TOC (last accessed on 3 June 2017)

[127] Official Journal of European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member States responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III)*, L 180, 29 June 2013, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0604 (last accessed on 3 June 2017). It was replaced, from 1 January 2014, Dublin II Regulation.

[128] *See* http://europa.eu/rapid/press-release_IP-16-1246_en.htm

[129] Ibid.

[130] Ibid.

EU's asylum agency and reinforcing the Eurodac system.[131]

The second objective is necessary to establish the tools to manage migration flows better. Thus, uncontrolled migration flows from third countries will be directed to the orderly and safe pathways to the EU. In this regard, the Commission lists some several measures concerning legal migration routes to Europe and integration policies.[132]

B. Secondary Legislation

One of the main objectives of the CEAS is to ensure respect for the fundamental human rights of third-country nationals. The absolute respect for the right to seek asylum together with the full and inclusive application of the Geneva Convention were enshrined in the Presidency Conclusions of the Tampere summit, and also confirmed in the Stockholm Programme in which high protection standards and fair and effective procedures capable of preventing abuse were also determined as the basis for the CEAS.

References to the respect for human rights are also made in related articles such as Article 63(1) of the former TEC and Article 78 of the TFEU as well as in the preambles of all first and second phase measures adopted under the CEAS. These preambles state that the CEAS is based on the full and inclusive application of the Geneva Convention, and therefore, it affirms the principle of non-refoulement and ensures that nobody is sent back to persecution.[133] Furthermore, referring to specific articles of the Charter for each, preambles are stated to be implemented accordingly.

Accordingly, in this chapter, the instruments of the second phase of the CEAS; i.e., the Dublin Regulation, the Asylum Procedures Directive, the Reception Conditions Directive and the Qualification Directive will be scrutinised in terms of the human rights they grant.[134]

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[131] European Commission, *Communication from the Commission to the European Parliament and the Council Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM (2016) 197 final, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0197&from=EN (last accessed on 3 June 2017)

[132] Ibid.

[133] The common text stated in preambles of directives is as follows: "The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention of 28 July 1951 relating to the Status of Refugees ('the Geneva Convention'), as supplemented by the New York Protocol of 31 January 1967 ('the Protocol'), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution."

[134] Although Eurodac Directive is under the scope of the CEAS. For the purpose of this study, Eurodac Directive is not detailed hereof due to its mainly procedural feature.

1. Dublin Regulation

The first instrument adopted was the Dublin Convention. This Convention was later amended as the Dublin II Regulation, and later as Dublin III Regulation in 2013 (Dublin Regulation).[135] The objective of the Dublin Regulation is to determine which Member State has the responsibility to process the asylum application. In other words, the Member States prevent multiple applications in various Member States and prevent asylum shopping within the EU area. Referred to as the cornerstone of the CEAS, the Dublin Regulation obliges the national authorities or courts to resolve if an application of an asylum seeker, who applies on the territory of any Member State, including at the border or in the transit zones, needs to be processed in that or another Member State. In this regard, the entire Dublin procedure mainly includes screening, interviews, determining which Member State is responsible for an asylum application, answering the request and organizing transfers. The determination of the Member State responsible shall be made according to the hierarchy of eight criteria set out in Articles 8-15 of the Dublin Regulation. Some of these criteria relating to family reunification are based on whether or not the applicant is an unaccompanied minor, has a family member in a Member State, or whether or not the applicant has a valid residence document or a valid visa. From the perspective of asylum law, according to the related provision in Article 13 of the ECHR, when an asylum seeker irregularly crosses the border into a Member State from a third country, the Member State entered is responsible. Thus, depending on the Member State from which an asylum seeker enters into the territory of the EU, the asylum seeker can be transferred back to that Member State to have his asylum request processed there.

On the other hand, according to paragraph 2 of Article 3 of the ECHR, titled "Access to the procedure for examining an application for international protection", when a responsible Member State cannot be designated on the basis criteria listed in the Dublin Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it. Furthermore, according to the second and third sub-paragraphs of the same article, if the transfer to the determined responsible Member State cannot be made

[135] Within the scope of the reform of the CEAS, it was pointed to the volume of arrivals, and to disproportionate pressure on countries mostly at the borders of the EU. Therefore, the Commission proposed the revision of the Dublin system to make it more transparent and effective in order to deal with the pressure on the system. The primary aim was to establish a system when a country is faced with a huge number of asylum applications. In this line, a corrective mechanism system was presented to be applied in case of disproportionate pressure. Besides other procedural arrangements in the proposal to enhance the system's capacity and discourage abuses and prevent secondary movements, it also foresees the protection interest of asylum seekers with new guarantees for unaccompanied minors and an amendment in the definition of family members.

due to the existence of substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions in that Member State, which results in a risk of inhuman or degrading treatment within the scope of Article 4 of the Charter, the transferring Member State shall continue to examine the criteria set out in the Dublin Regulation to determine another Member State to be responsible. In case such determination is not possible, the determining Member State shall become the Member State responsible. The Dublin system is established on the basis of the automatic mutual trust (inter-state trust).[136] This trust presumes that all Member States are safe for the asylum seekers since all of them abide by or respect the obligations and standards imposed by the international and EU law on asylum.[137] However, the transfer may be impossible if there is substantial ground to believe that they are systematic flaws in the procedures or reception conditions, which causes a risk of inhuman or degrading treatment.[138]

There are also categories of risk other than those mentioned in Article 3(2) of the Dublin Regulation, which preclude the transfers. These categories arose from the obligations of Member States under the international instruments including the case law of the Court.[139] When a risk is detected due to the violation of the obligations of the Member States under the international instruments, Member States can refrain from transferring asylum seekers to the responsible Member States according to a so-called "sovereignty clause", Article 17(1) of the Dublin Regulation, titled "Discretionary clauses".[140] This clause allows the Member States to examine any application for asylum presented to them. Article 17(2) of the ECHR also enshrines the "humanitarian clause". This clause enables the determining or responsible

[136] N.S. v. Secretary of State for the Home Department, C-411/10, EU:C:2011:865, European Court of Justice, (2011), 75-86.
[137] Ibid. Regarding the presumption of safety: *See also* Recital 3 of the preamble of the Dublin Regulation.
[138] The ECJ ruled that the transfer is not be fulfilled when the sending Member States "cannot be unaware systematic deficiencies" in the other Member State, according to its case N.S. v. Secretary of State for the Home Department.
[139] The risk assessment of the Court in this regard bears a particular importance in terms of determining the standards in application of the Dublin transfers. Also, a requirement of the systematic deficiency in Article 3(2) of the Dublin Regulation is one of the issues subject to discussion in the prominent cases of the Court. Recital 32 of the Dublin Regulation: "With respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by their obligations under instruments of international law, including the relevant case law of the European Court of Human Rights."
[140] The case law of the Court and ECJ used the term "sovereignty clause" in its following cases: M.S.S. v. Belgium and Greece, Sharifi and Others v. Italy and Greece and Tarakhel v. Switzerland by the Court; and N.S. and M.E., Kaved Puid, Abdullahi Shamso by the ECJ. For a detailed analysis of the sovereignty clause, *See* Silvia Morgades-Gil, The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What remains of the Sovereignty and Humanitarian Clauses after the interpretations of the ECtHR and the CJEU?, International Journal of Refugee Law, 27-3, 1 October 2017, Pages 433-456, available at: https://doi.org/10.1093/ijrl/eev034

Member State to request another Member State to take responsibility to bring together family relations, on humanitarian grounds based especially on family or cultural considerations. According to this provision, if such request is submitted, the requested Member State has to carry out any necessary checks to examine the humanitarian grounds.

In general, the Member States had relied on the principle of mutual trust in terms of the Dublin Regulation. This brings about two important conclusions within the context of the mutual trust. The first conclusion is that one Member State can decide if an asylum seeker fulfils the requirement for international protection, and every Member State can provide the harmonized examination and treatment as stipulated in the EU legislation. According to the Dublin Regulation, every Member State complying with the principle of non-refoulement is a safe country for third-country nationals.[141] The second conclusion is that the Member States respect decisions already made regarding the application for the international protection within the EU under the practice of non-interference. In addition to that conclusion, a Member State may declare an application as inadmissible if a decision on the same application has already been given by another Member State. However, significant differences between Member States regarding the protection causes inequality affecting asylum seekers. The Court argued this mutual trust understanding in several cases, and took the sovereignty clause into consideration to preclude a transfer to another member State that would amount to refoulement.[142] The differences also closely relate to and affect the nature of the right to access the asylum procedures. Also, the national system, authorities or courts do not consider the implications of the return of the asylum seekers for their status on human rights. An asylum seeker who has the possibility to be recognised as a refugee in that Member State may not be at another state to which they are transferred. Such application of the Dublin Regulation may constitute a breach of the non-refoulement principle.[143] A certain amount of flexibility left to the Member States may cause them to finalize the qualification process with diverse results and to choose to lower the standards of protection.[144] The national authorities may adopt different views on individual situations and their interpretation within the framework of the legal provisions. Therefore the case law of the Court on the application of the Dublin system and so the non-refoulement principle has lead to important changes in

[141] Recital 2 of the Dublin Regulation
[142] *See Chapter* IV.C.2.
[143] Ibid.
[144] FLORA A. N. J. GOUDAPPEL & HELENA S. RAULUS, THE FUTURE OF ASYLUM IN THE EUROPEAN UNION : PROBLEMS, PROPOSALS AND HUMAN RIGHTS (Flora A. N. J Goudappel & Helena S Raulus eds., Springer, 2011), p. 5. [hereinafter GOUDAPPEL]

practice, to be analysed in the Chapter IV herein.

Furthermore, the Dublin Regulation also enshrines some guarantees and safeguards. For instance, Article 4 regulates the right to information. It obliges the Member State to inform, in writing and in a language that the asylum seeker understands or is reasonably supposed to understand, of the Dublin Regulation and the procedure in general. Also, Article 5 of the ECHR requires the right to a personal interview. Moreover, ensuring legal assistance free of charge, a single ground for detention as well as strict time limitation for the length of the detention and the Dublin procedure are the main improvements thanks to a recasted version in 2013. In this sense, the only legal ground for the detention shall be the risk of absconding. The Dublin procedure shall not be longer than 11 months in order to take charge of an asylum seeker, or 9 months in order to return (except for absconding or in case an asylum seeker is imprisoned). Furthermore, as seen in the recasted version, new guarantees are applied for unaccompanied minors and amendments in the definition of family members, which increase the value of the Dublin Regulation in sense of human rights. Especially, for the sake of a child's best interests, a detailed description of the facts and more possibilities for reunifying with family members are included. Procedural safeguards are presented for unaccompanied minors and upholding family unity.[145] As regards to the right to an effective remedy pursuant to Article 27 of the Dublin Regulation, asylum seekers are allowed to stay while the appeal bodies reviewing their transfer decisions, or the appeal bodies shall have the authorization to suspend the transfer when the appeal is judged. An obligation to guarantee the right to appeal against a transfer decision introduced by the recasting version of the Dublin Regulation is the main effective remedy improving the system's efficiency.

A well-known implementation of the Dublin procedures declares that there is no harmonized asylum system structure within states.[146] In addition to such different organizational structure, there is also a different application in providing procedural guarantees and safeguards. For instance, there is no standard practice in the manner of providing information to asylum seekers about the application. In some states, a lack of capacity or sufficient information, or other illegitimate reasons cause the omission of a personal interview. Also, the same

[145] Article 6 (Guarantees for minors), Article 8 (Minors), Article 9 (Family members who are beneficiaries of international protection), Article 10 (Family members who are applicants for international protection), Article 11 (Family procedure), Article 16 (Dependent persons)

[146] Regarding the implementation problems stated herein: *See* European Commission, *Evaluation of the Implementation of the Dublin III Regulation – Final Report*, 18 March 2016, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_-_executive_sumary_en.pdf (last accessed on 3 June 2017)

significant differences are observed in time frames for conducting interviews. Language problems and quality of interviewers also prevent harmonized implementation. Besides such technical defects, some practical and capacity problems on the appointment of a representative for minors as well as on the effectiveness of family tracing activities increasingly occur due to the high influx of asylum seekers. According to the European Commission, the reason for such defects is the volume and concentration of arrivals in the EU, and therefore, the Commission presented a proposal of the Dublin IV Regulation to reform the Dublin system in 2016 with the aim of providing a mechanism to deal with situations of disproportionate pressure on the system.[147] Because the Dublin system allocates the responsibility to the Southern Member States, mostly Greece, Spain, Malta and Italy which are frontiers of the EU, there is a lot of pressure on these Member States. In this respect, according to the final report of the European Commission dated 18 March 2016 on the Evaluation of the Implementation of the Dublin III Regulation, there are concerns on systemic flaws in asylum procedures and reception conditions. Therefore, many Member States had refrained from sending asylum seekers back to Greece as per the Dublin Regulation. The same concerns and so the suspension of asylum seekers' transfers several times were also valid for Bulgaria, Italy and Hungary. In order to address the pressure on Italy and Greece, provisional measures were provided for their benefit by the Council Decision 2015/1523 of 14 September 2015 and the Council Decision 2015/1601 of 22 September 2015. This Decision introduced a temporary and exceptional mechanism for the relocation of a specific number of asylum seekers from Italy and Greece. Such situation also justifies that the Dublin system in practice is ineffective and inefficient since it creates hardship for asylum seekers and has adverse impacts on the functioning of the CEAS.[148]

2. Asylum Procedures Directive

The first version, "the Directive 2005/85/EC on minimum standards on procedures for granting and withdrawing refugee status in the EU", was adopted in 2005. Following the entrance to the second phase, it was repealed in 2013. This recasting version is titled "Directive 2013/32/EU on common procedures for granting and withdrawing international protection" (Asylum Procedures Directive), and it was resolved to be transposed into national

[147] *See* note supra 35.
[148] Francesco Maiani, *The reform of the Dublin III Regulation*, European Parliament Directorate-General for Internal Policies, 2016, p. 13, available at: www.europarl.europa.eu/RegData/etudes/STUD/2016/571360/IPOL_STU(2016)571360_EN.pdf (last accessed on 25 October 2017)

legislations by July 2015.[149] It aims to deliberate the procedures for granting and withdrawing the refugee status and the protection to be granted to ones who are not refugees but in risk of serious harm in case of return to their countries. The simple asylum procedures consist of the stages of interview, an examination procedure and initial decision-making. It has also an objective to strengthen the rights of asylum seekers such as the right to an effective remedy and the right to remain in the territory during the asylum procedure. According to the Asylum Procedures Directive, as the main principles, asylum procedures should be faster, more efficient and fairer as well as meet the EU standards.

The Asylum Procedures Directive mainly considers access to the territory and to procedures of asylum seekers as well as remedies. In the EU law, the Charter, grants the right to asylum, however, the manners for the arrival of asylum seekers to the EU territory are not foreseen by it. The scope of the EU acquis is only valid from the moment an asylum seeker manages to arrive to the border of a Member State or to enter into the EU territory legally or illegally. The Asylum Procedures Directive is applied for all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States[150], and takes effect after an asylum seeker makes an application. Moreover, as per the wording of Article 3(1), applications cannot be made by asylum seekers outside of a territory, territorial waters, transit zones or borders of the Member States. Therefore, still a Member State has the competence to decide whether or not an asylum seeker has a right to access asylum procedures until they make the application. Article 6 titled "Access to the Procedure" under Chapter II titled "Basic Principles and Guarantees", mainly imposes time-limits on authorities to register applications of asylum seekers instead of the content of this

[149] The recasting version puts clearer rules to fulfil such principles when compared with the earlier version. It set out rules on how to apply for international protection, on appeals in front of courts as well as on specific guarantees for vulnerable people because of their age, disability, illness during the application process. Regarding the application processes, it also envisages specific arrangements for the applications at borders to help asylum seekers. Also, the European Commission has submitted its new proposal for a new Asylum Procedure Regulation aiming to replace the Directive 2013/32/EU. This new initiative towards a CEAS reform targets a truly common procedure for international protection. This means that simpler and clearer procedures will be introduced together with reasonable time-limits. Some procedural guarantees of the applicant such as having adequate and timely information, conducting personal interviews, free legal assistance are also priorities to be strengthened. It is envisaged to give more attention to vulnerable individual with special procedural needs, particularly unaccompanied minors. Moreover, stricter rules to prevent abuse of system and secondary movements will be established in the new proposal together with more harmonized rules on safe countries.

[150] Article 3(1) of the Asylum Procedures Directive: "This Directive shall apply to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and to the withdrawal of international protection."

right.[151]

According to the general sense of the Asylum Procedures Directive, there is a right to access fair and efficient procedures, which is also the main objective of the CEAS, however no right to access asylum procedures in a real sense, which is subject to high criticism. Asylum Procedures Directive takes effect when a Member State admits an asylum seeker to asylum procedures and an asylum seeker has submitted his or her application in this regard. The Member States can still control the external border in practice, and the EU's limited role to intervene in the external border policies of the Member States makes it difficult to strengthen the right to access the asylum procedures in the borders or international sea areas.[152] Therefore, the Court's role and the standards of the ECHR have become significant.

As regards to the access to the asylum procedures, according to Article 8 of the Asylum Procedures Directive, titled "Information and counselling in detention facilities and at border crossing points", in case an asylum seeker may wish to make an asylum application, Member States should inform the asylum seekers held in detention facilities or present at border crossing points, including transit zones, at external borders, of this possibility to do so. In those detention facilities or crossing points, necessary arrangement for interpretation, if necessary, to facilitate access to the asylum procedures, should be made by the Member States.

On the other hand, the significant issue is the time limit which shall be a maximum 6 months for the initial application process as well as procedural guarantees in this regard. Accordingly, the responsible authority shall decide on asylum applications as soon as possible and not later than 6 months.[153] The review can be extended to a maximum of 21 months. In case of delay or request from an asylum seeker for information on the expected time for a decision, the asylum seeker shall be informed. Article 6 also obliges them to provide asylum seekers with effective opportunities to submit their applications as soon as possible.

However, Member States cannot reject or exclude asylum applications because asylum

[151] Article 6(1)(1): "When a person makes an application for international protection to an authority competent under national law for registering such applications, the registration shall take place no later than three working days after the application is made."
Article 6(1)(2): "If the application for international protection is made to other authorities which are likely to receive such applications, but not competent for the registration under national law, Member States shall ensure that the registration shall take place no later than six working days after the application is made."
[152] *See* GOUDAPPEL, p.10-13.
[153] Article 31 of the Asylum Procedures Directive

seekers do not make their applications as soon as possible.[154] The applications are required to be examined by the Member States individually, objectively and impartially. The precise and up-to-date information of general situations about a state of origin of an asylum seeker should be obtained from the EASO and UNHCR and the relevant international human rights organization. The relevant standards in the field of asylum and refugee law should be observed.

There are also guarantees stated in Article 12 for applicants, such as informing applicants of the procedure, their rights and other related issues in a language they understand, receiving an interpreter, giving an opportunity to communicate with UNHCR, giving notice of the decision in reasonable time, and informing them of the result of their application in a language they understand. A similar guarantee is given under Article 14 titled "Personal Interview". Accordingly, asylum seekers shall be given the opportunity for a personal interview on the application for international protection. These interviews shall be made by a competent person in a confidential setting without the presence of anyone including family members. A competent person has to take into account the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability. The Asylum Procedures Directive also regulates specific provisions for a child's interview as well as specific guarantees for unaccompanied minors. It is also important to note that asylum seekers have the right to withdraw their asylum claims by complying with the notification requirements.[155]

Beside the Member States' obligations for providing legal and procedural information free of charge in procedures at first instance and free legal assistance and representation in appeals procedures stated in Articles 19 and 20, asylum seekers have the right to legal assistance and representation at all stages of the procedure according to Article 22. In the following articles, rules on several guarantees such as applicants in need of special procedural guarantees in Article 24, guarantees for unaccompanied minors in Article 25, and other procedural rules (Chapter III titled Procedures at First Instance, Chapter IV titled Procedures for the Withdrawal of International Protection, Chapter V titled Appeals Procedures) are also provided. It is important to note that accelerated asylum procedures is foreseen in Article 31 (8). Article 31 lists ten situations for the circumstances when an accelerated version can be applied. These circumstances include, for instance, when an application is considered

[154] Article 10 of the Asylum Procedures Directive
[155] Articles 44 and 45 of the Asylum Procedures Directive

unfounded because the applicant is from a safe country of origin or when applicants refuse to give their fingerprints. Under Chapter III, Article 43 titled border procedures should be noted from the perspective of the rights of the asylum seekers. Accordingly, asylum applications can be made at the border, and a decision considering this application must be taken at the latest within four weeks from the submission of the asylum claim. If such a decision cannot be made, the applicant must be granted access to the territory.[156] The reason is that the basic principles and guarantees granted by the Asylum Procedures Directive are only valid for the asylum applications made inside the territory instead of at the border. The border procedures are not applied for asylum seekers who are in need of special procedural guarantees such as survivors of rape or other serious violence.[157]

There are two prominent provisions considering the right of the asylum seekers. The first provision is "the right to remain in the Member State pending the examination of the application" in Article 9. Its first paragraph is as follows:

> Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. That right to remain shall not constitute an entitlement to a residence permit.

This right actually constitutes a remedy that suspends a removal during the appeals process. Asylum seekers who are waiting for a final decision are allowed to remain in the Member State. Accordingly, the Asylum Procedures Directive prohibits their removal until a decision by the responsible authority has been made. Therefore, the presence of the asylum seeker in the territory of a Member State is lawful, and is granted as a right to asylum seekers. The right to remain in a territory is applicable also to exercise the right to an effective remedy. Until the right has expired or within its limit time, the Member State should allow asylum seekers to remain in the territory to wait for the outcome.[158]

The other provision is Article 46 which stipulates the right to an effective remedy before a court or tribunal against the decisions. Accordingly, an asylum seeker has the right to have an effective remedy against a decision made on their application for international protection.

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[156] Article 43(2) of the Asylum Procedures Directive
[157] Article 24(3) of the Asylum Procedures Directive
[158] MARCELLE RENEMAN, EU ASYLUM PROCEDURES AND THE RIGHT TO AN EFFECTIVE REMEDY (Hart Publishing, 2014), p.120.

An effective remedy should provide for a full and ex nunc examination of both facts and points of law together with reasonable time limits and other necessary rules to ensure that the applicant exercise his or her right to an effective remedy. On the other hand, such time-limits should not make the use of this right impossible or hard. The use of the word "reasonable" may be due to the proportionality principle. The general sense for the CEAS is also to respect the domestic procedural of the Member States. Nevertheless, in the practice, some of the Member States still have very short time-limits for submitting applications against judgments, particularly those made in the borders procedure and/or accelerated procedure.[159]

With regards to this right, it should be noted that asylum seekers can refer to the general principles of EU law and the ECHR to exercise this right according to case law.[160] Within this framework, the related authorities of the Member States should take into account Article 47 of the Charter and Article 13 of the ECHR, which is detailed in the next chapter.

Finally, the automatic suspensive effect of appeals is given in Article 46 (5) of the Asylum Procedures Directive as follows:

> (…) Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of remedy.

Accordingly, asylum seekers have the right to remain in the territory of a Member State under the Article's conditions. .

3. Reception Conditions Directive

Following the first version of the Council Directive 2003/9/EC of 27 January 2003 presenting the minimum standards for the reception of asylum seekers, the European Commission submitted its recast proposal on 9 December 2008 for the second phase of the CEAS. Because no decision could be made in the Council of the Europe Union, the European Commission presented its amended recast proposal as "Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for

[159] For instance, 24 hours in Spain, 2 days in the United Kingdom, and 3 days in Hungary, Germany, and Slovenia.

[160] For the reasons as to why Member States should offer effective remedies on the basis of EU general principles: *See* Lili Georgieva Panayotova and Others v. Minister voor Vreemdelingenzaken en Integratie, C-327/02, European Court of Justice, (2004), available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62002CJ0327&from=EN

international protection" (Reception Conditions Directive), which is in effect now.[161]

The application of the Reception Conditions Directive includes all asylum seekers in territorial waters or in transit zones.[162] As also stated in Recital 8, this Directive is applied "during all stages and all types of procedures concerning applications for international protection and in all locations and facilities hosting asylum seekers".[163] In line with this understanding, it is accepted that it also applies to asylum seekers waiting for the transfer under the Dublin Regulation, or in admissibility procedures, border procedures or any other procedure, or in detention, or in another location.

Harmonising reception conditions requires standard EU-wide reception conditions. Accordingly, the Reception Conditions Directive obliges the Member States to procure accommodation and decent material conditions while they are waiting for the assessment of their asylum applications. Accordingly, the preamble of the Directive describes a dignified standard of living and comparable living conditions.[164] "Dignified standards of living" is not defined in the Directive and remains ambiguous. In this regard, in September 2016, the European Asylum Support Office released guidelines, at the Commission's initiative, on the operational standards and indicators on reception conditions in the EU. For instance, the right to housing is evaluated as the requirement of dignity, and must fulfil some criteria such as safety, clean water, hygiene as well as access to food, healthcare, employment, medical and psychological care. The Court also explains the Reception Conditions Directive as imposing positive obligations on Member States to provide asylum seekers accommodation and decent material conditions in its well-known case M.S.S. v. Belgium and Greece.[165]

Another important issue is the Members States' positive obligation to give information as stated in Article 5 of the Reception Conditions Directive. Information on reception conditions should be given within 15 days as of the application lodged to asylum seekers in writing and

[161] The Directive 2003/9/EC was granting flexibility to the states for the choice of reception arrangement as also stated by the Office of the UNHCR. So the considerable discrepancies in Member States' practice differences causing an inadequate level of reception conditions, including access to housing, food, clothing, financial allowances, a decent standard of living, and medical and psychological care became the main problem in the practice. Therefore, clearer concepts and more simplified rules to facilitate the integration of the Reception Conditions Directive into the national legal systems and ability to prevent possible abuses of their reception systems were required the European Commission to redraft the said Directive in 2011.
[162] Recitals 8 and 13 and Article 3 of the Reception Conditions Directive
[163] Recital 8 of the Reception Conditions Directive
[164] Recitals 11, 16 and 21 and Article 17 of the Reception Conditions Directive
[165] *See Chapter* IV.C.2. Case of M.S.S. v. Belgium and Greece, Application no. 30696/09, European Court of Human Rights, (2011) http://hudoc.echr.coe.int/eng?i=001-103050 (last accessed on 3 June 2017) [hereinafter M.S.S v. Belgium and Greece]

in a language they can understand or are reasonably supposed to understand. It is important to note that in practice an interpreter should be available systematically to be sure that the asylum seeker understands the asylum procedures during the assessment process. In addition, the significant achievements are legally made on preventing unnecessary and disproportionate documentation requirements, accessing employment after having waited for 9 months for a first-instance decision as well as postponing the access to education not more than 3 months.[166] Also, the right to documentation for asylum seekers under EU law is stated in Article 6 of the Reception Conditions Directive. Applicants shall be given a document, within 3 days, certifying their status as asylum seekers. If the applicant is in detention or at the border, a Member State can refuse to give such document.

The most important issue is the detention of the asylum seekers stated in Article 8 of the Reception Conditions Directive. The relevant international standards are in Article 31 of the Geneva Convention, Article 6 of the Charter and Article 5 of the ECHR. Within this framework, the discussions are on the conditions of the detention, reasons for the detention, and procedural guarantees. The main objective is to prevent the arbitrary detention which is also stipulated particularly in Article 6 of the Charter. Accordingly, the Member States cannot detain a person because an asylum seeker has applied for international protection. This main principle is in line with the right to asylum as stated in Article 18 of the Charter together with the right to liberty and security. Referring also to Article 31 of the Geneva Convention, no penalties, including detention, shall be imposed on asylum seekers for unauthorized entry or stay.[167] The detention can only be acceptable following an individual and careful assessment if it is reasonable and necessary as well as proportionate to the lawful purpose. Accordingly, the second paragraph of Article 8 is as follows:

> 2. When it proves necessary and on the basis of an individual assessment of each case, Member States may detain an applicant, if other less coercive alternative measures cannot be applied effectively.

This paragraph, "When it proves necessary and on the basis of an individual assessment of each case" and "if other less coercive alternative measures cannot be applied effectively", introduces a necessity test as a safeguard reflecting the principle of international human rights

[166] Articles 6, 14 and 15 of the Reception Conditions Directive

[167] Even "detention" is not identified as a penalty in the Geneva Convention, it is accepted as included by the drafters. *See* UNHCR, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection*, 1 October 2001, para. 29.

law. Such a test arises from the principle of the prohibition of arbitrary detention and the right to liberty and movement and freedom to choose his residence in international human rights law.

In line with this understanding, the following exhaustive list in the Reception Conditions Directive was welcomed as a significant improvement of the EU acquis when compared with the previous version. In its previous version, without having such a list, detention would be possible for "legal reasons" or "reasons of public order", which are undefined and therefore require legal certainty. According to the list, national security and public order can be defined as two general legal bases for detention. The other bases are for verifying identity of the asylum seeker and preventing them from escaping.

The grounds for detention are listed in Article 8(3) of the Reception Conditions Directive.[168] Such grounds are also consolidated with the limitation put for the period of detention under the relevant part of Article 9(1) titled "Guarantees for detained applicants" as follows:

1. An applicant shall be detained only for as short a period as possible and shall be kept in detention only for as long as the grounds set out in Article 8(3) are applicable.

Reference to the shortest possible duration is compatible with the principle of proportionality as required by the case law of the Court.[169] According to the Court, the length of the detention should not exceed that reasonably required for the purpose pursued. Therefore, the applicants' detention should be a measure proportionate to the aim pursued by the law. Also other safeguards at the following paragraphs of Article 9 requires the detention order to be ordered

[168] 3. An applicant may be detained only: (a) in order to determine or verify his or her identity or nationality; (b) in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant; (c) in order to decide, in the context of a procedure, on the applicant's right to enter the territory; (d) when he or she is detained subject to a return procedure under Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, to prepare the return and/or carry out the removal process, and the Member State concerned can substantiate on the basis of objective criteria, including that he or she already had the opportunity to access the asylum procedure, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision; (e) when protection of national security or public order so requires; (f) in accordance with Article 28 of Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person. The grounds for detention shall be laid down in national law.

[169] *See* Case of Lokpo et Touré v. Hungary, Application no. 10816/10, European Court of Human Rights, (2011), para 22 http://hudoc.echr.coe.int/eng?i=001-106272 (last accessed on 30 October 2017)

by judicial or administrative authorities.[170] Article 9 also states the qualifications of the order, such as to be in writing, reference the grounds and duration as well as an arrangement for the exercise of the right to an effective remedy.[171] Again the requirement to inform detained asylum seekers is stated in Article 9(3) as also in line with Article 5(2) of the ECHR. Such information should include the reason for detention in a language they understand or are reasonably supposed to understand. In Saadi v. the United Kingdom, the Court explains the obligation to inform as telling the reasons for detention in a simple and non-technical language.[172] While general statements are not enough, the information to be given should include details with regards to the effective remedies available. Moreover, a regular judicial review of detention is possible under Article 9(3) of the Reception Conditions Directive. Any asylum seeker can request a review of the decision when new circumstances arise or new information become available. This provision is also compatible with Article 5(4) of the ECHR. Therefore, the detention can be prolonged or in effect when necessary. Free legal assistance is the final prominent issue under the guarantees of the applicants. This is possible if an asylum seeker cannot afford the costs for the appeal or review of a detention order. Accordingly, significant guarantees such as access to free legal assistance and information in writing in case of appeal against detention are presented.

The conditions of detention bear a particular importance in terms of the inherent dignity of the person. Article 10 of the Reception Conditions Directive prohibits the use of prison for the detention of asylum seekers, based on the idea that asylum seekers are not criminals, and they have specific legal status. This requirement is also observed in the cases of the Court, for instance Saadi v. the United Kingdom, to be analysed in the next chapter. It is also important to note that specific reception conditions for detention facilities providing the right to access to open-air spaces and the right to access and communication (contact with lawyers, non-governmental organisations and family members) are introduced.[173]

Finally, the Reception Conditions Directive also explains the conditions for minors and vulnerable groups with specific articles.[174] Some specific safeguards are introduced for the detention of vulnerable persons and of applicants with special reception needs in Article 11.

[170] Article 9(2) of the Reception Conditions Directive
[171] Article 9(3) of the Reception Conditions Directive
[172] Case of Saadi v. the United Kingdom, Application no. 13229/03, European Court of Human Rights, (2008) http://hudoc.echr.coe.int/eng?i=001-84709 (last accessed on 3 June 2017) [hereinafter Saadi v. the UK]
See Chapter IV.C.2.
[173] Article 10(2), (3) and (4) of the Reception Conditions Directive
[174] *See* Article 11(2) and (3), Article 14, and Chapter IV (Articles 21-25) of the Reception Conditions Directive

As a main principle it limits the detention of vulnerable persons, especially minors. Unaccompanied minors and victims of torture and violence are also paid particular attention. Specific rules such as detention of minors only as a measure of last resort and of unaccompanied minors only in exceptional circumstances are applied to them. Furthermore, an individual assessment should be conducted to determine the vulnerable persons (children, disabled people or victims of abuse) who need special reception needs. Also, the requirements of access to psychological care for vulnerable asylum seekers and a qualified representative to help unaccompanied children are introduced in the Directive.

Notwithstanding the steps taken for the harmonisation by the Reception Conditions Directive, considerable differences are still being observed between the Member States in the types of standards provided to applicants and in the organization of the reception conditions. In order to provide sufficient, consistent and decent reception conditions throughout the EU, a proposal presented by the Commission in July 2016 for the amendment of the CEAS's directives consists of significant amendments with regards to the Reception Conditions Directive.[175] In order to further harmonize the reception conditions, the amendments consider the applicants irregularly present in another Member State than the one in which they are required to be present. In this circumstance, according to the current legislation, the applicants are not entitled to material reception conditions, employment, vocational training as well as schooling and education of minors. The new proposal states that asylum-seekers are always entitled to health care and to a dignified standard of living together with the applicant's subsistence and basic needs both in terms of physical safety, dignity and interpersonal relationships. A right to a dignified treatment is enshrined also in cases when a Member State exceptionally applies different material reception conditions from the one stipulated in the Reception Conditions Directive.

Three significant issues have been held by the proposal. The first aspect is the extension of the definition of material reception conditions. Inclusion non-food items, such as sanitary items to the scope of the material reception conditions is introduced. The Member States also cannot reduce or withdraw accommodation, food, clothing and other essential non-food items, except daily allowances in some circumstances. According to the new proposal, in four

[175] European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)*, 13 July 2016, COM(2016) 465 final, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160713/proposal_on_standards_for_the_reception_of_applicants_for_international_protection_en.pdf

circumstances listed therein, the material reception conditions may be scaled back or altered. The second issue is an additional detention ground. Accordingly, an asylum seeker can be detained if a Member State assigns a specific place of residence but the asylum seeker does not comply with it, and if there is a risk that the asylum-seeker may abscond. Finally, the proposal foresees the reduction in time-limit for access to the labour market. Within 6 months from the date of the application, an asylum seeker should have this access.

In brief, there are certain prominent issues. The first issue is the scope of the dignified standards of living. The second issue is the right to effective remedy or the right to appeal when the authorities decide not to grant benefits stated in the Reception Conditions Directive. The other significant issue is detention. Necessary and proportional detention must be an exception and last resort; therefore, all alternatives must be exhausted. The exhaustive list of exceptions to the right to liberty is available in the Reception Conditions Directive, which introduces 6 different situations to able the Member States to detain asylum seekers. Therefore, grounds for detention (the principles of necessity and proportionality), conditions of detention (types of facilities, access to open-air access, right to access and communication), the obligation to establishment rules on alternatives, the length of detention, the right to judicial review, information obligation as well as the right to free legal assistance and representation constitute the main issues in respect of detention.

4. Qualification Directive

This directive establishes the grounds for granting international protection, and also offers access to rights and integration measures for beneficiaries. The Geneva Convention is largely incorporated into EU law through this directive. The first-phase was Council Directive 2004/83/EC of 29 April 2004 which was amended in 2011 by "Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted" (Qualification Directive).[176] Also the new draft

[176] The previous version had vagueness causing tremendous differences on the qualification processes of a person being granted international protection. Therefore, by the recast version of the Directive, some amendments were made on the general rules on qualification for refugee or subsidiary protection status. These amendments were related to the definitions of family members and actors of protection as well as a stricter rule regarding the internal flight alternative. In addition, amendments on granting refugee status in case of gender-based persecution, traumatisation of a person, unable to protect a person from private parties' persecution were made.

proposal was presented in July 2016.[177] The Qualification Directive introduces rights and procedures for asylum seekers to be treated fairly. Sustained procedures foresee more efficient determination processes, ensure uniformity within the judgments of the European court as well as fraud prevention. While grounds and minimum standards for granting the statuses for international protection are clarified, the rights given to asylum seekers by virtue of these statuses such as provisions on protection from refoulement, residence permits, travel documents, access to employment, access to education, social welfare, healthcare, access to accommodation, access to integration facilities, as well as specific provisions for children and vulnerable persons are also contained in the Qualification Directive.

There is no right to asylum guaranteed by the Qualification Directive. However, asylum seekers have the right to have a status recognised as a result of a determination process of the Member States. These statuses regulated in the Qualification Directive are "Granting of refugee status" found in Article 13 as well as "Granting of subsidiary protection status" found in Article 18.[178] These articles present a right to be granted status of refugee or subsidiary protection. Chapter II, which is on the assessment of applications for international protection, establishes the core provisions of the Qualification Directive. Accordingly, in order to make an assessment duly, specific points should be taken into account by the Member States. Asylum seekers have an obligation to submit all possible elements such as their statements and available documents for their applications to be assessed by the Member State.[179] However, according to the ECJ, it is a shared duty of an asylum seeker and Member States that they need to cooperate actively with the asylum seeker.[180] Pursuant to Article 4(3), during assessment of the application of asylum seekers, which shall be performed on an individual basis, Member States should take into account the following facts and circumstances to assess the credibility of an application for international protection:

[177] In the new draft proposal, the case law of the ECJ is reflected to the Qualification Directive. The aim is stated as further harmonization of the common criteria for recognising applicants for international protection, more convergence of the asylum decisions, addressing secondary movements of beneficiaries of international protection, further harmonizing the rights of beneficiaries of international protection.

[178] Article 13 of the Qualification Directive: "Member States shall grant refugee status to a third-country national or a stateless person who qualifies as a refugee in accordance with Chapters II and III."
Article 18 of the Qualification Directive: "Member States shall grant subsidiary protection status to a third-country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V."

[179] Article 4(1) of the Qualification Directive. These statements and documents are also detailed in Article 4(2), as the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.

[180] M.M. v. Minister for Justice, Equality and Law Reform, Ireland and Attorney General, C-277/11, EU:C:2012:744, European Court of Justice, (2012), para 65-66. [hereinafter M.M. case]

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship.

Accordingly, the assessments shall be conducted by eligibility officers on an individual basis, with all relevant and up-to-date facts, documents, evidence and laws, as well as information about the country of origin. Following the evaluation of the relevant factual elements, is an examination of the merits of an asylum application.[181] Therefore, an evidentiary standard is required to determine whether or not this evidence complies with the conditions for international protection. For granting refugee status, this is well-founded fear of being persecuted as stated in Article 2(d). According to the case law of the European courts, the nature of the well-founded fear should be individual and based on objective facts. There should be a real and substantial risk or a reasonable degree of likelihood of persecution.[182] The source of the persecution or serious harm encountered by asylum seekers is not only limited to the states. It may arise from parties or organizations controlling the states as well as

[181] M.M. case, para 69.
[182] *See* UK Supreme Court, RT (Zimbabwe) and Others, 25 July 2012, UKSC 38, para 55, available at: https://www.supremecourt.uk/cases/uksc-2011-0011.html (last accessed on 3 June 2017) German Federal Administrative Court, Judgment of 20 February 2013, No.10 C 23.12, para 19, available at: https://www.bverwg.de (last accessed on 3 June 2017) [hereinafter German Judgment of 20 February 2013]

non-state actors.[183] If the Member State decides that there is suffering or a fear of being persecuted, then the Member State can investigate whether or not such fear is limited to a specific part of the country of origin or the asylum seeker can have access to protection against persecution or serious harm if he or she lives there.[184] This is called the internal protection alternative, also subjected in the case law of the Court. Moreover, those who have these statuses can lose them if there is a significant improvement of the situation in their country of origin.[185]

Refugee status can be gained if they suffer from persecution as stated in the Geneva Convention.[186] The Qualification Directive also lists the situations constituting persecution in Article 9 titled "Acts of persecution" under Chapter III titled "Qualification for Being a Refugee" as follows:

> 1. In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must:
>
> > (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
> >
> > (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).

The Qualification Directive is the first instrument that requires the notion of persecution in relation to Article 1(A)(2) of the Geneva Convention. The definition of persecution with its two conditions is much more precise than the provision of the Geneva Convention. For the first condition, the following should be in place: whether a basic human right has been violated or would be violated in the future, whether the violation is severe, whether this is consequences of acts which are sufficiently serious by their nature or repetition. The basic rights from which derogation cannot be made under Article 15(2) of the ECHR are Articles 2 (Right to life), 3 (Prohibition of torture), 4 (Prohibition of slavery and forced labour) and 7

[183] Article 6 of the Qualification Directive
[184] Article 8 of the Qualification Directive
[185] Article 11 of the Qualification Directive
[186] Article 1A of the Geneva Convention

(No punishment without law) of the ECHR. However, Article 9(1)(a) is worded "in particular", so the rights other than non-derogable rights can be considered as basic human rights in this respect. For example, the right to religious freedom as well as imprisonment of an individual because of sexual orientation is treated as basic human rights.[187] Accordingly, Article 9(1)(a) also requires the acts of persecution to be sufficiently serious to constitute a severe violation. The severity is regarded on the basis of either the nature or repetition of the act. The qualitative criterion is "nature" while the quantitative criterion is "repetition".

According to the UNHCR, a threat to life and physical freedom always constitutes a serious violation of a basic human right and amounts to persecution.[188] However, for the rights which are not considered as non-derogable as per Article 15 of the ECHR, the severity of the violation should be stated. For example, for the freedom of religion, the ECJ stated that any interference with the right to religious can be so serious, and so be treated in a same way with the right non-derogable as per Article 15 of the ECHR.[189] The ECJ interprets Article 9(1) of the Qualification Directive that there should be a severe violation of religious freedom, and such violation should have a significant effect on the individual.[190] Accordingly, there should be an infringement in the protected right, and the right has to be violated, and finally this violation should have a severity which needs to be equivalent to severity of an infringement of a non-derogable right.[191] Severity has two standards, which have objective and subjective dimensions. In its case on the freedom of religion, the ECJ stressed that the objective severity is reached if a threat violates Article 3 of the ECHR, and the subjective severity is reached according to the consequences of the individual, and in its case the ECJ asked whether or not the religious practice, which was banned, was important for the individual to preserve his religious identity.[192]

While Article 9(1)(a) considers basic human rights, Article 9(1)(b) identifies other human rights which may constitute persecution on cumulative grounds. There is no guidance on the content of the provision, given by the ECJ. The measures that may be evaluated under Article

[187] Germany v. Y and Z, C-71/11 and C-99/11, EU:C:2012:518, European Court of Justice, (2012), para 57, http://curia.europa.eu/juris/liste.jsf?num=C-71/11 (last accessed on 3 June 2017) [hereinafter Germany v. Y and Z]. Minister of Immigration and Asylum of the Netherlands v. X, Y and Z, C-199/12, C-200/12 and C-201/12, EU:C:2013:720, European Court of Justice, (2013), para 54, http://curia.europa.eu/juris/liste.jsf?num=C-199/12 (last accessed on 3 June 2017)
[188] UNHCR Handbook, para 51.
[189] Germany v. Y and Z, para 57.
[190] Ibid, para. 59.
[191] Ibid, para. 60.
[192] Ibid, paras 65, 67, 70.

9(1)(b) are listed in Article 9(2).[193] In order to examine the acts of persecution under Article 9(1), all acts must be taken into account to evaluate whether or not these are violations of human rights (Article 9(1)(a)) or other measures, discrimination or disadvantage (Article 9(1)(b)).[194] The examination should begin with whether or not there is a act of persecution under Article 9(1)(a). If there is not, then interfering acts are taken into account in a cumulative manner to understand if such acts cause a violation of a right or freedom at the similar severity within the meaning of Article 9(1)(a).[195] Article 10 of the ECHR enumerates the reasons for persecution which are race, religion, nationality, membership of a particular social group, and political opinion. Article 9(3) of the ECHR requires a connection between acts of persecution and these reasons. This is similar with the wording of the Geneva Convention which refers to "being persecuted for reasons of".[196] Therefore, a mere violation of a human right is not sufficient.

The Qualification Directive also regulates the rights entitled by the asylum seekers after having refugee or subsidiary protection status. These rights, which are guaranteed by the Member States, are as follows: the right of non-refoulement; the right to information in a language they understand; the right to a residence permit valid for at least three years and renewable for refugees, and a residence permit valid for at least one year and renewable for persons with subsidiary protection status; the right to travel within and outside the country that granted refugee or subsidiary protection status; the right to take up paid employment or to work on a self-employed basis and the right to follow vocational training; access to the education system for minors and to retraining for adults; access to medical care and any other necessary forms of care, particularly for persons with special needs (minors, victims of torture, rape or other forms of psychological, physical or sexual violence, etc.); access to appropriate accommodation; access to programmes facilitating integration into the host society and to programmes facilitating voluntary return to the country of origin.

Considering the practice of the EU law and the case law, the right to non-refoulement bears a particular importance also from the point of asylum seekers. The Qualification Directive was adopted on the basis of the fundamental rights and the principles stated in the Charter (the right to asylum in Article 18), obligations under instruments of international law, in particular

[193] Article 9(2) of the Qualification Directive
[194] C. H. BECK & HART & NOMOS, EU IMMIGRATION AND ASYLUM LAW: A COMMENTARY (Kay Hailbronner and Daniel Thym eds., C. H. Beck, 2nd ed., 2016), p. 1175, para. 35. [hereinafter Hailbronner]
[195] Ibid. *See also* German Judgment of 20 February 2013, para. 34.
[196] Article 1(A) of the Geneva Convention

the Geneva Convention (Articles 32 and 33) as well as it embraces the non-refoulement principle as stated in the recitals 3, 16 and 17 in its preamble. Accordingly, Article 21 of the Qualification Directive titled "Protection from refoulement" is under Chapter VII titled "Content of International Protection", enshrining the non-refoulement principle as follows:

> 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 judgment of a particularly serious crime, constitutes a danger to the community of that Member State.
>
> 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.

As stated in paragraph 2 of this article, having non-mandatory terms, it does not prohibit the refoulement absolutely. A Member State can refoule a refugee, whether formally recognised or not (so that it includes asylum seekers, as defined in this study), if not prohibited by the principle of non-refoulement as well as if the refugee is a danger to the security and the community of a Member State.[197] The Geneva Convention also has identical exceptions such as posing a threat to national security or public order to the host state. Also, the right to documentation in Article 24 of the Qualification Directive entitles those recognised as refugee or beneficiaries of subsidiary protection to residence permits and travel documents.

C. Evaluation

The CEAS aims for enhanced harmonisation of standards of asylum protection and better cooperation among Member States. The secondary legislation presents clear benchmarks for Member States for adapting their asylum systems. This legislation brought an increased level of harmonisation in applied standards. However, as stated in the Communication adopted by the European Commission on launching the process for a reform of the CEAS, the EU needs a fairer system for allocating asylum applicants among Member States and a further

[197] *See* Hailbronner, p. 1257.

harmonization of asylum procedures and standards to create a level playing field across Europe.[198] Member States still have different asylum systems, with different actors responsible, different procedures and different results, and the standards of the treatment of asylum applicants remain highly divergent within the Member States.[199] Large scale arrivals of migrants and refugees to the EU and an increasing imbalance of economic strengths among the Member States have caused practical challenges in the implementation of the CEAS.[200] It is evident that broad definitions of "minimum standards" have allowed for a generous interpretation.

Particularly, the Asylum Procedures Directive and the Reception Conditions Directive leave too much discretion to the Member States in interpretation and application of the provisions. The UNHCR have criticised the Asylum Procedures Directive for its failure to minimise derogations and reduce the complexity of the instrument.[201] The problems on the harmonisation and fundamental rights aspect are different implementations among the Member States on procedural guarantees, practices on safe country of origin, access to legal representation and information and the lack of proper safeguards for children.[202] A new reform was proposed to replace the current Asylum Procedures Directive by a Regulation establishing a single common asylum procedure in the EU. Setting a maximum duration of the procedure, harmonising procedural standards on asylum procedures, the use and procedural consequences of applying the safe country of origin mechanism, and harmonising the safe third country mechanism must be improved.[203] Also, one of the important flaws is on the access to protection. There is no clause about the possibility to access asylum procedures from overseas or diplomatic representations abroad. Therefore, enhancing legal avenues to Europe

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[198] *See supra* note 131.

[199] *See* Martin Wagner et al, *The implementation of the Common European Asylum System*, European Parliament Directorate-General for Internal Policies, 2016, available at: http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556953/IPOL_STU(2016)556953_EN.pdf (last accessed on 25 October 2017)

[200] *See* Eurostat, Eurostat Statistics Explained, Asylum Statistics, 20 April 2016, available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics. (last accessed on 25 October 2017) *See* Frontex, Risk Analysis for 2016, Warsaw: Frontex, 2016, p. 48 available at: http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annula_Risk_Analysis_2016.pdf (last accessed on 25 October 2017)

[201] UNHCR, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009),* 2009, available at: www.unhcr.org/protection/operations/4c640eee9/unhcr-comments-european-commissions-proposal-directive-european-parliament.html (last accessed on 25 October 2017)

[202] Ibid.

[203] *See supra* note 131.

is one of the prominent issues for EU asylum law.[204]

Similarly, in the implementation of the Reception Conditions Directive, there is an overall shortage in reception capacity among Member States due to the high number of asylum seekers. Most of the reception centers do not guarantee an adequate standard of living and subsistence that protects their physical and mental health.[205] The Reception Conditions Directive also does not provide suitable accommodation of vulnerable persons in need of special reception arrangements.[206] The Directive requires Member States to determine if an applicant has special reception needs and how the identification of vulnerable persons is conducted. This is one of the problems preventing identical implementation among the Member States. In this regard, the Reception Conditions Directive proposes standards and guidance for the reception system of the Member States.[207]

These deficiencies in Asylum Procedure and Reception Procedure Directives also have significant reflections on the practice of the Dublin transfers. Mutual trust as the underlying principle of the Dublin transfers created an assumption that all Member States provide the same standards which does not simply exist. The difference on assessment processes also created problems with regards to the Dublin transfers.[208] For instance, what if a Member State to which an asylum seeker makes an application considers the person as a refugee, while the Member State responsible according to the Dublin system does not. These practical problems in the Dublin system are evaluated by the Court as a breach of the non-refoulement principle. In his regard, the Dublin system can function properly when the national courts trust the other Member States' asylum determination processes. Therefore, the functioning of the Dublin Regulation is related with solidarity and responsibility sharing within the Member States.[209]

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[204] European Commission, *Communication from the Commission to the European Parliament and the Council Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, COM (2016) 197 final, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0197&from=EN (last accessed on 3 June 2017) [hereinafter Communication on a Reform of the CEAS]

[205] Minos Mouzourakis et al., *Common asylum system at a turning point: Refugees caught in Europe's solidarity crisis, Annual Report 2014/2015*, AIDA, 2015, p. 89, available at: http://ecre.org/component/downloads/downloads/1038.html. (last accessed on 25 October 2017)

[206] Ibid.

[207] *See* Communication on a Reform of the CEAS.

[208] *See* European Commission, *Evaluation of the Implementation of the Dublin III Regulation – Final Report*, 18 March 2016, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_-_executive_sumary_en.pdf (last accessed on 3 June 2017)

[209] Minos Mouzourakis, '*We Need to Talk about Dublin' Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union*, OXFORD DEPARTMENT OF INTERNATIONAL DEVELOPMENT REFUGEE STUDIES CENTRE, Working Paper Series No. 105, 2014, p. 13, available at:

The debate on the solution for unduly heavy burdens on certain Member States focuses on the different ways for distribution of responsibility for processing asylum claims. The most prominent one is the burden-sharing, which distributes the responsibility fairly and equitably between all Member States on the basis of their respective reception capacities.[210] However, this principle of the Dublin system will not be fundamentally changed by the Dublin IV Regulation proposal.[211] In this framework, the Court and also ECJ pointed to Article 3(2) of the Dublin Regulation, challenged the mutual trust underpinning the Dublin system, and suspended the transfers of asylum seekers. This has become an effective tool to protect asylum seekers from the reception and processing standards not compatible with those formulated in international and EU law.

Also, the conditions and procedural rights guaranteed on the qualification process may vary between the Member States. For example, the recognition rates and the type of protection status granted to applicants originating from the same country of origin are different among the Member States.[212] Therefore, in the Commission's reform Communication of 6 April 2016, the transfer of the directive into a regulation was proposed to provide more convergence in the status decision and rights associated with the status.[213] The proposal also highlights that there is a need for more harmonised set of rights. In this respect, the Commission claims that adaption of the level of rights should be examined to reduce undue pull factors and secondary movements.[214] However, such incentives of the Member States may constitute a bar to improve the rights of the asylum seekers. Moreover, there are no guidelines to interpret the terms 'real risk' or 'serious harm' referred to in Article 15(c) of the Qualification Directive. Different interpretation by the Member States causes different implementation of the Qualification Directive. For example, for Syrian asylum seekers, the Member States granted a different type of protection according to their interpretation of the real risk or individual

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http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp105-we-need-to-talk-about-dublin.pdf/ (last accessed on 25 October 2017) [Hereinafter Mouzourakis]

[210] Ibid.

[211] European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, COM(2016)270 final, Brussels, 2016, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementaton-package/docs/20160504/dublin_reform_proposal_en.pdf (last accessed on 25 October 2017)

[212] *See supra* note 199.

[213] *See supra* note 131.

[214] Ibid.

risk.[215]

Overall, the planned reforms of the Commission show that the creation of a harmonized asylum procedure will take more years. There should be a system by which asylum seekers can access to a high level of protection under equivalent conditions in the Member States. In this respect, the CEAS has specific flaws because it is actually designed to control and limit migratory flows, exposing the current anti-immigration attitudes of the Member States. The policies in the Stockholm Programme support this idea since they focus on securing external borders and preventing illegal immigration, especially the restriction of secondary movements of the asylum seekers. The external border policy is still under the control of the Member States, and therefore, the EU has difficulties strengthening the right to access the asylum procedures in the borders or international sea areas. However, with the high number of asylum seekers arriving to the EU, the pressure on the Member States is increasing. However, simply improving standards in the EU legislation may not be sufficient. The Member States also have failed to effectively implement existing provisions. Lack of common standards and procedural harmonization in practice has created hesitation for national authorities, and has increased the effect of the Court to the asylum law. The Court has presented some indications for asylum seekers from a human rights perspective. It determines what does not comply with the standards of the ECHR, and affects the implementation of the Member States in practice. Also, it should be noted that the aim of the CEAS is not to provide adequate protection of asylum seekers' human rights. Therefore, the Court's active role is also important in respect of its contribution the improvement of their rights.

The fundamental rights and principles presented by the international law and the EU law including the CEAS are listed in the Annex as a summary of this chapter.[216] This chart also shows the related articles of the ECHR together with the leading cases of the Court, to be analysed in the next chapter, under the rights and principles. Many aspects of asylum protection under international law are also the subject of the EU law since Article 78(1) TFEU requires the CEAS to be in accordance with the Refugee Convention. Therefore, it necessitates the national courts of the Member States and ECHR to interpret and apply the EU law as well as to understand the implications for interpretation of CEAS provisions. In compatibility with the aim of this study's comparative perspective within protection granted

[215] European Asylum Support Office (EASO), *The Implementation of Article 15(c) QD in EU Member States*, EASO Practical Guides Series, 2015, p. 1-4, available at: https://easo.europa.eu/wp-content/uploads/EASO_The-Implementation-of-Art-15c-QDin-EU-Member-States.pdf. (last accessed on 25 October 2017)
[216] *See* Annex.

by the CEAS and the ECHR together with the interpretation of the Court, it is important to underline the following points of the CEAS.

The first point concerns the Dublin Regulation. For the Dublin transfers within the Member States, there is a safety presumption or, in other words automatic mutual trust that a transfer of an asylum seeker to a responsible state does not put him or her in a risk of refoulement or ill-treatment. Articles 3(2) and 17 of the Dublin Regulation present an exception to such presumption. The role of the Court within the ECHR standards will be evaluated in the next chapter, since it abolished the principle of safety presumption in practice by pointing the articles of the Dublin Regulation, and referring to Article 3 of the ECHR. The risk assessment in transfers to responsible states, and in this regard, the requirement of the systematic deficiencies in the responsible states will be underlined. The second point concerns the non-refoulement principle, particularly the assessment of the persecution or risk. Article 4 of the Qualification Directive details the rules for such assessment. The broad interpretation of Articles 2 and 3 of the ECHR by the Court provides the principles under EU law for the assessment of the risk to be applied commonly under the ECHR law. In addition, such risk assessments of the Court under the related articles of the ECHR contains the observation of certain rights and safeguards stated in other Directives, as showed in the Annex, to be analysed in the next chapter. Also, as regards to the exceptions to the non-refoulement principle, the Geneva Convention and the Qualification Directive have exceptions such as posing a threat to national security or public order to the host state. However, the prohibition of refoulement under Article 3 of the ECHR is absolute, to be detailed below. The third point concerns the scope of the access to asylum procedures. Particularly the extraterritorial access to the procedures and related rights, which are also explained in the Asylum Procedures Directive, is introduced with the case law of the Court. Also the application of the right to effective remedy by the Court will be discussed. Finally, the legal aspect relating to the detention of asylum seekers does not question the principle of the detention itself. However, problems related to the basic conditions of the detention, reasons for detention and procedural guarantees have been encountered in practice. The Reception Conditions Directive has a positive framework in this regard. On the other hand, assessment of the lawfulness of the detention, particularly in terms of the right to enter, is important since the Court also has different approaches.

IV. The European Convention on Human Rights

A. The Relation Between EU Law and the ECHR

Assessing the EU law from the point of view of human rights started with the ECJ which keeps human rights on the agenda, especially since even the Community law included no reference to fundamental human rights. The ECJ firmly resolved that human rights had a place in Community law,[217] and the secondary legislation should be based on "the respect for human rights", which is one of the values addressed in the TFEU (and then in Article 2 of the TEU and subject to monitoring as per Article 7 of the TEU). Accordingly, the ECJ have jurisdiction on the secondary legislation in terms of human rights pursuant to Article 269 of the TFEU.[218]

Later, the Treaty of Maastricht recognised fundamental rights, guaranteed by the ECHR, as general principles of Community law (now the EU law).[219] Finally, the Charter enshrined human rights together with the Treaty of Lisbon, which reiterates the reference to the ECHR. According to Article 6(1) and (2) of the TEU, the EU recognises the rights, freedoms and principles stated in the Charter, and accedes to the ECHR.[220] Thereby, due to the status of the ECHR and the case law of the Court as a major source of the general principles of EU law, the EU and the Member States should clearly comply with the standards of the ECHR and the case law in interpreting the EU legislation. This increases the importance of the case law of the Court in EU law in terms of asylum rights, especially assessing the standard of fundamental rights protection of asylum seekers in Europe.

The well-known case of Bosphorus v. Ireland demonstrates the compliance of EU law with the ECHR.[221] The notion of "equivalent protection" paved the way for the assessment of the

[217] Friedrich Stork & Cie v High Authority of the European Coal and Steel Community, case 1-58, European Court of Justice, (1959) http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61958CJ0001&from=EN (last accessed on 3 June 2017)

[218] Article 269 of the TFEU: "The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article."

[219] Article 6(3) of the TEU: "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

[220] For Article 6(1) of the TEU: *See above* note 61. Article 6(2) of the TEU: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."

[221] Case of Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, Application no. 45036/98, the European Court of Human Courts, (2005) http://hudoc.echr.coe.int/eng?i=001-69564 (last accessed on 3 June 2017) [hereinafter Bosphorus v. Ireland]

responsibility of the Member States in the area of human rights. Accordingly, fundamental rights under EU law are equivalently protected for the rights stated in the ECHR. Also, as per the notion of "presumption of conventionality" of the Court, a Member State should comply with the requirements of the ECHR in case these requirements are no more than implementing legal obligations arising from being a member of the EU.

Another point of view on international human rights law, especially on the asylum determination process, is that the application of human rights norms to decisions on entry and expulsion must be exercised within the rule of law, and cannot violate the basic human rights such as non-refoulement or prohibition of torture or degrading treatment. Although the Court "cannot adjudicate on the fulfilment of other international obligation, it must ensure that application of the Convention *(ECHR)* does not derogate from rights and freedoms enshrined in other agreements."[222]

B. The Role of the European Court of Human Rights

The development of the legislation and the rise of the asylum as a fundamental human right, particularly by the Charter needs a legal protection mechanism. This necessity especially occurs due to the different interpretation of similar cases by domestic courts within the EU. The role of the ECJ is limited with a common interpretation of the EU's legislation, which is insufficient to provide a judicial protection for the asylum seekers or refugees as well as to create a common assessment of the situation in third countries.

The international legal framework for EU legislation in this area requires the compliance with human rights as also guaranteed by the ECHR.[223] The Court has become a key source not only for protecting the human rights of asylum seekers or refugees but also for developing further procedural safeguards for them. Therefore, the question on whether the secondary legislation setting up the CEAS is in conformity with the minimum standards presented by the case law of the Court has also become significant. Since the CEAS is based on a mutual recognition to limit responsibility rather than sharing it, the Court bears an interventionist role as a guarantor of human rights to provide an effective protection for asylum-seekers' fundamental rights. Even the ECHR does not provide a distinct set of rights for asylum seekers or any provision for the examination of asylum claims; the Court adopts this role mostly on the basis of

[222] Article 53 of the ECHR
[223] Article 6(3) of the TEU and Article 78 (1) of the TFEU.

Articles 3, 5 and 13 as well as Protocols of the ECHR.[224] In this regard, the Court mainly interprets Article 3 in line with the principle of non-refoulement, as a prohibition on removing a person to a country in which he/she is facing a serious risk of torture or inhuman or degrading treatment or punishment. In addition, the rules concerning the detention under Article 5 as well as the prohibition of collective expulsion as per Article 4 of Protocol No 4 provides the Court constituting its own jurisprudence on asylum-related claims.

Analysis of the leading cases of the Court to present the applicability of the ECHR on asylum cases and its contribution to asylum law is the main objective of the following chapter.

C. Leading Asylum Cases

In its leading cases, the Court focuses on following prominent legal issues in terms of the asylum determination process under related articles of the ECHR. An asylum seeker can make its application solely to a Member State from which he/she entered to the EU as per the Dublin Regulation. Accordingly, the first legal issue related to this regulation occurs during removing applicants to a responsible state on the basis of facts of the cases. The Court judges the cases on transfer under the Dublin Regulation (the "Dublin Cases") according to Article 3 of the ECHR.

Another significant issue is the violation of the non-refoulement principle by the Member States. This principle is interpreted by the Court in its cases broadly under Article 3 of the ECHR. Collective expulsion, also, has become one of the main topics of focus by the Court under Article 4 of the Protocol 4 of the ECHR. Two main political problems, which affects the nature of this legal issue, are be analysed under this title. The first problem is that if an asylum seeker is not physically at the borders, the Member States argue that they are not within their jurisdiction. The second problem is the general understanding of the Member States that entries and expulsions are within the scope of their sovereignty. These two understandings were argued by the Court in its cases.

The final issue is the detention of asylum seekers. Legality and conditions of detention are the subjects of the most cases of the Court under Articles 3, 5 and Article 2 of Protocol No. 4 of the ECHR.

Moreover, the Court also observes the procedural obligations of the Member State, aiming to

[224] The Court also relies on Article 8 of the ECHR. However, the rights of refugees, the family-related issues of refugees or asylum seekers as well as their economic and social rights are out of the topic of this study.

provide an effective investigation for asylum seekers. Those procedural obligations within the scope of the asylum procedures, are ruled by the Court under Article 13 of the ECHR, mostly taken in conjunction with the related articles in violation. The wording of Article 13 titled "Right to an effective remedy" is as follows:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

In this respect, for instance, when asylum seekers are sent back to the state of their departure without making their application for international protection, the Court can evaluate the issue not only under the violation of Article 3 on the basis of non-refoulement but also the lack of possibility to challenge such removal under Article 13 of the ECHR. Besides cases of expulsion, the Court referred to Article 13 to decide on the existence of an effective remedy for lawfulness and the length of the proceedings, the rights to review of detention, have a personal interview, have a legal assistance, to remain in the territory during the proceedings, and other related rights to be detailed in the following part.

1. The Dublin Cases

The Dublin system is constructed on the basis of the presumption that the Asylum Procedures and the Reception Conditions Directives will be complied by all Member States. This automatic mutual trust (inter-state trust), means that when an asylum seeker is removed from one to another Member State, equal protection to the asylum seeker with an aim to guarantee the minimum standards and reception conditions during the ongoing asylum procedures would be provided in every Member State.[225] As an exception to this presumption, Article 3(2) of the Dublin Regulation authorizes a transferring Member State to determine another Member State when the transfer is not possible if the responsible Member State does not comply with the CEAS. Similarly, the Court may resolve that the Dublin Regulation not be applied, if the protection provided by the responsible Member State is manifestly deficient as per the CEAS and causes the violation of the ECHR. In this respect, standards for exceptions of Dublin transfers are determined by the Court with the case-specific judicial decisions via Articles 3 and 13 of the ECHR.

One of the Court's prominent cases in this regard is M.S.S. v. Belgium and Greece. The Court

[225] *See above* note 146, 147.

found a violation in a transfer executed as per the Dublin Regulation. In this well-known case, an asylum seeker travelled from Afghanistan to Belgium via Greece where his fingerprints were taken. Belgium, according to the Dublin Regulation, returned him to Greece where the detention and living conditions were not compatible with human dignity. As a result of its assessments, the Court found the violation by Greece of Article 13 taken in conjunction with Articles 2 and 3 of the ECHR because of the major structural deficiencies in the asylum procedure and the risk of his expulsion to his country of origin without any serious examination or access to an effective remedy.[226] In this respect, the Court also found the violation of Article 3 of the ECHR by Greece because of the applicant's detention and living conditions.[227] Therefore, Belgium's transfer of the asylum seeker to Greece, exposing him to these risks, violated Articles 3 and 13 of the ECHR.

The Court asked whether or not Belgian authorities should have known that Greek authorities would not seriously examine the asylum application. The Court pointed out the deficiencies which were proved by the UNHCR's call on the suspension of transfers to Greece as well as the conditions of detention and living conditions that amounted to degrading treatment.[228] Accordingly, the Court ruled that the presumption of equivalent protection that the Greek authorities would respect their international obligations arising from the CEAS in asylum matters, could not be applied in this case.[229] It also pointed to Article 3(2) of the Dublin Regulation stating where it is not possible to transfer an applicant to the Member State designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions in that Member State.[230] Therefore, the transfer under the Dublin Regulation would expose the asylum seeker to the risks arising from the deficiencies in the asylum procedure in Greece. In its assessment, the Court attributed some specific obligations to the sending state, Belgium, while fulfilling the Dublin Regulation.[231] These obligations include being aware of the deficiencies in the asylum procedure, and of whether the ECHR standards would be provided to the asylum seekers during the asylum application process as well as how Greece, within the scope of the Dublin Regulation, applies its asylum legislation in practice. Also, the existence of an individual guarantee given by Greece was recognized as another necessity by the Court for

[226] M.S.S. v. Belgium and Greece, para. 321.
[227] Ibid, para. 233 and 263.
[228] Ibid, para. 358 and 366.
[229] Ibid, para. 340.
[230] Ibid, para. 339.
[231] Ibid, para. 352 - 359.

the realization of the Dublin transfer.[232]

M.S.S. v. Belgium and Greece is a significant case in the asylum law with its impact on the implementation of the Dublin Regulation. The Dublin Regulation suggests burden-sharing among the Member States. However, in reality, such a system put more pressure on the Southern Member States from which the asylum seekers enter the EU from their countries.[233] Therefore, the Member States at the EU's southern frontier, such as Greece, Italy, Malta and Spain, on the migration routes of the asylum seekers entering the EU are held responsible within the scope of the Dublin Regulation.[234] The Court therefore changed the understanding on the system of transfers under the Dublin Regulation. The Court put a much stricter standard for the Member States in terms of Dublin transfers. It rebutted the presumption that all Member States respect the fundamental rights as per the EU secondary legislation. According to the Final report of the Evaluation of the Implementation of the Dublin III Regulation prepared for the European Commission, after the M.S.S. v. Belgium and Greece, most Member States refrained from transferring asylum seekers to Greece under the Dublin Regulation due to concerns about systemic flaws in the asylum procedure and reception conditions.[235] Some Member States also reported that they suspended transfers also to Bulgaria, Italy and Hungary due to similar problems.[236] Similarly, a growing number of appeals and legal challenges on the basis of systemic deficiencies after M.S.S. v. Belgium and Greece have been observed particularly in the United Kingdom.[237] In its assessments, the Court pointed out the findings of the Office of the UNHCR showing that the number of asylum applications received by Greece and the number of asylum seekers who entered the

[232] M.S.S. v. Belgium and Greece, para. 354.
[233] According to Eurostat and EASO figures, 39 183 persons applied for international protection in Italy between January and July 2015, compared to 30 755 in the same period of 2014 (an increase of 27 %). A similar increase in the number of applications was witnessed by Greece with 7 475 applicants (an increase of 30 %).
See European Asylum Support Office, *Annual Report on the Situation of Asylum in the European Union 2012*, available at: https://www.easo.europa.eu/sites/default/files/EASO_AnnualReport%202012.pdf (last accessed on 25 October 2017)
See The Council of the European Union, Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, 2015, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015D1601&from=EN (last accessed on 25 October 2017)
[234] For the migration routes, *See* http://frontex.europa.eu/trends-and-routes/migratory-routes-map/
[235] *See* European Commission, *Evaluation of the Implementation of the Dublin III Regulation – Final Report*, 18 March 2016, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_-_executive_sumary_en.pdf (last accessed on 3 June 2017)
[236] Ibid.
[237] Ibid.

EU through Greece were high.[238] Moreover, the Court listed the reports of international documents describing the conditions of detention and reception of asylum-seekers and also the asylum procedure in Greece.[239] After such assessments of the Court, the UNHCR's Observations had been taken into account by some Member States for the suspension of transfer, for example, to Bulgaria.[240]

At the end of the same year of the judgment of M.S.S. v. Belgium and Greece, the ECJ also addressed the same issue in N.S. v. Secretary of State for the Home Department and M.E. v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform.[241] It introduced the "systemic deficiencies" test. Accordingly, a transfer of an asylum seeker as per the Dublin Regulation should be prohibited if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible resulting in inhuman and degrading treatment, within the meaning of Article 4 of the EU Charter of Fundamental Rights.[242] The "systemic deficiencies" test was later consolidated in the recast of the Dublin Regulation under Article 3(2). However, the Court held that there is no additional requirement of "systemic deficiencies" in Tarakhel v. Switzerland.[243] Regardless of whether such a risk arises from a systemic deficiency of the asylum system, taking into account "a thorough and individualized" assessment, the transferring Member State can suspend the removal if there are substantial grounds to believe there is a real risk of inhuman and degrading treatment.[244] While the Court aims to provide better protection for asylum seekers in this context, the research shows that some Member States follow the more restrictive approach of the ECJ

[238] *See* UNHCR, *Observations on Greece as a Country of Asylum*, 2009, available at: http://www.refworld.org/docid/4b4b3fc82.html (last accessed on 25 October 2017)
UNHCR, *2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, 2009, available at: www.unhcr.org/statistics/country/4a375c426/2008-global-trends-refugees-asylum-seekers-returnees-internally-displaced.html (last accessed on 25 October 2017)
[239] M.S.S. v. Belgium and Greece, para. 159.
[240] *See* European Commission, *Evaluation of the Implementation of the Dublin III Regulation – Final Report*, 18 March 2016, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_-_executive_sumary_en.pdf (last accessed on 3 June 2017)
[241] Joined Cases of N.S. v. Secretary of State for the Home Department, C-411/10, European Court of Justice, (2011) and M.E. v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, C-493/10, European Court of Justice, (2012), available: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62010CJ0411&from=EN (last accessed on 3 June 2017)
[242] Article 4 of the EU Charter of Fundamental Rights is corresponding to Article 3 of the ECHR.
[243] Case of Tarakhel v. Switzerland, Application no. 29217/12, European Court of Human Rights, (2014) http://hudoc.echr.coe.int/eng?i=001-148070 (last accessed on 3 June 2017) [hereinafter Tarakhel v. Switzerland]
[244] Tarakhel v. Switzerland, para 104.

requiring systemic deficiencies or flaws, rather than focusing on individual risk.[245]

A similar understanding had been adopted in its earlier case of T.I. v. the United Kingdom in 2000. In this case, the Court ruled that the Member States could not be absolved from their responsibilities under the ECHR when executing Dublin transfers. In the case, the application of a Sri Lankan asylum seeker who left Germany and applied for asylum in the United Kingdom was declared by the Court as inadmissible.[246] The asylum seeker feared that Germany would send him back to Sri Lanka where there was a risk of being subjected to treatment contrary to Article 3 of the ECHR. The Court found that a real risk had not been established, that Germany's asylum procedures complied with the ECHR, and that Germany could honour its obligation under Article 3 of the ECHR as well as protect the asylum seeker from removal in case of the existing substantial ground for the risk in Sri Lanka as defined in Article 3 of the ECHR.[247] The United Kingdom could not be held in breach in returning the applicant to Germany as per Dublin Regulation. This is the first case the Court introduced that the Member States were not absolved from their responsibilities under the ECHR when implementing the transfer according to the Dublin Regulation. The important aspect of the Court in this case is to recognize the obligation of the United Kingdom to ensure that the transfer to Germany would not expose the asylum seeker to treatment described in Article 3 of the ECHR. As a general principle, the Court considered that the indirect removal of an asylum seeker to an intermediary Member State made a transferring Member State responsible to not deport a person if there was a substantial ground for a real risk of being subjected to treatment contrary to Article 3 of the ECHR.[248] Thus, the question should be, when applying the Dublin Regulation, whether or not an intermediary Member State affords sufficient guarantees for the non-refoulement.

On the other hand, in K.R.S. v. the United Kingdom, the Court took a different point of view in 2008. K.R.S. v. the United Kingdom, an Iranian asylum seeker arrived to the United Kingdom passing through Greece, and in compliance with the Dublin Regulation, the

[245] European Council on Refugees and Exiles (ECRE), *Dublin transfers post-Tarakhel: Update on European case law and practice*, 2015, para. 38, available at: http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Dublin%20transfers%20post-Tarakhel-%20Update%20on%20European%20case%20law%20and%20practice%20(3).pdf (last accessed on 25 October 2017)
[246] Case of T.I. v. the United Kingdom (dec.), Application no. 43844/98, European Court of Human Rights, (2000) http://hudoc.echr.coe.int/eng?i=001-5105 (last accessed on 3 June 2017) [hereinafter T.I. v. the UK]
[247] Ibid.
[248] Ibid.

responsibility to assess the asylum application was accepted by Greece.[249] However the asylum seeker objected to his transfer to Greece by claiming deficiencies in the Greek asylum procedures contrary to Article 3 of the ECHR. The Court held that in view of the information available at the time, there was no proof that Greece would not comply with its obligations under the Asylum Procedures Directive and the Reception Directive towards the returnees.[250] Therefore, accordingly, the Court declared the case inadmissible, and the United Kingdom had no violation. To validate proof of non-compliance, the Court takes into account numerous reports and materials of the UNHCR, the Council of Europe Commissioner for Human Rights, international non-governmental organisations to observe the conditions in the countries in respect of asylum procedures and reception conditions.[251] Although these documents had provided significant evidence about procedural deficiencies and low standards of detention in Greece, the Court held that these matters could or should have been taken up by K.R.S. with the authorities in Greece.[252] The Court was also satisfied that an asylum seeker would not be removed from Greece without a risk assessment in the country of origin.[253]

The presumptions of the Court that Greece would take Article 3 of the ECHR into account in its domestic system and the entire EU asylum system complied with the CEAS are open to criticism.[254] When compared with T.I. v. the United Kingdom, the judgment of K.R.S. v. the United Kingdom focuses on the removal practice instead of the Greek asylum system as well as on the formal approach relying on the fact that the Greek asylum system is bound with the EU law, rather than empirical approach.[255] The formal approach, based on the intra-trust principle, presumes that the Member State concerned will comply with its obligations. However, the Court assumed Greece was complying with its obligations according to the information available at the time to the United Kingdom and the Court. Therefore, the evaluation of evidences before the Court actually challenges the inter-state trust presumption. In this regard, the Court, according to the evidence before it, claimed that Greece had not, at that time, removed asylum seekers to countries such as Iran, Afghanistan, Iraq, Somalia or Sudan so there was no risk that the asylum seeker would be removed. Also, there was a letter

[249] Case of K.R.S. v. the United Kingdom (dec.), Application no. 32733/08, European Court of Human Rights, (2008) http://hudoc.echr.coe.int/eng?i=001-90500 (last accessed on 3 June 2017) [hereinafter K.R.S. v. the UK]
[250] Ibid.
[251] Ibid.
[252] Ibid.
[253] Ibid.
[254] Gina Clayton, *Asylum Seekers in Europe: M.S.S. v. Belgium and Greece*, HUMAN RIGHTS LAW REVIEW 11:4, 758-773, 2011, p. 762.
[255] *See* Gregor Noll, *Formalism vs. Empiricism: Some Reflections on the Dublin Convention on the occasion of Recent European Case Law*, NORDIC JOURNAL OF INTERNATIONAL LAW, 70:1, 2001.

from the Agent of the Government of Greece through the United Kingdom Agent describing new legislative framework for asylum applicants introduced in Greece. Therefore, it is important to observe from this case-law of the Court that on the basis of a case-by-case assessment, a view on systemic deficiencies can be restrictive according to the reports and individual position of an asylum seeker, and there should be an evidential standard showing that an asylum seeker cannot be transferred. According to the UNHCR Information Note on National Practice in the Application of Article 3(2) of the Dublin Regulation, the Member States have relied on the conclusions of both cases. They may confirm that indirect transfer does not affect a Member State's responsibility not to return anyone to torture, inhuman or degrading treatment, and also that asylum seekers need to submit the complaints regarding the procedures to the Member State where they are transferred.[256]

M.S.S. v. Belgium and Greece established an important change towards Greek asylum procedures from the earlier position of K.R.S. v. the United Kingdom. In K.R.S. v. the United Kingdom, the Court assessed the asylum procedures within the scope of available evidence and the Court focused on the responsibility of the sending state in removal because the asylum seeker had not been sent to Greece yet. On the other hand, in the M.S.S. v. Belgium and Greece, the asylum seeker had already been sent to Greece and was exposed to the poor reception conditions. Changing conditions, particularly conditions of the reception of asylum seekers as well as adverse reports concerning the treatment of asylum seekers in Greece revealed the need to consider the positions of both sending and receiving states in detail. In addition, the Court emphasized the letter sent by the UNHCR in April 2009 to the Belgian Minister, which recommended the suspension of transfers to Greece.[257] This case also impacts the obligations of the sending state. Belgium violated Article 13 of the ECHR due to no possibility given to the asylum seeker to state his reasons not to be transferred to Greece.[258] According to the Court, when the asylum seeker challenged his transfer under the Dublin Regulation, authorities made a limited consideration in this regard.[259] Starting from M.S.S. v. Belgium and Greece, the Court obliged the sending state to have a proper hearing of the asylum seeker's objection to the transfer.

[256] UNHCR, *UNHCR Information Note on National Practice in the Application of Article 3(2) of the Dublin II Regulation, in particular in the context of intended transfers to Greece*, 16 June 2010, para. 5, available at: http://www.refworld.org/docid/4c18e6f92.html (last accessed on 25 October 2017)
[257] M.S.S. v. Belgium and Greece, para. 349.
[258] Ibid, para 294-320.
[259] Ibid.

Another key case of the Court is Mohammed v. Austria. The asylum seeker's first application for asylum in Austria was rejected because Hungary was responsible for the asylum application according to the Dublin Regulation. One year later, the asylum seeker applied again for asylum protection and submitted that his transfer would be a violation of Article 3 of the ECHR. Pursuant to the Austrian law, the second application for asylum does not suspend the implementation of the transfer as per the Dublin Regulation. The Court ruled that such law prevented access to an effective remedy, constituting violations of 13 of the ECHR.[260] Accordingly, the second application of the asylum seeker cannot prima facie be regarded as abusively repetitive or entirely manifestly ill-founded because of the changed situation within one year and his arguable claim of a violation of Article 3 of the ECHR in case of transfer to Hungary.[261] This approach of the Court can imply that if the second application is prima facie abusively repetitive or entirely manifestly ill-founded, an asylum seeker can be removed without suspensive effect from the Member State according to the Dublin Regulation. However, such standard would be difficult to prove. Therefore, the ECHR should always be concerned before any decision is made on merits of the case if there is a risk of refoulement an asylum seeker faced in practice, as also stated in M.S.S. v. Belgium and Greece.[262]

In Sharifi v. Austria, the Court introduced a new criteria which is whether or not the threshold of the deficiencies would have been known by the transferring Member State.[263] The asylum seekers complained about their forced transfer to Greece due to the conditions amounting to inhuman treatment violating Article 3 of the ECHR. The Court resolved that there was no violation in the asylum seekers' transfer. For the conditions in Greece, the Court acknowledged that Greece had deficiencies concerning the asylum procedure and conditions, and the Austrian authorities should have known about such facts of Greece.[264] However, the Court stressed that authorities did not know that those deficiencies reached the threshold of Article 3 of the ECHR. So the Court took into consideration the possibility of the Member State to know not only about the facts in the other Member State to where the asylum seeker was transferred but also the threshold of those deficiencies.[265] Therefore, a mere awareness of serious deficiencies was determined as insufficient by Sharifi v. Austria. In M.S.S v. Belgium

[260] Case of Mohammed v. Austria, Application no. 2283/12, European Court of Human Rights, (2013) http://hudoc.echr.coe.int/eng?i=001-120073 (last accessed on 3 June 2017) [hereinafter Mohammadi v. Austria]
[261] Ibid, para. 108.
[262] M.S.S. v. Belgium and Greece, para. 315.
[263] Case of Sharifi v. Austria, Application no. 60104/08, European Court of Human Rights, (2013) http://hudoc.echr.coe.int/eng?i=001-138593 (last accessed on 3 June 2017) [hereinafter Sharifi v. Austria]
[264] Ibid, para. 33-39.
[265] Ibid.

and Greece, in 2011, the conditions of Greece were proved by the United Nations High Commissioner for Refugees officially as well as reports produced by international organizations and bodies. On the other hand, in Sharifi v. Austria, in 2013, there was sufficient information available to the Austrian authorities on the conditions in Greece, but the recommendations and results of the sources were partly conflicting. The Court also argued that there was no letter sent by the UNHCR as in M.S.S. v. Belgium and Greece.[266] In a similar ruling, Safaii v. Austria also followed the same case law.[267] This case involved the transfer of an Afghan asylum seeker to Greece from Austria as per Dublin Regulation. The first question was if the Austrian authorities knew or should have known that the transfer on 8 April 2009 would violate Article 3 of the ECHR, and the deficiencies and the shortcomings of the Greek asylum procedure reached the threshold of ill-treatment required by Article 3 of the ECHR. The Court assessed the facts according to the reporting available at the time of the decision-making process and the actual transfer to Greece. It concluded that such reports from different backgrounds did not provide coherent information and was also open to discretion.[268] Therefore, the Court did not find that authorities should have known that those deficiencies reached the threshold of Article 3 of the ECHR.

Another key case of the Court's case law is Sharifi and Others v. Italy and Greece ruled in 2014.[269] This case examined 35 asylum seekers entering Greece from Afghanistan, and later illegally boarding vessels from Greece to Italy due to their fear of deportation from Greece to their countries, where they were at the level of risk stated in Article 3 of the ECHR. When their vessels arrived to Italy, they were immediately deported back to Greece. According to the asylum seekers, they were not authorised to apply for asylum in Italy and Greece. In applying the Dublin Regulation, the Court ruled that Italy violated Article 3 of the ECHR because Italian authorities made asylum seekers return to Greece where there were shortcomings arising in the Greek asylum procedure.[270] Depriving asylum seekers of any procedural and substantive rights, Italian authorities removed these people automatically to Greece. The Court demonstrated that the application of the Dublin system must comply with the ECHR, and so that the implementation of this system cannot justify the collective and

[266] Sharifi v. Austria, para. 36.
[267] Case of Safaii v. Austria, Application No. 44689/09, European Court of Human Rights, (2014) http://hudoc.echr.coe.int/eng?i=001-142842 (last accessed on 3 June 2017) [hereinafter Safaii v. Austria]
[268] Ibid, para. 46.
[269] Case of Sharifi and Others v. Italy and Greece, Application No. 16643/09, European Courts of Human Rights, (2014) http://hudoc.echr.coe.int/eng?i=001-147287 (last accessed on 3 June 2017) [hereinafter Sharifi and Others v. Italy and Greece]
[270] Ibid, para 178.

indiscriminate returns.[271] According to the Court, the Member States need to ensure that the destination country in transfers provides sufficient guarantees while applying its asylum policies with a view to preventing people from being removed to their countries without the necessary and adequate assessment of the risks.[272] Therefore, the Court held that there was a violation by Italy of Articles 2 and 3 of the ECHR. By deporting asylum seekers to Greece, the Italian authorities exposed them to the risks arising from the failings of the asylum procedure in Greece.

Besides the violation of the transferring Member States in the Dublin transfers, the Court also evaluated the situation in the receiving Member States. It has a well-established case law in this respect. As an example from its case law, M.S.S v. Belgium and Greece is significant in respect of the violation by Greece of Article 13 taken in conjunction with Articles 2 and 3 of the ECHR because of the shortcomings in the asylum procedure as well as violation of Article 3 of the ECHR by Greece because of the applicant's detention and living conditions.[273] The Court accepted the ineffective asylum procedures in Greece and so, the risk he may be faced by being removed to Afghanistan without any serious examination of the merits of his application and without any access to an effective remedy, which caused the violation of the right to an effective remedy (Article 13) in conjunction with the prohibition of degrading treatment (Article 3).[274] As a general principle of the Court, the effective remedy should be available by law, and be accessible practically.[275] So the Court examined whether the asylum seekers had an arguable claim as to the risk of being subjected to treatment contrary to Article 3 of the ECHR in the event of their refoulement to Afghanistan and, if so, whether they had had a concrete possibility for access to the asylum procedure or other national procedure satisfying the requirements of Article 13 of the ECHR.[276]

The assessment of the applicant's risk under Article 3 must be made understanding both the general situation in the country of destination and the circumstances of the applicant's case. In this context, the Court must examine whether there is a situation of widespread violence in the country of destination. The Court concluded from such evaluation that the asylum seeker had an arguable claim under Article 2 or Article 3 of the ECHR since Afghanistan was posing a

[271] Sharifi and Others v. Italy and Greece, para 223. *See Chapter* IV.C.3. for the explanation of the Court for the Article 4 of the Protocol 4 as regards collective expulsion.
[272] Ibid, para 173.
[273] M.S.S. v. Belgium and Greece, para. 385-397.
[274] Sharifi and Others v. Italy and Greece, para. 180.
[275] Ibid, para. 167.
[276] Ibid, para. 173-181.

widespread problem of insecurity and the asylum seeker was exposed to reprisals at the hands of the anti-government forces because of his work.[277] Later, the Court examined if effective guarantees existed in order to protect the asylum seeker against arbitrary removal directly or indirectly back to Afghanistan.[278] Pursuant to sources of the Council of Europe Commissioner for Human Rights, the UNHCR and various non-governmental organisations, the Court recognized that Greece had shortcomings in access to the asylum procedure and in the examination of applications for asylum.[279] This means that asylum seekers could not receive sufficient information about the procedures, they had difficulty in accessing the Attica police headquarters, there was no reliable system of communication between the authorities and the asylum seekers, there were not enough interpreters, and the staff lacked training to conduct the individual interviews, there was a lack of legal aid effectively depriving the asylum seekers of legal counsel, and there were excessively lengthy delays in receiving a decision. These shortcomings did not only affect asylum seekers arriving in Greece for the first time but also those who sent back there in application of the Dublin Regulation.

Moreover, after the transfer of the asylum seeker to Greece, conditions for detention and living were also assessed by the Court, which concluded that the conditions of detention were unacceptable.[280] The feeling of arbitrariness and the feeling of inferiority and anxiety often existed. The profound effect of such conditions constituted degrading treatment was contrary to Article 3 of the ECHR. For the living conditions, the Court pointed out the obligations incumbent on the Greek authorities under the Reception Directive. The Court ruled that the authorities have not had due regard to an asylum seeker's vulnerability.[281] Thus, Greece must be held responsible, because of their inaction, for the situation in which he lived on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considered that such humiliating treatment showed a lack of respect for his dignity.[282] This situation caused feelings of fear, anguish or inferiority capable of inducing desperation. According to the Court, such living conditions, as well as the prolonged uncertainty in which he remained and the total lack of any prospects of his situation

[277] Sharifi and Others v. Italy and Greece, para. 173.
[278] Ibid, para. 180.
[279] Ibid, para. 176.
[280] Ibid, para. 189.
[281] Ibid, para. 172.
[282] Ibid, para. 178.

improving, reached the level of severity falling under the scope of Article 3 of the ECHR.[283]

The Court also held that the ill-treatment within the scope of Article 3 of the ECHR must attain a minimum level of severity. Besides the foreseeable consequences of transferring the asylum seeker as well as the general situation of the receiving country, the assessment of this minimum should be related to effects of the facts on the asylum seeker's personal circumstances, for example the duration of the treatment and its physical or mental effects. Also, the sex, age and state of health of the asylum seeker should be taken into account, particularly for the persons who need special protection. If there are no exceptionally compelling humanitarian grounds against removal, and also social and material living conditions are not significantly reduced, a breach of Article 3 of the ECHR does not arise. In this regard, there are 3 leading cases with different outcomes. These cases are similar in terms of conditions or treatments faced by the asylum seekers when transferred, however specific characteristics of asylum seekers affect the assessment of the Court. Therefore, for instance, while conditions or treatment in a country may not constitute a violation for a young able man, it can be for a family with six children.

The first case, Tarakhel v. Switzerland, involved the asylum application of an Afghan couple and their six children, who were sent back to Italy via Switzerland. The applicants described the systematic deficiencies in Italy regarding the reception arrangement, and therefore inhuman and degrading treatment they would face in case of their return without individual guarantees concerning their care. An important dimension of the case was the allegation of insufficient consideration of personal circumstance and the situation of family by the Swiss authorities. In its assessment, the Court paid attention to special conditions of the family such as the age of the children and the necessity to keeping the family together, and therefore the Court asked for the individual guarantees as requested by the asylum seekers. In this respect, the Court decided that Italy lacked sufficient assurances in terms of the current situation considering the reception conditions in Italy and especially detailed and reliable information on a specific facility to where the family would be sent.[284] Returning the family as per Dublin Regulation would constitute a violation of Article 3 of the ECHR.

In the case of A.M.E. v. the Netherlands, a Somalian applicant complained of poor living

[283] Sharifi and Others v. Italy and Greece, para. 188-189.
[284] Tarakhel v. Switzerland, para 120-122.

conditions in Italy and probable inadequate examination of his asylum application.[285] The Court compared the facts of the previous cases. Referring to the case Tarakhel v. Switzerland and the application of the family with six children, the Court pointed out that the Somalian applicant was an able young man with no dependants like the family and six children. The Court assessed his future prospects and resolved not to disclose a real and imminent risk of hardship that was within the scope of Article 3 of the ECHR.[286] Also, again, referring to its case law of M.S.S. v. Belgium and Greece, the Court compared the situation in Greece at that time to the situation in Italy, and resolved that the overall situation in Italy considering the reception arrangements could in no way be compared to the situation in Greece. Only the reception conditions could not be a bar for all removals to Italy, according to the Court.[287] Therefore the case was regarded as manifestly ill-founded, and so inadmissible.

Similar facts were also subjects in the case A.S. v. Switzerland. A Syrian national complained that his return to Italy, where there were deficiencies in the reception system in inadequate housing and medical treatment that he needed, would cause him to face inhuman or degrading treatment violating Article 3 of the ECHR.[288] The Court focused on whether or not his illness would be harmful at the level of threshold set out in Article 3 of the ECHR and that it was a bar to transfer him to Italy. In this respect, the existence of serious doubts on the capacities of the system in Italy was admitted by the Court by referring to the case, Tarakhel. However, it drew attention to the applicant's illness which was not critical.[289] As per the case law of the Court, only in a very exceptional cases, the illness could be compelling for removal.[290] The non-existence of the indications for inappropriate treatment received in Italy also constituted an important fact regarded by the Court. However, another application, judged by the Court in 2013, considering a Somali asylum seeker and two young children was found inadmissible or, in other words, manifestly ill-founded because the future prospects of the applicants did not constitute "a sufficiently real and imminent risk of hardship severe enough to fall within the

[285] Case of A.M.E. v. the Netherlands (dec.), Application no. 51428/10, European Court of Human Rights, (2015) http://hudoc.echr.coe.int/eng?i=001-152295 (last accessed on 3 June 2017) [hereinafter A.M.E. v. the Netherlands]
[286] Ibid, para. 36.
[287] Ibid, para. 35.
[288] Case of A.S. v. Switzerland, Application no. 39350/13, European Court of Human Rights, (2015) http://hudoc.echr.coe.int/eng?i=001-155717 (last accessed on 3 June 2017) [hereinafter A.S. v. Switzerland]
[289] A.S. v. Switzerland, para. 35-37.
[290] *See* Case of D. v. the United Kingdom, Application no. 30240/96, European Court of Human Rights, (1997) http://hudoc.echr.coe.int/eng?i=001-58035 (last accessed on 3 June 2017)
Case of N v. the United Kingdom, Application no. 26565/05, European Court of Human Rights, (2008) http://hudoc.echr.coe.int/eng?i=001-86490 (last accessed on 3 June 2017)

scope of Article 3 of the Convention *(ECHR)*."[291]

2. Non-refoulement

Article 78 of the TFEU and Article 18 of the Charter refer to the Geneva Convention, which enshrines the principle of non-refoulement. Article 19 of the Charter also enshrines the protection in the event of removal, expulsion or extradition. In line with these main provisions, the secondary legislation of the CEAS, particularly the related articles of the Qualification Directive as well as other instruments of the EU asylum acquis, s this principle are also analysed above. The non-refoulement principle in the ECHR law is not referred to in the ECHR's provisions. In this regard, the Court tries to make Articles 2 and 3 of the ECHR practical and effective within the interpretative framework of the ECHR, and interprets the related articles on the basis of the non-refoulement principle. Especially Article 3 (Prohibition of Torture) as well as Article 2 (Right to Life) of the ECHR are taken as the basis by the Court for the cases related to the obligation of the non-refoulement.[292] The difference between these articles is that the prospect of death on return should be certain as per Article 2, while substantial grounds should exist for a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in case of return as per Article 3. Prohibition on degradation under Article 3 of the ECHR also protects dignity.[293] The provisions against degradation are used to show the human interest in self-presentation such as taking care of elemental physical needs, and protecting against forms of humiliation related to this interest.[294] From the asylum law perspective, it is compatible with the scope of Article 3 of the ECHR that the Court takes into account reception and detention conditions of the asylum seekers under this article. In this sense, the Court has established a set of principles on circumstances that might count as inhuman and degrading. For example, ill-treatment must attain a minimum level of severity according to the Court, and its assessment must depend on the circumstances of the case such as the duration and other qualifications of the person. The Court also assesses the degrading treatment if it is performed to humiliate and debase the person, and its consequences and effects on his or her personality. On the other hand,

[291] Case of Mohammed Hussein v. the Netherlands and Italy, Application no. 27725/10, European Court of Human Rights (2013) http://hudoc.echr.coe.int/fre?i=001-118927 (last accessed on 3 June 2017)

[292] There are also other articles (Articles 4, 5, 6, 7, 8, 9, 10, 11, 14, and the related articles of Protocols) interpreted by the Court in its cases related ton on-refoulement. However, the prominent article, Articles 2 and 3 in this regard are focused on herein for the aim of this study.

[293] Jeremy Waldron, *How Law Protects Dignity*, NYU SCHOOL OF LAW PUBLIC LAW RESEARCH PAPER NO. 11-83, 2011, p. 9.

[294] *See* Jeremy Waldron, *Cruel, Inhuman and Degrading Treatment: The Words Themselves*, CANADIAN JOURNAL OF LAW AND JURISPRUDENCE, 2010 [hereinafter Waldron: Cruel, Inhuman and Degrading Treatment]

inhuman treatment must be more painful than degrading treatment,[295] causing very serious and cruel suffering.[296] The intensity of the suffering must be significant to determine the threshold required to invoke Article 3 of the ECHR. The Court has benefited from the graduating scale of degrading treatment in order to diversify the protective scope of Article 3 of the ECHR.[297] Such interpretation of Article 3 by the Court provided possible arguments for asylum seekers in their applications before the Member States.

The Court interprets Article 3 of the ECHR to provide an effective way of protection against all forms of return to countries or places where there is a risk of torture, or inhuman or degrading treatment or punishment. The ECHR does not have any provision for the purpose of providing a legal status as included by the Geneva Convention. The only obligation under Article 3 is not to return the individual if it gives rise to a violation of the ECHR. On the other hand, the scope of this article in terms of protection provided is wider than that provided by the Geneva Convention in many aspects. For instance, one of the provisions is the exception included by the Geneva Convention for the non-refoulement of refugees or asylum seekers. Article 3 of the ECHR absolutely prohibits any return of an individual to be faced a real risk of treatment stated in their provisions.[298] These put prohibition on expulsions, which give rise to death, torture and degrading treatment or punishment. It assesses the individual risks for each case depending on its specific circumstances. The Court also acknowledged that Article 3 of the ECHR provides protection more than Articles 32 and 33 of the Geneva Convention in this regard, by providing a safety net for asylum seekers not to be deprived of international protection.[299] Also, the risk of treatment referred to in Article 3 of the ECHR is different from a risk of persecution referred in the Geneva Convention as well as in the EU law. According to the Geneva Convention, a well-founded fear of persecution is required to be "for reasons of" race, religion, nationality, membership of a particular social group or political opinion". In contract, in the sense of Article 3 of the ECHR, the Court does not oblige the persecution to be for these reasons. Regardless of such reasons, assessment made by a state for the risk of

[295] Waldron: Cruel, Inhuman and Degrading Treatment, p. 20.
[296] Case of Ireland v. United Kingdom, Application no. 5310/71, European Court of Human Rights, (1978), para. 167. http://hudoc.echr.coe.int/eng?i=001-57506 (last accessed on 3 June 2017)
[297] *See* Yutaka Arai-Yokoi, *Grading Scale of Degradation: Identifying the Threshold of Degrading Treatment or Punishment Under Article 3 ECHR*, 21 NETHERLANDS QUARTERLY HUMAN RIGHTS, 21/3, 385-421, 2003.
[298] Case of Soering v. the United Kingdom, Application no. 14038/88, European Court of Human Rights, (1989), para. 88 http://hudoc.echr.coe.int/eng?i=001-57619 (last accessed on 3 June 2017) [hereinafter Soering v. the UK]
[299] Case of Chahal v. the United Kingdom, Application no. 22414/93, European Court of Human Rights, (1996), para. 80 http://hudoc.echr.coe.int/eng?i=001-58004 (last accessed on 3 June 2017) [hereinafter Chahal v. the UK]

persecution within the framework of the Geneva Convention is similar to the Court's assessment for the risk of being exposed to ill-treatment as per Article 3 of the ECHR. A risk of persecution defined in the Geneva Convention can be considered as being covered by Article 3 of the ECHR.[300]

The jurisprudence of the Court on Article 3 of the ECHR was first approved in Soering v. the United Kingdom in which a German national accused of a capital offence in the US was extradited by the United Kingdom. The Court applied the non-refoulement principle in case of extradition where the applicant could face the death row phenomenon. This case also provided the Court's definition of torture or inhuman or degrading treatment, which provides a broader scope than the Geneva Convention. The second case and also the first case on the expulsion of an asylum seeker was Cruz Varas v. Sweden for which the Court stated that the principle applied in Soering applied to decisions to extradite and also to expel.[301] This view was also acknowledged in Vilvarajah v. the United Kingdom.[302] In Chahal v. the United Kingdom, the deportation of the asylum seeker, Mr. Chahal, was also regarded as a violation of Article 3 of the ECHR by the Court. This case was significant in exposing the absolute nature of the principle of non-refoulement under Article 3 of the ECHR even in case of alleged danger posed by an asylum seeker to the national security of the host country. Later, in Saadi v. Italy, the Court even interpreted the absolute nature of Article 3 of the ECHR more broadly, and decided that an asylum seeker could not be returned even if he or she was a terrorist or committed a crime in the host country.[303] Furthermore, it should be noted that returns with regard to Dublin rules are within the scope of the protection provided by Article 3 of the ECHR. In other words, indirect removals to an intermediate country, which is also a Member State, on the basis of the Dublin Regulation, does not affect the application of Article 3 of the ECHR.[304] To this end, multilateral agreements on any kind of allocation of asylum claims between states as well as readmission agreements do not prevail over any obligation or responsible under Article 3 of the ECHR.

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[300] Nuala Mole and Catherine Meredith, *Asylum and the European Convention on Human Rights*, Council of Europe Publishing, Human rights files, No. 9, p. 25, available at: https://book.coe.int/eur/en/human-rights-files/4429-asylum-and-the-european-convention-on-human-rights-human-rights-files-no-9.html

[301] Case of Cruz Varas and Others v. Sweden, Application no. 15576/89, European Court of Human Rights, (1991) http://hudoc.echr.coe.int/eng?i=001-57674 (last accessed on 3 June 2017) [hereinafter Cruz Varas and Others v. Sweden]

[302] Case of Vilvarajah and Others v. the United Kingdom, Application no. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, European Court of Human Rights, (1991) http://hudoc.echr.coe.int/eng?i=001-57713 (last accessed on 3 June 2017) [hereinafter Vilvarajah and Others v. the UK]

[303] Case of Saadi v. Italy, Application no. 37201/06, European Court of Human Rights, (2008) http://hudoc.echr.coe.int/eng?i=001-85276 (last accessed on 3 June 2017) [hereinafter Saadi v. Italy]

[304] *See* T.I. v. the UK

The main question is how the Court assesses the risk in its cases within the scope of the ECHR. As also stated in Salah Sheekh v. the Netherlands, the Court emphasized that the states have the right to expel individuals.[305] Yet, Article 3 imposes an obligation on the expelling State not to expel an individual if there is substantial ground to believe the person to be expelled would face a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country, which is defined as the principle of non-refoulement.[306] In this respect, Salah Sheekh v. the Netherlands had a significant impact on the assessment of the risk arising from generalised violence faced by an asylum seeker of a minority clan in the receiving country. The Court's question focused on the responsibility of the Netherlands to assess the generalised violence in the receiving country. In this regard, the parameters of the Court are the responsibility of the state with regard to the foreseeable consequences of return when it takes place and the substantial grounds for believing that there is a real risk.

While the Court searches for the responsibility of the state for the foreseeable consequences of return, in principle, as in Saadi v. Italy, the Court has an assumption that the applicant should point to evidence to prove the real risk of exposure to prohibited treatment.[307] On the other hand, the Court also points to the duty of the state expelling an asylum seeker to investigate the risk.[308] In this regard, one of the latest cases is F.G. v. Sweden which involves expulsion of an Iranian asylum seeker to Iran without sufficient search of the occasion and resulted in his conversion to Christianity.[309] According to his claims, an Iranian national applied for asylum in Sweden because he had worked with opponents of the Iranian regime, was arrested several times by Iranian authorities, and had been forced to flee because his business premises had been searched and some politically sensitive documents had been taken. After his arrival to Sweden, during his asylum proceedings, he had changed his religion to Christianity, which caused a risk of capital punishment for apostasy in case of his return to Iran. However, the Swedish authorities rejected his asylum application and executed an order for expulsion. The Court decided that his expulsion to Iran was a violation of Articles 2 and 3, not due to risks associated with his political past, but due to the expulsion without an

[305] Case of Salah Sheekh v. the Netherlands, Application no. 1948/04, European Court of Human Rights, (2007) http://hudoc.echr.coe.int/eng?i=001-78986 (last accessed on 3 June 2017) [hereinafter Salah Sheekh v. the Netherlands]
[306] *See* Cruz Varas and Others v. Sweden, Soering v. the UK, Vilvarajah and Others v. the UK, Chahal v. the UK, Salah Sheekh v. the Netherlands.
[307] Saadi v. Italy, para. 129.
[308] *See* Article 4 of the Qulification Directive.
[309] Case of F.G. v. Sweden, Application no. 43611/11, European Court of Human Rights, (2016) http://hudoc.echr.coe.int/eng?i=001-161829 (last accessed on 3 June 2017) [hereinafter F.G. v. Sweden]

assessment of the risks that could arise from his religious conversion.[310] The Court reiterated its general principles on whether or not the state has a duty to assess a risk factor which is not relied upon by asylum seekers in his or her asylum application. In principle, it is the asylum seeker's duty to submit the reasons and evidence about his or her claims during the asylum application. When an asylum seeker presents evidence or statements, it is a state's duty to dispel any doubts, if there are any.[311] This is because of the benefit of doubt granting by the Court to asylum seekers when assessing their credibility. On the other hand, in case information is missing or there is a real reason to doubt the truth of their submissions, asylum seekers must present a satisfactory explanation.[312] Also, if a risk is a "well-known general risk, when information about such a risk is freely ascertainable from a wide number of sources", it is the states' duty to carry out an assessment of such risk. Otherwise, if an asylum seeker does not refer to any risk factor in the asylum application, the state is obliged to find such risk of their own motion. However, if the state is being "aware of facts relating to a specific individual" which can put the asylum seeker in a risk of ill-treatment on expulsion, an assessment of such risk should be made by the states' authorities. In F.G. v. Sweden, the asylum seeker expressed to the state authorities that his religion conversion was a private matter and there was no indication that Iranian authorities were aware of such conversion. However, the Court claimed that the state's authorities were obliged to assess, of their own motion, all the information before his or her expulsion to Iran.[313] Therefore, the Court judged that there would be a violation of Articles 2 and 3 if the applicant were to be returned to Iran without an ex nunc assessment by the Swedish authorities of the consequences of his religious conversion.[314] The Court decided such violation although the asylum seeker refused to claim his conversion during the asylum application.

Another aspect of a state's duty in risk assessment is to comply with their obligations under Article 3 of the ECHR even if the asylum seekers fail to ask for asylum or to describe the risks they will face. In Hirsi Jamaa and Others v. Italy, the Court assessed Italy's push-back in case of interception or interdiction at sea and returning asylum seekers back to Libya as a

[310] F.G. v. Sweden, para. 156
[311] Case of N. v. Sweden, Application no. 23505/09, European Court of Human Rights, (2010), para. 53 http://hudoc.echr.coe.int/eng?i=001-99992 (last accessed on 3 June 2017)
Case of M.A. v. Switzerland, Application no. 52589/13, European Court of Human Rights, (2014), para. 55 http://hudoc.echr.coe.int/eng?i=001-148078 (last accessed on 3 June 2017)
[312] F.G. v. Sweden, para. 113.
[313] Ibid, para. 126.
[314] Ibid, para. 127.

breach of Article 3, Article 4 of Protocol No. 4 and Article 13 of the ECHR.[315] One of the aspects of the Court on the principle of the non-refoulement is the real risk in asylum seekers' country of origin, which causes a violation of Article 3 of the ECHR.[316] In this sense, as regards to refoulement to Libya, the Court questioned if the migrants should have asked for the asylum request. Also as per the EU asylum directives, obligations of the states in this regard can occur when the applications "can be understood as a request for international protection."[317] However, in Hirsi Jamaa, the Court described the conditions of the interceptions at sea, which was not conducive for making formal asylum applications.[318] These persons following such a sea voyage, physically and mentally exhausted, should not have been expected to declare their wish to apply for international protection. These circumstances could also be created by the states' intentionally to discourage asylum applications. Therefore, in this case, even they did not ask for international protection, they would have been taken to Italy or the Italian authorities should have ascertained how the Libyan authorities fulfilled their international obligations to protect asylum seekers.[319]

As the other parameter of the Court, the concept of "substantial grounds for a real risk" is assessed according to whether or not the sending state "knew or ought to have known" about the risk of ill-treatment in breach of the ECHR in the country of destination. With regard to the assessment of the risk, under the "Qualification Directive", the principles under EU law and ECHR law have a lot in common due to the adoption of the EU asylum acquis according to the case law of the Court. The common principles necessitate the assessments to be made individually and also cumulatively as well as according to all relevant and up-to-date laws, facts, documents and evidence. In terms of the manner of assessing the risk, a state will consider the general conditions of the country, personal circumstances of the asylum seeker, evidence of a particular risk to the individual, and specific character of the facts. In this regard, reports by the UNHCR and international human rights organizations can be used by the Court. For instance, in the Hirsi Jamaa case, the Court judged that Libya is not a safe

[315] Case of Hirsi Jamaa and Others v. Italy, Application no. 27765/09, European Court of Human Rights, (2012) http://hudoc.echr.coe.int/eng?i=001-109231 (last accessed on 3 June 2017) [hereinafter Hirsi Jamaa and Others v. Italy]
[316] Another aspect of the case is the recognition by the Court of the push-back at sea, outside the territory of the state, as the exercise of jurisdiction by Italy and a manner of expulsion. The Court introduced a push back on the high seas as a hidden expulsion, which causes the violation of Protocol 4 Article 4 to the ECHR, to be detailed in the next chapter.
[317] Articles 2(b) and 3(1) of the Asylum Procedures Directive, Articles 2(c) and 3(1) of Dublin Regulation.
[318] Hirsi Jamaa and Others v. Italy, para. 133.
[319] Ibid, para. 157.

country for any irregular migrant as it is clear in view of generally available country information and pursuant to reports.[320] In this regard, J.K. and Others v. Sweden is one of the latest cases of the Court in 2017. Iraqi nationals' family members (a father, a mother and their son) worked with American clients, and therefore al-Qaeda, from 2004 to 2008, made several murder attempts and badly injured the father, murdered their daughter, and kidnapped the son.[321] The father left Iraq in 2010, and the mother and son in 2011. They applied for asylum in Sweden. The domestic court rejected the application due to there having been no personal threats towards the family since 2008 when the father finished working for American clients and therefore al-Qaeda stopped being a threat. According to the court, the threat was not present and concrete anymore to justify the granting of asylum. However, the Court judged that there were substantial grounds that their return to Iraq would constitute a real risk of treatment contrary to Article 3.[322] The Court summarized its general principles under the titles of general nature of obligations under Article 3, principle of non-refoulement, general principles concerning the application of Article 3 in expulsion cases, risk of ill-treatment by private groups, principle of ex nunc evaluation of the circumstances, principle of subsidiarity, assessment of the existence of a real risk, distribution of the burden of proof, past ill-treatment as an indication of risk, and membership of a targeted group.[323] Focusing on the distribution of the burden of proving a real risk of ill-treatment in the country of origin, the Court underlined that an asylum seeker cannot be evaluated as not responsible for the burden of proof until he or she submits a substantial individual and real risk of ill-treatment in case of expulsion.[324] The Court explained two points in this regard by referring to relevant materials of the UNHCR and to the Qualification Directive. The first point is the "shared duty" of an asylum seeker and the authorities to evaluate all relevant facts in the proceedings. On the other hand, concerning personal circumstances, responsibility of the burden belongs to an asylum seeker. Yet, the Court takes into consideration the difficulties that an asylum seeker may experience in collecting proof. But also the authorities during assessing the proceedings should establish proprio motu (its own motion) the general situation in country of origin as well as the ability of its public authorities to provide protection. The second point is the

[320] Hirsi Jamaa and Others v. Italy, para. 123.
[321] Case of J.K. and Others v. Sweden, Application no. 59166/12, European Court of Human Rights, (2016) http://hudoc.echr.coe.int/eng?i=001-165442 (last accessed on 3 June 2017) [hereinafter J.K. and Others v. Sweden]
[322] Ibid, para. 106-123.
[323] Ibid, para. 77-105.
[324] For the Court's explanations on the burden of proof, *See* J.K. and Others v. Sweden, para. 91-98.

significance of established past ill-treatment contrary to Article 3 in the country of origin.[325] Reviewing its case law in light of the Qualification Directive and UNHCR standards, the Court considered that such past ill-treatments can also be a strong indication of a future, real risk of ill-treatment in case the asylum seeker makes "a generally coherent and credible account of events that is consistent with information from reliable and objective sources about the general situation in the country in issue". In these conditions, the burden shifted to the authorities "to dispel any doubts about that risk". Accordingly, the Court decided that there was a "strong indication" of future real risk and so the authorities needed to dispel any doubts about that risk. The Court considered the domestic asylum judgment as lacking that perspective and pointed to reports proving the ongoing targeting of persons that had worked with the occupying powers in Iraq. Therefore, the Court found that continued persecution on expulsion to Iraq constituted a real risk for the applicants, and Iraqi authorities could not protect them. Thus, their expulsion to Iraq would be a violation of Article 3 of the ECHR according to the Court.

While assessing the risk, the Court considers the changing situations of the country of origin of asylum seekers. Therefore, similar cases can be concluded differently according to changing circumstances as this is the case for Somalia in Sufi and Elmi v. the United Kingdom and K.A.B. v. Sweden. In Sufi and Elmi v. the United Kingdom, arriving in the United Kingdom in 2003, the first applicant, Mr. Sufi, applied for asylum there as he was from a minority clan persecuted by the militia in Somalia.[326] This militia had killed his father and sister and also injured him. In 2008, it was reported that he suffered from post-traumatic stress disorder. The second applicant, Mr. Elmi, from the majority clan in Somalia, arrived in the United Kingdom in 1998 and was granted the status of refugee. Deportation orders were issued by the authorities in the United Kingdom for both of them due to convictions for some serious criminal offences. In its assessment, the Court asked whether there were substantial reasons to believe that the applicants would face a real risk of ill-treatment contrary to Article 3 in case of their removal. Whether or not such risk arose from a general situation of violence and/or an asylum seeker's individual characteristic should be taken into account in this regard. For the general situation of violence, it noted that only in the most extreme cases having sufficient intensity to create such a risk would be relevant. To understand the level of

[325] For the Court's explanations on the past ill-treatment, *See* J.K. and Others v. Sweden, para. 99-102.
[326] Case of Sufi and Elmi v. the United Kingdom, Applications nos. 8319/07 and 11449/07, European Court of Human Rights, (2011) http://hudoc.echr.coe.int/eng?i=001-105434 (last accessed on 3 June 2017) [hereinafter Sufi and Elmi v. the UK]

intensity, the Court investigated as to whether:

> the parties to the conflict were using methods and/or tactics of warfare which increased the risk of civilian casualties or directly targeting civilians;
>
> the use of such methods and/or tactics was widespread among the parties to the conflict; if the fighting was localised or widespread; and
>
> the number of civilians killed, injured and displaced as a result of the fighting.[327]

In light of these explanations, the Court evaluated the situation in Somalia at a high level of intensity whether these persons were well-connected to powerful actors in the country.[328] Otherwise, these persons had no protection since indiscriminate bombardments and military offensives caused unpredictable and widespread violence and civilian casualties. The Court also assessed other possibilities such as relocating to a safer region. The Court stated that the states could place the returnees who could travel, gain admittance or settle in the possible areas where there was no real risk of ill-treatment.[329] Considering Somalia, however, the Court took into account that returnees had no recent experience of living in Somalia. If their hometown was in or they were required to travel to an area controlled by al-Shabaab, they could be subjected to punishments.

The Court also considered the asylum seekers' individual situations. It judged that if the first applicant was to remain in Somalia, he would be at real risk of ill-treatment because his family was in a town controlled by al-Shabaab when he arrived in the United Kingdom in 2003, and found that same risk was still ongoing.[330] Accordingly, the Court cited the same assessments for the second applicant. Even though the second applicant was a member of the majority Isaaq clan, this seemed not to be a powerful enough connection to protect the applicant.[331] When he had arrived in the United Kingdom in 1988, he had had no experience of living under al-Shabaab's regime. He would therefore be at real risk if he were to seek refuge in an area under al-Shabaab's control.

In K.A.B. v. Sweden, which is also about the expulsion of an asylum seeker to Somalia, the Court did not evaluate the expulsion as a violation due to the improvements in the general

[327] Sufi and Elmi v. the UK, para. 241.
[328] Ibid, para. 242, 249.
[329] Ibid, para. 265-277.
[330] Ibid, para. 303.
[331] Ibid, para. 311.

situation in Somalia.[332] In its claims, the asylum seeker requested asylum from Sweden in 2009 due to threats from the al-Shabaab and so he would be at real risk in case he returned to Somalia. His application was rejected by the Swedish authorities due to his unsubstantiated and incoherent claims.[333] The Court recounted its case of Sufi and Elmi v. the United Kingdom in which the Court decided all returns would be a violation of Article 3 of the ECHR. However, in its assessment, the Court summarized the changed situation in Somalia since 2011, such as withdrawal of al-Shabaab from the city, a new administration, decreased general level of violence according to international sources, no frontline fighting or shelling, people returning to Mogadishu, and the normalised daily life of citizens.[334] Therefore, according to the available country information, the situation in the city showed that not everyone in the city was at a real risk of treatment. Applying this information to the individual situation of the applicant, the Court indicated that he was not a member of any group which was at risk of being under target of al-Shabaab, and also he had a home in Mogadishu where his wife lived. Since he did not substantiate his allegations that in case of his return he would be targeted, his submissions were incoherent and incomplete according to the Court.[335] The Court also stated that his claims were carefully examined and concluded with extensive reasons by executive and legal authorities in Sweden.[336] Yet, the applicant failed to submit a reasonable fact that he would face a real risk of being killed or subjected to ill-treatment upon his return.

In Sufi and Elmi v. the United Kingdom, the Court also evaluated the living conditions in Internally Displaced Persons and refugee camps where returnees could seek refuge and the Court concluded the conditions as dire.[337] When a crisis predominantly arises from the direct or indirect actions of the parties in a conflict, for instance, poverty or the state's lack of resources, the Court investigates whether or not these dire humanitarian conditions are within the threshold of Article 3 of the ECHR.[338] An applicant's ability to reach the most basic needs, his vulnerability to ill-treatment as well as the prospect of his situation improving within a reasonable time frame are taken into account in this regard. The Court concluded that the dire conditions in the main camps caused the treatment reaching such a threshold due to

[332] Case of K.A.B. v. Sweden, Application no. 886/11, European Court of Human Rights, (2013) http://hudoc.echr.coe.int/eng?i=001-126027 (last accessed on 3 June 2017) [hereinafter K.A.B. v. Sweden]
[333] Ibid, para. 57-65.
[334] Ibid, para. 75-78.
[335] Ibid, para. 96.
[336] Ibid, para. 92.
[337] Ibid, para. 278-292.
[338] Ibid, para. 279.

limited access to basic needs and shelter, extreme overcrowding, violent crime, abuse, forcible recruitment, exploitation, no prospect of their situation as as well as the real risk of refoulement by the Kenyan authorities in these camps.[339] Such assessment of the Court was compatible with its earlier decision in M.S.S. v. Belgium and Greece. The case broke new ground by applying Article 3 of the ECHR to the living conditions and by asking whether or not the general living conditions of the asylum seekers in Greece, during making their application or after the exhaustion of all legal avenues, amounted to inhuman and degrading treatment against Article 3 of the ECHR. The case was also important in that the Court decided a violation not only for Greece but also for Belgium, exposing the asylum seekers to the conditions in Greece. Therefore, the Court introduced the extra-territorial effect of Article 3 of the ECHR. Furthermore, access to food and shelter is under the ambit of the economic and social rights and outside the scope of the ECHR. Article 3 of the ECHR cannot oblige the states to provide a shelter or financial assistance for other needs.[340] However, the Court pointed out the Greek legislation transposing the Reception Conditions Directive, which requires accommodation and decent material conditions.[341] Another significant point is the acknowledgement of the asylum seekers as vulnerable.[342] Considering both the Reception Conditions Directive and the vulnerability of asylum seekers, the Court asked if a situation of extreme material poverty may result in the violation of Article 3 of the ECHR.[343] In this regard, the determination of threshold for the violation of Article 3 should be based on the degree of deprivation.[344] The impact of such assessment of the Court showed that the Reception Conditions Directive was not applied or was violated. It can be argued that whether such violation of the national law and the Reception Conditions Directive was influential or critical to the Court's finding the breach of Article 3 of the ECHR.[345] However, the Court's judgment indicates that the Court determines its standards and establishes its case-law by taking into account the Reception Conditions Directive rather than relying on it as a criterion for its assessments. Therefore, there is a mutual contribution among the EU law and the Court's case-law. While the standards of the EU law guide the Court for the determination of

[339] K.R.S. v. the UK, para. 291.
[340] M.S.S. v. Belgium and Greece, para. 249.
[341] Ibid, para. 250
[342] Ibid, para. 251.
[343] Ibid, para. 252.
[344] Ibid, para. 254.
[345] Gina Clayton, *Asylum Seekers in Europe: M.S.S. v. Belgium and Greece*, HUMAN RIGHTS LAW REVIEW 11:4, 758-773, 2011. For the contrary opinion, *See* Laurens Lavrysen, *M.S.S. v. Belgium and Greece (2): The impact on EU Asylum Law*, 2011, available at: http://strasbourgobservers.co/2011/02/24/m-s-s-v-belgium-and-greece (last accessed on 25 October 2017)

its standards, the Court interprets Article 3 of the ECHR in this regard and its implications affect the states' practices.

From the perspective of the Court's jurisprudence on socio-economic deprivation, the Court does not limit the application of Article 3 of the ECHR to cases concerning medical treatment. However, the threshold is higher than the determined one for the access to food and shelter. Only harsh medical conditions may be considered under the protection of this article. On the other hand, the Geneva Convention requires a well-founded fear together with the reasons for fear of persecution. However, Article 3 of the ECHR has no similar qualifications with the Geneva Convention. In D v. the United Kingdom, the Court extended the protection to an asylum seeker from St. Kitts and Nevis, who was suffering AIDS and already irremediably dying of this illness.[346] His expulsion would cause him to have inadequate medical treatment in his country where he had no family or material resources. He was in no sense being persecuted for a reason noted in the Geneva Convention. While the Court judged that his expulsion would amount to inhuman treatment as well as a real risk of dying under the most distressing circumstances and therefore be a violation of Article 3 of the ECHR, it emphasized the critical stage reached at that moment in the asylum-seeker's illness.[347] It is important to note that the Court evaluated the circumstances of the case as exceptional. Later, in N. v. the United Kingdom, for the applicant, claiming asylum based merely on her serious medical conditions, HIV, and lack of treatment in her home country, Uganda, the Court decided that her removal would not be a violation of Article 3 of the ECHR given the fact that the ECHR could not be invoked to guarantee economic and social rights.[348] The threshold given in D. v. the United Kingdom was not reached in this case, accordingly. The judgment is criticised due to the Court's focus on the economic implications of requiring states to provide medical treatment.[349] However, the Court has determined its threshold according to the criteria such as whether or not there is a serious deprivation incompatible with human dignity, or the asylum seeker is completely dependent on that state for the resolution of his illness.

For the risk assessments, the quality of the assessment made by the states is also important. For instance, in Singh and Others v. Belgium, the Belgium authorities' rejection of the

[346] Case of D. v. the United Kingdom, Application. no. 30240/96, European Court of Human Rights (1997) http://hudoc.echr.coe.int/eng?i=001-58035 (last accessed on 3 June 2017) [hereinafter D. v. the UK]
[347] Ibid, para. 53.
[348] Case of N. v. the United Kingdom, Application no. 26565/05, European Court of Human Rights (2008), para 51 http://hudoc.echr.coe.int/eng?i=001-86490 (last accessed on 3 June 2017) [hereinafter N. v. the UK]
[349] *See* Hemme Battjes, *In Search of a Fair Balance: the Absolute Character of the Prohibition of Refoulement under Article 3 ECHR Reassessed*, LEIDEN JOURNAL OF INTERNATIONAL LAW, 22:3, 583-621, 2009.

documents submitted by the Afghan nationals in support of an asylum application, without a close and rigorous scrutiny of the asylum application was a violation of Article 13 in conjunction with Article 3 of the ECHR.[350] A close and rigorous scrutiny of the asylum application is obviously related to the practice of the right to asylum and to access to meaningful asylum procedures. Accordingly, several rights and procedures, for instance accessing EU territory, the right to access asylum procedures, the right to enter and remain under EU law as well as effective remedies are evaluated by the Court through the non-refoulement principle. For instance, removal of an asylum seeker without access to asylum procedures can be a reason for the violation of the principle of non-refoulement and Article 3 of the ECHR. The right to access asylum procedure is observed in this sense. Generally, the Court's main concern is to protect asylum seekers against arbitrary refoulement. Therefore, effective guarantees are important provisions according to the Court. For instance, in I.M. v. France, the Court asks whether the asylum procedure provides effective protection against refoulement.[351] Furthermore, inaccessible and inadequate practices or procedures may result in a risk of refoulement. In Hirsi Jamaa and Others v. Italy, the Court concluded that no information was provided to asylum seekers concerning their future, no steps were taken for their identification, no interpreters or legal advisors were provided for them, or they were not given the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints for their returns.[352] The Court evaluated these deficiencies as a violation of Article 13 taken in conjunction with Article 3 and Article 4 of Protocol no. 4 to the ECHR. The connection between procedural failings and refoulement, therefore, should be recognized by the Court in its assessment. For instance, in Jabari v. Turkey, two significant procedural consequences are derived from the absolute nature of Article 3 of the ECHR.[353] In this case, an Iranian national applied for asylum in Turkey, but her application was inadmissible according to authorities due to the five-day time limit within which this application should be made, and therefore a deportation order was issued by Turkey, and her appeal against the order was also dismissed. According to the Court, such automatic and mechanical applications of such a short time-limit should be

[350] Case of Singh and Others v. Belgium, Application no. 33210/11, European Court of Human Rights, (2012), para. 103 http://hudoc.echr.coe.int/eng?i=001-113660 (last accessed on 3 June 2017) [hereinafter Singh and Others v. Belgium]
[351] Case of I.M. v. France, Application no. 9152/09, European Court of Human Rights, (2012) http://hudoc.echr.coe.int/eng?i=001-108934 (last accessed on 3 June 2017) [hereinafter I.M. v. France]
[352] Hirsi Jamaa and Others v. Italy, para. 202-204.
[353] Case of Jabari v. Turkey, Application no. 40035/98, European Court of Human Rights, (2000) http://hudoc.echr.coe.int/eng?i=001-58900 (last accessed on 3 June 2017) [hereinafter Jabari v. Turkey]

considered not complying with the values under the protection of Article 3 of the ECHR.[354] She appealed against the order, but the Court declared that her appeal did not suspend the implementation of the order.[355] However, appeals against the negative asylum decisions should have a suspensive effect, which means an asylum seeker must have the right to remain in the State during the judicial review proceedings.

3. Collective Expulsion

Article 4 of Protocol No. 4 of the ECHR is titled "Prohibition of collective expulsion of aliens", states that "collective expulsion of aliens is prohibited". In this regard, the ECHR was the first international instrument referring to this term. Under EU law, Article 78 of the TFEU clarifies that the asylum acquis should be in accordance with other relevant treaties. The 28 Member States accepted this obligation when ratifying the EU treaties. The collective expulsion takes place in the Charter, and the first paragraph of its Article 19 titled "Protection in the event of removal, expulsion or extradition" states that "collective expulsions are prohibited." One of the purposes of the prohibition on the collective expulsion is to impose individual assessment for each asylum seeker, which is also highlighted in Article 4(3) of the Qualification Directive. Furthermore, while the Court interprets the collective expulsion, it relates the cases to various rights that can be found in the EU Directives.

According to the drafters of Protocol No. 4, the word "expulsion" means to drive away from a place.[356] While the provision ruled out no justifying measures for the collective expulsion, the Court defined the collective expulsion in its case law as follows:

> "any measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each alien in the group"[357]

Another issue concerning the provision is the meaning of the "aliens". Aliens are those who have no right to reside within the state. In addition, the definition of aliens includes those who do not enjoy the right to citizenship.[358] These can be people passing through a country or

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[354] Jabari v. Turkey, para 40.
[355] Ibid, para 49-50.
[356] For more explanation, *See* Hirsi Jamaa and Others v. Italy, para. 174.
[357] Hirsi Jamaa and Others v. Italy, para. 166.
Case of Becker v. Denmark (dec.), Application no. 7011/75, European Court of Human Rights, (1975), para. 235 http://hudoc.echr.coe.int/eng?i=001-75008 (last accessed on 3 June 2017)
[358] Andrew Drzemczewski, *The position of aliens in relation to the European Convention on Human Rights*, Council of Europe Press, 1984, p. 10.

residing in it, or refugees, or entering the state on their own initiative, or stateless or having another nationality.[359]

The main aim of the Protocol is to prevent states from transferring groups of aliens to other states without an individual examination of their circumstances. As stated in Alibaks and Others v. the Netherlands, refusal of all asylum seekers from the same country did not necessarily mean that they had been collectively expelled if the authorities examined their facts individually.[360] Therefore, the scope of the interpretation of the non-refoulement principle broadened, so that the states must not remove a group of asylum seekers without assessing their personal circumstances on a case by case basis. The removal can be performed by the states only after a reasonable and objective examination on the personal basis.[361] Each person must be given the opportunity to put their argument before a competent authority. After such individual examinations, similar decisions may be given for a number of aliens, which does not mean collective expulsion. However, the background to the execution of the expulsion order should also be taken into account in search of the compliance with Article 4 of Protocol No. 4 of the ECHR.[362] In a decision of collective expulsion, the asylum seeker should not perform any culpable conduct or any other conduct hindering the procedures. Otherwise, if an expulsion decision after an individual examination is made because of such conduct, this will not be the violation of the article of the ECHR.[363]

The first case involving collective expulsion is Conka v. Belgium. The case concerns Slovakian asylum seekers of Romany origin, fleeing from Slovakia due to racist assaults there. Their asylum applications were declared inadmissible by Belgium, and without permission to enter the territory, they were ordered to leave the territory within 5 days. The Court reiterates the conditions of the collective expulsion as "compelling aliens, as a group, to leave the country" and without "a reasonable and objective examination of the particular case of each individual alien in the group". The Court found that the latter condition was not satisfied when the background of the expulsion order was assessed. The asylum applications

[359] Hirsi Jamaa and Others v. Italy, para. 174.
[360] Alibaks and Others v. the Netherlands (dec.), Application no. 14209/88, European Court of Human Rights, (1988) http://hudoc.echr.coe.int/eng?i=001-351 (last accessed on 3 June 2017)
[361] Case of Čonka v. Belgium, Application no. 51564/99, European Court of Human Rights, (2002), para. 59 http://hudoc.echr.coe.int/eng?i=001-60026 (last accessed on 3 June 2017) [hereinafter Conka v. Belgium]
Case of Sultani v. France, Application no. 45223/05, European Court of Human Rights, (2007), para. 81 http://hudoc.echr.coe.int/eng?i=001-82338 (last accessed on 3 June 2017) [hereinafter Sultani v. France]
[362] Čonka v. Belgium, para. 59.
[363] Case of Berisha and Haljiti v. the former Yugoslav Republic of Macedonia (dec.), Application no. 18670/03, European Court of Human Rights, (2005) http://hudoc.echr.coe.int/eng?i=001-69651 (last accessed on 3 June 2017)

were rejected and expulsion orders were issued by the authorities on the basis of the asylum seekers' personal circumstances which was that their stay in Belgium had exceeded three months. Therefore, the Court ruled that, taking into account the large number of asylum seekers of the same origin, "the procedure followed [by the state authorities] did not enable it to eliminate all doubt that the expulsion might have been collective"[364]. For such doubt, the Court showed four reasons, which were the operations announced and instructions given to the relevant authority for the implementation of the operations prior to the applicants' deportation; attendance of all the aliens to the police station at the same time; identical terms in the orders; difficulties in contacts with a lawyer; and the incomplete asylum procedure.[365] The Court stated that there were no sufficient guarantees showing that the procedure took into account the individual circumstances genuinely and personally.[366] Therefore, the Court found a violation of Article 4 of Protocol No. 4 of the ECHR. Such reasoning of the Court is important in terms of burden of proof. The burden is on the government to prove that there is no violation under Article 4 of Protocol No. 4 of the ECHR.

Similarly there are some key cases, particularly Hirsi Jamaa and Others v. Italy, and Sharifi and Others v. Italy and Greece, involving a violation on returning of an entire group of migrants and asylum seekers without verification of the individual identities of the group members. Hirsi Jamaa and Others v. Italy is the second judgment in which the Court found a violation. The case concerns Somalian and Eritrean asylum seekers travelling from Libya. When Italian authorities intercepted the asylum seekers at sea and sent them back to Libya, a question of territorial applicability and jurisdiction arose before the Court for the first time. The Court concluded that the applicability of Article 4 of the Protocol No. 4 of the ECHR on removals outside national territory, in other words, on the high seas, is within Italy's jurisdiction within the meaning of Article 1 of the ECHR for several reasons.[367] The main reason was that a vessel sailing on the high seas was subject to the exclusive jurisdiction of Italy because it was flying the Italian flag. The extraterritorial exercise of the jurisdiction of Italy permitted them to establish exclusive de jure and de facto control of asylum seekers. In its admissibility discussions, the Court stated that the wording of the article and the travaux préparatoires of the ECHR does not prevent extra-territorial application of Article 4 of Protocol No. 4 of the ECHR. It argued that in application of the article, the latest development

[364] Conka v. Belgium, para. 61.
[365] Ibid, para. 62.
[366] Ibid, para. 63.
[367] Hirsi Jamaa and Others v. Italy, para. 174.

in the migratory patterns should be taken into account, and the application of the article should not be limited to the collective expulsions only from the national territory since states can exercise their jurisdiction outside their national territories.[368] The exercise of extraterritorial jurisdiction by that State can take the form of collective expulsion.

In this respect the Court pointed out that the asylum seekers were transferred to the Italian military ships and returned to Tripoli. During such transfer and voyage, Italian authorities did not inform them of their destination, and did not do anything to identify them. In the Port of Tripoli, the asylum seekers were forced to leave the Italian ship and were transferred to the Libyan authorities. Accordingly, referring to its collective nature, the Court concluded that there was a violation of the prohibition of the collective expulsion because the transfer of those asylum seekers was executed without any examination of each asylum seekers' personal circumstances.[369] Without any identification procedure, Italian authorities only embarked and disembarked asylum seekers onto a military ship. Furthermore, the Court pointed out that the personnel at the military ship were not qualified for individual interviews, there were no interpreters or legal advisers.[370] While ruling, the Court referred to its case law, and investigated whether each asylum seeker was given an opportunity to put arguments against his expulsion to the authorities on an individual basis, or if there was a culpable conduct of the asylum seeker.[371] In addition to the violation of Article 4 of the Protocol No. 4 of the ECHR, the Court also found a violation of Article 3 of the ECHR because of asylum seekers' risks of ill-treatment in Libya and of repatriation to Somalia and Eritrea.[372]

Concerning the allegations on a violation of the right to an effective remedy, the Court ruled on the violation of Article 13 taken in conjunction with Article 3 and with Article 4 of the Protocol No. 4 to the ECHR. This ruling is because according to the reports of the international organizations and witness statements, there was no interpreters or legal advisers on board, the asylum seekers had been given no information by the Italian authorities as to the procedure to be followed to avoid being returned to Libya. In this respect, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints should be guaranteed according to the Court.[373] Also the asylum seekers could not make their complaints with a competent authority under Article 3 and

[368] Hirsi Jamaa and Others v. Italy, para. 177-178.
[369] Ibid, para. 117.
[370] Ibid, para. 185.
[371] Ibid, para. 184.
[372] *See Chapter* IV.C.2.
[373] Hirsi Jamaa and Others v. Italy, para. 201-207.

Article 4 of Protocol No. 4 of the ECHR to the competent authority, and therefore they could not obtain a thorough and rigorous assessment of their requests before the removal.[374]

In another case, Sharifi and Others v. Italy and Greece, the Court also found a violation of the prohibition of collective expulsion when Italy deported asylum seekers to Greece as per the Dublin system so that the asylum procedure be executed by Greece.[375] In this case, four asylum seekers entered the territory of Greece from Afghanistan on different dates in 2007 and 2008. They arrived illegally to Italy via vessels in 2009 in the port of Ancona, where the police immediately deported them back to Greece. Accordingly, the asylum seekers complained that neither Italy nor Greece gave them the opportunity to apply for asylum. For Greece, they pointed out the difficulties for the procedures in obtaining asylum. For Italy, they complained they were given no contact lawyers or interpreters, no information about their rights as well as no official, written and translated document about their return. Also, they claimed that Italian border police sent them back to ships immediately after they had disembarked.

Despite the Dublin Regulation, the Court decided that Italy should have performed an individual assessment of the circumstance of each asylum seeker before removing them.[376] Therefore, the Court concluded that the Dublin system cannot justify any form of collective returns. Depriving the asylum seekers of any substantive and procedural right and indiscriminate return without safeguards for the applicants concerned, by the Italian authorities in the ports of the Adriatic Sea to Greece constituted a form of collective expulsion.[377] In the case, the Italian Government claimed that the asylum seekers did not express their demands for asylum or another form of international protection during the identification process executed by the Italian authorities. In this regard, the Court stated that the intercepted asylum seekers without papers should have been met with an interpreter and officials who should have given them sufficient information about the procedures and the right to asylum.[378] Also, a lack of this information in a language they could understand during their identification process in the port of Ancona did not give a possibility to the asylum seekers to claim asylum in Italy. With this regard, such immediate and automatic returns gave rise to a violation of Article 4 of Protocol No. 4.

[374] Hirsi Jamaa and Others v. Italy, para. 201-207.
[375] *See above* note 226.
[376] Sharifi and Others v. Italy and Greece, para. 214-225.
[377] Ibid.
[378] Ibid.

The Court broadly interpreted the territorial applicability and jurisdiction of application. It rejected the Government's objection that this article could not be applicable because it considered the refusal to allow entry to the Italian territory to persons who arrived illegally. The Court did not consider whether or not these persons were returned after or before reaching Italian territory, and accepted that Article 4 of Protocol No. 4 of the ECHR was applicable in both situations. Therefore, the Court allows protection for the rights of asylum seekers in a broad concept. It also found a violation by Italy of Article 13 combined with Article 4 of Protocol No. 4 and Article 3 of the ECHR. This finding is because there was a lack of access to the asylum procedure. Even though there is no provision on the right to access asylum procedures, the right to be granted information, the right to an individual interview, or the right to enter or remain in the ECHR, the Court safeguarded these fundamental rights indirectly via Article 13 of the ECHR.[379]

In Khlaifia and Others v. Italy, the Court found no violation because Article 4 of Protocol No. 4 of the ECHR does not guarantee the right to an individual interview in all cases.[380] The background of the case was based on the 2011 migration crisis and the challenges of the receiving states in this regard. The case is about the detention of asylum seekers in a reception centre and on ships, and then their removal to Tunisia under an agreement of April 2011 between Italy and Tunisia. Tunisian nationals whose vessels were intercepted by the Italian Coast Guard while escaping from the events linked to the Arab Spring in September 2001, were placed in a reception centre on the island of Lampedusa, and then they were taken to ships in Palermo harbour following the fire of the centre during a riot. Refusal-of-entry orders were issued to them by the Italian authorities. Before they were removed from Italy, they were received and their identities were recorded by the Tunisian Consul. After, they were sent to Tunis and released there.

According to the Second Section of the Court, there was a violation of Article 4 of Protocol No. 4 of the ECHR because there were no "adequate safeguards of a genuine and specific examination of the individual situation of each applicant" as well as a violation of Article 13 of the ECHR because of a lack of suspensive effect of the relevant remedies. However, the

[379] Sharifi and Others v. Italy and Greece, para. 173-181.
[380] Case of Khlaifia and Others v. Italy, Application no. 16483/12, European Court of Human Rights, (2016) http://hudoc.echr.coe.int/eng?i=001-170054 (last accessed on 3 June 2017) [hereinafter Khlaifia and Others v. Italy]

Grand Chamber of the Court reversed the decision in its appeal.[381] The Court's assessment, in this regard, presents a useful review of the case law, which obliges the states for a sufficiently individualised examination of the particular case of each individual alien, as stated in previous cases. The Court addressed the migration crisis and its ongoing impacts. Problems with the management of this crisis or the reception conditions could not justify the practices incompatible with the ECHR.[382] Nevertheless, in this case, the Court confirmed the new challenges faced by the Europe on immigration control arising due to the Arab Spring, as well as the increasing number of asylum seekers or migrants arriving by sea.[383] In this regard, the Court ruled that the right to an individual interview could not be guaranteed in all circumstances by Article 4 of Protocol No 4 of the ECHR. The Court asked if each person had "a genuine and effective possibility of submitting their arguments against his or her expulsion" and if "those arguments were examined in an appropriate manner by the authorities".[384] It pointed out that two identity checks took place in the reception centre and before boarding to the planes for Tunis. The Court accepted that the Government could not produce the personal records of the asylum seekers because of the fire that occurred in the centre.[385] On the other hand, an identity check was performed by the authorities in the reception centre. In addition, the second identity check was performed before the asylum seekers boarded the planes for Tunis when they were received by the Tunisian Consul. Although this check was made by a third party, it established and verified the asylum seekers' nationality as well as gave a last chance to present arguments against their expulsion had they wished to do so. The Court also pointed out that some of them were not returned thanks to their arguments on the grounds of age or nationality.[386] According to those assessments, the Court judged that the expulsion could not be attributed as a collective. The Court also listed the number of days (9-12 days) they stayed in Italy. It remarked that asylum seekers could reasonable be returned to Tunisia, and even though they encountered some difficulties in the reception centre and on the ship, they had an opportunity to show the authorities any situation that could affect their status and stop their removal from Italy.[387] Another point that the Court highlighted was the identical nature of the refusal-of-entry order. This refusal was explained by the fact that the asylum seekers had no valid travel documents as well as they did not

[381] *See* the Judgment of the Second Section of the Court: http://hudoc.echr.coe.int/eng?i=001-157277 (last accessed on 3 June 2017)
[382] Khlaifia and Others v. Italy, para. 179.
[383] Ibid.
[384] Ibid, para 248.
[385] Ibid, para 246.
[386] Ibid, para 250.
[387] Ibid, para. 249.

allege that there would be ill-treatment in case of their return. Therefore, the individualist nature of the orders could not be provided in these conditions, according to the Court.[388] Under these circumstances, the Court also argued that even though a large number of asylum seekers were expelled at a relevant time or that some of them were expelled at the same time, it was not sufficient to determine the collective nature of the expulsion.[389] Thus, there was no violation of Article 4 of Protocol No. 4 of the ECHR.

Regarding the considerations of the Court on Article 13 taken together with Article 4 of Protocol No. 4 of the ECHR, the Court indicated that the individuals could appeal against the refusal-of-entry orders to the Italian Court within period of sixty days, as it was also notified in the orders.[390] It was clear that the Italian Court could examine any case about a failure on individual assessment and collective nature of expulsion. The Court concluded that, as also stated in Souza Ribeiro v. France, there was no an automatic suspensive remedy when an asylum seeker did not allege that there would be a real risk of a violation of the rights identified in Articles 2 or 3 of the ECHR, and so that the removal would not expose him to such risk or harm.[391] The important thing is that there should be an independent and impartial domestic forum to sufficiently examine complaints, and so to have an effective possibility to challenge the expulsion decision. Therefore, the Court decided there was no violation for this provision either.

Another case in which the Court did not find a violation is Sultani v. France. The case explores the risk of deportation on a collective flight to deport asylum seekers. An asylum seeker application was refused in France, and he complained about the manner of his return to Afghanistan. The applicant claimed that his return to Afghanistan on a group charter flight would mean the violation of Article 4 of Protocol No. 4 of the ECHR, and would put them at the risk of being subjected to inhuman and degrading treatment in case of their return. In this case, the Court judged that the asylum seekers' situation be examined by the domestic authorities individually, so that asylum seekers were able to put their arguments against their expulsion, and the authorities evaluated their personal situations as well as the risks in Afghanistan in case of their return.[392] Even if they were taken to the police station collectively and some of them were deported in groups, the Court pointed out that individual examinations

[388] Khlaifia and Others v. Italy, para. 251.
[389] Ibid, para. 252.
[390] Ibid, para. 274.
[391] Ibid, para. 275-277.
[392] Sultani v. France, para. 81-84.

were made and found out no violation.[393] Also according to the Court, several asylum seekers being subject to similar decisions or travelling in a group for the deportation or any other practical reasons did not merely mean that there was a collective expulsion and a violation of Article 4 of Protocol No. 4 of the ECHR.[394]

4. Detention

The Court assessed the detention of the asylum seekers under Article 5 of the ECHR titled "Right to liberty and security". The right to liberty and security is also referred to in the Declaration stating that "Everyone has the right to life, liberty and security of person" and "No one shall be subjected to arbitrary arrest, detention or exile".[395] Also, Article 31 of the Geneva Convention provides the non-penalisation of asylum seekers who enter or stay irregularly in case they submit their application for international protection without delay. It presents that restriction on movement can only be applied if it is necessary and until their status is regularized or they gain admission into another country. Article 26 of the Geneva Convention also regulates the freedom of movement and choice of residence for refugees lawfully in the territory. Accordingly, the right to seek asylum, the non-penalisation for irregular entry and stay, the right to liberty and security of person and freedom of movement means that the detention of asylum seekers, limiting all these rights, needs to be a last resort. In essence, the right to liberty and security protects all individuals from arbitrary arrest and detention. Article 5 of the ECHR also states that "Everyone has the right to liberty and security of person" and "No one shall be deprived of his liberty". Personal liberty is a basic condition since the deprivation of it also has direct and adverse effects on the enjoyment of other fundamental rights and freedoms. There is a presumption that everyone should enjoy liberty, and a person can be deprived of it only in exceptional circumstances.[396] It should be exceptional, objectively justified and not be longer than necessary.[397] However, in particular, detention of asylum seekers is increasingly automatic in Europe.[398] Security of person means physical liberty. It should not be interpreted as a duty of a state to give someone personal

[393] Sultani v. France, para. 83.
[394] Ibid, para 81.
[395] Articles 3 & 9 of the Declaration
[396] Monica Macovei, *The Right to Liberty and Security of the Person: A Guide to implementation of Article 5 of the European Convention on Human Rights*, Council of Europe Directorate General of Human Rights, Human Rights Handbooks, No. 5, 2004, p. 6, available at: https://rm.coe.int/168007ff4b [Hereinafter Macovei]
[397] Cathryn Costello, *Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law*, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, 19-1, 2012, 257-303, p. 258, available at: http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1478&context=ijgls
[398] *See* Council of Europe, Report of the Committee on Migration, Refugees and Population, *the Detention of Asylum Seekers and Irregular Migrants in Europe*, Doc. 12105, 2010.

protection from an attack.[399] The Court also referred to the right to liberty and security, and stated that one of the aims of this substantive right is to minimise the risks of arbitrariness by allowing the act of deprivation of liberty, and that the absence of safeguards can put the physical liberty of asylum seekers at stake and result in a subversion of the rule of law.[400] In this regard, Article 5 of the ECHR limits the right to liberty and security and gives a list of circumstances in which a deprivation of liberty, in other words 'detention', can be performed. Having no fixed definition of detention, the Court determines some criteria in order to decide whether there is a deprivation of liberty in a particular situation. In one of its case, the Court presented the following definition of the deprivation of liberty:

> In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.[401]

The Court's definition is flexible and adaptable to new cases. This can change as per criteria such as the extent of the area for the confinement, the social contact, the reporting requirements of the detainee, inability to move from the dwelling without notification as well as sanctions applied in case of violation of these obligations. Amuur v. France is the Court's examination of the existence of a deprivation of liberty.[402] The question is whether holding asylum seekers in the international zone of an airport constitutes a deprivation of liberty or not. Somalian asylum seekers were held in the transit zone of an airport. They asserted that their lives were in danger due to the overthrow of the regime in Somalia. The police refused to admit them to French territory and held them in a waiting area in Orly Airport. The Court investigated whether there was deprivation of liberty or not. In this regard, the Court asserted that this was an issue of "degree and intensity".[403] Asylum seekers were held in the zone for an excessive twenty days under strict and constant police surveillance without any legal and social assistance. Accordingly, a restriction upon liberty turned into a deprivation of liberty. Besides, such confinement prevented asylum seekers from the right to gain effective access to asylum procedures. The Government claimed that asylum seekers were not detained since

[399] Macovei, p. 6.
[400] Case of Kurt v. Turkey, Application no. 24276/94, European Court of Human Rights, (1998), para. 123 http://hudoc.echr.coe.int/eng?i=001-58198 (last accessed on 3 June 2017)
[401] Case of Guzzardi v. Italy, Application no. 7367/76, European Court of Human Rights, (1980), para. 92 http://hudoc.echr.coe.int/eng?i=001-57498 (last accessed on 3 June 2017)
[402] Case of Amuur v France, Application no. 19776/92, European Court of Human Rights, (1996) http://hudoc.echr.coe.int/eng?i=001-57988 (last accessed on 3 June 2017) [hereinafter Amuur v. France]
[403] Amuur v. France, para. 42.

they could have returned to their country. As a contrary to the claim of the Government, the Court considered that "the mere fact that possibility that it is possible for asylum seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty".[404] As a result, the Court decided that holding applicants in an airport's transit zone was equivalent in practice to deprivation of liberty due to restrictions suffered by the asylum seekers.[405]

A similar case was Riad and Idiab v. Belgium involving Palestinian asylum seekers, who left a dangerous Lebanon with their lives, coming from Sierra Leone to Belgium in late December 2002.[406] They were immediately placed in a transit zone inside the airport. Their asylum applications were refused. Later, in January 2003, they were transferred to a closed detention centre for illegal aliens. On the same day with the decision of the national court for their release, the asylum seekers were transferred to the transit zone of the airport pending their removal from Belgium. They complained of the inappropriate conditions to make them leave the country of their own free will. In its judgment, the Court explained that the asylum seekers were held in the transit zone for 15 days and 11 days respectively, which amounted to de facto deprivation of liberty. Leaving the country of their own free will did not eliminate the deprivation of their liberty. The Court also reiterated its case law that there should be a relation between the grounds of the deprivation and the place and/or conditions of detention.[407] However, the asylum seekers were left to their own devices in the transit zone. No form of humanitarian or social assistance was presented. Therefore, considering the legality of the detention, the Court found that:

> "Detaining" a person in the transit zone for an indefinite and unforeseeable period without that detention being based on a specific legal provision or valid decision of a court and with limited possibility of judicial control on account of the difficulties of contact enabling practical legal assistance, is in itself contrary to the principle of legal certainty, which is implicit in the Convention and is one of the fundamental elements of a State governed by the rule of law.[408]

While Article 5 of the ECHR confirmed that nobody can be deprived of the right to liberty

[404] Amuur v. France, para. 49.
[405] Ibid.
[406] Case of Riad and Idiab v. Belgium, Applications nos. 29787/03 and 29810/03, European Court of Human Rights, (2008) http://hudoc.echr.coe.int/eng?i=001-108395 (last accessed on 3 June 2017) [hereinafter Riad and Idiab v. Belgium]
[407] Riad and Idiab v. Belgium, para. 67-68.
[408] Ibid, para. 78.

and security of person, some exceptions are presented. As regards the detention of asylum seekers, the first paragraph and related exceptions detailed in Article 5 of the ECHR are as follows:[409]

> (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.
>
> > b) The lawful arrest or detention of a person […] in order to secure the fulfilment of any obligation prescribed by law
> >
> > f) The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition

The wording of the article clarifies clear grounds for detention, which are the prevention of unauthorised entry into the country and the facilitation of the removal of a person pending deportation or extradition. Moreover, together with each sub-paragraph, since everyone has the right to security and no one shall be deprived of liberty "in accordance with a procedure prescribed by law", the substantive conditions of deprivation of liberty are the legality and the lawfulness.

The condition of legality suggests the detention shall be based on a legal basis in domestic law.[410] The deprivation of freedom should be limited with the related exceptions specifically enumerated in paragraph 1 above. This exhaustive list of cases must be given a narrow interpretation.[411] The nature of the legality does not only mean the existence of the law but also the quality of the law.[412] As per the Court, the conditions under which domestic law authorises deprivation of liberty bear a particular importance in this sense. These conditions

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[409] All exceptions listed in sub-paragraphs of Article 5(1) are "after conviction by a competent court", "for failure to comply with a court order or a specific obligation prescribed by law", "pending trial", "specific situations concerning minors", "public health grounds or due to vagrancy", "to prevent an unauthorised entry or to facilitate removal of an alien".

[410] Amuur v. France, para. 50.

[411] Case of Winterwerp v. the Netherlands, Application no 6301/73, European Court of Human Rights, (1979), para. 37 http://hudoc.echr.coe.int/eng?i=001-57597 (last accessed on 3 June 2017) [hereinafter Winterwerp v. the Netherlands]

[412] The "quality of law" standard requires a legal provision authorising deprivation of liberty to be sufficiently precise, accessible, foreseeable and compatible with rule of law, and to avoid all risks of arbitrariness. The Court observes this standard when it assesses if a deprivation of liberty is in accordance with a procedure prescribed by law.

must be accessible and precise with adequate legal protection.[413] The domestic legislation on authorization of the deprivation of liberty should provide access to legal, humanitarian and social assistance as well as access to judicial review.[414] Hence, regarding the lawfulness as per Article 5(1)(b) and (f) of the ECHR, compliance with national law is not enough. Article 5 also requires the law on the deprivation of liberty to be with the aim of protecting the person from arbitrariness.[415] The notion of arbitrariness is also about compliance with national law too. A lawful deprivation of liberty in terms of national law can be still arbitrary.[416] The facts of a case as well as the conditions for avoiding the arbitrariness, as per the case law of the Court should be monitored. The Court explains the "lawfulness" and "a procedure prescribed by law" as follows:

> The Convention here refers essentially to national law and establishes the need to apply its rules, but it also requires that any measure depriving the individual of his liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness. What is at stake here is not only the "right to liberty" but also the "right to security of person".[417]

In Amuur v. France, the Court used the terms "in accordance with a procedure prescribed by law" that is also related to quality of law which has to comply with the rule of law.[418] For this case, the Decree of 27 May 1982 and the circular of 26 June 1990 were enacted after the fact and were not applicable at that time for the asylum seekers. The Court also ruled that against arbitrary interferences by authorities, there shall be adequate legal protection with rights safeguarded by the ECHR.[419] In this sense, French rules did not constitute a law of sufficient quality. The same case also refers to the grounds of asylum seekers' detention in transit zones, and the Court explained that:

> Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on

[413] Amuur v. France, para. 50-53.
[414] Ibid.
[415] Saadi v. the UK, para. 67
[416] Ibid.
[417] Case of Bozano v. France, Application no. 9990/82, European Court of Human Rights, (1986), http://hudoc.echr.coe.int/eng?i=001-57448 (last accessed on 3 June 2017)
[418] Amuur v. France, para. 50 and 53.
[419] Ibid, para. 53.

> Human Rights. States' legitimate concern to foil the increasingly frequent attempts to get round immigration restrictions must not deprive asylum-seekers of the protection afforded by these Conventions.[420]

This explanation of the Court is important. While it permits the states to confine asylum seekers to prevent unlawful immigration, it advises not to deprive asylum seekers of the human rights protection afforded by the Geneva Convention and the ECHR.

One of the key cases, Saadi v. the United Kingdom, examines unauthorized entry into the country and 7-day detention in a reception centre. When an asylum seeker from Iraq arrived at an airport in London, he immediately claimed asylum in December 2000, and t temporary admission was given to him accordingly. In 2 January 2001, he was detained and transferred to a reception centre for asylum seekers whose applications could be reviewed by a fast-track procedure. He was given information explaining the reason for the detention and his rights. However, the authorities did not notify him that his detention was for fast-track processing. In 5 January 2001, the reason for his detention was explained by the authorities to the asylum seeker's representative as that the applicant met the criteria for detention at the reception centre. The applicant applied for judicial review of the decision to detain him. In 8 January 2001, his request for asylum to enter the United Kingdom was refused. The following day he was released from Oakington and again granted temporary admission pending the determination of his appeal. In 14 January 2003, his appeal was allowed and he was granted asylum. He also sought judicial review of the decision to detain him. The House of Lords rejected it and found that detention was proportionate and reasonable.

The Court acknowledged that a state has the right to control the entry and residence of aliens. The state should be permitted to detain individuals who asked for permission to enter even for international protection. It recognized that an asylum seeker may enter the territory without authorization to apply for the asylum determination process and to be authorized to live in the country.[421] This unauthorized status makes the detention lawful as per Article 5(1)(f) of the ECHR. Even this kind of legal detention still allows the Court to supervise the detention in terms of human rights, especially, of duration and conditions under the other articles of the ECHR, and the Court decided that the detention on arrival of an asylum seeker was lawful under Article 5 of the ECHR.[422] The Court did not interpret this provision as "only permitting

[420] Amuur v. France, para. 43.
[421] Saadi v. the UK, para. 64.
[422] Ibid.

detention of a person who was shown to be trying to evade entry restrictions".[423] Such a narrow interpretation would limit the state's right to control the liberty of aliens. In certain circumstances such as identity checks and determination of the elements for asylum claims, detention is needed.

The Court also examined whether such detention was arbitrary or not. Governments mostly rely on detention aiming at deterrence to prevent irregular immigration. However, there is no proof that detention has any deterrence effect on asylum seekers.[424] Such detention aiming at deterrence without making individual assessment as a necessity to detain is unlawful and arbitrary under international human rights law.[425] Alternatives to detention must be taken into account accordingly. Under Article 5(1)(f) of the ECHR, the Court assesses the detention for the purpose of deterrence as a violation. Also, unless it is required by the national law, there is no requirement for a necessity test in contrast to the CEAS according to the Court. The existence of alternatives instead of detention is enshrined in the ECHR.[426] The reason for the absence of this requirement is to allow detention for the purpose of administrative expediency as stated in the Saadi v. the United Kingdom, as follows:

> Similarly, where a person has been detained under Article 5 § 1 (f), the Grand Chamber, interpreting the second limb of this sub-paragraph, held that, as long as a person was being detained "with a view to deportation", that is, as long as "action [was] being taken with a view to deportation", there was no requirement that the detention be reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing.
>
> (...) the principle of proportionality applied to detention under Article 5 § 1 (f) only to the extent that the detention should not continue for an unreasonable length of time; thus, it held that "any deprivation of liberty under Article 5 § 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not

[423] Saadi v. the UK, para. 65.
[424] Alice Edwards, B*ack to Basics: The Right to Liberty and Security of Person and Alternatives to Detention of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, UNHCR Legal and Protection Policy Research Series, 2011, p. 1
[425] UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, p. 7, http://www.refworld.org/docid/503489533b8.html
[426] The Reception Conditions Directive requires an individualised assessment in respect of the principles of necessity and proportionality. As per Recital 15 of the Directive, whether the detention is necessary or other measure is available as an alternative should be considered by the Member States.

prosecuted with due diligence, the detention will cease to be permissible ..."[427]

Accordingly, the Court does not apply the necessity test, but taking into account arbitrariness of the detention according to whether or not detention is taken with a view to deportation under an unreasonable length of time which should be within the scope of "as long as deportation proceedings are in progress".[428] Accordingly, the detention should not be arbitrary for both cases in Article 5(1)(f) of the ECHR (detention to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition). States have the right to equally control an asylum seeker's entry into and residence in their states, so that the Court does not apply a different proportionality test to both cases of detention, whether or not the asylum seeker is at the point of entry or already in the country.[429] Furthermore, according to the principle of proportionality, the detention should not take place for an unreasonable length of time. In this regard, the Court determined the following conditions for lawful detentions, avoiding arbitrariness, with the aim of the prevention of unauthorized entry:

> it was carried out in good faith; it was closely connected to the purpose of preventing unauthorised entry to the country; the place and conditions of detention were appropriate bearing in mind that the detainee might well have fled his home country in mortal fear; and the length of the detention did not exceed that reasonably required for the purpose pursued.[430]

According to the Court, the national authorities acted in good faith because such detention regime was for the benefit of asylum seekers to deal with their applications quickly and efficiently. It was also compatible with the purpose of preventing unauthorised entry. The Court also accepted that such detention regime was for ensuring the speedy resolution when considering the high number of asylum applications in the United Kingdom.[431] The asylum seeker was detained on the basis that his application was chosen for fast-tracking processing due to such high numbers. Finally, the asylum seeker's 7-day detention under a fast-track asylum procedure before his release the day after his claim to asylum which was refused at first instance, was not assessed as the period exceeded reasonable limit by the Court.[432] Such

[427] Saadi v. the UK, para 72.
[428] Ibid.
[429] Ibid, para. 72-73
[430] Ibid, para. 74.
[431] Ibid, para. 77.
[432] Ibid, para. 46.

period was required for processing the asylum claim speedily. Therefore, the Court found no violation.

In another case, Suso Musa v. Malta, an asylum seeker entered Malta by a boat in April 2011, was arrested and placed in detention.[433] On 2 April 2012, his asylum application was rejected. However, in July 2012, the Immigration Appeal Board held that his application was still pending, and he was detained due to return proceedings and a risk of absconding. The asylum seeker claimed that such detention is unlawful since there was no effective means to have the lawfulness of the detention. In this case, the Court found a violation of Article 5(1) of the ECHR because the detention of the asylum seeker preceding the determination of his asylum application was arbitrary.[434] The Court pointed out that Malta had legislation authorizing the entry or stay of immigrants pending an asylum application. Therefore, detention for the purpose of preventing unauthorized entry may be subject to an issue relating to the lawfulness because such legislation rendered the detention as unreasonable.[435] In the Saadi case, the United Kingdom's national law did not grant the asylum seeker formal authorization. But in this case, formal authorization to enter or stay was given by the national law of Malta.

As per the second limb of Article 5(1) of the ECHR, asylum seekers can be kept under detention for the purpose of his extradition or deportation proceedings in progress. This is possible when there is an order issued as well as a realistic prospect of removal. Otherwise detention will be arbitrary without meaningful action with a view to deportation. Such action is also necessary to be pursued as per the requirement of due diligence. In other words, extradition or deportation proceedings should be conducted with due diligence, or otherwise, pursuant to the ECHR, the detention would not be permissible.[436] Thus, Member States are required to take concrete steps and provide evidence in their removal arrangements, particularly in order to secure admission by a receiving state.

In Popov v. France, the nationals of Kazakhstan arrived in France in 2000 and applied for refugee status, which was rejected.[437] In 2007, they were arrested and transferred to airport to be expelled. However, they were transferred to a detention centre because their flight was cancelled. They stayed there for 15 days with their two children. After their second flight was

[433] Case of Suso Musa v. Malta, Application no. 42337/12, European Court of Human Rights, (2013) http://hudoc.echr.coe.int/eng?i=001-122893 (last accessed on 3 June 2017) [hereinafter Suso Musa v. Malta]
[434] Ibid, para. 102.
[435] Ibid.
[436] Chahal v. the UK, para. 113.
[437] Case of Popov v. France, Applications nos. 39472/07 and 39474/07, European Court of Human Rights, (2012) http://hudoc.echr.coe.int/eng?i=001-108710 (last accessed on 3 June 2017) [hereinafter Popov v. France]

cancelled, the judge released them. Later they made a new application for refugee status which was accepted. The Court explained that even though these children were placed with their parents in a wing reserved for families, their particular situation should have been taken into account by the authorities.[438] They were required to seek alternative solutions instead of detention, so that there was a violation of Article 5(1) of the ECHR. Also, taking into account the extreme vulnerability of children, the Court found a violation of Article 3 of the ECHR due to the length of the period of detention, the conditions of the place and harmful effects on the children.[439]

It is also important to note that the Court pays attention to the detention of individuals with specific needs such as children and persons with mental health problems. Popov v. France is one of these cases. Detention of minorities in conditions is not sufficient to handle their needs and can give rise not only to a violation of Article 5 but also Article 3 of the ECHR in some cases.[440] For example, in Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, the Court decided for the violation of Article 3 of the ECHR due to the detention of a child who was an unaccompanied and a child who was placed in a detention centre for adults.[441] Likewise, the Court regarded asylum seekers as vulnerable in terms of detention and its conditions. In S.D. v. Greece, the detention of a Turkish asylum seeker for 2 months without access to any person or any material needs such as blankets, clean sheets or hot water amounted to degrading treatment and was therefore a violation of Article 3 of the ECHR.[442]

Conditions of the place of the detention is another title recognized by the Court in its cases. Article 5 of the ECHR does not refer to the conditions nor the facilities where detention can be lawfully implemented. However, according to the ECHR law, detention shall comply with other fundamental human rights so that the conditions shall be humane, and vulnerable persons as well as children should not be detained in principle. Also, during detention, each person should behave in a humane and dignified manner. Otherwise, violations under notably, Article 3 but also Articles 5 and 8 of the ECHR, can occur. In this sense, the Court investigates many elements. Individual features of the conditions and their cumulative effects on asylum seekers present significant tools in this regard. Other elements such as place of the

[438] Popov v. France, para. 119.
[439] Ibid, para. 102-103.
[440] Price v. the United Kingdom, Kanagaratnam and Others v. Belgium.
[441] Case of Mubilanzila Mayeka And Kaniki Mitunga v. Belgium, Application no. 13178/03, European Court of Human Rights, (2016) http://hudoc.echr.coe.int/eng?i=001-77447 (last accessed on 3 June 2017)
[442] Case of S.D. v. Greece, Application no. 53541/07, European Court of Human Rights, (2009) http://hudoc.echr.coe.int/eng?i=001-93034 (last accessed on 3 June 2017)

detention, the possibility of using other areas, the size of the area, the number of persons sharing such area, washing and hygiene facilities, access to open air and the outside world as well as access to medical facilities bear a particular importance.[443] Also, characteristics of the detained persons such as children or old persons, pregnant women, victims of torture or trafficking, or people with disabilities are taken into account. The reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment are also referred by the Court as a guidance in order to assess conditions of detention.

In a well-known case, M.S.S v. Belgium and Greece, the Court judged for the violation of Article 3 of the ECHR due to the detention conditions. An Afghan asylum seeker was immediately placed in a detention centre without any explanation. Besides such systematic placement of asylum seekers in detention, the Court noted other reasons for the violation including police brutality, unsanitary conditions and overcrowding in the detention centre.. Despite the relatively short time that the asylum seeker stayed in the detention centre such conditions were attributed as unacceptable by the Court.[444] The Court also considered the feeling of arbitrariness and the feeling of inferiority and anxiety, the profound effect of such conditions on a person's dignity constituted degrading treatment contrary to Article 3 of the ECHR.[445]

Considering the length of detention, with regard to detentions to prevent his effecting an unauthorised entry into the country, there is no specific time limit in the ECHR for the duration of the detention, and there is no determination made by the Court about the existence of a time limit. However, the excessive prolongation of a mere restriction of liberty can be attributed as a deprivation of liberty according to the Court.[446] The ruling takes into account that a restriction of liberty upon arrival is needed in order to organize the practical details of

[443] *See* the following cases: Riad and Idiab v. Belgium, S.D. v. Greece.
Case of Dougoz v. Greece, Application no. 40907/98, European Court of Human Rights, (2001) http://hudoc.echr.coe.int/eng?i=001-59338; Case of A.A. v. Greece, Application no. 12186/08, European Court of Human Rights, (2010) http://hudoc.echr.coe.int/eng?i=001-100015; Case of Abdolkhani and Karimnia v. Turkey, Application no. 30471/08, European Court of Human Rights, (2009) http://hudoc.echr.coe.int/eng?i=001-94127; Case of R.U. v. Greece, Application no. 2237/08, European Court of Human Rights, (2011) http://hudoc.echr.coe.int/eng?i=001-105090; Case of A.F. v. Greece, Application no. 53709/11, European Court of Human Rights, (2013) http://hudoc.echr.coe.int/eng?i=001-121722; Case of Horshill v. Greece, Application no. 70427/11, European Court of Human Rights, (2013) http://hudoc.echr.coe.int/eng?i=001-123692; Case of Sakir v. Greece, Application no. 48475/09, European Court of Human Rights, (2016) http://hudoc.echr.coe.int/eng?i=001-161795; Case of Ilias and Ahmed v. Hungary, Application no. 47287/15, European Court of Human Rights, (2017) http://hudoc.echr.coe.int/eng?i=001-172091 [hereinafter Ilias and Ahmed v. Hungary]
[444] M.S.S v. Belgium and Greece, para. 233.
[445] Ibid.
[446] Amuur v. France, para. 43.

the asylum seeker's repatriation or to consider his asylum application made.[447] On the other hand, for the deportation within the scope of the same sub-paragraph, which also requires detention for deportation or expulsion, the Court questions the length of detention by assessing whether or not prosecution on extradition or deportation is executed with "due diligence". A related part from the case of Quinn v. France, states that:

> (…) deprivation of liberty under this sub-paragraph will be justified only for as long as extradition proceedings are being conducted. It follows that if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified under Article 5 para. 1 (f).[448]

In such "due diligence" assessment, the Court also gives importance to the complexity of the case, the conduct of the applicant as well as the remedies possible to be applied by the asylum seeker.

In its assessments, the Court also focused on an examination of national law as well as particular facts of the case. There is a need to examine all factors cumulatively instead of individually. Even a short term of detention may constitute a deprivation of liberty in case of a closed facility, the existence of elements of coercion, effects on individuals such as physical discomfort or mental anguish.[449] For instance, in Auad v. Bulgaria, the Court confirmed a time limit of up to 6 months in Article 15 of the Return Directive and stated that Article 5 (1)(f) did not include such time limits.[450] On the other hand, referring to the judgment by the ECJ in its Kadzoev case, the Court held that the length of the detention should be compatible with the purpose pursued which depended merely on the particular circumstances of each case.[451]

The ECHR law also stipulates the following safeguards via Article 5(2) and (4), which can be applied to Article 5(1)(f):

> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

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[447] Amuur v. France, para. 43.
[448] Case of Quinn v. France, Application no. 18580/91, European Court of Human Rights, (1995), para. 48 http://hudoc.echr.coe.int/eng?i=001-57921 (last accessed on 3 June 2017)
[449] Case of Foka v. Turkey, Application no. 28940/95, European Court of Human Rights, (2008) http://hudoc.echr.coe.int/eng?i=001-87175 (last accessed on 3 June 2017)
[450] Case of Auad v. Bulgaria, Application no. 46390/10, European Court of Human Rights, (2011) http://hudoc.echr.coe.int/eng?i=001-106668 (last accessed on 3 June 2017) [hereinafter Auad v. Bulgaria]
[451] Auad v. Bulgaria, para. 128.

> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

These safeguards are observed by the Court, and are interpreted as the right to be informed promptly of the reasons for deprivation of liberty and the right to have lawfulness of detention decided speedily by a court (the right to review of detention). As stated in the previous chapter, Article 15 of the Return Directive as well as Article 9 of the Reception Conditions Directive also present these specific safeguards for asylum seekers.

The legal and factual grounds to give reasons for detention in simple language understandable by the detainee must be provided. There are 3 requirements for this provision: deliverance of the information promptly, providing reason for detention, and in a language understandable by the person. The first requirement, the notion of "promptness", has no definition. The Court appreciates it as regards the facts of the cases. As for the second requirement, at least legal and factual grounds should be shared with a detainee. The information can be given in writing or orally directly to a detainee or legal representative. Also it should be enough to challenge lawfulness according to Article 5 (4) of the ECHR. Finally, non-technical terms as well as a language understandable of a foreigner should be used. A translation or interpreter should be provided if necessary. According to these conditions, the detainee can apply against its lawfulness before the court as per Article 5(4) of the ECHR, if necessary.

In Saadi v. the United Kingdom, the Court found a violation of Article 5(2) of the ECHR due to a 76-hour delay in informing an asylum seeker about the reasons for his detention. The reason was conveyed to the legal representative of the asylum seeker. The Court accepted that giving reasons to a representative was compatible with the right to be given reasons, however a delay of that length caused a violation.[452] The right to have lawfulness of detention decided speedily by a court as stated in Article 5 (4) of the ECHR necessitates that everyone can take legal action against the legality of the detention. This includes two prominent safeguards such as speedy review and accessibility of the remedy. The aim of this article is to guarantee a right to "judicial supervision". A court's periodic review for ongoing detention on whether it is needed or not is required instead of mere access to a judge.[453]

[452] Saadi v. the UK, para. 84.
[453] European Union Agency for Fundamental Rights, *Handbook on European Law relating to asylum, borders and immigration*, (ed. 2014), Luxembourg: Publications Office of the European Union, 2015, p. 166.

The latest example is the case of Ilias and Ahmed v. Hungary, in which two Bangladeshi asylum seekers were in border-zone detention for 23 days, and later their removal to Serbia. The asylum seekers claimed that 23 days in the transit zone without any legal basis and judicial review amounted to a deprivation of liberty. The Court held the case as the violation of Article 5 (1) and (4) of the ECHR, and particularly pointed out the lack of formal, reasoned decision and appropriate judicial remedy.[454]

Finally, one of the important cases in terms of detention of asylum seekers is Khlaifia and Others v. Italy, which was discussed under collective expulsion. In this case, the Court also found a violation of Article 5(1), (2) and (4) on grounds of the lack of a legal basis for deprivation of liberty. According to the Court, the detention took place as de facto regardless of any formal decision.[455] Therefore, it impeded access to a court. And, in terms of legal certainty, there was no clear and accessible basis as well as the legal and factual reasons for the detention. Such arbitrary detention constituted a violation. Furthermore, Italian authorities did not notify the asylum seekers of the refusal-of-entry orders promptly. Further, there was no possibility to hold a judicial decision on the lawfulness of the detention, which caused violations of Article 5(4) of the ECHR on account of the lack of effective remedy.[456]

In brief, according to the case law of the Court, the assessments significantly imply the following 4 conditions. These are honest implementation without deception; obliging with the restrictions listed in Article 5 of the ECHR; reasonable length of detention; proportionality between the reason of the deprivation of liberty and the detention's place and conditions.[457] It also takes into account the individual's situation in its assessments. Type, duration, effects and manner of the implementation are important in this regard. The assessment of the Court will depend on the specific facts. In principle, detention of asylum seekers and migrants must be a last resort. Detention should be applied in case other alternatives are exhausted. This principle particularly takes place in the Reception Conditions Directive which requires states to stipulate rules for alternatives to detention. The Court also looks if a less intrusive measure had been available despite of detention. In the Saadi case, the Court explained it as:

> The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be

[454] Ilias and Ahmed v. Hungary, para. 88.
[455] Khlaifia and Others v. Italy, para. 120.
[456] Ibid, para. 133.
[457] Amuur v. France, para. 43; Saadi and the UK, para. 69, 70 and 74.

insufficient to safeguard the individual or public interest which might require that the person concerned be detained.[458]

D. Evaluation

The limited harmonisation by the CEAS restricted its scope to the issues it explicitly addressed. This gives a certain amount of discretion to the Member States for implementation and application of the asylum procedures, as can be observed from the facts before the Court. On the other hand, the Court has developed extensive criteria for limiting state discretion and providing effective protection under certain issues through enlarging the application of the articles of the ECHR. Some argue that the Court "wrongly confuses the interpretation of human rights with statutory obligations under the Asylum Reception Conditions Directive".[459] However, referring to the Bosphorus judgment, the Court stated that "a State would be fully responsible under the Convention for all acts falling outside its strict international legal obligations, notably where it exercised State discretion"[460] and "the protection of fundamental rights afforded by Community law was equivalent to that provided by the Convention system"[461].

Considering this applicability of the ECHR on asylum cases as well as the human rights dimension of EU instruments on asylum, there is widespread overlap of the ECHR with the EU acquis. On the other hand, as evaluated in the second chapter, the CEAS provides far-reaching individual rights. The guarantees granted by these individual rights are not contained by the human rights due to their nature, and the Court's assessments of the facts are limited to the interpretation of the ECHR which do not encompass the statutory rules of the CEAS or a set of guarantees for the legal status of asylum seekers. This analysis accepts that the Court is concerned primarily with the prevention of refoulement and Article 3 of the ECHR for the asylum matters, and that the procedural rights for asylum seekers are more visible within the scope of the CEAS as detailed in the second chapter and listed in the Annex. However, this evaluation claims that the Court's broad and authoritative interpretation of the ECHR on asylum cases makes it possible to a certain extent to provide effective and sufficient protection covering fundamental asylum rights as well as prominent procedural issues regulated by the statutory rules of the CEAS. These procedural issues, particularly, are the right to information, the right to legal aid and interpretation services, the right to a personal

[458] Saadi v. the UK, para. 70.
[459] Hailbronner, p. 1051.
[460] Bosphorus v. Ireland, para. 155-157. M.S.S. v. Belgium and Greece, para. 338.
[461] Bosphorus v. Ireland, para. 165. M.S.S. v. Belgium and Greece, para. 338.

interview, the right to contact the UNHCR, the right to a reasoned decision on the asylum claim, the right to effective remedy as well as special guarantees for unaccompanied minors, appeals with automatic suspensive effect, accelerated asylum procedures, procedures relating to reception conditions of asylum seekers as addressed by the Court in its cases. In this sense, the Court considers the procedural issues by complementing the general standards at an international level with a more European approach. For instance, general principles on a fair and effective asylum procedure have been developed with the case law of the Court under Article 13 of the ECHR. Even if Article 13 of the ECHR is applicable only for the cases of a claim of refoulement, the case law of the Court provides an important guide for the interpretation of the rights. A similar approach can be observed in the cases related to detention.

As analysed in this chapter through the case law of the Court, the Court has contributory role to the EU asylum law, mainly, in terms of Dublin transfers in a way of protecting the human rights of the asylum seekers in the receiving state, assessment of the risk in application of the non-refoulement principle, providing extraterritorial jurisdiction for the responsibility of the expulsion and so the applicability of the asylum procedures, and finally putting standards for the grounds and conditions of the detention.

In this respect, the role of the Court is not limited to the improvement of human rights standards of the EU law. The Court's case-law also has impacted the legal practice of asylum cases. In the Dublin transfers, in the admissibility decision of T.I. v. the United Kingdom, the Court stated that the Member States were responsible under the ECHR when implementing the Dublin transfer. Later, in M.S.S. v. Belgium and Greece, the Court rebutted the presumption that every Member State respect the fundamental rights laid down in the ECHR. It concluded that transferring the asylum seeker to Greece where its detention and living conditions amounted to degrading treatment violating Article 3 of the ECHR did not strictly fall within Belgium's international legal obligations. Therefore, the Court ruled the violation of Article 3 of the ECHR both for Belgium and Greece. The judgment had three significant impacts. First, the Dublin transfers of asylum seekers to Greece by other Member States was suspended. Based on this case-law, an asylum seeker should have an opportunity to claim why the Dublin transfer could not be realized. The second impact is the emerging of responsibility of the transferring Member State. The Court's finding against Belgium means that the Dublin system does not absolve the transferring Member State of responsibility for the procedure applied to asylum seekers in the receiving state as well as for asylum seekers'

living conditions. Therefore, according to this case-law, the Member States may suspend the Dublin transfers to the Member States similar to Greece according to the reports of the NGOs, the input of the UNHCR and Commission reports.[462] Moreover, the Court found violations in three areas such as conditions in detention, general living conditions and the inadequacy of the asylum determination system, and the Court has a direct impact on standards of their criteria in this respect. For instance, a lack of clean water or overcrowding in detention facilities was determined as a breach of Article 3 of the ECHR. The Court also investigates failings in the asylum determination procedure, deciding whether or not detrimental effect of dysfunctional asylum procedures can be degrading. Another important criterion of the Court is whether or not the poor asylum processes cause a lack of an effective remedy against refoulement. In such cases, the Court ruled on a violation of Article 13 of the ECHR only relying on the criterion if an effective protection against refoulement is provided or not. The Court's focus on the impact of serious violations in the application and determination process can provide a benchmark and a starting point for scrutiny of asylum procedures.[463] Furthermore, the M.S.S. breaks new ground with wider implications in terms of the general living conditions amounting to inhuman and degrading treatment against Article 3 of the ECHR. The violation of Belgium found by the Court due to M.S.S. being exposed to the conditions in Greece by Belgium shows that Article 3 of the ECHR may have extra-territorial effect. In this regard, the Court introduced the threshold on case-by-case basis to prevent removal for the assessment of the risk posed by the transfer. For example, the Court described M.S.S.'s situation as "particularly serious" since he had no access to shelter and food as well as having a fear of being attacked. Such finding shows that absolute destitution of asylum seekers is a breach of Article 3 of the ECHR. However, socio-economic living conditions, especially as observed for the cases related to the lack of medical care in the state of origin, are evaluated under Article 3 of the Court only in very exceptional circumstances, as in D. v. the United Kingdom. Accordingly, in principle, any asylum seeker shall not remain in a state to benefit from the medical, social and other services, and may be removed to the state of origin regardless of the conditions there.

[462] *See* European Commission, *Evaluation of the Implementation of the Dublin III Regulation – Final Report*, 18 March 2016, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_-_executive_sumary_en.pdf (last accessed on 3 June 2017)

[463] Gina Clayton, *Asylum Seekers in Europe: M.S.S. v. Belgium and Greece*, HUMAN RIGHTS LAW REVIEW 11:4, 758-773, 2011, p. 765.

Furthermore, in its case-law, especially the Tarakhel judgment, the Court introduced the requirement to obtain individual guarantees from the Italian authorities to realize the Dublin transfer. After this judgment, the Swiss government announced that it had suspended all Dublin returns to Italy concerning families with children, and had made a request to the Italian authorities to obtain individual guarantees for the Tarakhel family in line with the judgment. A similar approach was also implemented by some other Member States.[464] Another impact of this judgment, the Court assessed the a real risk of treatment against Article 3 of the ECHR taking into account the individual circumstances of the asylum seekers regardless of requirement for "systemic deficiencies". The Court does not put additional requirements for the non-refoulement. It focuses on the individual risk of the asylum seekers, and expands the application of Article 3 of the ECHR and the implementation of human rights also for the cases where there are no systemic deficiencies in the receiving Member State. However, the different understanding between the Court and the ECJ has led to many different rulings within the Member States on the Dublin transfers. Some Member States have followed the more restrictive approach of the ECJ and required the criterion "systemic deficiencies", rather than focusing on the individual risk.[465]

One of the Court's most important contributions is to enlarge the interpretation of Article 3 for the application of the principle of non-refoulement to extradition and expulsion cases. In this regard, the landmark judgment on refoulement was Soering v. the United Kingdom, as the first case that the Court applied Article 3 of the ECHR to extradition cases. Later, the Court applied the article for expulsion cases, Cruz Varas and Others v. Sweden as well as Vilvarajah and Others v. the United Kingdom. Later, the Member States needed to be sure that when returning an asylum seeker to a third country, he would not be subjected to torture, inhuman or degrading treatment, against Article 3 of the ECHR. The Court attributes an absolute nature to Article 3 of the ECHR in terms of the prohibition on refoulement. There can be no limitation or derogation from the non-refoulement principle. On the other hand, the Geneva Convention and the Qualification Directive have exceptions such as posing a threat to national security or public order to the host state. Regardless of posing a threat as defined in the Geneva Convention and the Qualification Directive, the Court prohibits refoulement if an asylum seeker is under a real risk of being subjected to torture or inhuman or degrading

[464] *See* European Commission, *Evaluation of the Implementation of the Dublin III Regulation – Final Report*, 18 March 2016, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/asylum/examination-of-applicants/docs/evaluation_of_the_implementation_of_the_dublin_iii_regulation_-_executive_sumary_en.pdf (last accessed on 3 June 2017)
[465] Mouzourakis, p. 13-14.

treatment or punishment as defined in Article 3 of the ECHR, irrespective of their criminal conduct or the danger they pose to the host country. Chahal v. the United Kingdom was one of the cases of the Court involving the return of an asylum seeker who posed a danger to national security. The Court expanded the absolute nature of the Article 3 of the ECHR in case the asylum seeker posed a terrorist threat to the receiving state.

The assessment of the risk by the Court is another significant issue that forms its case-law. The basic questions asked by the Court while assessing the risk in the non-refoulement cases put important parameters to determine the duties of the states. In this regard, the Court searches for foreseeable consequences of return and the substantial grounds for believing the existence of the risk, and whether or not the state assessed the risk within this context. The Court also seeks that –as also stated in Qualification Directive– it is asylum seeker's duty to submit the reasons and evidence about his or her claim during the asylum application. But according to the Court's assessment in N. v. Sweden, dispelling doubts about these belongs to the state, which puts more responsibility on the states. The Court even obliges the state's authorities to assess the evidence of their own motion, as ruled in F.G. v. Sweden. According to the Court, a state's duty continues even if the asylum seekers fail to ask for asylum or to describe the risks they will face, for example, in case of interception or interdiction of them at sea.

The Court has contributed the development of the EU asylum law in practice with its case-law on the assessment of the risk. According to categories under Article 3 of the ECHR, the case-law of the Court that it has refrained from considering whether or not ill-treatment in the case is a torture or an inhuman or degrading treatment or punishment. Regardless of such categorization, the Court focuses on the criterion "the minimum level of severity". It also takes into account the particular vulnerability of asylum seekers when assessing the severity. Moreover, the Court also put standards for the elements of risk. The threshold for the real risk is assessed by the Court on case-by-case basis. In this regard, the rulings would be different with regards to the general conditions of the country, personal circumstances of the asylum seeker, evidence of a particular risk to the individual such as past-ill treatment of individual, and specific character of the facts. For instance, a general situation of violence in the state of origin in case of expulsion does not cause a violation of Article 3 of the ECHR in itself. Only in the most extreme cases, such a violation may occur according to the Court.[466] Also, the

[466] *See* N.A. v. the United Kingdom

same circumstances may not constitute a bar for the removal of young able men, but for the removal of a family with children. In this line, considering the manner of the assessment, the applications should be examined individually, objectively and impartially, according to the precise and up-to-date information obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations. These requirements are provided by the Court in its case law according to Article 3 and 13 of the ECHR, particularly under the notion of the requirement for "independent and rigorous scrutiny". In this regard, the Court's expansion of the role of Article 13 remedies should be noted.

Another contribution of the case-law of the Court is collective expulsion. The turning point as for recognition of collective expulsion of aliens was the judgment in Čonka v. Belgium in 2002. The important aspect of the case was the determination of government authorities to deal with a group of individuals collectively. The case has set a precedent for future collective expulsion cases. It was the first time that a government acted in violation with Article 4 of Protocol No. 4 of the ECHR, and the Court ruled that everyone has the right to a reasonable and objective examination of his or her specific situation. Later, in the Hirsi Jamaa case, the Court decided on the extraterritorial application of the article. Also, important procedural details were introduced, in particular the right to obtain adequate information allowing asylum seekers to have effective access to appeal procedures.

Finally, considering detention, the Court examines if there is a deprivation of liberty by taking into account its degree and intensity. Therefore, the length of the detention, the existence of social and legal assistance or police surveillance are important in its assessments in this regard. If the Court decides that there is a deprivation of liberty, then it searches whether or not it is a lawful detention, which means it secures the fulfilment of any obligations prescribed by law, or it prevents his effecting an authorised entry into the country, or it is for the purpose of conducting the procedures for deportation and extradition of an asylum seeker. Otherwise, the detention would be arbitrary, and other alternatives should transpire. While the Court is conducting such assessment, it takes into account the length, conditions, place of the detention, their proportionality between the reason for the detention. The Court also provides other safeguards such as the right to review detention and the right to be informed promptly. Taking into account the individual's situation, the Court also considers effects of the detention on the individuals. When compared, the first and second grounds in the Reception Conditions Directive (detention to determine or verify his or her identity or nationality and to determine those elements to conduct the asylum applications) can be regarded as "an obligation by law"

and for “securing the fulfilment” as stated in Article 5 of the ECHR. The third ground in the Directive (detention to decide on the asylum seeker’s right to enter the territory) is directly related to “detention to prevent a person from effecting an unauthorised entry into the country”. However, according to the Reception Condition Directive, the detention must be necessary and proportional. A requirement of a necessity test obliges the Member States to objectively justify why detention is necessary. The reason that the Court does not seek a necessity test is because the Court allows detention for administrative expediency, as explained in Saadi v. the UK. Accordingly, even the Reception Conditions Directive regulates six grounds of detention as a broad, exhaustive list and brings the requirement of necessity test for detentions. The Court’s broad interpretation of Article 5 of the ECHR according to the individual facts provides an extensive and effective protection as well as the full array of guarantees developed by its case law as regards judicial review, information obligation and the right to free assistance and representation.

V. Conclusion

One of the aims of this study is to summarize the main principles and rights constituting the basis of the asylum law in the main international instruments. While the Declaration formed the first steps of the basis of the right to asylum via the right to seek and to enjoy asylum as well as the right of an individual to leave his country, the Geneva Convention introduced the principle of non-refoulement and non-penalization for illegal entry or stay as well as the right to fair and effective procedure. Both the Declaration and the Geneva Convention were constructed for the benefit of the states rather than individuals. There is no right to asylum granted in treaty law. Later, even the Charter stepped forward by referring to "the right to asylum", which does not completely focus on the individualised right to asylum. Over time, the evolution of human rights has put limits on the sovereignty of states. The emergence of right to asylum as an individual right and other related rights became possible with the EU and ECHR law.

Built on this base, the CEAS broadened the legal framework of the asylum law, particularly in the context of human rights by regulating the rights of the asylum seekers and safeguards for the asylum process. However, the idea for development of a common EU policy on asylum, as a main aim, has been limited to setting the minimum standards because of the difficulties in the harmonization process within the Member States. Such limited regulation makes the Court's role leading for improving an understanding on these minimum standards. Also, the influx of asylum seekers to the EU has shown that the CEAS has some practical deficiencies, so a high number of asylum cases was brought to the Court.

The Court's case-law has had practical and legal impacts on EU law. The Court's well-established case-law approves that Member States are responsible under the ECHR when implementing the EU law. Accordingly, when minimum procedural standards of the EU law leave discretion to the Member States on how to implement certain provisions of EU law, the Member States are fully responsible for ensuring respect for and protection of rights under the ECHR. The Court has shown that it ensures that the Member States are not violating their obligations when they do not apply the international human rights standards in the application of the CEAS. In addition, as a monitoring mechanism, the Court has mainly reinforced the individualistic side of the right to asylum and presented a different point of view to increase the level of protection or put standards for both asylum seekers and states. For instance, the Court increases the level of protection by broadening the implementation area of the non-

refoulement principle in terms of returns of asylum seekers intercepted on the high seas to a country of departure. It has provided the extraterritorial application of the right to access asylum procedures while the EU acquis (particularly, Asylum Procedures Directive) is only valid from the moment an asylum seeker arrives to a border or enters a territory legally or illegally. Also, it changed the understanding of the presumption of equivalent protection in the Dublin returns by highlighting the sovereignty clause. The Court suspended the transfers of the asylum seekers to the specific Member States within the European Union, and placed an obligation for the transferring Member States to review the situation in another Member State. In some specific cases, it has imposed transferring states an obligation to obtain individual guarantees for the asylum seeker from the receiving state. Moreover, the Court has determined its parameters for assessing the risk of return in cases of non-refoulement, and does not permit to refoulement without access to asylum procedures or other related rights and/or safeguards by referring to Articles 3 and/or 13 of the ECHR, as stated above.

Under the ECHR law, there is no right to asylum such as that found in Article 18 of the Charter, nor reference to right to access the territory and procedures. The Court cannot examine whether the refusal or withdrawal of refugee status under the Geneva Convention, or whether the non-recognition of the right to asylum by a state under the Qualification Directive is contrary to the ECHR. Also, there is no detailed set of rights, rules or safeguards in the ECHR. However, the Court becomes prominent by bringing the ECHR into prominence for asylum cases. It gives broad interpretations of particularly, Articles 3, 5 and 13 as well as Article 4 of Protocol No. 4 of the ECHR. From this point, via Article 3 of the ECHR, it deals with the most prominent problems of the asylum seekers, which are both the Dublin transfers and their return to their country of origin with or without accessing asylum procedures, and assessing the risk in country of origin. Through the various interpretations of Article 3 of the ECHR, the Court has made the ECHR one of the most important juridical instruments to protect asylum seekers. Furthermore, it introduces the notion of “collective expulsion” of asylum seekers via Article 4 of the Protocol No. 4 of the ECHR, so that the Court provides more protection and puts different standards preventing identical assessments of the asylum applications. Another prominent problem of the asylum seekers is the arbitrary detention, conditions, place and/or length of detention, assessed by the Court under Article 5 of the ECHR under the scope of the right to liberty and security. The applicability of these articles to asylum cases have an impact on the integration of human rights standards to the application of the CEAS. The aim of the ECHR is to secure real rights for individuals with a substantive

content. Adapting the "Prohibition of torture" (Article 3) and "Right to liberty and security" (Article 5) in the ECHR for asylum seekers, the Court contributes to the growing area of interaction between human rights and the EU law with its rights-based standards. Limitations on these fundamental rights or freedoms should be exceptional, objectively justified, and not arbitrary. Personal liberty is a fundamental condition, and deprivation of liberty has a direct and adverse effect on the enjoyment of many of the other rights. The Court gives a particular importance under Article 5 of the ECHR to whether or not deprivation of liberty put the asylum seeker into an extremely vulnerable position. With regards to Article 3 of the ECHR, the Court refers to its absolute nature in its cases on non-refoulement. The substance of the prohibition of inhuman and degrading treatment is to protect human dignity. The Court refers to human dignity in its cases when taking into account the reception and detention conditions of asylum seekers are compatible with it. For example, the right to housing, safety, clean water, hygiene as well as access to food, healthcare, employment, medical and psychological care are the requirements of dignity according to the Court. Similarly, the Court looks at whether or not an asylum seeker will eventually be under a real risk of torture, inhuman and degrading treatment or punishment due to the deficiencies in asylum procedures in case of the return to a third country of origin or a Member State. This evaluation on the risk of inhuman and degrading treatment or deprivation of liberty protects various fundamental rights. For example, in the cases on the non-refoulement, the Court examines whether or not an asylum seeker has an access to effective asylum procedures. The table in the Annex herein categorizes the rights, in the international and EU law, also included by the Court by its broad interpretation under the related provisions of the ECHR. Finally, even some procedural rights are not elaborated on in the ECHR; the Court refers to Article 13 of the ECHR effectively not only to discover whether or not effective remedy is available for asylum seekers in order to complain about violations of their rights, but also to observe the safeguards. The Court's assessment on a close and rigorous scrutiny performed by the states for asylum applications is an important example in this regard.

This study focuses on the interconnectedness between international asylum law, EU law and the ECHR law, and investigates the role played by the Court in the application and interpretation of the common terms. The protection provided by the Court develops a number of effective guarantees against the interests of states. It also integrates human rights with the EU law so that it can respond to procedural gaps and systemic practices by which states may erode the fundamental rights of the asylum seekers. Its rights-based policy agenda overcomes

the limitations of existing EU asylum measures. The Court makes these findings and addresses the human rights violations thanks to its flexibility and practicality as well as its interpretative approach to the ECHR. Its case-law therefore effects the implementation of the law by the Member States.

VI. ANNEX

Rights/Procedures	International Law	EU Law	ECHR Law	Leading Cases of the Court
Right to Asylum & Other Related Rights **- Right to access to asylum procedure** **- Right to enter and stay/Right to remain in the Member State pending the examination of the application** **-Right to be informed** **-Right to fair and effective procedure**	No "right to asylum". However, there are other rights related to it. **Declaration:** -Article 13(2) (Right of an individual to leave his country) -Article 14(1) (Right to seek and enjoy to asylum) **Geneva Convention:** -Article 33(1) (Prohibition of expulsion or return)* -Article 31(1) (Non-penalization for illegal entry or stay)* *These articles can be associated to the right to access to asylum procedures and the right	**Charter:** -Article 18 (Right to asylum) -Article 47 (Right to an effective remedy and to a fair trial) **TFEU:** -Article 78 **Qualification Directive (2011/95/EU):** -Article 4 (Assessment of facts and circumstances) -Article 13 (Granting of refugee status) [Right to be granted the status of refugee] -Article 18 (Granting of subsidiary protection status) [Right to be granted subsidiary protection] **Asylum Procedures Directive (2013/32/EU):** -Article 6 (Access to the procedure) [Right to access to	No "right to asylum", "right to access to asylum procedures" or any other specific rights or safeguards mentioned. However, the Court mostly evaluates these rights under Article 3 of the ECHR and/or the principle of non-refoulement. [In addition, according to the Court's case law, individuals need access to the asylum procedure and adequate information concerning the procedure. It is required to avoid excessively long delays in deciding asylum claims. The availability of interpreters, access to legal aid and the existence of a reliable system of communication between the authorities and the asylum seekers are important in examination of	A.A. v. Sweden A.A.M. v. Sweden A.S. v. Switzerland Chahal v. the United Kingdom Čonka v. Belgium Cruz Varas and Others v. Sweden D. v. the United Kingdom D.N.W. v. Sweden F.G. v. Sweden H.N. v. Sweden Halimi v. Austria and Italy Hirsi Jamaa and Others v. Italy I.M. v. France J.K. and Others v. Sweden

- Right to documentation **-Right to legal assistance** **-Right to effective remedy**	to enter and stay. **Related text of the UNHCR:** -Right to Fair and Effective Procedure (particularly the right to remain and the right to effective remedy)	asylum procedures] -Article 8 (Information and counselling in detention facilities and at border crossing points) [Right to inform about the possibility to apply for international protection] -Article 9 (Right to remain in the Member State pending the examination of the application) -Article 10 (Requirements for the examination of applications) [No rejection due to late application, individual - objective and impartial examination, Obtain info about state of origin from the reports of international human rights organization] -Article 12 (Guarantees for applicants) [Right to be informed in a language which they understand or are reasonably supposed to understand, Right to receive the services of an interpreter, Right to communicate with UNHCR or with any other organisation providing legal advice or other counselling, Right	applications. The Court assesses the fact in this regard under Article 13 in conjunction with Article 13 of the ECHR. The Court also considers these rights or safeguards whether or not granted under the domestic law.]	Jabari v. Turkey K.A.B. v. Sweden Khlaifia and Others v. Italy M.A. v. Cyprus M.A. v. Switzerland M.S.S. v. Belgium and Greece M.Y.H. v. Sweden Mohammadi v. Austria Mohammed Hussein v. the Netherlands and Italy Mohammed v. Austria N. v. Sweden N. v. the United Kingdom N.D. v. Spain and N.T. v. Spain Nacic and others v. Sweden Saadi v. the UK Safaii v. Austria

		to be informed of the result of the decision] -Article 14 (Personal Interview) [Right to have an opportunity of a personal interview] -Article 19 (Provision of legal and procedural information free of charge in procedures at first instance) -Article 20 (Free legal assistance and representation in appeals procedures) [Right to legal assistance] -Article 22 (Right to legal assistance and representation at all stages of the procedure) [Right to legal assistance] -Article 46 (Right to an effective remedy) **Reception Conditions Directive (2013/33/EU):** -Article 5 (Information) [Right to be informed]		Salah Sheekh v. the Netherlands Sharifi and Others v. Italy and Greece Sharifi v. Austria Singh and Others v. Belgium Soering v. the United Kingdom Sufi and Elmi v. the United Kingdom Sultani v. France R.C. v. Sweden T.I. v. the UK Tarakhel v. Switzerland Vilvarajah and Others v. the United Kingdom

		-Article 6 (Documentation) [Right to documentation] -Article 7 (Residence and freedom of movement) [Right to remain] -Article 14 (Schooling and education of minors) [Right to access to the education system] -Article 15 (Employment) [Right to access to the labour market] -Article 16 (Vocational training) [Right to access to vocational training] -Article 17 (General rules on material reception conditions and health care) -Article 18 (Modalities for material reception conditions)		
Prohibition of refoulement ***Risk Assessment**	**Geneva Convention:** -Article 33(1) (Prohibition of Expulsion or Return)	**Charter:** -Article 19(2) (Protection in the event of removal, expulsion or extradition) **TFEU:** -Article 78	Article 3 of the ECHR (Prohibition of inhuman or degrading treatment) In extreme cases: Article 2 of the ECHR (Right to life)	A.A. v. Sweden A.A.M. v. Sweden Chahal v. the United Kingdom Cruz Varas and Others v. Sweden

		Qualification Directive: -Article 4 (Assessment of facts and circumstances) -Article 9 (Acts of persecution) -Article 10 (Reasons for persecution) -Article 21 (Protection from refoulement) **Return Directive (2008/115/EC)** -Article 5 (Non-refoulement, best interests of the child, family life and state of health) -Article 9 (Postponement of removal) **Schengen Borders Code:** -Article 12 (Principle of non-refoulement)		D. v. the United Kingdom D.N.W. v. Sweden F.G. v. Sweden H.N. v. Sweden Hirsi Jamaa and Others v. Italy I.M. v. France J.K. and Others v. Sweden Jabari v. Turkey K.A.B. v. Sweden M.A. v. Switzerland M.Y.H. v. Sweden N. v. Sweden N. v. the United Kingdom Nacic and others v. Sweden Saadi v. the UK Salah Sheekh v. the Netherlands

				Singh and Others v. Belgium Soering v. the United Kingdom Sufi and Elmi v. the United Kingdom R.C. v. Sweden T.I. v. the UK Vilvarajah and Others v. the United Kingdom
Dublin Procedure		**Dublin Regulation**: **Main rights related to Dublin Procedure:** -Article 3 (Right to access to procedure) -Article 4 (Right to information) -Article 5 (Personal Interview) [Right to have a personal interview] - Article 26 (Notification of a transfer decision) - Article 27 (Right to effective remedy) **Main safeguards:**	-Articles 3 and/or 13 of the ECHR	A.M.E. v. the Netherlands (dec.) A.S. v. Switzerland Abubeker v. Austria and Italy (dec.), D. v. the United Kingdom Halimi v. Austria and Italy K.R.S. v. the United Kingdom (dec.) M.S.S. v. Belgium and Greece, Mohammadi v. Austria Mohammed Hussein v. the Netherlands and Italy

		-Time limits for the Dublin procedure, transfers, detention for the purpose of transfer (Articles 21, 22, 25 and 29) -Other safeguards for the minors, dependant persons and family members (Articles 6, 8, 9, 10, 11 and 16)		Mohammed v. Austria N v. the United Kingdom Safaii v. Austria Sharifi and Others v. Italy and Greece Sharifi v. Austria T.I. v. the United Kingdom (dec.) Tarakhel v. Switzerland
Collective Expulsion		**The Charter:** -Article 19(1) (Protection in the event of removal, expulsion or extradition) **TFEU:** -Article 78	-Article 4 of Protocol No. 4 of the ECHR	Alibaks and Others v. the Netherlands (dec.) Andric v. Sweden (dec.) Becker v. Denmark (dec.) Berisha and Haljiti v. the former Yugoslav Republic of Macedonia (dec.) Čonka v. Belgium Dritsas and Others v. Italy (dec.) Ghulami v. France (dec.) Hirsi Jamaa and Others v. Italy

				Khlaifia and Others v. Italy M.A. v. Cyprus N.D. v. Spain and N.T. v. Spain Sharifi and Others v. Italy and Greece Sultani v. France
Detention	**Geneva Convention:** -Article 31	**Charter:** -Article 6 (Right to liberty and security) **Reception Conditions Directive (2013/33/EU):** -Article 8 (Detention) -Article 9 (Guarantees for detained persons) -Article 10 (Conditions of detention) -Article 11 (Detention of vulnerable persons and of applicants with special reception needs) -Return Directive (2008/115/EC)	-Article 5 of the ECHR -Article 2 of Protocol No. 4 of the ECHR	A.A. v. Greece A.F. v. Greece Abdolkhani and Karimnia v. Turkey Amuur v France Auad v. Bulgaria Bozano v. France Chahal v. the UK, Dougoz v. Greece Foka v. Turkey Guzzardi v. Italy Horshill v. Greece

				Ilias and Ahmed v. Hungary Kanagaratnam and Others v. Belgium Khlaifia and Others v. Italy M.S.S v. Belgium and Greece Mubilanzila Mayeka And Kaniki Mitunga v. Belgium Popov v. France Price v. the United Kingdom Quinn v. France R.U. v. Greece Riad and Idiab v. Belgium S.D. v. Greece Saadi v. the UK Sakir v. Greece Suso Musa v. Malta Winterwerp v. the Netherlands

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