T.C.

MARMARA ÜNİVERSİTESİ

AVRUPA TOPLULUĞU ENSTİTÜSÜ

AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

NON-REFOULEMENT PRINCIPLE IN A CHANGING EUROPEAN LEGAL ENVIRONMENT WITH PARTICULAR EMPHASIS ON TURKEY, A CANDIDATE COUNTRY AT THE EXTERNAL BORDERS OF THE EU

Ph. D. Thesis

LAMİ BERTAN TOKUZLU

Istanbul - 2006

T.C.

MARMARA ÜNİVERSİTESİ

AVRUPA TOPLULUĞU ENSTİTÜSÜ

AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

NON-REFOULEMENT PRINCIPLE IN A CHANGING EUROPEAN LEGAL ENVIRONMENT

WITH PARTICULAR EMPHASIS ON TURKEY, A CANDIDATE COUNTRY AT THE EXTERNAL BORDERS OF THE EU

LAMİ BERTAN TOKUZLU

TEZ DANIŞMANI: PROF. DR. TURGUT TARHANLI

Istanbul - 2006

ABSTRACT

Non-refoulement is a rule that imposes States the obligation not to return a person to any territory where he/she is likely to encounter persecution. This rule has emerged under the asylum law instruments and subsequently incorporated into human rights treaties. The EU Member States responded to the increase of asylum seekers in the last two decades by introducing more restrictive laws that put them in a state of limbo for keeping up with their existing legal obligations under asylum law and human rights law. These issues were carried to the Community level by the Treaty of Amsterdam which set forth a five year transition period through which all fundamental asylum laws were harmonized. Being a major transit country for asylum seekers and migrants in the region and a candidate State at the external borders of the EU, these developments brought new challenges for Turkey. In this respect, Turkey is being forced to change its role as a transit country for refugees and develop its own asylum system. On the other hand, despite its willingness to move forward, Turkish authorities soon realized that reforming its laws in this area was more difficult than some other fields of human rights law to a great extent, due to the burden sharing concerns peculiar to this area. In this regard, burden shifting instruments of the EU asylum acquis appear as the biggest obstacle before Turkey to carry out an overall reform process. This study purports to set forth the scope of obligations of the Republic under both asylum law and human rights law instruments, observe the developments in the European Union and assess their effects on the Turkish law and offer solutions for the problems encountered.

ÖZET

Non-Refoulement Devletlere kendi topraklarında bulunan bireyleri zulme uğrama riski altında oldukları bölgelere göndermeme yükümlülüğü yükleyen bir ilkedir. Söz konusu kural öncelikle iltica hukuku belgeleri içerisinde ortaya çıkmış olmakla birlikte, yakın zamanlarda insan hakları hukuku belgeleri altında da korunmaya başlanmıştır. Diğer yandan Avrupa Birliği Devletleri kendilerinden sığınma talebinde bulunan mültecilerin sayısındaki son yirmi yılda gerçekleşen artış karşısında giderek bu alanda daha sınırlayıcı kanunlar kabul etmişler, bu nedenle de non-refoulement ilkesini düzenleyen uluslararası iltica hukuku ve insan hakları hukuku belgelerinde yer alan yükümlülüklerinin kıskacında kalmışlardır. Söz konusu konular beş yıllık bir geçiş döneminde tüm temel iltica kanunlarının uyumlaştırılmasını öngören Amsterdam Andlaşması ile birlikte Avrupa Topluluğu zeminine taşınmıştır. Topluluk içerisindeki anılan gelişmeler mültecilerin geçiş güzergahı üzerinde bulunan ve de Avrupa Birliği'nin sınır komşusu ve bir aday ülke olan Türkiye için önemli sonuçlar doğurmaktadır. Nitekim, Türkiye mevcut transit ülke konumunu terk ederek kendi iltica hukuku sistemini geliştirmeye zorlanmaktadır. Türk hükümeti ilk aşamada istekli görünse de, kısa bir süre sonra bu konudaki reform sürecinin, ağırlıklı olarak konunun yük paylaşımı konusundaki özellikleri sebebiyle, insan hakları hukukunun diğer birtakım alanlarında olduğundan çok daha zorlu olduğu görülmüştür. Bu anlamda Türkiye'nin önündeki en önemli engel Avrupa Birliği Müktesebatı'nda yer alan ve mülteci yükünü transit ülkelere kaydırma fonksiyonunu gören düzenlemelerdir. Elinizdeki çalışma Türkiye'nin gerek iltica hukuku gerekse insan hakları hukuku belgelerinden kaynaklanan sorumluluğunun sınırlarını belirleme, Avrupa Birliği hukuku içerisindeki gelişmeleri gözlemleme, bunların Türk hukuku üzerindeki etkilerini değerlendirme ve nihayet bu alanda karşılaşılan sorunlara çözümler önerme amacını taşımaktadır.

TABLE OF CONTENTS

ABBREVIATIONS

CAT	: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
COI	: Country of origin information
Constitutional Treaties	: Treaty Establishing the European Community and Treaty on European Union
CPT	: European Committee for the Prevention of Torture
EC Treaty	: Treaty Establishing the European Community
EC	: European Community
ECHR	: European Convention on Human Rights
ECRE	: European Council on Refugees and Exiles
ECtHR	: European Court of Human Rights
EHRR	: European Human Rights Reports
EXCOM	: Executive Committee of the High Commissioner's Programme
FAL	: The Convention on Facilitation of International Maritime Traffic of 1965
ICAO	: International Civil Aviation Organization.
ICCPR	: International Covenant on Civil and Political Rights
ICJ	: International Court of Justice
ILC	: International Law Commission
I.L.M.	: International Legal Materials
IMO	: International Maritime Organization
LNTS	: League of Nations Treaty Series
Member States	: Member States of the European Union

NATO	: Noth Atlantic Treaty Organisation
NGOs	: Non-Governmental organizations
OAS	: Organization of American States
OAU Convention	: Convention Governing the Specific Aspects of Refugee Problems in Africa
OAU	: Organization of African Unity
R.G.	: Resmi Gazete
RSD	: Refugee Status Determination
SAR	: The International Convention on Search and Rescue at Sea
SOLAS	: The International Convention for the Safety of Life at Sea
TEU	: Treaty on European Union
U.N.	: United Nations
U.N.T.S.	: United Nations Treaty Series
U.S.C.	: United States Code
UNCLOS	: United Nations Convention on the Law of the
UNHCR	: United Nations High Commissioner For Refugees

INTRODUCTION

The principle of non-refoulement has gradually become one of the most debated topics in the agenda of international and regional organizations as well as of the States in the last two decades as a result of the dramatic increase in the number of asylum seekers. The Western countries, which were already experiencing difficulties in financing their own welfare systems, responded to the change in circumstances by introducing more restrictive asylum laws that put them in a state of limbo for keeping up with their existing legal obligations under international law and human rights law. These changes are taking place at a stunning pace at the universal level as well as at the European level, and therefore they do affect Turkey due to its position as a major transit country for migrants and asylum seekers at the external borders of the European Union. As the number of illegal migrants apprehended in its territory on their way to the destination countries on the West varies from 50,000 to 100,000 per year, Turkey is facing continuous pressure from the European Union for developing its asylum law framework. This is, in fact, one of the conditions of full membership of the Union since asylum and migration matters are tightly regulated in the EU Acquis, especially under the EC Treaty. In this regard, Turkey is being forced to change its role as a transit country and take over the responsibility of refugees, which is to a great extent delegated to the UNHCR for the time being. Turkey has responded positively to these demands and started to prepare for transition by incorporating a rather ambitiously drafted section in the National Programme for the Adoption of the Acquis. Nevertheless, soon after this programme has been published, Turkey had to revise its plans in this area while continuing other reforms of democratization at full speed ahead. While the subject matter remained at the top of the agenda of the Turkish authorities, steps that were taken had to be confined within the existing legal structures. In this respect, this study aims at assessing the state of developments in Turkey along with the challenges and the future prospects from a legal perspective.

This complex system relating to the prohibition of refoulement, which Turkey is a part of, works in continuous interaction between several legal

instruments regulating this topic. Therefore, setting aside any of the legal instruments concerned would cause a deficiency in setting forth a clear picture of the legal environment. Hence, grasping the recent developments in the EU Law requires an understanding of the dynamics of the universal instruments. In a similar fashion, understanding of the developments in the Turkish law with regard to the prohibition of refoulement requires a comprehensive understanding of both the universal instruments and the European law. In this respect, the search for Turkey's challenges and future prospects also reflects a search for the challenges and prospects of the legal spheres that Turkey is a part of. Absence of a comprehensive understanding of such interaction in Turkey, at this critical stage of change is conducive to making grave mistakes in planning further steps as illustrated by the revision of the targets expressed in the National Programme for the Adoption of the Acquis by the Turkish Government. The fact that non-refoulement principle emerged as a part of the refugee law, an area that until recently has been excluded from the curriculum of Turkish law schools, appears yet as another factor supporting the necessity and the urgency of selecting this topic as an area to be explored.

Although the principle has emerged under the asylum law framework, its practice today is in continuous interaction with many other legal disciplines such as international law, human rights law, administrative law and criminal law. Therefore, the matter is complex not only due to its involvement with a variety of legal spheres – universal, regional and domestic – but also because it requires an interdisciplinary approach. Thus, this thesis covers vertically and horizontally many aspects of law in order to succeed in its aim.

Covering all of these aspects of law without risking the integrity of the thesis requires a clear angle of approach. This is the reason that the author has chosen to give priority to State responsibility on non-refoulement rule involving the assessment of the risk in a territory where an alien within its jurisdiction would be sent. This appears to be the core aspect of the non-refoulement principle.

Procedural aspects have been covered to the extent that they affect State responsibility on risk assessment. In this respect, procedural standards specific to

particular types of measures, which may engage responsibility under the non-refoulement rule, have been deliberately avoided unless they are regarded as necessary for the purposes of this study. For instance, the standards specific to extradition or expulsion procedures which are not essential for the risk analysis have not been focused on. This is because of the fact that non-refoulement principle applies to situations regardless of the form of the administrative measure resulting in the removal of an alien to a territory where he/she would risk persecution or other acts attached to the prohibition of non-refoulement under the human rights instruments. This is why non-refoulement rule has been regulated under a separate article from the one regulating expulsion procedure in the 1951 Geneva Convention Relating to the Status of Refugees[1]. Focusing on the specific procedures concerning measures such as expulsion, extradition, rejection, rendition, return and so forth, which may vary from one State to another, would threaten the integrity of the study.

On the difficult question of how to decide which matter shall be regarded as procedural, the author has taken the broad understanding of the Asylum Procedures Directive of the European Union as a yard stick, since it is the most comprehensive and influential document in this respect.

Furthermore, the study does not concentrate on all individual rights of a protection seeker through out the protection procedure, which would be the topic of another comprehensive study on protection standards. For instance, issues such as gender sensitive treatment, interview techniques, access to justice, protection to be provided for subsistence during the protection procedure are not within the focus of the study. The emphasis is always on the responsibility of State to carry out the risk assessment and consequently take over the responsibility of the protection seeker.

On the other hand, the study has a broad understanding of the definition of the beneficiary of the prohibition of non-refoulement since it does not merely focus on any person who is removed from the territory of a State in the above-mentioned circumstances. The author is of the opinion that without covering the available

[1] Herein after referred as the '1951 Refugee Convention'.

protection statuses designed for avoiding refoulement, the dynamics and scope of the principle can not be grasped in sufficient clarity.

The problems highlighted in this study relate to determining the scope of prohibition of refoulement, the limits of State responsibility in this respect, finding out the points where this complex system fails and offering solutions by employing a complementary approach involving all legal tools available. Accordingly, the points where the rules of human rights instruments and the rules of asylum law intersect are of particular interest to this study. In this context, the study points to the advantages and disadvantages of using particular protection mechanisms and proposes methods on how they would complement each other. All of these questions eventually connect to the challenges that Turkey is facing due to its responsibilities regarding three different spheres of law, namely the rules of universal refugee law, the European Union Law and the relevant human rights law instruments.

Methodologically, the thesis follows a unique pattern of analysis for each legal sphere that it covers to the extent allowed by the characteristics of the instruments concerned. This methodology provides a sound ground for making comparisons between different legal instruments. There has been certain constraints however, arising from the characteristics of the instruments analyzed. In this respect, for instance, a better symmetry could be achieved between the 1951 Refugee Convention and the human rights instruments concerned as they exhibited similar characteristics in their development through practice. On the other hand, unlike the former, the European Union's asylum law framework developed through an intensive codification process. Due to the restricted powers of the European Court of Justice in the asylum law field, the Court has so far heard no cases under the asylum acquis that are directly related to the prohibition of refoulement. Therefore, the analysis thereof had to depart to a great extent from the pattern applied with regard to the other instruments. The same is also true for the Turkish practice, which is influenced by the developments under the asylum acquis of the Union. The fact that Turkish State practice is rather underdeveloped on risk assessment, since this task has been effectively delegated to UNHCR, also appears as a constraint in applying the same

pattern for the chapter on Turkish law. The pattern applied in the previous chapters however, is still of great value for determining the responsibilities of the Republic and it will guide the efforts for planning further actions in this context. Finally, the study is based on the analysis of primary resources to the extent that they are available to the author.

Given the considerations above, the thesis is divided into two major parts: the first part is devoted to the Universal instruments in this area and the second part is concerned with the European dimension of the prohibition of refoulement.

The first part is comprised of three chapters. Accordingly, the first chapter explores the emergence of the principle under the asylum law instruments.

The second chapter is devoted to the 1951 Refugee Convention since it is the major international law instrument regulating the principle from an asylum law perspective. This chapter seeks to answer questions regarding the scope of the non-refoulement including whether it can be complemented with instruments of the law of the sea, whether it has exceptions in addition to the ones that are expressly indicated in the text of Article 33, and whether it has become a customary rule of international law. Finally, the chapter ends with a section where the definition of refugee as the beneficiary of the principle is explored.

The third chapter focuses on the practice of two prominent human rights law instruments at the universal level. This chapter, however, starts with a section where the relationship between the asylum and human rights instruments is analyzed with a view to complementary protection. The following section is devoted to the analysis of the relevant communications of the Committee Against Torture under the Convention Against Torture and Other Cruel, Inhuman or Degreading Treatment or Punishment. Finally, the third section contains analysis on the relevant communications of the Human Rights Committee under the International Covenant on Civil and Political Rights.

The second part on the European dimension of non-refoulement is comprised of three sections. The first section explores the Council of Europe as a

standard setting and monitoring organization where particular weight is given to the jurisprudence of the European Court of Human Rights. The following chapter focuses on the developments in the European Union Law particularly after the adoption of the Amsterdam Treaty. In this context, the relevant constitutional rules as well as the secondary legislations are explored in a comprehensive fashion. Finally, the last section of this part concentrates on the Turkish law which is influenced by all the instruments analyzed in the previous sections. Therefore, this section underlines the interaction between the aforementioned instruments and the Turkish law and suggests solutions for the areas of conflict.

I. UNIVERSAL INSTRUMENTS

A. THE EMERGENCE OF THE NON-REFOULEMENT PRINCIPLE IN INTERNATIONAL LAW

Prohibition of refoulement is an inherent aspect of asylum. Therefore, the history of this principle should be traced back to the emergence of the asylum notion which, indeed is an old phenomenon. It is known to be in existence for at least 3.500 years and is found in the texts of many ancient societies.[2] Chimni quotes Singh, who revealed the following observations on the existence of this notion in the ancient Indian socity:

"It was the right of every sovereign state who felt strong enough to maintain its position among the community of states to give protection to anyone who had surrendered and taken refuge or shelter for the sake of his life. Both secular and sacred literature abound in legends which establish that it was the sacred duty of the king whose shelter any individual took, to protect the refugee…at all times. The Mahabharatha also speaks of the sacred duty of refusing to surrender a fugitive or a refugee to the enemy."[3]

Despite its long history, asylum has been regarded as an ad hoc or State-centric mechanism until the 20th Century.[4] In other words, States have been reluctant to undertake any legal obligations that would restrict their sovereign rights on controlling entry or removal of persons through their frontiers. Such ad hoc and State-centric mechanisms lacked cohesion and predictability and therefore provided infinite flexibility to States in dealing with aliens.[5] In this respect, establishment of the principle of non-refoulement as a rule of international law is relatively recent as described herein below.

---

[2] Nagendra Singh, *"India and International Law: Ancient and Medieval*", at B.S. Chimni (ed.), International Refugee Law: A Reader, Sage Publications, New Delhi 2000, p. 82.
[3] Ibid., p. 82.
[4] Laura Barnett, "*Global Governance and the Evolution of the International Refugee Regime"*, International Journal of Refugee Law, Vol. 14, No. 2/3, 2002, p. 241.
[5] Jean-François Durieux, Jane Mc Adam, *"Non-Refoulement Through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies"*, International Journal of Refugee Law, Vol. 16, No. 1, 2004, p. 4.

The first serious efforts for introducing the non-refoulement principle as a part of international law were made during the time of the League of Nations. These efforts achieved limited success since the instruments adopted during this period could attract very few States.

In this context, the first reference to the principle that refugees should not be returned to their country of origin in an international instrument was made in the Arrangement of 30 June 1928 Concerning the Legal Status of Russian and Armenian Refugees.[6] This Arrangement involved a recommendation that

'measures for expelling foreigners or for taking such other action against them be avoided or suspended in regard to Russian and Armenian refugees in cases where the person concerned is not in a position to enter a neighbouring country in a regular manner.'

A more concrete step however, was the adoption of the 1933 Convention Relating to International Status of Refugees[7] This instrument is regarded as a milestone in the protection of refugees since it served as a model for the 1951 Refugee Convention.[8] Article 3 of the Convention provided:

"Each of the Contracting Parties undetakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order. It undertakes in any case not to refuse entry to refugees at the frontier of their countries of origin. It reserves the right to apply such internal measures as it may deem necessary to refugees who, having been expelled for reasons of national security or public order, are unable to leave its territory because they have not received, at their request or through the intervention of institutions dealing with them, the necessary authorizations and visas permitting them to proceed to another

[6] 89 LNTS No. 2005
[7] 159 LNTS No. 3663.
[8] Gilbert Jaegler, *"On the History of the International Protection of Refugees"*, International Review of the Red Cross, Vol. 83, No. 843, 2001, p. 730.

country."

It appears that this provision contained very far reaching and clear obligations on the principle of non-refoulement even compared to that of the 1951 Refugee Convention. For instance, it explicitly referred to non-rejection at the frontier unlike its successor. In this respect, it is possible that the States regarded it far too enthusiastic for its time. The Convention was ratified by only eight States, three of which made reservations and declarations.

With regard to the earlier instruments relating to non-refoulement, the two arrangements concerning refugees coming from Germany are also notable. Article 4 of the Provisional Arrangement concerning the Status of Refugees coming from Germany, signed in Geneva on 4 July 1936[9] and Article 5 of the Convention concerning the Status of Refugees coming from Germany, signed in Geneva on 10 February 1938[10]both contained prohibited removal of asylum seekers. These two arrangements however, shared the bad fate of the 1933 Convention with regard to their popularity among the Member States of the League of Nations. The Arrangements were signed by seven and three States respectively.[11]

It is noticeable however, that during this period the receiving States did not resort to refoulement measures concerning mass influx of refugees from the Ottoman Empire, Russia, Germany and Spain, despite the limited interest shown by States for binding themselves with rules of international law on the non-refoulement principle.[12]

The efforts for adopting international instruments on non-refoulement were intensified after the establishment of the United Nations along with the development of asylum mechanisms generally. United Nations General Assembly adopted the Resolution No. 8(1) on 12 February 1946 which, indicated that refugees or displaced persons who have expressed valid objections against returning to their country of

[9] 171 LNTS No. 3952.
[10] 192 LNTS No. 4461.
[11] Guy S. Goodwin-Gill, The Refugee in International Law, Oxford 1998, Oxford University Press, p. 118.
[12] *Ibid.*, p. 119.

origin should not be compelled to do so.[13]

This was followed by the Resolution No. 62 (I) establishing the International Refugee Organization. The Constitution of the Organization made express reference to the above mentioned Resolution No. 8(I) .[14]

International Refugee Organization was originally meant to complete its operational activities by 30 June 1950. However, it was soon understood that the problem of refugees were not likely to be solved by that date. Therefore, the Commission on Human Rights adopted a resolution in 1946 expressing the wish that:

"early consideration be given by the United Nations to the legal status of persons who do not enjoy the protetion of any government, in particular pending the acquisition of nationality, as regards their legal and social protection and their documentation".[15]

Economic and Social Council took note of the above mentioned resolution and responded to the request in 1948 by asking the Secretary General to:

"undertake a study of national legislation and international agreements and conventions relevant to statelessness, and to submit recommendations to the Council as to the desirability of concluding a further convention on this subject."[16]

This request resulted in the preparation of a document titled *"A Study of Statelessness"* adopted in August 1949[17]. This is a landmark document since the

[13] UNGA Res. 8(I), Question of Refugees (12 February 1946), para. (c)(ii).
[14] UNGA Res. 62 (I), Constitution of the International Refugee Organization, and Agreement on Interim Measures to be Taken in Respect of Refugees and Displaced Persosns (14 December 1946), para. 2 (a).
[15] Official Records of the Economic and Social Council, Third Year, Sixth Session, Supplement No. 1, 1946, p. 13-14.
[16] ECOSOC Res. 116 (VI) D, (1st and 2nd March 1948).
[17] Meanwhile, the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva adopted the Geneva Convention Relative to the Treatment of Prisoners of War which, contained two Articles relevant to the principle of non-refoulement approximately at the same time, on 12 August 1949. The third paragraph of Article 109 states that *"no sick or injured prisoner of war who is eligible for repatriation under the first paragrapgh of this Article, may be repatriated against his will during the hostilities."* Whereas, the Article 118 contained a vaguer provision concerning the prisoners of war who are not sick or injured. The Article provides: *"[p]risoners of war shall be released and repatriated without delay after the*

main elements of the 1951 Refugee Convention was inspired by it.[18] The document also contained an article titled *"Expulsion and Reconduction"* which, provides an overview of the international practice on non-refoulement principle.

Finally, the United Nations General Assembly decided on 14 December 1950 *"to convene in Geneva a conference of plenipotentiaries to complete the drafting of and to sign ... the Convention Relating to the Status of Refugees..."*[19] and the Draft Convention Relating to the Status of Refugees was adopted on 28 July 1951[20]with wide support from the Member States of the United Nations.

B. 1951 CONVENTION ON THE STATUS OF REFUGEES AND THE 1967 PROTOCOL

1. Scope of the Non-Refoulement Principle

Non-refoulement can briefly be defined as the principle that no person should be returned to any territory where he or she is likely to encounter persecution.

Article 33(1) of the 1951 Refugee Convention defines it from a pure asylum law perspective 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 expression 'in any manner whatsoever' imply that the formal

---

cessation of the hostilities". Article 109 clearly adopted the non-refoulement principle for the benefit of sick or injured prisoners of war. On the other hand, Article 118 gave the impression that it would conflict with the non-refoulement principle. The United Nations General Assembly clarified the issue by adopting the Res. 610 (VIII) on 2 December 1952, upon the issues encountered in the Korean War, where is stated *"force shall not be used against prisoners of war to prevent or effect their return to their homelands..."* For a detailed analysis of these provisions see Stephane Jaquemet, *"The Cross-Fertilization of International Humanitarian Law and the International Refugee Law"*, International Review of the Red Cross, Vol. 83, No. 843, 2001 p. 651.

[18] Jaeger, p. 734.

[19] UNGA Res. 429 (V), Draft Convention Relating to the Status of Refugees, para.1.

[20] 189 U.N.T.S. 150.

description of the act is not limited in the text of the Article. Therefore, it shall include any measure that results in the removal or rejection that would expose the person concerned at the risk of persecution.[21]

Therefore, the prohibition of refoulement in Article 33 does apply to expulsion, deportation, return, reconduction, extradition, rejection, refoulement, irregular rendition etc. whatever measure that causes the risk defined in the Convention.

The definition of the above mentioned terms however, still is a point not to be omitted while discussing their potential relationship with the prohibition in Article 33 since the definition of the terms in question may possibly have certain distinctive legal consequences.

'Expulsion' is traditionally defined as the formal procedure by which a State requires a lawfully resident alien to leave its territory or removes him or her by force. Most of the time expulsion takes place as a result of criminal offences or violation of other national laws of the receiving State and is realized by a judicial decision taken by the judicial or administrative authorities.[22]The wording of Article 32 of the Convention also supports the view that the term 'expulsion' is meant to be used for lawfully resident aliens under the 1951 Refugee Convention.[23] By definition, expulsion is a unilateral act which does not require the consent of another State. The

---

[21] Elihu Lauterpacht, Daniel Bethlehem, "*The Scope and Content of the Principle of Non-Refoulement: Opinion"*, Erika Feller, Volker Türk, Frances Nicholson (eds.), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambridge 2003, Cambridge University Press, p. 112.

[22] UN doc. E/1112:E/1112/Add.1, A Study of Statelessness, August 1949, p. 49; also see Grahl-Madsen, Commentary on the Refugee Convention 1951: Articles 2-11, 13-37, Geneva 1997, reprinted by UNHCR, p. 136.

[23] The 1951 Refugee Convention regulates the safeguards concerning the expulsion of refugees who are lawfully residing in the host country in Article 32 seperately from the Article 33 where prohibition of refoulement is provided. Although this study is not focussed on Article 32, certain aspects of this provision is complementary to the non-refoulement regime under the Convention, particularly with regard to certain procedural rights. For instance, paragraph 2 of the Article provides that expulsion of a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Furthermore, a refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority unless compelling reasons of national security otherwise require. Finally, paragraph 3 imposes States Parties the responsibility to allow a refugee a reasonable period within which to seek legal admission into another country.

term ‘deportation’ is used to express the same act as expulsion. These two terms can be used interchangeably depending on the traditions.[24]

Unlike ‘expulsion’ and ‘deportation’, ‘extradition’ is a bilateral procedure based on a prior agreement on the trasfer of a person to the jurisdiction of another State upon a request. This procedure aims at the execution of criminal procedures or sentences. Hence, Article 1 of the European Convention on Extradition defines the ‘obligation to extradite’ as the “[undertaking] to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.”[25]

‘Irregular rendition’ is a term that is used to refer to the extrajudicial transfer of a person from one State to another.[26]

Definition of the terms ‘return’ and ‘refoulement’ which are referred both in the title and the body of the Article 33 is a more complex debate. The formulation of the Article gives the impression that the terms ‘return’ and ‘refoulement’ were meant to be used interchangeably.[27] The statement of the Representative of United Kingdom (Mr. Hoare) during the drafting process which, indicated that the word ‘return’ was the nearest equivalent English to the French term ‘refoulement’ supports this impression.[28]

---

[24] Ann Viebeke Eggli, Mass Refugee Influx and the Limits of Public International Law, 2002, Martinus Nijhoff Publishers, The Hague, p. 154-155; also see Grahl Madsen, Commentry on the Refugee Convention 1951: Articles 2-11, 13-37, p. 136.

[25] European Convention on Extradition, (ETS No. 24).

[26] Michale John Garcia, Renditions: Constraints Imposed by Laws on Torture, US Department of State: Congressional Research Service Report for Congress, 5 April 2006, p. 2.

[27] The Conference adopted the following formula that was proposed by the President of the meeting in accordance with the practice followed in previous Convention: *“The French word “refoulement’’ (“refouler’’ in verbal uses) was decided to be used as included in brackets and between inverted commas after the English word “return’’ wherever the latter occurred in the text.”* See Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-fifth Meeting, Second Reading of the Draft Convention Relating to the Status of Refugees (A/CONF.2/102 and Add. 1 and 2 thereto).

[28] Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-fifth Meeting (A/CONF.2/102 and Add. 1 and 2 thereto)

Despite the above mentioned formula, it is quite doubtful whether the scope of these two terms are precisely the same. The term 'refoulement originates from the French and Belgian laws and it includes non-admittance at the frontier. Whereas, 'Return' is generally defined as *"...mere physical act of ejecting from the national territory a person who has gained entry or residing therein irregularly"*.[29]Unlike the term 'non-refoulement', 'return' is only used for cases where the person concerned has actually managed to enter the country from which he or she is now being sent back.[30]Therefore, the use of these two terms together in the text of the Article 33 does raise a question relating to the scope of the prohibition of non-refoulement in the 1951 Refugee Convention. The question is whether Article 33 would apply to persons who have not yet entered the territory of the State concerned or not. The answer for this question will be pursued below.

a) Refoulement Within State Territory

Non-refoulement principle applies to those refugees who have entered legally or illegaly to the territory of a State. It is observed however, that refoulement of refugees may still take place in practice in two distinct patterns.

First, refugees may not have access to an effective asylum mechanism within those States that have underdeveloped or undeveloped asylum systems which, have not taken the responsibility of refugees. This protection gap is usually filled by the UNHCR which, determines the status of refugees in these States and resettles them to third countries.

This environment however, may be quite slippery for refugees since the legal mechanism concerned is often merely comprised of a cooperation agreement concluded between the State concerned and the UNHCR and that UNHCR's success is to a great extent dependant on the cooperation with the State concerned. An example for this pattern is the massive volumes of deportation in the African Continent which took place in the late 1980s and early 1990s. In late 1992, the South African authorities deported 61.000 Mozambicans according to the Official figures.

[29] A Study of Statelessness, p. 49.
[30] Grahl-Madsen, p. 136.

A further 80.926 Mozambicans were deported by the South African National Defence Forces and South African Police in 1993. The amount of deportations were raised to 71.279 in 1994 even though at that point the South African Government had already signed a Tripartite Agreement with UNHCR and Mozambique, which granted "group refugee status" to the Mozambican population in South Africa.[31]

A more recent example for this pattern was the forced return of Uzbek asylum seekers by the Kyrgyz Government in May 2005 to Uzbekistan in the wake of explosion of violence in Andijan. As the UNHCR spokesperson Jennifer Pagonis expressed at the press briefing on 10 June 2005, this was a direct violation of an agreement UNHCR had reached with the Kyrgyz government that no one would be forcibly returned unless they had been determined not to be a refugee after going through an asylum procedure.[32]

Second, refoulement of refugees within the territory of developed States generally occurs in a less direct form as Hathaway and Dent observed. These States which, have advanced asylum mechanisms may apply excessively restrictive interpretation of the Convention definition[33] or erect procedural or substantial walls that prevent the examination of the asylum claim effectively such as broad 'internal flight alternative' or 'safe third country' standards.

UNHCR's observation in its note on International Protection of Refugees in 2001[34]supports this conclusion. The note indicates that States which have established asylum mechanisms apply varying interpretations of the inclusion criteria set forth in the Article 1 of the 1951 Refugee Convention. As a result, significant differences have appeared in recognition rates between States for persons in similar circumstances. UNHCR identified three different situations where States apply

[31] Bonaventure Rutinwa, The End of Asylum? The Changing Nature of Refugee Policies in Africa, New Issues in Refugee Research, UNHCR Working Papers on New Issues in Refugee Research, Working Paper No. 5, May 1999, p. 13.
[32] Press briefing dated 10 June 2005 by the UNHCR spokesperson Jennifer Pagonis at the Palais des Nations in Geneva Concerning the Forcible Return of the Uzbek Asylum Seekers by the Kyrgyz Government. www.unhcr.org [visited on 03.07.2006].
[33] James C. Hathaway, John A. Dent, *"Refugee Rights: Report on a Comparative Survey"*, B.S. Chimni (ed.), 118.
[34] UNHCR doc.,The International Protection of Refugees: Complementary Forms of Protection: April 2001, paras. 8-9.

varying interpretations. These are listed as – persecution by non-state actors, -refugees who escape from areas of ongoing conflict –gender-related persecution.[35]

b) Rejection at the Frontier and Measures to This Effect

A highly debated topic concerning the scope of non-refoulement is whether it imposes the States Parties an obligation not to reject asylum seekers at the frontiers. Controlling entry through the borders has always been regarded as one of the core aspects of State sovereignty.[36] In this regard, interpreting the non-refoulement principle as a mechanism that compells States to admit asylum seekers into their territory, would constitute an exceptional limitation on the above mentioned sovereign right. Therefore, it is not difficult to visualise that the negotiating States of the 1951 Refugee Convention were hesitant to recognize a mechanism as such at once.

The text of the Article 33 does not explicitly state that the non-refoulement principle includes the duty not to reject asylum seekers at a State's borders. On the other hand, it does not limit the scope of the duty of non-refoulement to refugees already present in the territory of the State either. The words 'in any manner whatsoever' in the article allows a very broad interpretation of the Article but alone it is short of providing the means for giving an easy answer to the question concerned.

The need for clarifying the standards on this issue however, is more than ever today since the target countries have gradually intensified the so called non-entrée mechanisms, including visa requirements on the nationals of refugee producing States, carrier sanctions, burden shifting arrangements and even forcible interdicion of refugees at frontiers and in international waters.[37]

The debate in question is closely linked to the meaning to be attributed to

[35] For further information see the relevant section below.
[36] This aspect of controlling entry was underlined at the drafting of the 1948 Universal Declaration of Human Rights as well as the adoption of the 1951 Refugee Convention. See *Jens Vedsted-Hansen, "Non-admission Policies and the Right to Protection: Refugees' Choice Versus State's Exclusion?",* Frances Nicholson, Patrick Twomey (eds.), Refugee Rights and Realities: Evolving International Concepts and Regimes, Cambridge, 1999, Cambridge University Press, p. 273.
[37] James Hathaway (ed.), Reconceiving International Refugee Law, The Hague 1997, Martinus Nijhoff Publishers, p. xx.

the terms ‘return’ and ‘refoulement’ in the text of the 1951 Refugee Convention.

The Vienna Convention on the Law of Treaties[38]“sets the general rule of interpretation of international treaties in its Article 31 as follows:

“1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.”

In addition to the general interpretation rule in Article 31 of the Convention sets forth the supplementary means of interpretation in its Article 32 as follows:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order

[38] Vienna Convention on the Law of Treaties, *23 May 1969, 1155, U.N.T.S. 331.*

to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure; or

(b) Leads to a result which is manifestly absurd or unreasonable."

Grahl-Madsen suggests that the 'non-refoulement' principle as indicated in the 1951 Refugee Convention does not apply to persons who have not entered the territory of a State concerned and therefore, the States Parties have retained their right not to admit aliens through their borders. The writer comes to this conclusion by giving priority to the views presented by some of the State representatives through the drafting process, which were not reflected in the text of the Convention. This conclusion however, is open to debate. First, it is not clearly established that the statements of the Swiss and Dutch delegates on which Grahl-Madsen based his argument totally excluded the possibility of interpreting the non-refoulement rule as applying to non-admittance at the frontier; since the statements of both representatives are related to non-admittance in mass influx situations. On the other hand, the statements made by some other State representatives indicate that not all of the drafters of the Convention shared this view. For instance, the following statement of the United States delegate, Louis Henkin, reflected a totally different approach from the one Grahl-Madsen argues:

"Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same...Whatever the case might be...he must not be turned back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or

place him in an internment camp.[39]*"*

Second, the preliminary draft of the Convention prepared by the Secretariat in consultation with the International Refugee Organization had clearly referred to the non-refoulement principle that covers non-admittance at the frontier.[40] The clear reference to non-admittance at the frontier (refoulement) had been omitted from the new draft, which was criticized by the French representative Mr. Ordonneau for being incomplete.

It must be noted however, that the drafters were fully informed during the drafting process on the fact that the term "refoulement" did have a scope as to include admission from the frontier at least in some of the domestic laws of the drafting States.[41] Despite this fact, it appears that the drafters have decided to adopt a vague formula by including the term "non-refoulement" within the text of the Article without making reference to non-admission. This fact leads us to the conclusion that the drafters of the Convention did not intend to give the term "refoulement" a special meaning as stipulated under the Article 31 paragraph 4 of the Vienna Convention. Goodwin-Gill also interprets this situation as an indication of the fact that the drafters of the Convention might have deliberately left this point open in the text of the Convention since they were at that stage, probably not prepared to adopt an admission requirement which would come close to the right to be granted asylum.[42]

Even if the drafting history supported Grahl-Madsen's arguments it must be noted that an assessment that is strictly based on the drafting history can not be

---

[39] Ad hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Twentieth Meeting Held at Lake Success, New York, on Wednesday, 1 February 1950, (E/AC.32/SR.20), paras. 54–5.

[40] Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General, 3 January 1950, (E/AC.32/2):
"CHAPTER XI EXPULSION AND NON-ADMITTANCE
Article 24 (See 1933 Convention, Article 3).
1.Each of the High Contracting Parties undertakes not to remove or keep from its territory, by application of police measures, such as expulsions or non-admittance at the frontier (refoulement) refugees (and stateless persons) who have been authorized to reside there regularly, unless the said measures are dictated by reasons of national security or public order..."

[41] Paul Weis, The Refugee Convention, 1951: The Travaux Preparatoires Analysed with a Commentary, Cambridge; New York 1995, Cambridge University Press, p. 342.

[42] Goodwin-Gill, The Refugee in International Law, p. 122.

defended against the subsequent State practice since Article 32 of the Vienna Convention regards the preparatory work of treaties only as a supplementary mean of interpretation, whereas the Article 31 paragraph 3 (b) counts 'subsequent State practice' among the basic means of interpretation.

On the other hand, accepting the "non-refoulement" principle as a generic term in the Convention does compromise both the drafting history and the subsequent State practice on the principle.

The International Court of Justice developed its jurisprudence on the use of generic terms in international law treaties in its judgment regarding the Aegean Sea Continental Shelf Case. [43]

In this case, the Court had to interpret a reservation in Greece's instrument of accession to the General Act of 1928 for the Pacific Settlement of International Disputes which would potentially exclude the Court's comptence with respect to the dispute in question. The text of the reservation excluded disputes relating to the territorial status of Greece, including disputes relating to its sovereignty over its ports and lines of communication.

Greek Government took a restrictive view by reason of the historical context and relied on historical evidence for claiming that term "territorial status" in the clause was related to territorial settlements established by the peace treaties after the first World War. In this regard, Greece argued that the idea of the continental shelf was unknown when the General Act was concluded, and in 1931 when Greece acceded to the Act and that the Court was competent to review the case in question. The Court however, rejected this argument stating that:

"the expression "territorial status" was used in the Greek reservation as a generic term, the presumption necessarily arises that its meaning, as also that of the word "rights" in Article 17 of the General Act, was to follow the evolution of the law and to correspond with the meaning attached to it by the law in force at any given

[43] The Aegean Sea Continental Shelf Case, Judgement of 19 December 1978, ICJ Reports 1978.

time. The Court therefore finds that the expression "disputes relating to the territorial status of Greece" must be interpreted in accordance with the rules of international law as they exist today and not as they existed in 1931".[44]

The same reasoning can also be applied in interpreting the term "non-refoulement" since obviously, it did not have an agreed definition through the drafting process of the Convention. Moreover, the drafters had deliberately included this generic term in the text of the Convention in order to correspond with the meaning attached to it by the law in force at any given time in the future. This reasoning also allows putting full emphasis on the evolution of the law as supported by the subsequent State practice.

The subsequent state practice supports the view that the States gradually regarded non-rejection at the frontier as a requirement of the non-refoulement principle. There are several instruments adopted after the 1951 Refugee Convention which, clearly refer to rejection at the frontier.

As indicated in the amicus curiae brief filed by UNHCR in the R (ex parte European Roma Rights Centre et al) v. Immigration Officer at Prague Airport and another (UNHCR intervening) case:[45]

"over many decades, the linkage between non-refoulement and non-rejection at the frontier has established itself in the practice of States, which have allowed large numbers of asylum seekers not only to cross their frontiers, for example, in Africa, Europe and South East Asia, but also to remain pending a solution."

This practice has been developed through various instruments adopted after the conclusion of the 1951 Refugee Convention.

Article 3(1) of the 1967 Declaration on Territorial Asylum, adopted unanimously by the General Assembly, recommends the States to be guided by the

[44] *Ibid.* paras. 77-80.
[45] International Journal of Refugee Law 2005 17(2): para. 44.

principle that no one entitled to seek asylum, *"shall be subjected to measures such as rejection at the frontier ... to any State where he may be subjected to persecution".*[46]

Article III (3) of the Principles concerning Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee in Bangkok in 1966, reflects the same approach on the scope of the non-refoulement principle.[47]

This practice has also been confirmed by the Article II(3) of the 1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa. [48]

The Committee of Ministers of the Council of Europe also recommended the member States to

"ensure that no one shall be subjected to refusal of admission at the frontier, rejection, expulsion or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution..."

The Committee of Ministers repeated the same approach in its Resolution No. (67) 14 on Asylum to Persons in Danger of Persecution adopted in 1967 and in its Recommendation No. R (84) 1 on the Protection of Persons satisfying the Criteria in the Geneva Convention who are not Formally Recognized as Refugees.

Article 5 of the Cartagena Declaration on Refugees adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia in 1984 also supports the suggested scope of the principle indicating that non-rejection at the frontier is a part of the non-

---

[46] UNGA Res. 2312 (XXII), Declaration on Territorial Asylum,14 December 1967.

[47] Report of the Eighth Session of the Asian-African Legal Consultative Committee, Bangkok, 8–17 August 1966, p. 355 : Article III (3) *"No one seeking asylum in accordance with these Principles should, except for overriding reasons of national security or safeguarding the population, be subjected to measures such as rejection at the frontier, return or expulsion which would result in compelling him to return to or remain in a territory if there is a well-founded fear of persecution endangering his life, physical integrity or liberty in that territory."*

[48] OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (Adis Ababa, 10 September 1969, 1001 U.N.T.S. 45). *"No person shall be subjected...to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened."*

refoulement principle.[49]

The Executive Committee has also supported this practice authoritatively in several conclusions. In Conclusion No. 6 (XXVIII) in 1977, for instance, the Committee underlined "the fundamental importance of the observance of the pinciple of non-refoulement –both at the border and within the territory of a State".[50]The Committee took the same approach and further developed it in its more recent conclusions.[51]

This approach also finds wide support among scholars and commentators.[52] Therefore, there is convincing evidence to show that non-rejection at the frontier is now regarded by States as a part of the non-refoulement principle.

A critical question that is relevant to the admission requirement is when a person should be considered at the frontier. The drafting history of the Article 33 of the 1951 Refugee Convention does not contain any debate that would shed light on

[49] Cartagena Declaration on Refugees, 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, (1984-85), (OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1), p.190-193: "Article 5. *To reiterate the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens."*

[50] EXCOM Conclusion No. 6 (XXVIII), 1977, para. (c) at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 2005, Geneva, p. 8.

[51] See for instance, EXCOM Conclusion No. 85 (XLIX), 1998, para. (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 reitrates 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 refugee status and protection needs..."* (UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 189)*;* EXCOM Conclusion No. 99 (LV), 2004, para. (l): *"Expresses concern at the persecution, generalized violance and violations of human rights which continue to cause and perpetuate displacement within and beyond national borders and which increase the challenges faced by States in effecting durable solutions; and calls on States to address these challenges while ensuring full respect for the fundamental principle of non-refoulement, including non-rejection at frontiers without access to fair and effective procedures for determining status and protection needs...".* It is interesting to note that the Committee speaks of responsibilities beyond national borders in the later conclusion. (UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 244)

[52] See Elihu Lauterpacht and Daniel Bethlehem, *"The Scope and Content of the Principle of Non-refoulement: Opinion"*, p.113-115.; Hathaway, p. 7; Goodwin-Gill, The Refugee in International Law, p. 124, Eggli, p. 156; Vedsted-Hansen, *"Non-admission Policies and the Right to Protection: Refugees' Choice Versus State's Exclusion?",*pp. 273-276; Nils Coleman, *"Non-Refoulement Revised Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law",* European Jounal of Migration and Law, Vol. 5, 2003, p. 40-41.

determining the precise geographical scope of the application of the non-refoulement principle.

Goodwin-Gill observes that *"as a matter of fact, anyone presenting themselves at a frontier post, port or airport will already be within state territory and Jurisdiction"*.[53]

Although, there has been a few incidences where States intended to exclude ports[54] or airports[55] form their jurisdiction, this has not found support from other States or international organizations. Therefore, it is true that any person presenting himself or herself at the frontier post, port or airport would be within a State's territory.

This observation however, must be resorted cautiously since a State's sovereign territory does extend beyond the frontier post, port or airport. Thus, this approach is far from clarifying legal questions arising from State practices such as intercepting vessels and turning them away by navys ships either at the territorial waters or at the High Seas.

---

[53] Goodwin-Gill, The Refugee in International Law, p. 123.

[54] Australian Federal Government reformed its Migration Act in 2001 whereby it excluded Ashmore Reef and Cartier Island, Christmas Island, Cocos Island and any other prescribed external territory and island from the Australian Migration Zone. By virtue of this amendment, Australia claimed that a migrant has not entered the Australian territory by landing on these islands. This practice was criticised UNHCR and by various human rights NGOs. UNHCR spokesperson Jennifer expressed her concerns about the reform at the press briefing, on 18 April 2006, at the Palais des Nations in Geneva as follows: *"If this were to happen, it would be an unfortunate precedent, being for the first time, to our knowledge, that a country with a fully functioning and credible asylum system, in the absence of anything approximating a mass influx, decides to transfer elsewhere the responsibility to handle claims made actually on the territory of the state. This is even more worrying in the absence of any clear indications as to what might be the nature of the envisaged offshore processing arrangement",* http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=4444cb662&page=news, [visited on 12.07.2006]; Amnesty International was among the NGOs which criticised the reform of the Migration Act. For detailed information about this NGOs position see Amnesty International, 2001 Report on Australia, http://web.amnesty.org/report2001/webasacountries/AUSTRALIA?OpenDocument, [visited on 12.07.2006]

[55] The French Government tried to limit the scope of its obligations by turning part of its airport in to a rule-free international zone. However, this attempt turned out to be futile since the European Court of Human Rights found that the French Government violated the European Convention on Human Rights in this section: See *Amuur v. France*, Judgement of 25 June 1996, Application No. 19776/92.

Article 2 of the UN Convention on the Law of the Sea[56] sets forth the geographical limits of a coastal States' sovereignty as follows:

"1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil..."

Accordingly, a State has exclusive sovereignty within its territorial sea, that is comprised of internal waters and in the case of an archipelagic State, its archipelagic waters. This indicates that international obligations, such as the obligation of non-refoulement, apply in the territorial sea just as in the land territory.[57]Thus, considering the fact that non-refoulement obligation includes non-admittance at the frontier in the light of the the explanations above, turning asylum seekers back within the territorial sea of a State, would breach the principle. In fact, this is why States which, tend to avoid taking responsibility of refugees resort to interception measures at the high seas, before the asylum seekers enter the territorial sea of the State concerned.[58]

c) Extra-Territorial Application

A more complex issue concerning the responsibility of coastal States, is the applicability of the non-refoulement principle at the High Seas. In UNHCR's understanding, the principle of non-refoulement also extends to outside the territorial sea.[59]This issue was brought before the US Supreme Court in the Sale v. Haitian

[56] United Nations Convention on the Law of the Sea, adopted at Montego Bay, Jamaica, 10 December 1982,1833 U.N.T.S. 3.
[57] See Mark Pallis, *"Obligations of States Towards Asylum Seekers at Sea: Interactions and Conflict Between Legal Regimes"*, International Journal of Refugee Law, Vol. 14, No. 2/3, 2002, p. 343.
[58] Amnesty International EU Office, A Bird's Eye View: Interception and Rescue at Sea, The Framework of International Law Principles, 28 September 2005, p. 9; Standing Committee of the Executive Committee of the High Commissioner's Programme, 18th Meeting, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, 9 June 2000, EC/50/SC/CRP.17, p. 2.
[59] Background Discussion Paper Prepared by UNHCR informing the Expert Roundtable on Rescue at Sea and Maritime Interception in the Mediterranean; Athens, 12-13 September 2005, p. 8.

Centers Council Case[60], where the US Government argued that interdicting asylum seekers on the high seas without assessing asylum claims did not violate 1951 Refugee Convention.

This case was concerning an executive order that directed the U.S. Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they qualify as refugees. The authorization for such forced repatriation was only granted in order to be applied beyond the territorial sea of the United States. Organizations representing interdicted Haitians and a number of Haitians, requested a temporary restraining order, arguing that the Executive Order violates the Immigration and Nationality Act of 1952 and Article 33 of the United Nations Convention Relating to the Status of Refugees.

UNHCR presented a Brief Amicus Curiae[61] where it analyzed the applicability of the principle of non-refoulement at the High Seas and found the directive concerned to be incompatible with the principle. In this context UNHCR first established that the Article 33 makes no exceptions for state conduct that occurs outside the territory or territorial waters of the Contracting State. Rather, the obligations which it imposes arise where ever a state acts.

Second, this meaning is also confirmed by the structure of the treaty which sets forth territorial limitations in other articles but includes no such limitation in Article 33.

Third, UNHCR further underlined the 1951 Refugee Convention's broad and overriding humanitarian purpose, which is to protect an especially vulnerable group from persecution. Thus, confining the applicability of the principle to the territorial sea would be contrary to this purpose.

---

[60] Sale v. Haitian Ctrs. Council, 113 S. Ct. 2549, 113 S. Ct. 2549, 125 L. (92-344), 509 U.S. 155 (1993), available at http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=509&invol=155 [visited on 25.09.2006].

[61] UNHCR, The Haitian Interdiction Case 1993: Brief Amicus Curiae, International Journal of Refugee Law, Vol. 6. No. 1, 1994, p. 92.

Finally, UNHCR depended on the United States Governments' own prior practice under the Convention and the Protocol and other international treaties which, indicated that fundamental protection of refugees is not limited by state territory as a fact confirming its standing.

The Supreme Court however, rejected to uphold UNHCR's position and concluded that Article 33 was not meant to have an extra-territorial effect and therefore, the U.S. Government had the power to establish a naval blockade that would deny illegal Haitian migrants the ability to disembark on the shores of the Country. The judgement of the Supreme Court was criticised by scholars as well as the UNHCR. The High Commissioner for Refugees described the decision "as a setback to modern international refugee law".[62]

The dispute was later brought before the Inter-American Commission on Human Rights by the Haitian Centre for Human Rights and other Haitians with a petition primarily based on claims concerning the violation on several rights stipulated in the American Declaration of the Rights and Duties of Man and particularly the right to asylum in article XXVII.

The Commission did not agree with the finding of the U.S. Supreme Court in its decision and clearly upheld the views of the UNHCR indicating that Article 33 had no geographical limitations in the amicus curiae which, was presented to the Supreme Court.[63]

As a conclusion, the Commission found that the United States had breached the right to seek and receive asylum in Article XXVII as well as the right to life, right to liberty, right to security of the person in Article I, right to equality before the law in Article II and the right to resort to the courts in Article XVIII of the American

[62] Hathaway, Dent, p. 117; also see Pallis, p. 344; Guy S. Goodwin-Gill, *"Refugees and Responsibility in the Twenty-First Century: More Lessons Learned From the South Pacific",* Pacific Rim Law and Policy Jounal, Vol. 23, 2003, p. 30.

[63] The Haitian Centre for Human Rights et al. v. United States, Case 10.675, Report No. 51/96, Inter-American Commission on Human Rights., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997), para. 157.

Declaration of the Rights and Duties of Man.[64]

A similar incident that clearly shows the complications that may be caused by rejection at the frontier occurred in 2001 when the Australian authorities directed a container ship with a Norwegian flag named MV Tampa which had 433 persons of Afghan, Iraqi, and Pakistani origin on board whom were rescued from a fishing boat sinking in the Indian Ocean, 87 miles north of the Christmas Island of Australia, at the High Seas.[65]

The Captain asked the Australian Coast Guard where he should disembark the rescued persons, but the Coast Guard responded that they did not know. The ship started to go towards Indonesia that the rescued persons on board threatened the Captain to commit suicide if they did not turn back to Australia. As a result, the Captain was convinced to do as they want. When the ship was approaching the Christmas Island, but outside the territorial waters, the Australian authorities ordered the ship to go back to Indonesia since they considered the flag State Norway or the state of embarkation Indonesia to be responsible for the asylum seekers and threatened to fine the shipowners if an illegal entry into territorial waters took place. The Captain was concerned that the lack of sufficient food and water would cause a significant loss of life. Indonesia expressed its unwillingness to receive the asylum seekers. When the Captain gave notice of his intention to proceed to Christmas Island, the Australian Government refused to give permission to enter Australian waters which was ignored. As result, Australian troops seized control of the ship and Tampa was stopped. Australian Government received a negative response from Norway to its call for accepting the asylum seekers. In this context, Norwegian Ministry of Foreign Affairs asserted that the non-refoulement principle only became relevant when the ship entered Australia's territorial waters.[66]

---

[64] *Ibid.* paras. 183 – 188.
[65] Cecilia Bailliet, *"The Tampa Case and its Impact on Burden Sharing at Sea"*, Human Rights Quarterly, Vol. 25, 2003, pp. 741 -744. For further information on the case see also Goodwin-Gill, *"Refugees and Responsibility in the Twenty-First Century: More Lessons Learned From the South Pacific"*,; Richard Barnes, *"Refugee Law at Sea"*, International and Comparative Law Quarterly, Vol. 53, 2004, p. 48.
[66] Baillet, p. 751.

The UNHCR issued a compromise recommendation calling upon the States to share the burden. Despite the positive response of the Norwegian Government, the Australian Government rejected this offer and kept contact with New Zealand, Nauru and later Papua New Guinea, all of which agreed to receive the asylum seekers. The asylum seekers were sent to Papua New Guinea, New Zealand and Nauru. As result of this incident the Australia amended its Migration Act and removed Ashmore Reef and Cartier Island, Christmas Island, Cocos Island and any other prescribed external territory Island and the Australian sea or resource installations from the Australian Migration Zone. Bailliet describes this act as a 'legal fiction' since the amendment in question resulted in the consideration that a migrant has not entered the Australian territory by landing on these Islands. But from a military perspective the Islands were part of Australia. Accordingly, asylum seekers arriving by boat would be taken to detention centers in Nauru, Papua New Guinea, and the Islands mentioned above for off-shore rapid processing. The Border Protection Act was also amended in order to authorize Australia to board boats at the High Seas and towe them to other parts of the High Seas.[67]

As illustrated by these two incidents, the State practice concerning the applicability of the non-refoulement principle at the High Seas is not as consistent as the one within the territorial sea. The number of States applying those non-entree measures are not limited to United States, Australia and Norway, other coastal States such as Italy, United Kingdom, Spain, France and Portugal also apply similar interception measures at the High Seas.[68]

The inconsistency of practice at the High Seas is further confirmed with a recent conclusion of the Executive Committee on protection safeguards in

[67] Baillet, p.746.

[68] See Frances Kennedy, *"Italy's Illegal Migrant Conundrum: The Sinking of a Boat Full of African Migrants Off the Coast of Tunisia Underlines the Difficulties for Nations Like Italy of Stopping Illegal Migrants Before They Reach Their Shores",* BBC News, 21 June 2003, http://www.bbc.co.uk/ [visited on 5 July 2006]; *"Altogether seven vessels will now be on patrol in the Mediterranean with the aim of stopping the wave of mafia-operated boats that ply the coasts."* (Isambard Wilkinson, EU Fleet is Launched to Head Off Immigrants, The Telegraph, 29.01.2003 [visited on 5 July 2006].)

interception measures[69]. Article (a)iv of the Conclusion puts emphasis on the responsibility of States for non-rejection at the frontier by providing:

"Interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly to the frontiers or territories where their life or freedom would be threatened on account of a Convention ground or where the person has other grounds for protection based on international law..."

The Committee's approach towards the geographical scope of the State responsibility in this Conclusion however, is notable. As provided in the following Article (a) i, the Committee merely speaks of the primary responsibility of States within their sovereign territory and territorial waters:

"i. The State within whose sovereign territory, or territorial waters, interception takes place has the primary responsibility for addressing any protection needs of intercepted persons;"

Since the Conclusion does not at all refer to the responsibility issue at the High Seas, it still does not completely hinder the possibility of accepting UNHCR's interpretion of Article 33. This provision may merely be regarded as an indication that the Executive Committee was not prepared to step into a grey area on State responsibility in the High Seas.

The grey area concerning the responsibility of States at the High Seas arise to a great extent due to the lacunaes within the 1951 Refugee Convention and the relevant instruments of law of the sea concerning search and rescue and interception regimes.[70]Combined with the reluctance of certain coastal States targeted by asylum seekers to provide protection, the said grey area threatens the entire legal mechanism established under the 1951 Refugee Convention.

---

[69] EXCOM Conclusion No. 97 (LIV) 2003 (UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 233)
[70] Pallis, *passim*.

The coastal States may encounter asylum seekers at sea through interception by coastal state patrols, search and rescue operations, or as stowaways aboard commercial vessels.

(1) Search and Rescue Regime

Search and rescue is particularly important for asylum seekers who often find themselves lost or in distress during their trip to safe heavens. Rescue of asylum seekers at sea and their asylum claims are regulated by several international treaties in addition to the 1951 Refugee Convention. The UNCLOS sets forth the general legal structure of the law of the sea including wide range of topics. SOLAS Convention[71]is a treaty that deals with vessel safety at sea. The SAR[72]Convention establishes a system for search and rescue operations.

(a) Duties of a Flag State

Article 98 of the UNCLOS imposes the flag State the following obligation:

"1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:(a) to render assistance to any person found at sea in danger of being lost;(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;"

SOLAS Convetion provides a similar provision putting more empasis on ship master's resposibilities*:*

"The master of a ship at sea, on receiving a signal from any source that a ship or aircraft or survival craft thereof is in distress, is bound to proceed with all speed to the assitance of the persons in distress informing them if possible that he is doing so. If he is unable or, in the special circumstances of the case, considers it unreasonble or unneccessary to proceed to their assistance, he must enter in the logbook the reason for failing to proceed to the assitance of the persons in

[71] International Convention for the Safety of Life at Sea (SOLAS), 1974, 1184 U.N.T.S. 278.
[72] International Convention on Maritime Search and Rescue (SAR) , 1979, 1405 U.N.T.S. 97.

distress."[73]

This duty applies to any person found at sea in danger of being lost and persons in distress. The persons found at sea category *"covers chance encounters by vessels of, say, refugee craft or floating survivors*.[74] *"Whereas, the duty concerning persons in distress is "* linked in the treaties to a response to distress calls."[75]

Although the duty is imposed upon the flag States, it is carried out by ship masters in practice. States are obliged to ensure that the obligation to rescue is provided in their own domestic laws.[76]

On the other hand, it is observed that the obligation to rescue is not fulfilled effectively in practice. This concern has been expressed in a number of Executive Committee Conclusions.[77]

Barnes provides a list of the causes of such ineffectiveness.[78] According to the scholar's observation, first, States commonly do not or partially transpose this obligation to their domestic laws.

Second, the obligation is weakened due to the problems of enforcement encountered in practice. In this context he indicates that unless shore-based rescue

---

[73] International Convention for the Safety of Life at Sea, Annex, Chapter V, Regulation 15.
[74] Pallis, p. 338.
[75] *Ibid.*
[76] Barnes, p. 50.
[77] See EXCOM Conclusion No. 2(XXII) 1976 (UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 3); EXCOM Conclusion No. 14 (XXX) 1979 (UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 20; EXCOM Conclusion No. 23 (XXXII) 1981(UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 41); EXCOM Conclusion No. 26 (XXXIII) 1982(UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 47.); EXCOM Conclusion No. 31 (XXXIV) 1983(UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 56); EXCOM Conclusion No. 34 (XXXV) 1984(UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 60); EXCOM Conclusion No. 38 (XXXVI) 1985, (UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 65); EXCOM Conclusion No. 97 (LIV) 2003 (UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 233).
[78] Barnes, pp. 50-51.

centres are fully aware of events, the persons in distress can be ignored without legal consequence. In most of the cases it is only the flag State that can enforce the obligation. The effectiveness of the flag States' control is however, hindered by the fact that approximately one-third of all vessels at the High Seas are registered under flags of convenience in States which, are not interested in enforcing this obligation.[79]

The third indicated cause is that masters of ships at High Seas are discouraged to rescue persons on the sea due to the fact that the coastal States are reluctant to receive such persons in their own territory and this does cause excessive delays in transportation as in the Tampa incident. This appears to be the prevailing cause for the plight of asylum seekers and is also on the agenda of UNHCR and IMO as well. UNHCR reports that the vessels fulfilling their humanitarian duty in waterways around the world have encountered problems as States have occasionally refused to let some migrants and refugees rescued at sea to enter their territorial waters or disembark, especially when they lacked proper documentation. This practice put ship-owners and companies in a very difficult situation, even threatening the integrity of the humanitarian tradition to assist those in peril at sea.[80]

The said problem arises due to the lack of clear provisions in the law of sea concerning the procedure to be followed after the persons are rescued.

The term *'rescue at sea'* has been defined in the Chapter 1, para. 1.3.2 of the Annex to SAR Convention as: *"an operation to retrieve persons in distress, provide for their initial medical or other needs, and deliver them to a place of safety".*

The master is released of his/her obligations upon delivering the rescued person to a place of safety. Therefore, the definition of the term *'place of safety'* is crucial. The Convention however, does not define this term. Thus, the extent of the

[79] This point was also raised in the "Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea" prepared by UNHCR at the expert roundtable Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees, held in Lisbon, Portugal on 25-26 March, 2002.

[80] *"Maritime Conventions Amended to Facilitate Search-and-Rescue at Sea,"* UNHCR News Stories, 30 June 2006, www.unhcr.org [visited on 07.07.2006]

obligation of the master is left rather unclear in the Convention despite the recent amendments which came into force on the 1st of July 2006.[81]

The common maritime practice to disembark rescued persons is indicated as the next port of call in the Conclusion No. 23 of the Executive Committee.[82]On the other hand, the term place of safety can be much broader than that as defined in the IMO Guidelines on the Treatment of Persons Rescued at Sea adopted in May 2004 which, is a useful but a non-binding instrument.[83] The place of safety is defined in the Article 6.12 of the Guidelines as "a place where the survivor's safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for survivors' next or final destination. The Guidelines further indicate that an assisting ship should not be considered a place of safety and that the master of the ship shall be releived from responsibility as soon as alternative

[81] The amendments to the SOLAS and SAR Conventions, adopted in May 2004, concern the treatment of persons rescued at sea. The amendments were adopted in response to Resolution A.920 on Review of Safety Measures and Procedures for the Treatment of Persons Rescued at Sea, adopted by IMO's 22nd Assembly in 2001. The resolution requested IMO to review all IMO instruments so that any existing gaps, inconsistencies, ambiguities, vagueness or other inadequacies could be identified and any action needed could be taken.

[82] EXCOM Conclusion No. 23, 1981, para. 3: *"In accordance with international practice, supported by the relevant international instruments, persons rescued at sea should normally be disembarked at the next port of call. This practice should also be applied to asylum-seekers rescued at sea. In cases of large-scale influx, asylum-seekers rescued at sea should always be admitted, at least on a temporary basis. States should assist in facilitating their disembarkation by acting in accordance with the principles of international solidarity and burden-sharing in granting resettlement opportunities.";* On the other hand, the term "next port of call" is not clear either. The Background Note discussed at the expert roundtable rescue-at-Sea held in Lisbon in 2002 elaborated on this term. *("Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea"* discussed at the expert roundtable Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees, held in Lisbon, Portugal on 25-26 March, 2002, para. 30.) Accordingly, this term shall be considered in connection with a number of possibilities. In some instances, especially when large numbers of rescued persons or overriding security concerns appear, the next port of call will be "the nearest port in terms of geographical proximity". Second, in some circumstances, priority may be given to the port of embarkation as the place to disembark the rescued persons considering the responsibility of the country of embarkation to prevent un-seaworthy vessels from leaving its territory. A third option would be the next scheduled port of call when the number of rescued persons is small and the safety of the vessel and the persons on board would not be endangered. Fourth, there may be cases where the next port of call would be not the closest one but the best equipped one for the purposes of treating injured or traumatized persons. Finally, it is indicated that when State vessels are concerned that intercept illegal migrants, choosing the nearest port of that State as the next port of call would be appropriate; also see Barnes, pp. 51-52.

[83] IMO Res. MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea, (20 May 2004).

arrangements can be made.[84]A place of safety may be on land, or it may be aboard a rescue unit or other suitable vessel or facility at sea that can serve as a place of safety until the survivors are disembarked to their next destination.[85]

The SAR Convention and SOLAS Conventions, as amended, indicate that particular circumstances of the case shall be taken into account in determining the place of safety. The Guidelines provides a list of these particular circumstances which may be relavant to determining the place of safety. Accordingly, these circumstances may include factors such as the situation on board the assisting ship, on scene conditions, medical needs, availability of transportation or other rescue units.[86] In this regard, the Guidelines also addresses to the need of avoiding dismebarkation in territories where the lives and freedoms of those alleging a well founded fear of persecution would be threatened.

(b) Duties of a Coastal State

The plight of the asylum seakers rescued at the High Seas is caused to a great extent by the acts of the coastal states that are reluctant to receive them in their own territory as in the Haitian boat people and Tampa incidents. Therefore, determining the scope of their responsibilities under the UNCLOS, SAR and SOLAS Conventions is necessary in order to see the root causes of the problem. Neither UNCLOS nor the other instruments mentioned above contain any obligation relating to the responsibility of coastal States for disembarkation of rescued people.[87]

Paragraph 2 of Article 98 of the UNCLOS provides*:*

"Every coastal State shall promote the establishment, operation and

[84] "6.13 An assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger aboard the ship. An assisting ship may not have appropriate facililites and equipment to sustain additional persons on board without endangering its own safety or to properly care for survivors. Even if the capable of safely accomodating the survivors and may serve as a temporary place of safety it should be releived of this responsibility as soon as alternative arrangements can be made."
[85] *Ibid.,* Article 6.14.
[86] *Ibid.* Article 6.15.
[87] Amnesty International EU Office, A Bird's Eye View:Interception and Rescue at Sea: The Framework of International Law Principles, 28 September 2005, p. 5, available at www.amnesty-eu.org [visited on 15.09.2006].

maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements co-operate with neighbouring States for this purpose".

Amendments to the Annex to the SAR Convention, added a new paragraph in Chapter 2 concerning organization and co-ordination, relating to the definition of persons in distress; new paragraphs in Chapter 3 concerning cooperation between States, relating to assistance to the master in delivering persons rescued at sea to a place of safety; and a new paragraph in Chapter 4 concerning operating procedures, relating to rescue co-ordination centers initiating the process of identifying the most appropriate places for disembarking persons found in distress at sea.

As a result, the States parties have undertaken to cooperate and coordinate search and rescue plans and arrangements in their own SAR zone. However,there is still no indication neither in the SAR Convention nor in the other instruments cited above, concerning the duty of receiving or disembarkation of the rescued persons in the amended texts. Therefore, the amendments in question are still far from clarifying the duties of coastal States towards rescued persons on the sea.

(2) Interception Regime

The legal regime of interception at High Seas is not clear either on the duties of coastal States towards the asylum seekers encountered during their conduct. An internationally accepted definition of interception does not exist. Therefore, the Executive Committee has drawn the meaning of interception practices from the past and current State practice in its Conclusion No. 97 (LIV) 2003 on Protection Safeguards in Interception Measures as follows:

"...interception is one of the measures employed by States to: (i) prevent embarkation of persons on an international journey; (ii)prevent further onward international travel by persons who have commenced their journey; or (iii)assert control of vessels where there are reasonable grounds to believe the vessel is

transporting persons contrary to international or national maritime law"[88]

Interception occurs in the form of physical interception of vessels suspected of carrying irregular migrants or asylum seekers. States generally try to intercept vessels at the High Seas before they reach their territorial waters.[89] Interception is mostly practiced in order to prevent smuggling and trafficking of human beings. In this respect, States try to detect persons without valid documents of entry. In most cases the aim of interception is to return such irregular passengers to their country of origin.[90]It is a fact that asylum seekers may in most cases not be able to provide such documents due to their peculiar relationship with the country of origin. This phenomenon is reflected in the Article 31(1) of the 1951 Refugee Convention which, intends to avoid evidence requirements to work against the asylum seekers as a constraint in having access to the asylum procedures. Accordingly the Article prohibits the penalization of refugees for illegal entry or presence provided that they come directly from countries where they are under the risk of persecution. Therefore, it is vital to make a distinction between asylum seekers and other irregular migrants during interception measures. Identifying genuine refugees is a responsibility that falls on the governments of States Parties to the 1951 Refugee Convention. UNHCR notes however, that in practice immigration control measures such as interception can seriously jeopardize the ability of refugees to gain access to the asylum procedures. In the view of the Executive Committee this may result in the refoulement of refugees.[91]

A notable progress has been made recently on the legal framework of controlling irregular movements by the two Protocols to the United Nations

---

[88] The Standing Committee of the Executive Committee of the High Commissioner's Programme gave a less authoritative but a more accurate definition in 2000: *"...interception is defined as encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination"* (Standing Committee of the Executive Committee of the High Commissioner's Programme, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, 9 June 2000, EC/50/SC/CRP.17, p. 2.)

[89] *Ibid.,* p. 9.

[90] *Ibid.,* p.2.

[91] EXCOM Conclusion No. 58.(XL), 1989, (UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 109)

Convention Against Transnational Organized Crime adopted by the United Nations General Assembly namely; The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children[92] which, entered into force on 25 December 2003 and the Protocol against the Smuggling of Migrants by Land, Sea and Air[93], which, entered into force on 28 January 2004. The later Protocol, in particular, establishes the legal framework for procedures pertaining to interception measures in connection with smuggling of persons which, are applicable to a majority of the cases dealt with in this section.

The UNHCR is also of the opinion that elaboration of the two Protocols mentioned above represents a unique opportunity to design an international framework which could provide a solid legal basis for compromising the interests of preventing smuggling and trafficking of persons through interception and that of protecting asylum-seekers and refugees under the 1951 Refugee Convention.[94]

(a) Ships Without Nationality

The vessels at the High Seas are subject to the exclusive jurisdiction of the flag State.[95]The UNCLOS has stipulated certain exceptions to this rule where third Satetes may exercise jurisdiction over a vessel. Ships of uncertain nationality in Article 110 and stateless ships in Article 92 are particularly relavant for our topic since the States may consider the boats of asylum seekers which, may not be flying a flag, a ship without nationality.[96]In this context, the limits of the third States' jurisdiction is debated. Pallis suggests:

"States' jurisdiction is limited not only by the fact that they merely have a

[92] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001); Article 14 of the Protocol contains a provision on respect to the non-refoulement principle.
[93] Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime, G.A. res. 55/25, annex III, 55 U.N. GAOR Supp. (No. 49) at 65, U.N. Doc. A/45/49 (Vol. I) (2001).
[94] Standing Committee of the Executive Committee of the High Commissioner's Programme, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, 9 June 2000, EC/50/SC/CRP.17, para. 32.
[95] UNCLOS, Article 92.
[96] Pallis, p. 350.

'right of visit' over stateless ships, but also by the reservation for the High Seas for peaceful purposes, and finally by the obligations of non-refoulement ..."

The scholar therefore, considers that not having a nationality does not give a third State the standing for claiming a right to tow a ship to another part of the sea.[97]

The extent of jurisdiction on the stateless ships and the definition of stateless ships was considered by the United States Court of Appeals for the Third Circuit in the case of United States of America v. Rosero Et al. in 1994. The case involved the US Coast Guard's seizure of a boat carrying 200 bales of marijuana in the waters off the coast of the Saba Island, Netherlands Antilles. The vessel was not marked with a port or country registry and was not flying a flag. The ship was brought into port at St. Croix, US Virgin Islands, where the ship's crew was convicted under the US Maritime Drug Enforcement Act.

The government's theory at trial was that the vessel was subject to United States jurisdiction because it was without nationality. The vessel in question, however, did not clearly fall within the category of ships listed as without nationality in the U.S. Statute. Judge Alito considered that, this term had acquired a settled meaning under customary international law. Therefore, if a vessel is considered stateless under international law, but it does not satisfy the non-exhaustive categories in the Statute, the judge shall read the Statute to incorporate the international law standards for determining statelessness.

From this judgement, it appears that, contrary to the suggestion of Pallis, the U.S. practice vests the Government almost complete enforcement power over the ships without nationality.

Article 8 paragraph 7 of the Palermo Protocol provides a procedure regarding the enforcement powers of the coastal States:

"A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be

[97] *Ibid.,* p. 351.

assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law."

This provision grants the powers to board and search Stateless vessels at the High Seas but it is still ambiguous on indicating the limits of coastal State's enforcement power.

In this case, there is nothing to stop the coastal State from applying jurisdiction on the stateless ship at the High Seas since, no flag State exists to protect the ship concerned. While applying jurisdiction or more particularly enforcement action at the High Seas the coastal States shall abide with their international law and human rights obligations. Pallis[98]suggests that this would inevitably require respect for the non-refoulement principle and humane treatment of the persons on board. This position is confirmed, to the extent that it is related to humane treatment of persons aboard the Stateless ship, by Article 9[99] and Article 16 of the Palermo Protocol on Smuggling [100]which, contains certain safeguards applicable for ships without nationality as well as the ones with nationality. On the other hand, paragraph 1 of Article 19 of the same provides a much more hesitant approach on non-

---

[98] *Ibid.*

[99] *"1. Where a State Party takes measures against a vessel in accordance with article 8 of this Protocol, it shall: (a) Ensure the safety and humane treatment of the persons on board;"*

[100] *"1. In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.*
2. Each State Party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol.
3. Each State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol.
4. In applying the provisions of this article, States Parties shall take into account the special needs of women and children.
5. In the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol, each State Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers."

refoulement in order to establish the relevance of the principle at the High Seas.[101]

In this respect, it is possible to argue that, even if the UNHCR's position is not taken with regard to the geographical scope of the non-refoulement principle, returning or towing a Stateless ship to the other parts of the High Seas may be contrary to principle of humane treatment as expressed by Pallis and the Palermo Protocol since such interception measures may entail risks even amounting to the death of the persons on board. [102]

Although, the enforcement power of the coastal State is restricted at the High Seas as mentioned above, in practice it is difficult to detect violations and pursue the rights of the persons on Stateless ships against the Coastal State which, takes interception measures.

It could be considered that a State that has its citizens aboard the intercepted ship, could intervene in order to protect the rights of its citizens, however, this is not an option in the case of asylum seekers since, by definition, refugees can not avail themselves or have well founded reasons to reject the protection of their own State.[103]

(b) Ships With a Nationality

Asylum seekers are sometimes encountered by coastal States at the High Seas on a ship that has a nationality as in the Tampa Case. In this context, a distinction has to be drawn between the contiguous zone where the coastal State has limited control and that of other parts of the High Seas.

---

[101] *"Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein."*

[102] See UNHCR News Stories, UNHCR Calls on Leaders at EuroMed Summit to End Humanitarian Crisis in the Mediterranean, 25 November 2005, www.unhcr.org [visited on 11.07.2006]; Mathew also observes that towing a boat to a point beyond the contiguous zone is a practice which could be questionable from the perspective of safety of life at seaif the boat's engine is not working. (Penelope Mathew, *"Legal Issues Concerning Interception"*, Georgetown Immigration Law Journal, Vol. 17, 2003, p. 228.)

[103] See 1951 Refugee Convention, Article 1.

(i) Contiguous Zones

Article 33 of the UNCLOS sets forth a rule concerning a zone contiguous to the territorial sea, described as the contiguous zone which, may extend up to 24 nautical miles from the baselines from which the breadth of the territorial sea is measured, where the coastal State may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea or punish infringement of the laws and regulations committed within its territory or territorial sea. Contiguous zone is particularly important for our topic since although it is a part of the High Seas, it allows the coastal State to take certain measures such as interception without receiving the permission of the flag State. Therefore, in practice, States may prefer to wait until the ships to enter the contiguous zone in order to commence interception measures.[104]

UNCLOS is not quite clear on what enforcement measures can be taken by the Coastal States, it merely referres to exercise the control necessary to prevent infringement of its own laws.

Goodwin-Gill suggests:

"[i]f there are reasonable and probable grounds to believe that a vessel's intended purpose is to enter the territorial sea in breach of the immigration law, the coastal State may have the right to stop and board the vessel."[105]

(ii) High Seas

Ships with nationality benefit the freedom of navigation rule at the High Seas, which, involves uninterrupted navigation. The flag State has exclusive jurisdiction on these vessels. Therefore, any interruption with navigation would require consent of the flag state. For instance, the Haitian interception program of the United States that is mentioned above in the Sales case was based on the consent of

[104] For instance, this appears to be the case in Australian practice. (Mathew, p. 227.)
[105] Goodwin-Gill, The Refugee in International Law, p. 166.

the flag State in the form of exchange of notes.[106]

Article 8 of the Palermo Protocol on Smuggling contains a procedure for interception of ships with nationality at the High Seas, which, confirms the practice mentioned above. Accordingly, a State Party to the Protocol that has reasonable grounds to suspect that a vessel exercising freedom of navigation at the High Seas flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may notify the flag State and request confirmation of registry and if confirmed request authorization from the flag State in order to take appropriate measures with regard to the ship. In this regard, the flag State may authorize the requesting State:

"-To board the vessel; - To search the vessel; and - If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State."[107]

A State Party is, in principle, only allowed to take interception measures at the High seas with the express authorization of the flag State, however, the Article provides two exceptions to this general rule: First, the States may take measures without the authorization of the flag State if it is necessary to relieve imminent danger to the lives of persons on board. Second, it is also possible if authorization derives from a bilateral or a multilateral agreement.

According to the legeal framework described above, the actions taken by the coastal States, including inspection and redirection at the High Seas might be objected by the flag States.

As illustrated by the Tampa case, such framework can not be implemented effectively when asylum seekers are concerned since the flag states are reluctant to intervene and take the responsibility of asylum seekers on board. For instance, as Bailliet observes, the critisim of the Australian Government's refusal to allow

[106] Mathew, p. 228.
[107] See the Protocol on Smuggling., Article 8 para. 2.

disembarkation of asylum seekers did not even result in a discussion in Norway concerning the possibility of granting them asylum in Norway.[108]

In such cases, the Office of the UNHCR might be expected to make representations, in the absence of a flag State. Such representations were made in 1970s and 1980s when towing boats to the High Seas resulted in loss of life of Indochinese asylum seekers to Malaysia. As a result, an international agreement was reached according to which refugees were to be interned in Malaysia until they could be either resettled to third countries or else repatriated.[109]

(3) Stowaway Regime

Stowaways are not as visible as those boat people rescued in masses however, it is a group that shall not be omitted while discussing the scope of the non-refoulement principle. States provide periodic reports to IMO on number of stowaway cases. Accordingly the States reported 2415 stowaway between November 1999 and March 2005.[110] However, UNHCR believes that these numbers do not reflect the real situation.[111] There are even reports of incidents that stowaways are thrown at the sea in order not to avoid any trouble with the coastal State authorities.[112] This practice can be affected secretly since stowaways are not recorded on passenger list of a ship.

The Executive Committee has visited the issue in several conclusions. For

---

[108] Baillet, p. 747.
[109] Human Rights Watch Report on Malaysia, 2000, http://www.hrw.org/reports/2000/malaysia/maybr008.htm [visited on 10.07.2006]
[110] IMO Circulars, www.imo.org/includes/blastDataOnly.asp/data_id%3D11176/86.pdf [visited on 12.07.2006]
[111] Background Discussion Paper Prepared by UNHCR for informing the Expert Roundtable on Rescue at Sea and Maritime Interception in the Mediterranean; Athens, 12-13 September 2005, p. 5.
[112] For instance, see BRUSSELS, December 21 (AFP) – *"Two illegal stowaways were found dead in the water Wednesday in the Belgian port of Antwerp, after arriving by boat from Nigeria, prosecutors said. The two were among about 10 illegal immigrants found in a lock off the main port, after having arrived from Lagos, said a prosecution spokesman cited by the VRT Flemish-language television station. Emergency services were searching for other stowaways, who were believed to have spent the 10-day trip from the African port city in an unheated machine room on board a cargo vessel, he said. The immigrants were only lightly dressed, in chilly winter temperatures in the northern Belgian port, Europe's biggest after Rotterdam. The eight survivors were taken to hospital. The RTBF French-language television station said that the two dead immigrants had died during the trip and their bodies were thrown overboard on arrival. No further details were immediately available"* http://skyscrapercity.com/showthread.php?t=220858&page=3 [12.07.2006].

instance, the Committee recommends the States in its Conclusion No. 53 (XXXIX) 1988 on stowaway asylum seekers that *they:*

"must be protected against forcible return to their country of origin and should, when ever possible, be allowed to disembark at the first port of call for their asylum application to be determined by the local authorities."

The International Convention Relating to Stowaways, which was adopted in 1957, could not enter into force since it did not attract sufficient number of ratifications. In the absence of an international treaty in this field IMO tried to fill this gap through the IMO Committee System. In 2002 the Facilitation Committee adopted certain provisions on stowaways which, were later incorporated in the 1965 FAL Convention.[113] The Amended FAL Convention defines a stowaway as:

"[a] person who is secreted on a ship, or in cargo which is subsequently loaded on the ship, without the consent of the shipowner or the master or any other responsible person and who is detected on board the ship after it has departed from a port, or in the cargo while unloading it in the port of arrival, and is reported as a stowaway by the master to the appropriate authorities."[114]

A notable provision in the amended text is the Article 4.1. in Section 2(A) which reserves the provisions of the 1951 Refugee Convention. This provision gains importance when the provision in the following paragraph is considered. This paragraph indicates the purpose of the amendment as securing an early return or repatriation of the stowaway. The amendment seems to establish a balance between the interest of returning migrants back to their own countries and that of providing a safe heaven for refugees. Furthermore, the amendment provides in its Article 4.6.1 a notification requirement to the relevant authorities on the existence of a stowaway on board. [115]This is a crucial provision in order to avoid situations of throwing

[113] Convention on Facilitation of International Maritime Traffic, 1965, 591 U.N.T.S. 265.
Annex 2 to the FAL convention, as amended. FAL 29/18.doc amendments to the Annex to the FAL Convention. Section 4 – Stowaways. Drafted in November 2000 and entered into force in May 2003.
[114] Amended Annex 2, Section 1(A).
[115] *"Contracting Governments shall require shipmasters to make every effort to establish the identity, including nationality of the stowaway and the port of embarkation of the stowaway, and to notify the*

stowaways at sea.

Unlike other Conventions cited above, the amended FAL Convention contains certain disembarkation obligations on the first scheduled port, subsequent ports or call and the port of embarkation. Accordingly, public authorities in the ship's first scheduled port of call shall allow disembarkation of the stowaway, when the stowaway is in possession of valid travel documents for return, and the public authorities are satisfied that timely arrangements have been or will be made for repatriation and all the requisites for transit fulfilled.[116] Second, the State shall allow disembarkation of the stowaways when the public authorities are satisfied that they or the shipowner will obtain valid travel documents, make timely arrangements for repatriation of the stowaway, and fulfill all the requisites for transit. Third, the State shall, further, favorably consider allowing disembarkation of the stowaway, when it is impracticable to remove the stowaway on the ship of arrival or other factors exist which would preclude removal on the ship such as - a case is unresolved at the time of sailing of the ship; or - the presence on board of the stowaway would endanger the safe operation of the ship, the health of the crew or the stowaway. [117]

When disembarkation of a stowaway has failed in the first scheduled port of call, public authorities of the subsequent ports of call shall accept the stowaway if he/she has full nationality or residence permit in that State.[118]

Finally, when it has been established that stowaways have embarked a ship in a port in their State, public authorities shall accept for examination such stowaways being returned from their point of disembarkation after having been found inadmissible there. The public authorities of the State of embarkation shall not return such stowaways to the country where they were earlier found to be inadmissible. Finally, the State of embarkation is responsible for accepting the

---

existence of the stowaway along with relevant details to the public authorities of the first planned port of call. This information shall also be provided to the shipowner, public authorities at the port of embarkation, the flag State and anysubsequent ports of call if relevant."

[116] Article 4.9.2.

[117] Article 4.9.3.

[118] Article 4.10.1, Article 4.11.1 and Article 4.11.2.

stowaways if the ship is still within their territorial waters or in the immigration jurisdiction of that State.[119]

Since the entire system is designed on the return of stowaway it is very unlikely that an asylum-seeker or refugee will benefit such provisions. This must be the reason for reserving the provisions of the 1951 Refugee Convention in the amendment.

An asylum seeker would not satisfy the conditions set forth for being accepted in the first scheduled port of call and the subsequent port of calls due to the return requirement. The State of embarkation would in most cases either be his/her country of origin or another territory where he/she will be under the risk of persecution. Therefore, the only feasible option an asylum seeker has in this legal framework is the State of the first scheduled port where the State has the obligation to favorably consider disembarkation in the event that factors exist which would preclude removal from the ship. Even in this case, the obligation of the State herein is only to make a favorable consideration. Therefore, this provision does not force the coastal State to accept disembarkation.

(4) Refugee Seamen

1951 Refugee Convention contains a special clause in its Article 11 regarding the status of refugee seamen.[120] Accordingly, in case of refugees regularly serving as crew members on board a ship flying the flag of a State Party to the Convention, that State is obliged to give sympathetic consideration to their admission to its territory and the issue of travel documents to them or their temporary admission to its territory in order to facilitate their admission to another country.

This provision does merely impose the flag State an obligation to consider admission of refugee seamen favorably as in the above mentioned Article 4.9.3. of the FAL Convention. A disembarkation obligation on behalf of the flag State does not arise from this provision. Weis while admitting that is ‘only a recommendation’

[119] Article 4.12.1. and Article 4.12.2.
[120] Article 11.

interprets the word 'shall' in the text as an obligation on the States not to deny them the benefits mentioned without good reason.[121]

On the other hand, a right of entry for seamen is more strongly implied in several provisions of the Hague Agreement Relating to Refugee Seamen.[122] Article 2 of the Agreement indicates that:

"A refugee seaman who is not lawfully staying in the territory of any State and who is not entitled to admission for the purpose of so staying to the territory of any State, other than a State where he has well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, shall become entitled to be regarded…as lawfully staying in the territory: (a) of the Contracting Party under whose flag he, while a refugee, has served as a seafarer for a total of 600 days within the three years preceding the application of this Agreement to his case on ships calling at least twice a year at ports in that territory, provided that for the purposes of this paragraph no account shall be taken of any service performed while or before he had a residence established in the territory of another State; or, if there is no such Contracting Party, (b) of the Contracting Party where he, while a refugee, has had his last lawful residence in the three years preceding the application of this Agreement to his case, provided that he has not, in the meantime, had a residence established in the territory of another State."

While the Agreement contains a more concrete obligation concerning the admission of the refugee seamen, it provides a higher threshold in order to qualify as a refugee seamen. Accordingly, a period of service of 600 days within 3 years as qualifying period for the issuance of a travel document by the flag State. As a result, the possibility of benefiting this advantegous status as a refugee seamen has been mimimized for those refugees who are often in need of leaving their country of

[121] Weis, p. 84.
[122] Atle Grahl-Madsen, Göran Melander, Rolf Ring, *"Article 13"*, Gudmundur Alfredsson, Asbjorn Eide (eds), The Universal Declaration of Human Rights: A Common Standard of Achievement, The Hague 1999, Martinus Nijhoff Publishers, p. 277; Agreement Relating to Refugee Seamen, 1957, 506, U.N.T.S. 125, and Amending Protocol of 1973, 965, U.N.T.S. 445.

origin immediately.

(5) Persons Applying for Protection from the Territory of Another State

The 1951 Refugee Convention has been drafted having territorial contact with the receiving State in mind. On the other hand, the receving States, particularly the European Union Member States have recently developed so called 'Protected Entry Procedures' which refers to receiving and processing asylum applications or visa applications on asylum related grounds at their embassies abroad. [123] Through these procedures the States intend to control their refugee burden by restricting entry to their territories. This phenomenon raises the difficult question: Is there any territorial limit to the right to seek asylum? Does the admission requirement extend to individuals who apply for asylum from the territory of another State? As they are seperately examined above, the practice of non-refoulement has different characteristics within the territory of a State, at the frontier and on the High Seas. However, extending the protected scope of the principle to the territories of other States have distinctive complications since unlike the others, such practices take place under the sovereign authority of another State.

According to Goodwin-Gill the question of access to countries and therefore also of procedures for the determination of refugee status and the grant of asylum falls between competing responsibilities of States. The scholar observes that only some of these measures are clearly regulated by rules of international law. In this context, while intercepting refugees at the High Seas and returning them to a country where they will be persecuted constitutes a violation of the non-refoulement principle, State practice is still far from attributing responsibility to States who prevent the flight of a refugee to a safe heaven by refusing to issue a visa. [124]

On the other hand, Lauterpacht and Bethlehem seem to have a more liberal approach based on the jurisprudence under the human rights instruments. The

[123] Gregor Noll, *"Seeking Asylum at Embassies: A Right to Entry under International Law?"*, International Journal of Refugee Law,Vol. 17, No. 3, 2005, p. 542.
[124] Goodwin-Gill, The Refugee in International Law, p. 252.

scholars argue that:

"...the priciple of non-refoulement will apply to the conduct of State officials or those acting on behalf of the State whereever this occurs, whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc."[125]

Despite its vague formulation, this statement seems to include State practices within the territory of other States.

Noll criticises the approach of Lauterpacht and Bethlehem, stating that determining the scope of obligations under the 1951 Refugee Convention by drawing analogies to human rights instruments as the |ICCPR and the ECHR is not possible through bypassing the wording and context of the treaty norm to be interpreted. According to the writer this would be contrary to the interpretation rule laid down in the Vienna Convention on the Law of Treaties. The writer further argues that visa claims at embassies are different from rejection at the frontier and interdiction at the High Seas since these representations are situated outside the territory of the host State. When interdicting boats on the High Seas, the absence of competing territorial authority makes it easy for an interdicting State to establish control over interdicted boats and their passengers. The degree of control exercised by the sending State is drawn narrowly by international treaties and custom, and the principle authority is exercised by the receiving State. Finally, he indicates that the causal chain linking denial of an entry visa and harm relevant under the 1951 Refugee Convention is not easy to establish in such situations.[126]

Although Noll's opposition is well formulated it is open to criticism. First of all, as indicated above, the wording of Article 33 of the 1951 Refugee Convention does not limit the protected scope of the principle, to the contrary, it is drafted as to allow a broader interpretation by prohibiting refoulement "*in any manner whatsoever".* Therefore, it definitely allows cross-fertilization with human rights instruments. Secondly, Noll's suggestion puts the customary rules applicable for

[125] Lauterpacht, Bethlehem, p. 111.
[126] Noll, *"Seeking Asylum at Embassies: A Right to Entry under International Law?"*, pp. 550-551.

missions in charge of issuing entry visas at the heart of the problem. However, this in fact is a misinterpretation of the latest developments regarding 'Protected Entry Procedures'. Initiation of these procedures, which is a phenomenon of the last decade, hardly resembles the classical visa regimes that the writer desribes. As illustrated in detail with regard to the Lampedusa incident below, these procedures are established by bilateral treaties or arrangements between the State that sends the mission and the receiving State that the former has a dominant position in the relationship. The sending State determines all the terms and conditions of establishing the offshore processing zones. The border guards and police are trained by the sending State. The processing mechanism works completely for the benefit of the sending State in order to avoid its responsibilities arising from the 1951 Refugee Convention by preventing entry of asylum seekers to its own territory. And finally, the processing, detention and repatriation programme is financed by the sending State. These two States do apply 'concurrent jurisdiction' concerning the practice in question since they are both entitled legislative and enforcement jurisdiction in relation to the same factual circumstances.[127] Given these circumstances, none of the writer's arguments are valid. Rejecting the responsibility of the sending State for the acts committed by its own agents in the asylum and migration processing zones would be contrary to the obligation of interpreting the terms of the 1951 Refugee Convention in good faith. Effectiveness of the protection mechanism established under the 1951 Refugee Convention also necessitates such interpretation given the recent non-entre practices of States. Therefore, a distinction has to be drawn between the conventional consular relations and those off-shore processing zones where the sending State enjoys a dominant position vis-a-vis the receiving State.

(6) Overall Assessment on the Extra-territorial Application of the Principle

Whatever the mode of encounterance with asylum seekers and refugees within or outside the territory or the territorial sea in the context of a rescue operation, interception or as a stowaway, asylum seeker at an off-shore processing

[127] For a detailed analysis on the nature of jurisdiction see Vaughan Lowe, *"Jurisdiction"*, Malcolm D. Evans (ed.), International Law, Oxford; New York 2003, Oxford University Press, p. 333.

zone, the obligation to identify refugees falls upon the coastal State according to the 1951 Refugee Convention since the ordinary meaning of Article 33 of the Convention does not make any reference to entry at all. Thus, attaching too much weight to legal consequences of entry is not compatible with the text of Article 33[128].

Secondly, rejecting the applicability of the non-refoulement principle at the High Seas might result in total rejection of the responsibilities of a State under the 1951 Refugee Convention if all other means of access to the protection procedures are physically prevented. Therefore, this approach does clearly conflict with and defeat the object and purpose of the 1951 Refugee Convention.

Third, it is clear that this approach also breaches the obligation to interpret the text of the Convention in good faith.

Another aspect of this discussion on the applicability of the non-refoulement principle at the High Seas is its link with other instances where States tend to escape from responsibility through utilising extra-territorial channels. In 2003, the governments of Denmark, the Netherlands and the United Kingdom agreed on a policy called 'New Vision for Refugees' which intended to remove certain classes of asylum seekers to centres outside Europe or at its fringes. This initiative was inspired by the legal framework established by Australia in 2001 which, entailed the transfer of asylum seekers to, and the processing of their asylum claims in, third countries in the Pacific as described above. Although the United Kingdom received the support of Denmark, the Netherlands, Italy and Spain, it failed to convince a number of EU Member States, including Sweden, Germany and France to adopt this policy. The idea of outsourcing the asylum processing mechanism however, is still alive since it was implemented in a several pilot projects and also Germany has changed its position in 2004.[129]Given such developments in the legal environment confining the scope of the non-refoulement principle to the territories would to a great extent hinder the effectiveness of the 1951 Refugee Convention and the Article 33 thereof in particular. Therefore, UNHCR's position in this regard deserves support.

[128] For a view parallel to this conclusion see Mathew, p. 230.
[129] UNHCR, The State of the World's Refugees 2006, Chapter 2 Safeguarding asylum: Box 2.2 Outsourcing refugee protection: extraterritorial processing and the future of the refugee regime.

On the other hand, as Goodwin-Gill proposes, the mere refusal of disembarkation of asylum seekers shall not automatically be considered as a violation of the non-refoulement principle.[130] A breach of the non-refoulement principle occurs if return to the high seas would not leave any alternative to the asylum seekers other than returning home or to go to a third country which would send them back to the frontiers where his life or freedom would be threatened.[131]The words *'to the frontiers of territories where his life and freedom would be threatened'* in Article 33 has the same meaning as 'well-founded fear of persecution in Article 1 A(2) of the 1951 Refugee Convention[132] which, is analysed below in the section concerning the refugee definition.

This perspective provides a margin of appreciation to the coastal State which, encounters asylum seekers on the sea. Conducting the RSD process aboard the ship is a possibility. However, UNHCR does not favour this option since the facilities on board such as confidentiality, access to information and to the competent authority, presence of an interpreter are usually quite limited. Therefore, this option does raise concerns especially when the traumatic conditions of asylum seekers are concerned.[133]Furthermore, it must be recalled that if the asylum seeker is encountered through a rescue operation, the assisting ship is not considered as a safe place according to the IMO Guidelines either.

Therefore, the most preferrable option that a coastal State may choose is to allow disembarkation at least on a temporary basis, in order to determine the status of the asylum seekers.

Furthermore, it is possible to transfer the asylum seekers or refugees to a first country of asylum if the persons aboard the ship had already found and continue

[130] Goodwin-Gill, The Refugee in International Law, p. 155.
[131] Pallis, p. 349.
[132] Weis, p. 341.
[133] Background Discussion Paper Prepared by UNHCR informing the Expert Roundtable on Rescue at Sea and Maritime Interception in the Mediterranean; Athens, 12-13 September 2005, p. 8, available at http://www.coe.int [visited on 20.09.2006].

to enjoy protection in a first country of asylum[134]or to a safe third country where their claim will be determined from the territory of the country which will treat the asylum-seekers in accordance with the accepted international standards. This will ensure effective protection against refouelement and will provide the asylum seeker(s) with the possibility to seek and enjoy asylum.[135]

d) Exceptions to the Non-Refoulement Principle

The principle of non-refoulement is not an absolute principle in refugee law. The 1933 Convention Relating to the Status of Refugees which is the predecessor of the 1951 Refugee Convention had recognized 'national security' and 'public order' as exceptions to the principle.

Article 33 (2) of the 1951 Refugee Convention sets forth the exceptions to the principle as follows:

"The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

Accordingly, 'posing a danger to the security of the country in which he is' and 'having been convicted by a final judgement of a particularly serious crime that constitutes a danger to the community of that country' are the two exceptions listed by the article. The exceptions to the non-refoulement principle in Article 33 (2) are complementary to the exclusion clauses in Article 1 (F) which, provide a list of situations where the applicant will be excluded from the refugee status. UNHCR believes that the exclusion clauses mentioned above do serve different purposes and they should be considered separately.[136]However, this argument has little value

[134] EXCOM Conclusion No. 87 (L) 1999. (UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 197).
[135] See EXCOM Conclusion No. 85 (XLIX) 1998.
[136] See comment on Article 14 (UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Mininmum Standards for the Qualification and Status of Third

against the clear reference to refugee status in Article 33(2). Therefore, a person must qualify as a refugee in order to benefit the prohibition in Article 33.[137]In this regard, any exception to qualification as a refugee does also prevent a person to enjoy protection under the non-refoulement principle under the 1951 Refugee Convention.[138]It has to be noted however, that this argument is only valid for applying the principle within the framework of the 1951 Refugee Convention. Hence, one does not need to qualify as a refugee in order to benefit the non-refoulement principle under human rights instruments.

Declaration on Territorial Asylum contains an exception that does not exist in the 1951 Refugee Convention, namely 'mass influx' situations which may be resorted in order to safeguard the population.

Finally, it is sometimes argued that extradition may fall outside the protected scope of the principle.

The purpose of introducing such exceptions to non-refoulement under the asylum instruments was to strengthen the principle by making it a realistic policy for host countries.[139]Some more recent instruments however, took a different approach than the 1951 Refugee Convention on providing exceptions to the principle.

For instance, the 1969 OAU Convention contains no exception to non-refoulement. Paragraph 4 of the Article 2 however, contains a clause, which, may

---

Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, January, 2005); for further information on the exclusion clauses in Article 1 (F) see Section on refugee definiton below.

[137] Please note that the official recognition of refugee status is declaratory. Therefore, a persons does not need to be officially recognized in order to qualify as a refugee. In this context see paragraph 28 of the UNHCR Handbook:
"A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee." (UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, 1979; (re-edited in 1992))

[138] Kathleen M. Keller, *"A Comparative and International Law Perspective on the United States (Non)Compliance With Its Duty of Non-Refoulement"*, Yale Human Rights and Development Law Journal, 1999, p. 188.

[139] *Ibid.,* p. 187.

help the States to fill this gap:

"Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum."

Similarly, non-refoulement is not subject to any exception in either the American Convention on Human Rights or the Cartagena Declaration.

This approach of the OAU Convention reflects a much better understanding of the current state of law on the non-refoulement principle. The standard of protection in the 1951 Refugee Convention is left, in a way, behind the human rights instruments which, provide absolute protection against refoulement as it is discussed below. This is one of the areas where the complementary use of human rights instruments turned out to be extremely successful. Therefore, in practice the States Parties to the 1951 Refugee Convention had to establish new statuses such as subsidiary status which, provide less favorable treatment than the refugee status but protected against refoulement just like the later. In this regard, it has to be noted that although these two exceptions to the non-refoulement principle applies to refugees, the practical value of this discussion has been diminished due to the broader safety net provided by the human rights instruments.

It is observed that such trend against exceptions to non-refoulement outside the framework of the 1951 Convention has been reflected in the Conclusions of the Executive Committee. [140]For instance, although it is possible to justify extradition following conviction for a serious crime, the Committee states that *"refugees should be protected in regard to extradition to a country where they have well-founded fear*

[140] Lauterpacht, Bethlehem, p. 131.

of persecution".[141]

Given such developments, the two exceptions have still been retained in the 1951 Refugee Convention and even introduced into some recent instruments such as the Qualification Directive of the EC.[142]This situation may be explained by the fact that 'persecution' in the 1951 Refugee Convention can be regarded as a broader term compared to the terms 'prohibition of torture, inhuman and degrading treatment of punishment' in the human rights instruments under which, the non-refoulement principle is protected. It is true that in most cases, persecution will correspond to the prohibition of torture, inhuman and degrading treatment of punishment or the prohibition of arbitrary deprivation of life however; since the term is not defined in the 1951 Refugee Convention, in practice 'persecution' is interpreted as a much more encompassing concept than the freedoms cited above. Goodwin-Gill indicates: [143]

"less overt measures may suffice, such as the imposition of serious economic disadvantage, denial of access to employment, to the professions, or to education, or other restrictions on the freedoms traditionally guaranteed in a democratic society, such as speech, assembly, worship, or freedom of movement"

in order to be regarded as persecution.

One such example is the right to access to employment or losing the basis of living within the domain of persecution. The Austrian Federal Asylum Agency[144]considered as follows when it received an asylum application from a person of Kurdish origin who refused to work as a 'village guard' and that he had to leave his country because the Turkish authorities withheld every possibility for him to earn his living legally:

---

[141] EXCOM Conclusion No. 17 (XXXI) 1980, para. (c) at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 27.

[142] see Article 21 of the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standardsfor the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Prtection and the Content of the Protection Granted (OJ L 304/12 of 30.09.2004) (Herein after referred to as the 'Qualification Directive'.)

[143] Goodwin-Gill, The Refugee in International Law, p. 68.

[144] The original name is "Bundesasylamt".

"[t]he intensity of this measure constitutes a relevant persecution because the Kurd had no other way to earn his living and depended on the goodwill of the Turkish authorities."[145]

The Belgian practice also accepts that persecution may occur at the economic level. However, the socio-economic damage suffered by the applicant is not sufficient alone to make the fear well founded the applicant also needs to show that he has been subjected to discriminatory treatment which made his subsistence very difficult or impossible.[146]

Another example appears in the context of State Conscription. In the matter of Salim, the U.S. Migration Board found that the applicant's fear of punishment due to his refusal to be conscripted into the Afghan army where boys were forced to fight against their fellow countryman under Soviet command, constituted persecution.[147]

These measures would normally not be considered within the scope of the prohibition of torture, inhuman or degrading treatment or punishment under the human rights instruments and therefore, could be subject to the exceptions stipulated

---

[145] Klaus Hullmann, *"Austria",* Jean-Yves Carlier, Dirk Vanheule, Klaus Hullmann and Carlos Pena Galiano (eds.), Who is a Refugee: A Comparative Case Law Study, Boston 1997, Kluwer Law International, p. 43.

[146] Dirk Vanheule, "Belgium", Dirk Vanheule, Klaus Hullmann, Carlos Pena Galiano (eds.), p. 91.

[147] Mark R. von Sternberg, The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared, Martinus Nijhoff Publishers, The Hague; New York 2002, p. 126; On the other hand, although the right to consciensious objection does not exist within the European Convention on Human Rights the European Court of Human Rights has recently found a vioation of Article 3 in a consciencious objction case namely; Ülke v. Turkey, stating that *" The numerous criminal prosecutions against the applicant, the cumulative effects of the criminal convictions which resulted from them and the constant alternation between prosecutions and terms of imprisonment, together with the possibility that he would be liable to prosecution for the rest of his life, had been disproportionate to the aim of ensuring that he did his military service. They were more calculated to repressing the applicant's intellectual personality, inspiring in him feelings of fear, anguish and vulnerability capable of humiliating and debasing him and breaking his resistance and will. The clandestine life amounting almost to "civil death" which the applicant had been compelled to adopt was incompatible with the punishment regime of a democratic society. Consequently, the Court considered that, taken as a whole and regard being had to its gravity and repetitive nature, the treatment inflicted on the applicant had caused him severe pain and suffering which went beyond the normal element of humiliation inherent in any criminal sentence or detention. In the aggregate, the acts concerned constituted degrading treatment within the meaning of Article 3."(Ülke v. Turkey,* Judgment of 24 January 2006, ECtHR) It is interesting to note that the Court has applied a cumulative approach here in order to find a violation. This corresponds to the cumulative approach through the RSD process under the 1951 Refugee Convention

in Article 33 (2) of the 1951 Refugee Convention. In this regard, the exceptions mentioned above may still have limited value in practice.

(1) Danger to the Security of the Country

The scope of this exception is rather vaguely formulated in the 1951 Refugee Convention. The Article does not indicate the kinds of acts for which national security exception will be applied.

Goodwin-Gill interprets this vague formula in the light of the drafting history and concludes that the existence of a security risk is left to the judgement of the State authorities. In this context, he refers to a statement by one of the State representative during the negotiations interpreting the term 'reasonable grounds' as to allow States to determine whether there were sufficient grounds for regarding the refugee as a danger and whether the danger likely to be encountered by the refugee after refoulement was outweighed by the threat to the Community. [148]He further indicates that this interpretation is supported by immigration law and practice generally.[149]

On the other hand, the approach which grants States a broad margin of appreciation on determining the acts conerning national security is opposed by the majority of scholars and the UNHCR.

Weis argues that this exception shall be interpreted restrictively like all exceptions and that not every reason of national security may be invoked by States in this context.[150]

Keller shares this view and observes that 'threats to security' exception appears to be applied fairly narrowly. She links this fact to evidentiary concerns and further states that this exception is typically applied only in the case of immigrants who have manifested their dangerousness by criminal acts. In this regard, she makes a reference to Gunnel Stenberg's argument indicating that 'threats to security' clause

[148] Goodwin-Gill, The Refugee in International Law, p. 139.
[149] *Ibid.* p. 140.
[150] Weis, p. 342.

is meant to be more restrictive than the 'particularly serious crime' clause that follows.[151]

UNHCR made emphasis on the serious consequences of this judgement and therefore concludes that the exception provided in Article 33(2) should be applied with the greatest caution.[152] As with any exception to human rights guarantees, Article 33(2) must always be interpreted restrictively. Such an approach is particularly warranted in view of the serious possible consequences for the individual. Article 33(2) is, therefore, a measure of last resort, to be applied under extraordinary circumstances.[153]

Lauterpacht and Bethlehem consider that although States have a margin of appreciation in determining the reasonableness of the concerned, such margin of appreciation does not mean that such determination may be made arbitrarily. In this regard, the relevant State authorities must specifically address the question whether there is a future risk; and their sufficient evidence is shown in order to support this conclusion. Furthermore, the writers point to the fact that the acts regarding exclusion clauses in Article 1F which, is mentioned above as having a complementary character to the exceptions herein, gives the impression that the drafters of the 1951 Refugee Convention considered such safeguards to be inapplicable only in the event of serious acts such as committing a crime against peace, a war crime or a crime against humanity, a serious non-political crime or acts contrary to the purposes and principles of the United Nations.[154]

Given the open ended formula of the Article, it is not possible to make an exhaustive list of the acts threatening the security of a State. Security threat may appear in a variety of contexts. On the other hand, it is important to have an objective

---

[151] Keller, pp. 188-189.
[152] Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, Note on Non-Refoulement (Submitted by the High Commissioner), (EC/SCP/2), 1977, para. 14.
[153] UNHCR Comments Relating to Serious Criminals and Statutory Review Nationality Immigration and Asylum Bill 2002 of the United Kingdom, para. 2, http://www.unhcr.org.uk/legal/positions/UNHCR%20Comments/comments_2002_clause20.htm ,[visited on 17.07.2006]
[154] Lauterpacht, Bethlehem, pp. 135-136.

assessment of reasonable grounds based on concrete evidence. The serious effects of this decision must always be considered while striking a balance between the public order of the receiving country and the rights of the refugee.[155] The wording of the article implies that the acts in question must pose a present or future danger to the receiving State.[156]Furthermore, since the provision is articulated in singular terms it is the person who has committed the crime or acts in question, but not his spouse or relatives, shall be the one to be refouled by virtue of this provision.[157]

In practice, it is indicated that the national security exception may come into play when a refugee is engaged in activities aiming at facilitating the conquest of the Country where he is resident, by another State or works for overthrowing the Government of this country by force or other illegal means, or engages in activities which are directed against a foreign government which may result in threatening the country of residence. Finally, espionage, sabotage of military installations and terrorist activities are among those acts which are considered in this domain.[158]

(2) Conviction of a Final Judgement of a Particularly Serious Crime

The second exception to the non-refoulement principle that is stipulated in Article 33(2) is *"[conviction] by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."*

The first issue that has to be dealt with in this context is the temporal element of the crimes concerned. The crimes in question must have been committed in the receiving country or elsewhere subsequent to admission as a refugee. This appears from the interpretation of Article 33(2) together with the Article 1(F) b of the 1951 Refugee Convention. If the crimes prior to admission was covered by Article 33(2), then it would be difficult to explain why the drafters of the Convention had

[155] This balance is refferred to as 'the requirement of proportionalty' by Lauterpacht and Bethlehem. See *ibid.,* p. 137.
[156] Egli, p. 172; Lauterpacht, Bethlehem, p.135.
[157] Lauterpacht, Bethlehem, p.135.
[158] Grahl-Madsen, pp. 235-236.

inserted two provisions in the Convention with the same scope. [159]

The second and more challenging question with regard to the implementation of this article is how the severity test shall be applied. In this regard, it has to be determined whether the commission of a particularly serious crime is per se evidence of dangerousness to the community, or must these two elements be assessed and proved separately.

According to Goodwin-Gill it is unclear to what extent, if at all, a refugee convicted of a particularly serious crime must also be shown to constitute a danger to the community and that the jurisprudence of States is inconsistent in this regard.[160]

On the other hand, UNHCR is of the opinion that:

"[a] criminal conviction for a crime regarded as "particularly serious" - does not per se suffice for the application of Article 33(2). A further judgement has to be made that the particular refugee in question poses a present or future threat to the community of the country."[161]

The observations of Lauterpacht, Bethlehem[162] and Keller[163]in this regard all support the views of UNHCR; the scholars indicate that the weight of opinion among commentators have concluded that the two are separate requirements to be satisfied individually.

Therefore, the later view appears to be the prevailing one in the legal doctrine. Interpretation of this provision is still not an easy task since 'particularly serious crime' and 'danger to the community' are flexible terms which grant States a considerable margin of appreciation. Whereas the comments on avoiding arbitrary

---

[159] Lauterpacht, Bethelehem, p. 130.
[160] Goodwin-Gill, The Refugee in International Law, p. 140.
[161] UNHCR Comments Relating to Serious Criminals and Statutory Review Nationality Immigration and Asylum Bill 2002 of the United Kingdom, para. 3, http://www.unhcr.org.uk/legal/positions/UNHCR%20Comments/comments_2002_clause20.htm [visited on 17.07.2006], (herein after referred as the 'UNHCR Comments Relating to Serious Criminals').
[162] Lauterpacht, Bethlehem, p. 139.
[163] Keller, p. 189.

practices that are made with regard to the previous title is also valid here.

Weis suggests that capital crimes such as murder, rape, armed robbery and arson are definitely included. However, even in such cases the crime may not constitute a danger to the Community. For instance, a refugee may not constitute a danger to the community even if he/she commits a particularly serious crime if the crime is committed in moment of passion.[164]UNHCR recommends this to be determined on a case by case basis according to the circumstances of the crime.

The reverse meaning of this article also indicates that commission of multiple minor crimes as a habitual criminal may constitute the refugee as a danger to the community, however, he/she shall not be considered within the domain of Article 33(2) since no particularly serious crime has been committed. On the other hand, States sometimes do consider habitual criminals within the coverage of Article 33(2) even though the crimes concerned are not particularly serious individually.[165]

In practice States frequently resort to methods such as determining the severity of the committed crime according to its duration. For instance, National Immigration and Asylum Bill of the United Kingdom stipulates in its Section 72(2):

"A person shall be presumed to have been convicted by a final judgement of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is (a) convicted in the United Kingdom of an offence, and (b) sentenced to a period of imprisonment of at least two years."

This provision provides a presumption which can be rebutted if persuasive evidence exists that an individual is no longer a danger to the community notwithstanding the crime he has commited. It is quite doubtful however, to what extent this mechanism complies with the Article 33(2) since it does not contain any seperate assessment concerning the dangereousness of the refugee at the initial stage. UNHCR has also criticised United Kingdom for having shifted the burden of proof to

[164] Weis, p. 342.
[165] See for instance, *Ahmed v. Austria*, Judgement of 17 December 1996, ECtHR, Application No. 25964/94 http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en [visited on 17. 07.2006]

the asylum seeker with this amendment.[166]

(3) Is Mass Influx an Exception to the Principle of Non-refoulement?

Mass influx situation is defined by the Executive Committee in its Conclusion No. 100 as:

"(i) considersable numbers of people arriving over an international border; (ii) a rapid rate of arrival; (iii) inadequate absorption or response capacity in host States, particularly during emergency; (iv) individual asylum procedures, where they exist which are unable to deal with such large numbers"[167]

By definition, the way that the 1951 Refugee Convention was drafted appears to be better serving for the claims of individual asylum seekers. It is indicated that the refugee definition therein requires a case-by-case examination of subjective and objective elements[168]. In this respect, processing asylum claims individually may not be feasible or practical when mass influx of refugees are concerned. This consideration has lead some scholars to the conclusion that the Convention was not made to deal with mass influx situations.[169]

Combined with the reluctance of States to admit asylum seekers due to the excessive burden that they may encounter in mass influx situations, especially when there is no prospect of further resettlement or other forms of burden sharing, 'mass influx' may sometimes appear as a situation where States try to derogate from their obligation of non-refoulement under the 1951 Refugee Convention.[170] This argument is based on the statements of State representatives during the drafting process of the 1951 Refugee Convention and subsequent State practices.

---

[166] See UNHCR Comments Relating to Serious Criminals.
[167] EXCOM, Conclusion No. 100 (LV) 2004. at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 251.
[168] Goodwin-Gill, The Refugee in International Law, p. 8.
[169] Sayed Mahammad Ghari Seyed Fatemi, "Who is a Refugee?: Comparison of a Misconstrued Concept in International Human Rights Shi'i Figh and the Iranian Legal System", International Journal of Human Rights, Vol. 9, No. 2, 2005, p. 195.
[170] For instance, this was among the issues that the United States Supreme Court discussed in the *Sale v. Haitian Centers Council* Case above.

With regard to the drafting history, the following statement of Swiss Representative Mr. Zutter is frequently visited in order to justify such claims:

"From this logic 'the Swiss Government considered that in the present instance the word[refoulement] applied solely to refugees who had already entered a country, but were not yet resident there....states were [therefore] not compelled to allow larger groups of persons claiming refugee status to cross its frontiers'"[171]

This statement was supported by the representatives of Italy, the Netherlands, Belgium, France and the Federal Republic of Germany during the Conference.[172] Therefore, it was ruled by the President of the Conference that the Article did not apply to mass influx situations.[173]

The State practice on mass influx is materialized in the form of declarations and measures such as closing borders. In this context, Article 3 (2) of the United Nations Declaration on Territorial Asylum adopted in 1967 constitues the firmest standpoint for States that intend to escape their responsibilities towards refugees in mass influx situations. This Article contains the following exception to non-refoulement:[174]

"*2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of*

[171] A/Conf.2/SR.16, p. 6., www.unhcr.org [visited on 17.07.2006]
[172] *Ibid*. pp. 11-12.
[173] *"Baron van BOETZELAER (Netherlands) recalled that at the first reading the Swiss representative had expressed the opinion that the word'' expulsion'' related to a refugee already admitted into a country, whereas the word "expulsion'' related to a refugee already admitted into a country, whereas the word "return'' ("refoulement'') related to a refugee already within the territory but not yet resident there. According to that interpretation, article 28 would not have involved any obligations in the possible case of mass migrations across frontiers or of attempted mass migrations. He wished to revert to that point, because the Netherlands Government attached very great importance to the scope of the provision now contained in article 33. The Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory.At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation. From conversations he had since had with other representatives, he had gathered that the general consensus of opinion was in favour of the Swiss interpretation. In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33. There being no objection, the PRESIDENT ruled that the interpretation given by the Netherlands representative should be placed on record."* (ibid.)
[174] UNGA Res. 2312(XXXII).

a mass influx of persons."

The mass influx exception reappeared in the Report of the UN Conference on Territorial Asylum in April 1977. This Article was adopted upon a proposal by the Turkish Government at the Conference on Territorial Asylum by 24 votes to 20, with 40 abstentions. The Turkish Government's position was that non-refoulement might not be claimed in exceptional cases where a massive influx constitutes a serious problem to the security of the State.[175]

Another aspect of State practice that is addressed in this context is the way States respond to mass influx situations. Fitzpatrick addresses to the influx of refugees from Hungary in 1956 as a historical precedent.[176] In this case, the receiving States offered asylum seekers temporary protection if more distant States agreed to accept such refugees for ressettlement.[177]

The practice of providing temporary protection was also established by the African States which, developed a generous protection policy based on the traditional African hospitality.[178]This tendency was reflected in the 1969 OAU Convention that broadened the refugee definition as to include persons fleeing *"external agression, occupation, foreign domination or events seriously disturbing public order."*[179]However, the limits of traditional hospitality were exceeded as the number of refugees increased parallel to the causes of flight with the influx of refugees from the Southern Africa to the North in the post-independence Africa between 1978/9-1989 which, is referred to as the 'long decade'.[180] The increase in the number of refugees initially resulted in a new initiative where the concept of burden sharing was formally introduced.[181]However, the mass refoulement of the Liberian refugees in 1996 from Tanzania and the former Zaire to Rwanda and Burundi indicated a shift in

[175] Report of the UN Conference on Territorial Asylum in April 1977, UN Doc. A/CONF.78/C.1/L.28/Rev.1.
[176] Barnett, p. 247.
[177] Fitzpatrick, p. 283.
[178] *Ibid.,* p. 283.
[179] OAU Convention, Article I(2)
[180] Asha Hans, Astri Suhrke, *"Responsibility Sharing, Reconceiving International Refugee Law"*, James Hathaway (ed.), p. 90.
[181] *Ibid.*

the traditional African attitudes. [182]

A similar tendency of shift in practices was observed in the Latin American countries at the end of 1970s and the beginning of 1980 due to the escalating conflicts in Nicaragua and El Salvador which, created the largest influx of refugees in the history of Latin America although Latin America had strong traditions of asylum within the region generally characterized by liberal asylum policies. Such liberal asylum policies were later reflected in the Cartagena Declaration of 1984 as a broadened definition of refugee which was very similar to the definition in the OAU Convention. Although, this definition was never formalized as a treaty among the Latin American States, it was transposed into the domestic laws of 10 Latin American States[183]

Amnesty International reported in 1997 that many States in Asia had acted as host to large numbers of refugees including those from Myammar Srilanka, Tibet, Bhutan even if they often had lacked the means to provide much support. However, in recent years refugees had been encountering more difficulties in gaining safety and protection even in these Asian countries of asylum due to financial shortcomings. And some of them were being turned away.[184]

The practices of European States were not much different in the last two decades. For instance, Turkey had received about 60.000 Kurdish Peshmerga in 1988 due to the military campaign directed against them by the Iraqi Army after the cease-fire between Iran and Iraq. This was followed by the admission of 310.000 ethnic Turks from Bulgaria fleeing from the repressive Bulgarian regime. [185] However, Turkey closed its borders to the Iraqi citzens both in the Gulf War in 1991 and

---

[182] Fitzpatrick, p. 283.
[183] UNHCR, The Refugee Situation in Latin America: Protection and Solutions Based on the Pragmatic Approach of the Cartagena Declaration on Refugees of 1984, document prepared in order to facilitate the discussion between the participants of the regional preparatory meetings for the final commemorative event of the 20th anniversary of the Cartagena Declaration on Refugees of 1984, to be celebrated in Mexico City, on November 15th and 16th of 2004. (International Journal of Refugee Law 2006 Vol. 18(1), p. 252-270.
[184] Amnesty International, Asia: Etnicity and Nationality, 10.10.1997 AI Index: ASA 01/01/97.
[185] Kemal Kirişçi, *"Provide Confort and Turkey: Decision Making for Humanitarian Intervention"*, http://www.kent.ac.uk/politics/research/kentpapers/kirisci.html [visited on 19.07.2006].

2002.[186]

In 1992, 340,000 Bosnian refugees and a total number of approximately 600,000 of their dependants fled to Croatia. This number represented 12 per cent of the total population in the Country and in some towns outnumbered the indigenous residents. In June 1992, it was estimated that the financial burden this refugee population placed upon Croatia amounted to USD/66 million a month. As a result, the Croatian government announced that only those refugees who were in possession of a 'letter of guarantee', a declaration of sponsorship by relatives, friends or organizations in Croatia, or a third country, stating that the refugee would be financially supported while in Croatia, would be permitted to enter Croatian territory. And finally, the Croatian Government started to apply even tighter measures such as allowing the entry for only the refugees in direct transit to other European countries.[187]

The pattern was repeated in 1999 during the Kosovo War when more than 130,000 Kosovar Albanian refugees arrived in the Former Yugoslav Republic of Macedonia. Within nine weeks time the number of refugees fled to Macedonia reached 344.500. Macedonia had calculated that it could host 20,000 refugees and had informed the United States, the UN, NATO and the European Union, together with requests for assistance.[188] However, the amount of refugees hosted by Macedonia in camps and private homes by far exceeded this estimation. Coleman indicates that Macedonia's unwillingness to host refugees was due its concerns for the internal stability of the young nation-state which, feared that large numbers of ethnic Albanian refugees entering the country could destablize the ethnic composition and increase the risk of Macedonia being forced into the conflict. Combined with the concerns related to the already suffering Macedonian economy this gave a strong motivation for the Macedonian Government to close its borders.

[186] Human Rights Watch Briefing Paper, Iraqi Refugees, Asylum Seekers, and Displaced Persons: Current Conditions and Concerns in the Event of War, February 13, 2003, http://www.hrw.org/backgrounder/mena/iraq021203/3.htm [visited on 16.06.2006]; For detailed information concerning Turkey's practices see Marjoleine Zieck, UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis, 1997, Martinus Nijhoff Publishers, pp. 171-260..
[187] Coleman, pp. 25-26; Weis, pp. 341-342.
[188] *Ibid.,* pp. 33-34.

The authorities resorted to periodic border closings during the conflict which, resulted in the plight of tens of thousands of refugees.[189]

Given such state of affairs in State practice, the legal aspects of applicability of the non-refoulement principle to mass influx situations needs a careful assessment.

Despite the statements of certain State representatives during the drafting process indicating that the 1951 Refugee Convention should not apply in mass influx situations, the text of the 1951 Refugee Convention does not support any exception as such,[190] nor does it have any opening for interpretation of its inclusion[191]since exceptions to the principle that are stipulated in Article 33 (2) must be interpreted restrictvely as *numerus clausus.*

Second, Durieux and Mc Adam have set forth rather convincing arguments against the view that the definition of refugee in Article 1 exclusively confines the scope of the 1951 Refugee Convetion to individual refugees. The writers argue that the said requirement of a case-by-case examination of asylum claims is a misconception. The '*prima facie'* refugee status determination which, refers to the determination of refugee status on the basis of the objective circumstances leading to the mass displacement, may be resorted as a contsructive way of coping with mass influx situations. This has been the traditional response to mass influx of refugees and remains as a wide spread practice in Africa. [192]

Jackson confirms this suggestion by stating that mass influx situations normally have a political background and often a persecutory element which, could also justify a *prima facie* determination of group refugee status according to the definition in the 1951 Refugee Convention.[193]

Another indication of the applicability of the non refoulement principle is

[189] *Ibid.,* pp. 35-36.
[190] See Lauterpacht, Bethlehem, p. 119; Jean-François Duieux, Jane Mc Adam, *"Non-Refoulement Through Time: The Case for a Derogation Clause to the Refugee Conventionin Mass Influx Emergencies",* International Journal of Refugee Law, Vol. 16., No. 1, 2004, p. 9.
[191] Coleman, pp. 44-46.
[192] Jean-François Duieux, Jane Mc Adam, p. 9.
[193] Ivor C., Jackson, The Refugee Concept in Group Situations, Martinus Nijhoff Publishers, The Hague 1999, p. 458.

the efforts of the Executive Committee as a body comprised of State representatives. The Executive Committe was compelled to consider this issue at the beginning of 1980s due to the increasing number of mass influx situations all around the World and the inconsistent practices of States. The Executive Committe Conclusion No. 19 in 1980 was a response to the failure of the receiving States to protect the interests inherent in the 1951 Refugee Convention. In this Conclusion, the Committee considered that *"the need for the humanitarian legal principle of non-refoulement to be scrupulously observed in all situations of large-scale influx"*.[194] Despite the strong wording of this Conclusion, the Committee felt the need to revisit the same issue the following year.

Conclusion No. 22 is a landmark document in this context. The Committee recommended the States Parties to admit the asylum seekers and to provide at least temporary refuge if the "*State is unable to admit them on a durable basis. The Committee also provided a long list of protection measures concerning the treatment of these refugees."*[195]According to Sztucki, Conclusion No. 22 does not only reflect the existing principle of non-refoulement as a mandatory rule of international law but it also shows the way for a progressive development of law and acceptable State behaviour.[196]

In the recent years, the Committee has been putting more emphasis on the burden sharing arrangements which appears to be at the heart of the matter. The Committee held in the Conclusion No. 85 (XLIX) 1998 on international protection stressed that access to protection should not be made

"dependent on burden-sharing arrangements first being in place, particularly because respect for fundamental human rights and humanitarian

[194] EXCOM Conclusion No. 19 (XXXI) – 1980 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 30.
[195] EXCOM Conclusion No. 22 (XXXII) 1981 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 36.
[196] Jerzy Sztucki, *"The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme",* International Journal of Refugee Law, Vol. 1, No. 3, 1989, p. 301 at Eggli, p. 164..

principles is an obligation for all members of the international community".[197]

The Comittee further developed this burden sharing perspective with the Conclusion on International Cooperation and Burden and Reponsibility Sharing in Mass Influx Situations adopted in 2004[198]where the Committee encouraged States "to seek to develop, as early on in a crisis as possible, a comprehensive plan of action, including within the Convention Plus[199] context, that includes arrangements on a bilateral or a multilateral basis to apportion burdens and responsibilities in response to specific mass influx situations"[200]. Moreover, the Conclusion in question contains a list of points to be considered while designing such arrangements.[201]

While these were the initiatives endorsed by the Executive Committee, a conference was held in Delhi, in 2002, by the International Law Association, Committee on Refugee Procedures[202]which, reflects the approach of the academia on the matter. The Committee on Refugee Procedures refrained from proposing a draft convention on temporary protection. The reason for this was that some members of the Committee were concerned that such an initiative might lead to solutions that would weaken the obligations of States rather than strengthening it in today's restrictive international climate. All Committee Members agreed on the fact that a draft declaration on temporary protection would serve as an important tool to remind States of their obligations under the 1951 Refugee Convention. The Committee

[197] See EXCOM Conclusion No. 85 (XLIX) 1998.
[198] EXCOM Conclusion No. 100 (LV) – 2004 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 251.
[199] 'Convention Plus' is an international effort initiated, in late 2002, and coordinated by UNHCR which, aims to improve refugee protection worldwide and facilitate the resolution of refugee problems through multilateral special agreements. This is planned to be achieved through a process of discussion and negotiations on the disputed areas of the 1951 Refugee Convention in order to adapt it to the contemporary environment of asylum. (UNHCR Press Releases, *"Lubbers Proposes "Convention Plus" Approach"*, 13 September 2002, http://www.unhcr.org [visited on 20.07.2006]).
[200] *Ibid.,* Article (g).
[201] *Ibid.,* Article (j).
[202] The Committee on Refugee Procedures is comprised of the most prominent scholars working in the field of asylum law. Members of the Committe who took part in the Delhi meeting were Kay Hailbronner (Germany), Guy. S. Goodwin-Gill (United Kingdom), Walter Kälin (Switzerland), Michale Byers (United Kingdom), S V Chernichenko (Russia), Woon-San Choi (Korea), J P L Fonteyne (Australia), Yoshio Kawashima (Japan), Jang Hie Lee (Korea), Stephan H Legomsky (United States), Erik Lampert Sweden), Dinesh Chand Mathur (India), Ved P Nanda (United States), Bruno Nascimbene (Italy), Micahel Petersen (Switzerland), Olaf Reermann (Germany), Volker Turk (Austria), Mieczylawa Zdanowics (Poland), M Zieck (Netherlands), Gottfried Zurcher (Switzerland), available at http://www.ila-hq.org/ [visited on 18.07.2006].

confirmed the Executive Committee's view on mass influx situations and that there was a consensus that at least temporary protection should be provided in situations of mass-influx of persons. The Committee also agreed that temporary protection should allow suspension of asylum proceedings for some time so that States can provide protection to such persons without being compelled to go into full-fledged RSD procedures.[203] However, the Committe further indicated that temporary protection should only be used in exceptional cases where the application of the usual procedures is no longer possible or practical.[204]

A considerable part of the discussions of the Committee was devoted to the Directive on Minimum Standards for Giving Temporary Protection in the Event of Mass Influx adopted by the Council of the European Union on 20 July 2001.[205] It was established that the Directive corresponded to a great extent to the views of the Executive Committee on mass influx situations.

If the legal framework of asylum in mass influx situations is as described above by UNHCR and the scholars, how can the State practice which, materialized as exceptions in the 1967 Declaration on Territorial Asylum and the 1977 Report of the UN Conference on Territorial Asylum, or the above stated measures of border closings be explained?

The answer is simple; these are violations of international law, 1951 Refugee Convention in particular. Then one may ask why these States so explicitly commit such violations or confortably pay lip service in this direction. The answer for this question may be found at the nature of mass influx situations. Recalling that *'inadequate absorption or response capacity in host States'* is a part of the definition of mass influx, it may be imagined that the States which signed under such non-binding documents or closing their borders were in fact referring to a state of

[203] Final Report and Draft Guidelines on Temporary Protection of the Delhi Conference in 2002, adopted by the Committee on Refugee Procedures of the International Law Association, p. 2.
[204] *Ibid.,* p. 6.
[205] EC Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof, OJ L 212/12, 07.08.2001. (Herein after referred to as the 'Temporary Protection Directive'.)

necessity.

The 'state of necessity' is a valid justification for breach of a State. It does not indicate a denial of the obligation but it provides an avenue for justification in order to lift the State's responsibility.[206]This conclusion is supported by the fact that in all of the incidences provided above the States concerned were willing to admit refugees at some point but decided to close their borders in extreme conditions threatening either their public order or security.

Article 25 of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts[207]contains a provision on the state of necessity as an expression of a customary norm of international law. Accordingly:

"...Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act…[i]s the only way for the State to safeguard an essential interest against a grave and imminent peril"

Article 25 requires that the situation must endanger an 'essential interest' of the State and place it in 'grave and imminent peril'. Boed examined the applicability of the state of necessity in the Draft Articles on the non-refoulement principle, particularly in cases of mass influx situations in an article that he published in the Yale Human Rights and Development Law Journal.[208] The writer considered that 'essential interest' did not mean that the interest in question to be a matter of the existence of State as this was clearly mentioned in the ILC' Commentary on the Draft Articles. [209] Therefore, 'essential interest' might be related to internal stability as in the case of Macedonia, by a large influx of persons of a particular ethnic group. It may as well be related to the maintenance of economic stability or even

[206] Roman Boed, *"State of Necessity, as a Justification for Internationally Wrongful Conduct"*, Yale Human Rights and Development Law Journal, Vol. 3, No. 1, 2000, p. 1.
[207] Responsibility of States for Internationally Wrongful Acts, 2001, Official Records of the General Assembly, Supplement No. 10 (A/56/10). The text was reproduced as it appears in the annex to UNGA Res. 56/83,12 December 2001, http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf [visited on 20.07.2006].
[208] Boed, "*State of Necessity, as a Justification for Internationally Wrongful Conduct",* pp. 1-40.
[209] *Ibid.,* p. 15.

environmental protection.[210]

Sometimes an 'essential interest' may appear on account of multiple causes such as the closing of border by Turkey to the Iraqi Kurds in 1991 and 2002. The existence of an ethnicity based disorder in the South East Turkey played a role in Turkey's decision as well as the excessive economic burden it would bring to the Turkish economy.

The second condition for resorting to the 'state of necessity' is indicated as the existence of 'grave and imminent peril' in the Article 25 of the Draft Articles. It is not quite clear how much of a threat to public order or national security is required in order to satisfy this condition. Boed notes that ILC rather vaguely refers to the term 'imminent peril' as "a threat to the interest at the actual time" in its Commentary.[211] The existence of these conditions must be assessed on a case by case basis.

Finally, the act in question must be the only way for the State to safeguard its essential interest. For instance, if a State is concerned that admission of refugees in a particular incident would threaten its economic order, but receives financial assistance offers from other States or international organizations in order to cover potential damage caused such influx, rejection of such offers may prevent such State from justifying its acts resulting in refoulement under the State of necessity.

In fact, the attraction of invoking the state of necessity in mass influx cases is shadowed to a great extent by another provision in the Draft Articles namely, Article 26 which, provides: *"Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law."*

Vienna Convention on the Law of Treaties defines a peremptory norm of

[210] In this respect the writer refers to the Gabčikovo-Nagymaros Case of the International Court of Justice where the Court considered that a State's protection of its environment, even when limited to a particular region rather than the State's entire territory, constitutes an essential interest of the State within the within the meaning of ILC Draft Articles. (Ibid.)
[211] *Ibid.*

general international law in its Article 53:

"a norm accepted and recognized by the international community of states as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

In this regard, the Executive Committee's observation in the Conclusion No. 25 is notable. The Committee considered that *"the principle of non-refoulement…was progressively acquiring the character of a peremptory rule of international law.* [212]

The fact that Article 33 of the 1951 Refugee Convention is among the provisions that the States Parties may not make reservations according to the Article 42 supports this argument. This argument however, is less than convincing since even the customary rule nature of the principle is currently debated among scholars.[213]

On the other hand, the answer for this question may be different with regard to the prohibition of refoulement under the human rights mechanisms since both the prohibition of torture[214] and the prohibition of arbitrary deprivation of life that non-refoulement rule is affiliated with are regarded as peremptory rules of internatioal law.[215]

---

[212] EXCOM Conclusion No. 25 (XXXIII) 1982, para. (b) at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 45.

[213] See infra section on the non-refoulement principle as a cusomary norm.

[214] Jastine Barrett, *"The Prohibition of Torture under International Law; Part 1: The Institutional Organization"*, International Journal of Human Rights, Vol. 5, No.1, 2001, p. 3.

[215] Human Rights Committee of the ICCPR observed in its General Comment No. 24 that prohibition of Torture constitutes *jus cogens*. (General Comment No. 24 (52) 1994, UN Doc. CCPR/C/21/Rev. 1/Add. 6, 2, November 1994, para. 10.); The Inter-American Commission on Human Rights has established in its Report on the Situation of Human Rights in the Dominican Republic that right to life is a peremptory rule of law. (See Chapter IV, para. 135, OAE/SER.L/V/III.104 Doc. 49 Rev. 1, 7 October 1999.); Rene Bruin and Kees Wouters, *"Terrorism and the Non-Derogability of Non-refoulement,"* International Journal of Refugee Law, Vol. 15, No. 1, 2003, p. 5; Jean Allain, "The *Jus Cogens* Nature of *Non-refoulement*," International Journal of Refugee Law, Vol. 13., No.4, 2001, p. 538; David Weissbrodt, Isabel Hörtreitere, *"The Principle of Non-refoulement: Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-refoulement Provisions of Other International Human Rights Treaties"*, Buffalo Human Rights Law Review, Vol. 5, 1999, p. 61.

Accordingly, a State may only justify its wrongful act through the 'state of necessity' if the mass influx is related to a persecution that is out of the scope of the right to life or prohibition of torture. This is however, quite unlikely in the incidences cited above where the mass influx situations concerned erupted from different forms of aggression.

(4) Applicablity of the Non-Refoulement Principle in Extradition Cases

The 1951 Refugee Convention does not make any reference to the extradition of refugees as an exception to the non-refoulement principle. Therefore, the text of article 33(1) of the 1951 Refugee Convention would not allow extradition to be accepted as an exception since, as indicated above, the exceptions in this article should be interpreted restrictively particularly considering their consequences.

This issue however, was a part of the debates during the drafting process. The French representative for instance asked that it should be put in the Summary Record that the Article was without prejudice to the right of extradition.[216] He was followed by the representative of the United Kingdom who claimed that the matter of extradition treaties between countries of refuge and countries of persecution was outside the scope of the Convention.[217] He further noted that most of the extradition treaties that the United Kingdom signed already expressed that the crime for which the criminal was to be returned could not be of a political nature.[218]

This is an approach that confines the scope of the non-refoulement principle only to political grounds. In fact, the asylum mechanism established under the 1951 Refugee Convention was much more comprehensive.

Weis criticises the statements of the representative of the United Kingdom on the ground that they could not explain

"why the non-refoulement principle should not apply where extradition is requested for a non-political crime and the requested person fears disproportionate

[216] UN doc. A/Conf.2.SR.35, p. 11.
[217] Weis, p. 342.
[218] *Ibid.*

punishment or persecution apart from punishment for one of the reasons mentioned in Article 1 of the Convention."[219]

Therefore, the writer concludes that Convention prevails over the extradition treaties concluded between the States Parties previuosly.[220]

Apart from the criticisms towards the statements in the drafting process, there is a consensus among the scholars that the subsequent State practice has clarified this misconception of the 1951 Refugee Convention in this regard.[221]

First, the principle of non-refoulement is included in the standard setting international law instruments on extradition adopted after the 1951 Refugee Convention such as Article 3(2) of the 1957 European Convention on Extradition[222] and Article 4(5) of the 1981 Inter-American Convention on Extradition[223] and Article 3(f) of the Model Treaty on Extradition adopted by the United Nations General Assembly on 14 December 1990.[224]Therefore, it is clear that the non-refoulement principle is a part of the extradition regimes today.

Second, the Executive Committee has explicitly confirmed this argument in

---

[219] *Ibid.*
[220] *Ibid.*
[221] See Goodwin-Gill, "The Refugee in International Law", p. 147; Chimni (ed.), p. 90; Lauterpacht, Bethlehem, pp. 27-28; Weis, p. 342.
[222] *"1. Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence. 2. The same rule shall apply if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons."* (European Convention on Extradition, Paris, 13 December 1957; ETS No. 24, entered into force 18 April 1960)
[223] At 4(5) of the 1981 Inter-American Convention on Extradition precludes extradition when *'it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons'.* (Inter-American Convention on Extradition, Caracas, 25 February 1981, OAS Treaty Series No. 60, entered into force 28 March 1992, 326).
[224] *"Extradition shall not be granted in any of the following circumstances:… (f) If the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14;"* **(**Model Treaty on Extradition, adopted by the United Nations General Assembly on 14 December 1990, UN doc**.** A/RES/45/116).

its Conclusion No. 17 (XXXI) in 1980. [225]

Finally, the way non-refoulement principle has been developed under human rights instruments does not allow extradition to be accepted as an exception to the principle. Complementary use of human rights instruments always prevents extradition measures to be treated differently than other administrative measures resulting in the sending of a person who is seeking international protection to the territory of another State.[226]

2. Non-Refoulement Principle as a Customary Rule of International Law

The answer for the question whether non-refoulement has acquired the status of a customary norm is crucial especially as a tool for engaging those States which are not party to the 1951 Refugee Convention to the practice that is in line with international standards. Today it has become more apparent that asylum law may only operate efficiently when the standards concerned are widespread on a geographical basis. Otherwise, a transit country which does not consider itself bound with such standards like Libya may appear as a collaborator of a target country that has burden shifting intensions such as Italy in refoulement of asylum seekers as in the Lampedusa incident.[227] In the end, it is often too late to help the asylum seekers,

---

[225] *"(c) Recognized that refugees should be protected in regard to extradition to a country where they have well-founded reasons to fear persecution on the grounds enumerated in Article 1(A)(2) of the 1951 United Nations Convention relating to the Status of Refugees; (d) Called upon States to ensure that the principle of non-refoulement is duly taken into account ın treaties relating to extradition and as appropriate in national legislation on the subject;"* (See EXCOM Conclusion No. 17 (XXXI) 1980).

[226] *Soering v. the United Kingdom*, ECtHR, Judgement of 7 July 1989, Application No. 14038/88; *Richard Lee Goldstein v. Sweden*, ECtHR, Admissibility decision of 12 September 2000, Application No. 46636/99; *Chitat Ng v. Canada*, Communication No. 469/1991, Views of the Human Rights Committee, 5 November 1993, UN Doc. CCPR/C/49/D/469/1991 (1994); *Agiza v. Sweden*, Communication No. 233/2003, Decision of the Committee Against Torture, 20 May 2005 UN Doc. CAT/C/34/D/233/2003.

[227] Being situated 200 km South of Sicily and 300 km North of Libya, the Island of Lapedusa became the main destination of arrival for undocumented migrants coming to Italy through Libya in 2004. It is estimated that 10, 497 migrants transited through Lampedusa that year. After staying in the reception centre for 5 to 45 days, most of the migrants were transferred to Sicily while others are expelled to Libya. Italy has established a collaboration on illegal migration with Libya which initially started with a general agreement to fight terrorism in 2000 and subsequently the collaboration was extended by signing a readmission agreement. In this context, Italy also trains Libyan border guards and police officers. Moreover, Italy finances detention and repatriation programmes for irregular migrants in

after the persons concerned are sent back to the unsafe collaborator and subsequently to the countries of origin where they are persecuted. Most of these people remain as anonymous figures in the statistical data of the UNHCR or the European Union.

The 'Statute of the International Court of Justice' stipulates in its Article 38 that: *"international custom, as evidence of a general practice accepted as law"* is among the sources of international law applicable by the Court.

ICJ has established the exact meaning and scope of this concept in its landmark case of North Sea Continental Shelf.[228]The Court points to three conditions[229] to be fulfilled in order to establish that a rule has become an

---

Libya. No official data is available on the countries of origin or the reasons for migration. UNHCR has stressed the presence of refugees and asylum seekers among those detained as well as among those expelled to Libya. However, the Italian authorities all refer to the camp residents as illegal migrants. (Rutvica Andrijasevic, How to Balance Rights and Responsibilites on Asylum at the EU's Southern Border of Italy and Libya, Centre on Migration Policy and Society, Working Paper No. 27, University of Oxford, 2006. pp. 3-4.)

[228] North Sea Continental Shelf Case, Judgement of 20 February 1969, ICJ Reports 1969.

[229] *"In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the opinio juris, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained. (para. 71)*

It would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally normcreating character such as could be regarded as forming the basis of a general rule of law… Yet in the particular form in which it is embodied in Article 6 of the Geneva Convention, and having regard to the relationship of that Article to other provisions of the Convention, this must be open to some doubt….it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties,-but this is not normally the subject of any express provision, as it is in Article 6 of the Geneva Convention. Secondly the part played by the notion of special circumstances relative to the principle of equidistance as embodied in Article 6, and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potentially norm-creating character of the rule. Finally, the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention…(para. 72)

With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. (para. 73)

…State practice, including that of States whose interests are specially affected, should have been both

international custom. First, the rule must have a fundamentally norm creating character. Second, State practice must be consistent, widespread and representative, including those States whose interests are specially affected. Third, general recognition of the rule.

a) Fundamentally Norm-Creating Character

International Court of Justice attributed special weight to relationship between the rule concerned and other provisions of the Convention; and the possibility of making reservations to the provision in this regard in the North Sea Continental Shelf Case.

Article 33 is undoubtfully at the heart of the mechanism established by the 1951 Refugee Convention. If a refugee could be sent to a territory where he/she would be persecuted, the entire Convention would lose its *raison d'être*. Therefore, the drafters have listed this article among the provisions that no reservation may be made at Article 42 (1).

The principle's normative character is also supported by the fact that it has been incorporated in numerous international treaties and other instruments adopted at the universal and regional level. UNHCR contends that the incorporation of the principle of non-refoulement in the 1951 Refugee Convention was part of an already existing tradition since provisions regarding non-refoulment were included in various international instruments adopted under the auspices of the League of Nations[230] the Provisional Arrangement concerning the status of refugees coming from Germany of 4 July 1938[231] and the Convention Concerning the Status of Refugees Coming from

---

extensive and virtually uniform in the sense of the provision invoked; -and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved." (para. 74).

[230] UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law, Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, para. 9, available at http://www.unhcr.org [visited on 20.08.2006] (herein after referred as 'UNHCR, The Priciple of Non-Refoulement as a Norm of Customary International Law').

[231] Article 4.

Germany of 10 February 1938[232]and the Convention Relating to the International Status of Refugees of 28 October 1933.[233]This argument may look less than convincing when it is recalled that these instruments did not attract much attention from States. For instance, it is noted that only eight States had ratified the 1933 Convention, however; three of them with reservations and declarations.[234]On the other hand, probably a better indication of at least a progressively emerging customary norm at that time was the fact that despite the large number of refugee influxes from Russia, Spain, Germany and the Ottoman Empire, no noticeable refoulement had occurred.[235]

Both the State support for the instruments and number of texts adopted has definetely changed dramatically after the conclusion of the 1951 Refugee Convention. Among the instruments which, incorporated the principle either through jurisprudence or in their texts are the American Convention on Human Rights[236]; OAU Convention Governing the Specific Aspects of Refugee Problems in Africa[237]; Bangkok Principles Concerning Treatment of Refugees[238]; the European Convention on Human Rights[239]; UN Covenant on Civil and Political Rights[240]; Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children[241]; Protocol Against the Smuggling of Migrants by Land, Sea and Air[242];

---

[232] Article 5.
[233] Article 3.
[234] Goodwin-Gill, The Refugee in International Law, p. 118.
[235] *Ibid.,* p. 118.
[236] Signed at San José, Costa Rica, 22 November 1969 OAS Treaty Series No. 36, (Article 22 (8).
[237] Article II(3)
[238] Adopted by the Asian-African Legal Consultative Committee at its Eighth Session in Bangkok in 1966. (Article 8 (3).
[239] Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 005. The text of the Convention has been amended according to the provisions of Protocol No. 3 (E.T.S. 45), which entered into force on 21 September 1970, of Protocol No. 5 (E.T.S. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (E.T.S. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (E.T.S. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (E.T.S. 155), as from the date of its entry into force on 1 November 1998.
[240] UN Covenant on Civil and Political Rights, UNGA Res. 2200A (XXI) of 16 December 1966.
[241] Supplementing the United Nations Convention Against Transnational Crime, UNGA Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001), Article 14.
[242] Supplementing the United Nations Convention Against Transnational Crime, UNGA Res. 55/25, annex III, 55 U.N. GAOR Supp. (No. 49) at 65, U.N. Doc. A/45/49 (Vol. I) (2001).

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[243]; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[244]; Geneva Convention Relative to the Treatment of Prisoners of War[245]**;** Geneva Convention Relative to the Protection of Civilian Persons in Time of War[246]; European Convention on Establishment[247]; European Convention on Social and Medical Assistance[248], European Convention on Extradition[249]; Inter-American Convention on Extradition[250]; United Nations Declaration on Territorial Asylum[251]; Cartagena Declaration on Refugees.[252]

The normative character of the non-refoulement principle has also been supported by the Conclusions of the Executive Committee approaching it as an instrument that is much more than a contractual obligation.[253]For instance, the Committee indicated in its Conclusion No. 6 that *"the fundamental humanitarian principle of non-refoulement has found expression in various international instruments adopted at the universal level and regional levels and is generally accepted by States"*.[254]The Committee even went further in its Conclusion No. 25 as noted above indicating that the principle was *"progressively acquiring the character of a peremptory rule of international law."*[255]

b) Consistent, Widespread and Representative State Practice, Including Those Whose Interests are Specially Affected

Widespread and Representative State practice is the most challenged aspect

[243] Adopted and opened for signature, ratification and accession by UNGA Res. 39/46, 10 December 1984, Article 3.
[244] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UNGA Res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), Article 20.
[245] Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, Article 109.
[246] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287**,** Article 45/4.
[247] Adopted in 1955, ETS No. 19, Article 3.
[248] Article 6.
[249] ETS No. 24, Article 4 (5).
[250] Article 4(5).
[251] Article 3.
[252] Article 5.
[253] Lauterpacht, Bethlehem, p. 143.
[254] See EXCOM Conclusion No. 6 (XXVIII) 1977.
[255] See EXCOM Conclusion No. 25 ((XXXIII) 1982.

of the customary law nature of the principle of non-refoulement. As of 1 March 2006 the total number of States parties to the 1951 Convention is 143 and both the Convention and the Protocol is 140. These amounts correspond to to approximately %73-74 of the 192 of the UN Member States today.[256] While it is debated whether this amount would suffice in order to conclude that a widespread and representative State exists, the main debate arises due to the state of Asia which hosted more than a third of all the people of concern to UNHCR, 6.9 million or 36 per cent in 2005.[257] Amnesty International published a report in 1997 which indicated that Asia had the worst record of ratifying the 1951 Refugee Convention.[258] Accordingly, only a minority of countries in Asia had ratified the Convention and its 1967 Protocol. Jerzy Sztucki oberves in a book published in 1999 that only 10 out of 48 Asian States, or 23 per cent of those States were party to the Convention and that specially affected States with refugee populations over 100.000 such as Bangladesh, India, Indonesia, Nepal, Pakistan or Thailand were not parties to the Convention.[259]

These figures regarding Asian States has lead some of the prominent legal scholars to the conclusion that the principle of non-refoulement is not a universally accepted customary norm due to the fact that the State practice concerned is not sufficiently widespread and representative.[260] A considerable number of Asian States whose interests were particularly affected had chosen not to become a party to the Convention. Coleman favored the view that non-refoulement might be considered as a regional customary rule in Europe, Africa and America.[261]

On the other hand, the majority of legal scholars[262] as well as the

[256] UNHCR, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b73b0d63 [visited on 22.07.2006].
[257] UNHCR, Refugees by Numbers: 2005 Edition, http://www.unhcr.org/cgi-bin/texis/vtx/basics/opendoc.htm?tbl=BASICS&id=3b028097c [visited on 23.07.2006].
[258] Amnesty International Asia: Etnicity and Nationality, 10.10.1997, AI Index:ASA 01/01/97.
[259] Jerzy Sztucki, *"Who is a Refugee? The Convention Definition: Universal or Obsolete?"*, Refugee Rights Frances Nicholson, Patrick Twomey (eds.), p. 77.
[260] Coleman, pp. 46-49; Walter Kälin, Das Prinzip des Non-Refoulement, 1982, p. 71 from Goodwin-Gill, p. 135;
[261] Coleman, p. 49.
[262] Goodwin-Gill, The Refugee in International Law, pp. 134- 137; Lauterpacht, Bethlehem, pp. 140-149; Volker Türk, *"The Role of UNHCR in the Development of International Refugee Law"*, Frances

UNHCR[263] are of the view that the State practice concerned is sufficiently widespread and representative to conclude that non-refoulement is a universal customary rule.

In this respect, the following arguments can be produced in order to justify this conclusion. Although, the number of parties to the 1951 Convention is 143 any analysis solely based on this figure would not be quite accurate since, as mentioned above, this Convention is not the only instrument that the principle has been incorporated to. In fact, the number of States that are not bound with any international law treaty containing non-refoulement principle is much less that the figures indicated above.

According to a table provided by Lauterpacht and Betlehem[264] Bhutan, Brunei Darussalam, Kiribati, Lao People's Democratic Republic, Malaysia, Maldives, Marshall Islands, Micronesia, Myammar, Nauru, Oman, Pakistan, Palau, Saint Kitts and Nevis,[265]Saint Lucia, Singapore, Tonga, United Arab Emirates and Vanatu are the only States in the World today which are not bound by any of the cited international instruments containing the non-refoulement principle. These 18 States infact constitute an omitable portion of the States of the World whose interests are specifically affected.

UNHCR further points to another fact that confirms the widespread and representative State support. According to UNHCR's statements, even the Governments of States not parties to the 1951 Refugee Convention have frequently confirmed to UNHCR that they recognize and accept the principle of non-refoulement. [266]

Nicholson, Patrick Twomey (eds.), p. 172; Baillet, p. 751; Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, Arlington 2005, N. P. Engel Publishers, p. 185.

[263] UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law.

[264] Lauterpacht, Bethlehem, p. 170.

[265] Saint Kitts and Nevis has signed the 1951 Refugee Convention on 01 February 2002, see http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b73b0d63 [visited on 23.07.2006]

[266] UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law, para. 6.

The Memorandum of Understandings signed between UNHCR and States that are not party to the Convention can be shown as a proof of this statement. For instance, UNHCR signed a Memornadum of Understanding with the Jordanian Government in 1998, whereby non-Palestinian refugees were granted a six months stay.[267] A similar document was signed with the Government of Lebanon in September 2003, giving asylum seekers the right to reside in the Country for three months.[268]In the Asia&Pacific Region UNHCR signed a Memorandum of Understanding in January 2005 for the resolution of the situation of some Montagnards from Vietnam, through ressetlement in Cambodia.[269]

Finally, it has to be noted that many of the States hosting large refugee commun-ities but not party to the 1951 Refugee Convention such as Bangladesh, India, Pakistan and Thailand are members of the Executive Committee; the only intergovernmental forum where refugee issues are discussed in detail. The Executive Committee currently consists of 70 Member States[270]and meets annually and comes to conclusions on important issues of refugee protection. These conclusions represent an international consensus and carry persuasive authority. By being members of the Executive Committee these States show their interest and contribution to the implementation of the 1951 Refugee Convention.

Therefore, there is sufficient data at hand to conclude that a widespread and representative State support, including those whose interests are specially affected exists in order to establish non-refoulement as a customary rule.

Another issue that needs to be disscussed in this context is to what extent the unresolved controversies as to the exact meaning and scope of this principle will affect the customary nature of the principle. International Court of Justice indicated in the North Sea Continental Shelf case that very considerable, still unresolved

---

[267] UNHCR, Global Appeal 2004, Geneva, p. 164.
[268] *Ibid.,* p. 165.
[269] UNHCR, Update on UNHCR's Operations in Asia and the Pacific, Executive Committee 2005, http://www.unhcr.org/cgi-bin/texis/vtx/excom/opendoc.pdf?tbl=EXCOM&id=432fcbeb2 [visited on 23.07.2006].
[270] The complete list of the Executive Committe Member States are available in the following link: http://www.unhcr.org/cgi-bin/texis/vtx/excom?id=40111aab4 [visited on 23.07.2006].

controversies as to the exact meaning and scope of the notion may affect the customary nature of a norm.

As discussed above, the State practice is not consistent with regard to the applicability of non-refoulement at the High Seas. Whereas it is quite consistent at the frontier or within the territory of a State.

In this regard, the ruling of ICJ in the Nicaragua case[271]has to be recalled. The Court considered in this judgement that application of a particular rule in the practice of States does not need to be perfect for customary international law to emerge. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, this confirms rather than weakens the rule as customary international law. This is exactly the case with regard to the principle of non-refoulement. UNHCR confirms this conclusion stating that:

"Cases in which a Government has stated to UNHCR that it is not willing to react positively to its representations on the simple ground that it does not recognize any obligation to act in accordance with the principle of non-refoulement - and are thus entirely free to return a person to a country of persecution - have been extremely rare."[272]

Hence, there is a core area where State practice is perfectly consistent. This position was also confirmed in the San Remo Declaration on Non-Refoulement in September 2001.[273]

c) General Recognition as a Rule of Law (Opinio Juris)

1951 Refugee Convention has been in force for over 50 years during which time a consistent state practice has been established on the core elements of the

[271] Case Concerning Military and Paramilitary Activities in and Against Nicaragua, Judgement of 26 November 1984, ICJ Reports 1984.
[272] UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law, para. 6.
[273] San Remo Declaration on Non-Refoulement on the occasion of the 50th Anniversary of the Convention relating to the Status of Refugees of 28 July 1951, the International Institute of Humanitarian Law, in co-operation with the United Nations High Commissioner for Refugees, organised the 25th Round Table, between 6-8 September 2001, in Sanremo, Italy.

principle. States have shown their recognition of this rule. They did not confine their practice to the 1951 Refugee Convention but developed it through regional instruments such as the OAU Convention, Cartagena Declaration, and in Europe in the form of a number of Council Directives and also by domestic instruments. The number of States that has adopted the principle of non-refouelment through domestic legislations is over 125.[274]

The interest of States to the membership of the Executive Committee is another indication of the State practice and *opinio juris* in this regard.[275] As shown in the Table I.1, the interest of States to the Excutive Committee membership have gradually increased since 1958.

[274] See Annex 2.2. on Constitutional and legislative provisions importing the principle of non-refoulement into municipal law in Lauterpacht, Bethlehem, pp. 171-177.
[275] Lauterpacht, Bethlehem, p. 148.

Table I.1 Executive Commmittee Membership: Year and number of members[276]

Year	Members
1958	25
1963	30
1967	31
1979	40
1982	41
1988	43
1991	44
1993	46
1994	47
1995	50
1996	51
1997	53
1999	54
2000	56
2001	57
2002	61
2003	64
2004	66
2005	68
2006	70

Finally, the recognition of the principle by States was also confirmed by the 'San Remo Declaration on Non-Refouelement' which was adopted as a result of the round table meeting organized by the International Institute of Humanitarian Law with UNHCR on the occasion of the 50th anniversary of the 1951 Refugee Convention in 2001. The panel of experts underlined the customary law nature of the principle as follows:

"...while there are doubts affecting borderline issues, the essence of the principle is beyond dispute. This essence is encapsulated in the words of Article 33 (1) of the 1951 Refugee Convention, which can be regarded at present as a reflection of general international law."

[276] UNHCR, Executive Committee Membership, http://www.unhcr.org/cgi-bin/texis/vtx/excom?id=40111aab4 [visited on 24.07.2006].

In conclusion, it observed that despite the opposite views of some legal scholars particularly focused on the widespread and representative nature of the rule, all conditions regarding the existance of a customary rule have been met in the case of non-refoulement principle. Therefore, it is binding on all States regardless of the fact that a State is party to the 1951 Refugee Convention or not.

3. Refugee as the Beneficiary of the Prohibition of Non-Refoulement

a) Relationship Between the Refugee Status and the Non-refoulement Principle

The 1951 Refugee Convention has had a cornerstone role in the development of the principle of non-refoulement. It is not only due to the fact that it contains specific provisions concerning the principle but also because it has introduced a status that is instrumental for implementation of the principle.

Goodwin-Gill suggests that a realistic assessment of the non-refoulement principle requires that the rule be examined not in isolation, but in a dynamic sense and in relation to the concept of asylum.[277]

The relationship between the refugee status and non-refoulement principle is essential due to the fact that it represents a carefully crafted balance between the interests of providing protection to those persons who risk persecution and that of the receiving states who have limited capacity of taking responsibility. Therefore, the refugee definition represents a miraculous formula that enables the States to stabilize their economic interests with humanitarian interests. On the other hand, the States Parties to the 1951 Refugee Convention increasingly tend to interpret the eligibility criteria for refugee status more restrictively in the recent years, in order to strike a new balance in the above mentioned formula as a response to the increasing refugee mobility towards their territories.[278]

[277] Goodwin-Gill, The Refugee in International Law, p. 124.
[278] Hathaway and Dent support this view indicating that refoulement of refugees from within the territory of developed states often occurs in a less direct form, namely by application of an excessively

Restrictive interpretation of the refugee definition does affect the implementation of the non-refoulement principle since the refugee definition also determines the beneficiary of the non-refoulement principle according to the 1951 Refugee Convention. This fact alone justifies a closer look at the definition while examining the scope of the non-refoulement principle.

It is necessary to further elaborate on the interaction between the definition and the non-refoulement principle before stepping in to explanations on the refugee definition, in order to show how the system operates.

A request for substantial determination of an asylum request under the 1951 Refugee Convention may result in two ways. Either the applicant is determined to be in need of protection or not. The applicant will be allowed to stay in the territory of the Country concerned if it is established that there is a protection need recognized by the Convention. In this case, he will be granted refugee status and a residence permit attached to this status.

On the other hand, if the outcome of the RSD procedure is negative, the applicant will become a rejected asylum seeker. The rejected asylum seeker is defined in the Memorandum of Understanding between the United Nations High Commissioner for Refugees and the International Organization for Migration as follows:

"The term rejected asylum seekers [...] is understood to mean people who, after due consideration of their claims to asylum in fair procedures, are found not to qualify for refugee status, nor to be in need of international protection are who are not authorized to stay in the country concerned".[279]

According to this provision, rejected asylum seekers will not be permitted to

---

restrictive interpretation of the definition in the 1951 Refugee Convention. Hathaway, Dent, *"Refugee Rights: Report on a Comparative Survey"*, B.S. Chimni (ed.), p. 118.

[279] Memorandum of Understanding between the United Nations High Commissioner for Refugees and the International Organization for Migration, May 1997, para. 29 at Refugee Survey Quarterly,1998, Vol. 17, No. 3, pp. 70-78.

stay in the territory of the country if the State concernes is not willing to let the applicant stay on some other grounds. It has to be noted, however that, as stipulated in the provision above, this is only the case where the claims of the asylum seeker is assessed through a fair and effective procedure.

Therefore, if the applicant has not been given the opportunity to have access to an effective RSD procedure, the State concerned may not claim that the applicant shall not benefit the non-refoulement principle in Article 33 on the ground that he or she is not a formally recognized refugee.

This argument finds its basis on the nature of refugee status as stipulated in the 1951 Refugee Convention. It is generally accepted that the Convention does not contain a right of being granted refugee status. Therefore, a State Party to the Convention may avoid granting refugee status to a person even though the person concerned has a well founded fear of persecution.[280]

This does not mean however, that in such a case the State may send the person concerned to a territory where he or she will face the risk of persecution. Refugee status is declaratory in nature and a person becomes a refugee as soon as the conditions mentioned in Article 1 of the Convention are satisfied. In other words, formal recognition by a state is not a condition of being protected against refoulement under Article 33. This argument is supported by a number of factors. First, 1951 Refugee Convention does not define a refugee as being formally recognized by a State Party. Second, the Handbook on Procedures and Criteria for Determining Refugee Status prepared by the UNHCR also underlines the declaratory nature of the refugee status as follows:

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

[280] Gregor Noll, Rejected Asylum Seekers: The Problem of Return, New Issues in Refugee Research, UNHCR Working Paper No. 4, May 1999, pp. 2-3.

refugee."[281]

The Executive Committee and the UN General Assembly have also consistently taken this approach in several conclusions[282] and resolutions.[283]

As a conclusion, it can be said that if a State Party is not prepared to grant refugee status to a person who will risk persecution in the territory where is going to be sent, the State must take appropriate measures that do not amount to refoulement including but not limited to removal to a safe third country or provision of temporary protection.[284]In this regard, non-refoulement rule constitutes the last and strongest barrier erected against the realization of the risk of persecution in a loosely built mechanism. Therefore, it has a central role in the effective implementation of the Convention. [285]

b) Refugee Definition

Article 1 A. 2 of the 1951 Refugee Convention defines refugee as a person who:

"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,

[281] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, 1979; (re-edited in 1992), para. 28.
[282] See EXCOM Conlusion No. 6, XXVIII-1997, at para (c); EXCOM Conclusion No. 79 (XLVII) – 1996 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101) p. 169; EXCOM Conclusion No. 81 (XLVIII) – 1997 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 177.
[283] UNGA Res. 52/103, Office of the United Nations High Commissioner for Refugees, (9 February 1998), para. 5.; UNGA Res. 53/125, Office of the United Nations High Commissioner for Refugees, (12 February 1999), para. 5.
[284] Lauterpacht, Bethlehem, p. 28.
[285] For a detailed analysis on the central role of non-refoulement principle in the 1951 Refugee Convention see Pieter Boeles, Fair Immigration Poceedings in Europe, The Hague; Boston 1997, Martinus Nijhoff Publishers, p. 66-69.

owing to such fear, is unwilling to return to it."

Paragraph B of the Convention further allowes States parties to make a choice concerning the scope of their obligations with regard to the refugee definition. Accordingly, Sates may limit the scope of the definition to events that occurred in Europe before 1 January 1951. On the other hand, these temporal and geographical limitations have been lifted by the Article 1 of the Protocol Relating to the Status of Refugees of 31 January 1967.[286]However, Congo, Madagascar, Monaco and Turkey adopted geographical limitations according to paragraph B of Article 1. Among those Turkey expressly maintained its declaration of geographical limitation while acceeding to the 1967 Protocol.[287]

Goodwin-Gill addresses to this definition as a 'term of art' the content of which is verifiable according to the principles of general international law.[288] It is such a term of art that leaves States Parties a broad margin of appreciation and flexibity in practice. This carefully crafted Formula intends to help States to provide protection to those persons who are indeed under the risk persecution without exceeding their limited capacity of taking responsibility. The spirit of such formula was successfully summarized by the following words of the Federal Court of Australia:

"...the Convention did not aim at providing a universal right to change countries for every inhabitant of every oppressively ruled society on Earth, however important civil and political rights may, as a matter of intellectual persuasion, be to such an inhabitant. The Convention was intended to relieve against actual or potential real suffering."[289]

As noted above however, the formula does not work perfectly in mass influx situations. This flexibility has made it difficult to develop a harmonized approach to the definition and resulted in profusion of interpretations. This situation has been

[286] Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, 1967**,** p. 267.
[287] See UNHCR, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol.
[288] Goodwin-Gill, The Refugee in International Law, p. 3.
[289] *Win v. Minister for Immigration & Multicultural Affairs*, Federal Court of Australia, 2001, 132.

reflected in the words of Rigaux as follows: *"*

Who is a refugee? How is that a definition contained in the few lines of Article 1 of the Geneva Convention has mobilized such an army of glossers and post-glossers, who have buried the text itself under the mass of their writings?"[290]

Sztucki discussed whether the refugee definition has become a customary law or not and answered the question in negative due to such inconsistencies with regard to the interpretation.[291]

On the other hand, considering such difficulties of interpretation in practice, the Executive Committee requested the UNHCR to consider the possibility of issuing, for the guidance of Governments, a handbook relating to procedures and criteria for determining refugee status at its twenty-eighth session. Accordingly, UNHCR prepared the first edition of the Handbook[292] in September 1979, which was subsequently reedited in 1992. The Handbook is considered as an authoritative interpretation of the definition by government officials, courts, academics and lawyers since it reflects the experience of the Organization. UNHCR indicates that the interpretations in the Handbook were guided by the practice of States, exchanges of views regarding the practice of States[293] as well as the principles defined by the Executive Committee.[294]

(1) Well-Founded Fear

The phrase 'well founded fear of persecution' is regarded as the key phrase in the definition which gives the States flexibility.[295]The phrase implies that the primary motivation for requesting refuge must be fear. No other motivation such as disagreement with the conditions in another country or a desire to have greater

[290] François Rigaux, Who is a Refugee?: A Comparative Case Law Study, Jean-Yves Carlier, Dirk Vanheule, Klaus Hullmann, Carlos Pena Galiano (eds.), p. XXIX.
[291] Sztucki, *"Who is a Refugee? The Convention Definition: Universal or Obsolete?",* p. 75.
[292] Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, UN Doc. HCR/4/Eng/REV.1, 1979, (reedited in January 1992), (herein after referred as 'UNHCR Handbook').
[293] *Ibid.,* para. V.
[294] *Ibid.,* para. VI.
[295] *Ibid.,* para. 37.

economic advantage or freedom would be acceptable as a ground for refugee status.[296]The phrase further expresses a particular form of fear caused by persecution and excludes any cause of fear other than persecution, regardless of how compelling the cause is. For instance, it does not include victims of natural disasters unless the condition is combined with the fear of persecution.[297]In this context, an interesting case was brought before the Supreme Court of the Czech Republic. An Ukrainian woman's asylum claim was rejected by the Court when she argued that she was forced to leave her country of origin because she lived in an area affected by the Chernobyl disaster which exposed her to the risk of being affected by nuclear radiation. The Court however, considered that ecological catastrophe did not constitute a ground for granting asylum under the 1951 Refugee Convention.[298]

The term "well founded fear" consists of a subjective and an objective element. 'Fear' is a state of mind and a subjective condition. Therefore, this is referred as the subjective element of the definition since it is based on the personal experience of the applicant.[299]

The phrase "well-founded" on the other hand does not only imply the applicant's state of mind. Accordingly, the state of mind must be supported with an objective fear. Establishing the objective fear requires an assessment on whether "a person with a common sense" would reasonably fear persecution in a situation similar to that of the asylum seeker.[300]

The subjective fear analysis always goes hand in hand with the credibility analysis of the applicant. Examination of the applicant's personality is an indispensable part of fear analysis. Adverse credibility findings always affect the fear

---

[296] *Acosta v. Immigration and Naturalization Service*, Board of Immigration Appeals of the United States, Decision of 1 March 1985, No. A-24159781, available at http://www.refugeecaselaw.org [visited on 27.07.2006].
[297] UNHCR Handbook, para. 39.
[298] *L.F. (Ukraine) v. Ministry of Interior*, Supreme Administrative Court of the Czech Republic, Judgement of 25.02.2004, No. 5A2s 38/2003-58. available at http://www.refugeecaselaw.org [visited on 25.07.2006].
[299] *Ibid.,* para. 38.
[300] Federal Administrative Court of Austria (Verwaltungsgerichtshof), Judgement of 15.12.1993, No. 93/01/0285 at Hullman*, "Austria*", Carlier, Vanheule, Hullmann, Galiano (eds.), p. 24..

analysis.[301]

A key question to be discussed in the context of evaluation of 'fear' is what degree of risk is necesary in order to establish a well-founded fear of persecution. The 1951 Refugee Convention is silent on this issue. Whereas, the Handbook indicates *"[t]he applicant's fear should be well founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for reasons stated in the definition."*[302] Reference to the phrase 'reasonable degree' in the Handbook is still far from clarifying the issue. Carier observes that the courts often, do not address this question in their judgments; they often frequently simply acknowledge the existence or lack of serious risk or of concrete and individualized persecution. Spanish and Poruguese case-law is more precise, and refers to a 'reasonable likelihood', German case-law refers to 'considerable likelihood', Swiss case-law speaks of 'strong probability', but also of risk 'not without foundation', French case-law refers to the concept 'sufficiently probable'.[303]

In this respect, the ruling of the Federal Court of Australia in the case of Chan v. Minister for Immigration and Naturalization Service is remarkable. The Court said: *"The Convention necessarily contemplates that there is a real chance that the applicant will suffer some serious punishment or penalty or some significant detriment or disadvantage if he returns"*[304]

This approach was criticised as it incorporated a high risk threshold that does not exist in the 1951 Refugee Convention. Carlier considers it incorrect indicating *"as soon as there is risk, the risk is sufficient. It can not be required that it be serious. A minimum risk is enough"*

---

[301] *Yi Quan Chen v. Immigration and Naturalization Service*, United States Court of Appeals fort he Nineth Circuit, Judgement of 11 September 2001, No. 00-70478, available at http://www.refugeecaselaw.org [visited on 25.07.2006].
[302] UNHCR Handbook, para. 42.
[303] Jean-Yves Carlier, *"The Geneva Refugee Definition and the 'Theory of the Three Scales"*, Nicholson, Twomey (eds.), p. 42.
[304] *Chan v. Minister for Immigration and Naturalization Service*, Judgement of 12 September 1989, No. 169 CLR 379, http://www.refugeecaselaw.org [visited on 26.07.2006].

Carlier has based this argument on the case-law developed by the United States courts which were followed by the Courts of Canada and United Kingdom. In the case of Cardoza-Fonseca v. Immigration and Naturalization Service the Supreme Court stated:[305]

"That the fear must be "well-founded" does not alter the obvious focus on the individual's subjective beliefs, nor does it transform the Standard into a "more likely than not" one. One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place".

The Court in fact did not mean in this judgement to adopt a mathematical approach to asylum seekers requiring them to demonstrate an objectively quantifiable risk of persecution. This conclusion can be discerned from an assessment of the judgement in its entirety since the Court further indicated in the judgement that:

"There is simply no room in the United Nations' definition for concluding that because an applicant has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no "well-founded fear" of the event happening…As we pointed out in Stevic, a moderate interpretation of the "well-founded fear" standard would indicate "that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but is enough that persecution is a reasonable possibility."

As a result, Carlier's argument concerning the risk threshold is justified by this judgement. Therefore, an objectively verifiable possibility of persecution will be sufficient for qualifying as a refugee.

Meanwhile, a hesitant step back can be observed in the Australian case-law after the Chan judgement as well. In Guo Ping Gui v Minister for Immigration and Multicultural Affairs the High Court ruled: *"to use the "real chance" test as a*

[305] *Cardoza-Fonseca v. Immigration and Naturalization Service*, United States Supreme Court, Judgement of 9 March 1987, No. 85-782, available at http://www.refugeecaselaw.org [visited on 30.07.2006].

substitute for the Convention term "well-founded fear" is to invite error. A fear is well founded when there is a "real substantial basis for it". No fear of persecution is well founded unless the evidence indicates a real ground for believing that the person is at risk of persecution."[306]However, the judgement of NACB of 2002 v. Minister for Immigration&Multicultural Affairs[307] shows that Australian judge shall not be satisfied with mere presence of "some risk" through his/her persecution assessment. This was a case concerning a Tamil from Sri Lanka who sought refuge in Australia claiming that he would face persecution on the ground of his political opinions if he was returned to his country of origin. The first instance judge considered that he was *"not satisfied that it is likely that the applicant would be persecuted by the police or his political opponents, or that the Sri Lankan authorities would be unable or unwilling to protect him"*. Nevertheless, he noted that *"there seem[ed]to be a culture of political violence in the country of origin"* and he was satisfied that there was some risk that this would happen due to the applicant's political tendency existed. As a conclusion, the Tribunal recognized the applicant as a refugee. However, the case was subsequently brought before the Appeal Court which, reversed the judgement with a reasoning that can be summarized as follows: The Tribunal which, decided on the application was satisfied that some risk of harm was present. However, the term "some" risk, encompassed an infinite estimate which may even fall short of "likely". Moreover, the Tribunal was not satisfied with the remoteness of the harm either. On the other hand, in the view of the Federal Court the fear assessment requires the judge to be satisfied about the remoteness of the risk, the judgement should be based on a positive state of satisfaction from the material before it.

"Fear is well founded where there is a real substantial basis for it, but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well founded fear of persecution even though the possibility of the persecution occurring

[306] *Guo v. Minister for Immigration and Ethnic Affairs*, Australian High Court, Judgement of 29 October 1999, No. 191 CLR 559 available at http://www.refugeecaselaw.org [visited on 26.07.2006].
[307] *NACB of 2002 v. Minister for Immigration&Multicultural Affairs*, Federal Court of Australia, 21 May 2002, No. 94 of 2002, available at http://www.refugeecaselaw.org [visited on 26.07.2006].

is well below 50 per cent".

Evaluation of subjective fear would, in principle, require the decision making authority to establish that the applicant is aware of the risk of persecution. However, in this regard, if a conflict appears between the subjective and objectice fear tests, the later prevails over the former in practice. This issue was considered by the United States Court of Appeals in Yayeshwork Abay and Burhan Amare v. Immigration and Naturalization Service Case. In this Case, the asylum application of a mother and a child was based on the fear that if they were returned to Ethiopia, the daughter would be subjected to female genital mutilation. Among the grounds of rejection the immigration judge at the first instance had expressed that the daughter only had an ambiguous fear if she were deported. This ruling was reversed by the Appeal Court which indicated that *"children under the age of 16 may lack the maturity to form a well-founded fear of persecution, thus requiring the adjudicator to give more weight to objective factors."*[308]

The Canadian Federal Court of Appeal has expanded this category to persons other than minors. In Yusuf v. Canada the Court said: "a refugee status claim could not be dismissed solely on the ground that as the claimant is a young child or a person suffering from mental disability, he or she was incapable of experiencing fear the reasons for which clearly exist in objective terms."[309]

The applicant for refugee status must present the reasons why he/she individually fears persecution.[310]Therefore, for instance mere existence of a civil war in the country of origin in itself does not consitute a well founded fear of persecution.[311] In this case, the applicant would be expected to show the reasons for

---

[308] *Yayeshwork Abay and Burhan Amare v. Immigration and Naturalization Service*, United States Court of Appeals fort he Sixth Circuit, Judgement of 19 May 2004, No. FED App. 0145P, available at http://www.refugeecaselaw.org [visited on 25.07.2006]; for another case in the same direction also see Federal Administrative Court of Austria, Judgement of 26.01.1994, No. 93/01/0291, in Hullman, *"Austria"*, Carlier, Vanheule, Hullmann, Galiano (eds.), p. 24.

[309] *Yusuf v. Canada, Federal Court of Appeal,* 1992, No. 629 in Jeanne Donald, Dirk Vanheule, *"Canada,"* Carlier, Vanheule, Hullmann, Galiano (eds.), p. 178.

[310] UNHCR Handbook, para. 45.

[311] The Refugee Appeals Board of Belgium (Vaste Beroepscommissie voor Vluchtelingen), Decision of 4 May 1994, No. w1216 in Vanheule, *"Belgium*", Carlier, Vanheule, Hullmann, Galiano (eds.), p. 64.

what singles him or her out form the rest of the community in terms of having a fear of persecution.

Similarly, a general political situation, or lack of democratic freedoms in the country of origin are not sufficient alone to subtantiate a fear for claiming refugee status.[312]Furthermore, the fear is not sufficiently individualized by simply invoking the membership of a community[313]or participation in a demonstration that thousands of other people took part.[314]

On the other hand, the experience of family members or persons clause to the applicant would be regarded as an indication of individual risk.[315]

An interesting judgement with regard to the evaluation of individualized fear is the Yayeshwork Abay and Burhan Amare case that was decided by the United States Court of Appeals.[316] This case was unique since the court had to decide whether a mother could seek asylum in her own right based on her fear that her daughter would be subjected to female gender mutilation if they were returned to Ethiopia. In response to this claim, the Court decided that *"the mother's fear of taking her daughter to Ethiopia and being forced to witness the pain and suffering of her daughter was well-founded. The mother thus qualified as a refugee."*

A concrete standpoint for evaluating the fear of persecution is what has occurred to the applicant in the past. Persecution that the applicant has gone through in the past is regarded as powerful indicator of a possible occurrence in the

---

[312] Regional Administrative Court of Toscana, Italy, No. 199/94, in Bruno Nascimbene and Carlos Pena Galiano, "Italy", Carlier, Vanheule, Hullmann, Galiano (eds.), p. 465.
[313] Refugee Appeals Board of Belgium, Decision of 5 March 1992, No. R382, in Vanheule, *"Belgium"*, Carlier, Vanheule, Hullmann, Galiano (eds.), p. 73; One exception to the requirement of establishing individualized fear of persecution is the mass influx situations. In this case, it may not always be possible to carry out an individual determination of refugee status for each member of the group. Therefore, for practical reasons, each member of a group is regarded *prima facie* as a refugee. (See UNHCR Handbook, para. 44).
[314] Refugee Appeals Board of Belgium, Decision of 13 January 1992, No. R272, in Vanheule, *"Belgium"*, Carlier, Vanheule, Hullmann, Galiano (eds.), p. 73
[315] *Arrechea Gonzalez v. Ministry of Employment and Immigration*, Federal Court of Appeal of Canada, Judgement of 8 May 1991, at http://www.refugeecaselaw.org [visited on 26.07.2006].
[316] See *Yayeshwork Abay and Burhan Amare v. Immigration and Naturalization Service*.

future.[317]On the other hand, lack of prior acts of persecution does not necessarily indicate that well-founded fear of persecution does not exist. For instance, the Federal Administrative Court of Austria decided in 1993 that the fear of an Albanian teacher in Kosovo whose name and profession had been noted by the police should be well founded considering the fact that several cases of maltreatment by the Serbian police were already known. The fact of having left his country without being persecuted could not be used as an argument to refuse a asylum request. [318]

The continuity of the risk of persecution is a condition for establishing the well-foundedness of fear. There is a consensus among the decision making authorities on that the applicant must have reason to fear persecution at the time his claim is being decided.[319] For instance, in the case of Hoxha v. Secterary of State for the Home Department which was filed by two Albanians from Kosovo who applied for asylum in the United Kingdom, the Court held that a genuine fear of persecution did not exist anymore on 14 October 2002, at the time that the asylum application is examined by the Court since the circumstances have changed in Kosovo since 1998. The Court ruled that the country of origin has become objectively safe for the applicants during the time spent in the United Kingdom.[320]On the other hand, exceptionally the decision making authority may consider that the persecution that the asylum seeker had encountered in the country of origin was so serious and intense that the refugee should not be returned to this place even though the potential for the realization of the risk of persecution has been diminished.[321]

---

[317] *Kalala v. Ministry for Immigration&Multicultural Affairs*, Federal Court of Australia, Judgement of 12 November 2001, No. 1594 available at http://www.refugeecaselaw.org [visited on 25.07.2006]; Refugee Appeals Board of Belgium(Commission Permanente de Recours des Réfugiés) (2 ch), Decision of 7 February 1994, No. F295, Vanheule, *"Belgium"*, Carlier, Vanheule, Hullmann, Galiano (eds.), p. 64; Council of State of the Netherlands (Raad van State, Afdeling Rechtspraak), Judgement of 1 June 1984, in Dirk Vanheule, *"The Netherlands",* Carlier, Vanheule, Hullmann, Galiano (eds.), p. 487.

[318] The Federal Administrative Court of Austria, Judgement of 15.12.1993, No. 93/01/0746, in Hullman, *"Austria"*, Carlier, Vanheule, Hullmann, Galiano (eds.), p. 23.

[319] Rodger Haines, *"Gender-Related Persecution",* Feller, Türk, Nicholson (eds.), p. 339.

[320] *Hoxha v. Secretary of State for the Home Department of the United Kingdom*, Court of Appeal Civil Division, Judgement of 14 October, 2002. available at http://www.refugeecaselaw.org [visited on 25.07.2006].

[321] Refugee Appeals Board of Denmark(Flygtningenavnet), 21 February 1992, No. 21-3007 in Pia Lynggaard Justesen, *"Denmark"*, Carlier, Vanheule, Hullmann, Galiano (eds.), p. 305.

The timing of applicant's flee from the country of origin is also relevant to the fear test. A person who is under imminent threat of persecution is normally expected to flee as soon as he or she can, by any means. For instance, in the case of Gomez v. the Minister for Immigration&Muli Cultural Affairs, the Federal Court of Australia[322] decided that the applicants did not depart Sri Lanka until 12 days after obtaining a protection visa from Australia. This resulted in the rejection of the application since the Court was not convinced that the asylum seekers had well founded fear of persecution.[323]

The same rule applies for the asylum applications; an asylum seeker is expected to apply for asylum as soon as possible upon fleeing from the country of origin. If the determining authority finds out that the applicant had visited the country before without applying for asylum, this would affect the genuineness of the applicant's fear in a negative way.[324]

The fear test does not necessarily require that the asylum seeker must have left his country of origin on account of that fear. A person may also become a refugee due to circumstances arising in his country in his absence. This is called a refugee *sur place*.[325]This phenomenon is also reflected in the court practice of States Parties to the 1951 Refugee Convention. For instance, the Greek Supreme Administrative Court has decided on an application of a Turkish national who had left his country in 1979 to study in Germany. Due to the military take over in Turkey in 1980 the applicant could not return to his country of origin since the political situation in Turkey had changed radically and he had been declared an outlaw due to his membership of a youth organization. In the end, his asylum application was

---

[322] *Gomez v. The Minister for Immigration&Multicultural Affairs*, The Federal Court of Australia, Judgement of 22 April 2002, No. FCA480, available at http://www.refugeecaselaw.org [visited on 25.07.2006].

[323] In a similar case the Belgian Refugee Appeals Board decided that *"A person who waits four months before leaving his or her country without doing anything, demonstrates a lack of eagerness to flee that is of a nature to deny the existance of a serious and imminent threat to that person."(* Belgian Refugee Appeals Board, Decision of 26 March 1992, No. R452, in Vanheule, *"Belgium"*, Carlier, Vanheule, Hullmann, Galiano (eds.), p. 72.).

[324] Refugee Appeals Board of Denmark (Flygtningenavnet), Decision of 3 November 1993, No. 21-0508 in Pia Lynggaard Justesen, *"Denmark"*, Carlier, Vanheule, Hullmann, Galiano (eds.), p. 307.

[325] See UNHCR Handbook, paras. 94-96.

accepted by the Court.[326]

Relationship of the asylum seeker with the authorities of the country of origin is a determining factor in fear assessment as well. For instance, the fact that an asylum seeker has left his country of origin legally with his or her passport usually works against the asylum seeker depending on the circumstances of the case.[327] Nevertheless, this does not usually automatically exclude fear of persecution. There may be certain factors that justify this attitude of the asylum seeker. For instance, the applicant could have obtained a valid passport through bribery.[328]However, if the asylum seeker returns to the country of origin, after having stepped into the territory of the receiving State, this would result in the conclusion that the fear of the applicant is not found genuine.[329]This situation is also stipulated among the cessation clauses of refugee status under Article 1 C (1) of the 1951 Refugee Convention. Therefore, voluntary return to the country of origin would even result in the cessation of the refugee status after recognition.

(2) Persecution

1951 Refugee Convention does not define the term 'persecution'. The drafting history of the Convention does not reveal any further information which would aid determinig the exact scope of this concept.[330] Therefore, a wide margin of appreciation is left to the States Parties in interpreting this term.[331] UNHCR noted in the Handbook that various attempts to formulate a universally accepted definition of

[326] Supreme Administrative Court of Greece, No. 830/1985, in Paroula Naskou-Perraki, *"Greece"*, Carlier, Vanheule, Hullmann, Galiano (eds.) p. 449.
[327] Refugee Appeals Board of Denmark (Flygtningenavnet), Decision of 29 November 1988, No. 21-0222 in Justesen, *"Denmark"*, Carlier, Vanheule, Hullmann, Galiano (eds.), p. 307.
[328] Refugee Appeals Board of Denmark (Flygtningenavnet), Decision of 28 September 1987, No. 2-4075 in Justesen, *"Denmark"*, Carlier, Vanheule, Hullmann, Galiano (eds.), p. 307.
[329] *NAAV of 2002 v. Minister for Immigration and Multicultural Indigenous Affairs*, Federal Court of Australia, Judgement of 29 November 2002, available at http://www.refugeecaselaw.org [visited on 26.07.2006].In this case, the Court *"found out that the applicant returned on a number of occasions to India that her professed fear which the applicant had was not genuine."* ; for another judgement in the same direction see Refugee Appeals Board of France(Commission de Recours des Réfugiés), Decision of 10 February 1984, No. 18.756, in Klaudia Schank and Carlos Pena Galiano, *"France"*, Carlier, Vanheule, Hullmann, Galiano (eds.), p. 385.
[330] Alexander Aleinikoff observes that the disacussions did not focus on the kinds of persecution that should give rise to refugee status but rather dealt with the geographical and temporal limitations in the definition. (T. Alexander Aleinikoff, *"The Meaning of "Persecution"*, Chimni (ed.), p. 28).
[331] Goodwin Gill, The Refugee in International Law, p. 67.

persecution had very little success.[332]However, it must be noted that in the recent years both the jurisprudence under the human rights mechanisms and the tendency to harmonize domestic laws fort the purpose of fighting irregular movements of refugees or asylum shopping, have forced States to come closer to a common understanding in this respect. One such example of the former is the instances where States were held responsible for violations under the human rights instruments in the absence of acts committed by State actors.[333]This development has forced States Parties to recognize acts committed by non-State actors to give rise to refugee status. Moreover, the tendency of harmonization has contributed to incorporation of acts of gender-specific nature among the grounds of persecution in the European Union Qualification Directive.[334]This aspect of the Directive was welcomed by the UNHCR[335] and the practitioners[336] since some of the Member States used to reject gender-specific asylum claims before the adoption of the Directive. Despite these efforts, the term 'persecution' is today still far from being interpreted in a uniform manner.[337]

Hathaway suggests a definition based on identifying certain basic rights

[332] See UNHCR Handbook, para. 51.

[333] See the following case-law where States were held responsible for human rights violations in the absence of an act of State: *Sadiq Shek Elmi v. Australia*, Committee Against Torture, Communication No. 120/1998; see *Ahmed v. Austria*, ; *H.L.R. v. France*, ECtHR, Judgement of 29 April 1997, Application No. 24573/94; *D. v. The United Kingdom*, ECtHR, Judgement of 2 May 1997, Application No. 30240/96.

[334] Coucil Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugeesor as Persons who Otherwise Need Protection and the Content of the Protection Granted, OJ L 304/12, 30.09.2004, Article 9 2. (f).

[335] UNHCR Annotated Comments on the EC 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 Protection and the Content of the Protection Granted.

[336] Amnesty International EU Office, Amnesty International's Comments on the Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country National and Stateless Persons as Refugees or as Persons Who are Otherwise in Need of International Protection, 2 October 2002.

[337] Given the inconsistencies in the jurisprudence of States Parties to the 1951 Refugee Convention on the definition of persecution, the Courts have a surprising tendency of referring to and sometimes criticising each others' interpretations. For instance, in a landmark decision, the Refugee Status Appeals Authority of New Zealand criticised the approach taken by the High Court of Australia which, in its view, ignored the totality of the words that define refugee status. It further indicated that New Zealand decided to follow the interpretation adopted by the Supreme Court of Canada which, gives priority to the rationale underlying refugee protection regime under the 1951 Refugee Convention. See (Refugee Appeal No. 71427/99, Refugee Status Appeal Authority of New Zealand, Decision of 16 August 2000, available at http://www.refugeelawreader.org/index.d2?target=getpdf&id=117 [visited on 27.07.2006]).

'which all States are found to respect as a minimum condition of legitimacy'. He thus defines 'persecution' as the *"sustained systematic violation of core human rights demonstrative of a failure of state protection"*.[338] This analysis is based on a hierarchy of rights according to their presence in various human rights instruments and their non-derogability.[339]

Despite its popularity in practice, abiding with this interpretation in a strictly sense, can be criticised on the ground that persecution should not be defined solely on the basis of serious and severe human rights violations since various human rights violations not satisfying such severity test categorically in fact may have cumulative effects amounting to persecution.[340]

Hathaway's approach is also criticised by Wilsher on the basis that a definition solely structured on human rights grounds is weakening the claims against violations committed by non-State actors. Thus, the writer suggests a broader definition based on the notion of 'human dignity'. According to him "persecution should be viewed as the infliction as sustained and serious harm upon the victim so as to interfere with any key aspect of human dignity".[341] Wilsher's suggestion is based on the presumption that non-State actors can not committ human rights violations. However, given the catalogue of case-law under the human rights instruments that included acts committed by non-State actors in expulsion cases, the reasoning of the writer is less than convincing.

On the other hand, the definition that the writer provided is worth closer attention since 'human dignity' can be considered as a useful notion for defining persecution. In fact, the term 'human dignity' also constitues the basis of Hathaway's definition, however, the writer sees 'core human rights' as the

---

[338] James Hathaway, The Law of Refugee Status, 1991, p. 125 in Daniel Wilsher, *"Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?"*, International Journal of Refugee Law, Vol. 15, No. 1, 2003, p. 72.
[339] James Hathaway, The Law of Refugee Status, 1991, p. 106, in Daniel J. Steinbock, *"The Refugee Definition as Law: Issues of Interpretation, Refugee Rights and Realities: Evolving International Concepts and Regimes",* Nicholson, Twomey (eds.), p. 31.
[340] UNHCR Handbook, para. 53.
[341] Wilsher, p. 72.

appropriate standard for human dignity.[342]

Canadian supreme Court has adopted a combination of Hathaway's "core rights" and the "human dignity" perspective in its jurisprudence.[343] The Court refers to the Hathaway's definition,[344]while extending the scope of the persecution concept beyond the traditionally recognized limits of core human rights category. The core human rights, violation of which, may amount to persecution are listed as the right to life, prohibition of torture, or cruel or inhuman treatment or punishment, prohibition of slavery or servitude, the right not to be subjected to retroactive criminal penalties, the right to recognition as a person before the law, the right to freedom of thought, conscience, and religion and freedom from arbitrary arrest.[345]

The Canadian Supreme Court has gone beyond the scope of the above mentioned 'core human rights' in the E. v. Eve case[346] where it stated:

"All of the people coming within this group are united or identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it on the basis of that interference with a woman's reproductive liberty is a basic right "ranking high in our scale of values".

Acceptance of "women's reproductive liberty" - defined as *"a state of complete physical, mental and social self-being and not merely the absence of disease or infirmity, in all matters relating to reproductive system and to its functions and processes"*- as a form of persecution, is definetely a far reaching effort in this context, since it has only emerged in the human rights law arena in the recent years.[347]

---

[342] See *Ward v. Canada*, Supreme Court of Canada, Judgement of 30 June 1993, No. S.C.R. 689, para. 79, available at http://www.refugeecaselaw.org [visited on 28.07.2006].
[343] *Ibid.*
[344] *Ibid.*
[345] Goodwin-Gill, The Refugee in International Law, p. 69.
[346] E. v. Eve, Supreme Court of Canada, 1986, S.C.R 388 at *Ward v. Canada*, para. 79.
[347] Christine Bateup, *"Can Reproductive Rights be 'Human' Rights? Some Thoughts on the Inclusion of Women's Rights in Mainstream Human Rights Discourse",* Australian Journal of Human Rights, Vol. 6, No. 2, 2000, available at http://austlii.law.uts.edu.au/au/journals/AJHR/2000/19.html#Heading159 [visited on 09.07.2006].(no page number)

Complementary use of both approaches as in the Canadian experience appears to be the best option, since the 'core human rights' perspective is much more efficient and clearcut in establishing the standard[348], whereas the 'human dignity' perspective is more encompassing and it helps the decision maker to fill the gaps that could possibly cause protection deficiencies in practice.

In any case, determination of the scope of 'persecution' is a challenging and complex effort. Even in the event of core human rights violations, establishment of the existence of persecution is not automatic. In all jurisdictions an additional severity test is required. The United States Court of Appeals for instance has provided examples concerning the severity of action that may rise to the level of persecution in the Liu case.[349] Accordingly, the Court had found persecution in a case where *"the applicant was beaten successively by multiple assailants, was attacked and cut with a razor, his home was broken into, his father beaten, and his wife raped in front of him and his family"*. In another case the Court found persecution where *"the applicant was detained for two weeks, beaten in result of loss of two teeth, deprived of food and water, kept in a cell with no room to sit, and chained to a radiator."* However, in the Liu case the Court did not find persecution since it was not convinced that two days of detention, physical brutality limited to hair pulling and pushing twice, house search and ransack in a single event without causing serious damage to the furniture have risen to the level of persecution.

Determination of the existence of persecution on cumulative grounds is another method which involves cumulative assessment of the effects of several human rights violations. A cornerstone case in this respect is the case of Korablina v. Immigration and Naturalization Service of the United States which was decided by

[348] Furthermore, Steinbock observes, as a positive aspect, that adoption of human rights based interpretations of the refugee definition results in focusing on the effects of persecution rather than the causes thereof. (Steinbock,*"The Refugee Definition as Law: Issues of Interpretation, Refugee Rights and Realities: Evolving International Concepts and Regimes",* Nicholson, Twomey (eds.), p.30.)
[349] *Liu v. Attorney General*, United States Court of Appeals for the Seventh Circuit, Judgement of 17 August 2004, No. 03-3870, available at http://www.refugeecaselaw.org [visited on 27.07.2006].

the United States Court of Appeals in 1998.[350] Korablina was a jewish woman who was living in Ukraine when she encountered a series of harrassing acts by ultra-nationalistic Ukranians, which would not amount to persecution individually however, their cumulative effect was to make her stay in the Country intolerable. The said harrassing acts included causing her to lose her job due to her jewish origin, having her new Office ransacked and new jewish boss beaten on a monthly basis, disappearance of her jewish friends and finally her boss, receiving phone calls and letters threatening to kill, being tied up on a chair in a single event and having her daughter and husband beaten while she was in the United States and no reponse to complaints from the local police. These were initially seen as simple discriminatory acts but not persecution by the first instance immigration judge and later by the Board of Immigration Appeals until this judgment was reversed by the Court of Appeals. Similar decisions are rendered in other receiving countries as well. The Danish Refugee Appeals Board recognized a refugee on cumulative grounds who had been detained for twenty one days, had been deprived of his official residence, had been forced to do military service in spite of a bad back and had been arrested several times.[351]The Council of State of the Netherlands accepted refugee status by cumulation where the applicant was dismissed from his job, impeded to obtain a job of similar status and all financial assistance was denied by the government.[352]

Given these considerations above persecution test shall involve an examination concerning the individual circumstances of each claim[353]upon which the determining authority will initially try to find out whether a severe violation of a core human right has taken place and/or likely to occur. Secondly, if the answer for the

[350] *Korablina v. Immigration and Naturalization Service*, United States Court of Appeals for the Nineth Circuit, Judgement of 23 October 1998, No. 9770361, available at www.refugeelawreader.org/120/Korablina_v._INS.pdf [visited on 28.07.2006].
[351] Refugee Appeals Board of Denmark, Decision of 11 May 1988, No. 21-0048 in Justesen, *"Denmark"*, Carlier, Vanheule, Hullmann, Galiano (eds.), p. 319.
[352] Council of State of the Netherlands, Decision of 11 March 1982, in Vanheule, *"The Netherlands"*, Carlier, Vanheule, Hullmann, Galiano (eds.), p. 505.
[353] UNHCR Handbook, para. 52; This approach that involves a case-by-case analysis also found support from the judiciary. For instance, the United States Court of Appeals stated in the Liu case that *"Persecution claims cannot simply be evaluated against a generic checklist. Review of an applicant past experience must be carried out on most specific level."(Mei Dan Liu v. Attorney General*, United States Court of Appeals for the Seventh Circuit, Judgement of 17 August 2004, No. 380 F3d. 307, available at http://www.refugeecaselaw.org [visited on 26.07.2006]).

first question is negative, the determining authority shall try to find out whether the acts encountered and/or likely to be encountered in the country of origin would amount to persecution on the ground of human dignity.

Another question to be dealt with in the context is 'what consequences are to be attached to the actions or characteristics of actors –meaning agents or victims- of persecution.

It is generally the behaviour of the agent of persecution that determines which persons shall be considered refugees.[354]For instance, the agent of persecution may sometimes impute one of the grounds of persecution listed in the 1951 Refugee Convention, namely political opinion, race, religion, nationlity, membership of a particular social group to the victim of persecution. In this case, the victim does not necessarily have that imputed characteristic in order to qualify as a refugee. For instance, a person would still qualify as a refugee if he or she in fact does not feel affiliated with a political opinion that is imputed to him or her by the persecutor.[355]

Characteristics of the victim may also play a role in the existence of persecution. When vulnerable groups such as women and children are concerned, vulnerability of these groups and the effects of the measures must be assessed with due regard to the international human rights instruments focussed on those characteristics.[356]

Although 'persecution' is a flexible term that gives decision making authorities considerable margin of appreciation, determination of the existence of persecution is indeed a legal issue. Because, 'persecution' is a legal concept that can be delimited by way of interpretation based on international treaty law.[357] The Danish High Court has recently rendered a dramatic judgement on this topic. A case was brought before the High Court challenging the legality of a decision of the

[354] Sternberg, p. 46.
[355] UNHCR Handbook, para. 80.
[356] Sternberg, p. 49.
[357] Jens Vedsted-Hansen, *"The Borderline Between Questions of Fact and Questions of Law"*, Proof, Evidentiary Assessment and Credibility in Asylum Procedures, Gregor Noll (ed.), Leiden; Boston 2005, Martinus Nijhoff Publishers, p. 63.

Refugee Appeals Board in which the Board had found lack of persecution on the ground that two years of imprisonment would not be considered improportionate for evasion of military service. In response to the claims of the applicant, the High Court rejected the case without going into the merits, stating that the application required assessment of factual circumstances which was not an issue of law and therefore, the Refugee Appeals Board had been exercising its discretionary competence to decide on asylum applications.[358] This judgement of the High Court was however, quashed by the Supreme Court which held that review of the applicant's claim indeed involved issues of law.[359]

The 1951 Refugee Convention confines the protected grounds of persecution to political opinion, race, religion, nationality and membership of a particular social group. It is indicated that the Drafters of the Convention were inspired by the Nazi persecutions of 1933-1945 since the treatment of jews on account of their race, religion and nationality was the freshest experience in the minds of the drafters.[360]The drafters were also definetely influenced by the wave of refugees escaping from persecution on political grounds from the repressive communist regimes of the Central and Eastern Europe during and after the Second World War.[361]It appears that well founded fear of persecution on these five grounds corresponded to the experience of these refugees who faced persecution due to their individual caharacteristics such as political opinion, nationality, religion, race or social group.

(a) Race

In the view of UNHCR the term 'race' must be understood in its widest

---

[358] *I.I. v. Refugee Appeals Board*, High Court for Eastern Denmark, Judgement of 10 December 2002, in Jens Vedsted-Hansen, "The Borderline Between Questions of Fact and Questions of Law", p. 63-64.

[359] *I.I. v. Refugee Appeals Board*, Supreme Court of Denmark, Judgement of 2 December 2003, in Jens Vedsted-Hansen, "The Borderline Between Questions of Fact and Questions of Law", p. 64.

[360] Steinbock, ,*"The Refugee Definition as Law: Issues of Interpretation, Refugee Rights and Realities: Evolving International Concepts and Regimes",* Nicholson, Twomey (eds.), p. 18; This aspect of the definition was also expressed by the dissenting opinion of Judge Blackmun in his dissenting opinion in *Sale v. Haitian Centers Council* case.

[361] Steinbock, ,*"The Refugee Definition as Law: Issues of Interpretation, Refugee Rights and Realities: Evolving International Concepts and Regimes",* Nicholson, Twomey (eds.), pp. 18-19.

sense to include all kinds of ethnic groups that are referred to as 'races' in common usage. It will also include membership of a specific social group of common descent forming a minority within a larger population.[362]

Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination[363] which, defines 'racial discrimination' as

"any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

supports UNHCR's broad understanding of the concept.

Race has a distinguished position among the grounds of persecution. The Handbook indicates that racial discrimination alone may constitute persecution. Although, the mere fact of belonging to a racial group will normally not suffice for qualifying for refugee status, there may even be instances where, due to particular circumstances affecting a group, such membership will be in itself sufficient.[364] Despite the broad understanding of UNHCR of the concept, Sternberg observes that the applicants who are granted refugee status on this ground is rare under the United States's law. In his view, this is linked to the fact that the Courts have not focused sufficiently on the emotional harm that is caused by racial discrimination.[365]

(b) Religion

The 1951 Refugee Convention does not define 'religion'. Neither is there any universally accepted definition of this term. Therefore, UNHCR recommends to consider this term within the framework of the right to freedom of thought,

[362] UNHCR Handbook, para. 68.
[363] International Convention on the Elimination of All Forms of Racial Discrimination adopted and opened for signature and ratification by UNGA Res. 2106 (XX), (21 December 1965), *entry into force* on 4 January 1969.
[364] UNHCR Handbook, para. 70.
[365] Sternberg, p. 21

conscience and religion in international human rights instruments.[366] In this regard, the determining authority will have to refer to international human rights insturments such as Article 18 of the Universal Declaration of Human Rights, Articles 18 and 27 of the 1966 International Covenant on Civil and Political Rights and Article 9 of the European Convention on Human Rights while conducting the persecution test on religious grounds. Non-binding documents such as the General Comments of the Human Rights Committe, Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief[367] and Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities are also relevant in this context.[368]

The Human Rights Committee interprets 'religion' in a broad sense. The Committe indicated in paragraph 2 of the General Comment No. 22. that 'religion' is *"not limited ... to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions".*[369]It covers refusing to be affiliated with a particular religion as well as holding a particular religion and also converting from one religion to another.

In the UNHCR's understanding the claims based on religion may involve religion as a belief[370], as an identity[371] or as a way of life.[372]

---

[366] UNHCR Handbook, para. 71.
[367] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UNGA Res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684, 1981.
[368] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, UNGA Res. 47/135, annex, 47 U.N. GAOR Supp. (No. 49) at 210, U.N. Doc. A/47/49,1993.
[369] Human Rights Committee, General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18), 30 July 1993, CCPR/C/21/Rev.1/Add.4.
[370] UNHCR undertsands the term belief as to include theistic, non-theistic and atheistic beliefs. It indicates that *"beliefs may take the form of convictions or values about the divine or ultimate reality or the spiritual destiny of human kind. Claimants may also be considered heretics, apostates, schismatic, pagans or superstitious, even by other adherents of their religious tradition and be persecuted for that reason."* , see UNHCR, Guidelines on International Protection: Religion-Based Refugee Claims under Article 1 A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees, 28 April 2004, HCR/GIP/04/06 para. 6.
[371] UNHCR defines 'identity' as "less a matter of theological beliefs than membership of a community that observes or is bound together by common beliefs, rituals, traditions, ethnicity, nationality, or ancestry", *Ibid.,* para. 7.

Establishing sincerety of belief is usually the first step of persecution test when claims on religous grounds are concerned. However, there may be exceptions to this rule. For instance, if the religious belief is attributed to the person by the persecutor, the applicant need not hold such religious beliefs. The situation is similar in the event of minors who are part of a religious community.[373]

(c) Nationality

Incoporation of 'nationality' as a ground for persecution is open to criticism since, it would be unreasonable to expect a State to persecute its own citizens on the ground of nationality. This would possibly the case for citizens of other countries. However, even in this option, the persecued person would have a chance to seek protection in his or her own country and therefore he or she can not qualify as a refugee.[374] Therefore, the term has come to be understood broader than "citizenship". According to UNHCR *"it refers also to membership of an ethnic or linguistic group".*[375] In this case, it overlaps with the ground of "race" to a great extent.[376]

The "nationality" ground is usually resorted when two or more ethnic or linguistic national groups are involved in conflict situations in a country. In this case, nationality ground often overlaps with "political opinion" ground as well. [377]

(d) Membership of a Particular Social Group

'Membership of a particular social group' is the ground of persecution with the least clarity.[378] Therefore, it proved to be a fruitful avenue for developing the refugee definition. Hence, the liberal view that favors the growth of refugee jurisprudence found support in 'particular social group' ground which, has

---

[372] Religion as a way of life relates to how an individual relates to the World either completely or partially. Religion may be manifested in activities such as wearing distinctive clothing or observance of particular religious practices, religous holidays or dietery requirements. See ibid., para. 8.
[373] *Ibid.,* paras. 9-10.
[374] Goodwin-Gill, The Refugee in International Law, p. 45.
[375] UNHCR Handbook, para. 74.
[376] Sternberg, p. 27.
[377] UNHCR Handbook, para. 75.
[378] See Summary Conclusions: Membership of a Particular Social Group, Expert Roundtable organized by the UNHCR and the Institute of Humanitarian Law, San Remo, Italy, 6-8 September 2001, para. 1.

potentially an "open-ended" scope.[379]

The variety of issues considered under the 'particular social group' have increased dramatically in the recent years. States have recognized women, families, tribes, occupational groups and homosexual groups, disabled people as constituting a particular social group for the purposes of the 1951 Refugee Convention.

There are two main schools of thought as to what consitutes a social group within the meaning of the 1951 Refugee Convention. The 'protected characteristics approach' which is adopted by Common Law countries such as Canada[380], Australia,[381] United Kingdom[382], United States[383], New Zealand[384], is based on an unchangeable characteristic or a characteristic so fundamental to human dignity that a person should not be compelled to give it up.[385] Groups defined by unchangeable characteristics are those such as gender, linguistic background, sexual orientation, family, past experiences. Whereas an example for the groups that shall not be forced to give up a charcteristic is human rights activists.

The 'social perception approach' which, is applied in Countries that are part of the Continental European Law tradition such as France[386], Germany[387], the Netherlands is based on *"a common characteristic which creates a cognizable group that sets it apart from the society at large."*[388]

These two schools of thought have several variations between the practices

[379] Sternberg, p. 46, Goodwin-Gill, The Refugee in International Law, pp. 46-47.
[380] Alexander Aleinikoff*, "Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'membership of a Particular Social Group"*, Feller, Türk, Nicholson (eds.), p. 268; see also Sternberg, p. 199.
[381] Aleinikoff, *"Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'membership of a Particular Social Group"*, p. 271.
[382] *Ibid.,* p. 273.
[383] *Ibid.,* p. 275.
[384] *Ibid.,* p. 280.
[385] Heaven Crawley, Trine Lester, Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe, May 2004, UNHCR Evaluation and Policy Analysis Unit, EPAU/2004/05, p. 83.
[386] Aleinikoff, *"Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'membership of a Particular Social Group",* Feller, Türk, Nicholson (eds.), p. 280.
[387] *Ibid.,* p. 283.
[388] Crawley, Lester, p. 83.

of different States and sometimes even in the same State among the Courts[389] The results of a survey conducted in forty-one European States published in May 2004 shows this striking disparity between the States regarding the interpretation of particular social group concept. Only seventeen out of forty-one States have recognized sexual violance as a possible form of persecution either in law, policy or case-law.[390] Only four of those States had guidance on how to define a particular social group either in law, policy or case-law.[391]

UNHCR seems to have adopted the 'social perception approach' in the Handbook stating that *"A "particular social group" normally comprises persons of similar background, habits or social status".*[392]On the other hand, UNHCR's position in the brief that it submitted as intervenor in Islam v. Secretary of State and Regina v. Immigration Appeal Tribunaland Another Ex Parte Shah case raises doubts about its exact position.[393] In its brief UNHCR indicated:

"'Particular social group' means a group of people who share some characteristic which distinguishes them from the society at large. That characteristic must be unchangeable, either because it is innate or otherwise impossible to change or because it would be wrong to require the individuals to change it. Thus, where a person holds beliefs of has values such that requiring them to renounce them would contravene their fundamental human rights, they may in principle be part of a particular social group made up of like-minded persons."

This reasoning seems to be closer to the 'protected characteristics approach'.

(e) Political Opinion

[389] Aleinikoff noted the variations of interpretation of the term 'membership of a social group' between the Nineth Circuit Court of Appeals and the other Courts of the United States (Aleinikoff, *"Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'membership of a Particular Social Group",* Feller, Türk, Nicholson (eds.), p. 271.)
[390] Crawley, Lester, p. 35.
[391] *Ibid.,* p. 85.
[392] UNHCR Handbook, para. 77.
[393] Brief as Intervenor in Islam v. Secretary of State and Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah, 1999, 2 W.L.R. 1015 in Aleinikoff, *"Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'membership of a Particular Social Group"*, Feller, Türk, Nicholson (eds.), p. 267.

Holding political opinions other than the government or the ruling athority may appear as a cause of persecution in suppressive regimes. In order to qualify as a refugee on political ground, the applicant shall not only demonstrate his or her distinctive political opinions but also that such opinions have come to the attention of authorities or will inevitably come to the attention of the auhorities. Furthermore, a causal link has to be established between the opinions of the asylum-seeker and persecution. The opinions concerned does not need to have come to the notice of the authorities before the asylum- seeker has left his country of origin since it is possible that he or she could have avoided persecution by hiding his or her opinions. [394]

Asylum seekers who leave their countries for political reasons often feel more comfortable about being involved in political activities after having gotten out of reach of the authorites of the country of origin. This creates an environment potentially conducive to refugee sur place situations. A person may become a refugee *sur place* as a result of his or her own actions such as keeping contact with other refugees or expressing his or her views in the country of residence. The claims based on activities outside the country of origin can present special difficulties. It is possible that a person, having no well-founded fear of persecution, deliberately set and create circumstances in order to be recognized as a refugee. Existence of such abuse attempt may, for instance, be presumed if an Iranian woman who had been rejected by the determining authority at the first instance, comes up with a second application attaching reports regarding her protest of the Iranian Government's suppressive policies and lack of positive response by determinig auhtority, published both in the national newspapers of country of residence and the country of origin revealing her name and pictures. Such an abusive claim would be rejected in many of the receiving States.[395]

A central question with regard to asylum on political grounds is the definition of "political opinion". Being inspired by the judgement of the Canadian

[394] UNHCR Handbook, paras. 80-83.
[395] See for instance the decision of the Refugee Status Appeals Authority of New Zealand, Decision of 18 November 2004, No. 75139 available at http://www.refugee.org.nz/Fulltext/75139.html [visited on 25.08.2006].

Supreme Court in the Ward case,[396]Goodwin-Gill suggests that

" 'political opinion' should be understood in the broad sense, to incorporate, within substantive limitations now developing generally in the field of human rights, any opinion on any matter in which the machinery of State, government, and policy may be engaged. The typical 'political refugee"is one pursued by the government of a State or other entity on account of his or her opinions, which are an actual or perceived threat to that government or its institutions, or to the political agenda and aspirations of the entity in question."[397]

On the other hand, as illustrated by the Ward judgement, the protection on the ground of political opinions extends not merely to those who are seen as a threat by the government, but also to those who are regarded as a threat by groups other than the government. In the Ward case, the applicant had been a member of the Irish National Liberation Army which, was a paramilitary group fighting for the political unification of Northern Ireland with the Republic of Ireland. The applicant had been assigned to guard hostages who later released them upon discovering that they would be executed. The applicant was therefore tortured by the group members. In the end, the Canadian Supreme Court accepted the asylum application on political grounds. [398]

Another crucial issue that needs to be clarified in this context is whether the a person may qualify as a refugee if the act attributed to him/her constitutes a crime. A mere fear of prosecution does not give rise to a refugee status under the 1951 Refugee Convention. In this respect, the Handbook draws a distinction between prosecution on account of expressing political opinions and for politically motivated acts. If the prosecution is concerning an act punishable even without political motives, and if the anticipated punishment is in accordance with the general law of the country of origin, the mere existence of fear of prosecution will not make the

[396] *Ward v. Canada*, Supreme Court of Canada, Judgement of 30 June 1993, No. S.C.R. 689, available at http://www.refugeecaselaw.org [visited on 31.07.2006].
[397] Goodwin-Gill, The Refugee in International Law, p. 49.
[398] See *Ward v. Canada*; for a detailed analysis of the Ward judgement see Sternberg, p. 61.

applicant a refugee.[399]In this case, the determining authority shall also consider *"personality of the applicant, his political opinion, the motive behind the act, the nature of the act committed, the nature of the prosecution and its motives, ... the nature of the law on which the prosecution is based"*[400] in its analysis as to whether the prosecution concerned amounts to persecution or not.

(3) Being Outside the Country of Nationality or the Country of Former Habitual Residence

Being outside the country of nationality and, in the event of stateless persons, being outside the country of former habitual residence is among the requirements for qualifying as a refugee under Article 1 (A) 2 of the 1951 Refugee Convention. The Article further clarifies how it will be applied for persons who have more than one nationality. Accordingly, for this category the term 'country of nationality' shall mean each of the countries that the applicant is a national of. Therefore, a person as such will need to demonstrate the existence of conditions for refugee status in all of the countries that he/she is a national of. As a result, if the applicant as such is present in one of the countries of nationality he/she can not qualify as a refugee unless he or she crosses the border.

In exceptionally cases, States may provide the possibility of not applying this requirement in their own domestic laws. For instance, Section 101(a)(42)(B) of the United States Immigration and Nationality Act[401] empowers the President to specifically designate any person who is within the country nationality as a refugee.

Although internally displaced persons, who have identical needs to that of refugees, have been excluded from the protection mechanism under the Convention, the need for protection covering this category has recently become rather pressing. The global population of internally displaced persons have reached 25 million people

[399] UNHCR Handbook, para. 85.
[400] *Ibid.,* para. 86.
[401] Also known as the 'McCarran-Walter Act', Public Law No. 82-414; 8 U.S.C. 1158.

whereas, the population of refugees is approximately 18 million.[402]

The situation in Yugoslavia caused the United Nations to consider extending the mandate of UNHCR for the internally diplaced persons. The first explicit reference to the activities of UNHCR with respect to internally displaced persons was made by the United Nations General Assembly in 1992.[403] As a result, UNHCR has gradually focused more and more on the needs of internally displaced persons to be reviewed on a case-by-case basis.[404] Despite the extended mandate of UNHCR concerning internally displaced persons, this category is still not protected under the 1951 Refugee Convention and they are not considered refugees as the requirement of being outside the country of origin remains to be a condition of refugee status under the Convention.

(4) Unable or Unwilling to Avail Himself of the Protection of the Country of Origin

'Being unable to avail himself of such protection' refers to circumstances that prevent the person's return to the country of nationality or the former habitual residence beyond his/her will. This may be a state of war, civil war, or other disturbance that prevents the country of nationality from providing protection to its national. Furthermore, the country of nationality or the former habitual residence might have denied providing protection to the applicant to the effect of supporting his/her fears of persecution. This may appear as refusal of providing services which are normally provided to all nationals such as providing or extending a passport.[405]

On the other hand, being 'unwilling …to avail himself' refers to refugees who refuse to accept the protection of the government of the country of their

[402] Pilar Villanueva Sainz-Pardo, *"The Contemporary Relevance of the 1951 Convention Relating to the Status of Refugees"*, The International Journal of Human Rights, Vol. 6, No. 2, 2002, p. 29.
[403] *Ibid.* p. 30.
[404] UNHCR, Position Paper Prepared for the 18th Meeting of Standing Committee of the Executive Committee titled *"Internally Displaced Persons: The Role of the United Nations High Commissioner for Refugees"*, 20 June 2000, No. EC/50/SC/INF.2; also see Barnett, p. 252.
[405] UNHCR Handbook, paras. 97-99.

nationality or the former habitual residence due to their fear of persecution.[406] Willingness of availing the protection of the country of origin is incompatible with the refugee status. In fact, even after being granted a refugee status such wilingness would result in cessation of the staus. Therefore, it is understandable that the 1951 Convention contains such requirement at the initial stage, as a part of RSD.

(5) Cessation and Exclusion Clauses

(a) Cessation Clauses

1951 Refugee Convention provides a list of circumstances in its Article 1(C) in which a person ceases to be a refugee. Accordingly, the refugee status that is granted to person will cease if: - he has voluntarily re-availed himself of the protection of the country of his nationality; - having lost his nationality, he has voluntarily re-acquired it; or - he has acquired a new nationality, and enjoys the protection of the country of his new nationality; - he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; - he can no longer, because the circumstances in connection with which he has been recognized as a refugee ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality (provided that this condition shall not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality); - being a person who has no nationlity he is, because the circumstances in connection with which he has been recognized as a refugee ceased to exist, able to return to the country of his former habitual residence (provided that this condition shall not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of former habitual residence).

(b) Exclusion Clauses

Finally, Sections D, E, and F of Article 1 of the 1951 Refugee Convention provides a list of such instances that even if an asylum seeker satisfies the

[406] *Ibid.,* para. 100.

requirements of the refugee definition in Section A he/she would be excluded from refugee status. The Convention contains three categories of exclusion clauses: The first category, in Section D, consists of persons who are already receiving protection or assistance from United Nations, the second category in Section E consists of persons who are not considered to be in need of international protection and the third category in section F consists of persons who are not considered to be deserving international protection.

Section D was previously applied to those persons within the mandate of former United Nations Korean Reconstruction Agency and it currently applies to United Nations Relief and Works Agency for Palestine Refugees in the Near East[407] It is crucial to note that this clause only excludes from refugee status those persons who are within the areas that the said Agency operates. An asylum seeker who is outside such areas may not receive protection or assistance from this Agency and thus will be eligible for refugee status under the 1951 Refugee Convention.

With regard to the second category, Section E provides

"[t]he Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the posession of the nationality of that country."

This provision relates to those persons who have been received in a country and granted a status other than nationality which allows him/her most of the rights that are normally enjoyed by citizens. Goodwin-Gill notes[408] that this provision was originally intended to cover those Germans admitted to the German territory as a refugee or expellee of German ethnic origin as defined in Article 116 (1) of the German Constitution[409]who were granted a status equivalent to those of formally

[407] UNHCR Handbook, paras., 142-143. For further information on the activities of this agency see http://www.unorg/unrwa/ [visited on 02.08.2006].
[408] Goodwin-Gill, The Refugee in International Law, p. 93.
[409] Article 116 of the German Constitution titled "Definition of "a German", "regranting citizenship" provides *"Unless otherwise provided by statute, a German within the meaning of this Constitution is a person who possesses German citizenship or who has been admitted to the territory of the German*

recognized citizens. The writer further argues that the applicability of this provision could be considered for Commonwealth Citizens who had the right of abode which allowed them enter the country, live and work without permission. He however adds that this possibility has been reduced after adoption of the British Nationality Act in 1981 which established the British Citizenship as the sole criterion for the right of abode.[410] On the other hand, it has to be noted that exceptionally, the right of abode is still conferred on certain Commonwealth Citizens born before 1983 who have an automatic right to be granted British Citizenship.[411]

The third category appears to be the most frequently resorted one among the exclusion clauses and it has a complementary effect with the exceptions to the principle of non-refoulement in Article 33 of the 1951 Refugee Convention, namely posing a 'danger to the security of the country' and 'having been convicted by a final judgement of a particularly serious crime, constituting a danger to the community of that country.' This argument is also supported by a statement of the Standing Committee of the Executive Committee indicating the primary purpose of the exclusion clauses as *"to deprive the perpetrators of heinous acts and serious common crimes of ...[refugee] protection, and to safeguard the receiving country from criminals who present a danger to that country's security."*[412]

The major difference between the exceptions indicated above and the exclusion clauses herein below is that the later are focussed on crimes committed prior to entering the territory of the State of refuge.

Given such relationship with the scope of the non-refoulement principle this

---

Reich within the frontiers of 31 December 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such a person." Available at http://www.jurisprudentia.de/jurisprudentia.html [visited on 02.08.2006].

[410] Goodwin-Gill, p. 94.

[411] See http://www.nationalarchives.gov.uk/ERO/records/ho415/1/ind/roa.htm [visited on 02.08.2006].

[412] Article 116 of the German Constitution titled "Definition of "a German", "regranting citizenship" provides *"Unless otherwise provided by statute, a German within the meaning of this Constitution is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the frontiers of 31 December 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such a person."* Available at http://www.jurisprudentia.de/jurisprudentia.html [visited on 02.08.2006].

category of exclusion clauses deserve a closer look with a view to clarifying their mode of interpretation. Section F provides the following list of circumstances which, a person will be considered not to be deserving international protection:

"(a) a person who 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."

The drafters of the 1951 Refugee Convention must have considered earlier humanitarian law instruments such as the 1945 London Agreement and Charter of the International Military Tribunal (Nuremberg), 1948 Genocide Convention and the 1949 Geneva Conventions while incorporating the crimes against peace, war crimes and crimes against humanity into the Convention. There is however, a consensus among scholars and practitioners today that the relevant provisions of contemporary instruments such as the Statute of International Criminal Tribunal for Former Yugoslavia[413], Statute of the International Criminal Tribunal for Rwanda[414] and most importantly; the Rome Statute of the International Criminal Court [415]shall be taken into consideration while interpreting those terms.[416]In this respect, the scope of the crimes listed in 1 F(a) are comparatively easy to define. This provision creates a presumption regarding the severity of the above mentioned crimes so that no further analysis on seriousness is required as in following paragraph.[417]

---

[413] The Statute of International Criminal Tribunal for Former Yugoslavia established by the Resolution 827 of the United Nations Security Council on 25 May 1993.
[414] The Statute of the International Criminal Tribunal for Rwanda established by the Resolution 955 of the United Nations Security Council in November 1994.
[415] Rome Statute of International Criminal Court adopted in the Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, U.N. Doc. A/CONF.183/9.
[416] Nicholas Blake, *"Exclusion from Refugee Protection: Serious Non Political Crimes After 9/11"*, European Journal of Migration and Law, Vol. 4, 2003, p. 430.
[417] Goodwin-Gill, The Refugee in Internatinoal Law, p. 97.

Paragraph (b) refers to the phrase *'serious non-political crime outside the country of refuge prior to his admission to that country as a refugee'*. Therefore, a crime must exceed a severity threshold inorder to exclude an asylum seeker from refugee status. Since the term 'serious' has not been defined in the text, each State Party will enjoy a certain amount of margin of appreciation in determining the seriousness of the crime according to its own domestic law. UNHCR recommends taking into account *"the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the naure of the penalty, and whether most jurisdictions would consider it a serious crime"* in order to establish the seriousness of the crime.[418]

Another question which needs to be addressed in this context is how the political nature of a crime shall be determined. A serious crime may be considered non-political when motives other than political ones are dominant in the act concerned. There must be a clear link between the crime and the political objective. The political objective shall be proportionate to the harm inflicted by the commission of the crime.[419] A challenging topic in this context is how such proportionality test shall be implemented when crimes of terrorist nature are concerned. Article 1 F(a) of the 1951 Refugee Convention was drafted in such a way that, as mentioned above, it would eliminate threats towards the receiving State's own public order. It was presumed that political crimes traditionally only threatened the public order of the country of origin therefore, would pose no threat to the public order and security of the receiving State. Blake however, argues that the said mechanism under the Convention has been eroded due to radical change of circumstances after the 9/11 terrorist attacks. The writer observes that terrorist crimes have come to be accepted as a threat to all States in this new environment, and therefore, States have lost their objective position as a safe heaven for political criminals.[420] The fact that terrorism

[418] UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, 4 September 2003, UN Doc. HCR/GIP/03/05, para. 14, (herein after referred as 'UNHCR Guidelines on International Protection: Application of the Exclusion Clauses').
[419] UNHCR Hanbook, para. 152.
[420] Blake, *"Exclusion from Refugee Protection: Serious Non Political Crimes After 9/11"*, p. 432.

has no agreed definition[421] prepares the suitable background for political criminals to be easily considered within this category where the proportionality test works against the asylum seeker with the aid of the new formulas incorporated in extradition treaties. For instance, Article 1 of the 1977 European Convention on the Suppression of Terrorism[422], as amended by the Protocol[423] adopted by the Committee of Ministers on 13 February 2003, lists certain offences[424] that should not be considered political crimes for the purpose of extradition. The Committee of Ministers itself was concerned about the potential effects of this provision that it subsequently recommended States that such offences should not be classified automatically as non-political under Article 1 F (b) of the 1951 Refugee Convention.[425]

Paragrapgh (c) stipulates the last clause in Article 1 F which excludes those

---

[421] For a detailed analysis of the definition of 'terrorism', see the following article of Ben Saul where the writer focusses on acute problems of definition based on the resolutions of the United Nations Security Council which, in his view, resulted in the Council's encouraging States to unilaterally define terrorism in their respective national laws. (Ben Saul, *"Definition of Terrorism in the UN Security Council: 1985-2004"* Chinese Journal of International Law, Vol. 4, No. 1, 2005, pp. 141-166).

[422] ETS. No. 090.

[423] 2003, ETS No. 190.

[424] *"Article 1*

1. For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:

a. an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;

b. an offence within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971;

c. an offence within the scope of the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted at New York on 14 December 1973;

d. an offence within the scope of the International Convention Against the Taking of Hostages, adopted at New York on 17 December 1979;

e. an offence within the scope of the Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980;

f. an offence within the scope of the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal on 24 February 1988;

g. an offence within the scope of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome on 10 March 1988;

h. an offence within the scope of the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988;

i. an offence within the scope of the International Convention for the Suppression of Terrorist Bombings, adopted at New York on 15 December 1997;

j. an offence within the scope of the International Convention for the Suppression of the Financing of Terrorism, adopted at New York on 9 December 1999."

[425] Committee of Ministers of Council of Europe, Recommendation Rec(2005)6 on Exclusion from Refugee Status in the Context of Article 1 F of the Convention Relating to the Status of Refugees of 28 July 1951, 23 March 2005.

asylum seekers who have been *"guilty of acts contrary to the purposes and principles of the United Nations"from qualifying as a refugee.* This paragraph clearly overlaps with the paragrapgh (a) of the same article since commission of a *"crime against peace, a war crime or a crime against humanity"* would clearly conflict with the principles of the United Nations. UNHCR addressed to this issue in the Handbook indicating that

"Article 1 F (c) does not introduce any specific new element, however, it is intended to cover in a general way such acts against the purposes and principles of the United Nations that might not be fully covered by the two preceding exclusion clauses."[426]

The scope of this exclusion clause was considered by the Canadian Supreme Court in Pushpanathan case in 1998. The Court set forth the acts that fall within this principle as follows:

"...where a widely accepted international agreement or United Nations resolution explicitly declares that the commission of certain acts is contrary to the purposes and principles of the United Nations, then there is a strong indication that those acts will fall within Article 1(F)(c). The Declaration on the Protection of All Persons from Enforced Disappearance (GA Res. 47/133, 18 December 1992, Article 1(1)), the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment (GA Res. 3452 (XXX), 9 December 1975, Article 2), and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism (GA Res. 51/210, 16 January 1997, Annex, Article 2), all designate acts which are contrary to the purposes and principles of the United Nations. Where such declarations or resolutions represent a reasonable consensus of the international community, then that designation should be considered determinative."[427]

Finally, although it is not explicitly stated in the Convention, it is accepted

[426] UNHCR Handbook, para. 162.
[427] *Pushpanathan v. Minister of Citizenship and Immigration*, Supreme Court of Canada, Judgement of 4 June 1998, No. 25173, available at http://www.refugeecaselaw.org/ [visited on 03.08.2006].

in practice that, refugee status may be cancelled on account of general principles of administrative law, where it is subsequently found that the person in question should not have been granted refugee status due to the emergence of facts leading to an exclusion clause.[428]

4. The Issue of Responsibility

The responsibility for protection refugees falls on the States Parties under the 1951 Refugee Convention. This reference does include all sub-divisions of the State Party, such as provincial or state authorities, and will be born by all the organs of the State.[429]

A question that may arise in this context is whether a State may fulfil such protection obligation through a person or entity which is not an organ of the State which is empowered or encouraged by the law of the State to exercise elements of governmental authority. It is a fact that non-governmental organizations are increasingly taking more responsibilities for the protection of refugees.[430] Sometimes the responsibility undertaken by the non-governmental organization takes the form of delegation of responsibility by the governmental auhtorities.[431] This can be called as the privitization of the protection mechanism under the 1951 Refugee Convention.

The role of the non-governmental organizations in this area has become so instrumental that even the Executive Committee frequently makes reference to the non-governmental organizations in its recommendations directed to the States. For instance, the Conclusion on the Reception of Asylum Seekers in the Context of

---

[428] ECRE, Position on Exclusion from Refugee Status, March 2004, PP1/03/2004/Ext/CA, p. 9; also see UNHCR Handbook, para. 141; UNHCR, Guidelines on International Protection: Application of Exclusion Clauses, p.3; UNHCR: Protection Policy and Legal Advise Section, Department of International Protection, Note on the Cancellation of Refugee Status, 22 November 2004, in International Journal of Refugee Law,Vol. 17, No. 3, 2005, pp. 630-642.

[429] Articles on State Responsibility adopted by the International Law Commission of the United Nations on 12 December 2001, Article 4. UNGA Res. 56/83, annex, U.N. GAOR Supp. (No. 10) U.N. Doc. A/56/10.

[430] For further information on the significant role played by the nongovernmental organizations see B. S. Chimni(ed.), p. 215.

[431] For instance, International Catholic Migration Commission (ICMC) has built a longstanding and solid relationship with the U.S. State Department's Bureau of Population, Refugees, and Migration and the UNHCR on ressetlement processing issues. See http://www.icmc.net/docs/en [visited on 15.06.2006].

Individual Asylum Systems in 2002 reflects this tendency as follows: "ii. Asylum-seekers should have access to the appropriate governmental and non-governmental entities when they require assistance so that their basic support needs, including food, clothing, accomodation, and medical care, as well as respect for their privacy, are met."[432]

While the increasing role of non-governmental organizations in this area is a very positive development, it does also create certain risks for causing reluctance of States Parties to pursue their obligations. In this regard, it must be remembered that governments or other persons or bodies exercising governmental authority according to the Articles on State Responsibility adopted by the International Law Commission of the United Nations in 31 May 2001.

The 1951 Refugee Convention defines the refugee status and attaches certain consequences to it. However, it is silent on the procedures for identifying refugee status. In this regard, the States Parties are given a broad margin of appreciation on the choice of means for implementing the Convention. Goodwin-Gill indicates that States may fulfill this obligation through "legislative incorporation, administrative regulation, informal and ad hoc procedures, or a combination thereof".[433]It has to be noted however, that this statement is only valid for the RSD procedure itself; the use of administrative regulation, informal or ad hoc procedures with regard to human rights aspects of the 1951 Refugee Convention could be problematic when the practices of international human rights instruments on the required legal basis for interference is concerned.[434]

Although the choice of means is left to the States in the Convention, this does not mean that the States can avoid establishing RSD procedures. There is a consensus among legal scholars that the effective implementation of the Convention

[432] EXCOM Conclusion No. 93 (L111) -2002 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 216.
[433] Goodwin-Gill, The Refugee in International Law, p. 240.
[434] See for instance Sunday Times case of the European Court of Human Rights where the Court set forth the standards that the law has to display while interefering the fundamental rights stipulated in the European Convention on human Rights. Accordinly, the law must be adequately accessible and formulated with sufficient precision in order to enable foreseeability of the consequeces of the action Sunday Times v. United Kingdom, Judgment of 26 April. 1979, Application. No. 6538/74.

imposes States Parties an obligation to establish such procedures.[435] The States Party's overall responsibilities under the 1951 Refugee Convention can be summarized as the ones related to i) determination of the refugee status, ii) the application of the Convention to refugees without discrimination, iii) the issue of travel documents, iv) the treatment of asylum seekers entering illegaly v) expulsion of refugees and vi) the non-refoulement of refugees.[436]

The Executive Committee of the UNHCR however, noted in its' Conclusion No. 8 (XXVIII) that only a limited number of States parties to the 1951 Convention and the 1967 Protocol had established procedures for the formal determination of refugee status under the 1951 Refugee Convention.[437] As noted above, RSD procedure is an essential compenent of the protection responsibility of States under the Convention. Therefore, the text of the Conclusion implies that the Contracting States had still not yet satified the most important requirement of the 1951 Convention which enables the States Parties to provide protection to the specified category of persons indicated in the 1951 Refugee Convention by the year 1977.

The Committee reminded the States Parties their responsibility under the 1951 Refugee Convention and recommended them "to take steps to establish such procedures in the near future".[438]

Another issue that is related to the responsibility of refugees is the role of UNHCR on providing international protection to refugees. The 1951 Refugee Convention is a unique instrument since it gives a supervisory role to an international

---

[435] See Goodwin-Gill, The Refugee in International Law, p. 240; R. Fernhout, *"Bezwaren Tegen het, Verplicht Wegschuiven van Asielverzoeken, Juridisch Dossier, Migrantenrecht special number, 1993/10"*, p. 255 at Pieter Boeles, p. 68; Kay Hailbronner, *"Perspektiven einer Europäischen Asylrechtsharmonisierung nach der Maastrichter Gipfelkonferenz, Zeit schrift für Ausländerrecht und Auslanderpolitik, 2/1992"*, p. 51 from Pieter Boeles, p. 67.
[436] Goodwin-Gill, The Refugee in International Law, p. 240.
[437] EXCOM Conclusion No. 8 ((XXVIII), 1977, 28th Session, Article (b) at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 10.
[438] See Article (d).

organization assigned exclusively for this purpose.[439] Article 35 of the Convention regulates the obligation of the States Parties to cooperate with the UNHCR or any other agency of the United Nations which may succeed it.

The Conclusion No. 8 recommends the States Parties to "give favourable consideration to UNHCR participation in such procedures in appropriate form".

Approximately 29 years after the adoption of the Conclusion No. 8 it appears that UNHCR's recommendations are far from being satisfied by the Contracting States and UNHCR is still in the position of recommending the States Parties to establish their own RSD mechanisms and take responsibility of refugees.[440]

Hesitant or reluctant approach of the States Parties to the 1951 Refugee Convention has caused the UNHCR to become a more visible actor in the field of asylum not only as a supervising organization but also a service providing one. In other words, this was equivalent to shifting the responsibility of States concerning protection of refugees to UNHCR[441]. In this environment, UNHCR gradually converted itself to an organisation primarily focused on providing direct services.[442] The adoption of the Procedural Standards for Refugee Status Determination under the UNHCR's Mandate[443] in September 2005 is an indication of this tendency since this is the first document that UNHCR has put its' RSD procedure in the form of a formal document. This can be regarded as formalisation of UNHCR's role as a service providing organization. Adoption of this document was necessitated by the

---

[439] James C. Hathaway, *"Who should watch over refugee law?"*, Forced Migration Review, Vol. 14, 2002, p. 24; International Organization for Migration also has a similar characteristics which is focused on one human right, freedom of movement. See Goodwin-Gill, The Refugee in International Law, p. 225. However, IOM is not assigned as the guardian of a treaty as the 1951 Refugee Convention.

[440] See Article III.2. of the Agenda for Protection Addendum of the General Assembly of the United Nations dated 26 June 2002, UN Doc. A/AC.96/965/Add.1; Executive Committee of the High Commissioner's Programme, also represents a similar approach by the UNHCR. http://www.unhcr.org [visited on 17.06.2006].

[441] Dennis McNamara, *"The Protection of Refugees and the Responsibility of States: Engagement or Abdication"*, Harvard Human Rights Journal, Vol.11, 1998, p. 358.

[442] Hathaway, *"Who should watch over refugee law?"*, p. 24; also see B. S. Chimni(ed.), p. 213.

[443] http://www.unhcr.org

fact that RSD has become a core UNHCR protection function.[444] Hence, UNHCR has performed RSD in at least 60 countries in 2001 mostly in the developing countries and received approximately 66,000 asylum applications and the responsibilty of the UNHCR as such has been increasing.[445]UNHCR has been concluding bilateral cooperation agreements with countries which have not established their own asylum mechanisms in order to provide those services more efficiently.[446]

Hathaway argues that the UNHCR faces a dilemma due to its' service providing role since it can not ethically supervise its own services. Therefore he suggests that UNHCR must leave to the others direct provision of services and go back to its original supervisory role.[447]

It is difficult not to agree with the concerns of Hathaway concerning the role of UNHCR in the process; however, it is quite doubtful that withdrawal of UNHCR from the provision of services would contribute to better protection of refugees unless the States in which, UNHCR is currently providing such services, are willing to fill the gap by taking responsibility of refugees in the absence of UNHCR.

Despite the unwilingness of the transit countries to take on the responsibility of refugees and the lack of legal structures, these countries already shelter the majority of asylum seekers. Africa alone shelters more than double the number of refugees protected in Europe, North America and Oceania all together.[448] This is because such distribution of asylum seekers takes places spontaneously and in anarchy, rather than a systematic law based mechanism.[449]

---

[444] See Unit 1 of the of the Procedural Standards for Refugee Status Determination under the UNHCR's Mandate, 1 September 2005, p. 1, available at http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.htm?tbl=PUBL&id=4316f0c02 [visited on 23.09.2006].

[445] Michael Kagan, *"The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination"*, International Journal of Refugee Law, 2006, Vol. 18, No. 1, p. 3; also see Asha Hans, Astri Suhrke, *"Responsibility Sharing"*, Hathaway (ed.), pp. 84-85 for further information on how UNHCR improved its operational capacity through time.

[446] See Model UNHCR Cooperation Agreement, Rev. MNW 24.10.2001, http://www.unhcr.org [visited on 18.06.2006].

[447] Hathaway, *"Who should watch over refugee law?"*, pp. 23-26.

[448] Hathaway (ed.), p. xxi.

[449] Asha Hans, Astri Suhrke, *"Responsibility Sharing",* Hathaway (ed.) , p. 84.

In this environment, the principle of burden sharing appears as an important tool for encouraging the receiving countries of today to take more responsibility of refugees. The 1951 Refugee Convention however, does not provide any burden sharing mechanism among the States Parties. The Convention merely sets forth the problem in its preamble indicating that the grating of asylum does place unduly burdens on certain countries and further stipulates that it can be solved through cooperation.[450] Establishment of a mechanism to mitigate the burdens of receiving States at the Global scale would be an important step in this respect.[451]

C. UNIVERSAL HUMAN RIGHTS INSTRUMENTS AND THE PRINCIPLE OF NON-REFOULEMENT

1. Relationship Between the 1951 Refugee Convention and Fundamental Rights

There is no doubt that the 1951 Refugee Convention represents the commitment of the Contracting States to protect refugees by granting them a right of provisional stay abroad[452] and provide them a package of human rights during their stay as a means of protecting their human rights.

It is still debatable, however; to what extent asylum and fundamental human rights overlap.

The Preamble of the 1951 Refugee Convention supports the view that the Convention is an instrument to guarantee fundamental human rights to a specific category of persons called refugees by referring to the Universal declaration of Human Rights[453] On the other hand, there are indications that the drafters of the Convention deliberately stood distant to a formula defining refugee status as a fundamental human right. The drafters rejected to take the Universal Declaration of

---

[450] *"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 cooperation,"*

[451] Hathaway (ed.), p. xxii.

[452] Niraj Nathwani, Refugees and Human Rights:Rethinking Refugee Law, The Hague; Boston 2003, Martinus Nijhoff Publishers, p. 23.

[453] Nathwani, p. 23.

Human Rights as the sole point of departure since this would result in adopting a formula far too abstract and it would conflict with the experience of the United Nations acquired later.[454] The right to seek asylum was included in the Universal Declaration of Human Rights adopted in 1948, which, was a non-binding instrument, but not in the human rights treaties on the collection of fundamental human rights at the universal level, such as the UN Covenant on Civil and Political Rights after the Universal Declaration of Human Rights.

There have been initiatives within the United Nations and the Council of Europe to reach an agreement on introducing an individual right to asylum after the adoption of the 1951 Refugee Convention in order to strengthen the protection mechanism for refugees. However, the efforts within the United Nations, between 1948 and 1966 to provide a right to asylum in the form of a binding fundamental human right were futile.[455] In the end, it was decided that asylum law should be separated from human rights law and a separate convention on territorial asylum should be adopted. This initiative lead to the adoption of the United Nations Declaration on Territorial Asylum which merely confirmed the right of States Parties to grant asylum.[456]Reference to human rights terminology is also quite limited in the UNHCR documents and Executive Committee Conclusions until recently.[457] Most of

[454] "Mr. ROBINSON (Israel) remarked that, as a result of the various oral proposals and suggestions which had been made, the Committee should be able to take an over-all view of the question. There were three possible methods of defining the term "refugees":[…] The third method was to work out a new definition independent of that of the United Nations. That was the proposal of the delegations of the United Kingdom (E/AC.32/L.2) and of France (E/AC.32/L.3), which had submitted very broad and vague definitions. Seen in the light of recent experience, those definitions seemed to embrace many categories of persons not recognized as refugees and to leave out others already recognized as such. They were too abstract and too far removed from reality and departed from the tradition of the United Nations, which was based on humanitarian principles in the case in point. The French draft in particular wished to some extent to scrap what might be called the legal precedents in the matter and to take the Universal Declaration of Human Rights as the sole point of departure. Members of the United Nations could hardly be asked to discard the experience already acquired by that Organization in exchange for abstract formulas."

[455] See Morten Kjaerum, *"Article 14",* Alfredson, Eide (eds.), p. 284.

[456] Sandra Lavenex, Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe, Budapest 1999, Central European University Press, p. 11.

[457] Kjaerum speaks of "absence of human rights language" until the early 1990s in , *"Refugee Protection Between State Interests and Human Rights: Where is Europe Heading?"*, Human Rights Quarterly, Vol. 24, 2002, p. 524.

the time reference is made to humanitarian concerns[458] or humanitarian law[459]. When there is a reference to human rights it is usually separated from refugee law. For instance, the Executive Committee Conclusion on the Civilian and Humanitarian Character of Asylum in 2002 contains an expression which, supports this impression such as "[r]ecalling the relevant provisions of international refugee law, international human rights law and international humanitarian law"[460].

The faith of the attempt within the Council of Europe was not much different. The European Convention on Human Rights and Fundamental Freedoms does not contain a right to asylum. The proposal of the Consultative Assembly of the Council of Europe to the Council of Ministers in 1961 to insert a substantive right to asylum in the Protocol No. 2 of the Convention was rejected.[461]

Despite the above mentioned negative approaches to recognizing the right to seek and be granted asylum as a fundamental right, more recent documents at the regional and domestic level implies a transition in this regard.

The right to seek asylum is contained both in the 1969 American Convention on Human Rights[462] and in the 1981 African Charter on Human and Peoples' Rights.[463]

The practice of the European Union has been rather hesitant in this respect. The early documents such as the Dublin Convention and the London Resolutions did not make reference to the European Convention on Human Rights and other human

[458] EXCOM Conclusion No. 44, 1986 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 78.
[459] EXCOM Conclusion No. 48, 1987 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 88.
[460] EXCOM Conclusion No. 94, (L111) – 2002 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 219.
[461] Lavenex, Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe, p. 11.
[462] American Convention on Human Rights, signed on 22 November 1969 OAS, Treaty Series, NO. 36: "*Article 22. Freedom of Movement and Residence […]7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes."*
[463] African (Banjul) Charter on Human and Peoples' Rights, adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5: *"Article 12 […] 3. Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions."*

rights instruments[464]. The Amsterdam Treaty is an important instrument to observe the more recent tendency of the European Union in this regard. The Title IV of the EC Treaty empowers the Community Institutions for the harmonization of the asylum laws of the Member States. On the other hand, as far as the institutional structure stands, the Community Institutions do not have the same competence on human rights issues. Furthermore, there is no reference to human rights under this Title where the entire constitutional background of asylum policy of the European Community is regulated.

On the other hand, the Protocol on Asylum for Nationals of Member States of the European Union attached to the Amsterdam Treaty starts with a provision stipulating that the Union shall respect fundamental rights as guaranteed by the European Convention on Human Rights.[465]As mentioned above, the European Convention on Human Rights does not contain a right to asylum. Therefore, it is difficult to interpret this fact alone as a sign of recognizing asylum as a fundamental right. It could however, imply the existence of a human rights approach on the asylum policy.

Another instrument that makes reference to the right to seek asylum within the EU framework is the Charter of Fundamental Rights of the European Union, which, contains a provision on the right to asylum.[466] The Member States have twice rejected to give binding effect to this document[467].

The Member States however, made reference to the Charter in the Qualification Directive, which is indeed a binding instrument. Item (10) of the preamble provides:

---

[464] Kjaerum, p. 524.
[465] See further chapter on European Union law.
[466] Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, (7 December 2000): "*Article 18 - Right to asylum - 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 establishing the European Community.*"
[467] See Presidency Conclusions of the Nice European Council meeting 7, 8 and 9 December 2000 http://europa.eu/european_council/conclusions/index_en.htm [visited on 10 September 2006]); Also the Charter was not given binding force due to the rejection of France and the Netherlands (see http://www.unizar.es/euroconstitucion/Treaties/Treaty_Const_Rat.htm [visited on 10 September 2006]), The Treaty Establishing a Constitution for Europe (see OJ C 310, Vol. 47, 16.12.2004) which contained the Charter of Fundamental Rights.

"This Directive respects the fundamental rights and observes the principles recognized 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 the right to asylum of applicants for asylum and their accompanying family members."[468]

May this provision be interpreted as a sign of recognition of a fundamental right to asylum under the EU legal framework? The answer to this question is still not quite clear. Firstly, the scope of the Directive in question is not only confined to the refugee status but also a status called subsidiary protection that covers those persons not covered by the 1951 Refugee Convention but the other human rights instruments. Therefore, it could be contended that the first sentence only referred to this status. Secondly, it is doubtful that the recognition of a right to asylum as a fundamental right is possible through a secondary legislation such as the Qualification Directive. Considering that the Constitutional Treaties do not authorize the Community institutions to adopt legislations binding on the Member States concerning human rights matters and that the Title IV of the EC Treaty which, authorizes the institutions of the European Community on asylum matters does not make any reference to fundamental rights, it is difficult to conclude that the Qualification Directive alone constitutes a solid background for arguing that right to asylum is now regarded as a fundamental right under the EU Acquis. However, it is possible to conclude that the European Union is going through a transition stage in which the Member States are still intensively criticized for not showing sufficient diligence on keeping their asylum policies in line with human rights standards.

In practice, the European Commission's activities also imply that asylum is an issue with certain peculiarities. For instance, it is noticeable that the Commission has prepared separate strategy documents for cooperation with third countries on human rights and asylum matters.[469]

---

[468] Council Directive 2004/83/EC of 29 April 2004.

[469] Communication from the Commission to the Council and the European Parliament, The European Union's Role in Promoting Human Rights and Democratisation in Third Countries, Brussels, 8 May 2001, COM (2001)252 final; Communication from the Commission to the European Parliament and

At the domestic level it is possible to observe that many states are reluctant to recognize asylum as a fundamental right in their constitutions. Whereas, there are a number of States that have recognized it as such in their constitutions. A brief study of constitutions of European States reveal signs of a transition in this regard. Among a group of selected European countries Belgium[470], Bosnia Herzegovina[471], Denmark[472], Estonia[473], Finland[474], Greece[475], Iceland[476], Ireland[477], Latvia[478], Liechtenstein[479], Lithuania[480], Luxemburg[481], Malta[482], Netherlands[483], Sweden[484],

---

the Council, Thematic Programme for the Cooperation with Third Countries in the Areas of Migration and Asylum, Brussels 21 January 2006, COM (2006)26 final.

[470] The Constitution of Belgium, as coordinated on February 14, 1994, as amended on April 4, 2005, translated by Dirk Vanheule of the Faculty of Law, University of Antwerp, http://home.tiscali.be/dirkvanheule/compcons/ConstitutionBelgium/ConstitutionBelgium.htm [visited on 27.06.2006].

[471] Constitution of Bosnia and Herzegovina, of December 1, 1995, a translation by Sienho Lee, published by the European Journal of International Law http://www.ejil.org/journal/Vol7/No2/art3.html . [visited on 27.06.2006].

[472] The Constitution of Denmark, of 5 June 1953, http://www.oefre.unibe.ch/law/icl/da00000_.html . [visited on 27.06.2006].

[473] The Constitution of Estonia, of 18 June 1992, from the International Constitutional Law Project at the University of Bern, http://www.oefre.unibe.ch/law/icl/en00000_.html [visited on 27.06.2006].

[474] The Constitution of Finland of 11 June 1999, based on the text of the official government translation, http://www.oefre.unibe.ch/law/icl/fi00000_.html . [visited on 27.06.2006].

[475] The Constitution of Greece, http://www.hri.org/MFA/syntagma/ . [visited on 27.06.2006].

[476] The Constitution of Iceland, As amended in 1995 and 1999, http://government.is/constitution/ . [visited on 27.06.2006].

[477] The Constitution of Ireland, of 1 July 1937, http://www.taoiseach.gov.ie/upload/publications/297.htm . [visited on 27.06.2006].

[478] Constitution of the Republic of Latvia, of 1922, as amended in 1998, from the Constitutional Court of the Republic of Latvia, http://www.satv.tiesa.gov.lv/Eng/satversme.htm . [visited on 27.06.2006].

[479] The Constitution of Liechtenstein of 1921, http://www.geocities.com/dagtho/lieconst19211005.html . [visited on 27.06.2006].

[480] The Constitution of Lithuania, of 25 October 1992, as amended 13 June 2004, translated and published by the Constitutional Court of the Republic of Lithuania, http://www.lrkt.lt/Documents2_e.html . [visited on 27.06.2006].

[481] The Constitution of Luxemburg dated 17 October 1868, http://www.oefre.unibe.ch/law/icl/lu00000_.html . [visited on 27.06.2006].

[482] The Constitution of Malta, dated 1964, based on the official English language version of the constitutional text, first published by the Department of Information in 1992. Includes amendments adopted in 1994 (Section 101A) and in 1996, http://www.oefre.unibe.ch/law/icl/mt00000_.html . [visited on 27.06.2006].

[483] The Constitution of the Kingdom of the Netherlands, dated 2002, published by the Ministry of Interior, and Kingdom Relations, Constitutional Affairs and Legislation Department , in collaboration with the Translation Department of the Ministry of Foreign Affairs. http://www.minbzk.nl/contents/pages/6156/grondwet_UK_6-02.pdf [visited on 27.06.2006].

[484] The Swedish Constitution, http://www.riksdagen.se/templates/R_Page____6357.aspx [visited on 27.06.2006].

Turkey[485] and the Turkish Republic of Northern Cyprus[486] do not have a right to asylum in their respective constitutions. Whereas, the constitutions of Bulgaria[487], Croatia[488], Germany[489], Hungary[490], Italy[491], Macedonia[492], Poland[493], Portugal[494], Romania[495], Slovakia[496] and Slovenia[497] contain provisions regarding the right to asylum.

These findings at the universal, regional and domestic level lead us to the conclusion that the right to asylum under the 1951 Refugee Convention has not yet become a univerally recognized fundamental right.[498] On the other hand, there is no doubt that most of the rights attached to the refugee status under the 1951 Refugee Convention, including the non-refoulement principle are universally recognized fundamental rights.

After having established the duality of these two areas of law, a clarification is needed on why these issues are covered together in the confines of this research. The answer for this question lies in their complimentary effect on each other. The

[485] Law No. 2709 Constitution of the Republic of Turkey of 7 November 1982, R.G. 17863 bis, 09.11.1982.
[486] The Constitution of the Republic of Nothern Cyprus, http://www.cm.gov.nc.tr/servet/cons/consin.htm [visited on 27.06.2006].
[487] Article 27 of the Constitution of Bulgaria, dated 12 July 1991, http://www.oefre.unibe.ch/law/icl/bu00000_.html [visited on 27.06.2006].
[488] Article 33 of the Constitution of the Republic of Croatia, Published by the Constitutional Court of the Republic of Croatia, based on the text provided to the public by the Constitutional Court, http://www.oefre.unibe.ch/law/icl/hr00000_.html [visited on 27.06.2006].
[489] Article 16 a) of the Constitution of the Federal Republic of Germany, dated 23 May 1949, http://www.jurisprudentia.de/jurisprudentia.html [visited on 27.06.2006].
[490] Article 65 of the Constitution of the Republic of Hungary, dated 20 August 1949, http://www.oefre.unibe.ch/law/icl/hu00000_.html [visited on 27.06.2006].
[491] Article 10 of the Constitution of Italy, based on a translation provided by the Italian Embassy in London, dated 22 December 1947, http://www.oefre.unibe.ch/law/icl/it00000_.html [visited on 27.06.2006].
[492] Article 29 of the Constitution of the Republic of Macedonia, http://faq.macedonia.org/quicklinks/quicklinks2.html [visited on 27.06.2006].
[493] Article 56 of the Constitution of the Republic of Poland, dated 2 April 1997, http://www.oefre.unibe.ch/law/icl/pl00000_.html [visited on 27.06.2006].
[494] Article 33 of the Constitution of the Portuguese Republic, http://www.parlamento.pt/ingles/cons_leg/crp_ing/ [visited on 27.06.2006].
[495] Article 18 of the Constitution of the Republic of Romania, http://www.oefre.unibe.ch/law/icl/ro00000_.html [visited on 27.06.2006].
[496] Article 53 of the Constitution of the Slovak Republic, dated 1 September 1992, http://www.oefre.unibe.ch/law/icl/lo00000_.html [visited on 27.06.2006].
[497] Article 48 of the Constitution of the Republic of Slovenia, http://confinder.richmond.edu/country.php [visited on 27.06.2006].
[498] For a supporting view see Chimni(ed.), p. 85.

findings of this research suggest that differentiation between asylum law and human rights law[499]shall never lead to the absence of a human rights perspective in dealing with asylum matters or absence of an asylum perspective in dealing with human rights matters.

Although, the absence of a human rights perspective in the target countries, particularly in the EU Member States[500] has been among the prevailing motives of this study, absence of an asylum law perspective in the area of human rights law may also lead to protection deficits.

A simple substantial examination of the charateristics of asylum and human rights law instruments is sufficient to identify how these instruments do complement each other.

If all human rights violations were to give rise to refugee status, it is clear that the target countries would never be able to finance the asylum system established under the 1951 Refugee Convention. Therefore, the refugee definition is inevitably narrower than the protected scope of fundamental human rights. For instance, the term "persecution" which is indicated in the Convention as one of the core elements of the refugee definition, generally corresponds to aggrevated versions of certain forms of human rights violations, and thus it provides a higher threshold to be achieved compared to human rights standards.

Second, the protected scope of refugee status is confined to five grounds of well founded fear of persecution which are listed *numerus clausus* in Article 1 of the 1951 Refugee Convention namely race, religion, nationality, membership of a particular social group or political opinion. On the other hand, the scope of protection provided under the human rights instruments, is not confined to these grounds.

Third, human rights law instruments do have a clear advantage concerning

[499] It shall be noted that there is no consensus in the doctrine and the practice on this point. There are scholars who regard refugee law as a subsidiary system of human rights protection. For instance see Nathwani, p. 17. Nathwani criticises the German doctrine which concluded that asylum can not constitute a human right in subtance but a subsidiary instrument to ensure human rights.
[500] Kjaerum, p. 518.

the exceptions to the principle of non-refoulement as the Article 33 the 1951 Refugee Convention, on the non-refoulement principle, provides that

"[t]he benefit of the present provision may not ... be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

The prohibition of torture, however, that non-refoulement principle is generally linked to under the human rights instruments has an absolute character and allows no exceptions.[501]

On the other hand, there are certain instances where asylum law is known to be a more effective instrument of protection. Firstly, the 1951 Refugee Convention does not require the existence of a human rights violation as a precondition of being granted refugee status. Hence, "persecution" does not need to have occured in order to give rise to refugee status according to the Article 1 of the Convention.[502] In this regard, mere well founded fear of persecution is sufficient. The said advantage of refugee law however, has been eliminated to a great extent, due to the recent developments in human rights law, particularly on the principle of non-refoulment which became a common interest protected by both areas.

The fact that "persecution" need not have occurred before the responsibilty of the receiving state to arise, however; is not a distinct feature of refugee law anymore, since the recent human rights jurisprudence indicates that the existence of a real risk of human rights violation is sufficient in order to engage the responsibility of the sending state under human rights instruments.[503]

Second, as matter of definition "persecution" needs not be attributable to a

[501] See for instance *H.L.R. v. France*
[502] See supra chapter on definition of refugee.
[503] See for instance infra *Cruz Varas v. Sweden*, *Chahal v. United Kingdom*, *Jabari v. Turkey* judgements of the ECtHR.

State in refugee law[504] unlike the human rights law. The acts raising responsibilty may also be committed by non-state agents in a territory where there is no state authority. Being unable or unwilling to avail oneself of the protection of the country of origin is sufficient to be granted refugee status.[505] The human rights jurisprudence however, has evolved in to a new stage that it recognizes that the right to life and prohibition of torture guaranteed under human rights instruments may also apply where danger emanates from non-state actors.[506]Therefore, this aspect of refugee law does not prove to be complementing human rights standards either anymore.

The real advantage of the 1951 Refugee Convention lies not on defining the beneficiary of the right but the standard of protection provided for the persons who are granted refugee status. As mentioned in the preamble,

"the object of the [1951 Refugee Convention] is to endavour to assure refugees the widest possible exercise of the fundamental rights and freedoms enshrined in the Charter of the United Nations and the Universal Declaration of Human Rights".

In this regard, the Convention contains a referencing system for determining the standard of protection to be provided for refugees that does not exist in human rights treaties.

---

[504] Goodwin-Gill also supports this view by stating that "...the issue of State Responbility for persecution, relevant though it may be in other circumstances, is not part of the refugee definition." Goodwin-Gill, The Refugee in International Law, p. 73.; There are varying interpretations of the 1951 Refugee Convention as to whether refugee status should be granted on account of fear of persecution due to the acts of non-state agents. For instance, Member States of the European Union had to adopt a more restrictive interpretation in 1996 in the Joint position Defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term "Refugee" in Convention Relating to the Status of Refugees, Article 1, adopted 28 July 1951, U.N. Doc. A/CONF.2/1087(1951), 189 U.N.T.S. 150(96/196/JHA). This was due to the fact that in mid-1990s Germany, France, Italy, Norway, Sweden and Switzerland did not grant refugee status to those targeted by non-state agents (see Rupert Colville, *"Asylum in Europe: Persecution Complex"*, Refugees Magazine, Issue 101, 1995, available at http://www.unhcr.org/publ/PUBL/3b543f784.html [visited on 25.08.2006] (no page number)). On the other hand, UNHCR's position was clearly set forth in paragraph 65 of the 1979 Handbook on Procedures and Criteria for Determining Refugee Status which, is generally accepted as the main international guidelines for interpretation of the definition in the 1951 Refugee Convention. Accordingly, acts that are committed by the local population can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection. (HCR/IP/4/Eng/Rev. 1 Reedited, Geneva, January 1992, UNHCR, 1979)

[505] See Article 1 (A) of the 1951 Refugee Convention.

[506] see H.L.R. v. France, para. 40.

Accordingly, first, refugees are accorded the same treatment as nationals concerning artistic rights and industrial property,[507]access to the courts, including legal assistance and exemption from cautio judicatum solvi[508], rationing,[509] elementary public education,[510]public relief,[511]social security,[512]fiscal charges.[513]

Second, the standard of protection is indexed to the most favourable treatment accorded to nationals of a foreign country in the same circumstances on the right of association[514] and on wage-earning employment.[515]

Third, the States Parties have undertaken to treat refugees not less favourable than that accorded to aliens generally in the same circumstances on the right to Housing[516]and right to movable and immovable property.[517]

These standards clearly indicate that the standards of protection provided under the 1951 Refugee Convention are higher than the minimum standards allowed by human rights treaties in most cases.

This fact has lead some of the target countries to watering down the refugee definition through varying interpretations in order to avoid granting refugee status but offering complementary forms of protection such as 'B-Status', 'subsidiary protection', 'de facto status', 'humanitarian protection' to those persons who could normally meet the criteria in the 1951 Refugee Convention.

Adoption of complementary forms of protection is regarded, in principle, as a positive way of responding to the protection needs of those persons who are outside

[507] Article 14
[508] Article 16
[509] Article 20
[510] Article 22
[511] Article 23
[512] Article 24
[513] Article 29
[514] Article 15
[515] Article 17
[516] Article 21
[517] Article 13

the protected scope of the 1951 Refugee Convention.[518]This mechanism may however, easily be misused since it allows States to provide fewer benefits and entitlements compared to the refugee status.

The recognition rates imply that there is a risk as such at least within the European Countries. Hence, the Member States tend to grant complementary form of protection more often than refugee status. For instance, Sweden granted only 1.1% of asylum applications refugee status on Convention grounds but above 20% on humanitarian or other grounds in 2002. Similarly, the United Kingdom granted only 10% of the applications status on Convention grounds but the rate is 21% for humanitarian and other grounds.[519]

The Executive Committee of the UNHCR has identified at least three of those groups on whom divergent views concerning the interpretation of the refugee definition have emerged in its' Conclusion on Complemetary forms of Protection.[520]Therefore, UNHCR underlines the importance of applying the standards of the 1951 Refugee Convention in a harmonized way together with human rights standards and further reminds the States that it has wider competence on those persons who may not necessarily be Convention Refugees but nevertheless need international protection.[521]

In the light of these explanations, it can be concluded that in terms of substance both the human rights law standards and the standards under the 1951 Refugee Convention have the potential of backing up each others' deficiencies and shall be utilized as complementary instruments. Parallell to this conclusion, it shall be noted that the Executive Committe of the UNHCR often resorts to basic human rights standards as a backup system as well. For instance, in its Conclusion No. 22 the Committee indicated that the standards defined in Article 31 of the 1951 Refugee

[518] Standing Committee of the Executive Commitee of the High Commissioner's Programme, Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime, 9 June 2006, UN Doc. EC/50/SC/CRP.18, p. 1.
[519] Jane McAdam, Complementary Protection: A Comparative Perspective, Discussion Paper No. 2, 2005, United Nations High Commissioner for Refugees Regional Office for Australia, New Zealand, Papua New Guinea and the Soutn Pacific, p. 3.
[520] EC/50/ SC/CRP.18, p. 2.
[521] *Ibid,* p. 3.

Convention do not cover all aspects of the treatment of asylum seekers in large scale influx situations and that it is therefore, essential that asylum seekers who have been temporarily admitted pending arrangements for a durable solution should be treated in accordance with minimum basic human standards.[522] In another conclusion, the Committee recommended the States to develop a more comprehensive approach, particularly on problems of displacement, involving respect for all human rights.[523]

The potential of the legal norms of both areas for complementing each other raises another question; what will be the legal framework for the complementary use of these norms ?

One such legal framework suggested by Lauterpacht and Bethlehem is the cross-fertilisation of treaties which means the wording and construction of one treaty influencing the interpretation of another treaty containing similar words or ideas.[524]

Cross-fertilisation of asylum law and human rights law is useful since, as mentioned above, they often protect common interests. This argument is especially valid for the non-refoulement principle which appears to be the most concrete example of such common interests. Goodwin-Gill suggests that non-refoulement principle shall be examined not in isolation, but in its dynamic sense and in relation to the concept of asylum and the pursuit of durable solutions.[525] This statement shall be extended as to cover the developing human rights standards today. 1951 Refugee Convention may better serve the protection needs of today and more effectively work against refoulement, if it is regarded as a living instrument which is interpreted in the light of the developments in the human rights law.[526]In fact, the indexing system in

[522] See EXCOM Conclusion No. 22 (XXXII) - 1981
[523] EXCOM Conclusion No. 80 (XLVII) – 1996 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 174; also see EXCOM Conclusion No. 81 (XLVIII) – 1997.
[524] Lauterpacht, Bethlehem, p. 19.
[525] Goodwin-Gill,The Refugee in International Law, p. 124.
[526] This approach is, in fact, not shared by all scholars. Brian Gorlick refers to the following speech of the former Indian Permanent Representative to the UN at the 48th Session of the UNHCR Executive Committee as an illustration of the approach of States that regard the 1951 Refugee Convention as an outdated and Euro-centric instrument that has limited relevance to the problems of less developed countries: *"The 1951 Refugee Convention was adopted in the specific context of conditions in Europe during the period immediately after the Second World War. International refugee law is currently in a state of flux and it is evident that many of the provisions of the Convention, particularly those which*

the Convention does inevitably establish a living instrument according to which States Parties are oblidged to change their treatment of refugees along with the developments in the human rights standards.

There are some aspects of the issue however, where cross fertilisation is not a suitable tool for providing an effective protection such as clearly conflicting provisions of the 1951 Refugee Convention and the human rights instruments. For instance, Article 33 of the 1951 Refugee Convention does contain certain exceptions to the principle of non-refoulement, whereas the prohibition of torture under which the human rights instruments protect individuals against refoulement is absolute in character and therefore, provide no avenues for refoulement even in exceptional situations. In such instances, the instrument that sets the higher standard shall prevail over the one setting the lower standard as the States Parties have to abide by both standards.

Effectiveness of monitoring mechanisms and procedures is another aspect of the issue to be considered in the context of complementary use of instruments.

UNHCR is the only international organization assigned exclusively to monitor the implementation of a treaty devoted to one single right. The human rights treaties under the UN framework however, are under the hierearchy of the United Nations High Commissioner for Human Rights to support the monitoring procedures run by part-time supervisory bodies.[527]Therefore, UNHCR seems to be in a better position than the UNHCHR with regard to the institutional structure, concentration and funding opportunities.

Second, UNHCR is also advantegous with regard to the competences because, despite its' special status as the guardian of the 1951 Refugee Convention

---

provide for individualised status determination and social security has little relevance to the circumstances of developing countries today who are mainly confronted with mass and mixed inflows...We therefore, believe that the time has come for a fundamental reformulation of international refugee law to take into account the present day realities...", Brian Gorlick, Human Rights and Refugees: Enhancing Protection Through International Human Rights Law, New Issues in Refugee Research, UNHCR Working Paper No. 30, October 2000, p. 2.

[527] Hathaway, *"Who Should Watch Over Refugee Law?"*, p. 24.

it's mandate is not limited to the substantive provisions thereof.[528]Therefore, UNHCR may rely on whatever instruments of international law[529], human rights law and even humanitarian law that may be relevant for the purpose of protecting the persons that it is concerned with. Therefore, developing and promoting the practical and analytical links between refugee law and human rights law is seen among the tasks of UNHCR.[530]

Third, UNHCR has considerable field presence with its protection officers which enables it to make better assessment of the country conditions and potential solutions to refugee problems and offer protection directly.[531]This is an aspect that human rights monitoring mechanisms are rather underdeveloped. The visits paid by missions of human rights monitoring mechanisms such as the UN Special Rapporteurs or the CPT are closest that the human rights mechanisms could get to field presence which are very limited compared to UNHCR's permanent presence in the field.

On the other hand, it is observed that despite the authority given to UNHCR to supervise the implementation of the 1951 Refugee Convention, the States Parties often ignored and sometimes even openly resisted UNHCR's views on protection issues.[532] This is due to a number of factors that hinder the effectiveness of this supervisory mechanism of the UNHCR.

First, although UNHCR has an advantage of field presence compared to

---

[528] The Statute of the Office of the United Nations High Commissioner for Refugees which was adopted by the United Nations General Assembly on 14 December 1950 defines the mandate of the organization in paragraph 1 of Chapter I as follows: *"The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting governments and, subject to the approval of the governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.";* Hathaway also establishes that UNHCR's mandate is much broader than supervising the 1951 Refugee Convention. It is so broad that in the recent years its work as a humanitarian relief agency has started to overshadow its core protection functions. See Hathaway, "Who Should Watch Over Refugee Law?", p. 23.
[529] Lauterpacht, Betlehem, p. 8.
[530] Gorlick, p. 2.
[531] *Ibid.,* p. 8.
[532] McNamara, p. 360.

most human rights monitoring mechanisms, such presence and activities are to a great extent dependent on the willingness of the governments to cooperate with UNHCR. [533]

Second, unlike the human rights instruments, no complaints procedure is available in asylum law to receive individual or inter-state applications to detect violations. Hathaway sees the absence of a free standing mechanism to promote inter-state accountability as a fundamental dimension of the problems regarding the implementation of the 1951 Refugee Convention.[534]And thus he recommends to establish an oversight mechanism with the involvement of the States Parties. There are definetely legal and institutional benefits that can be gained from the establishment of an inter-state mechanism particularly considering the burden sharing aspects of the issue.

On the other hand, although absence of an inter-state mechanism designed for dealing with state responsibility is an important gap in the system, its' effects on the supervisory mechanism is far more limited compared to the absence of a mechanism that allows indivuduals to challenge the acts of States before judicial or quasi-judicial bodies; since States are generally reluctant to use inter-state mechanisms against each other in order to avoid creating political tension among themselves.[535]

1951 Refugee Convention makes clear that the States shall not regard granting of asylum as a hostile act[536], however, it is still quite likely that the fate of an inter-state mechanism in this area would be similar to the one under the human rights instruments since the States are extremely senstive on asylum issues.[537]

---

[533] Gorlick, p. 9.
[534] Hathaway, Who Should Watch Over Refugee Law?, pp. 23-26.
[535] See Scott Leckie, *"The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?"*, Human Rights Quarterly, Vol. 10, No. 2, 1988, p. 249-303.
[536] *"Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,"*
[537] An extreme example of this case was the reaction of the Turkish Government to a series of asylum requests by the terrorist Abdullah Ocalan after being expelled from Syria on 9 October 1998. Ocalan visited Greece, Russia and Italy and applied for asylum in each of these countries. Turkey warned its

The absence of a complaint mechanism for individuals is a major disadvantage of the UNHCR's monitoring mechanism since this is the most dynamic channel for developing the instruments in the human rights law area and maintaining their living instrument character. Bedford lists several strengths of a potential individual complaint system in the area of asylum law[538]. Accordingly an individual complaints procedure provides an opportunity for the individual to seek direct enforcement of his or her rights. Moreover, Bedford indicates that a potential of being declared as a violating State by a supervisory body may force a State to take remedial action since States would not like to be known as such. The publicity of a negative finding may turn international attention to the violating State which, may also contribute to the discontinuation of the violation. And finally, an individual complaints procedure may also lead to a positive dialogue between the applicant and the State concerned, which may result in amicable settlement of the dispute. The current UNHCR monitoring system lacks all these advantages since it does not have an individual complaints procedure.

Third, although Article 35 of the 1951 Refugee Convention contains an obligation of States Parties to provide information and statistical data on the implementation of the Convention, this provision is not formulated as a regular reporting requirement as in the human rights monitoring mechanisms and moreover, UNHCR has still not given full effect to this provision.[539]

As a result, it can be concluded that both monitoring systems do have their own advantages that may complement each other being dominantly the existence of

---

neighbors that granting asylum to Ocalan would be regarded as a hostile act. (Joshua Black, **"***Greek Diplomacy and the Hunt for Abdullah Ocalan"*, http://www.wws.princeton.edu/cases/papers/greekdiplomacy.html [visited on 09.06.2006]). The following response of the Italian Prime Minister Massimo D'Alema was also interesting: *"This is the great European tradition and therefore, whatever we decide should not be interpreted as a hostile act against Turkey, but as an act of respect for our own laws, our history, our values,"* http://news.bbc.co.uk/1/hi/world/europe/216497.stm [visited on 09.06.2006])

[538] Vanessa Bedford, Overseeing the Refugee Convention: Complaints, Working Paper No. 2, James C. Hathaway (research director), International Council of Voluntary Agencies and the Program in Refugee and Asylum Law University of Michigan, 2001, http://www.icva.ch/cgi-bin/browse.pl?doc=doc00000485 [visited on 09.06.2006].

[539] see Gorlick, p. 8.

complaints procedures in the human rights law area and the field presence and direct assistance in the asylum law.

2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CAT[540] has been the first international human rights treaty that incorporated an explicit and specific provision on the principle of non-refoulement.[541] Article 3 of the Convention which, is clearly influenced by the formula in Article 33 of the 1951 Refugee Convention[542], has proved to be the most frequently invoked provision of CAT.[543] For some scholars this article provides the only justification of exitence of ACT along with the ICCPR[544]. Article 3 provides:

"1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

One substantial difference in the formula however, is that CAT does not stipulate any exceptions to the non-refoulement principle. The second paragraph of Artice 2 provides: *"No exceptional circumstances whatsoever, whether a state of war, internal political stability or any other public emergency, may be invoked as a*

---

[540] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (UNGA Res. 39/46, 10 December 1984).
[541] It is notable that not even the United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 9 December 1975 contains any provision on the principle of non-refoulement. (UNGA Res. 3452 (XXX) **).**
[542] Boeles, p.173.
[543] Anne Bayefsky, Stephanie Farrior, Karen Hanrahan, Andrew Landgham, *"Protection Under the Complaint Procedures of the United Nations Treaty Bodies"*, Joan Fitzpatrick (ed.)., Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures, New York 2002, Transnational Publishers, p. 75.
[544] Barrett, p. 12.

justification of torture." Secondly, unlike the Article 33 of the 1951 Refugee Convention CAT explicitly refers to extradition cases.[545] The second variation however, does not have any distinctive legal consequences, since the formula in the 1951 Refugee Conventions is interpreted as to include all types of acts resulting in sending of a person to a place where he/she will face well founded fear of persecution as discussed above.

Committe Against Torture conducts its monitoring duty through three procedures adopted for this purpose. The first such procedure is the so called 'reporting procedure' where the Committee examines the report which the States parties submit on a regular basis on the way they implement CAT in their own domestic legal systems[546]. Secondly, CAT contains an 'inquiry procedure' whereby the Committee invites a State Party to cooperate in examination of information before the Committee if it receives reliable information which appears to contain well founded indications that torture is systematically being practiced on the territory of a state.[547] This procedure poses an advantageous side of CAT over the ICCPR since the Human Rights Committee lacks similars powers under the ICCPR. Until so far, such investigations have been carried out for Turkey[548], Egypt[549], Peru[550], Mexico[551], Republic of Serbia[552] and Sri Lanka[553] The findings of the investigation concerning Turkey has been taken into consideration in Ismail Alan v. Switzerland case.[554] This procedure enables the Committee to have direct access to factual information concerning State practies. This is a useful tool for assessing compliance with the non-refoulement obligation since such examination is most of the time dependent on problematic factual evidence. Thirdly, CAT contains two complaint procedures which allows submitting communications to the Committee. The most

[545] For a detailed analysis of torture in extradition cases see *Agiza v. Sweden*, Committee Against Torture, Communication No. 233/2003, Decision of 20 May 2005, UN Doc. CAT/C/34/D/233/2003.
[546] CAT, Article 19.
[547] *Ibid.,* Article 20.
[548] Report of the Committee Against Torture on Turkey, UN Doc. CAT A/48/44/Add.1,1994.
[549] Report of the Committee Against Torture on Egypt, UN Doc. CAT A/51/44, 1996.
[550] Report of the Committee Against Torture on Peru, UN Doc. CAT A/55/44, 2000.
[551] Report of the Committee Against Torture on Mexico, UN Doc. CAT /C/75, 2003.
[552] Report of the Committee Against Torture on Republic of Serbia, UN Doc. CAT A/59/44, 2004.
[553] Report of the Committee Against Torture on Sri Lanka, UN Doc. CAT A/57/44, 2002.
[554] *Ismail Alan v. Switzerland*, Committee Against Torture, Communication No. 21/1995, Decision of 31 January 1995, UN Doc. CAT/C/16/D/21/1995, para.11.5

frequently resorted procedure is the individual complaint procedure regulated under Article 22 of CAT. This requires a unilateral declaration of the State recognizing the competence of the Committee. Article 21 of CAT contains an inter-State complaint mechanism. This mechanism however, has not been used until so far.

The Committee adopted a General Comment[555] on the implementation of Article 3 in November 1997 where it summarized its case-law on Article 3 of CAT.

a) Geographical Scope of Protection

(1) Extra-Territorial Application

The geographical scope of obligations is determined by the first paragraph of Article 2 which provides: *"Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."* [556]

The Committee Against Torture has recently interpreted this provision with regard to the question of extra-territorial applicability of non-refoulement rule in the context of refoulement of terrorist suspects by the United States intelligence agencies outside its own territory. The concluding observations of the Committee in the 2006 Country Report[557] of the United States clearly indicates that the Committe does not regard non-refoulement obligation to be merely limited to a State's own territory. In this respect, the Committee expressed the following concerns on the United State's said practice abroad:

---

[555] Committee Against Torture, General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22, 21 November 1997, UN Doc. A/53/44, Annex IX.

[556] It is notable that Article 5 of CAT involves further provisions concerning the State's responsibility for criminalizing and punishing torturers abroad but within its own jurisdiction.as follows*: "Article 5 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases: (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) When the alleged offender is a national of that State; (c) When the victim is a national of that State if that State considers it appropriate. 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article. 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with internal law."*

[557] Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, 19 May 2006, UN Doc. CAT/C/USA/CO/2.

"The Committee is concerned that the State Party considers that the non-refoulement obligation, under article 3 of the Convention, does not extend to a person detained outside its territory. The Committee is also concerned by the State party's rendition of suspects, without any judicial procedure, to States where they face a risk of torture. (article 3). The State Party should apply the non-refoulement guarantee to all detainees in its custody, cease the rendition of suspects, in particular by its intelligence agencies, to States where they face a risk of torture, in order to comply with its obligations under article 3 of the Convention. The State party should always ensure that suspects have the possibility to challenge decisions of refoulement."[558]

(2) Admission at the Frontier

Although Article 3 of CAT does not define the term "refouler", the Committee has been interpreting this term as to include admission at the frontier. For instance, while considering the second periodic report of Norway, the Committee members requested information from the Norwegian government on how the Norwegian Immigration Act actually worked and whether foreigners, especially refugees, could be denied entry to Norway by the border police and turned back and what recourse procedure was avaılable to them.[559]

More recently, the Committe repeated the same position while considering the periodic report of France. In its concluding observations, the Committee criticized the new French Act of 26 November 2003 on the ground that *"any person who has been returned (refused entry) is no longer automatically entitled to one clear day before the decision is enforced…"*[560]

[558] *Ibid.,* para. 20; for a detailed analysis of the compatibility of U.S. Government's rendition policy with CAT see Michale John Garcia, Renditions: Constraints Imposed by Laws on Torture, US Department of State: Congressional Research Service Report for Congress, Order Code RL32890, 5 April 2006.
[559] Committee Against Torture, Concluding Observations of the Committee Against Torture: Norway, 26 June 1993, UN Doc. A/48/44, para.68.
[560] Commitee Against Torture, Conclusions and Recommendations of the Committee Against Torture: France, 3 April 2005, UN Doc.CAT/C/FRA/CO/3, para. 8.

(3) Chain Refoulement

Definition of the territory to which Article 3 prohibits refoulement raises another question mark that has to be answered in the context of geographical scope of CAT. Does Article 3 merely prohibit refoulement to the country of origin or does it also extent to other States where the applicant may be expelled to the country of origin or subjected to torture? In Mutombo v. Switzerland, the Committe clarified this issue by stating that the *"State party has an obligation to refrain from expelling Balabou Mutombo to Zaire, or to any other country where he runs a real risk of being expelled or returned to Zaire or of being subjected to torture".*[561]

The Committee elaborated on the same approach in a more recent decision namely Avedes Hamayak Korban v. Sweden. Korban was a citizen of Iraq who could not return to his country due to the fact that he was suspected of being an informer for the Kuwaiti authorities on the grounds that he did not leave Kuwait when the Iraqi army withdrew. He has stayed in Jordan and Turkey without obtaining residence permit before he arrived in Sweden. As a result the Swedish migration authorities ordered his expulsion to Jordan without making an evaluation of risk of torture in this country. The Committee however, observed there was a risk of deportation from Jordan to Iraq. Therefore, the Committee concluded that

"the State party has an obligation to refrain from forcibly returning the author to Iraq. It also has an obligation to refrain from forcibly returning the author to Jordan, in view of the risk he would run of being expelled from that country to Iraq."[562]

b) Definition of Torture

One peculiarity of Article 3 of CAT is that its protected scope is limited to the prohibition of torture and it does not extend to inhuman or degrading treatment or punishment. In this regard, the protected scope of Article 3 is much narrower than

[561] *Mutombo v. Switzerland*, Communication No. 13/1993, Decision of 27 April 1994, UN Doc. A/49/44, para. 10
[562] *Avedes Hamayak Korban v. Sweden*, Communication No. 88/1997, UN Doc. CAT/C/21/D/88/1997 paras. 6.5 – 7.

the formula in the 1951 Refugee Convention.[563]

On the other hand, unlike the persecution test in the 1951 Refugee Convention, CAT does not require any additional severity test other than establishing the risk of being exposed to acts amounting to torture. In this respect, the protected scope of CAT is broader than the 1951 Refugee Convention.

The definition of torture and the distinction between torture and inhuman or degrading treatment or punishment is crucial for determining the protected scope of CAT since, as mentioned above, this Convention has limited its protected scope to the prohibition of torture.

Article 1 of CAT defines 'torture' as:

"*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."*

The Committee Against Torture has elaborated on this definition while considering the compatibility of the interrogation techniques applied by Israel to the Article 1 of CAT. The Committe considered that the following techniques amounted to torture:

"(1) Restraining in very painful conditions, (2) hooding under special conditions, (3) sounding of loud music for prolonged periods, (4) sleep deprivation

[563] The General Comment No. 01 on the implementation of Article 3 of the Convention in the Context of Article clearly indicates in its Article 1 that *"[a]rticle 3 is confined in its application to cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in Article 1 of the Convention."*

for prolonged periods, (5) threats, including death threats, (6) violent shaking and (7) using cold air to chill".

The Committee further expressed that existence of torture is evident paticularly when the above mentioned practices are applied in combination.[564]

On the other hand, Article 1 clearly states that *"[i]t does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions"* as in the practice of the 1951 Refugee Convention. This does not mean that any punishment according to the country of origin's domestic law will be acceptable. The Committee does find a violation of Article 3 if the sanction concerned is below the standard indicated above. For instance, in A.S. v. Sweden the Committee found that sending a woman back to Iran where she would face a punishment by stoning to death was prohibited under Article 3.[565]

CAT contains a peculiar provision on defining the actors of torture. Whether or not State responsibility should arise from the acts of non-state actors has been a debated issue under the asylum law until recent times. It appears that the hesitant approach of States to this topic during 1980s was reflected to the text of CAT as well. Hence, unlike the approach which has become dominant in interpreting the 1951 Refugee Convention, CAT in principle, only protects against the acts of State agents. Article 1 of CAT explicitly makes reference to *"torture with the consent or acquiescence of a public official or other person acting in official capacity."* Therefore, at least consent or acquiescence of a public official is needed for establishing a violation under Article 3.

This argument also finds support in paragraph 1 of the General Comment No.1 which provides: *"...Article 3 is confined in its application to cases where there are substantial grounds for believing that the author would be in danger of being subjected to torture as defined in article 1 of the Convention."*

---

[564] Committee Against Torture, Special Report of Israel, 9 May 1997, UN Doc. CAT/C/SR.297/Add.1, para. 5.

[565] *A. S. v. Sweden*, Communication No. 149/1999, Decision of 24 November 2000, UN Doc. CAT/C/25/D/149/1999.

Although the case-law of the Committee reflects the same perspective,[566] the Committee showed signs of flexibility in this approach in a recent case titled Sadiq Shek Elmi v. Australia.[567] Australian Government intended to deport the applicant to Somalia which had been without a central government for a number of years. There were however, factions operating in Mogadishu which had set up quasi-governmental institutions and were negotiating the establishment of a common administration. The Committee considered that "*the members of those factions can fall, for the purposes of the application of the Convention, within the phrase "public officials or other persons acting in an official capacity" contained in article 1.*"

c) Assessment of the Risk

Article 3 of CAT does not provide much detail concerning the degree of risk that shall be required in order to find a violation. It merely indicates that there must be *"substantial grounds for believing that [the person] would be in danger of being subjected to torture."*

The Committee interpreted this formula in the Haydin v. Sweden case as follows:

"...for the purposes of article 3 of the Convention, the individual concerned must face a forseeable, real and personal risk of being tortured in the country to which he is returned. The Committee wishes to point out that the requirement of necessity and predictability should be interpreted in the light of its general comment on the implementation of Article 3 which reads: 'Bearing in mind that the State Party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to

[566] See for instance, *V.X.N. and H.N. v. Sweden*, Communication Nos. 130/1999 and 131/1999, Decision of 15 May 2000, UN Doc. CAT/C/24/D/130 & 131/1999, para. 13.8.
[567] *Sadiq Shek Elmi v. Australia*, Communication No. 120/1998, Decision of 14 May 1999, UN Doc. CAT/C/22/D/120/1998 para. 6.9.

meet the test of being highly probable."[568]

While examining the existence of forseeable, real and personal risk of torture in the country of origin, the Committee takes into consideration several factors regarding the personal circumstances of the case.

(1) Past Experience

The Committee puts emphasis on the past torture experience while determining the risk of torture. In A.L.N. v. Switzerland the Committe pointed to the fact *"...that past torture is one of the elements to be taken into account when examining a claim under article 3 of the Convention..."*[569]

In many cases, the Committee took into consideration the timing of the past torture experience. If the applicant has been tortured in the recent past, this has been regarded a factor supporting the future risk of torture. On the other hand, in many instances the Committe rejected applications on the ground that the past experience was not recent enough. For instance, in A.R. v. the Netherlands,[570] the Committee considered that the applicant's torture experience in the past due to his political activities in Iran occurred in 1983, some 20 years ago. Therefore, the Committee concluded that these facts can not subtantiate any real and foreseeable risk of torture in the country of origin.

Unlike the 1951 Refugee Convention, Article 3 of CAT does not restrict the grounds of protection. In this sense, the applicant does not need to base his/her arguments on grounds such as political opinion, nationality, race etc. The applicant however, is still required to provide convincing evidence concerning the cause of his/her flight from the country of origin. The Committee's approach in this regard shows that, as in the case of asylum seekers, it is usually the torturer's intention that

[568] *Halil Haydin v. Sweden*, Communication No. 101/1997, Decision of 20 November 1998, UN. Doc. CAT/C/21/D/101/1997, para. 6.5.
[569] *A.L.N. v. Switzerland*, Communication No. 90/1997, Decision of 19 May 1998, UN Doc. CAT/C/20/D/90/1997, para. 8.3.
[570] *A.R. v. the Netherlands*, Communication No 203/2002, Decision of 14 November 2003, Un Doc. CAT/C/31/D/203/2002 paras. 7.3 – 7.4.; see also *A. D. v. the Netherlands*, Communication No. 96/1997, Decision of 12 November 1999, Un Doc. CAT/C/23/D/96/1997, para. 7.4.; See *V.X.N. and H.N. v. Sweden*, para. 13.6.

determines the existence of risk. This argument is also valid when the torturer imputes a character or experience that the victim in fact does not have. For instance, in A. v. Netherlands, the applicant had repeatedly stated that he was not a supporter of the Al-Nahda movement in Tunisia for which he was chased by the Tunisian authorities. Government of the Netherlands interpreted this fact as to conclude that the Tunisian authorities would not have interest in him. The Committee however, rejected this defense stating that the author was already tortured in the past for being an Al-Nahda supporter although he wasn't. Therefore, whether he really was a supporter of the group was not a factor determining the risk of torture.[571]

Past experience of family members may also support a future risk of torture. In Elmi v. Australia, the Committee has put emphasis on the fact that the applicant's father and brother were executed, his sister was raped. This had caused the rest of the family to flee and constantly move from one part of Somalia to the other in order to hide. In the light of these facts, the Comittee considered that substantial grounds existed for believing that the applicant would be in danger of being subjected to torture if returned to Somalia.[572]

(2) Credibility

Credibility of the applicant is another factor that is taken into account in determining the risk of torture. As in the case of asylum, claims against refoulement under CAT are predominantly based on oral statements of the applicant. Therefore, credibility constitutes a crucial aspect of the examination process. The Committee has rendered a number of decisions rejecting applications on this ground.[573]

On the other hand, the Committee does not regard inconsistencies in an applicant's statement as a fact that automatically results in rejection of the claim. It has consistently held in its' decisions *"that complete accuracy is seldom to be expected by victims of torture and that such inconsitencies ... are not material and*

[571] *A. v. the Netherlands*, Communication No. 91/1997, Decision of 13 November 1998, UN Doc. CAT/C/21/D/91/1997, para. 6.7.
[572] *Sadiq Shek Elmi v. Australia*, paras. 6.8.- 6.9.
[573] *V.X.N. and H.N. v. Sweden*, para. 13.6; also see *A.A. v. The Netherlands*, Communication No. 198/2002, Decision of 30 April 2003, UN. Doc. CAT/C/30/D/198/2002, para. 7.4.

do not raise doubts about the general veracity of the author's claim'[574] Therefore, if the Committee finds out contradictions in the statements of the applicant, it initially examines whether or not such contradicion is material for the essence of the file and if so whether or not there is any justification for such inconsistency such as post-traumatic-stress-disorder or lapse of time. In quite many instances, the Committee did not share the State Party's doubts about the credibility of the applicants due to such grounds of justification. For instance, in A.F. v. Sweden the Committe concluded:

"…The State party has pointed to circumstances in the author's story which raise doubt about the credibility of the author, but the Committee considers that the presentation of the facts by the author do not raise significant doubts as to the trustworthiness of the general veracity of his claims. In this context the Committee especially refers to the existence of medical evidence demonstrating that the author suffers from post-traumatic stress disorder and supporting the author's claim that he has previously been tortured while in detention."[575]

(3) Wide-Spread and Mass Human Rights Violations in the Country of Origin and Internal Flight Alternative

General conditions in the country of origin is also a strong indicator of the risk of torture in the country of origin. Paragraph 2 of Article 3 expressly mentiones that *"the competent authorities shall take into account...the existance in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."* In Ismail Alan v. Switzerland[576], the Committee has set forth how the general conditions of a country of origin should be considered in the assessment. In this respect, the Committee stated that all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights must be taken into account. On the other hand, the Committee noted that the

[574] *Ismail Alan v. Switzerland*, para. 11.3; *Halil Haydin v. Sweden*, para. 5.2; *A.F. v. Sweden*, Communication No. 89/1997, Decision of 8 May 1998, UN. Doc. CAT/C/20/D/89/1997, para. 6.5.
[575] See *A.F. v. Sweden*, para. 6.5.
[576] See *Ismail Alan v. Switzerland*, paras. 9.3.-9.4; see also *Mutombo v. Switzerland*, para. 6.3; *Sadiq Shek Elmi v. Australia*, para. 6.4.

existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country was not sufficient alone for determining the risk of being subjected to torture since the aim of the determination is to establish whether or not the applicant would be at risk personally.[577] In this regard, the consistent pattern of gross, flagrant or mass violations must be supported by specific grounds indicating that the individual would be at risk personally. Finally, the Committe also stated that absence of a consistent pattern of gross violations in a country does not mean that no risk of torture exists in that particular country.

The fact that country of origin is party to CAT or accepted the Committee's jurisdiction is considered by the Committe as a fact that would work against the substantial risk of torture in that country. In Tahir Hussain Khan v. Canada, for instance, the Committee observed:

"the Committee considers that, in view of the fact that Pakistan is not a party to the Convention, the author would not only be in danger of being subjected to torture, in the event of his forced return to Pakistan, but would no longer have the possibility of applying to the Committee for protection."[578]

On the other hand, the fact that the country of origin which is party to the Convention and has accepted the Committee's competence under Article 22, is not decisive if a systematic practice of torture can be documented. In Ismail Alan v. Switzerland, the Swiss Government invoked that Turkey was a party to CAT and had accepted the competence of the Committee and therefore should not be considered risky in the meaning of Article 3. On the other hand, the Committee rejected this argument stating that

"the Committee has taken note of the State party's argument that Turkey is a party to the Convention against Torture and has recognized the Committee's

[577] For instance, in *M.K.O. v. The Netherlands*, although being convinced of gross violations in Turkey, the Committee did not find a risk of torture for the applicant who was a PKK sympathizer from Tunceli, since the applicant did not show sufficient evidence on personal risk to substantiate his claim. *M.K.O. v. the Netherlands*, Communication No. 134/1999, Decision of 9 May 2001, UN Doc. A/56/44.

[578] *Tahir Hussain Khan v. Canada*, Communication No. 15/1994, Decision of 15 November 1994, UN Doc. A/50/44, para. 12.5; For a similar decision see also *Mutombo v. Switzerland*, para.9.6.

competence under article 22 of the Convention to receive and examine individual communications. The Committee regretfully notes, however, that practice of torture is still systematic in Turkey, as attested to in the Committee's findings in its inquiry under article 20 of the Convention.1 The Committee observes that the main aim and purpose of the Convention is to prevent torture, not to redress torture once it has occurred, and finds that the fact that Turkey is a party to the Convention and has recognized the Committee's competence under article 22, does not, in the circumstances of the instant case, constitute a sufficient guarantee for the author's security."[579]

Internal flight alternative is another factor that has to be taken into consideration while determining the risk of torture in the country of origin. This ground was invoked before the Committee in Ismail Alan v. Switzerland case. The Committee however, rejected this argument noting that *"the author already had to leave his native area, that Izmir did not prove secure for him either, and that, since there [were] indications that the police [were] looking for him, it [was] not likely that a "safe" area for him exist[ed] in Turkey."*[580]

On the other hand, in Sadiq Shek Elmi v. Australia, where the applicant was escaping from ethnic harrassment of another clan operating in Somalia, the Committee did not examine whether there would be a possibility to go to an area in Somalia which he would be safe due to the lack of State authority in the Country. The Committee merely established that:

"on the basis of the information before it, that the area of Mogadishu where the Shikal mainly reside, and where the author is likely to reside if he ever reaches Mogadishu, is under the effective control of the Hawiye clan, which [had] established quasi-governmental institutions and [provided] a number of public services".[581]

Giving this sort of effect to 'lack of State authority' may be criticised for

[579] *Ismail Alan v. Switzerland*, para. 11.5.
[580] *Ibid.,* para. 11.4.
[581] *Sadiq Shek Elmi v. Australia*, para. 6.7.

internal flight alternative cases since it is the State authority which in fact helps the torturer to chase the victim in other parts of the country of origin.

(4) Continuity of the Risk

The Committee's decisions are generally consistent on the fact that the risk of torture on the date of expulsion shall determine a State Party's obligation with regard to the Article 3 of CAT. On the other hand, in T.P.S. v. Canada, the Committee took into consideration the events that occurred after deportation of the applicant by the Canadian authorities. This was a case concerning a person of Indian nationality who had been convicted of hijacking a plane by a court in Pakistan. After being released by the authorities of Pakistan, instead of returning to his country of origin, the applicant escaped to Canada and applied for asylum for fear that he would be tortured by the Indian authorities if he were sent back to this country. The Canadian authorities deported him to India ignoring an interim measure rendered by the Committee Against Torture asking for not to remove him to India while the application of the person was pending. Surprisingly, the Committee based its entire conclusion on the fact that the applicant did not face measures amounting to torture after being deported to India.[582]This conclusion was criticized by the Committee member Guibril Camara in her individual opinion as follows:

"[t]he facts clearly show that, at the time of his expulsion to India, there were substantial grounds for believing that the author would be subjected to torture. The State party therefore violated article 3 of the Convention in acting to expel the author."

d) Evidence and Burden of Proof

The wording and case-law of CAT is quite innovative on the burden and standard of proof to be applied in the risk assessment. Paragraph five of the General Comment No. 1, which is devoted to this topic, provides: *"With respect to the*

[582] *T.P.S. v. Canada*, Communication No. 99/1997, Decision of 16 May 2000, UN Doc. CAT/C/24/D/99/1997, para. 15.6.

application of article 3 of the Convention to the merits of a case, the burden is upon the author to present an arguable case. This means that there must be a factual basis for the author's position sufficient to require a response from the State party."

Although this wording seems to have put the burden of proof on the applicant at the initial stage of the procedure, in practice, the threshold for providing such factual basis is determined relatively low by the Committee. The decision of A.S. v. Sweden is a good example for substantiating this argument. In this case, the applicant was a woman of Iranian nationality who had been forced to have a mutah marriage to a prominent religious leader and subsequently got arrested while trying to escape out of the country together with another man. She subsequently managed to escape from Iran and requested refugee status from Sweden. The Swedish authorities however, were not convinced that she had fulfilled her obligation to submit the verifiable information that would enable her to enjoy the benefit of the doubt. Therefore, a deportation procedure was initiated. The Committee on the other hand, did not agree with the Government on the standards of proof. According to the Committee:

"the author ha[d] submitted sufficient details regarding her sighe or mutah marriage and alleged arrest, such as names of persons, their positions, dates, addresses, name of police station, etc., that could have, and to a certain extent ha[d] been, verified by the Swedish immigration authorities, to shift the burden of proof. In this context the Committee [was] of the view that the State party ha[d] not made sufficient efforts to determine whether there [were] substantial grounds for believing that the author would be in danger of being subjected to torture."[583]

It appears from this decision that upon submission of sufficient factual information to substantiate the claim by the applicant, the State's obligation to conduct a detailed investigation is triggered in which case the applicant should be given the benefit of the doubt. This obligation originates from the paragraph 2 of Article 3 which imposes an active role to the authorities in determining the

[583] See *A.S. v. Sweden*, para. 8.6.

probability of the applicant being subjected to torture. [584]

Another question relevant to this topic is which evidence may the Committee take into account other than those provided by the parties. The Committee frequently refers to the reports of other relevant United Nations agecies such as

"the United Nations Commission on Human Rights; Commission's Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; the Special Rapporteur on the Question of Torture; the Working Group on Enforced or Involuntary Disappearances..."[585]*;*UNHCR.[586]Finally, the Committee may also refer to its own findings through the inquiry or reporting procedures.

3. International Covenant on Civil and Political Rights

Unlike the CAT, ICCPR does not directly address to the question of non-refoulement neither does it include a right to asylum or a right to seek asylum.[587]The principle of non-refoulement however, has become a part of the practice of the Covenant through the case-law, General Comments and concluding observations as a part of the State reporting mechanism adopted by the Human Rights Committe which is the monitoring organ of the Covenant.

Another peculiar aspect of ICCPR is that it is not only confined to the prohibition of torture as in the case of CAT but contains the entire catalogue of civil and political rights. This character of the Covenant involves certain technical complications with regard to the incorporation of non-refoulement. The case-law of the Committee reveals that the States Parties do not have a legal obligation to ensure that receiving countries actually provide the full catalogue of human rights. This obligation is merely confined to the right to life and prohibition of torture, inhuman

---

[584] *"For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."*
[585] *Mutombo v. Switzerland*, para. 9.5.
[586] *Halil Haydin v. Sweden,* p. 6.4.
[587] The Human Rights Committee has found an application inadmissible on the ground that the ICCPR does not protect a right to asylum. (*V. M. R. B. v. Canada*, Communication No. 236/1987, Decision of 18 July 1988, U.N. Doc. Supp. No. 40 (A/43/40), para. 6.3.).

and degrading treatment or punishment. Therefore, States are not prohibited from returning a person to a country in which political rights, such as the freedoms of expression and of association and assembly, are denied or not effectively secured.[588] This is indeed a reflection of the core rights persepective advocated by Hathaway. While this appraoch does not create any problems within the flexible borders of refugee definition under the 1951 Refugee Convention, the situation is quite different under the ICCPR since the Covenant does not include any express provision establishing a heirearchy among the rights stipulated therein. Hence, Nowak suggests that this might in principle be applicable to all Covenant rights.[589] A distinguished treatment for the right to life and prohibition of torture may be only explained by practical terms (meaning to avoid excessive financial burdens) and their severity.

Unlike the CAT, protected scope of ICCPR is not only confined to the acts of public officials or other persons acting in an official capacity.

General Comment No. 20 provides:

"It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity."[590]

This understanding has also been reflected in the practice of ICCPR. For instance, in Mansour Ahani v. Canada, the Human Rights Committee, which is the monitoring organ of the ICCPR, has stated that, as in the case of the right to life, prohibition of torture requires not only the State party to refrain from torture but also to take steps inorder to avoid a threat to an individual from third parties.[591]

This is an aspect that the ICCPR system is advantageous compared to the protection meachanism under the CAT. Therefore, it appears as a useful tool against

[588] Eggli, p. 199.
[589] Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, 2005, N. P. Engel Publisher, Germany, p. 150.
[590] Human Rights Committee, General Comment 20, 1992, UN. Doc. HRI\GEN\1\Rev.1, para.2.
[591] *Mansour Ahani v. Canada*, Communication No. 1051/2002, UN. Doc. CCPR/C/80/D/1051/2002, para. 10.6.

those States which, maintain their position against recognizing persecution of non-State actors a ground for refugee status under the 1951 Refugee Convention.

a) Geographical Scope of Non-Refoulement Under ICCPR

The geographical scope of obligations regarding the non-refoulement principle under the ICCPR is not as clear cut as CAT which, contains a relatively liberal provision on this matter.

Article 2 (1) of the ICCPR provides: *"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant…"*

The phrase *"within its territory and subject to its jurisdiction"* gives the impression that the geographical scope of the State Party's obligations under the ICCPR is narrower than the formula in CAT which imposes States Parties *"to prevent acts of torture in any territory under its jurisdiction."* This provision has lead some scholars to the conclusion that the drafters of the Covenant wanted to exlude extra-territorial acts from the protected scope of the Covenant by introducing a cumulative requirement of presence on State territory and within State jurisdiction and that Article 7 couldnot be invoked where the applicant lacks territorial contact with the target country.[592]

On the other hand, the Optional Protocol[593] to the ICCPR has adopted a more flexible formula while defining the competence of the Human Rights Committee by simply referring in its Article 2 (1) "to receive and consider communications from individuals subject to its jurisdiction" without providing any linkage with the national territory. Mantouvalou argues that such differenciation in wording justifies a more flexible interpretation of the ICCPR.[594]

In this regard, Nowak suggests that the words "within the territory" should

[592] Gregor Noll, *"Seeking Asylum at Embassies: A Right to Entry under International Law?"*, p. 557.
[593] Optional Protocol to the International Covenant on Civil and Political Rights, (UNGA Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302).
[594] Virginia Mantouvalou, *"Extending Judicial Control in International Law: Human Rights Treaties and Extraterritoriality"*, International Journal of Human Rights, Vol. 9, 2005, p. 154.

not be taken too literally and that any interpretation to the contrary would lead to absurd results. For instance, a State Party would not be expected to comply with its obligation under Article 12 to let its own citizens to enter through its frontiers.[595]The writer further argues that such inconsistency between the Articles 2(1) and 12 of the Covenent should affect the interpretation of the entire provisions within the Covenant.[596]

The Human Rights Committee has also adopted a broad interpretation of the Article 2 (1) of ICCPR. In its General Comment No. 23 dated 1994, the Committee refers to entitlement to equal treatment as applying to all individuals *"within the territory or under the jurisdiction of the State".*[597]

The Committee's General Comment No. 31 on Article 2 that it has adopted in 2004 further elaborates on the matter. Accordingly:

"States Parties are required by Article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."[598]

This broad interpretation raises a crucial question that is to what extent and in which conditions does a State Party's responsibility extends out of its nationaly territory?

A few months after the landmark Soering judgement of the European Court of Human Rights, the Committee was forced decide whether or not it would adopt

---

[595] Manfred Nowak, Uno Pakt Über Bürgerliche und Politische Rechte und Fakultativprotokoll, 1989, p. 44, at Boeles, p. 97.
[596] Manfred Nowak, Uno Pakt Über Bürgerliche und Politische Rechte und Fakultativprotokoll, 1989, p. 45 at Noll, *"Seeking Asylum at Embassies: A Right to Entry under International Law?*", p. 563.
[597] Human Rights Committee, General Comment No. 23: The Rights of Minorities, 8 April 1994, UN Doc. CCPR/C/21/Rev.1/Add.5**,** para. 4.
[598] Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 21 April 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10.

the same innovative reasoning. In Torres v. Finland[599], the applicant who was a former political activist with a criminal record of acts of sabotage to the Spanish property in France, complained that the Finnish Government to which it had applied for asylum had extradited him to Spain where there were reasons to believe that he might be subjected to torture or inhuman oır cruel treatment. The Finnish Government defended itself stating that the Covenant did not cover the issue of extradition and that extradition of the applicant was carried out according to the international obligations of Finland. [600]

It is interesting to note that as in the case of 1951 Refugee Convention, States did try to exclude extradition from their obligations regarding the non-refoulement principle. However, again similar to the situation under the 1951 Refugee Convention this tendency did not find support from monitoring mechanisms.

In the Torres case, the Committee examined whether the Finnish Government extradited the applicant to a State where there were reasons to believe that he would be subjected to a treatment contrary to Article 7. However, it did not find a violation since the applicant had not sufficiently substantiated his fear of torture.

The Committee has adopted the General Comment No. 20 in 1992 which, substituted and expanded on its earlier position regarding issues of extradition, expulsion and forcible return of aliens. Paragraph 9 of this General Comment provides:

"...States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of extradition, expulsion or refoulement. States parties should

[599] *Torres v. Finland*, Communication No. 291/1988, Decision of 2 April 1990, UN Doc. CCPR/C/38/D/291//1988.
[600] *Ibid.* para. 4.1.

indicate in their reports what measure they have adopted to that end."[601]

Thus following the case-law of the European Court of Human Rights, the Human Rights Committee adopted the non-refoulement principle by extending the geographical scope of protection and attributing responsibility to States which, deliberately expose persons to torture or cruel, inhuman or degrading treatment or punishment out of their territories.

The Committee has also rendered several decisions, though not as many as CAT, on this issue in response to individual complaints brought before it in the framework of the quasi-judicial monitoring mechanism established under the ICCPR. These decisions not only included the prohibition of torture or cruel, inhuman or degrading treatment or punishment but also the right to life in the context of non-refoulement.

(1) Extra-Territorial Application

The Committee dealt with extra-territoriality in several decisions. In Saldías de López v. Uruguay which concerned a dispute regarding kidnapping and detention of the applican's spouse by Uruguayan security officers while he remained in Argentina as a refugee. The applicant argued that he was tortured at the place where he was secretly detained in Argentine and later illegally transferred to Uruguay. The way the Human Rights Committee drew the lines of its geographical competence in this decision was extensive. The Committee considered that:

"...although the arrest and initial detention and mistreatment of Lopez Burgos allegedly took place on foreign territory, the Committee is not barred either by virtue of article 1 of the Optional Protocol ("... individuals subject to its jurisdiction ...") or by virtue of article 2 (1) of the Covenant ("... individuals within its territory and subject to its jurisdiction ... ") from considering these allegations, together with the claim of subsequent abduction into Uruguayan territory, inasmuch

[601] Human Rights Committee, General Comment 20, 1992, U.N. Doc. HRI\GEN\1\Rev.1, para. 9.

as these acts were perpetrated by Uruguayan agents acting on foreign soil."[602]

"The reference in article 1 of the Optional Protocol to "individuals subject to its jurisdiction" does not affect the above conclusion because the reference in that article is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant, wherever they occurred."[603]

Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights "to all individuals within its territory and subject to its jurisdiction", but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it."[604]

The Committee repeated the same reasoning in Celiberti de Casariego v. Uruguay[605] case that was brought before the Committee by an Uruguayan citizen who had been arrested and detained in Brazil with the cooperation of the Brazilian Police.

Interdiction of the Haitian refugees by the United States authorities has also been in the agenda of the Committee. This is an interesting incident to observe the input of human rights mechanisms in a debated asylum case. In its 1995 State Report for United States, the Committee stated that it *"[did] not share the view expressed by the Government that the Covenant lack[ed] extraterritorial reach under all circumstances."*[606] The Committee found such a view contrary to the consistent interpretation of the Committee on this subject*, "that, in special circumstances, persons may fall under the subject-matter jurisdiction of a State party even when*

[602] *Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979, 29 July 1981, UN Doc. CCPR/C/OP/1**,** para 12.1.
[603] *Ibid.,* para. 12.2.
[604] *Ibid.,* para. 12.3.
[605] *Lilian Celiberti de Casariego v. Uruguay*, Communication No. 56/1979, Decision of 29 July 1981, UN Doc. CCPR/C/OP/1.
[606] Human Rights Committee, Concluding Observations on the Report of the United States of America, 3 October 1995, UN Doc. CCPR/C/79/Add.50; A/50/40, para. 284.

outside that State's territory."[607]

Concluding Observations of the Committee on Israel's State Report in 2003 reveals a similar understanding. The Committee noted that Israel had maintained the position that the Covenant did not apply beyond its own territory, particularly in West Bank and in Gaza, especially as long as the armed conflict continued in those territories. However, the Committee rejected this view stating that:

"...in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by its authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of state responsibility of Israel under the principles of public international law."[608]

It is notable that at least in issues involving South Lebanon, the acts to which the Committee referred took place in such territories that concurrent sovereignties of two States existed. In this context, it is noticeable that the International Court of Justice also confirmed the position of the Human Rights Committee in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory by considering that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.[609]

Given the practice of the Committee and the International Court of Justice above, it is evident that extraterritorial human rights violations are covered by the ICCPR. This includes both the territories where no other States have jurisdiction as in the case of interdiction of Haitian asylum seekers by the United States at the High Seas and the territories that are occupied by other States as in the case of the Uruguay cases and Israel's acts within Southern Lebanon. This approach of the Human Rights Committee resembles the position of Committe Against Torture that

---

[607] *Ibid.*

[608] Human Right Committee, Concluding Observations on the Report of Israel, 5 August 2003, UN Doc. CCPR/CO/78/ISR, para. 11.

[609] Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports [2004], 9 July 2004, para. 111.

may be described as giving priority to the 'effective control on the person'. Both monitoring bodies established responsibility of States for the acts committed by their agents out of their national territories where the State Party concerned effectively controls the relationship with the victim of a violation. This is the case in the rendition of terrorist suspects by the United States intelligency and again this is the case where Uruguay was kept responsible for violating the Covenant in Argentine and Brazil. The Committee explicitly addressed to this understanding in its General Comment No. 31 by referring to "*anyone within the power or effective control of that State Party".*[610]

Noll rejects this mode of interpretation indicating that it conflicts with the ordinary meaning of the Article 2 (1) of the Covenant.[611] However, as Nowak correctly pointed out, a strict textual interpretation does raise question marks with regard to the integrity of the Covenant itself. Therefore, the text of the Convention itself excludes a strict textual interpretation. In this regard, extensive interpretation of the Human Rights Committee giving priority to the effectiveness of the protection mechanism established by the Covenant shall be favored. Hence, the Covenant does apply to interception measures at the High Seas. Secondly, in the event of concurrent State jurisdictions the responsible State should be the one that is effectively controlling the relationship with the victim in that particular incident. For instance, there is no doubt that Israel should be liable for any refoulment which takes place by its own agents within Southern Lebanon or the United States shall be liable for refouling terrorist suspects to territories where they were to subjected to torture.

On the other hand, the situation is quite different when a State rejects granting a visa through its consulate or embassy situated in the territory of another country where the applicant faces the risk of torture or in the event of diplomatic asylum. In this case, it is difficult to conclude that this State is effectively controlling the relationship with the applicant since the applicant will need the approval of the auhtorities of the host country in order to leave this territory even if he/she is granted a visa.

---

[610] Human Rights Committee, General Comment No. 31, para. 10.
[611] Noll, *"Seeking Asylum at Embassies: A Right to Entry under International Law?"*, p. 563.

(2) Admission at the Frontier

General Comment No. 15 on Aliens states that the Covenant does not recognize the right of aliens to enter or reside in the territory of a State Party. The persons to be admitted through the frontiers is, in principle, a matter to be determined by the State. The Covenant provides an exclusive right to entry for the citizens under its Article 12. On the other hand, the General Comment also recognizes that an alien may enjoy the protection of the Covenant in relation to entry and residence when considerations of prohibition of inhuman treatment arise.[612]Therefore, in the view of the Committee, prohibition of inhuman treatment appears to be an exception to the State's sovereign right to control entry of aliens throught its frontiers.

This understanding has surfaced from time to time during the monitoring procedures run by the Committee as well. For instance, the Committee criticised the French Goverment in its Concluding Observations on the French Report of 1997 as follows:*"... The Committee is furthermore concerned at the reported instances of asylum seekers not being allowed to disembark from ships at French ports, without being given an opportunity to assert their individual claims..."*[613]

After examining the practice of the Committe, Eggli concludes that the prohibition under Article 7 in relation to these matters is a negative duty not to push away and does not extend to a positive obligation of reaching out for people in need outside national territory.[614] Although the ICCPR does not contain a clear positive obligation to search and protect persons out of their territories, as explained in detail above the Law of the Sea instruments clearly do. Therefore, the ICCPR and the Law of the Sea instruments do complement each other in this respect.

b) Right to Life

Right to life is regulated in Article 6 of the ICCPR. This article does not prohibit death penalty. However, it allows this penalty to be resorted only for the

[612] See *Ibid*., para. 5.
[613] Human Rights Committee, Concluding Observations on France, 4 August 1997, UN Doc. CCPR/C/79/Add.80, para. 20.
[614] Eggli, p. 198.

most serious crimes and to be carried out only pursuant to a final judgement of a competent court. On the other hand, the Second Optional Protocol to ICCPR[615] provides that no one within the jurisdiction of a State Party shall be executed and that the State Party shall take all necessary measures to abolish death penalty in its jurisdiction. The case-law under the Article of ICCPR has been through an interesting evolution in the last two decades. This Human Rights Committee has heard a number of cases on this article particularly related to extradition of persons that would potentially subject persons to death penalty.

Kindler v. Canada[616] was among the earlier cases where the Committee had to consider extradition exposing a person to death penalty. The applicant was convicted in the State of Pennsylvania, United States, of first degree murder and kidnapping; the jury had recommended the death sentence. In the Applicant's understanding this recommendation was binding on the Court. The applicant managed to escape from custody prior to sentencing and crossed the Canadian border. He was subsequently arrested by the Canadian police in the province of Quebec. The United States requested his extradition in July 1985 and within one month time the Superior Court of Quebec accepted such request. Canada had abolished the death penalty in 1976, except in the case of certain military offences. The Minister of Justice did not require any assurances from the United States Government in order to prevent the applicant's being subjected to death penalty. Article 6 was among the provisions that the applicant based his claim before the Human Rights Committee. The Committee noted that Article 6, paragraph 1, must be read together with Article 6, paragraph 2 which, did not prohibit the imposition of the death penalty for the most serious crimes. Canada itself did not impose death penalty on the applicant, but extradited him to the United States, where he faced capital punishment. The Committee considered that if the Applicant had been exposed, through extradition from Canada, to a real risk of a violation of Article 6, paragraph 2, in the United States, that would have resulted in a violation by Canada

615 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, GA Res. 44/128 of 15 December 1989.

616 *Kindler v. Canada,* Communication No. 470/1991, 11 November 1993, U.N. Doc. CCPR/C/48/D/470/1991.

of its obligations under Article 6. Therefore, the Committee examined whether the requirements under Article 6, paragraph 2 were complied with by the United States. Firstly, the Committee established that the applicant was convicted of premeditated murder which indeed was a very serious crime.[617]

Secondly, it observed that the applicant was extradited to the United States following extensive proceedings in the Canadian Courts which reviewed all the evidence submitted concerning the Applicant's trial and conviction.[618]

A crucial question to be answered in this regard was whether the fact that Canada had generally abolished capital punishment, taken together with its obligations under the Covenant, required it to refuse extradition or to seek the assurances it was entitled to seek under the extradition treaty. It is notable that although Canada had abolished death penalty within its own domestic law, it had not become a party to the Second Optional Protocol to the ICCPR. The Committee rejected the applicant's claim stating that Article 6 of the Covenant did not necessarily require Canada to refuse to extradition or to seek assurrances in order to avoid death penalty.[619]

The Comittee revised this appraoch ten years later in the case of Roger Judge v. Canada[620]. The facts of this case was parallel to the Kindler case including the States involved. While determining the scope of Canada's obligationds under Article 6 of the Covenant, the Committee recalled its previous jurisprudence in the Kindler case.[621]The questions that the Committee was asked were exactly the same as the ones in the Kindler case, however, the answers were quite different. The Committee stated that the jurisprudence in the Kindler case was established ten years ago and that since that time there had been a broadening international consensus in favour of abolution of death penalty, and in States which had retained the death penalty, a broadening consensus not to carry it out. The Committee noted that even

[617] *Ibid,* para. 14.3.
[618] *Ibid.,* para. 14.4.
[619] *Ibid.,* paras. 14.5-14.6.
[620]*Roger Judge v. Canada*, Communication No. 829/1998, 20 October 2003, U.N. Doc. CCPR/C/78/D/829/1998 .
[621] *Ibid.,* para. 10.2.

the Supreme Court of Canada had recognized the need to amend its domestic law to secure the protection of those extradited form Canada. In this respect, the Committee stated that it regarded the ICCPR as a living instrument. Given the above considerations, the Committee concluded:

"Canada, as a State party which has abolished the death penalty, irrespective of whether it has not yet ratified the Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty, violated the author's right to life under article 6, paragraph 1, by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out. The Committee recognizes that Canada did not itself impose the death penalty on the author. But by deporting him to a country where he was under sentence of death, Canada established the crucial link in the causal chain that would make possible the execution of the author."[622]

Therefore, as the law stands a State which has abolished death penalty, be it by ratifying the Second Optional Protocol or not, has to ensure that any person who is extradited is not subjected to death penalty.

On the other hand, mere existance of death penalty in a requesting State does not per se violate Article 6 even if the State Party has abolished death penalty in its domestic law. Article 6 would not be violated if the extraditing State proves that such measure will not foreseeably and necessarily result in death penalty. For instance, in A.R.J. v. Australia[623], the Committee did not find a violation where: - the maximum prison sentence for committed crime would be five years inprisonment in the requesting State, Iran; - Australia had informed the Committee that Iran had manifested no intenion to arrest and prosecute the applicant; - Australia has set forth convincing evidence that there were no precedents in which an individual in a situation similar to the Applicant's had faced death penalty. Hence, the Committee has found no violation of Article 6 when the applicants failed to substantiate their

[622] *Ibid.,* para. 10.6.
[623] *A.R.J. v. Australia*, Communication No. 692/1996, 28 July 1997, UN Doc.CCPR/C/60/D/692/1996; also see *G.T. v. Australia* Communication No 706/1996, 4 November 1997 UN Doc. CCPR/C/61/D/706/1996.

claims that the crime was punishable by death penalty in the receiving country in the event that the extraiting State had no death penalty in its domestic law.[624]

c) Torture, Cruel, Inhuman or Degrading Treatment or Punishment

Prohibition of torture, to cruel, inhuman or degrading treatment or punishment is regulated in Article 7 of ICCPR. The Human Rights Committee has adopted two General Comments on the interpretation of Article 7. It is interesting to observe that the link between prohibition of torture and refoulement was not described in the first the first general comment No. 7.[625]This linkage has been implied in General Comment No. 15 on the position of aliens in the Covenant[626]which, simply indicates that entry and residence of alienst may give rise to issues related to prohibition of inhuman treatment.[627]Finally, the Committee has filled this lacuna with its General Comment No. 20 which, contains a paragraph devoted to this issue. Paragraph 9 of the General Comment 20 provides:

"In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end."

Unlike CAT, ICCPR does not define the prohibited act, namely torture cruel, inhuman or degrading treatment or punishment. ICCPR simply requires States to ensure protection against torture, without reference to certain purposes such as obtaining a confession or punishing someone or committed by or with the consent or acquiescence of a public official. Given such variations Fitzpatrick observes that it may be preferable in some cases to address a complaint to the Human Rights

---

[624] See also *T. v. Australia*, Communication No. 706/1996, 4 November 1997, UN Doc. CCPR/C/61/D/706/1996.
[625] Human Rights Committee, General Comment No. 7, Article 7 (1982), U.N. Doc. HRI\GEN\1\Rev.1 at 7 (1994).
[626] Human Rights Committee, General Comment No. 15, 1986, The position of aliens under the Covenant, U.N. Doc. HRI\GEN\1\Rev.1 at 18 .
[627] *Ibid.,* para. 5.

Committee rather than the Committee Against Torture.[628]

The General Comment No. 20 does not provide a detailed definition of the prohibited act either. The Committee explains this situation stating that it did not consider necessary drawing up a list of prohibited acts. Unlike the ECHR, the Committee does not favor establishing sharp distictions between the different kinds of punishment or treatment. It merely indicates that such distinctions depend on the nature, purpose and severity of the treatment applied.[629]

The General Comment No. 20 further elaborates on the protected scope of Aricle 7 indicating that the prohibition in this Article relates not only to acts that cause physical pain but also to acts that cause mental suffering. In the view of the Committee, the prohibition must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure. In this regard, the General Comment puts special empahsis on children, pupils and patients in teaching and medical institutions.[630]

The Committee notes that prolonged solitary confinement of the detained or imprisoned person may also amount to acts prohibited by Article 7. The Committee further established a link between death penalty and Article 7. In this respect, even when death penalty is allowed by the Covenant it may still raise issues under Article 7 if the chosen method is not the one which causes least possible physical and mental suffering.[631] Medical or scientific experimentation without the free consent of the person concerned is also prohibited under Article 7.[632] In a recent judgement, the Committee found that the imposition or the execution of a sentence of whipping constitutes a violation of author's rights under article 7.[633]

The case-law of the Human Rights Committee sheds light on the patterns of

---

[628] Anne Bayefsky, Stephanie Farrior, Karen Hanrahan, Andrew Landgham, *"Protection Under the Complaint Procedures of the United Nations Treaty Bodies"*, Fitzpatrick (ed.), p. 75.
[629] Human Rights Committee, General Comment No. 20, Article 7, (1992), U.N. Doc. HRI\GEN\1\Rev.1 at 30, para. 4.
[630] *Ibid.,* para. 5.
[631] *Ibid.,* para. 6.
[632] *Ibid.,* para. 7.
[633] *Higginson v. Jamaica*, Communication No. 792/1998, Decision of 28 March 2002, UN Doc. CCPR/C/74/D/792/1998.

violations that may come into play under the Article 7 of ICCPR.

As mentioned above, there is a link between death penalty and Article 7. As the Committee considered in Chitat v. Canada, *"by definition, every execution of a sentence of death [might] be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant"*[634] if Article 6 pargraph 2 had not allowed death penalty. On the other hand, as indicated in the General Comment No. 20 the method and other conditions in which the death penalty is executed is also relevant to Article 7 . The so called "death row phenomenon" which, is a term used to express prolonged detention prior to the execution of the death penalty, was an aspect that the Human Rights Committee dealt with in this regard.

Despite the fact that it has been the most frequently resorted ground before the Committee, the linkage between the 'death row phenomenon' and Article 7 has not been established immediately in the case-law of the Committee. This was among the claims of the applicant in Kindler v. Canada which, was a case decided right after the landmark Soering case of the ECtHR that established the said link within the domain of the ECHR. The Human Rights Committee took a different approach than the Soering judgement of the ECtHR in this earlier judgement by stating that:

"As to whether the "death row phenomenon" associated with capital punishment, constitutes a violation of article 7, the Committee recalls its jurisprudence to the effect that "prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies.""[635]

This ruling did not completely close all the avenues for resorting Article 7 in 'death row phenomenon' cases however, it certainly reflected the reluctance of the Committee to pave the way for using this channel for non-refoulement purposes. Hence, the Committee showed a similar response to the 'death row phenomenon' claim in the Chitat v. Canada case where the applicant invoked the Factum of the

[634] *Chitat v. Canada*, para. 16.2.
[635] *Kindler v. Canada*, para. 15.2.

United States Supreme Court which estimated 16 years to clear the then present backlog of death sentence executions.[636] This claim however, was again rejected by the Committee.

The Committee gave the same response in Cox v. Canada [637]case in which the applicant referred to the fact that *"nobody ha[d] been executed in Pennsylvania[United States] for more than twenty years, and there [were] individuals awaiting execution on death row for as much as fifteen years."*[638]It is interesting to note that the Canadian Government based its defence not only on the previous jurisprudence of the Committee but also on the Soering Judgement of the ECtHR. The Government wanted to avoid the possible effect of this authoritative ruling. Therefore, it described the circumstances of this case that differentiated it from that of the Soering case. According to the Government,

"[t]he decision in Soering turned not only on the admittedly bad conditions in some prisons in the state of Virginia, but also on the tenuous state of health of Mr. Soering. Mr. Cox ha[d] not been shown to be in a fragile mental or physical state. He [was] neither a youth, nor elderly."[639]

This defence was upheld by the Committee that invoked three grounds for rejecting a violation under Article 7. Firstly, no specific factors relating to the applicant's mental condition had been brought before the Committee. Secondly, Canada had submitted specific information concerning the then current state of prisons in Pennsylvania which in the Committee's view did not violate Article 7. Finally, as per the period of detention the Committee noted that the applicant had not been senteced to death penalty at the time of the hearing. Therefore, it was not certain that he would be subjected to death row phenomenon when he was

---

[636] *Chitat v. Canada,* para., 11.11.
[637] *Cox v. Canada*, Communication No. 539/1993, Decision of 31 October 1994, U.N. Doc. CCPR/C/52/D/539/19930.
[638] *Ibid.,* para. 14.4.
[639] *Ibid.* para. 13.7; The Canadian Government referred to the Soering judgement as a ruling rendered by the European Court of Justice. Please note that, as it may be seen in the next chapter, in fact this ruling was given by the European Court of Human Rights, but not the European Court of Justice.

extradited.[640]

The Committee found a violation of Article 7 with regard to the 'death row phenomenon' for the first time in the Francis v. Jamaica case[641] which was decided in 1995. The Jamaican Court of Appeal had failed to issue a written judgment over a period of more than 13 years despite numerous requests filed by the applicant. Such delay was regarded as unacceptable by the Committee. The Committee considered the extent of delay, the conditions on death row and the physcological effect on the applicant in reaching this conclusion.[642]

Another aspect of the death penalty that is related to Article 7 is the method through which it is carried out. In this context, Chitat v. Canada is a landmark case where the applicant argued that asphyxiation by cyanide gas that was used in the California, United States caused prolonged suffering and agony over 10 minutes prior to death.[643] Canadian Government defended the extradition measure stating that in the absence of a norm of international law which expressly prohibited asphyxiation by cyanide gas*, "it would be interfering to an unwarranted degree with the internal laws and practices of the Unites States to refuse to extradite a fugitive to face the possible imposition of the death penalty by cyanide gas asphyxiation".*[644] The Committee however, was convinced by the applicant's arguments that this method constituted cruel and inhuman treatment, in violation of article 7 of the Covenant as it was not the method resulting in the "least possible physical and mental suffering".[645]

In the Committe's understanding expulsion to a State where there are no means of medical treatment may raise issues under Article 7. In C. v. Australia[646] the

---

[640] *Ibid.* paras. 17.1.-17.2.
[641] *Francis v. Jamaica*, Communication No. 606/1994, Decision of 25 July 1995, U.N. Doc. CCPR/C/54/D/606/1994.
[642] *Ibid.,* para. 9.2.; For a detailed analysis of death row phenomenon cases see Patrick Hudson, *"Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law"*, European Journal of International Law, Vol. 11, No. 4, 2000 pp. 833-856.
[643] *Chitat v. Canada*, para. 16.3.
[644] *Ibid.*
[645] *Ibid.,* para., 16.4.
[646] *C. v. Australia*, Communication No. 900/1999, Decision of 28 October 2002, UN Doc. CCPR/C/76/D/900/1999.

Committee found a violation of Article 7 where the Australian Government decided to expell a person to Iran, despite his deteriorating health condition, where there were no sufficient means of treatment for his medical situation. The applicant who was a recognized refugee in Australia had developed extreme depression due to the detention conditions in Australia. A pschological assessment on the applicant found that he was *'"actively suicidal" and "a serious danger to himself"'*.[647] The Committee established that it was unlikely that the only effective medication (Clozaril) and back-up treatment would be available in Iran, and found the author "blameless for his mental illness" which "was first triggered while in Australia". Therefore, it considered that:

"...in circumstances where the State Party has recognized a protection obligation towards the author ... deportation of the author to a country where it is unlikely that he would receive the treatment necessary for the illness caused, in whole or in part, because of the State Party's violation of auhtor's rights would amount to a violation of Article 7 of the Convention." [648]

d) Assessment of the Risk

The Human Rights Committe has developed a 'foreseeablity test' which at first glance resembles the risk analysis under the 1951 Refugee Convention or the CAT. However, the method by which Human Rights Committee defines *'a real risk (that is, a necessary and foreseeable consequence)'* varies dramatically from the risk analysis under the other mechanisms herein. In the Chitat case the Comittee defined foreseeablity as follows:

" a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeablity of the consequence would mean that there was a present violation by the State Party, even though the consequence would not occur

[647] *Ibid.,* para. 2.4.
[648] *Ibid.,* para. 8.5.

until lateron."[649]

The following statements of the Committee in Kindler v. Canada also sheds light on its understanding of 'foreseeable risk' that the Committee has been applying consistently:

"... a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over. For example, a State party would itself be in violation of the Covenant if it handed over a person to another State in circumstances in which it was foreseeable that torture would take place. The foreseeability of the consequence would mean that there was a present violation by the State party, even though the consequence would not occur until later on."[650]

Unlike the other monitoring bodies examined in this study, the Human Rights Committee requires the 'presence of violation' and 'certainty of violation' but not the 'presence of risk of violation' in order to hold a State responsible for refoulement. This appraoch reduces the effectiveness of non-refoulement principle to a great extent under the framework of ICCPR.

In Sholam Weiss v. Austria, the Committee was not convinced that the risk was sufficiently foreseeable although the Applicant was sentenced to 845 years' imprisonment by the United States Court *in absentia.* The Committee indicated that the applicant's conviction and sentence were not then final, pending the outcome of the re-sentencing process which would open the possibility to appeal against the initial conviction. Therefore, the Committee considered *"[s]ince conviction and sentence have not yet become final, it is premature for the Committee to decide, on the basis of hypothetical facts, whether such a situation gave rise to the State party's responsibility under the Covenant."*[651] The Human Rights Committee's

[649] *Chitat v. Canada*, para. 6.2.
[650] *Kindler v. Canada*, para. 6.2.
[651] *Sholam Weiss v. Austria*, Human Rights Committee, Communication No. 1086/2002, decision of 3 April 2003, U.N. Doc. CCPR/C/77/D/1086/2002, para. 9.4.

interpretation of foreseeablity of risk is considerably narrow compared to the case-law under the CAT which, finds the exitance of a legal requirement and supporting patterns of practice sufficient for establishing the risk of torture. It must be due to this appraoch that most of the cases that could succeed before the Committee has been related to 'inhuman punishment' where the risk is easily identifiable.

(1) Intent of the Receiving Country

The Human Rights Committee has been consistently applying the same restrictive approach in other cases as well. The intent of the receiving country appeared as a factor blurring the foreseeablity of risk in G.T. v. Australia.[652] The Committee was not convinced that there was a foreseeable risk that the applicant would be subjected to death penalty in Malaysia due to his conviction for importing 240 grams of heroin to Australia from Malaysia. However, the Committee members Eckart Klein and David Kretzmer authoritatively challenged this conclusion in their dissenting opinion stating that the Malaysian law required mandatory death sentence for anyone found to have been in possession of 15 grams of heroine and it was a fact that the applicant was caught in possession of 240 grams of heroine. Secondly, the Committee had indicated in its conclusion that *"[i]n cases like the present case, a real risk is to be deducted from the intent of the country to which the person concerned is to be deported, as well as from the pattern of conduct shown by the country in similar cases."*[653] The Committee had noted that nothing in the infomation before the Committee pointed to any intention on the part o the Malaysian authorities to prosecute the applicant. The dissenting members however, rightly argued that a simple oral statement by the Malaysian police should not be taken as a serious assurance in this regard.

(2) Credibility

The Human Rights Committee generally does not put much emphasis on the credibility of the applicant, unlike the Committee Against Torture or the practice under the 1951 Refugee Convention. However, it accepted arguments predominantly

[652] See *G.T. v. Australia.*
[653] *Ibid.,* para. 8.4.

based on the credibility of the applicant in a recent case, namely Daljit Singh v. Canada[654]. The applicant was an Indian citizen who was awaiting deportation from Canada. He argued that his right under Article 7 would be violated if the intended deportation took place.

The Canadian Government on the other hand, submitted to the Committee the following contradictions, inconsistencies and improbabilities with regard to the applicant's file:

"*part of the author's written account was strikingly similar, in parts identical, to accounts from other unrelated claimants, also from India; the author's oral and written accounts about his employee, whom police allegedly accused of being involved with the militants, were contradictory; the allegations concerning his brother-in-law were contradictory and lacked credibility, in particular the allegation that although he had been caught with arms, explosives, and fake currency in his truck, he was released without charge, and continues to live in India; and similarly that the author's son, who was a registered owner of one of the trucks, had also been able to remain in India.*"[655]

As a result, the Committee found the applicant's claim inadmissible on the basis that he had not substantiated his claim sufficiently.

e) Other Provisions of the ICCPR That are Indirectly Relevant to the Non-Refoulement Principle

Although the non-refoulement principle has been incorporated to the practice of ICCPR under the prohibition of torture or inhuman or degrading treatment or punishment or the right to life, the Covenant further contains some other rights which support such protection mechanism. These rights are frequently resorted by asylum seekers or others within the protected domain of the non-refoulement principle. It must be remembered however, these rights do not have an absolute

[654] *Daljit Singh v. Canada*, Communication No. 1315/2004, Decision of 28 april 2006, UN Doc. CCPR/C/86/D/1315/2004.
[655] *Ibid.,* para. 4.3.

nature as in the case or prohibition of torture and therefore, may be restricted or derogated in certain circumstances.

(1) Right to Effective Remedy

Although by definition it is not a part of the prohibition of refoulement, the right to effective remedy has proved to be instrumental for the implementation of this principle. This ground has been frequently invoked by applicants in non-refoulement cases where the legal avenues for having access to the relevant procedures are closed.

The right to effective remedy is regulated in Article 2 (3) of the Covenant by which 3. each State Party undertakes:

"to ensure that any person whose rights or freedoms as [recognized in the Covenant] are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity"; *"[t]o ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; and "[t]o ensure that the competent authorities shall enforce such remedies when granted."*

The right to effecive remedy may sometimes come into play when the applicant is deprived of legal remedies in the sending State. Sholam Weiss v. Austria[656] is a recent and interesting case where the Committee dealt with this issue in the context of non-refoulement. The applicant was a citizen of the United States of America and Israel who was detained in Austria pending extradition to the United States of America at the time of the application. The applicant had obtained, after submission of the case to the Committee, a stay from the Administrative Court to prevent his extradition until the Court had resolved his challenge to the Minister's decision ordering his extradition. The Committee observed however, that although

[656] *Sholam Weiss v. Austria.*

the order of stay was duly communicated to the relevant officials, the applicant was transferred to United States jurisdiction after several attempts, in violation of the Court's stay. Therefore, the Committee concluded that the applicant's extradition in breach of a stay issued by the Administrative Court and his inability to appeal an adverse decision of the Upper Regional Court, while the prosecutor was able, amounted to the violation of the applicants right under Artic 2 (3).

In another case, namely Roger Judge v. Canada, the Committee found a violation of Article 2 (3) on the ground that the applicant could not exercise his right to appeal before he was extradited to the United States, where he would face death penalty, since the Canadian authorities removed the applicant from its jurisdiction within hours after the decision of the Superior Court of Québec rejecting his application for a stay of his deportation. Therefore, although further remedies were available in theory, against the decision of the Superior Court the applicant could not pursue them.[657]

(2) Expulsion of a Lawfully Resident Alien

Article 13 of the Covenant establishes a right similar to the one in Article 32 of the 1951 Refugee Convention. It provides that:

"[a]n alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority."

The General Comment No. 15 states that this *"...article is applicable to all procedures aimed at the obligatory departure of an alien, whether described in national law as expulsion or otherwise."*[658] The 'obligatory departure' element seems to correspond to the non-refoulement principle. However, Article 13 is only

[657] *Roger Judge v. Canada, para. 10.8.*
[658] See para. 9.

applicable for aliens who are lawfully residing in the territory of a State Party, therefore; generally the Committee has found that aliens who have illegally entered a State, or who have remained longer than the law or the validity of a permit allows, can not benefit the protection of this provision. On the other hand, if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13.[659] Therefore, the scope of Article 13 has been extended significantly; on the basis of this interpretation of the Committee, expulsion of any alien who claims that he has been wrongfully refused entry or residence, comes within the protection of Article 13.[660] This argument is also valid for an alien who has entered the State illegally but whose status has been later regularized.[661]

In the view of the Commitee, Article 13 only regulates the procedural aspects of expulsion, but not substantive matters. It's purpose however, is to prevent arbitrary expulsions. A crucial guarantee of Article 13 for the purpose of this study is that it entitles each alien to an individual decision. In other words, it prohibits collective or mass expulsion of aliens.[662] To some extent this provision reflects the much criticised individualistic aspect of the 1951 Refugee Convention.

Article 13 requires that any expulsion of a lawfully present alien shall only be carried out in pursuance of a decision reached in accordance with the law. The reference to 'law' in this context is to the domestic law of the State party concerned.[663] The law in question must of course be compatible with the relevant provisions of the Covenant. In Anna Maroufidou v. Sweden the applicant based her claims on the fact that Swedish Aliens Act was interpreted incorrectly by the Swedish authorities. However, the Committee cosidered that the interpretation of domestic law is essentially a matter for the courts and authorities of the State party concerned and tehrefore, the Committee was not empowered to review the

[659] *Ibid.*
[660] Boeles, p. 121.
[661] Ismet Celepli v. Sweden, Human Rights Committee, Communication No. 456/1991, decision of 18 July 1994, UN Doc. CCPR/C/51/D/456/1991, para. 9.2.
[662] General Comment No. 15, para. 10.
[663] Anna Maroufidou v. Sweden, Human Rights Committee, Communication No. R.13/58, decision of 5 September 1979, UN Doc. Supp. No. 40 (A/36/40), para. 9.3.

correctness of the interpretation of the domestic law by the national authorities unless it is established that they have not interpreted and applied it in good faith or that it is evident that there has been an abuse of power.[664]

Article 13 makes express reference to the 'compelling reasons of national security' as a ground for derogation from the right therein. It appears from the case-law before the Committee that States Parties have frequently resorted to this exception especially when terrorism suspects or convicts are in question. [665]

(3) Right to Liberty and Security of Person

Detaining asylum seekers or other persons seeking international protection is a practice commonly applied by the receiving States. This practice however, may have adverse effects on their access to the protection procedures.[666]Therefore, it is closely related to the prohibition of refoulement. The right to liberty and security of person is regulated in Article 9 of the Covenant. As in the case of the right in Article 13, this provision only represents a procedural guarantee. Article 9 does not prohibit deprivation of liberty itself but rather aims at preventing this act being carried out in an arbitrary and unlawful manner.[667]

When detention of asylum seekers or other persons seeking international protection principle are concerned 'arbitrariness' or 'unlawfulness' have a peculiar nature that the persons in question are not criminals but individuals who are in desperate need of international protection. This is an aspect that has to be given priority while restricting the rights thereof.

The Human Rights Committee has expressed the following views on the detention conditions of asylum seekers while examining the regular report of United Kingdom of Great Britain and Northern Ireland in 2001:

"The Committee is concerned that asylum-seekers have been detained in

[664] *Ibid.,* para. 10.1.
[665] See *Ibid.;* See *Mansour Ahani v. Canada.*
[666] Human Rights Committee, Concluding observations on Japan, 19 November 1998, UN Doc. CCPR/C/79/Add.102, para. 19.
[667] Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, p. 211.

various facilities on grounds other than those legitimate under the Covenant, including reasons of administrative convenience. In any event, the Committee considers unacceptable any detention of asylum-seekers in prisons."[668]

The Committee has also expressed concern over the extended detention of illegal aliens in a number of concluding observations and comments where it indicated that extended detention of illegal aliens is likely to breach Article 9. For instance, in its concluding observations on the regular report of Japan in 1998, the Committee expressed concern that asylum-seekers were held for *"periods of up to six months and, in some cases, even up to two years."*[669]The conclusions regarding the Swiss practice even suggest a higher standard in this respect. In its concluding observations on the Swiss regular report of 1996, the Committee noted with concern that the Swiss law

"…in some cases permits the administrative detention of foreign nationals without a temporary or permanent residence permit, including asylum-seekers and minors over the age of 15, for three months while the decision on the right of temporary residence is being prepared, and for a further six months, and even one year with the agreement of the judicial authority, pending expulsion. The Committee notes that these time-limits are considerably in excess of what is necessary, particularly in the case of detention pending expulsion, and that the time-limit of 96 hours for the judicial review of the detention decision or the decision to extend detention is also excessive and discriminatory, particularly in the light of the fact that in penal matters this review is guaranteed after 24 or 48 hours depending on the canton concerned." [670]

A. v. Australia[671] is a cornerstone case where the Human Rights Committee

---

[668] Human Rights Committee, Concluding Observations on the Report of the United Kingdom of Great Britain and Northern Ireland, 6 December 2001, UN Docs. CCPR/CO/73/UK; CCPR/CO/73/UKOT, para. 16.
[669] Human Rights Committee, Concluding observations on Japan, 19 November 1998, CCPR/C/79/Add.102, para. 19.
[670] Human Rights Committee, Concluding Observations on Switzerland, 8 November 1996, CCPR/C/79/Add.70, para. 15.
[671] *A v. Australia*, Communication No. 560/1993, Decision of 3 April 1997, U.N. Doc. CCPR/C/59/D/560/1993.

elaborated on this matter. The applicant was a Cambodian citizen who had arrived in Australia by boat and detained for over four years in different detention centres. The Committee was asked to examine two questions[672] with regard to Article 9: First, *"whether the prolonged detention of the author, pending determination of his entitlement to refugee status, was "arbitrary" within the meaning of article 9.",* Second, *"whether the alleged impossibility to challenge the lawfulness of the author's detention and his alleged lack of access to legal advice was in violation of article 9, paragraph 4".*

On the first question, the Committee indicated that every decision to keep a person in detention should be open to periodic review in order to enable the grounds of justification to be assessed. The detention should only continue as long as the existance of the justication. According to the Committee the need for investigation due to illegal entry or factors particular to the individuals, such as the likelihood of absconding and lack of cooperation may justify detention for a certain period. Without such grounds of justification detention would become arbitrary, even if entry was illegal. The Committee noted that in this particular case the Australian authorities had not presented any grounds of justification which would justify the applicant's detention for over four years. Therefore, the Committee found a violation on the first question.[673]

With regard to the second question, the Committee admitted that article 9, paragraph 4, encompasses a right to legal assistance in order to have access to the courts, however, it did not find a violation on this ground since it was satisfied that the applicant was given this opportunity during the period that he was detained.[674]

f) Evidence and Burden of Proof

The case-law of the Human Rights Committee on non-refoulement principle reflects indeed a less comprehensive understanding compared to the case-law under the CAT. The Committee generally confined its assessment to the information made

[672] *Ibid.,* para. 9.1.
[673] *Ibid.,* para. 9.4.
[674] *Ibid.,* para. 9.6.

available to it by the parties. [675]

The Committee did not set forth detailed standards on the burden of proof of parties to the dispute which may be peculiar to non-refoulement cases due to the traumatic and special conditions surrounding this concept. In the event that it is not satisfied with the information submitted, the Committee simply concluded that the applicant could not sufficiently substantiate his/her claim. Therefore, obviously the burden of proof is on the applicant.

In one particular case, namely Torres v. Finland, the Committee referred to the temporal aspect of evidence in non-refoulement cases. The Committee rejected the applicants' claim under article 7 on the ground that the Finnish Government was not in possession of the information indicating that the applicant might upon extradition be subjected to torture or to other inhuman or degrading treatment.[676] From this vague statement, it is possible to discern a conclusion that the Committee takes into consideration the evidence available to the State Party at the time of extradition.

[675] For instance see *Sholam Weiss v. Austria*, para. 9.1.; *Roger Judge v. Canada*, para. 10.1.; *Eric Hammel v. Madagascar*, Communication No. 155/1983, Decision of 3 April 1987**,** U.N. Doc. Supp. No. 40 (A/42/40) at 130, para. 17.
[676] *Torres v. Finland*, para. 5.2.

II. EUROPEAN DIMENSION OF THE NON-REFOULEMENT PRINCIPLE

A. COUNCIL OF EUROPE AS A STANDARD SETTING AND MONITORING ORGANIZATION ON THE PROHIBITION OF NON-REFOULEMENT

1. Emergence of the Principle of Non-Refoulement Under the Council of Europe Framework

The Council of Europe has always been among the dominant actors in this area both as a standard setting and a monitoring organization on the situation of refugees, asylum seekers and displaced persons in Europe. It has played an important role through numerous authoritative recommendations and resolutions of the Committee of Ministers and of the Parliamentary Assembly as well as treaties adopted within its domain.

Starting from 1950s both the Committee of Ministers and the Parliamentary Assembly adopted numerous documents on asylum either with a case-specific or a standard setting focus.[677]Since 1977 the Committee of Ministers has been acting through its Ad Hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons which is comprised of experts elected by each of the 46 member states of the Council of Europe as well as representatives of a certain number of countries and organisations with the observer status.[678] The Ad Hoc Committee has been functioning as an important forum on refugee law for exchange of information on national and international practices and to assist harmonization of laws in this field. The 'return of rejected asylum seekers' has also been among the topics of interest to this Committee.[679] In this respect, the Committe

[677] As of 17 August 2006 the number of documents adopted as such by the Committee of Ministers can be expressed by hundreds and that of the Parliamentary Assembly by thousands. See www.coe.int [visited on 17 August 2006].
[678] *Ibid.;* UNHCR has been among those organizations with observer status and it has actively taken part the Works of the Committee: See Executive Committee of the High Commissioner's Programme, Note on International Protection, 7 July 2000, UN Doc. A/AC.96/930, para. 43.
[679] Commission on Population and Development of the U.N. Economic and Social Council, Report of the Secretary-General on the Activities of Intergovernmental and Non-Governmental Organizations in

drafted a number of recommendations which were later adopted by the Committee of Ministers.[680]

The Committee of Ministers' active role in the field of asylum has partly been a response to the Parliamentary Assembly's pressure in this area. The Parliamentary Assembly has been concerned with refugees and asylum seekers for a long time. In this respect, it has repeatedly insisted on the need for the prohibition of refoulement in several recommendations including the Recommendations 434 (1965)[681], 1334 (1997)[682] 1475 (2000).[683] The Parliamentary Assembly made several attempts for the inclusion of a right to asylum in a protocol to the European Convention on Human Rights which were all futile.[684]Alternatively, it also suggested introducing a separate European convention on asylum which attempt shared the same fate with the former.[685]

Although these recommendations seems to have had limited success in practice, both the evolving scope of the ECHR through the dynamic interpretation of the European Court of Human Rights and developments under the framework of the European Union have achieved the same purposes. These developments in fact reduced, to some extent, the importance of the efforts of the Committee of Ministers and the Parliamentary Assembly which operated through soft law instruments. This

---

the Area of International Migration, 10 January 1997, UN. Doc. E/CN.9/1997/5, para. 14.

[680] See www.coe.int [visited on 17 August 2006].

[681] Parliamentary Assembly of the Council of Europe, Recommendation 434 (1965) on the Granting of the Right of Asylum to European Refugees, 1 October 1965, para. 11.ii.

[682] Parliamentary Assembly of the Council of Europe, Recommendation 1334 (1997) on Refugees, Asylum-Seekers and Displaced Persons in the Commonwealth of Independent States (CIS), 24 June 1997.

[683] Parliamentary Assembly of the Council of Europe, Recommendation 1475(2000) on Arrival of Asylum Seekers at European Airports, 26 September 2000.

[684] See Parliamentary Assembly of the Council of Europe, Recommendation 293(1961) on the Right to Asylum, 26 September 1961; Parliamentary Assembly of the Council of Europe, Recommendation 1088(1988) on the Right to Asylum, 7 October 1988; Parliamentary Assembly of the Council of Europe, Recommendation 1236(1994) on the Right to Asylum, 12 April 1994; Parliamentary Assembly of the Council of Europe, Recommendation 1278(1995) on refugees and asylum-seekers in central and eastern Europe 25 September 1995, para. 6. i.

[685] Parliamentary Assembly of the Council of Europe, Recommendation 842 (1978) on the 21st Report on the Activities of the Office of the United Nations High Commissioner for Refugees, 30 September 1978, para. 8.i.; Parliamentary Assembly of the Council of Europe, Recommendation 1088 (1988) on the Right to Territorial Asylum, 7 October 1988, para. 10. iii.

observation was implied during the two joint meetings of the Ad Hoc Committee of Experts on the Legal Aspects of Territorial Asylum, Refugees and Stateless Persons and the European Committee on Migration upon a decision of the Committee of Ministers of the Council of Europe. The Committes noted:

"since other international bodies were also developing efficient cooperation on frontier control matters and the problem of illegal migration, the bodies of the Council of Europe might concentrate on the broader aspects of migration flows and policies, such as the need to take a comprehensive view of migration phenomena affecting Europe, including consideration of root causes and integration policy, and the definition of principles for orderly migration movements into and within Europe."[686]

As indicated by the Committees the bodies of Council of Europe have found new areas where they could fill the gaps of other international mechanims. One such area is the relationship with non-EU Member States. This was an important area which could not be sufficiently covered neither by the European Convention on Human Rights nor by the European Union Acquis on asylum and migration. At the 7th Ministerial Conference of Ministers responsible for Migration Affairs that was held in Helsinki in September 2002, non-Member States from the Southern coast of the Mediterranean that were countries of origin or transit also participated in the meeting as invited guests for the first time.[687] In October 2003, the Committee on Migration, Refugees and Population of the Parliamentary Assembly organized the First-Euro-Mediterranean Parliamentary Forum on Migration with the participation of Members of parliaments of several Mediterranean countries such as Algeria, Egypt, Tunisia and Jordan.[688]The bodies have also been concerned with situation of

[686] Commission on Population and Development of the U.N. Economic and Social Council, Report of the Secretary-General on the Activities of Inter-governmental and Non-governmental Organizations in the Area of International Migration, 10 January 1997, UN. Doc. E/CN.9/1997/5, para. 13.
[687] Maria Ochoa-Llido, *"Recent and Future Activities of the Council of Europe in the Fields of Migration, Asylum and Refugees"*, European Journal of Migration and Law,Vol. 5, 2004, p. 497.
[688] Agnieszka Nachilo, *"Activities of the Parliamentary Assembly of the Council of Europe and its Committee on Migration, Refugees and Population in the Field of Migration and Refugees"*, European Journal of Migration and Law, Vol. 6, 2004, p. 158.

refugees in the Russian Federation and other CIS countries.[689] Such forums including the non-EU States have gradually been institutionalized by the Council of Europe.[690]

As indicated above, the hard-law instruments adopted by the Council of Europe appeared to be more effective in consolidating the prohibition of refoulement. In this regard, the European Convention on Human Rights and its Protocols[691], European Agreement on the Abolition of Visas for Refugees[692], European Agreement on Transfer of Responsibility for Refugees[693], the European Convention on Extradition[694]and European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[695] shall be recalled among the instruments that are directly or indirecly relevant to the non-refoulement principle.

The European Convention on Human Rights turned out to be the most prominent mechanism both as a standard setting and monitoring instrument among those treaties. Therefore, the following section is devoted to this Convention and the jurisprudence thereof.

In addition to the European Convention on Human Rights, the mechanism established by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 1987 is also notable. This Convention has an innovative approach to the matter of torture since the purpose of this Convention is predominantly the prevention of torture rather than standard setting. For instance, unlike the CAT this Convention does not define torture. Therefore, the terms within the text of the Convention shall be construed according to the meaning provided by other instruments, namely the European Convention on Human Rights. Hence the preample of the European Convention for the Prevention of Torture expressly refers to the European Convention on Human Rights. Therefore, the purpose of this

[689] *Ibid.*
[690] Ochoa-Llido, pp. 497-498.
[691] See Convention for the Protection of Human Rights and Fundamental Freedoms.
[692] European Agreement on the Abolition of Visas for Refugees, 20 April 1959, E.T.S. 031.
[693] European Agreement on Transfer of Responsibility for Refugees, 16 October 1980, E.T.S. 107.
[694] European Convention on Extradition, 13 December 1957, E.T.S. 24.
[695] European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, E.T.S. 126.

Convention is to strengthen the protection mechanism rather than setting new standards on torture and inhuman or degrading treatment or punishment. For this purpose the Convention established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which *"by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment."*[696] This is a non-judicial mechanism of a preventive character based on visits to places. In this respect, it provides a complementary mechanism to the European Convention on Human Rights.[697]

2. European Convention on Human Rights

The ECHR is the most prominent human rights instrument with respect to the prohibition of refoulement since it has played a crucial role in introducing the principle to the area of human rights law together with the CAT. The jurisprudence of ECHR does influence the practice under other universal and regional human rights instruments such as the ICCPR and Inter-American Court of Human Rights.[698] ECHR does not contain an explicit provision on non-refoulement and this principle has been incorporated to the Convention through the case-law of the ECtHR that is the monitoring body of the of the ECHR. The Convention contains a catalogue of civil and political rights similar to the ICCPR. Therefore, the delimitation question and concerns that have been raised in the context of ICCPR are also valid with regard to the ECHR. Therefore, it is a critical question whether non-refoulement principle would apply to all human rights violations stipulated in the Convention. Traditionally the principle applies to cases on the right to life in Article 2 and the prohibition of torture or inhuman or degrading treatment or punishment in Articles 3. Thus, there is no doubt that these two are within the core category of rights through which non-refoulement has been incorporated in the field of human rights law. On the other hand, as it has been discussed in the previous chapter, the answer for this question is

[696] *Ibid.,* Article 1.
[697] Barrett, p. 6.
[698] See for instance Ivcher Bronstein Case, Inter-American Court of Human Rights, Judgment of 24 September 1999, (Ser. C) No. 54 (1999), para. 45; Kindler v. Canada, Human Rights Committee, para. 15.3.

rather vague when other fundamental rights are concerned. Röhl[699] argues that the ECtHR has ambiguosly established which human rights contain prohibitions of refoulement. The author for instance, raises the question:

"whether an individual who, due to his or her presence on the territory of a state party to the ECHR, would be entitled to the protection of their right to freedom of religion, could lawfully be expelled if it was established that this right would be violated in the destination country"

and answers it in the negative. She bases her argument on the Court's statements in Bensaid[700] and Soering cases.

As to the Bensaid case, the author refers to the Court's statement which provided: *"[t]he fact that the applicant's circumstances in Algeria would be less favourable than those enjoyed by him in the United Kingdom is not decisive from the point of view of Article 3"*[701]It is difficult however, to discern the meaning that the scholar contends from this statement, since the statement concerned has been made in relation to the comparison of the quality of medical treatment in the United Kingdom and that of Algeria which, goes to the severity of suffering rather than the type of the protected interest.

On the other hand, the author's argument finds a firmer basis in the Soering case where the Court stated:

"Article 1 of the Convention cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the

[699] Katharina Röhl, Fleeing Violence and Poverty: Non-Refoulement Obligations Under the European Convention of Human Rights, New Issues in Refugee Research: UNHCR Working Paper No. 111, 2005, p.8.
[700] *Bensaid v. the United Kingdom*, ECtHR, Judgement of 6 February 2001, Application No. 44599/98.
[701] *Ibid.,* para. 38.

Convention."[702]

The Court made clear here that prohibition of refoulement does not apply to each of the safeguards in the Convention. This is again a reflection of Hathaway's core human rights approach. What is not clear in the Court's judgment is that which rights and freedoms would be considered within the scope of non-refoulement.

The Court elaborated on this approach in a more recent admissibility decision namely, J.E.D. v. the United Kingdom.[703] The applicant had submitted that his expulsion to the Ivory Coast would violate his right to freedom of expression and to impart information on the human rights abuses in that country relying on Article 10 of the Convention. The Court however, rejected this argument stating that Article 10 does not in itself grant a right of asylum or a right to stay in a given country. Deportation of an alien pursuant to immigration controls does not therefore constitute an interference with the rights guaranteed under Article 10.

In Razaghi v. Sweden[704], the applicant complained that the fact that he was not allowed to convert to Christianity under the Iranian Law, would engage the responsibility of the Swedish Government if he was deported to Iran. The Court however, rejected this argument considering that the applicant's expulsion could not separately engage the Swedish Government's responsibility under Article 9 of the Convention.

In the admissibility decision of F. v. United Kingdom, the Court included the right to fair trial in Article 6 within the core rights category of the non-refoulement principle but left the question open for violations of Article 5.[705]

Another interesting aspect of the Court's jurisprudence in this regard is that it exhibited a tendency to regard Article 3 as a blanket provision which protects the interests protected by the other articles in the Convention. For instance, in the

[702] *Soering v. the United Kingdom*, para. 86.
[703] *J.E.D. v. the United Kingdom*, ECtHR, Admissibility Decision of 2 February 1999, Application No. 42225/98, para. 5.
[704] *Razaghi v. Sweden*, ECtHR, Admissibility Decision of 11 March 2003, Application No. 64599/01.
[705] *Fashkami v. United Kingdom*, ECtHR, Decision of 22. June 2004, Application No. 17341/03, para. 2.

admissibility decision of Ould Barar v. Sweden, the Court considered *"that the expulsion of a person to a country where there is an officially recognised regime of slavery might, in certain circumstances, raise an issue under Article 3 of the Convention."*[706] Thereby, the Court extended the scope of non-refoulement even without including other rights within this core category.

Similar to the legal practice under the ICCPR, The Court's position towards recognizing a core category of rights which apply to non-refoulement can be criticised on the ground that the text of this Convention does not support such a heirearchy among the rights and freedoms thereof.[707]

With regard to the much debated topic of State responsibility arising from non-state agents, the ECtHR has adopted a rather liberal approach. In Ahmed v. Austria[708], the Court found a violation of Article 3 due to an expulsion order issued by the Austrian Government for the applicant who feared torture or inhuman or degrading treatment by the other rival clans in Somalia where no proper state structure or authority had existed.

The Court's ruling in H.L.R. v. France, represents a further step in this regard since this time the alleged risk was emanating from a drug trafficking mafia in Colombia where, unlike Somalia, State authority did exist. The Court ruled that:

"the Article 3 of the Convention (art. 3) may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection."[709]

A more recent case namely, T.I. v. UK was centred around the responsibility of States due to the acts of non-State agents. The Court was asked to rule on the alleged deficiency of the German law which, did not safeguard the rights

[706] *Ould Barar v. Sweden*, ECtHR, Decision of 19 January 1999 Application No. 42367/98, para. 1.
[707] Noll, *"Seeking Asylum at Embassies: A Right to Entry under International Law"*, p. 568.
[708] See *Ahmed v. Austria.*
[709] *H.L.R. v. France*, para. 40; Also see *N. v. Finland*, ECtHR, Judgement of 26 July 2005, Application No. 38885/02, para. 163.

under Article 3 against the actions of non-state agents. The applicant therefore, challenged the order of the United Kingdom auhtorities which would result in returning him to Germany. This allowed the Court to set forth its understanding in this respect. The Court indicated that:

"the existance of this obligation is not dependent on whether the source of the risk of the treatment stems from factors which involve the responsibility, direct or indirect, of the authorities of the receiving country. Having regard to the absolute character of the right guaranteed, Article 3 may extend to situations where the danger emanates from persons or groups of persons who are not public officials, or from the consequences of health from the effects of serious illness."[710]

a) Geographical Scope of Protection

Article 1 of the ECHR that provides: *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."* appears to have adopted a less restrictive formula compared to the one in ICCPR and even the CAT since it makes no reference to 'territory'.

On the other hand, the reference to jurisdiction in the wording of the Article raised a question with regard to the inclusion of the non-refoulement principle even through interpretation of Articles 2 or 3 of the Convention. The question was that whether in the absence of an express provision as in Article 3 of CAT, States Parties to the ECHR could be kept responsible for exposing a person to a real risk of being subjected to violations by other States or non-State agents out of their territories. A restrictive interpretation of Article 1 could easily confine the applicability of the Convention to acts that were committed by that State within its own territory.

The Court was asked to answer this question in the Soering v. the United Kingdom case. This was an extradition case where a German citizen was arrested in the United Kingdom for an alleged homicide that he had committed in the State of

[710] *T.I. v. the United Kingdom*, ECtHR, Admissibility decision of 7 March 2000, Application No. 43844/98.

Virginia in the United States. The United States requested the applicant from the United Kingdom in order to be prosecuted for the committed crime with the alleged charges of death penalty. The death penalty had been abolished in the United Kingdom at the time of the request,[711] however, it had not become a party to the Protocol No.6[712] of the ECHR which provides for the abolution of death penalty in time of peace. Therefore, when the applicant brought the case before the EctHR, he challenged the Secretary of States' extradition order not on the ground of right to life in Article 2 which apparently allowed death penalty, but on the right stipulated in Article 3 which prohibited torture or inhuman or degrading treatment of punishment. The interpretation of Article 1 appeared as a key point during the course of the trial since the Government of the United Kingdom raised the following arguments in order to convince the Court that the extradition order in question was not in any way covered by its obligations under the Convention:

"Article 1 (art. 1) of the Convention, ... sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to "securing" ... the listed rights and freedoms to persons within its own "jurisdiction". Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States. Article 1 (art. 1) cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. In the instant case it is common ground that the United Kingdom has no power over the practices and arrangements of the Virginia authorities which are the subject of the applicant's complaints."[713]

The Court however, rejected to uphold the Gorvernment's predominantly territorial perspective. In this regard, it was underlined that the object and purpose of

[711] *Soering v. the United Kingdom*, para. 15.
[712] Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, E.T.S. No. 114.
[713] *Soering v. the United Kingdom*, para. 86.

the Convention as an instrument for the protection of individual human beings required that its provisions be interpreted and applied so as to make its safeguards practical and effective.[714] Thus in the Court's view, it would be incompatible with the underlying values of the Convention, namely *the "common heritage of political traditions, ideals, freedom and the rule of law"* indicated in the Preamble, to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture. [715] This reasoning enabled inclusion of the non-refoulement principle within the protected scope of the Convention by going around the jurisdiction barrier of Article 1 through the effectiveness principle.

Soering judgement is a landmark in this area, however, it still left three questions open under the practice of ECHR. First, it is not clear whether a State Party would be under an obligation to respect the non-refoulement principle outside of its national territory. Second, it is not clear whether the Convention imposes an obligation of admission at the frontier. Third, it is not clear whether a State Party would be liable for sending a person to a territory where he/she is not directly under the risk of being subject to violation of his/her rights but, would be in danger of being sent to a third country where he/she runs such risk.

(1) Extra-Territorial Application

Extra-territorial application of the Convention has become one of the most challenging aspects of the ECHR due to the inconsistent case-law of the European Court.

The earlier case-law of the Commission reflected a broad interpretation of Article 1 of the Convention with regard to the extra-territorial responsibility of States Parties. In W. v. Ireland, the Commission summarised its practice on extra-territorial application of the Convention as follows:

"... the High Contracting Parties are bound to secure the said rights and

[714] *Ibid.,* para. 87.
[715] *Ibid.,* para. 88.

freedoms to all persons under their actual authority and responsibility, not only when the authority is exercised within their own territory but also when it is exercised abroad… the authorised agents of the State, including diplomatic or consular agent and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property "within the jurisdiction" of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsiblity of the State is engaged."[716]

This reasoning appears to be very similar to the case-law of the Human Rights Committe under the ICCPR which, as noted above, is based on the effective control of the relationship with the person concerned.

The Court upheld this approach as well in Drozd and janousek v. France and Spain, where it referred to the Commission's relevant decisions concerning the extra-territorial responsibility of States Parties, however, it did not find a violation of Article 6 on the ground that the decisions rendered by the Andorran Court were not under the supervision of French or Spanish governments.[717]

On the other hand, the jurisprudence with regard to the Cyprus issue demonstrated a different approach concerning the extra-territorial responsibility of a State Party, based on the "effective control of an area outside its national territory" in Loizidou v. Turkey where the Court regarded the presence of Turkish troops as effective control of the area at the Northern Cyprus.[718]

In Bankovic case, the Court adopted an even more restrictive approach with regard to the extra-territorial responsibility of States Parties. This case was brought before the Court by the relatives of the deceased persons who had initiated the

[716] *W. v. Ireland*, European Commission of Human Rights, Application No. 9360/81, Decision of 28 February 1983, para. 14. In this context the Commission cites the following earlier decisions of its own: *Cyprus v. Turkey,* Application Nos. 6780/74 and 6950/75, Decisions and Reports 2, 125, 136; X and *Y v. Switzerland*, Application Nos. 7229/75 and 7349/76, Decisions and Reports 9, 57-76; *Ilse Hess* v. the United Kingdom, Application No. 6231/73; Decisions and Reports 2, 72, 73.
[717] *Drozd and Janousek v. France and Spain,* ECtHR, Judgement of 26 June 1992, Application No. 12747/87, para. 91.
[718] *Loizidou v. Turkey*, ECtHR, Judgement of 23 February 1995, Application No. 15318/89, para. 62.

procedure which the Court had to decide whether the bombing of a radio television station in Former Republic of Yugoslavia, as part of the NATO air campaign, would entail the responsibility of those States Parties to the ECHR. Although there is no reference to territory in the text of Article 1, the Court considered that the jurisdictional competence of a State is primarily territorial under the ECHR.[719] It further states, however, that exceptionally exercise of extra-territorial jurisdiction by a Contracting State might be recognized. In this regard, it was first mentioned that a geographic area could be deemed to fall within the jurisdiction of a State Party when

"[i]t, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government".[720]

Thus in the view of the Court, a single act could not bring a person under the jurisdiction of a State Party. This line of thought would still keep a State liable for the acts in the off-shore processing zones since the activity in such zones are carried out through the consent of the receiving State. However, it would exclude a single act of refoulement without such territorial control.

Secondly, the Court noted that other recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State. This reasoning does expand the protected scope of the non-refoulement principle to air and sea vessels of a flag State. This rule applies in the territory of other States as well as the High Seas.[721]

Another aspect of the Court's restrictive approach in the Bankovic case was the so called condition of '*espace juridique'*. In this respect, the Court indicated that

---

[719] *Bankovic and Others v. Belgium and 16 Other Contracting States*, Decision of 12 December 2001, Application No. 52207/99, para. 59.
[720] *Ibid.,* para. 71.
[721] See *Öcalan v. Turkey*, ECtHR, Judgement of 12 March 2003, Application No. 46221/99 where ther Court considered the respondent State responsible for acts committed at the international zone of Nairobi Airport.

it regarded the Convention as a multilateral treaty operating, subject in an essentially regional context and notably in the legal space of the Contracting States. According to the Court *"[t]he Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States."*[722] This aspect was noted as a crucial distinction between Cyprus and the Former Republic of Yugoslavia: the inhabitants of Northern Cyprus would enjoy the rights guaranteed by the Convention if Turkish occupation had not taken place; whereas in the later they would not since the Former Republic of Yugoslavia was not a party to the ECHR. This approach would be extremely hazardous for the effectiveness of protection of non-refoulement under the ECHR. For instance, it would be possible to argue that the off-shore processing programmes run by the European countries in North Africa would be excluded from the protected scope of the ECHR since such countries were out of the '*espace juridique'* of the European Convention.

Finally, the Court also refused to make an analogy from other similar jurisdiction provisions in the international instruments in the Bankovic case. It's response to the applicant's argument on ICCPR is particularly striking. The Court noted in this regard that:

"it is difficult to suggest that exceptional recognition by the Human Rights Committee of certain instances of extra-territorial jurisdiction (and the applicants give one example only) displaces in any way the territorial jurisdiction expressly conferred by that Article of the CCPR 1966."[723]

While Bankovic judgment represents such a restrictive approach to the extra-territorial repsonsibility of States the post-Bankovic jurisprudence demonstrates a visible departure from this restrictive approach.

In Issa and Others v. Turkey[724] that was a case brought before the Court due to the alleged murders and mutilations committed by the Turkish troops in the Northern Iraq. First of all, the Court seems to have dropped the *'espace juridique'*

[722] *Ibid.,* para. 80.
[723] *Bankovic and Others v. Belgium and 16 Other Contracting States*, para. 78.
[724] *Issa and Others v. Turkey,* ECtHR, Judgement of 16 November 2004, Application No. 31821/96.

precedent since it heard the case without referring to the fact that the allaged acts were carried out in Iraq outside the legal space of the ECHR. The Court took the same approach in Öcalan v. Turkey as well, where it found Turkey responsible for acts committed in Kenya.

In Issa and Others case, the Court further stated that:

"a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully - in the latter State."[725]

It striking to observe that the Court refers to the Lopez Burgos v. Uruguay and Celiberti de Casariego v. Uruguay decisions of the Human Rights Committee in this context. This aspect of the judgement indicates a considerable change after the Bankovic case where the Court rejected any kind of analogy with the ICCPR which, has a broader perspective of extra-territorial responsibility. The Court tends to come closer to the personal jurisdiction approach by stating:

"[a]ccountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory."

It is rather difficult to extract objectively verifiable standards from the Court's jurisprudence which utilises both the "effective control of territory" and "personal jurisdiction" approaches. However, it is possible to conclude that at least, it is moving towards a less restrictive understanding of extra-territorial responsibility of States.

(2) Admission at the Frontier

Unlike the Committee Against Torture and the Human Rights Committee,

[725] *Ibid.,* para.71.

the European Court of Human Rights has not taken a clear position on the admission of asylum seekers at the frontier. Noll has suggested that a right of entry may be deduced from the wording of Articles 1 and 3 of ECHR. His suggestion is based on the fact that Article 1 imposes a positive obligation on the States Parties to 'secure' the rights and freedoms in the Convention, particularly the freeom of torture or inhuman or degrading treatment or punishment in Article 3. However, such obligation only arises when the person concerned is subject to the State's jurisdiction and a sufficiently large risk has appeared that an asylum or protection seeker would be subjected to treatment contrary to Article 3 if he/she is denied entry through rejection of a visa or by any other means.[726]

Considering the case-law of the European Court on the extra-territorial responsiblity of States in the previous chapter, however inconsistent it is, there is no doubt that an applicant within the territorial sea or ports or at the Airports is subject to the jurisdiction of that State. The Court has confirmed this statement, with respect to the international transit zones of airports, in the case of Amuur v. France[727]. The applicants were two Somalian citizens who had arrived at the Paris-Orly Airport escaping from persecution on political grounds.[728]However, they were kept in a Hotel at the international transit zone of the Airport which, was according to the Ordinance of 2 November 1945 was considered outside the French territory. Therefore, they were left under strict and constant police surveillance for twenty days without legal and social assistance in accordance with Article 5 of the Convention, and finally they were sent back to Syria. With regard to the jurisdiction issue, the Court noted that even though the applicants were not in France within the meaning of the Ordinance of 2 November 1945, holding them in the international zone of Paris-Orly Airport made them subject to French law. Despite its name, the international zone did not have extraterritorial status.[729]Thus, asylum or protection seekers in international transit zones of airports shall benefit all the rights and freedoms provided by the ECHR. This conclusion should be valid for other comparable places

[726] Noll, *"Seeking Asylum at Embassies: A Right to Entry Under International Law?*", p. 564; see also Coleman, p. 43-44.
[727] See *Amuur v. France.*
[728] *Ibid.,* para. 7.
[729] *Ibid.,* para. 52.

such as the ports or the territorial sea of States Parties.

Another case to be noted in this context is D. v. the United Kingdom,[730] where the Government tried to consider a drug dealer not to have technically entered the United Kingdom territory on the ground that he was not given 'a leave to remain' but only 'a leave to enter' the United Kingdom. In response to this defense, the Court observed:

"[r]egardless of whether or not he ever entered the United Kingdom in the technical sense…it is to be noted that he has been physically present there and and thus within the jurisdiction of the Respondent State within the meaning of Article 1 of the Convention…It is for the Respondent State therefore to secure to the applicant the rights guaranteed under Article 3…"[731]

While the European Court has not expressly referred to the admission requirement as a part of the protected scope of Article 3 the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which, in fact applies the standards of the ECHR through its monitoring function has often referred to the admission requirement as a part of this freedom. For instance, the Committee criticised the Swedish Government in its report on the visit to Sweden in 1998 as follows:

"…although aliens have a right to appeal to the Swedish Immigration Board against a police decision to refuse them entry, such an appeal does not have suspensive effect. Consequently, as matters stand, the [Committee] is not entirely convinced that everyone who runs a risk of ill-treatment if refused entry and removed from the country will be identified." [732]

There are other indications that both States Parties and the other organs of the Council of Europe regard non-rejection at the frontier within the scope of Article

[730] See *D. v. the United Kingdom.*
[731] *Ibid.,* para. 48.
[732] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Swedish Government on the Visit to Sweden Carried out from 15 to 25 February 1998, 3 July 1998, CPT/Inf(99)4[EN] (Part 1), para. 75.

3. For instance, The Committee of Ministers adopted Resolution ResDH (2002) 99 in 2002 welcoming the amendment in the Austrian Aliens Act, brought to its attention by the Austrian Government, after the Court found a violation against Austria in Ahmed v. Austria case.[733] The newly introduced Article 57 paragraph 1 of the Act provides: *"Refusal of entry, expulsion or deportation of an alien to another State are unlawfull if they would lead to a violation of Articles 2 and 3 of the European Convention on Human Rights or of its Protocol No. 6 on the abolution of death penalty".* The Committe of Ministers concluded *"...Austria has thus complied with the Court's judgement in the Ahmed case as required by Article 46 paragraph 1 of the Convention".*[734]

(3) Chain Refeoulement

Responsibility of States regarding the risk of chain refoulement, in which the third country in turn refoules the person to his/her country of origin, is particularly important for the European legal environment which involves a wide-spread practice of the 'safe third country notion'. This notion basicly refers to returning asylum or protection seekers back to countries, that are presumed to be safe, through which they transited before they arrived to the target country. It is however, open to criticism since it potentially results in manifestly unfounding the claim of the applicant on the basis of a presumption on the safety of a third country. As a matter of fact, such presumption may apparently not always be true. Therefore, involvement of the European Convention's effective monitoring mechanism would be a significant achievement for the entire international protection regime. T.I. v. the United Kingdom case demonstrated how essencial involvement of ECHR is in this process. This was a cornerstone case as it dealt with a dispute where the duality of European Union and Council of Europe regimes surfaced. The applicant was a Srilankan citizen who had applied for asylum in the United Kingdom on the ground that he would be killed or tortured if sent back to Srilanka. The United Kingdom Government however, determined that the German Government should be

[733] See *Ahmed v. Austria.*
[734] Committee of Ministers of the Council of Europe, Resolution ResDH (2002) 99, 8 October 2002, Human Rights Information Bulletin, No. 57, 2002, pp. 12-13.

responsible to receive and review his application according to the Dublin regime of the European Union. On the other hand, the applicant believed that the German law contained a lower Standard with regard to granting refugee status, since it did not regard persecution by non-state actors as a ground for this status. Therefore, the applicant feared that he would eventually be expelled to Srilanka if he was transferred to Germany by virtue of the Dublin Convention. In fact, his asylum application had already been rejected by the German authorities before he had arrived in the United Kingdom. Thus, he had solid reasons to belive that being sent to Germany would eventually result in his deportation to the country of origin. He brought his case to the European Court of Human Rights arguing that his right to life as guaranteed under Article 2 and the right to prohibition of torture and inhuman treatment and punishment under Article 3 would be violated if such transfer took place. The question that the Court had to deal with in this case was whether a readmission agreement with a country that is determined as a safe third country prior to the application would be sufficient to lift the responsibility of the sending state. The position of the European Court was crucial for the implementation of the Dublin system as the most advantageous aspect of the Dublin Convention for the Member States was that it enabled Member States to shift the responsibility of a particular asylum seeker to another Member State without being compelled to examine the application of the person concerned. The answer for this question would also affect the validity of the "safe third country" and "safe country of origin" clauses under the Asylum Procedures Directive since this Directive also allows to find applications manifestly unfounded without making any further examination for the persons coming from safe third countries or safe countries of origin.

In its judgement, the Court found the application inadmissible since it was not convinced that the Standard of protection applied by Germany did not comply with the stanadards in the Convention. Its reasoning however, is striking for the future practice of the Dublin Convention and also for the Asylum Procedures Directive as the Court indicated that indirect removal to an intermediary country, which is also a State Party, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its expulsion, exposed to the

treatment contrary to Article 3 of the Convention. It further stated that the United Kingdom could not rely automatically on the arrangements made in the Dublin Convention concerning the attribution of responsibility between the European Countries for deciding asylum claims. Then the Court pointed to the risks that the Dublin Convention might entail if the States Parties did not eliminate differing approaches to the scope of protection offered. This ruling provides a solid ground for further harmonization within the European Union. Otherwise, it is quite likely that the ECHR may prevent the intended objective to be attained by the burden sharing or burden shifting arrangements of the European Union Acquis.

b) Right to Life

Unlike the case-law under the ICCPR, the right to life issue has rarely been raised before the European Court of Human Rights in extradition or expulsion cases. The right to life, as stipulated in Article 2 of the ECHR, is a non-derogable right except in respect of deaths resulting from lawful acts of war according to Article 15 of the Convention. On the other hand, Article 2 of the European Convention permits deprivation of life as the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. This aspect of the Article however, has lost much of its significance against the Protocol No. 6 of the Convention that abolished death penalty for all acts other than the ones committed in time of war or of imminent threat of war has been ratified by all Member States excluding Russia[735]and the Protocol No. 13[736] to the Convention, which provides for the abolition of the death penalty in all circumstances. Only 10 of the Member States have not ratified this Protocol.[737]

In Soering v. the United Kingdom the European Court examined the applicability of Article 2 with regard to the United Kingdom which, had not ratified the protocol No. 6 at the time of extradition order. In this context, the applicant

[735]http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=114&CM=7&DF=8/23/2006&CL=ENG [visited on 24.08.2006].
[736] Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, E.T.S. No. 187.
[737]http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=187&CM=7&DF=8/23/2006&CL=ENG [visited on 24.08.2006].

agreed with the two Government Parties and the Commission that that the extradition of a person to a country where he risked the death penalty did not in itself raise an issue under either Article 2 or Article 3.[738] The Court considered whether the changes in the practice of States Parties with regard to Article 2 had the effect of bringing the death penalty per se within the prohibition of ill-treatment under Article 3. On the other hand, the Amnesty International had argued that the evolving standards in Western Europe required that the death penalty should be considered as inhuman and degrading punishment within the meaning of Article 3 since there was a virtual consensus among the States Parties to the Convention on abolishing death penalty. Even the few States Parties which retained death penalty for some peace time offences, death sentence was not imposed in practice.[739]The Court however, rejected to give such marked changes the effect of bringing the death penalty per se within the prohibition of ill treatment under Article 3 since in the Court's view adoption of the Protocol No. 6 indicated that the States Parties had the intention to introduce this obligation by the normal method of amending the text of the Convention.[740]As it is examined in the following section, the Court took another way of interpretation under Article 3 in order to resolve the dispute.

After the Soering judgement, the Commission in at least two different occasions, received applications based on the right to life argument in extradition cases in connection with the Protocol No. 6. In both occasions the Commission raised the question whether comparable considerations applied to Article 1 of Protocol No. 6 to the Convention, in particular whether this provision equally engaged the responsibility of a Contracting State where, upon extradition, the person concerned faces a real risk of being subjected to the death penalty in the receiving State.[741]However, the Commission hesitated to give the answer for this question and concluded that it did not need to resolve this issue as the complaints at issue were in any event manifestly ill-founded.

---

[738] *Soering v. the United Kingdom*, para. 101.
[739] *Ibid.,* paras. 101-102.
[740] *Ibid.,* para. 103.
[741] *Y v. the Netherlands*, European Commission of Human Rights, Admissibility Decision of 16 January 1991, Application No. 16531/90; *Alla Raidl v. Austria*, European Commission of Human Rights, Admissibility Decision of 4 September 1995, Application No. 25342/94.

The Commission however, found an application admissible on the grounds including Article 2 in M.A.R. v. the United Kingdom.[742] The applicant was an Iranian citizen detained in Oxfordshire pending expulsion to Iran. The applicant had been granted refugee status by the Government upon the initiative of UNHCR, however, he was subequently convicted of a number of drugs related offences in the United Kingdom. Therefore, the Government had intended deport him on account of his conviction of a serious crime and consequently constituting a danger to the community of the host country accoring to Article 33(2) of the 1951 Refugee Convention. The Government had also received the approval of UNHCR in this regard. The applicant however, brought a case before the European Commission where he argued that although Article 2 allowed execution of a death sentence of a court following conviction of a crime for which that penalty was provided by law, he would be facing a real risk of extra-judicial execution if deported to Iran. In addition, he contended that even if he were to be tried in Iran, the judicial institutions and procedures by which he would be tried were so deficient that his execution following such procedures would engage the United Kingdom's responsibility under Article 2 of the Convention. As a result, the Commission found the application admissible under Articles 2, 3, 5 and 6. The Court however, did not have a chance to rule on this case since the dispute was resolved through friendly settlement on 19 September 1997.[743]

Despite this admissibility decision, the Court until recently has shown a tendency to prefer considering issues under Article 3 rather than article 2 and the Protocol No. 6 or 13 even in the rare cases where the applicants alleged that their lives would be at risk if returned to their home countries.[744] This is probably a consequence of regarding Article 3 as a blanket provision.

For instance, in Müslim v. Turkey,[745]where the applicant was a citizen of

[742] *M.A.R. v. the United Kingdom*, European Commission of Human Rights, Admissibility Decision of 16 January 1996, Application No. 28038/95.
[743] *M.A.R v. the United Kingdom*, European Commission of Human Rights, Report dated 19 September 1997.
[744] Nuala Mole, Asylum and the European Convention on Human Rights, 2000, Council of Europe Publishing, Human Rights Files No. 9, p. 24.
[745] *Müslim v. Turkey*, ECtHR, Judgement of 26 April 2005, Application No. 53566/99.

Iraq who had been involved in a quarrel with a powerful figure in the local branch of the Baath Party and an associate of Saddam Hussein, and allegedly had received gunshot wounds and had been pursued by Iraqi secret service agents. Consequently the applicant had fled to Turkey. The applicant submitted that his deportation to Iraq would place him at risk of being ill-treated, or even killed, by officials of the Baath party. He relied on Articles 2 and 3. In those circumstances, the Court first examined the application under Article 3 and held unanimously that there would be no violation of this Article if a potential decision to deport the applicant to Iraq was executed. In the light of that conclusion, it decided that it was unnecessary to examine the complaint under the Article 2. [746]

In Mamatkulov and Abdurasulovic v. Turkey, the applicants who were charged with homicide, causing injuries by the explosion of a bomb in the Republic of Uzbekistan and an attempted terrorist attack on the President of Uzbekistan alleged that their extradition to the Republic of Uzbekistan would constitute a violation of Article 2[747] in addition other Articles of the Convention. the Court however, only examined the case in relation to Articles 3, 6 and 34 and found a violation of Article 34 of the Convention.

On the other hand, there has recently been a few cases regarding the application of Protocol No. 6 of the Convention on deportation or extradition orders which, the Court found admissible. The Court, however, could not examine these cases on the merits as they were struck off the list due to the settlement of the disputes between the parties.

One such case was Yang Chun Jin Alias Yang Xiaolin v. Hungary.[748]The applicant was citizen of China and of Sierra Leone who was convicted of a crime characterised as 'bodily assault causing disabling injuries', an offence punishable with imprisonment of three to seven years under Article 134 of the Chinese Criminal

[746] For another case that the Court took the same approach see *D. v. the United Kingdom*, para. 59.
[747] *Mamatkulov and Abdurasulovic v. Turkey,* ECtHR, Judgement of 6 February 2003, Application Nos. 46827/99 and 46951/99, para. 57.
[748] *Yang Chun Jin Alias Yang Xiaolin v. Hungary*, ECtHR, Judgement of 11 January 2001, Application No. 58073/00.

Code 1979 and imprisonment of one to five years under Article 170 (4) of the Hungarian Criminal Code. However, in the formal extradition request issued by the Chinese Ministry of Justice on 12 January 2000, it was explained that the applicant was wanted by the Chinese authorities for having shot a Mr. L.Y. in Fuqing town, China. A legal opinion provided by a Chinese law firm indicated that this was an offence potentially punishable with death under Chinese law unless mitigating factors occurred. Thus, the Hungarian Ministry of Justice enquired a formal undertaking by the Chinese Government indicating that the death penalty would not be imposed on the applicant after his extradition to China. This formal undertaking was provided by the Chinese Ministry of Justice, however the applicant was not convinced with this undertaking considering two well-known extradition cases where the Chinese Government had not complied with similar undertakings. Therefore, he brought the case before the European Court complaining that his extradition might expose him to the danger of being sentenced to death and executed in breach of Article 1 of Protocol No. 6. The Applicant disputed the credibility of the assurance provided by Chinese Government by invoking two case-reports of Amnesty International with regard to the strength of the Chinese assurance not to sentence him to death or to execute such a sentence. One was about a Mr W.J. who was executed in 1995 after he had been returned to China from Thailand. The second case was about a Mr F.Y. who, after being expelled from Canada in January 1999 was sentenced to death in China in June 2000. The Court found the case admissible. However, the Hungarian Minister of Justice decided to refuse the applicant's extradition to China and allowed him to leave Hungary for Sierra Leone. Therefore, the Court found that the applicant was no longer threatened with extradition to China from Hungary and that the matter was resolved.

Another admissibility decision in the same line was Razaghi v. Sweden[749]. The Applicant was an Iranian citizen who feared that he would face death penalty by stoning in Iran due to the relationship he had with a married woman whose husband was a mullah. He presented the copies of two notices issued by the Iranian court requiring him to appear before an the court to answer questions regarding charges of

[749] See *Razaghi v. Sweden*.

zenâ (adultery). In addition to the fear of punishment on account of adultery, the applicant further argued that he had converted to Christianity which was also a crime punishable by death penalty under the Iranian Law. His asylum request was rejected by the Swedish Aliens Appeals Board on 13 November 2000. Thus, he brought his case before the European Court claiming that if deported to Iran he would be subjected to death penalty, which in his opinion raised issues under Article 2 and Article 1 of Protocol No. 6 to the Convention. The Swedish Government defended its position predominantly putting emphasis on the lack of credibility of the Applicant by setting forth the following contradictory aspects of his statements: Firstly, the Government did not consider it likely that a woman would engage in a relationship in the way it had been described by the applicant, especially in view of her position and the alleged risk of severe punishment. Therefore, the applicant's claim that a few witnesses had observed them having sexual intercourse was very unlikely. Secondly, the Government disputed the authenticity of the two Iranian documents as in her view the person reporting a crime would never be indicated in a notice to appear before a court and that an Iranian court could not determine a criminal case of the present type in a manner as arbitrarily as allegedly indicated by the second notice. Such response based on the credibility of the applicant however, did not convince the Court to find the case manifestly unfounded. Therefore, the Court found the application admissible stating that the applicant's complaint that his expulsion to Iran would result in a violation of his rights under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 6 to the Convention. The Court however, could not examine the case on the merits as the Swedish Aliens Board had revoked the expulsion order against the applicant and granted him a permanent residence permit.[750]

In a very recent case, namely Shamayev and 12 Others v. Georgia and

[750] Also see *Aspichi Dehwari v. the Netherlands*, Admissibility Decision of 12 March 1998, Application No. 37014/97 for a case challenging the legality of an expulsion decision to Iran which was found admissible with regard to complaints of violations of Articles 2 and Article 1 of Protocol No. 6. This time, the alleged risk was caused by the Applicant's political opposition to the Iranian Regime. The Court however, did not examine the case on the merits since the Applicant was granted a residence permit in the Netherlands and accordingly the case was struck off the list.

Russia,[751] the Court finally examined a case on the merits with a view to violation of Article 2 of the Convention. This was a case brought before the Court by 13 Russian and Georgian nationals of Chechen origin who were detained in Georgia with a view to their extradition to the Rusian Federation. The Russian authorities were accusing them of being involved in terrorist attcaks in Russia. Mr. Shamayev, Adayev, Aziev, Khadiev and Vissitov were extradited to Russia by the Georgian authorities on 4 October 2002. On 26 July 2003 four of the applicants except Mr. Aziev were transferred to a detention center in Stavropol Region. The Russian Government stated that Mr. Aziev was also transferred to the same place lateron. According to the information provided by the Russian Government, Mr. Shamayev and Khadiev were sentenced to three years and six months, Mr. Vissitov to ten years and Mr. Adayev to one year and six months imprisonment. The rest of the applicants were not extradited to Russia.

The applicants claimed that extradition to Russia, which had not abolished the death penalty at the time of extradition, had exposed them to a real risk of inhuman treatment and extra-judicial killings or death penalty contrary to Articles 2 and 3 of ECHR. Unlike Russia, Georgia was a party to the Protocol No. 6 abolishing the death penalty.

The lawyers alleged that Mr. Aziev had been subjected to extra-judicial killing after the extradition took place. This argument was based on the fact that Aziev was not being kept in the same place with the others and had not appeared in the sequence filmed in the airport of Tbilissi by the Georgian journalists. The Russian Government rejected this argument claiming that Aziev was in good health and presented photographs of him taken after his extradition, accompanied by medical certificates.[752]According to the Russian Governement, the reason for not having been filmed together with the other four applicants in the Tbilisi Airport was that he was kept seperately in SIZO of city A. He was subsequently placed with them in the same SIZO of the city B after August 2003.

[751] *Shamayev and 12 Others v. Georgia and Russia*, ECtHR, Judgement of 12 April 2005, Application No.36378/02.
[752] *Ibid.,* para. 296.

The Court examined Mr. Aziev's situation seperately from the others due to the peculiar claims with regard to his case. It was noted that unlike the other applicants, the Russian Government had submitted only one photograph of Aziev, and he was not photographed in his cell. Having regard to these circumstances and the fact that applicants in Russia were not allowed to meet or communicate neither with their lawyers nor with the Court, the Court considered that there were lagitimate doubts of the lawyers regarding the fate of Mr. Aziev after October 4, 2002.[753] However, the Court concluded that the evidence at hand did not make it possible to conclude that Mr. Aziev was dead since he approached to the Court concerning a new request on 19 August 2003 after the extradition. [754]Therefore, the Court found no violation of Article 2 with regard to Mr. Aziev.

Secondly, the Court examined whether Georgia had violated Article 2 on account of exposing the Applicants to the risk of being subjected to death penalty or extra-judicial killing in Russia. With regard to the extra-judicial killing argument, the Court noted the reports and figures presented concerning killings and arbitrary detentions in the Republic of Chechnia. In the Court's view however, the reports and figures regarding the Chechen people generally would not be sufficient to substantiate the claim that the Applicants would personally run such risk if extradited to Russia.[755] Therefore, the Court did not find a violation of Article 2 with regard to the claims of extra-judicial killings. As to the claim on death penalty, the Court noted that at the time of the decision making on the request of extradition, Russia was a member of the Council of Europe and had adopted a moratorium on the non-execution of death sentence since 1996. This argument was supported by the judgement of the Consititutional Court in February 1999 that no court in the federation would render convictions on death penalty. Furthermore, the Russian authorities had provided assurances to the Georgian Government indicating that the extradited persons would neither be subjected to death penalty nor any treatment contrary to Article 3.[756]In this context, the Court has put special emphasis on the

[753] *Ibid.,* para. 320.
[754] *Ibid.,* para. 321.
[755] *Ibid.,* para. 371.
[756] *Ibid.,* para. 327.

credibility of the guarantee letters provided by the Russian Attorney General. The Court noted that the letters were provided by the Attorney General who controlled the activities of all the prosecutors in the Russian Federation and responsible for bringing charges before the courts.[757] An examination of the relevant provisions and practices under the Russian Criminal Code also revealed that the Russian Courts would currently abstain from applying death penalty to the applicants.[758] The fact that none of the applicants who were already extradited, had been subjected to death penalty also supported this conclusion. As a result, the Court considered that although Russia had ratified neither of the Protocols abolishing death penalty, the information before the Court indicated that the applicants were not under the real risk of being subjected to death penalty in Russia. Therefore, the Court concluded that Georgia had not violated Article 2 of the European Convention by extraditing five of the Applicants to Russia.

c) Prohibition of Torture, Inhuman or Degrading Treatment or Punishment

Unlike the CAT which expressly defined 'torture' in its Article 1, the European Convention does not define the terms in Article 3. Thus, the scope of Article 3 had to be defined progressively by the European Court of Human Rights. Article 3 simply defines the textual borders of the prohibition of torture with the following provision: *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."*

The Court had to define three terms in this provision, namely *"torture"," inhuman treatment or punishment"and "degrading treatment or punishment".* Unlike the Human Rights Committee the Court imputes great significance to such differentiation. In the Court's view, the Convention intends *"by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering."*[759] However, still such differentiation is not as siginificant as in the practice of CAT as the protected scope of Article 3 ECHR does

[757] *Ibid.,* para. 344.
[758] *Ibid.,* para. 332.
[759] *Selmouni v. France*, ECtHR, Judgement of 28 July 1999, Application No. 25803/94, para. 96.

not exclude any of the terms mentioned for non-refoulement cases.

In the landmark case of Ireland v. the United Kingdom[760] the Court defined these terms and drew the differences from each other. Accordingly, a treatment or punishment is regarded as 'inhuman' when *"premeditated,... applied for hours at a stretch and "caused, if not actual bodily injury, at least intense physical and mental suffering""*[761]On the other hand, the Court defines 'torture' as *"deliberate inhuman treatment causing very serious and cruel suffering."*[762] In other words, the Court classifies torture as a deliberate and aggrevated form of inhuman treatment. It appears that the Court draws the distinction between 'torture' and 'inhuman or degrading treatment or punishment' on the basis of both the intent and severity of the act the victim is subjected to.[763] In Aksoy v. Turkey, the Court noted that 'torture' would only appear when there is a deliberate inhuman treatment causing very serious and cruel suffering. In that particular case, Court discerned deliberation from the fact that *"a certain amount of preparation and exertion would have been required to carry out"* the act concerned which gave such serious and cruel suffering.[764] The Court further noted that the acts were administered with the aim of obtaining confessions or information from the applicant.

Deliberate infliction of pain and suffering, on the other hand, is not an indipensable element of inhuman or degrading treatment or punishment. In Peers v. Greece, the Court considered *that:*

"there [was] no evidence that there was a positive intention of humiliating or debasing the applicant…although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of

[760] *Ireland v. the United Kingdom*, ECtHR, Judgement of 18 January 1978, Application No. 5310/71.
[761] *Ibid.,* para. 167; *Soering v. the United Kingdom*, para. 100.
[762] *Ireland v. the United Kingdom*, para. 167.
[763] Röhl, p. 13.
[764] *Aksoy v. Turkey*, ECtHR, Judgement of 18 December 1996, Application No. 21987/93, paras. 63 – 64.

Article 3."[765]

This aspect of inhuman or degrading treatment or punishment is particularly important for non-refoulement cases since the State which removes the applicant from its territory need not have an intention to subject him/her to inhuman or degrading treatment or punishment in order to be responsible for the act concerned.[766]

With regard to the 'severity' element, the Court had taken a rather restrictive approach in the Ireland v. United Kingdom case by considering the following interrogation techniques as 'inhuman treatment' but not 'torture':

"(a) wall-standing: forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spread eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers";

(b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;

(c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;

(d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep;

(e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations."[767]

In assessing the minimum level of severity, the Court took into account all the circumstances of the case, such as the duration of the treatment, its physical or

[765] See *Peers v. Greece,* ECtHR, Judgement of 19 April 2001, Application No. 28524/95, para. 74.
[766] Röhl, p. 16.
[767] *Ireland v. the United Kingdom*, para. 96.

mental effects and, in some cases, the sex, age and state of health of the victim.[768]

The Court has elaborated on the severity test in its subsequent jurisprudence. In Aksoy v. Turkey, it has put particular emphasis on the fact that the treatment had lead to a paralysis of both arms of the person which lasted for some time.[769]

On the other hand, a clear move towards a less restrictive approach is visible in the Court's jurisprudence on defining the minimum level severity of harm inflicted as a condition of establishing 'torture'. In Selmouni v. France[770], the applicant complained about the treatment that he was subjected to during the police custody for three days in connection with a drug trafficking investigation.

With regard to the standard of minimum level of severity, the Court stated:

"...having regard to the fact that the Convention is a "living instrument which must be interpreted in the light of present-day conditions"...the Court considers that certain acts which were classified in the past as "inhuman and degrading treatment" as opposed to "torture" could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."[771]

Having these considerations in mind, the Court was satisfied that a large number of blows were inflicted on the Applicant. It was presumed that whatever a person's state of health, such intensity of blows would cause substantial pain. Furthermore, the Court observed that although a blow does not always automatically leave a visible mark on the body, in the case of the applicant, it could be seen from the medical report that the marks of the violence he had endured covered almost all

[768] *Ibid.,* para. 162.
[769] *Aksoy v. Turkey*, para. 64.
[770] See *Selmouni v. France.*
[771] *Ibid.,* para.101.

of his body.[772] In addition to the physical violence inflicted, the Court also took into account the mental violence that the Applicant was subjected to by the police[773] in concluding that the acts that the applicant encountered should be defined as 'torture'.

Finally, the Court defines 'degrading treatment or punishment' as an act *"…such as to arouse in the victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance."*[774]

Such feelings of fear, anguish and inferiority may appear in a variety of contexts. For instance, in Van Der Ven v. the Netherlands, the Court considered that the parctice of weekly strip-searches in a situation where a person is already subject to a great number of surveillance measures, and in the absence of convincing security needs in a detention center is a degrading treatment.[775]

It may sometimes appear as a result of the cumulative effects of certain acts. For instance in Ülker v. Turkey[776], the Court considered the cumulative effects of the criminal prosecutions and convictions against a conscientious objector for the aim of ensuring that he did his military service. In the Court's view, the prosecutions in queston were designed for repressing the applicant's intellectual personality, inspiring in him feelings of fear, anguish and vulnerability capable of humiliating and debasing him and breaking his resistance and will. Considering its gravity and repetitive nature, the Court concluded that the treatment inflicted on the applicant had caused him severe pain and suffering amounting to degrading treatment within the meaning of Article 3. This approach comes close to cumulative determination of persecution under the 1951 Refugee Conevention.

Article 3 of the Convention maintains the absolute character of the prohibition of torture, inhuman or degrading treatment of punishment as in the other

---

[772] *Ibid.,* para. 102.
[773] *Ibid.,* para. 103.
[774] *Ireland v. the United Kingdom*, para. 167; *Soering v. the United Kingdom*, para. 100.
[775] *Van Der Ven v. the Netherlands*, ECtHR, Judgement of 4 February 2003, Application No. 50901/99.
[776] *Ülker v. Turkey,* ECtHR, Judgement of 24 January 2006, Application No. 39437/98.

human rights instruments. Article 15 of the Convention indicates that the right stipulated in Article 3 is non-derogable even in times of war or other public emergency. As mentioned in the context of CAT and ICCPR, this is a common character of the human rights instruments that involve a higher protection standard compared to the 1951 Refugee Convention which allows exceptions to the non-refoulement principle when the person concerned poses a danger to the security of the country in which he is, or having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.[777] For this reason, the States Parties to the European Convention have repeatedly been caught in violation of the safety net erected by the absolute nature of the right in Article 3 when non-refoulement cases are concerned.

For instance, Ahmed v. Austria was one such case which concerned the deportation of a Somalia citizen, who was a recognized refugee in Austria, on the ground that he constituted a danger to the Austrian society on account of a two-and-half years' imprisonment for attempted robbery. The Court attributed particular weight to the fact that the applicant was a recognized refugee which meant that the Austrian Government had already acknowledged that he would face persecution in the country of origin if he had been returned to this country.[778]

The Court indicated that the absolute protection of Article 3 was equally valid when issues under this Article arise in expulsion cases. In this respect, the Court expressed that no matter how undesirable or dangerous the activities of the person in the State of refugee, returning a person to a territory where he/she would be exposed to a treatment contrary to Article 3 would engage the responsibilityt of the returning State under the ECHR. The Court therefore, ruled that the protection afforded by Article 3 is wider than that provided by Article 33 of the 1951 Convention, since the prohibition under Article 3 is absolute.[779]

---

[777] See supra 1951 Refugee Convention, Article 33.
[778] *Ahmed v. Austria*, para. 42.
[779] *Ibid.,* para. 41; see also the following cases where the Court repeted this reasoning: *Chahal v. the United* Kingdom, ECtHR, Judgement of 15 November 1996, Application No. 22414/93, para. 80; *H.L.R. v. France*, para. 35.

In N. v. the Finland, the Court elaborated on the absolute character of protection under Article 3. In this respect, the Court stated that the absolute protection under this provision could not be invalidated either by the nature of the applicant's work in the country of origin or by his offences in Finland.[780] As indicated above, the 1951 Refugee Convention draws a distinction between the exceptions to the non-refoulement principle in Article 33 and the exclusion and cessation clauses in Article 1 of the Convention. In this regard, the exceptions to Article 33 only apply to the offences committed with the receiving country, whereas the exclusion clauses in Article 1 applies to the offences before entering the territory of the receiving country. By referring to the activities of the applicant within the country of origin, the European Court made it clear that the absolute protection does cover both of those situations.

The pressing need for finding solutions for the security deficit of the industrilized countries that became more apparent after the terrorist attacks on the World Trade Center in 2001 motivated those States to question the absolute nature of protection with regard to non-refoulement cases where deportation of terrorists are concerned. The Court had already made its position clear on this point in its earlier case-law. Fo rinstance, in Chahal v. the United Kingdom, which was a case concerning deportation of a Sikh militant to India who had been involved in terrorist activities including an assassination attempt to the Indian Prime Minister who visited the United Kingdom. The Government argued that there was an implied limitation to Article 3 which entitled a State Party to expel a person even where a real risk of inhuman treatment existed, if such removal was required on national security grounds.[781] The Court rejected this argument with the following words:

"The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and

[780] *N. v. Finland*, para. 166.
[781] *Chahal v. the United Kingdom*, para. 76.

4 (P1, P4), Article 3 (art. 3) makes no provision for exceptions and no derogation from it is permissible under Article 15 (art. 15) even in the event of a public emergency threatening the life of the nation."[782]

Despite this clear response by the Court in the Chahal case, a similar application has recently been lodged with the Court, namely Ramzy v. the Netherlands[783] concerning the removal to Algeria of a person suspected of involvement in an Islamic extremist group in the Netherlands. The number of third parties intervening the case shows the sensitivity of the topic in the current legal environment. The Court has granted leave of intervention to the Governments of Italy, Lithuania, Portugal, Slovakia and the United Kingdom and the non-governmental organisations the AIRE Centre, Interights (on behalf of Amnesty International Ltd, the Association for the Prevention of Torture, Human Rights Watch, The International Commission of Jurists, Open Society Justice Initiative and Redress) and Justice and Liberty. The response of the Court to this application remains to be seen.

The Court had to deal with some other technical issues regarding the legal framework of incorporating the non-refoulement principle to the Convention in the Soering case. The first question to be aswered was how it would compromise examining a foreseeable violation in the territory of another country, with the condition of being a 'victim of a violation' of Article 3 in the context of the admissibility of an application.[784]The Court indicated in this respect that:

"[i]t is not normally for the Convention Institutions to pronounce on the existance or otherwise of potential violations of the Convention. However, where an applicant claims that a decision to extradite him would, if implemented, be contrary to Article 3…by reason of its foreseeable consequences in the requesting country, a

---

[782] *Ibid.,* para. 79.
[783] *Ramzy v. the Netherlands*, ECtHR, Pres Release issued by the Registrar dated 20.10.2005, Application No. 25424/05.
[784] This condition was stipulated in the ex-Article 25 of ECHR at the time of the Soering judgement. It is currently regulated in Article 34 as amended by the Protocol No. 11 to the Convention (Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, ETS No. 155)

departure from this principle is necessary, in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article…"[785]

This is an extended version of the 'potential victim' concept that it developed starting from the Klass and Others v. Germany case.[786]Although the Court did not establish a clear connection between these two cases in the Soering judgement, such connection is more visible in the admissibility decision of Afrim Šijaku v. Former Yugoslav Republic of Macedonia.[787]

Secondly, the Court had to determine the criteria for establishing the degree of risk in the country of origin that is sufficient to engage the responsiblity of a State Party under the Convention. In this respect, the Court stated that the responsiblity of a State is engaged *"...where substantial grounds have been shown for believing that the person concerned, if extradited, faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country."*[788]This matter is discussed in a seperate section below.

Having covered the general theoretical aspects of Article 3 from the perspective of the prohibition of non-refoulement, it is also essential for the purposes of this study to identify in which contexts the Court has been applying this Article to the prohibition of refoulement.

One of the issues that the European Court has been dealing with under Article 3 is the death penalty. The Court was initially forced to examine death penalty under Article 3 in the Soering case since, as noted above, at the time of the dispute the United Kingdom was not bound with Protocol No. 6 which abolished death penalty. However, despite the drastic change of the legal environment by the increase of the States Parties to the Protocol No. 6 and the adoption of the Protocol No. 13, the Court still does regard death penalty as an issue to be dealt with under

[785] See *Soering v. the United Kingdom*, para. 90.
[786] *Klass and Others v. Germany*, ECtHR, Judgement of 6 September 1978, Application No. 5029/71.
[787] *Afrim Šijaku v. Former Yugoslav Republic of Macedonia*, ECtHR, Admissiblity Decision of 27 January 2005, Application No. 8200/02.
[788] See *Soering v. the United Kingdom*, para. 91.

Article 3 as well as Article 2. In the entire death penalty cases cited in the previous chapter, the Court also made an assessment of Article 3. This is due to the link that the Court established between death penalty and freedom from torture, inhuman or degrading treatment or punishment in the Soering case. In this judgement, the Court had considered that although death penalty itself does not per se constitute a violation of Article 3, this does not mean that circumstances relating to a death penalty can never give rise to an issue under Article 3 of the Convention.[789] In this respect, the Court provided the following examples of factors capable of bringing the treatment and punishment received by the condemned person within the domain of Article 3: *"[t]he manner it is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution…"* [790]

Having these considerations in mind, the Court examined whether the so called 'death row phenomenon' would constitute a violation of Article 3 of the Convention, the way it appeared in the practice of the State of Virginia, United States if the Applicant was extradited to this country. With regard to the length of detenion in Virginia, the Court observed that the automatic appeal to the Supreme Court of Virginia normally took no more than six months. The condemned person however, was granted such appeal safeguards that the lapse of time between sentence and execution might inevitably amount to years of waiting at the death row. In this regard, the Court was convinced that the machinery of justice to which the Applicant would be subjected to in the United States was not arbitrary or unreasonable, but rather respected the rule of law. On the other hand, it was noted that despite such procedural safeguards, the time spent on the death row was still very long.[791] This approach is radically differrent from the approach of the Human Rights Committee under the ICCPR which, indicated that prolonged periods of detention under a severe custodial regime on death row couldnot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person was merely availing himself

[789] See *Soering v. the United Kingdom*, para. 104.
[790] *Ibid.*
[791] *Ibid.,* para. 111.

of appellate remedies.[792]

The Court further observed the bad conditions on death row in Virginia including the insufficient medical, legal and social services and the possibility of physical attack and homosexual abuse.[793]Finally, it noted that the applicant was only at the age of 18 years old and there were some psychiatric evidence that he was suffering from an abnormality of mind which substaintially impaired his mental responsiblity for his acts.[794] Given such considerations, the Court concluded that the decision to extradite the applicant to the United States would give rise to a violation of Article 3 if implemented.

In Jabari v. Turkey[795], the manner that the receiving country applied penalty was again at center of the Court's assessment. The applicant was an Iranian woman who was arrested in Iran on suspicion of having an intimate relationship with a married man. After having escaped from Iran, she was caught with a forged Canadian passport in France while enroute to Canada and trasferred back to the Turkey where she transited on her way to France. UNHCR had granted her refugee Status upon an RSD interview on the ground that she had well-founded fear of persecution as she risked being subjected to inhuman punishment such as death penalty by stoning or being whipped or flogged if she was returned to Iran.[796] The Turkish authorities however, issued a deportation order since she had not applied for asylum within the five days time limit after entering the Turkish territory. While examining this case, the European Court gave due weight to the UNHCR's interpretation of the circumstances and was convinced that the punishment for adultery by stoning still remained on the Statute book and it might be resorted by the authorities if she was returned to Iran.[797] Therefore, there was a real risk that the applicant would be subjected to treatment contrary to Article 3 if she were to be returned to Iran. Accordingly, the Court conluded that the order for her deportation to

[792] See *Kindler v. Canada.*
[793]See *Soering v. the United Kingdom*, para. 107.
[794] *Ibid.,* para. 108.
[795] *Jabari v. Turkey,* ECtHR, Judgement of 11 July 2000, Application No. 40035/98.
[796] *Ibid.,* para. 18.
[797] *Ibid.,* para. 41.

Iran would give rise to a violation of Article 3 if executed.

Another notable case that the Court dealt with inhuman punishment was D. and Others v. Turkey[798] which, was brought to the Court by three Iranian nationals; a man of Kurdish origin, his wife of Azeri origin and their daughter. The family sought refuge in Turkey since the marriage of the couple was declared null and void, they were both fined and sentenced by the Islamic Court on account of having a Sunni wedding ceremony although the woman was a Shia. Each of them had been sentenced to 100 lashes under the Iranian Criminal Code. Although the husband's punishment had been executed, the execution of the wife's sentence had been postponed due to her pregnancy. Unlike the Jabari case, their application for refugee status was rejected by the UNHCR. The Turkish Government, together with the UNHCR, contested the severity of the penalty indicating that the penalty imposed on the woman was of a symbolic character inflicted by means of a special lash in which the number of tails were equal to the number of blows to be inflicted. Thus they concluded that the penalty concerned did not have an inhuman character.[799] The Court however, was not convinced that the lash with one hundred tails had made the punishment symbolic or changed its inhuman character. It further mentioned that even if this was the case, and the applicant would be spared from flagrant injury, the enforcement of such sentence which involved treating her in public as an object in the hands of the State power, would inflict harm on her personal dignity and her physical and mental integrity in such a way that it would be contrary to Article 3.[800]

The Court has also heard a number of cases concerning protection seekers escaping from conflict situations caused by separatist or dissident movements. Cruz Varas v. Sweden[801] was among the earlier cases in this category. The applicant was a citizen of Chile who had sought refuge in Sweden together with his wife and son escaping from political oppression of the Chilean regime. His asylum application on political grounds was based on his membership to the Socialist Part and the Revolutionary Worker's Front both of which opposed to the oppressive regime of the

[798] *D. and Others v. Turkey*, ECtHR, Judgement of 22 June 2006, Application No. 24245/03.
[799] *Ibid.,* para. 49.
[800] *Ibid.,* para. 50.
[801] *Cruz Varas v. Sweden*, ECtHR, Judgement of 20 March 1991, Application No. 15576/89.

General Pinochet in Chile. He stated that he was an active member of these organizations and therefore, he had been arrested and tortured several times by the authorities. He had submitted medical reports supporting this statement. It is notable however, that he had for the first time mentioned of exposure to such inhuman treatment approximately two years after he lodged his first asylum application. His application was rejected by the Swedish authorities and he was subsequently expelled to Chile. It appears from the facts of the case that he did not personally encounter any inhuman treatment from the Chilean authorities after his return to Chile. The applicant claimed that by expelling him to Chile where there were allegedly substantial reasons to believe that he would face a real risk of inhuman treatment, the Swedish Government had violated Article 3 of the Convention. In response to the applicant's claims, the Court noted that the he had serious credibility problems. He had been silent about the past ill treatment for almost two years. There were considerable inconsistencies in his statements. Moreover, the Swedish Government had carried out a thorough and diligent investigation with regard to the his claims. The Government was very well informed about the situation in Chile. It contacted the opposition groups in Santiago through its Embassy in order to find out about the political activities of the applicant.[802] Such information obtained from the dissident groups indicated that the applicant had not been politically active or a member of the said organizations or persecuted by the police.[803] The Court further took note of the medical evidence submitted by the applicant indicating that he had, at some stage in the past, been subjected to inhuman or degrading treatment. On the other hand, unlike the Commission, the Court was not convinced that the Chilean authorities were responsible for such injuries.[804] The applicant was unable to find any witnesses or submit any other evidence which might have supported his alleged political activity in the course of his stay in Chile subsequent to his expulsion.[805] Finally, the Court considered the democratic evolution which was taking place in Chile.[806] Having these considerations the Court concluded that the applicant had

[802] *Ibid.,* para. 72.
[803] *Ibid.*
[804] *Ibid.,* para. 77.
[805] *Ibid.,* para. 79.
[806] *Ibid.,* para. 80.

shown no substantial basis for his fears and therefore his expulsion did not exceed the threshold set by Article 3 in this regard.[807]

The cases that the Court examined in this category[808] varied from protection seekers escaping from oppressive regimes such as the Cruz Varas case, to territories on which there was no State authority such as the case of Ahmed v. Austria[809] where the applicant escaped from an ongoing civil war among a number of clans in Somalia.

It is notable that in many of these cases, the examination of the Court involves an 'abstract' projection of the possible outcome of Applicant's expulsion. Therefore, unlike the extradition or punishment cases above where the form of treatment is regulated by law, it is generally difficult and sometimes unnecessary to estimate the exact form of treatment contrary to the Convention. The conditions in the country of origin may demonstrate that a person with the background of the applicant is under a real risk of being subjected to some form of aggression which may even result in his/her death. It is probably this feature of the cases concerned that caused the Court to develop a blanket rule approach in examining them under the Article 3 of ECHR.

The third category of non-refoulement cases that the Court has dealt with under the Article 3 has been health-related issues. These are cases relating to mental health as well the physical health of applicants. D. v. the United Kingdom[810] is the leading case in this category. The applicant was a citizen of Saint Kits and Nevis who was convicted to six years' imprisonment for possession of cocaine by a Court of the United Kingdom. While serving his sentence he was diagnosed as HIV positive and suffering from immunodeficiency syndrome (AIDS). Upon serving half of his sentence, the Court ordered his removal to his country of origin which lacked

[807] *Ibid.,* para. 85.
[808] See also *Vilvarajah and Others v. the United Kingdom*, ECtHR, Judgement of 30 October 1991, Application Nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87; supra *T.I. v. the United Kingdom*; *Thampibillai v. the Netherlands*, Judgement of 17 February 2004, Application No. 61350/00.
[809] See *Ahmed v. Austria*.
[810] See *D. v. the United Kingdom.*

the appropriate means for treatment of his illness. While the necessary treatment was widely and freely available in the United Kingdom this was not the case for the country of origin.[811] The applicant therefore, argued that his expulsion to St Kitts would condemn him to spend his remaining days in pain and suffering in conditions of isolation. In such conditions his death would be imhuman an degrading. The critical question in this case was that untill the date that this case was brought before the Court the principle had been applied by the European Court where the risk to a person had arisen from intentionally inflicted acts of the public authorities in the receiving country or from those of non-state bodies when the authorities were unable to provide appropriate protection, whereas in D. v. the United Kingdom this was not the case. [812] The Court upheld the Applicant's claims considering that he was in the advanced stages of a terminal and incurable illness and withdrawal of the treatment would entail the most dramatic consequences for him. Furthermore, the Court noted that there was indeed no possiblity for treatment in the country of origin. The Court's conclusion in this case reveals that the Court was willing to provide this sort of protection in very exceptional cases as the Court underlined the very exceptional and compelling humanitarian nature of the conditions of this case. [813] Hence, the Court's subsequent practice in this context proved to be rather restrictive. It adopted the position that aliens facing expulsion cannot in principle claim any entitlement to remain to benefit medical, social or other forms of assistance except where there were compelling humanitarian considerations. The Court has rejected a number of applications in this regard. For instance, Ndangoya v. Sweden[814] was a case brought by a Tanzanian citizen who was serving a sentence for aggravated assault in a Swedish prison and diagnosed as HIV positive similar to the D. v. the United Kingdom case. The Government issued an expulsion decision which was unsuccessfully challenged by the applicant in the Swedish Courts. The Court rejected this application by considering the medical situation of the applicant and the possibility of treatment in the country of origin. With regard to the first question the

[811] *Ibid.,* para. 16.
[812] *Ibid.,* para. 49.
[813] *Ibid*., para. 54.
[814] *Ndangoya v. Sweden*, ECtHR, Admissibility Decision of 22 June 2004, Application No. 17868/03.

Court noted that although the applicant was diagnosed as HIV positive, it had not reached the stage of AIDS. Secondly, the Court observed that, unlike the situation in Saint Kitts, adequate treatment was available in Tanzania. In this respect, the Court noted that the applicant's circumstances in Tanzania might be less favourable than those he enjoyed in Sweden. It rejected however, to regard this fact as a decisive point in its assessment. The Court took exacly the same approach in the case of S.C.C. v. Sweden, where the applicant was an HIV infected protection seeker from Zambia.[815]

As a consequence of this restrictive approach, although accepting the possibility of it in principle, the Court has been reluctant to uphold non-refoulement claims on mental health grounds.

In Bensaid v. the United Kingdom[816], the Applicant who was an Algerian citizen challenged the Government's expulsion decision on the ground that it would cause him a full relapse in his mental health problems and would amount to inhuman and degrading treatment contrary to Article 3 of the Convention. Such risk was confirmed by the medical report provided by his pschiatrist. Although, the Court accepted that suffering associated with a relapse into hallucinations and psychotic delusions involving self-harm and harm to others, as well as restrictions in social functioning could, in principle, fall within the scope of Article 3,[817]it rejected the claims of the applicant by applying the test developed in the D. v. the United Kingdom case. Accordingly, the Court observed that the risk of deterioration and the alleged lack of adequate support were to a great extent speculative.[818] First of all, the Applicant was not himself a likely target of the terrorist activity concerned. Secondly, the means of having access to medical aid was not prevented by the situation in the region.[819] Therefore, the Court concluded that the case did not

[815] *S.C.C. v. Sweden,* ECtHR, Admissibity Decision of 15 February 2000, Application No. 46553/99, see also *Arcila Henao v. Netherlands*, ECtHR, Admissibility Decision of 24.06.2003, Application No. 13669/03 (Expulsion to Colombia of an HIV-positive drug offender was found inadmissible).
[816] See *Bensaid v. the United Kingdom*.
[817] *Ibid.,* para. 37.
[818] *Ibid.,* para. 39.
[819] *Ibid.,* para. 38.

disclose the exceptional circumstances of D. v. the United Kingdom case.[820]

In Salkic and Others v. Sweden[821], which was a case concerning expulsion of a family suffering from post-traumatic stress disorder to Bosnia and Herzegovina, that the Court once more came to a negative conclusion with respect to the claims of the applicants despite accepting the seriousness of the their mental health status, in particular that of the children. The negative decision was based on the fact that there were health care centres which included mental health units in the country or origin. The Court made emphasis on the high threshold that it applies for health-related issues as follows:

"...having regard to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the State Party for the infliction of harm, the Court did not find the expulsion of applicants to Bosnia and Herzegovina contrary to the standards of Article 3 of the Convention."

Other than the three above mentioned contexts, the Court expressed that an officially recognized regime of slavery might in certain circumstances raise an issue under Article 3 of the Convention. This is a part of the blanket provision character of the Article 3. In Ould Barar v. Sweden[822], the applicant who was a Moritanian citizen claimed that his father was a slave working for a certain clan in Moritania. In the applicants' view, his father was a priviliged slave as he could arrange for his children not to work as slaves although he had to visit his father's master once a year and perform certain tasks. The Swedish authorities rejected the applicants' asylum claim and ordered him to be deported. Consequently, he brought a case before the European Court arguing that if he was expelled to Moritania he could be punished by his father's master who probably had gotten angry about his flight. The Court noted that slavery might in principle raise an issue under Article 3. It further observed that although the Moritanian law prohibited slavery, the reports of various international organizations indicated that it continued to exist in countryside, and the Government

[820] *Ibid.,* para. 40.
[821] *Salkic and Others v. Sweden*, ECtHR, Admissibility Decision of 29 June 2004, Application No. 7702/04.
[822] See *Ould Barar v. Sweden*.

had been ineffective in preventing it. On the other hand, the personal situation of the applicant did not convince the Court that he was a slave himself since he had apparently lived an independent life in the capital city away from his father. Therefore, the Court found the application inadmissible.

Finally, the Court's approach towards claims linked to socio-economic problems is also important to note. This is an aspect that calls for special attention as asylum mechanisms stay distant to accepting the claims with economic motives. Only in a few instances, as noted above, the applicants were granted refugee status where the basis of living is completely lost. Therefore, it may be possible to make fruitfull comparisons between these two branches of law with a view to complementing each other. The Court did clarify its position concerning the relationship of Article 3 and socio-economic problems in the case of Pančenko v. Latvia[823]. The Applicant was registered as 'an ex-USSR citizen' in the Latvian Register, which was a particular category of stateless person under the Latvian Law. She had however, adopted the citizenship of Russia in 1994 in order to be able to leave the territory of Latvia and go abroad for commercial trips. Therefore, the Latvian Citizenship and Migration Authority annulled her entry in the Register and issued a temporary residence permit. At the end of the period, she was informed that her continued stay in Latvia was illegal and that she was required to leave the Country, otherwise she would be served with a deportation order. Although, the applicant was subsequently issued with a permanent residence permit in Latvia, she brought a case to the European Court where she complained about her socio-economic problems and requested compensation for a violation relating to her inability to be registered as a permanent resident of Latvia during the period of 1995-1999. The Court noted that, at the time of the hearing, the applicant had already been granted a permanent residence permit and was not under a threat of deportation. Therefore, the threat of deportation order was remedied. With regard to the appllicants' socio-economic claims the Court indicated that:

"the Convention [did] not guarantee, as such, socio-economic rights,

[823] *Pančenko v. Latvia*, ECtHR, Admissibility Decision of 28 October 1999, Application No. 40772/98.

including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a State to maintain a certain level of living. To the extent that this part of the application relates to Article 3 of the Convention, which prohibits torture or inhuman or degrading treatment, the Court observes…that her present living conditions do not attain a minimum level of severity to amount to treatment contrary to the above provision of the Convention."

The Court has cited the case of Ireland v. the Kingdom judgment with the regard to the last sentence of this paragraph. This goes to 'deprivation of food and drink' which was one of the five interrogation methods that was found inhuman by the Court in that landmark judgement.

In Hilal v. the United Kingdom, the Court found the United Kingdom responsible under Article 3 on the grounds that the prison conditions in Tanzania, where the Applicant was intended to be deported, inhuman and degarding due to inadequate food and medical treatment leading to life threatening conditions.[824]

As a result, it can be concluded that the Convention is not concerned with socio-economic problems unless the situation is so severe that the treatment amounts to inhuman treatment as in the case of deprivation of food and drink in order to extract information or in life threatening conditions.

d) Right to Fair Trial

The right to fair trial that is stipulated in 6 of the European Convention has recently been added to the core rights category that the Court applies in the context of the non-refoulement principle. In Fashkami v. the United Kingdom[825], the applicant complained that if he was expelled to Iran he would be under the risk of unfair trial due to his suspected homosexual activities invoking Article 6. The United Kingdom Government objected to this argument indicating that the applicant

[824] *Hilal v. the United Kingdom*, ECtHR, Judgement of 6 March 2001, Application No. 45276/99, para. 67.
[825] See *Fashkami v. United Kingdom*.

had not raised this complaint in the domestic proceedings. The Court considered that its case-law did not *"exclude that an issue might exceptionally be raised under Article 6 by an expulsion decision in circumstances where the person being expelled has suffered or risks suffering a flagrant denial of a fair trial in the receiving country, particularly where there is a risk of execution…"*. The Court rejected the applicant's claim as it was not satisfied with his submissions on how he would face a risk under this provision in the absence of a concrete indication that he would face a trial on the particular charge in question.

It is notable that the Court again applied a very high threshold for raising an issue under Article 6 as the decision does not speak of any violation of Article 6, but a flagrant violation of this right.

e) Assessment of the Risk

The Court has set the standard for assessing the degree of risk in the Soering case where it mentioned that removal from the territory of a State Party to the ECHR would violate Articles 3 *"where substantial gorunds have been shown for believing that the person concerned … faces a real risk"* of ill-treatment.[826]

Existance of a 'real risk' is considered sufficient in order to raise the responsibility of a State Party. Moreover, substantial grounds need to be shown for the existance of such risk. Thus, the scope of probabilty test that the Court applies is determined by concepts of 'real risk' and 'substantial grounds'.

Unlike the foreseeability test of the Human Rights Committee under the ICCPR, the concept of 'real risk' that the European Court uses to determine the degree of risk, does not refer to a degree of certainty. For instance, in the Soering case the Court indicated that it was not certain and not even probable that the applicant would be sentenced to death and subjected to 'death row phenomenon'.[827] The Court however, was satisfied with the degree of risk for finding a violation of

[826] See *Soering v. the United Kingdom*, para. 91.
[827] *Ibid.,* para. 94.

Article 3.[828]

While determining the scope of the degree of risk it appears that the Court has been inspired to some extent by the wording of Article 3 of CAT which speaks of *"substantial grounds for believing that he would be in danger of being subjected to torture."* In the Soering judgement, the Court underlined the similarity of obligations under Article 3 of CAT and that of Article 3 ECHR by stating:

"[t]he fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention."[829]

The Court has adopted the phrase 'substantial grounds' and omitted the term 'danger' at its own risk assessment. This term has been replaced with the phrase 'real risk'.

Alleweldt believes that by drawing such distinction, the Court must have aimed at accepting as relevant not only 'dangers' but also 'very small risks', as long as they are not unreal. The author explains this approach with the need to make the safeguards of Article 3 practical and effective. According to the author, if the concept of real risk is interpreted in such a way that small probabilities below a certain level could be neglected, this would in the long run lead to the result that a certain quota of the persons obliged to return would be ill-treated and this would obviously go against the effectiveness of protection. In this respect, effectiveness principle justifies a broad interpretation of the phrase 'real risk'.[830] On the other hand, obviously the Court used the phrase 'real risk' in order to determine the bottomline of the probability test. In this respect, the Court has expressed in a number or cases that 'real risk' does not refer to a vague, remote possibility or speculative risks.[831]

---

[828] *Ibid.,* para. 99.
[829] *Ibid.,* para. 88.
[830] Ralf Alleweldt, *"Protection Against Expulsion Under Article 3 of the European Convention on Human Rights"*, European Journal of International Law, Vol. 4, 1993, p. 366.
[831] See *Bensaid v. the United Kingdom*; See *Fashkami v. United Kingdom*.

The concept of 'substantial grounds' which constitutes the other component of the risk assessment refers to the factual aspects of a case. The Court uses this concept in the meaning that the real risk of inhuman treatment or, as the case may be violating act, must be supported by established facts. For instance in Cruz Varas v. Sweden the Court implies such factual aspect of this concept with the following words: *"In determining whether substantial grounds have been shown for believing in the existence of a real risk of treatment contrary to Article 3 (art. 3) the Court will assess the issue in the light of all the material placed before it…"*[832]

As in the jurisprudence of the other monitoring bodies there are several factors that the Court takes into account in its risk assessment. The Court considers applicant's past experience, profile, credibility or the general situation in the country of origin and the continuity of the risk in this regard.

(1) Past Experience

The past experience of an applicant is valued by the European Court in establishing the substantial grounds for a real risk of inhuman treatment. The Court has repeatedly stated that *"the historical position is relevant in so far as it may shed light on the current situation and its likely evolution"*. [833]

In Hilal v. the United Kingdom the Court gave due weight to the fact that the applicant had been detained and tortured in Zanzibar prior to his departure from the country in finding a violation of Article 3 of the European Convention.[834] This fact however, is not generally sufficient alone to substantiate a real risk of torture. The case has to be supported with the factors such as the general human rights situation in the country of origin. It is possible that having submitted medical reports verifying previous inhuman treatment is found insufficient by the Court to substaintiate a claim especially where, the information provided is questionable under other factors. A credibility problem or the general situation in the country of

[832] See *Cruz Varas v. Sweden*, para. 75.
[833] See *Chahal v. the United Kingdom*, para. 86, *Thampibillai v. the United Kingdom*, ECtHR, Judgement of 17 February 2004, Application No. 61350/00, para. 61.
[834] See *Hilal v. the United Kingdom*, para. 61.

origin may diminish the value of a report indicating inhuman treatment. In Cruz Varas v. Sweden for instance, the Court was not convinced that the applicant was under a real risk of inhuman treatment despite the existance of medical reports indicating that he had been ill-treated previously. Considering the applicants' credibility problems the Court concluded that such reports did not necesarily mean that the ill-treatment concerned was carried out by the Chilean authorities.[835]

The past experience concerned does not necessarily have to be of the applicant's own; the treatment towards family members or colleagues may also be considered in the same context. In Thampibillai v. the United Kingdom, the fact that the applicant's father had been shot dead by the Sri Lankan army for having been suspected of providing material assistance to Tamil Tigers was among the main grounds that the applicant invoked in order to convince the Court that he was individually under the risk of sharing the same fate with his father. [836]The Government had defended itself argueing that the killing of the father did not adequately justify the applicant's fear or inhuman punishment. According to the Government, the applicant further had to demonstrate that he was known by the Sri Lankan authorities as a supporter of the Tamil Tigers as well.[837] The Court considered the father's death in its risk assessment but concluded that this was not the reason for the applicant's flight from the country since he had left the country almost four years after his father's death.[838]

Not having experienced the treatment feared of, in the past, may in some circumstances negatively affect the outcome of the case. For instance, in Ould Barar v. Sweden, the fact that the applicant had not experienced slavery in the country of origin caused the Court to conclude that he was not under a real risk of slavery.[839]

(2) Profile of the Applicant

The applicant is expected to prove that his personal situation is worse than

[835] See *Cruz Varas v. Sweden*, para. 77.
[836] See *Thampibillai v. the United Kingdom*, para. 12.
[837] *Ibid.,* para. 56.
[838] *Ibid.,* para. 62.
[839] See *Ould Barar v. Sweden*.

the people of the country of origin generally.[840] The high profile of an applicant or particular characteristics of him/her may support the case for individuating the alleged risk that the applicant would possibly face if returned to the country of origin. In Chahal v. the United Kingdom the Court underlined the importance of the profile of the applicant with the following expressions:

"The Court further considers that the applicant's high profile would be more likely to increase the risk to him of harm than otherwise. It is not disputed that Mr. Chahal is well known in India to support the cause of Sikh separatism and to have had close links with other leading figures in that struggle…The Court is of the view that these factors would be likely to make him a target of interest for hard-line elements in the security forces who have relentlessly pursued suspected Sikh militants in the past…"[841]

The profile of the applicant can be very decisive on the outcome of the case. For instance, in N. v Finland, the Court indicated that the profile of the applicant differentiated this case from Vilvarajah and Others v. the United Kingdom, where the Court found that the evidence before it concerning the background of the applicants, as well as the general situation, did not establish that their personal position was any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country. N. was coming from the Democratic Republic of Kongo where the situation was not settled and he was involved in specific activities as an infiltrator and informant in President Mobutu's special protection force, reporting directly to very senior-ranking officers close to the former President. On account of those activities the Court found that he would still run a substantial risk of treatment contrary to Article 3, if expelled to the country of origin. [842]

[840] For instance in In *H.L.R. v. France*, Court rejected the Applicant's claims stating that "…there are no documents to support the claim that the applicant's personal situation would be worse than that of other Colombians, were he to be deported."(see para. 42).
[841] See *Chahal v. the United Kingdom*, para. 106.
[842] See *N. v. Finland*, para. 162.

(3) Credibility

The credibility of an applicant is decisive on the outcome of a application as protection seekers most of the time do not have proper documentation on the facts of the case and in fact, they can not be expected to have them when it is considered that in most cases they escape from their Government's persecution via illegal means and in traumatic conditions. Therefore, personal statements of an applicant appears as a prevailing evidence in non-refoulement cases. Such evidence however, may only have a value if they are consistent and there are no question marks on the credibility of the applicant. A remarkable case to observe the role of the credibility of an applicant is N. v. Finland. The applicant had not been able to provide any identity card, travel document, certificate of education or the like in this case. Neither did the asylum file contain any indication of such a document having been presented at the applicant's arrival in Finland. Apart from his oral statements, the only information relating to his background which the Directorate of Immigration had at its disposal, was the material forwarded by the Dutch authorities where he had stayed before arriving to Finland.[843] The oral evidence from the applicant, his common-law wife, another asylum seeker originating from the Democratic Republic of Congo who was regarded as a credible witness played the major role in the Court's assessment.[844] The Court had certain reservations about the applicants' own testimony which it considered to have been evasive on many points and it was not prepared to accept every statement of his as fact. Particularly, there were inconsistencies with regard to his journey to Finland.[845] The Court however, found the applicants' statements sufficiently consistent and credible considering the overall evidence before it. Therefore, it accepted that he had fled the country of origin in May 1997 at the time when Laurent-Désiré Kabila's forces were over-throwing President Mobutu's regime. The Court further found it sufficiently credible that, although the applicant was not senior in military rank, he could be considered to have formed part of the President's and the commander's inner circle. As a result, on the basis of the oral and consistent evidence, the Court considered that the expulsion of the applicant would

[843] *Ibid.,* para. 100.
[844] *Ibid.,* paras. 152, 153.
[845] *Ibid.,* para. 154.

be contrary to Article 3 of the European Convention.

It is notable that although the Court's judgement was almost solely based on oral evidence, it did not require one hundred per cent consistency in the applicant's statements in order to find them reliable. This approach is parallel to the position of the Committee Against Torture, which repeatedly mentioned that a certain amount of inconsistency is ommitable for those people escaping from such traumatic conditions.[846]

The best example for the negative impact of the lack of credibility on the fate of an application, is the case of Cruz Varas. The Court considered in its assessment that there had been no reference to the allegations concerning inhuman treatment during the police interrogations that took place in June 1987 and October 1988 and the many written submissions made in the course of the immigration proceedings up to January 1989. These doubts were supported by the fact that he had been legally represented at all stages throughout such proceedings and that he should have been aware of the importance of bringing to the attention of the authorities any element which supported his asylum claim. His credibility had further been shadowed by the continuous changes in his story following each police interrogation and by the fact that no material had been presented to the Court, which substantiated his claims of political activity.[847] Therefore, the Court concluded that the applicant could not show substantial grounds for believing in the existence of a real risk of inhuman treatment by the Chilean authorities, despite the existence of a medical report revealing a previous ill treatment.

An applicants is expected to submit his/her application and to provide all evidence regarding his/her claims as soon as possible as in the case of the 1951 Refugee Convention. This is regarded as an aspect of credibility since late submission of an asylum claim may raise question marks concerning the genuineness of the applicant's fear of persecution. For this reason, some States adopted time limits in their asylum procedures for filing asylum applications. In Jabari v. Turkey,

[846] See supra the section on CAT.
[847] See *Cruz Varas v. Sweden*, para. 78.

the Turkish Government challenged the applicant's credibility on the ground that she had failed to comply with the five-days time-limit under the 1994 Asylum By-Law. Furthermore, in the Governments' view the fact that she had failed to lodge an application to the Turkish authorities after she arrived in Turkey for the first time in 1997 and she had not claimed refugee status when she arrived at the airport in Paris raised question marks concerning the genuineness of her fear. [848] The Court however, rejected such arguments of the Government indicating that :*"the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention."*[849] With regard to the credibility analysis, the Court referred to the assessment of the UNHCR which was in a position to analyze the genuineness of the applicant's fears accurately.

As a result it is possible to conclude that the Court does view the credibility analysis as an essential aspect of the risk analysis but it is in favour of a flexible approach in this respect.

(4) Wide-Spread and Mass Human Rights Violations in the Country of Origin and Internal Flight Alternative

The general conditions in the country of origin is among the fundamental components of the risk analysis of the European Court. The Court apparently applies a lower threshold for considering 'substantial grounds' as a part of the risk analysis if the country of origin concerned is known to be a territory where wide-spread and mass human rights violations take place. This was clearly one of the reasons why the Court found a violation of Article 3 by virtue of the oral statements in N. v. Finland. In this judgment, the Court had put particular weight on the UNHCR Country-of-Origin Report on the Democratic Republic of Congo of June 2002, which indicated that many of the former Mobutu soldiers had been persecuted since Laurent-Désiré

[848] See *Jabari v. Turkey,* paras. 36, 37.
[849] *Ibid.,* para. 40; see also *Bahaddar v. the Netherlands* where the Court concluded that time-limits for asylum applications should not be short or applied inflexibly as to deny an applicant for recognition of refugee status a realistic opportunity to prove his/her claim. (*Bahaddar v. the Netherlands*, ECtHR, Judgement of 19 February 1998, Application No. 25894/94, para. 45.)

Kabila had seized the power. Many were feared to have lost their lives at the Kitona Military Base, where they had been taken, or had been accused of being in alliance with the regime in Rwanda or with the armed opposition, and indeed many of them had been targeted.[850]

On the other hand, establishing the general situation in the country of origin is not always an easy task for the European Court. The parties to the dispute often challenge each other's COI data before the European Court. Some European Union Member States generate their own country of origin information and have developed sophisticated information systems upon which their decision-makers can rely.[851] Therefore, the Court often finds itself in a position of assessing conflicting information concerning a country that is not even member of the Council of Europe. In Chahal v. the United Kingdom for instance, the applicant had presented a number of reports by governmental bodies and by intergovernmental and non-governmental organisations on the situation in India generally and in Punjab in particular and argued that human rights abuses in India by the security forces, especially the police, remained endemic.[852] Moreover, Amnesty International in its written submissions informed the Court that prominent Sikh separatists still faced a serious risk of disappearance, detention without charge or trial, torture and extrajudicial execution, frequently at the hands of the Punjab police.[853] On the other hand, the Government side argued that there would be no real risk for the applicant to be ill treated if the deportation order were to be implemented pointing out that they had regularly been monitoring the situation in India through the United Kingdom High Commission in New Delhi. The Government further requested the Court to be cautious about the material prepared by the Amnesty International as, in her view, it was not possible to verify the facts of the cases referred to and when studying these reports it was losing sight of the broader picture of improvement by concentrating too much on individual

[850] See *N. v. Finland*, paras. 137, 161.
[851] UNHCR, Observations on the Communication from the Commission to the Council and the European Parliament on Strengthened Practical Cooperation - New Structures New Approaches: Improving the Quality of Decision Making in the Common European Asylum System [COM (2006) 67 final, 17 Febrary 2006], p. 3.
[852] See *Chahal v. the United Kingdom*, para. 87.
[853] *Ibid.,* para. 89.

cases of alleged serious human rights abuses.[854] As a result, the Court decided to give more weight to the observations of the United Nations' Special Rapporteur on torture who had also described the practice of torture upon those in police custody as 'endemic' and had complained that inadequate measures were taken to bring those responsible to justice and had also drawn attention to the problems of widespread, often fatal, mistreatment of prisoners and had called for a systematic reform of the police throughout India.[855] Therefore, the Court was not persuaded that the Applicant would be adequately safe in India.

It appears that the human rights monitoring mechanisms have a lot to learn from the asylum mechanisms which are more prepared to find and process such information through their COI standards and databases.

'Internal flight alternative' refers to a situation which, it is possible to believe that the applicant would avoid being exposed to the alleged risk of inhuman treatment in a particular area of the country of origin. This concept of asylum law has also been argued before the European Court in several instances. In Hilal v. the United Kingdom, the Govenrment relied on the 'internal flight alternative' arguing that even assuming that the applicant was at risk in Zanzibar, the situation in mainland Tanzania had been more secure.[856] The Court however, was convinced that the "internal flight alternative" offered a reliable guarantee against the risk of ill-treatment. This is a standard setting ruling with regard to resorting this option. Firstly, the evidence provided by the parties revealed that human rights infringements were more prevelant in Zanzibar however, the situation in mainland Tanzania was far from satisfactory and disclosed a long-term, endemic situation of human rights problems either. Secondly, the police in mainland Tanzania was linked institutionally to the police in Zanzibar as part of the Union and could not be relied on as a safeguard against arbitrary action. Finally, there was also the possibility of extradition between Tanzania and Zanzibar.[857]

[854] *Ibid.,* para. 90.
[855] *Ibid.,* para. 104.
[856] See *Hilal v. the United Kingdom*, para. 67.
[857] *Ibid.*

It is possible to conclude from such reasoning that the Court would not accept 'internal flight alternative' argument in instances where the applicant would still be under a real risk of inhuman treatment in the proposed territory even though the likelihood of occurrance of the risk is less than the country of origin. In this respect, the ruling puts emphasis on the long-term endemic character of the risks in the area. Secondly, there should not be any link between the authorities between the two territories which would put the applicant's security at stake. Thirdly, the applicant should not be under the risk of extradition to a territory where he would be exposed to a risk of inhuman treatment, at the proposed territory. These conditions address to a very high standard for resorting to the 'internal flight alternative' under the ECHR. It is difficult to visualise any situation other than a complete collapse of the State structure, such as the one in Somalia, that these conditions could all be satisfied.[858]

(5) Continuity of the Risk

In the Court's jurisprudence, a risk has to be actual in order to engage the responsibility of a State Party. The Court has consistently held that even though the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive for the risk analysis.[859]

In Vilvarajah v. the United Kingdom, the improvement of the situation in the country of origin was at the center of the Court's risk analysis. The Comission had reported that there had been an improvement in the situation in the North and East of Sri Lanka which were the main areas of disturbance. The Indian Peace Keeping Forces had, in accordance with the Accord of July 1987, taken over from the Sinhalese dominated security forces in these areas and the major fighting at Jaffna had ended.[860]The fact that UNHCR had initiated a voluntary repatriation

[858] 'Internal flight alternative' was also argued by the United Kingdom Government in the Chahal case, (see para. 88). However, this attempt was also futile since the Court was not convinced that the conditions outside the Punjap province were not safe for the Applicant either, (see para. 91).
[859] See *Chahal v. the United Kingdom*, para. 86.
[860] See *Vilvarajah v. the United Kingdom*, para. 109.

programme that began to oparate in the region in December 1987 was regarded as a significant sign of improvement in the region.[861] The Court took exactly the same approach in the two subsequent cases originating from the alleged risks of inhuman treatment in Sri Lanka, namely Thampibillai v. the Netherlands[862] and Venkadajalasarma v. the Netherlands.[863]

The Court also noted the democratic evolution that had been taking place in Chile and the voluntary return of refugees from Sweden and elsewhere to Chile while finding that no real risk of inhuman treatment existed for the applicant in the country of origin.[864] Voluntary return programmes appear as the common denominator of the Court's risk assessment in these cases as a significant indicator of improvement.

f) Other Provisions of the ECHR That are Indirectly Relevant to the Non-Refoulement Principle

The European Convention and its protocols contain certain provisions that are not directly applied as a part of the prohibition of non-refoulement but, however, usefull for an integral and complete protection regime and provide additional legal avenues for protection seekers. This title does not purport to set forth a detailed analysis of these provisions but only to note a limited number of landmark cases in order to show their utility as support mechanisms.

(1) Right to Liberty and Security

Article 5 of the European Convention stipulates the right to liberty and security of a person which, is among the most frequently visited provision in the Convention by protection seekers in the context of this study due to the intensifying restrictive reception policies of the European Countries. Sub-paragraph (f) of paragraph 1 of this Article allows the lawful arrest or detention of a person in two

[861] *Ibid.,* para. 110.
[862] See *Thampibillai v. the Netherlands*, para. 65.
[863] *Venkadajalasarma v. the Netherlands*, ECtHR, Judgement of 17 February 2004, Application No. 58510/00, para. 66.

[864] See *Cruz Varas v. Sweden*, para. 80.

circumstances that relate to the protection seekers covered in this study. The first one is the arrest or detention of a person for effecting an unauhtorized entry into the country. The second one is the arrest or detention of a person against whom action is being taken with a view to deportation or extradition.

A condition that has to be satisfied with regard to the deportation procedures in both of the above mentioned circumstances is the lawfulness of detention. The Court examined claims regarding the lawfulness of detention in Amuur v. France where the applicants argued that their detention during the asylum proceedings had no legal basis. They had found themselves in a legal vacuum in which they had neither access to a lawyer nor information about the procedure to be followed at the international transit zone of the Airport.

The Court responded to the applicants' claims by defining the scope of responsibilities of the States Parties on the lawfullness of detention. Accordingly, the 'lawfulness' of detention is an issue, including the question whether 'a procedure prescribed by law' has been followed. In this respect, the Convention refers essentially to substantive and procedural rules of national law. Such rules must also satisfy a quality standard that any deprivation of liberty should be in line with the purpose of Article 5 which is to protect the person from arbitrariness. The 'quality of law' further implies that where a national law authorises deprivation of liberty, it must be sufficiently 'accessible' and 'precise', in order to avoid all risks of arbitrariness.[865] In the case at thand, the Court observed however with regard to the quality of French law that the brief section of the decree devoted to holding in the international zone and aliens' rights contained no guarantees comparable to those introduced for the law applicable within the French territory. In this respect, the Court obsereved that:

"[a]t the material time none of these texts allowed the ordinary courts to review the conditions under which aliens were held or, if necessary, to impose a limit on the administrative authorities as regards the length of time for which they were held. They did not provide for legal, humanitarian and social assistance, nor did they

[865] See *Amuur v. France*, para. 50.

lay down procedures and time-limits for access to such assistance so that asylum-seekers like the applicants could take the necessary steps."[866]

Therefore, the Court found the French laws in force at the time, as applied in the case, incompatible with Article 5 of the European Convention.

The Court has rendered several judgements interpreting arrest or detention with a view to deportation or extradition. In Kolompar v. Belgium[867], the applicant argued that his deprivation of liberty had not been justified under Article 5 para. 1 during his extradition to Italy from Belgium. The fact that the extradition proceedings were conducted at an unreasonable pace was among his claims. The Court considered that detention with a view to extradition was in principle justified under 5. 1 (f), however it decided to examine the case as a period over two years and eight months was concidered to be unusually long.[868] In the course of its examination, the Court found that the detention in question was not only due to the extradition proceedings but also the crimes that the applicant had committed in Belgium. Moreover, the detention was continued as a result of the successive applications for a stay of execution or for release that the Applicant lodged.[869] Therefore, the Court concluded that the Belgian State could not be held responsible for the delays to which the applicant's conduct gave rise.[870] The Court did not consider in this judgement whether the applicant's detention was necessary in order to ensure that he could be extradited, or whether a less intrusive measure would have achieved the same aim.

Chahal v. the United Kingdom judgement is more clear with regard to the standards to be applied on the necessity and length of detention in deportation proceedings. The applicant had complained about the length of time taken to consider and reject his application for refugee status (approximately seven and a half months); the period between his application for judicial review of the decision to

[866] *Ibid.,* para. 53.
[867] *Kolompar v. Belgium*, ECtHR, Judgement of 24 September 1992, Application No. 11613/85.
[868] *Ibid.,* paras. 34, 40.
[869] *Ibid.,* para. 40.
[870] *Ibid.* para. 42.

refuse asylum and the national court's decision (approximately 4 months); and the time required for the fresh decision refusing asylum (approximately 6 months).[871] In response to the Applicant's claim, the Court indicated that deptivation of liberty under Article 5. 1 (f) would be justified only for as long as deportation proceedings are in progress. In the Court's view however, existance of deportation proceedings is not sufficient alone; it is also necessary that such proceedings are administered with due diligence. Otherwise, the detention concerned would cease to be permissible under Article 5. 1 (f).[872]In the light of these considerations, the Court examined the length of periods of the administrative and the judicial review proceedings. Accordingly, with regard to the decisions taken by the Secretary of State to refuse the asylum claim, the Court concluded that approximately seven and a half months period was not excessive considering the detailed and careful consideration required for the applicant's request for political asylum and the opportunities afforded to the latter to make representations and submit information.[873]Secondly, with regard to the judicial review proceedings the Court noted that the applicant had made three applications including the ones in the appeal stage and concluded that approximately ten months in total was not excessive for this stage as the his case involved considerations of an extremely serious and weighty nature.[874] Therefore, no violation of Article 5 1. (f) of the European Convention was found.

The Court interpreted detention 'to prevent effecting an unauthorised entry' in Article 5 1. (f) recently in the Saadi v. the United Kingdom case.[875] In this respect, the Court addressed to two crucial questions in its judgement: The first question was whether a person who has presented himself to the immigration authorities and has been granted temporary admission to the country can be considered as a person who is seeking to effect an 'unauthorised entry' into the country. In this regard, the Court considered that a potential immigrant can not seek to effect an authorized entry as soon as he surrenders himself to the immigration authorities. Although the applicant

[871] See *Chahal v. the United Kingdom*, para. 109.
[872] *Ibid.* para. 113.
[873] *Ibid.* para. 115.
[874] *Ibid.* para. 117.
[875] *Saadi v. the United Kingdom*, ECtHR, Judgement of 11 July 2006, Application No. 13229/03.

was granted temporary admission in the territory of the United Kingdom, the Government's detention measure could be justified on the ground of 'preventing unauthorized entry'.[876] The second question that the Court had to deal with was whether it is permissible for a State to detain a potential asylum seeker or immigrant in circumstances where there is no risk of his absconding or other misconduct. The Applicant had brought this 'necessity test' question before the Court as it was known that Oakington (the centre the Applicant was detained) was only used for those who did not present a risk of absconding. The Court answered the question in negative: It stated that:

"there is no requirement in Article 5 § 1 (f) that the detention of a person to prevent his effecting an unauthorised entry into the country be reasonably considered necessary, for example to prevent his committing an offence or fleeing."

Consequently, the only requirement that this provision contained was that the detention should be a genuine part of the process of refugee status determination or immigration clearance, and that it should not otherwise be arbitrary, for example on account of its length. [877]

It appears that the Chamber was strongly divided on this conclusion which leaves a broad discretion to the States Parties on the detention of asylum seekers and refugees. Three members of the Court submitted a joint dissenting opinion to the ruling where they criticised the opinion of the majority on the ground that States were under an obligation *"to grant an asylum seeker admission to the territory until the final decision in the asylum procedure is taken"*. Therefore the applicant should not be considered as unauthorized on the territory as suggested by the majority.[878]

Although, the ruling can be criticised for reducing the effectiveness of the Article 5 by leaving a far too broad margin of discretion to the States Parties, the reasoning of the dissenting opinion is also open to debate since Article 31 of the 1951 Refugee Convention does itself allow to apply certain restrictions on the

[876] *Ibid.,* para. 40.
[877] *Ibid.,* para. 44.
[878] See the Joint Dissenting Opinion of Judges Casadevall, Traja and Sikuta.

movements of asylum seekers who are unlawfully in the country of refugee, until their status in the country is regularized. Furthermore, at this stage, the admission requirement under the 1951 Refugee Convention had already been fulfilled since the applicant was within the territory of the United Kingdom, in the technical sense, with the consent of the authorities. Therefore, the reference to detention to "prevent his effecting an unauthorised entry into the country" should be understood as a measure designed to enable determining the status of a person in order to regularize his/her stay in the receiving country. Consequently, the Court's ruling can not be interpreted as a sign of rejection of the admission requirement of asylum seekers.

(2) Right to Family Life

The right to family life which is stipulated in Article 8 of the Convention relates to expulsion cases to the extent that it interferes with family unity. The cases brought before the Court on this issue generally follow a pattern where a State Party intends to expel an alien, who has family ties within its territory, for the prevention of disorder or crime. Unlike Articles 2 and 3 of the European Convention, the right to family life is not an absolute right and therefore, an interference with this right may be justified if such interference is:

"in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."[879]

Amrollahi v. Denmark[880]is a case that follows the pattern mentioned above,[881] where the Court was asked to examine a deportation order concerning the Applicant, an Iranian citizen, who had a wife and children in Denmark. The deportation order was issued after being sentenced to three years imprisonment for drug trafficking. The main focus of this case was whether the interference in question

[879] ECHR, Article 8, para. 2.
[880] *Amrollahi v. Denmark*, ECtHR, Judgement of 11 July 2002, Application No. 56811/00.
[881] See also *Boultif v. Switzerland*, ECtHR, Judgement of 2 August 2001, Application No. 54273/00; *Jakupovic v. Austria*, ECtHR, Judgement of 6 February 2003, Application No. 36757/97.

was ‘necessary in a democratic society’. In this respect, the Court had to strike a balance between the relevant interest, namely the applicants’ right to respect for his family life, on the one hand, and the prevention of disorder and crime, on the other.[882] In the view of the Court, such balance can be struck after a complex analysis by considering:

“the nature and seriousness of the offence committed by the applicant; the length of the applicant's stay in the country from which he is going to be expelled; the time elapsed since the offence was committed and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; and other factors expressing the effectiveness of a couple's family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage, and if so, their age. Not least, the Court will also consider the seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion.”[883]

In the light of the above, the Court considered that drug trafficking was indeed a crime of serious and grave nature.[884] On the other hand, it was also convinced that the applicant had not maintained strong links with his country of origin Iran while he had strong ties with Denmark through his wife and children who were all Danish citizens. There was no doubt that the couple had an effective relationship.[885] Furthermore, the family could not establish a family life elsewhere, particularly in Iran, since the Applicant's wife was a Danish national, she had never been to Iran, she did not speak Farsi and she was not a Muslim. Therefore, she had no ties with Iran. This was also the case for the children.[886] It was not possible for them to establish family life in Greece or Turkey where they had stayed previously

[882] See *Amrollahi v. Denmark,* para. 34.
[883] *Ibid.,* para. 35.
[884] *Ibid.,* para. 37.
[885] *Ibid.,* para. 39.
[886] *Ibid.,* para. 41.

as they had no residence permit in these countries. [887] Taking these facts into consideration, the Court was convinced that permanent exclusion of the Applicant from Denmark would inevitably result in separation of the family since it was impossible for them to continue family life elsewhere. As a result, the Court found that the expulsion of the applicant to Iran would be disproportionate to the aims pursued and would be incompatible with Article 8 of ECHR. It appears that the Court has interpreted Article 8 quite liberally in favour of the family unity. There has been several similar successfull applications based on the family unity principle under this Article.[888]

(3) Right to Effective Remedy

The right to effective remedy in Article 13 of the European Convention grants everyone whose rights and freedoms under the Convention are violated, the right to an effective remedy before a national authority in the event that the violation has been committed by persons acting in an official capacity. The European Court perceives this Article as setting a rule *"guaranteeing the availability of a remedy at national level to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order."*[889]Therefore, a person merely needs an arguable claim under the Convention in order to benefit the protection of Article 13.

In Vilvarajah v. the United Kingdom the Court considered questions concerning the effectiveness of asylum procedures under Article 13. According to the law of the United Kingdom, the courts had no power to determine whether a person was a refugee or not. The courts were authorized however, to examine whether the Home Secretary had interpreted the law correctly in relation to the grant or refusal of asylum. They could for instance, examine the exercise of discretion by the Secretary of State to determine whether he left out of account a factor that should have been taken into account or took into account a factor he should have ignored, or whether he came to a conclusion so unreasonable that no reasonable authority could

[887] *Ibid.,* para. 42.
[888] See *Boultif v. Switzerland*; *Jakupovic v. Austria*.
[889] See *Vilvarajah v. the United Kingdom*, para. 122.

have reached it.[890] The applicants argued that they had no right of appeal on the merits before they were expelled to Sri Lanka. The Government contested this argument stating that a court would have jurisdiction to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of inhuman or degrading treatment according to the standards set in case of Soering.[891] The Court's response to these arguments reveals its understanding of the scope of the right in Article 13. Accordingly, this provision provides a broad margin of discretion to the States Parties on choosing the form of remedy. In other words, no particular form of remedy was imposed on the States Parties in this respect. The Court agreed that there were some limitations to the powers of the courts in the judicial review proceedings. It considered however, that the limitations in question did not deem the prooceedings ineffective. Therefore, the Court found no violation of Article 13 in this case.

On the other hand, in Jabari v. Turkey the Court found a violation of Article 13 on the ground that no assessment was made by the domestic authorities of the applicant's claim to be at risk if removed to Iran, since the she had not filed her asylum application within the 5 days time-limit set by the law. The Court indicated that although the States are afforded some discretion as to the form in which they comply with their obligations, Article 13 required them to provide a domestic remedy allowing the competent national authority to deal with the substance of the relevant Convention complaint.[892] In this particular case, the applicant could challenge the legality of her deportation in judicial review proceedings however, this did not entitle her neither to suspend its implementation nor to have an examination of the merits of her claim to be at risk. The Court has further put emphasis on the irreversible nature and the severity of the harm concerned in concluding that the notion of an effective remedy under Article 13 requires the possibility of suspending the implementation of the measure in question as well.[893]

Čonka v. Belgium is a landmark case where the applicants raised a number

[890] *Ibid.,* paras. 89, 90.
[891] *Ibid*. paras. 124, 125.
[892] See *Jabari v. Turkey*, para. 48.
[893] *Ibid.,* paras. 49, 50.

of questions under Article 13 with regard to the Belgian deportation procedures. They claimed that an alien had no guarantee of being heard before the court since, it was not recognized as a right under the deportation procedures. Secondly, he/she had no access to his case file, could not consult the record of notes taken at the hearing or demand that his observations be put on record. With regard to the remedies available before the Conseil d'Etat, the applicants argued that they were not effective for the purposes of Article 13, as they had no automatic suspensive effect.[894] They had only five days to leave the national territory, whereas the Conseil d'Etat had forty-five days to decide on such applications.[895] The Court listed the general rules on Article 13 arising from its case-law as follows: The remedy required by Article 13 must be 'effective' in practice as well as in law. The 'authority' referred to in that provision does not necessarily have to be a judicial authority; but it can be an administrative one with comparable powers and guarantees. Even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so. [896] The notion of an effective remedy under Article 13 requires that the remedy shall prevent the execution of measures that are contrary to the Convention and the effects of which are potentially irreversible. Consequently, it is inconsistent with Article 13, if the deportation measures are executed before the national authorities have examined their compatibility with the Convention. [897] Given the considerations above, the Court concluded that it is not possible to exclude the risk that in a system where stays of execution must be applied for and are discretionary they may be refused wrongly. In such cases, the remedy exercised by the applicant would not be sufficiently effective for the purposes of Article 13.[898] Secondly, even if the risk of error in practice is negligible, requirements of Article 13 must take the form of a guarantee, but not of a mere statement of intent or a practical arrangement.[899] In this respect, the Court observed that the authorities were not required to defer execution of the deportation

[894] See *Čonka v. Belgium*, EctHR, Judgement of 5 February 2002, Application No. 51564/99, para. 65.
[895] *Ibid.,* para. 80.
[896] *Ibid.,* para. 75.
[897] *Ibid.,* para. 79.
[898] *Ibid.,* para. 82.
[899] *Ibid.,* para. 83.

order while an application under the 'extremely urgent procedure' was pending, not even for a minimum reasonable period to enable the Conseil d'Etat to decide on the application. Therefore, the Court conlcuded that the applicants did not have a remedy available that satisfied the requirements of Article 13.

(4) Prohibition of Collective Expulsion

Article 4 of the Protocol No. 4[900] of ECHR prohibits collective expulsion of aliens. This provision does not define what is meant by the term 'collective expulsion'. The Court however, defined it in the admissibility decision of Pranjko v. Sweden as:

"any 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. Moreover, the fact that a number of aliens receive similar decisions does not lead to the conclusion that there is a collective expulsion when each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis."[901]

In this particular case, the applicant had complained that he would be collectively expelled to either Bosnia-Herzegovina or Croatia with other Bosnian Croats. He contended that the Swedish authorities had treated him as belonging to a group of Bosnian Croats and had failed to properly examine his individual claims. The Court also observed that the Swedish Government issued guidelines for the assessment of asylum applications submitted by persons holding both Bosnian and Croatian citizenships. On the other hand, the Court noted that the applicant submitted individual applications to the immigration authorities and was able to present any arguments he wished to make against his possible deportation to the respective countries. Moreover, the authorities took into account not only the general situation

[900] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 16.09.1963, Strasbourg, E.T.S. No. 46.
[901] *Pranjko v. Sweden,* ECtHR, Admissibility Decision of 23 February 1999, Application No. 45925/99.

in the countries but also the applicant's statements concerning his own background and the risks allegedly facing him upon return. In rejecting his applications, the authorities issued individual decisions concerning the applicant's situation. Therefore, the Court found no violation of the Article 4 of the Protocol No. 4 in this case.

In Conka v. Belgium however, the Court came to an opposite conclusion upon its assessment on Article 4 of Protocol 4 to the European Convention. This was a case concerning the alleged collective expulsion of the Roma to Slovakia. The only reference to the personal circumstances of the applicants in the deportation order was to the fact that their stay in Belgium had exceeded three months and the document made no reference to their application for asylum. Combined with the large number of persons of the same origin who suffered the same fate as the applicants,[902] the Court was convinced that collective expulsion was carried out by the Belgian authorities.

(5) Procedural Safeguards Relating to Expulsion of Aliens

Article 1 of the Protocol No. 7[903] of the ECHR contains certain procedural safeguards specific to expulsion of aliens. Accordingly, an allien lawfully resident in the territory of a State Party shall not be expelled from it except in pursuance of a decision reached in accordance with law and shall be allowed to submit reasons against his expulsion, to have his case reviewed, and to be represented for these purposes before the competent authority or a person or persons designated by that authority. An alien however, may be expelled before the exercise of these rights when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

These rights are only confined to those aliens who are 'lawfully resident' in the territory of a State Party. The Court has interpreted the term 'lawfully resident' restrictively in Piermont v. France. The Applicant was expelled from the French

[902] See *Conka v. Belgium*, para. 61.
[903] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 22.11.1984, E.T.S. No. 117.

territory after having passed through the passport control and gotten her passport stamped by the border police. She was later stopped and taken into an airport office where she was held until her forced departure. The Court considered that the applicants' argument that the mere fact of going through immigration control regularises a person's position in a territory was too formalistic. In the Court's view, the applicant could not be considered 'lawfully resident' in France when She was still held in the airport under police guard.[904]

Another claim that the Court examined under Article 1 of the Protocol No. 7 was the case of Lupsa v. Romania[905]where Romania had expelled a Yugoslavian citizen who had been lawfully residing in Romania for fourteen years. The European Court noted that the authorities had failed to inform the applicant of the offence of which he was suspected and that the public prosecutor's office had not sent him the order issued against him until the day of the one hearing before the Court of Appeal. Furthermore, the Court observed that the Court of Appeal had dismissed all requests for an adjournment, thus preventing the applicant's lawyer from studying the aforementioned order and producing evidence in support of her application for judicial review of it.[906] As a result, the European Court found a violation of the Protocol No. 7 on the ground that the applicant was not genuinely able to have his case examined with regard to the deportation order.[907]

g) Evidence and Burden of Proof

Non-refoulement cases are peculiar with regard to the evidence issue as they most of the time require processing and analysis of information concerning a country of origin outside the Council of Europe. Therefore, definition and limitation of evidence that a State Party is responsible for is a crucial question that the European Court had to deal with in those cases. In this respect, the case-law of the European Court primarily determines the responsibility of a State according to the facts which

[904] *Piermont v. France*, ECtHR, Judgement of 20 March 1995, Application Nos. 15773/89 and 15774/89, para. 49.
[905] *Lupsa v. Romania*, ECtHR, Judgement of 8 June 2006, Application No. 10337/04.
[906] *Ibid.,* para. 59.
[907] *Ibid*., paras. 60-61.

were known or ought to have been known to it at the time of expulsion. Therefore, if a person has been expelled upon a thorough examination of the information available to the authorities at the time of expulsion, but unexpectedly he/she is subjected to a treatment contrary to core fundamental rights enshrined in the Convention, the State concerned shall not be liable for such violations. For instance, in Vilvarajah and Others v. the United Kingdom the applicants who were Tamil asylum seekers were subjected to torture after being expelled to Sri Lanka.[908] The Court however, found no violation against the United Kingdom by putting considerable weight on the UNHCR's voluntary repatriation programme in Sri Lanka as a justifying factor of the Government's expulsion decision. In the Court's view, the United Kingdom authorities had fulfilled their obligation under the Article 3 of the Convention by carefully considering the personal circumstances of each applicant in the light of the evidence available to them.[909] This part of the Court's judgement was heavily criticed on the ground that the judgement contained no indication of the fate of persons who were subject to the voluntary repatriation programme.[910] On the other hand, if an expulsion order has been issued but it has not been executed at the time of the judgement of the ECtHR, the Court may also take into account information that has come to light after the final decision taken by the domestic authorities.[911]

Cruz Varas and Others v. Sweden is a peculiar case that the Court departed from this general line of thought. The applicant had contested the Swedish Government's expulsion order on the ground that he would be subjected to treatment contrary to Article 3 if he was expelled to Chile due to his political activities. The Swedish Government however, expelled him despite his objection. In its conclusion on this point, the Court considered:

"…the existance of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of

[908] See *Vilvarajah and Others v. the United Kingdom*, para. 43.
[909] *Ibid.,* para. 114.
[910] Alleweldt, pp. 369-370; see *Vilvarajah v. The United Kingdom*, para. 77.
[911] See *Thampibillai v. the Netherlands*, para. 61; see *H.L.R. v. the Netherlands*, para. 37.

value in confirming or refuting the appreciation that has been made by the Contarcting Party or the well-foundedness or otherwise of an applicant's fears." [912]

In this case, the evidence that came to light subsequent to expulsion worked for the benefit of the Swedish Government since it was established that the applicant had not encountered any serious threat after expulsion. The wording of the Court's decision however, implies that it could either work the other way around in the event that the well foundedness of the applicant's fears are confirmed. It is difficult to compromise this reasoning with the Court's general approach that confines State liability to facts that are known or ought to be known by the State authorities at the time of expulsion.

The Court repeated the same reasoning in Mamatkulov and Abdurrasulovic v. Turkey,[913] and intended to use the evidence which came to light after the extradition of the applicants to Uzbekstan, however, it was not possible to obtain adequate evidence to substantiate the applicants' claims regarding Article 3 of the European Convention.

With regard to the Court's methodology of evidence assessment, it is observed that the Court makes use of extensive and diverse forms of COI infomation in its analysis. The material submitted by the parties has primary importance in the Court's assessment. On the other hand, the Court's jurisprudence is indeed wealthier than the decisions of the Committee Against Torture and the Human Rights Committee on the diversity of metrial used in the assessment. Like some of the States Parties to the European Convention, the Court does give due weight to the COI data provided by UNHCR in its assessments.[914] On the other hand, in a recent case namely, D. and Others v. Turkey, the Court strongly rejected the UNHCR's interpretation of the situation.[915] The Court sometimes also makes references to the reports generated by inter-governmental monitoring bodies such as the United

[912] See *Cruz Varas and Others v. Sweden*, para. 76.
[913] See *Mamatkulov and Abdurrasulovic v. Turkey*, para. 68.
[914] For instance, see *Jabari v. Turkey*, para. 41; see *N. v. Finland*, paras. 117-121; see *Vilvarajah and Others v. the United Kingdom*, paras. 75, 76.
[915] See *D. and Others v. Turkey*.

Nations Special Rapporteur on Torture,[916] the CPT,[917] the Committee Against Torture,[918] the Human Rights Committee.[919] Moreover, credible NGOs such as the Amnesty International are increasingly playing a more significant role in the European Courts' work.[920]

On the other hand, although the European Court is empowered to "undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities", it is observed that the Courts' fact finding power that is regulated in Article 38 of the ECHR is rather ineffective for non-refoulement cases which most of the time require assessment of facts outside the territories of Council of Europe. Even when the Member States are concerned, the Court has been encountering difficulties in carrying out such missions. For instance, in Shameyev and 12 Others v. Russia and Georgia a fact finding mission to Russia that was planned in order to find out the state of the applicants extradited to this country had to be cancelled due to uncooperative attitudes of the Russian Government. Therefore, the Court concluded:

"[b]y obstructing the Court's fact-finding visit and denying it access to the applicants detained in Russia, the Russian Government had unacceptably hindered the establishment of part of the facts in the case and had therefore failed to discharge its obligations under Article 38 § 1 (a) of the Convention."[921]

The burden of proof is initially on the side of applicant under the European Convention. As indicated in the Soering case, the applicant has to show substantial grounds for believing that he/she, if extradited or expelled, will face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment. On

[916] See *Thampibillai v. the Netherlands*, para. 104.
[917] *Dougoz v. Greece*, ECtHR, Judgement of 6 March 2001, Application No. 40907/98, para. 46.
[918] See *Mamatkulov and Abdurrasulovic v. Turkey*, paras. 47, 48.
[919] *Ibid.,* paras. 45, 46.
[920] See for instance, the citations to reports generated by the Amnesty International in *Cahahal v. the United Kingdom*, para. 55; *Mamatkulov and Abdurrasulovic v. Turkey*, para. 54; *Thampibillai v. the Netherlands*, para. 46. See also supra *Ramzy v. Netherlands*, where the Court granted leave to intervention for the non-governmental organisations, the AIRE Centre, Interights (on behalf of Amnesty International Ltd, the Association for the Prevention of Torture, Human Rights Watch, The International Commission of Jurists, Open Society Justice Initiative and Redress) and Justice and Liberty.
[921] See *Shameyev and 12 Others v. Russia and Georgia.*

the other hand, the European Court consistently refers to the positive obligations of States Parties when non-refoulement cases are concerned.

In Cruz Varas v. Sweden, the Court made special emphasis on the fact that the Swedish authorities had particular knowledge and experience in evaluating similar claims and that the final decision to expel the applicant was taken after thorough examinations of his case.[922]

In Vilvarajah v. the United Kingdom the Court, once more, attached importance to the knowledge and experience of United Kingdom authorities in dealing with large numbers of asylum seekers from Sri Lanka and to the fact that the personal circumstances of each applicant had been carefully considered by the Secretary of State in the light of a substantial body of material concerning the then current situation in Sri Lanka and the position of the Tamil community within it in finding no violation against the United Kingdom. [923]

In Jabari v. Turkey, however, not having fulfilled the positive obligations that fell on the State Party, played the primary role in the Court's finding of a violation of Article 3 against Turkey. The Court was not convinced that the Turkish authorities had conducted any meaningful assessment of the applicants' claims. The applicants' failure to comply with the five-days time-limit denied her any scrutiny of the factual basis of her fears about being removed to Iran. It fell to the branch office of the UNHCR to interview the applicant about the background of her asylum request and to evaluate the risk to which she would be exposed in the light of the nature of the offence with which she was charged.[924]

In both Cruz Varas and Vilvrajah cases, the respondent governments had extensive preparation on obtaining COI information and conducted thorough assessment of the claims of the applicants. From these judgements, it may be deduced that the Court favours establishement of a detailed processing mechanism which, involves a meaningful and careful assessment of the merits of the application

[922] See *Cruz Varas v. Sweden*, para. 81.
[923] See *Vilvarajah v. the United Kingdom*, para. 114.
[924] See *Jabari v. Turkey*, para. 40.

in light of COI data.

B. THE LEGAL ENVIRONMENT OF NON-REFOULEMENT IN THE EUROPEAN UNION LAW

1. Evolution of the Principle of Non-Refoulement Under the EU Asylum Framework

The incorporation of asylum issues within the European Community legal framework is a rather recent phenomenon as the Member States had been reluctant to loose control over these fields which were regarded as an integral component of their national sovereignty. Therefore, the initial efforts for establishing cooperation between Member States have been ad hoc in nature. Hence, the Member States prefered to deal with these senstive issues outside the European Union Framework for a long time.[925] The adoption of the Schengen Agreement between Germany, France and the three Benelux countries on 14 June 1985 reflects this understanding. This Agreement aimed at the abolution of internal border controls, and contained chapters regarding the conditions governing the movement of aliens[926] and responsibility for the processing of applications for asylum[927]and it remained outside the European Union framework until it was incorporated into the European Union by a Protocol annexed to the Amsterdam Treaty in 1997.

Asylum policies of the Member States were initially dealt within the Ad Hoc Working Group on Migration and Asylum that was established in October 1986. This was an inter-governmental body in which the European Commission only had an observer status. The European Parliament and the European Court of Justice had no powers at all concerning the activities of this Working Group.[928]

The senstivity of the issue was illustrated by a case brought against the Commission Decision 85/381/EEC of 8 July 1985 setting up a prior communication

[925] Maria Fletcher, *"EU Governance Techniques in the Creation of a Common European Policy on Immigration and Asylum"*, European Public Law, Vol. 9, No. 4, 2003, p. 534.
[926] Articles 19 – 24.
[927] Articles 28 – 38.
[928] Joanne van Selm-Thorburn, *"Asylum in the Amsterdam Treaty: a harmonious future?"*, Journal of Ethnic and Migration Studies, Vol. 24, No. 4, October 1998, p. 628.

and consultation procedure on migration policies in relation to non-member countries by Germany, France, Denmark, and the United Kingdom.[929] The French Republic argued that matters relating to the conditions of entry, residence and employment of nationals of non-member countries affected the Member States' security and went substantially beyond the social field referred to in Article 118 of the European Economic Community Treaty. In response to such claim, the Court considered that migration policy was capable of falling within the social field only to the extent that it concerned the situation of workers from non-member coutries with regard to their impact on the Community employment market and working conditions. Therefore, the Court declared the Commission decision void to the extent that it was outside this area.

The Single European Act which, amended the Treaty of Rome entered into force in 1 July 1987. This amendment aimed at the elimination of the remaining barriers to the internal market and defined the internal market as *"an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."*[930]In the Final Act of the Single European Act, the Member States declared that: *"In order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries."*[931]

The declaration on the 'entry, movement and residence of nations of third countries' was inserted in the Final Act since it was feared that introduction of free movement of persons, leading to an abolution of internal border controls would lead to a loss of control over movement of nationals of third countries. This would result in the increase of asylum applications as well as illegal migrants. As to the asylum seekers, it was considered that liberalization of the movement of persons within the internal borders could trigger the abuse of asylum procedures such as multiple

[929] *Germany, France, Denmark, and the United Kingdom v. Commission*, Joined Cases, 282, 283-285, 287/85 [1987] ECR 3203.
[930] Article 8a.
[931] See Political Declaration by the Governments of the Member States on the free movement of persons. (Single European Act, 28.02.1986, OJ L 169 of 29.06.1987.)

applications, in more than one Member States, so called 'asylum shopping' and the worst; influx of refugees towards countries which offer higher standard of protection and thus cause unequal distribution of the burden.[932]

This reasoning is based on the view that asylum seekers are rational actors, acting as law consumers, selecting States offering the highest level of protection.[933] In this environment, cooperation and approximation of laws appeared as the only way to discourage such irregular movements of persons between the Member States.

These concerns lead to the adoption of the Convention Applying the Schengen Agreement on 19 June 1990, though outside the EC framework, and the Dublin Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities on 15 June 1990[934] which both contained burden sharing arrangements. It took however, years for these mechanisms to become operational under the weak inter-governmental framework of relations at that stage. The numbers of people applying for refugee status in the EC countries increased dramatically before these two instruments entered into force. In 1985, for instance, 160,000 asylum applications were recorded in the EC Member States. That number rised to 441,800 five years later and peaked at 696,500 in 1992.[935]

Considering the given figures, the Immigration Ministers of the Member States responded to this deveoplment by adopting two resolutions and a conclusion in 30 November-1 December 1992, the so called 'London Resolutions'. These were non-binding instruments, however, they are notable as initial attempts for approximation of asylum laws of the Member States. The 'Council Resolution on a

---

[932] See Lavenex, Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe, p. 34.

[933] Cathryn Costello, *"The Asylum Procedures Directive and the Proliferation of Safe Country Policies: Deterrence, Deflection and the Dismantling of International Protection"*, European Journal of Migration and Law, Vol. 7, 2005, pp. 37-38.

[934] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 15 June 1990,[1997] OJ C254/1.

[935] Stefan Telöken, *"Europe: The Debate Over Asylum, It's a Long Way to Harmonization",* Refugees Magazine, 1999, Issue 113, http://www.unhcr.org/cgibin/texis/vtx/publ/opendoc.htm?tbl=PUBL&id=3b810f2e4 [visited on 2 September 2006].

Harmonized Approach to Questions Concerning Host Third Countries' defined the criteria for determining a country as a 'host third country'[936] and the principles applicable for the return of an asylum seeker to such a country. The second instrument namely, the 'Council Resolution on Manifestly Unfounded Applications for Asylum'[937] defined the conditions for considering a claim manifestly unfounded in which accelerated asylum procedures applied. Finally, the 'Conclusions on Countries in Which There is no Serious Risk of Persecution'[938] provided a series of criteria defining 'safe countries of origin' including respect for human rights and effective operation of democratic institutions.

The timing of adoption of these instruments was not a coincience since they corresponded to the deadline for the completion of the internal market which, was 31 December 1992 as it was set by the Single European Act.[939] The rising concernes of the Member States were clearly reflected to these soft-law instruments that all indicated a tendency to shift the burden of asylum seekers outside their territory.

The Maastricht Treaty that entered into force in November 1993, established the European Union and incorporated the 'asylum policy' and the 'rules governing the crossing by persons of the external borders of the Member States and the exercise of controls' within the so-called third pillar.[940] The third pillar which is titled 'Cooperation in the fields of Justice and Home Affairs' had an inter-govermental structure which, aimed at approximation of the laws of Member States unlike the harmonization aim in the first pillar.

Post-Maastricht era was characterized by the liberalization of policies towards free movement of persons within the European Union, particularly considering the fact that the border controls among the States Parties to the Schengen

[936] Council Resolution of 30 November 1992 on a Harmonised Approach to Questions Concerning Host Third Countries, Doc No. WG I 1283; The term 'host third country' is referred as 'safe third country' in the more recent documents.
[937] Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum, Doc No. WG I 1282 REV 1.
[938] Council Conclusions of 30 November 1992 Concerning Countries in Which There is Generally No Serious Risk of Persecutions, Doc. No. WG I 1281.
[939] See the Declaration on Article 8a of the EEC Treaty.
[940] Article K of the TEU.

Agreements were gradually abolished after its entry in to force in 1995. Despite the entry into force of the Dublin Convention on 1 September 1997, improvements in the structures and rules governing the EU asylum and migration framework proved to be inadequate to stablise the security deficit that appeared as a result of lifting internal border controls.

The third pillar system on asylum cooperation failed to respond to the needs due to its inter-governmental nature and non-implemetation. Most of the measures adopted were not legally binding and there was virtually no mechanism for supervising their implementation or settling disputes arising between the Member States in this respect.[941]Due to the inter-governmental structure, treaties such as the Dublin Convention took many years until they were ratified and entered into force.[942]

The Amsterdam Treaty was adopted to solve the above mentioned problems of the asylum policy of the European Union on 2 October 1997. The Treaty made such radical amendments in the structure of the Constitutional Treaties of the EU that it was identified as a 'fudamental reconstruction' in respect of asylum and migration issues by Hailbronner.[943] The Amsterdam Treaty symbolises the replacement of the approximation policy of the national asylum laws of the Member States with the harmonisation policy. For some authors however, it is a missed opportunity for a serious progress in asylum matters.[944] The major change that it has done in the system is the communitarization of asylum and migration policy by trasfering certain topics from the third pillar to the first pillar of the European Union. Accordingly, the matters of entry visas, asylum, immigration and other policies related to free movement of citizens of third country citizens were incorporated into the Title IV of the EC Treaty.

The expected advantages of the transfer of asylum issues from the third

---

[941] Karin Zwaan, UNHCR and the European Asylum Law, Netherlands 2005, Wolf Legal Publications, p. 9.
[942] Kay Hailbronner, *"European Immigration and Asylum Law under the Amsterdam Treaty"*, Common Market Law Review,Vol. 35, 1998, p. 1048.
[943] Hailbronner, *"The Treaty of Amsterdam and Migration Law"*, European Journal of Migration and Law, Vol. 1, 1999, p. 9.
[944] See Van Selm-Thorburn, p. 627.

pillar to the first pillar was summarized by the European Council on Refugees and Exiles as a greater democracy and transparency in decision making process. Accordingly, the involvement of the European Commission in the asylum area would result in a policy that is more comprehensive and less driven by State self-interest. The European Parliament's contribution in the process would also be beneficial as it represented a more progressive approach to such matters compared to the Council. Finally, the supranational judicial controls would bring a positive restraining force in the practice of the common standards adopted by the legislature.[945]

On the other hand, although the Member States had realized the grave need for harmonization of national laws on asylum matters, they were not prepared to immediately treat asylum as a standard Community topic. The fact that Title IV contains standards on the role of Community Institutions in asylum matters departing from the other Community topics supports this conclusion.

The exclusive right to initiate legislative proposals is a significant aspect of Community' decision making procedures, however, Article 67 paragtaph 1 of the EC Treaty required that during a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Commission would share this power with Member States. The Commission has indicated that, in practice, sharing the right to initiative with the Member States sometimes had the effect that national concerns were given priority over the priorities of Member States set collectively in the Tampere Summit.[946] The Commission would be vested the exclusive right to initiate legisations automatically at the end of the transition period according to Article 67 paragraph 2 of the EC Treaty. This is one of the rare clearcut undertakings in the Convention towards progressively treating asylum as in the other topics of the European Community law.

Another notable exception concerning the decision making on asylum issues

[945] European Council on Refugees and Exiles, Analysis of the Treaty of Amsterdam in so far as it relates to asylum policy, http://www.ecre.org/research/Analysis.doc [visited on 03.09.2006].
[946] Communication From the Commission to the Council and the European Parliament titled: Assessment of the Tampere programme and the future orientations COM(2004) 4002 final, 02.06.2004, p. 4.

is in the quarum of voting in the Council. Unlike the general charactersitic of European Community, Article 67(2) of the Treaty provides that during the five years of transition period, decisions of the Council would be taken unanimously. Qualified majority voting is among the fundamental charactersitics of the supranational legal order of the Community.[947] The fact that qualified majority voting in the Council was not recognized for the transition period in which, an intensive codification process was planned shows the hesitance of Member States in loosing their control over asylum matters. The Article however, postponed the decision whether or not to apply qualified majority voting in asylum matters until the end of the transition period. It stipulated that the Council would take a decision, acting unanimosly and after consulting the European Parliament, at the end of the transitional period, with a view to providing all or parts of the areas covered by Title IV to be governed by the procedure in Article 251 which involves qualified voting.

The Treaty of Nice[948] however, added a new paragraph 5 to the Article 67 which provides an exception to the general rule, indicating that asylum and temporary protection will mainly be subject to qualified majority voting but subject to prior unanimous adoption of common framework legislation, defining common rules and basic principles. Adoption of the entire common framework legislation that are listed in the Article 63 (1) and (2) (a) of the Treaty have been completed by the adoption of the Asylum Procedures Directive[949] on 1 December 2005. Therefore, qualified majority voting has automatically become applicable for the criteria and mechanisms for determining which Member State is responsible for considering an application for asylum, the reception of asylum seekers, the qualification of nationals of third countries as refugees, procedures for granting or withdrawing refugee status.

---

[947] Hailbronner, *"European Immigration and Asylum Law under the Amsterdam Treaty"*, p. 1053.
[948] Treaty of Nice 2001/C 80/01 of 10 March 2001 amending the Treaty on European Union, the Treaties Establishing the European Communities and certain related acts, OJ LC 325.
[949] Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, OJ L 326/13. (Herein after referred to as the 'Asylum Procedures Directive.')

Furthermore, the Council has adopted on 22 December 2004 a decision[950] according to Article 67(2) of the EC Treaty and added the following topics to the ones that are subject to qualified majority voting: - carrying out checks on persons at such borders, - list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, - promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons, - illegal immigration and illegal residence, including repatriation of illegal residents, - Procedures for examining visa applications, - border checks and surveillance.

With regard to the powers of the European Parliament, the Amsterdam Treaty also contained a restrictive mechanism under the Title IV. Article 67 (1) which provides that the Council should act after consulting the European Parliament during the transition period. Although this may be considered as an improvement over the intergovernmental decision making applied previously under the third pillar, in the consultation procedure the European Parliament is far less equipped for influencing decision making where it could only give advice, than the co-decision procedure where it is on equal footing with the Council since its approval of the text is necessary.[951] On the other hand, the requirement in Article 67 (2) of the Amsterdam Treaty concerning whether the decision making procedure would be switched to the co-decision procedure in Article 251, at the end of the transition period, also affected the powers of the European Parliament.

As mentioned above, the Treaty of Nice made it automatic to switch to the co-decision procedure for certain fields of asylum law. Therefore, in those fields the co-decision procedure became applicable as soon as the legislations establishing the common legal framework were adopted. This development has also affected the decision making powers of the Parliament. On the other hand, with regard to the rest of the topics in the field of asylum law, Article 3 of the Council Decision 2004/927/EC preserved the consultation procedure for procedures on examining visa

[950] Council Decision 2004/927/EC of 22 December 2004 on Providing for Certain Areas Covered by Title IV of Part Three of Three of the Treaty Establishing the European Community to be Governed by the Procedure Laid Down in Article 251 of that Treaty, OJ L 396/45.
[951] See EC Treaty, Article 251.

applications and for procedures on carrying out border checks and surveillance.

The powers of the European Parliament under the Title IV has been subject to a debate recently. Article 29 of the Asylum Procedures Directive provides that minimum common list of third countries which shall be regarded by Member States as 'safe countries of origin' shall be decided by qualified majority of the Council after consulting the European Parliament. It was argued that the fact that the Parliament has not been involved in the process through co-decision procedure is contrary to Article 67 (5) of the Amsterdam Treaty which was added to the text by the Treaty of Nice. Since this provision clearly refers to the application of the co-decision procedure in Article 251 after the adoption of common rules and basic principles co-decision procedure should be applicable in this legislative initiative.[952]

The Amsterdam Treaty also provides unusual restrictions on the powers of the European Court of Justice under the Title IV. According to Article 68 of the EC Treaty, a case may only be refferred to the European Court of Justice on the validity or interpretation of acts of the institutions of the Community if it is pending before a court or a tribunal against whose decisions there is no judicial remedy in the domestic law of the Member State concerned. This provision does have the potential of threatening the uniform application and interpretation of Community law in this area as it limits the possibility of bringing cases before the ECJ.

Secondly, the ECJ does not have jurisdiction to rule on the legality of measures taken by Member States relating to the maintenance of law and order and the safeguarding of internal security. It is difficult to visualize any issue that cannot be related to the maintenance of internal security when asylum issues are concerned. Therefore, defining the limits of the Court's competences under this Article is rather troublesome.

Finally, it has to be recalled that the Article 67(2) of the EC Treaty requires

[952] Amnesty International, AIDE-MEMOIRE in view of the 21-22 February 2006 JHA Council: Amnesty International's concerns regarding an EU list of safe countries of origin, http://www.amnesty-eu.org/static/documents/2006/b525-aide_memoire-_safe_countries_of_origin-Feb_06.pdf [visited on 03.09.2006]

the Council to take a decision with a view to adapting the provisions concerning the jurisdiction of the Court of Justice at the end of the transitional period. However, no such decision has been taken although the transitional period expired on 1 May 2004.[953]

The Commission has recently adopted a communication which criticises this Article on the above mentioned grounds and proposes amendments to it.[954]

The above mentioned arrangements in the institutional framework were made in order to implement an agenda which is set under the Title IV of the EC Treaty as Amended by the Amsterdam Treaty. Considering the earlier performance of the Union under the third pillar, it appeared to be impossible to adopt a comprehensive package as aimed at in the Amsterdam Treaty within a 5 years period. Therefore, the reconstruction of the institutional structure mentioned above prepared the appropriate insitutional environment for facilitating the adoption of such measures under the Title IV of the EC Treaty.

Articles 62 and 63 of the EC Treaty contain an ambitious programme for adopting the basic secondarly legislations on asylum and migration within a 5 years transition period. Among the list of topics that were put in the agenda of the decision making institutions of the Community, the following framework legislations are of relevance to the purposes of this study:

Measures on the crossing of the external borders of the Member States:

- Standards and procedures to be followed by Member States in carrying out checks on persons at such borders;

---

[953] This point was criticied in a report presented to the Finnish Presidency recently. see European Council on Refugees and Exiles, Memorandum to the Finnish Presidency: The Hague Programme and beyond, August 2006, No. AD6/8/2006/EXT/RW, http://www.ecre.org/eu_developments/presidencies/memofinnishpresaug06.doc [visited on 04.09.2006].

[954] Communication from the Commission COM(2006) 346 final, to the European Parliament, the Council, the European Economic and Social Committee, the Committee of Regions and the Court of Justice of the European Communities of 28 June 2006 on Adaptation of the Provisions of Title IV of the Treaty Establishing the European Community Relating to the Jurisdiction of the Court of Justice With a View to Ensuring More Effective Judicial Protection.

- Rules on visas for intended stays of no more than three months, including: the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement;

- The procedures and conditions for issuing visas by Member States; [955]

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:

- Citeria 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,

- Minimum standards on the reception of asylum seekers in Member States,

- Minimum standards with respect to the qualification of nationals of third countries as refugees,

- Minimum standards on procedures in Member States for granting or withdrawing refugee status.[956]

Measures on refugees and displaced persons within the following areas:

- 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,

- Promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons.[957]

[955] See EC Treaty, Article 62.
[956] See EC Treaty, Article 63(1).
[957] See EC Treaty, Article 63(2).

Measures on immigration policy within the following areas:

- 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,

- Illegal immigration and illegal residence, including repatriation of illegal residents.[958]

Amsterdam Treaty contains noteworthy provisions on asylum issues in its protocols as well. As indicated above, the Schengen acquis was integrated into the Union[959] and the Community[960]by the Schengen Protocol to the Amsterdam Treaty.[961]

Secondly, according to the Protocol on asylum for nationals of Member States of the European Union, the Member States are regarded in principle as constituting safe coutries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. As a result of this Protocol, asylum applications from European Union citizens are generally to be declared inadmissible by Member States.

European Council summits in Tampere in 1999[962] and in Brussels in 2004[963] complemented this legal framework with policy frameworks.

The Tampere European Council Conclusions established the first programme covering the years 1999-2004 for developing a common European Union immigration and asylum policy. The Conclusions had placed the rule of law at the center of the asylum and immigration policy by stating: *"From its very beginning*

[958] See EC Treaty, Article 63(3).
[959] The third pillar.
[960] See EC Treaty, Title IV.
[961] Pieter Jan Kuijper, *"Some Legal Problems Associated with the Communitarization of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen Acquis"*, Common Market Law Review, Vol. 37, 2000, for a detailed analysis of the problems encontered through the incorporation of the Shengen Acquis in to the European Union.
[962] Tampere European Council, Presidency Conclusions, 15 – 16 October 1999, http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm [visited on 04.09.2006].
[963] Brussels European Council, Presidency Conclusions, 4 – 5 November 2004.

European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law".[964] The programme was based on four components namely, partnership with the countries of origin and transit countries, a common European Asylum System, fair treatment of third country nationals and management of migration flows.

The partnership approach to countries of origin which was suggested by the European Council was focussed on the political, human rights and development issues in countries and regions of origin and transit. It was considered that improving economic conditions in these countries would contribute reducing or eliminating the root-causes of and pressures for migration. This approach was related to the management of migration flows. The reference to transit countries in this respect implied acceptance of readmission agreements.[965] The European Council specifically invited the Council to conclude readmission agreements or to include standard clauses in other agreements such as Europe Agreements, trade and cooperation agreements, Euromed agreements between the EC and relevant third coutries or groups of countries.[966]

Substantively, the European Council agreed on the need to develop a common European Asylum System, respecting the principle of non-refoulement. This was suggested as a two stage plan of action. The short term plans included the adoption of secondary legisations under the EC Treaty.[967] And in the long term the Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.[968]

Finally, the fair treatment of third country nationals heading suggested the need for approximation of national legislations on the conditions for admission and residence of third country nationals that are of relevance to the non-refoulement principle.

---

[964] Tampere European Council, Presidency Conclusions, para. 1.
[965] *"The Tapere Summit: The Ties That Bind or The Policemen's Ball"*, Common Market Law Review, Vol. 36, the Netherlands 1999, Kluwer Academic Publishers, p. 1122.
[966] Tampere European Council, Presidency Conclusions, paras. 26, 27.
[967] *Ibid.,* para. 14.
[968] *Ibid.,* para. 15.

The transition period of 5 years in the Amsterdam Treaty has ended on 1 May 2004. Until the end of the transition period a number secondary legislations were adopted despite the constraints on the role of institutions in the decision making procedures which were negatively affecting the efficiency of the mechanism.

Among those secondary legislations adopted during this period, the following are particularly notable for the purposes of this study:

- The Council Regulation 343/2003 of 18 February 2003 establising 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[969];

- Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof[970];

- Council Regulation 2725/2000/EC of 11 December 2000 concerning the establishment of EURODAC for the comparison of fingerprints for the effective application of the Dublin Convention on the State responsible for examining applications for asylum lodged in one of the European Union Member States[971];

- 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[972]

The following two legislations were subsequently added to this group of cornerstone instruments:

[969] OJ L 50/1 of 25 February 2003.
[970] OJ L 212/12 of 7 August 2001.
[971] OJ L 316 of 15 December 2000.
[972] OJ L 304 of 30 September 2004.

- Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status[973];

- Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.[974]

Despite the adoption of a considerable number of secondary legislations during the transition period, their transposition into the domestic laws of Member States and their rate of implementation have been less than ideal in the Commission's view.[975]

In November 2004, the European Council adopted the second five year programme namely, the Hague Programme[976] which, covers the years 2005-2009. The humane spirit of the Tampere program had lost a considerable amount of its strength in the Hague Programme. Unlike its predecessor, the emphasis on the security issue prevails over the protection approach in this document. The following statements in the introduction part reveals accurately the main concern of the drafters:

"The security of the European Union and its Member States has acquired a new urgency, especially in the light of the terrorist attacks in the United States on 11 September 2001 and in Madrid on 11 March 2004. The citizens of Europe rightly expect the European Union while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as illegal migration, trafficking in and smuggling of human beings, terrorism and organized crime, as well as the prevention thereof."

The Hague Programme is rather comprehensive compared to the Tampere

[973] OJ L 326/13 of 13 December 2005.
[974] OJ L 349/1 of 25 November 2004.
[975] Communication from the Commission COM (2006) 333 final of 28 June 2006 to the Council and the Parliament: Report on the Implementation of the Hague Programme for 2005, Brussels.
[976] The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, published on 03.03.2005, OJ C 053.

Conclusions. With regard to the development of the Common Eurpean Asylum System the European Council urged the Member States to fully implement the first phase without any further delay. This was required in order to initiate the second phase instruments until the year 2010 as it was planned by the Council.[977]

The Programme puts less emphasis on the need to observe the principle of non-refoulement compared to the demands of the fight against illegal immigration. This is particularly visible in the way the Programme approaches to the relationship with the States bordering the Mediterranean or at the Eastern border of the European Union. The European Council indicates that the countries in regions of origin and transit will be encouraged in their efforts to strengthen the capacity for the protection of refugees. Considering the 'safe third country' practice of the Union, this shall be regarded as an indirect way of requesting them to block refugee flows from those countries.

Secondly, it is also notable that the European Council welcomes the Commission Communication on improving access to durable solutions and invites the Commission to develop EU-Regional Protection Programmes in partnership with the third countries concerned.[978] In fact, this is the Communication[979] where the Commission recommended the much criticised 'protected entry measures'. Therefore, this statement is conducive to pave the way for off-shore processing zones. This tendency is further supported by the European Council's emphasis on the intensified cooperation with the Southern and Eastern borders of the EU under the European Neigbourhood and Partnership Instrument. Hence, the said Strategy Paper[980] requires the adoption of Action Plans on cooperation on migration, asylum, visa policies, etc. including the conclusion of readmission agreements. These Action Plans are formulated in such as a way that they would support the said 'protected

[977] *Ibid.,* para. 1.3.
[978] *Ibid.,* para. 1.6.2.
[979] Communication from the Commission COM (2004) 410 final of 4 June 2004 to the Council and to the European Parliament on the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin: Improving Access to Durable Solutions.
[980] Communication from the Commission COM(2004) 373 final on European Neighbourhood Policy Strategy Paper of 12 May 2004.

entry measures.'[981]

The European Council has also requested the Commission to initiate a proposal on the minimum standards on return procedures with emphasis of safeguarding public order and security. Such proposal has been initiated by the Commission[982] and waiting to be adopted currently. Further measures are also suggested for the purpose of facilitating the return of third-country nationals such as launching the preparatory phase of a European Refugee Fund, common integrated country or region specific return programmes, establishement of a European Return Fund, conclusion of readmission agreements, appointment of a special representative for a common readmission policy.[983]

Moreover, a series of measures focussing on increasing the efficiency of the border control have been planned. These are the establishment of teams of national experts to provide rapid technical border control assistance, establishment of a border management fund and Schengen evaluation mechanisms after the introduction of the Schengen Information System II in 2007 and the use of biometrics and information systems in border control mechanisms. Finally, it is noticeable that the European Council requests the Council and the Commission the firm establishment of immigration liason networks in the relevant third couuntries. And particular attention was purported to be paid to cooperation in rescueing immigrants at sea in conformity of international law. [984]

It is observed that the efforts for addressing the needs and rights of asylum seekers or irregular migrants have been rather limited under the Hague Programme.

2. Beneficiaries of the Prohibition of Non-Refoulement

The European Union's legal framework provides for three different statuses concerning the protection seekers that are designed to avoid refoulement to territories

[981] For a more detailed examination of this issue, see infra the title 'Protected Entry Measures'.
[982] Proposal for a Directive COM(2005) 391 final of 1 September 2005 of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals.
[983] See The Hague Programme, para. 1.6.4.
[984] *Ibid.,* paras. 1.7.1., 1.7.2.

where they could run the risk of persecution.

a) Temporary Protection Status

The Council of the European Union adopted the Temporary Protection Directive in accordance with the Article 63(2) of the EC Treaty which requires the adoption of *"minimum standards for giving temporary protection in the event of a mass influx of displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection*." This was the first secondary legislation adopted from the agenda provided by the Amsterdam Treaty.

The Temporary Protection Directive was built on the experiences of Bosnia-Herzegovina and Kosovo conflicts in 1990s where the Member States treated the asylum seekers outside the framework of the 1951 Refugee Convention. Temporary protection became popular for the receiving States[985] as it increased the asylum capacities of European States reluctant to accept refugees for permanent settlement.[986] Such increase in the asylum capacities of the Member States was two folded: Firstly, this is a return-oriented concept although, in certain circumstances return might not be possible for prolonged periods of time in which case it may be necessary to find alternative solutions.[987] Secondly, given the fact that temporary protection has been considered outside the framework of the 1951 Refugee Convention, States did not offer the full range of economic and social rights guaranteed by this Convention to the asylum seekers from Bosnia-Herzegovina and Kosova. The only country that offered protection closer to the standards of the 1951 Refugee Convention was the United Kingdom which, admitted much fewer Bosnians

[985] The Council had already adopted the following measures at mid-1990s on temporary protection: Resolution of 25 September 1995 on Burden Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis (OJ C 262/1 of 7 October 1995); Decision of 4 March 1996 on an Alert and Emergency Procedure for Burden Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis (OJ L 63/10 of 13 March 1996).
[986] Matthew J. Gibney, *"Between Control and Humanism: Temporary Protection in Contemporary Europe"*, Georgetown Immigration Law Journal, Vol. 14, 2000, p. 692.
[987] See Final Report and Draft Guidelines on Temporary Protection of the Delhi Conference in 2002, p. 2

and Kosovars compared to the other Member States.[988]

Therefore, it is not surprising to see this Directive adopted first among others. With regard to the standards of protection, the Directive contains inferior standards compared to the refugee status though higher than the standards provided for subsidiary protection in the Qualification Directive. It is notable that Member States are allowed to regulate the standards of remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment in their domestic laws. For reasons of labour market policies Member States may give priority to EU citizens and citizens of States bound by the Agreement on the European Economic Area and also to legally resident third country nationals who receive unemployment benefit.[989]

On the other hand, the Directive provides certain precautions against watering down the protection mechanism under the 1951 Refugee Convention by preventing the misuse of temporary protection. First of all, the existance of a mass influx of displaced persons is established by a Council decision adopted by qualified majority which does have an effect of introducing temporary protection for the displaced persons to which it refers, in all Member States.[990] Secondly, persons enjoying temporary protection are granted the right to lodge an asylum application at any time during their stay in the receiving country.[991] This is an important indication that temporary protection is exceptional and that it is not an alternative to the refugee status.[992]

The Committee on Refugee Procedures of the International Law Association, which convened in Delhi in 2002 however, criticised the definition of status of temporary protection under the Directive, on the ground that a clear

---

[988] See Gibney, p. 699.
[989] See Temporary Protection Directive, Article 12; for further information on the standards of protection see Karoline Kerber, *"The Temporary Protection Directive"*, European Journal of Migration and Law, Vol. 4, 2002, pp. 201-208.
[990] *Ibid.,* Article 3.
[991] *Ibid.,* Article 17.
[992] UNHCR, Annotated Comments on Council Directive 2001/55/EC of 20 July 2001, http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=RSDLEGAL&id=3ecdeebc4#search=%22OJ%20C%20262%2C%207.10.1995%20temporary%20protection%22 [visited on 05.09.2006].

distinction has not been drawn between the refugee status and this status.[993] The criticism finds its basis in the definition of 'displaced persons' in Article 2 (c) of the Directive which provides:

" "diplaced persons" means third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular: (i) persons who have fled areas or armed conflict or endemic violence; (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights…"

Although, it is true that the definition of 'displaced persons' clearly includes refugees under the Temporary Protection Directive, this fact should be considered as an inevitable consequence of mass influx that is characterized by the unfeasibility of individual refugee status determination. The possibilility of application for refugee status compensates any overlap between these statuses. Furthermore, it has to be noted that the possibility of admission to the territory of a Member State without going through the RSD procedure, may be more beneficial even for asylum seekers under the current legal framework since the 'border procedures' stipulated in Article 35 of the Asylum Procedures Directive provides inferior standards for the applicants compared to the asylum cases submitted within the territory.

Another notable aspect of this definition is that it is much broader than the refugee definition and also the protected scope of human rights instruments examined in this study. Unlike the other instruments, no individual risk has to be substantiated in order to enjoy this status. Indiscriminate risks arising from armed conflicts or endemic violence may be sufficient to qualify for temporary protection status. It is however, possible to exclude a person from temporary protection,

[993] Final Report and Draft Guidelines on Temporary Protection of the Delhi Conference in 2002, p. 3.

according to Article 28 of the Directive. The grounds for exclusion are comparable to the exclusion clauses in the 1951 Refugee Convention.[994]

An interesting question was raised by Arenas who asked whether the mechanism of the Directive could only be activated in case of a flow across borders. The author answered this question in the negative considering that the evacuation programmes were not linked to any such requirement, thus they could also be used in the event of humanitarian crisis far from the European Continent. In this respect, the author referred to a precedent in connection with the Iraq crisis where the Spanish Parliament discussed recommendations for the initiation of the procedure under the Temporary Protection Directive which eventually had to be resumed as the feared mass influx did not take place.[995]

b) Refugee Status

Harmonized Application of the refugee definition consitutes the backbone of the entire Common European Asylum System. The main motive behind the harmonization process on asylum matters has been the irregularities such as asylum shopping that was caused by the different standards applied by the Member States on defining the refugee status under the 1951 Refugee Convention.

The Council of the European Union had attempted to encourage a harmonized approach on the application of the refugee definition even before the Amsterdam Treaty in 1996, by a Joint Position that was adopted under the Article K.3 of the European Union Treaty.[996] The standards adopted by the Joint Position however, were rather disappointing. For instance, although many of the Member States had already recognized well founded fear of persecution by non-state agents sufficient to give rise to refugee status under Article 1 (A) of the 1951 Refugee Convention by that time, the Joint Position contained a more restrictive formula on

[994] For further information see the title 'Exceptions to the Non-Refoulement Principle' above.
[995] Nuria Arenas, *"The Concept pf 'Mass Influx of Displaced Persons' in the European Directive Establishing the Temporary Protection System"*, European Journal of Migration and Law, Vol. 7, 2005, p. 443.
[996] Joint Position (96/196/JHA) by the Council of 4 March 1996 on the basis of Article K.3. of the Treaty on European Union on the Harmonized Application of the Definition of the Term "refugee" in Article 1 of the Geneva Convention of 28 July 1951 Relating to the Status of Refugees.

this matter. Furthermore, Joint Position did not contain any provision concerning whether gender based persecution would be considered as a part of persecution on the ground of membership of a particular social group.[997]

The Qualification Directive is the first supranational instrument to harmonize the standards on the refugee definition through a comprehensive set of rights that an asylum seeker may rely on. It is notable that the drafters of the Directive do not intend to modify the refugee definition through interpretation, the aim of the Directive is clearly set as *"full and inclusive application"* of the 1951 Refugee Convention.[998] On the other hand, the provisions of the Directive do not fully reflect the standards of the 1951 Refugee Covention. Thus, UNHCR has urged Member States to assess carefully, in consultation with UNHCR, where more favourable provisions need to be introduced.[999]

Article 3 of the Directive indicates that the standards set forth in this instrument are the minimum standards and therefore, Member States are allowed to adopt more favourable standards for determining who qualifies as a refugee.[1000] Hence, this matter has been regulated by a directive in order to provide a boader margin of discretion to the Member States in transposing it into their domestic laws.

The beneficiaries of the refugee status are mentioned in Article 2 (c) of the Directive as a 'third country national' or a 'stateless' person. The basis for this limitation in the refugee definition is obviously the Asylum Protocol annexed to the EC Treaty which, in principle considers EU Member States as 'safe country of origin' for each other's citizens. It is possible to argue however, that the Protocol itself does not comply with the 1951 Refugee Convention with respect to this provision on the ground that a mechanism automatically considering an asylum application manifestly unfounded would defeat the object and purpose of the Convention. Secondly, it shall also be noted that the Asylum Protocol does not

[997] See Nathwani, p. 63.
[998] See Qualification Directive, recitals para. 2.
[999] UNHCR, Annotated Comments on Council Directive 2001/55/EC of 20 July 2001, p. 13; The Member States are required to transpose the provisions of the Directive into their domestic laws before 10 October 2006 in according to the Article 38.
[1000] *Ibid.,* para. 8.

completely close all the avenues for an EU citizen to apply for asylum in another Member State. The Protocol provides a list of exceptions to this general principle in which an asylum application could be acceptable. In times of war or other public emergency according to Article 15 of the ECHR or in the event that of a Council decision concerning the existance of a persistent breach of fundamental rights by a Member State is initiated or a Member State unilaterally decides to receive such an asylum application, it is possible for an EU citizen to be recognized as a refugee. Therefore, the legality of excluding the EU citizens from the protected scope of the Qualification Directive is arguable.[1001]

The substantive standards for assessing the well-founded fear of persecution are set forth in Articles 4 (4) and (5) of the Directive. Accordingly, the fact that an applicant has already been subject to persecution or to direct threats of persecution is regarded as a serious indication of the applicant's well-founded fear of persecution, unless there are good reasons to consider that such persecution will not be repeated.

It appears that the burden of proof shifts to the decisison making authority if the applicant proves that he/she has previously been subjected to persecution. The Directive further indicates that the applicant will not need confirmation to substantiate his/her claims by documentary or other evidence when the applicant has made a genuine effort to substantiate his application; all relevant elements at his/her disposal have been submitted or a satisfactory expalanation has been provided for their absence; the applicant's statements are found coherent, the applicant has applied for protection at the earliest time and the general credibility of the applicant has been established.

A debated issue under the Directive is the situation of refugees *sur place* under Article 5. Although this provision accepts refugees sur place, it draws a distinction between the 'events that takes place' and the 'activities carried out' after

[1001] See also Amnesty International EU Office, Comments on the Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country National and Stateless Persons as Refugees or as Persons Who are Otherwise in Need of International Protection COM (2001)510 final, 2 October 2002.

the applicant left the country of origin. If a well-founded fear of persecution appears as a result of an event that took place after the applicant left the country of origin, this would give rise to refugee status without any further condition being satisfied. On the other hand, if the alleged fear is based on an activity that the applicant is engaged in then he/she has to prove that the activities relied upon is the expression and continuation of convictions or orientations held in the country of origin. The Article further indicates that if an asylum applicant files a subsequent application based on circumstances which he/she has created by his/her own decision since leaving the country of origin, Member States may determine not to grant him/her refugee status. The rejection of refugee *sur place* as a ground for refugee status in certain circumstances aims at preventing the abuse of this mechanism.

UNHCR rejected such restrictions stating that even where it can not be established that the applicant has already held the convictions or orientations in the country of origin, the asylum seeker is entitled to the right of freedom of expression, freedom of religion and freedom of association and that such freedoms included the right to change one's religion or convictions, which could occur subsequent to leaving the country of origin. In this respect, UNHCR believes that the circumstances where an applicant manufactures his/her claim should be dealt with addressing difficult evidentiary and credibility questions rather than accepting provisions having automatic exclusion effect which may leave genuine asylum claims unprotected.[1002]

With regard to the actors of persecution the Directive contains a provision of reformist nature. Article 6 lists actors of persecution as the state; parties or organizations controlling the State or a substantial part of the territory of the State; non-State actors if it can be demonstrated that the former are unable or unwilling to provide protection against persecution. This provision sets quite a high standard considering that several Member States of the Union were not accepting asylum

[1002] UNHCR, Annotated Comments on Council Directive 2001/55/EC of 20 July 2001, p. 16; Amnesty International also supports UNHCR's views in this respect (Amnesty International EU Office, Comments on the Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country National and Stateless Persons as Refugees or as Persons Who are Otherwise in Need of International Protection, p. 3.)

claims by non-State actors until the Directive was adopted.[1003] When non-State actors are concerned, the decision making authority is expected to examine whether reasonable steps to prevent the persecution, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution and the applicant had access to such protection.[1004]

Internal fight alternative has been regulated as a circumstance which the applicant shall be deemed as not having well-founded fear of persecution under Article 8. Sub-paragraph 3 of this provision indicates that 'technical obstacles to return to the country of origin' would not prevent the applicability of internal flight alternative. This is a problematic standard since it denies international protection to those persons who have no internal flight alternative. In this regard, the Directive falls short of complying with the authoritative interpretation of the UNHCR's Handbook on Refugee Status Determination.[1005] An asylum seeker may not reasonably be expected to relocate himself/herself at an area if it is technically impossible.

The Directive attempts to define the acts which may amount to persecution in the meaning of Article 1 A of the 1951 Refugee Convention with a casuistic reasoning which, is unprecedented in the other international instruments. The Article 9 is comprised of two parts. The sub-paragraph 1 is devoted to establishing a severity test. Whereas the the sub-paragraph 2 stipulates in which contexts persecution may appear. The severity test, as adopted by the Directive once more raises the academic discussion on the relationship between human rights norms and persecution. McAdam observes that persecution is defined from a pure human rights law point of view in the Directive and criticises it on the ground that the Convention definition captures a need for protection that is outside the realm of pure human rights assessment.[1006] The Qulifiction Directive is the first supranational hard law

[1003] Roland H.M. Bruin, Working Party on Non-State Agents of Persecution: 2002 Report, Presented at 5th Biannual World Conference of the International Association of Refugee Law Judges, 22-25 October 2002, New Zealand, p. 453; see also Nathwani, p. 67.
[1004] See Article 6 (2).
[1005] See UNHCR Handbook, para. 91.
[1006] Jane McAdam, *"The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime",* International Journal of Refugee Law, Vol. 17, No. 3, 2005, p. 471; UNHCR has

instrument that codifies the complementary appraoch of human rights and asylum in one single text. Therefore, the position that this instrument takes is of particular significance with regard to this discussion. Article 9 (1) of the Directive provides:

"Acts of persecution within the meaning of article 1 A of the Geneva Convention must: (a) be sufficiently serious by their 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 (a)."

McAdam's position on the definition of persecution indicating that persecution should not be defined solely on the basis of serious or severe human rights violations, is defended by the author of this study as indicated in the the first chapter. On the other hand, it is notable that Article 9 (1) (b) does allow an interpretation for importing acts outside the realm of human rights into the definition of persecution since it speaks of "measures, including human rights". It is clear from this expression that the drafters of the Directive did not confine the scope of persecution to human rights violations.

Sub-paragraph 2 provides a long list of acts which may amount to persecution as follows:

- Acts of physical or mental violence, including acts of sexual violence;

- Legal, administrative, police, and /or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

- Prosecution or punishment, which is disproportionate or discriminatory;

---

submitted a comment in the same line with McAdam.(UNHCR, Annotated Comments on Council Directive 2001/55/EC of 20 July 2001, p. 20).

- Denial of judicial redress resulting in a disproportionate or discriminatory punishment;

- Prosecution or punishment for refusal to perform mililitary service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses;

- Acts of gender-specific or child-specific nature.

Providing an exhaustive list of acts amounting to persecution is a position that UNHCR has refrained from even in the Handbook on Procedures and Criteria for Determining Refugee Status since it is of the view that the interpretation of *"what constitutes persecution needs to be flexible, adaptable and sufficiently open to accommodate its changing forms".*[1007] On the other hand, providing a list of acts as in the Directive has its own merits. For instance, inclusion of gender-specific acts within the definition of persecution has caused a change in the laws of several Member States that were consistently rejecting gender-specific asylum claims on the ground that this was not a part of the refugee definition in the 1951 Refugee Convention.[1008]

Finally, it is notable that the Qualification Directive elaborates on the grounds of persecution which are left undefined in the 1951 Refugee Convention. The definitions of race, religion, nationality and political opinion in Article 10 are generally parallell to the definitions provided in the Handbook on Procedures and Criteria for Determining Refugee Status.[1009] The definition of a 'particular social group' however, is worth having a closer look due to its peculiar scope. According to the Article 10 (d):

"a group shall be considered to form a particular social group where in particular: - members of that group share an innate charactersitic, or a common

[1007] UNHCR, Annotated Comments on Council Directive 2001/55/EC of 20 July 2001, p. 20.
[1008] Crawley and Lester observed that the recent proposal for changes in the Swedish asylum legislation refers to the Qualification Directive when proposing that gender should be accepted as a ground of persecution. Similarly, Belgian case-law has referred to the Qualification Directive on the definition of particular social group in this regard. (Crawley, Lester, p. 24).
[1009] See paras. 66-85.

background that can not be changed, or share a charactersitic or belief that is so fundamental to identify or conscience that a person should not be forced to renounce it, and - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society…"

It appears that the Directive has adopted a combination of two schools of thought in defining 'particular social group'; the first item that refers to *"an innate charactersitic"* is peculiar to the 'protected characteristics approach' which is prevalent in Common Law legal systems, whereas the second item that refers to *" a distinct identity...perceived as being different by the surrounding society"* implies the 'social perception approach' which is the dominant perspective in the Continental European Legal systems. The drafters of the Covenant must have aimed at compromising the interests of the Union that is comprised of States adopting both legal systems. On othe other hand, UNHCR has rightly criticised this duality in the Article, stating that it might cause protection gaps due to their different scopes.[1010]

c) Subsidiary Protection Status

The Qualification Directive is also unique for adopting a subsidiary protection status in a supranational instrument. The starting point for the establishment of the subsidiary scheme is the human rights provisions of Article 3 of ECHR, Article 3 CAT and Article 7 ICCPR and their active involvement in the practice of non-refoulement.[1011] The fact that these human rights instruments did not limit the protected scope of non-refoulement in the narrow refugee definition of the 1951 Refugee Convention, forced Member States to seek solutions for those persons whom they could not remove from their territories. Therefore, subsidiary forms of protection first appeared as ad hoc domestic practices that subsequently evolved into codifications in the domestic laws of Member States under different names.[1012] By the year 1998, subsidiary forms of protection existed in all Member States in one

[1010] UNHCR, Annotated Comments on Council Directive 2001/55/EC of 20 July 2001, p. 23.
[1011] Ryszard Piotrowicz, Carina van Eck, *"Subsidiary Protection and Primary Rights"*, International Comparative Law Quarterly, Vol. 53, 2004, p. 115.
[1012] See McAdam, *"The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, p. 461.

way or another and they were being refered to as 'temporary residence', 'exceptional leave to remain', 'tolerated status' or 'de facto refugee status'.[1013]

Finally, the subsidiary protection was introduced by the Qualification Directive after a fair amount of debate both among the practitioners and academia as to what the scope of this protection should be.[1014] The Qualification Directive introduced subsidiary protection as a complementary and additional status to the refugee status in the 1951 Refugee Convention.[1015] Unlike the temporary protection status, the subsidiary protection status entails considerably inferior protection standards in many respects compared to the refugee status under the 1951 Refugee Convenion. Hence, the subsidiary protection status is excluded from the family unification possibility under the Family Unification Directive[1016]and subject to less favourable standards on the duration of residence permits[1017], the provision of travel documents[1018], entitlement to social welfare benefits,[1019] access to health care,[1020] access to the employment market,[1021] and access to integration facilities.[1022] Therefore, it is necessary to ensure that the 1951 Refugee Convention is not undermined by subsidiary protection. In this respect, the definition of subsidiary protection had to be carefully crafted in order to avoid watering down the protection mechanism under the 1951 Refugee Convention. Article 2(e) defines the beneficiary of the subsidiary status as:

"...a third country national or a stateless person who does not qualify as a

---

[1013] See Piotrowicz, Van Eck, p. 110.
[1014] Due to the role of these instruments in the introduction of subsidiary protection Jens Vedsted-Hansen suggests that the legal scope of protection under the subsidiary protection status must be formulated according to the evolution of the legal practice under these human rights instruments (Jens Vedsted-Hansen, Complementary or Subsidiary Protection? Offering an Appropriate Status Without Undermining Refugee Protection, New Issues in Refugee Research, Working Paper No. 52, February 2002, p. 4.); For an article where Noll discusses alternative hypothetical definitions, see Gregor Noll, Fixed Definitions or Framework Legislation? The Delimitation of Subsidiary Protection Ratione Personae, New Issues in Refugee Research, Working Paper No. 55, February 2002.
[1015] See Qualification Directive, recital para. 24.
[1016] Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Unification, OJ L 251/12, Article 3 (2)(c).
[1017] See Qualification Directive, Article 24.
[1018] *Ibid.,* Article 25.
[1019] *Ibid.,* Article 28.
[1020] *Ibid.,* Article 29.
[1021] *Ibid.,* Article 26.
[1022] *Ibid.,* Article 33.

refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm…and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country."

The term 'serious harm' above is defined in Article 15 as consisting of :

"…death penalty or execution; or… torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or …serious and individual threat to a civillian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

The definition has several elements to be noted. Firstly, similar to the refugee definition, subsidiary protection status also excludes EU citizens from its protected scope under the Directive.

Secondly, as result of the complementary nature of this status, subsidiary protection shall only be granted to a person who does not qualify as a refugee. Therefore, an asylum application may be considered under the criteria for subsidiary protection only after being examined under the criteria of the 1951 Refugee Convention.

Thirdly, as McAdam argues, the standard of proof for subsidiary protection has a higher threshold compared the refugee status under the Directive. This argument is worth further examination. The author has based her reasoning on the expressions "*substantial grounds have been shown for believing*" in the definition of subsidiary protection.[1023] She states that the wording of this definition lacks subjective fear analysis of the refugee definition by only referring to substantial grounds which is an objective element of assessment. This part of the definition is clearly taken from the jurisprudence of the European Court of Human Rights. In assessing the 'substantial grounds' the European Court consistently takes into

[1023] McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, pp. 470 – 471.

account all the circumstances of the case, including the mental effects on the victim.[1024] Therefore, subjective fear is a part of the Court's analysis. The reason for adopting this clause from the European Court's jurisprudence is undoubtfully to establish a standard in the same line with the ECHR.[1025] The following expressions in the Explanatory Memorandum of the Proposal confirms this view:

"The definition of subsidiary protection employed in this Proposal is based largely on international human rights instruments relevant to subsidiary protection. The most pertinent of them being (Article 3 of) the European Convention on Human Rights and Fundamental Freedoms…"[1026]

In this respect, the definition of subsidiary protection shall be interpreted in the light of the Court's case-law. Therefore, the author of this study does not agree with McAdam on the fact that the definiton of subsidiary protection involves a higher threshold in terms of the standard of proof.

Fourthly, the term 'serious harm' in Article 15 that determines the nature and degree of suffering with regard to subsidiary protection status needs to be clarified. Paragraph (a) of the Article refers to *"death penalty or execution"*. This paragraph finds its basis in the Protocol 6 to the ECHR which was subsequently strengthened by the Protocol No. 13. Similarly, paragraph (b) that refers to *"torture or inhuman or degrading treatment or punishment"* finds its basis in Article 3 of the ECHR.[1027] Therefore, both of these paragraphes should be interpreted in the light of the practice of ECHR under those Articles respectively. On the other hand, paragraph (c) of the Article 15 that refers to *"serious and individual threat to a civillian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict"*is distinct in character. This paragraph aims at extending the

[1024] See *D. and Others v. Turkey*.
[1025] Please note that the Qualification Directive also refers to the ECHR in its Article 9 with regard to the severity test.
[1026] Explanatory Memorandum from the Commission COM(2001) 510 of 12 September 2001 on the Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection, p. 5.
[1027] See McAdam, "*The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime"*, pp. 477-478.

scope of protection to those persons fleeing from civil war or armed conflict who are not in principle protected under the 1951 Refugee Convention that rejects risks arising from indiscriminate threats. In fact, persons who merely escape from indiscriminate threats are not protected under the ECHR, CAT and ICCPR either, since in all of these instruments a certain level of individualization of the risk is required. On the other hand, the provision at hand is not without questionmarks in this regard either. The Article requires that the threat to be serious and individual. It is difficult to compromise the term 'individual' with the following phrase 'indiscriminate violence'. How can it be possible to be individually threatened in an environment of indiscriminate violence? McAdam explaines this as an opt out possibility in the text of the Article in order to avoid an undesired opening of the scope of this paragraph.[1028]

3. Procedural Aspects of Non-Refoulement in the EU Framework

The European Community has adopted and is in the process of adopting a number of secondary legislations governing the field of admission and return. This process has rather intensified after the adoption of the Hague Programme. Some of the adopted instruments do not have a non-refoulement persepective although they are directly or indirectly related to this principle. Therefore, in order to show the entire picture of the legal environment, focussing on these newly developing instruments, with a non-refoulement point of view is necessary in addition to the legislations having a clear non-refoulement reference. Given the wide-spread and complex nature of the norms in this environment, it is usefull to examine the issue with a view to 'admission and barriers of entry' and 'removal from the territory' both of which exhibit a burden shifting tendency at the external borders of the EU and the rules concerning the burden sharing arrangements among the Member States.

[1028] *Ibid.,* p. 481.

a) Admission and Barriers of Entry

(1) Admission Requirement Under the Asylum Procedures Directive

On 1 December 2005, the Council of the European Community adopted the Asylum Procedures Directive containing the rules on minimum procedural guarantees for asylum seekers, minimum standards in the decision making process and important definitions concerning the asylum procedures.[1029] The Directive was planned to be the adopted during the transition period however, it had to be delayed until the end of 2005 due to the difficulties in determining a common position by the Member States on the senstive nature of its content. The European Parliament suggested 111 amendments to the Directive in its draft report of 11 May 2005.[1030]

UNHCR expressed its concernes over the proposed text in its provisional comments of 10 February 2005 as follows:

"... UNHCR notes that the possible exceptions and derogations which qualify these safeguards are so broad that, in practice, these minimum safeguards may not apply to a significant number of asylum seekers in the EU. Moreover, throughout the negotiations of the draft, UNHCR has repeatedly expressed serious concerns that a number of provisions in the Directive could lead to violations of international law. Many of these provisions remain in the proposal. If incorporated into national law without further safeguards, these provisions may create a serious danger of refoulement."[1031]

Article 35 of the Directive titled 'Border procedures', is among those provisions that UNHCR was refferring to with regard to exceptions and derogations.

[1029] See Zwaan, p. 16.
[1030] Draft Report 2000/0238(CNS) by the European Parliament of 11 May 2005 on the Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status.
[1031] UNHCR, Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 10 February 2005, p. 1.

Eurpean Council on Refugees and Exiles,[1032] with a broad interpretation of the admission requirement, opposed the idea of introducing border procedures, argueing that they run counter to the acknowledged need to admit refugees into the territories of Member States, which includes non-rejection at the frontiers without fair and effective procedures for determining status and protection needs.[1033]

This argument is not valid, as it is noted above both in connection with the 1951 Refugee Convention and the human rights instruments that places such as ports, airports and border posts are considered within the territory of a State where States bear the responsibility of refugees. Therefore, as long as a fair system of asylum procedure is at place, having applications processed at the border alone would not be contrary to the admission requirement.

Article 30 is one of the rare provisions in the European asylum acquis that contains an explicit reference to the admission requirement. Accordingly, Member States may provide for procedures in order to decide at the border or transit zones on applictions made at such locations. This provision also refers to the Chapter II of the Directive which also includes the right to remain in the Member State pending the examination of the application under Article 7.[1034] Therefore, a right to admission in the territory can be deduced from this Article.

On the other hand, paragraph (2) of Article 35 containes an exception to the main rule and it allows Member States to maintain their procedures in force on 1 December 2005, derogating from the basic principles and guarantees enshrined in Chapter II, in order to decide at the border or in transit zones as to whether applicants for asylum who have arrived and made an application for asylum at such locations, may enter the territory. This Article however, does not bring an exception to the right to remain at the border or trasit zones since this right is reserved at paragraph 3 (a).

[1032] Eurpean Council on Refugees and Exiles is an umbrella organization of 70 refugee-assisting member agencies in 25 European countries. See www.ecre.org [visited on 07.09.2006].
[1033] See European Council on Refugees and Exiles, Comments on the Amended Proposal for a Council Directive on Minimun Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 5 March 2003, p. 22.
[1034] It has to be noted however, that the right to remain in the Member State pending the examination of the asylum application has certain exceptions under Article 7. For an analysis of this issue see infra title 'Prohibition of Refoulement under the Asylum Procedures Directive'.

Therefore, Member States are not allowed to return asylum seekers from the border even if they resort to the exception in Article 35(2).

The Article provides further guarantees for the situations where Member States maintain their existing systems by virtue of paragraph (2). In case that the permission to enter is refused, the comptetent decision making authority is required to state the reasons in fact and in law, why the application for asylum is considered as unfounded or as inadmissible.[1035] Furthermore, Member States are required to ensure that the decision concerning the entry of the applicant is taken within a reasonable time. In the event that a Member State has not taken this decision within four weeks time, the Member State concerned is oblidged to grant entry to its territory, in order to have the applicants' asylum request processed in accordance with the provisions of the Directive.[1036] Therefore, the Directive not only requires Member States to allow the asylum seeker to remain at the border or transit zones, but also, in certain instances, it compelles the State to allow him/her to cross the border.

On the other hand, the situation is quite different when mass influx situations are concerned. The Temporary Protection Directive which, was adopted four years before the Asylum Procedures Directive had been criticised by UNHCR with regard to the absence of an explicit admission requirement, as follows:

"The Draft Directive does not explicitly deal with the admission to the territory of asylum-seekers. UNHCR, though acknowledging the specific scope of the Directive, considers that given the fundamental importance of the principles of admission to the territory and non-refoulement, including non-rejection at the frontier, these should have been explicitly recalled in the text. In any event, this obligation is based inter alia on preambular paragraph 10 (recalling Member

[1035] Asylum Procedures Directive, Article 35 (3)(3).
[1036] *Ibid.,* Article 35 (3)(4).; UNHCR has criticised this Article for that it allows confinement of asylum seekers without judicial review for up to four weeks. Confinement at the border is regarded as detention in line with the jurisprudence of the ECtHR. Moreover, paragrapgh (2) excludes the safeguards in Chapter II including the right to challenge the legality of detention in Article 18 (2). (UNHCR, Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 10 February 2005, p. 48.).

States' international obigations as regards refugees and the 1951 Convention/1967 Protocol.)"[1037]

The wording of Article 35 (5) of the Asylum Procedures Directive however, indicates that the preambular paragraph 10 of the Temporary Protection Directive was not exactly meant to be undertood as UNHCR presumed. The provision reserves mass influx situations or other particular types of arrivals where the application of border procedures becomes practically impossible. In those situations, the use of procedures stipulated in paragraphs 1, 2 and 3 of the Article 35 is not compulsory since the pragraph 4 merely indicates that *"those procedures may also be applied where and for as long as these third country nationals or stateless persons are accommodated normally at locations in proximity to the border or transit zone."* What is more striking in this wording however, is that the asylum seekers may be accommodated near the border or transit zone in mass influx cases. The Article implies the security zones outside the frontier similar to the ones established by the Turkish Government during the so called 'Operation Iraqi Freedom in 2003.[1038] Therefore, contrary to the Conclusions of the Executive Committee in this respect, the Asylum Procedures Directive does not contain a non-rejection requirement at the border when mass influx situations are concerned.

(2) Visa Policy

European Union's visa policy under the Schengen Acquis[1039] constitutes a major barrier for asylum seekers to have access to international protection. A commentator argued that strict visa requirements which have been introduced create

[1037] UNHCR, Annotated Comments on Council Directive 2001/55/EC of 20 July 2001, p. 7.
[1038] See Arthur C. Heltoni Gil Loescher, Turkey Prepares for a Refugee Influx from Iraq, 11 March, 2003,http://www.cfr.org/publication/5714/turkey_prepares_for_a_refugee_influx_from_iraq.html [visited on 16.06.2006].
[1039] 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 Controls at the Common Frontiers (the Schengen Agreement), June 14, 1985, 30 I.L.M. 73; Convention Applying the Schengen Agreement of 14 June 1985 Between the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, June 19, 1990, 30 I.L.M. 84.

such legal obstacles for refugees that this process threatens to undermine the entire institution of asylum.[1040]

The Union's visa policy is based on a list of third countries whose nationals must be in possession of visas when crossing the external borders, the so called 'black list'[1041], and a list of third countries and those whose nationals are exempt from that requirement so called the 'white list'.[1042] The black list currently contains 135 States, and the white list is much shorter with only 43.[1043]

The deterrence of the visa policy is compelemented with the Schengen Information System, so called 'SIS', which is a database established in order to compensate the security deficit created by the abolution of internal border controls under the Schengen Acquis. The database contains variety of security related data[1044] including that of illegal aliens. Article 96 of the Convention from 19 June 1990 Applying the Schengen of 14 June 1985 concernes data relating to aliens who are reported for the purposes of being refused entry to the Schengen zone.[1045]

The criteria for registering aliens on the database set forth in article 96 as, posing:

*"a threat to public order or national security and safety"*or having been *"subject of a deportation, removal or expulsion measure which has not been rescinded or suspended...where appropriate, residence, based on non-compliance*

[1040] Nathwani therefore, searches for a robust rationale for asylum policy in his article in order to show that asylum is compatible, even complimentary, with a policy of strict immigration control, (see Niraj Nathwani, *"The Purpose of Asylum",* International Journal of Refugee Law, Vol. 12, No. 3, 2000, p. 356).

[1041] See Costello, p. 27.

[1042] See Council Regulation 539/2001 of 15 March 2001 Listing the Third Countries Whose Nationals Must Be in Possession of Visas When Crossing the External Borders and Those Whose Nationals are Exempt From That Requirement, OJ L 81/1 of 21.3.2001.

[1043] See Council Regulation 539/2001 of 15 March 2001 as Amended by the Council Regulation 2414/2001 of 7 December 2001, OJ L 327/1 of 12.12.2001; Council Regulation 453/2003 of 6 March 2003 OJ L 069/10 of 13.03.2003; Council Regulation No 851/2005 of 2 June 2005, OJ L 141/3 of 04.06.2005.

[1044] See Convention from 19 June 1990 Applying the Schengen Agreement of 14 June 1985, Articles 95-100.

[1045] As of 1 February 2003, there were a total of 1,266,142 records relating to persons in the SIS. Of this total 390,368 records related to aliens. Of the 875,774 remaining records, 89% are article 96 alerts, http://www.statewatch.org/news/2005/apr/08SISart96.htm [visited on 08.09.2006].

with national regulations on the entry or residence of aliens."

An Article 96 entry of an alien's name on the SIS will lead to refusal of his/her admission to any Member State. It is also reported that persons whose visa request is refused are likely to have their names entered in the SIS, leading to exclusion from the entire Schengen zone, possibly indefinitely.[1046]

The visa regime summarized above negatively affects the possibility of asylum seekers to have access to international protection through several channels. Firstly, since the Article 35[1047] of the Asylum Procedures Directive allows Member States to derogate from the safeguards in Chapter II thereof, asylum seekers who cannot succeed in having themselves admitted to the territory will possibly be subject to border procedures with inferior standards. As a result of the visa requirements for the States in the black list, it is less likely that an asylum seeker from a refugee creating country will have admission to the territory.

Another constraint related to visa requirement arises from the Article 36 of the Asylum Procedures Directive. Whether an asylum seeker's entry into the territory of a State is 'illegal' or not may depend on his/her possession of a valid visa. Since almost all the refugee creating States are on the black list, the vast majority of asylum seekers enter the Member States illegally.

Article 36 of the Asylum Procedures Directive provides that a Member State may provide no, or not full examination for an aslyum application which is submitted by a person who is seeking to enter or has entered into the territory illegally from a safe third country.[1048] Therefore, illegality of an entry may deem an application manifestly unfounded under the European asylum acquis. [1049]

Finally, sometimes possession of a visa may be problematic for an asylum seeker under the European asylum acquis. Possession of a visa may under certan

[1046] Piaras Mac Éinrí, Migration Policy in Ireland: Reform and Harmonisation, December 2002, National Consultative Committee on Racism Publication, p. 43.
[1047] Also see Article 24.
[1048] For a detailed analysis of the 'safe third country' notion under the Asylum Procedures Directive see infra title 'Prohibition of Refoulement Under the Asylum Procedures Directive'.
[1049] See Costello, p. 62.

circumstances result in the asylum applicant be transferred to a country other the safe heaven he/she aimed at under the Council Regulation 343/2003.[1050] Article 9 of this Regulation stipulates posession of a visa, in certain instances, as a ground for engaging the responsiblity of a State which, accordingly is required to admit the person concerned. On the other hand, it is a fact that only about 40 per cent of the approved transfers under the this framwork can be effected since, in many cases, upon learning of the transfer decisions, the applicant disappears.[1051]

(3) Protected Entry Measures

Protected entry measures is a notion that is understood:

"to alow a non-national to approach the potential host state outside its territory with a claim for asylum or other form of international protection, and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final".[1052]

Protected entry measures resemble the old notion of diplomatic asylum on the point that they both involve a protection seeker to approach diplomatic missions of a State outside its territory with a protection claim. Noll and Fagerlund underlined the differences between these two notions. Accordingly, diplomatic asylum is an exceptional practice and is as a rule not based on a set-up of rigid legal rules, allowing them to be described as a system, whereas protected entry measures typically operate under a fixed normative framework. Secondly, diplomatic asylum inevitably involves confrontation with the persecutor State with the State represented by the diplomatic mission.[1053] On the other hand, protected entry measures always

[1050] See Article 9 of the Council Regulation 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, OJ L 50/1 of 25.2.2003. (Herein after referred to as 'Dublin II Regulation'.)
[1051] See Legomsky, p. 580.
[1052] Communication from the Commission COM (2004) 410 final of 4 June 2004 to the Council and to the European Parliament on the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin: Improving Access to Durable Solutions, para. 14.
[1053] Gergor Noll, Jessica Fagerlund, Safe Avenues to Asylum?: The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests, the Danish Centre for Human Rights and UNHCR, April 2002, p. 15.

involve a close cooperation with the State where the agents of the potential host State is situated. This cooperation most often is formulated in the form of a bilateral international law treaty betwen the two States.

The major distinction however, that should addeded to the above mentioned authors' suggestions is hidden at the aims of these two notions. Diplomatic protection is, as implied by its name, a pure protection oriented notion whereas, protected entry measures also have the aim of controlling and sometimes even barring entry to the potential host State parallell to a protection purpose.

The visible aims of protected entry measures are, as the Commission presents it, *"to offer rapid access to protection without refugees being at the mercy of illegal migration or smuggling gangs or having to wait years for recognition of their status"*[1054] or identifying candidates for protection at the earliest stage possible in order to avoid fiscal, social and other costs born by both the protection seeker and the host country.[1055]The prevailing aim of protected entry measures in the European example however, is shifting the burden of asylum seekers or other protection seekers to third countries.

The European Neighbourhood and Partnership Strategy[1056] which was developed by the Commission in line with the partnership strategy suggested by the Tampere European Council summit and subsequently elaborated on in the Hague Programme, forms the policy framework through which, the cooperation mechanism of protected entry measures is crafted. In the view of Commission, the aims of European Neighbourhood Policy are:

"to build a zone…in the interests of both the neigbouring countries and the EU itself. It offers partners a relationship that goes beyond cooperation to include

[1054] Communication from the Commission COM (2004) 410 final of 4 June 2004 to the Council and to the European Parliament on the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin: Improving Access to Durable Solutions, para. 12.
[1055] See Noll, Fagerlund, p. 3.
[1056] The strategy was introduced by the Commission by the Communication COM(2003) 104 final of 11 March 2003 on Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours. It was subsequently elaborated on by the Communication from the Commission COM(2004) 373 final.

closer political links and an element of economic integration, as well as assistance with reforms to stimulate economic and social development. In turn, ENP partners accept precise commitments ...and to cooperate on key foreign policy objectives..."[1057]

Among the committments of the partner countries[1058] the ones related to the movement of persons are particularly notable. For instance, the EU/Tunisia Action Plan[1059] contains the following undertakings on behalf of the Tunisian Government in its paragraph 46:

"- establish an open and constructive dialogue between Tunisia and the EU on visas, including ways of facilitating visa issue procedures; - in order to facilitate the movement of persons, examine, within the existing structures, possibilities for facilitating, simplifying and speeding up the visa issue procedures for certain jointly agreed categories of persons in accordance with the acquis."

Considering the context of the materials above, there is no doubt that the initial steps for intitutionalizing protected entry measures have been taken starting from the year 2005.

On the other hand, as noted above, not all Member States have until so far agreed on this policy of outsourcing the asylum procedures,[1060] therefore; the Hague Programme merely speaks of pilot protection programmes to be launched in this regard and encourages those Member States who are willing to take part on such joint ressettlement programme.[1061]

[1057] European Commission, European Neighbourhood Policy: A Year of Progress (press release, reference IP/05/1467), 24.11.2005, Brussels. Available at http://www.europa.eu/rapid/ [visited on 08.09.2006].
[1058] As of 08.09.2006, the partner countries concerned are Armenia, Algeria, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestinian Authority, Syria, Tunisia, Ukraine. See http://ec.europa.eu/world/enp/documents_en.htm [visited on 08.09.2006].
[1059] Available at http://ec.europa.eu/world/enp/documents_en.htm [visited on 08.09.2006].
[1060] UNHCR, The State of the World's Refugees 2006, Chapter 2 Safeguarding Asylum: Box 2.2 Outsourcing Refugee Protection: Extraterritorial Processing and the Future of the Refugee Regime.
[1061] See The Hague Programme, para. 1.6.2.

(4) Interception Measures

Strengthening border controls and extra-territorial interception measures is another method for deterring asylum and protection seekers from targeting EU Countries as safe heavens. Member States are particularly concerned about sea vessels which appear to be the most and usually the only feasible way of entering the EU territory, considering the high standards of the Schengen acquis for obtaining an entry visa. According to the the Assistant High Commissioner for Protection of UNHCR, Erika Feller, until May 24th within the year 2006, the number of persons arriving only in the Canary Islands archipelago by boat was around 7,400 people, most of whom were at various stages of dehydration and hypothermia after surviving their hazardous journey. Feller also observed that as illegal migration had become more difficult, African migrants kept trying to reach Europe, taking greater risks and therefore, she warned the authorities about the rising death toll.[1062]

The Asylum Procedures Directive instructs, in principle, not to refoule asylum seekers who arrive at the border posts, ports or transit zones of airports. On the other hand, the Directive is silent about extra-territorial interception measures, thus this appears as a viable option for the Member States to escape responsibility. The Presidency Conclusions of the Laeken European Council which was held on 14-15 December 2001 contained a specific paragraph on sea borders implying that the European Union intended to resort this option. The European Council suggested that : *"[i]nternational cooperation between Member States, as well as between them and non-member countries will in particular have to involve stepping up "pre-border" checks and joint processing of illegal immigrants intercepted at sea".*[1063]

Acting upon the suggestion of the European Council in the Laeken Summit, the Council adopted a Programme of measures to combat illegal migration across the

[1062] UNHCR News Stories, *"As Thousands Risk Their Lives at Sea to Reach Europe, UNHCR Calls for a Broad Joint Response to Deal with the Challenge"*, 24 May 2006, available at http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=447489cf2 [visited on 09.09.2006].

[1063] Laeken European Council, Presidency Conclusions, 14-15 December 2001, para. 26, available at http://europa.eu/european_council/conclusions/index_en.htm [visited on 09.09.2006].

maritime borders of the European Union on 21 October 2003.[1064]

The Programme has adopted the concept of virtual maritime border in order to reinforce the legal borders of Member States by means of joint operations and specific measures in the places where illegal flows originate or transit. The Programme gives detailed information about the European Union's understanding and practice of the Law of the Sea with regard to interception measures. The Programme draws a distinction between types of joint actions according to the place where the action takes place, on the high seas, in ports, within territorial waters or at contiguous zones. It indicates that the costal State has full jurisdiction over vessels anchored within its internal waters and in its territorial waters. At this point it is noted that the innocent passage exception does not apply to vessels heading for its internal waters when illegal migration is concerned by virtue of Article 19(2)(g) of UNCLOS and the coastal State may also exercise criminal jurisdiction for the purpose of preventing or punishing illegal migration, in a contiguous zone according to Article 33 of UNCLOS. Whereas, the programme admits that UNCLOS does not allow for a State other than the flag State to intercept a ship and inspect it at the High Seas on illegal immigration grounds. This is however, possible where the vessel has no nationality or its nationality is in doubt. A critical question in this regard is how to respond to vessels with a flag. It is noted that inspection of a vessel of another State at the High Seas would be lawful if the consent of the flag State is obtained. In this respect, the Programme aims at initiating joint sea patrols carried out by the navies of Member States and of non-member countries concerned by illegal migration flows.[1065]

The program is considerably comprehensive on how to respond to illegal migration however, there is a significant point missing in the document; although, it was prepared for the Strategic Committee on Immigration, Frontiers and Asylum, there is not even single reference to the treatment of refugees. It speaks of "detection

[1064] Council Programme 13791/03 of 21 October 2003 on Measures to Combat Illegal Migration Across the Maritime Borders of the European Union, , available at http://www.statewatch.org/news/2003/nov/137911.en03.pdf#search=%2213791%2F03%20%20migration%22 [visited on 09.09.2006].
[1065] *Ibid.,* para. 26.

of false documents" however, it does not mention how the authorities searching a vessel should respond if a passenger attempts to claim asylum. The document simply does not make any distinction between illegal migrants and refugees on the sea. Considering that a vast majority of refugees use false documents, this approach raises questionmarks on the interception measures applied by the EU.

The Programme also refers to the key role assigned to the "Common Unit of External Border Practitioners" to coordinate joint operations and measures at sea and in ports which was established on the basis of a plan approved by the Justice and Home Affairs Council on 13 June 2002. It is noted that Member States had initiated major joint operations at the sea borders of the Union.[1066]

Another type of interception measure which, is less common than interception at sea, is the interception of persons at international airports of third countries. This practice was illustrated by a case recently decided by the House of Lords of the United Kingdom. R. (ex parte European Roma Rights Centre et al.) v. Immigration Officer at Prague Airport and another (UNHCR intervening).[1067]This was a case that the the lawfulness of procedures adopted by the British immigratrion authorities atn the Prague Airport in July 2001 was contested. It was known that the number of Roma seeking asylum in the United Kingdom had risen steeply in the recent years due to discrimination within the Czech society in employment, education and access to services as well as sporadic attacks by 'skinheads'. Czech citizens could easily to travel to the United Kingdom in the absence of a visa requirement. In February 2001, however, the Governments of the United Kingdom and the Czech Republic concluded an agreement to the effect that British immigration officers were posted to Prague Airport to 'pre-clear' all passengers before they boarded on flights to the United Kingdom. The object of the agreement was clearly to prevent the asylum seekers from fleeing to the United Kingdom. The pre-clearence appeared to have served the purpose considering the fall of asylum

[1066] *Ibid.* para. 5.
[1067] *R. (ex parte European Roma Rights Centre et al.) v. Immigration Officer at Prague Airport and another (UNHCR intervening)*, House of Lords of the United Kingdom, Judgement of 9 December 2004.

applications by the Roma: In three weeks before the operation was commenced there were over 200 asylum claims made by the Czech nationals at entry points in the United Kingdom. This number had fallen down to 20 in the following three weeks. This practice was challenged by six Czech citizens of Roma ethnic origin who had been refused entry to the United Kingdom. The applicants invoked the prohibition of non-refoulement in the 1951 Refugee Convention and the prohibition of non-discrimination. The House of Lords agreed with the High Court's ruling in 2002 on the point that the non-refoulement principle in the 1951 Refugee Convention, did not stop the United Kingdom to prevent a potential refugee from reaching its border. The Court followed the Sale v. Haitian Centers Council judgement of the United States Supreme Court which rejected attributing extra-territorial effect to the non-refoulement principle. The House of Lords however, found a violation on the grounds of non-discrimination since the Roma were ethnically discriminated against other groups.

Given these forms of interception practices, the Council adopted a Regulation setting up a "European Agency for the Management of the External Borders"[1068] in October 2004 for the purpose of assisting Member States to implement Community legislation on the control and surveillance of the external borders (land and maritime borders and international airports) and to coordinate operational cooperation between competent authorities of Member States. The FRONTEX Agency which is located in Warsaw has become operational on 3 October 2005.

(5) Carrier Sanctions

1990 Schengen Implementation Agreement oblidges all Members States to implement carrier sanctions on transportation by air, sea or land. Article 26 (b) of the Agreement oblidges the carrier *"to take all necessary measures to ensure that an alien carried by air or sea is in possession of the travel documents required for entry into the territory of the Contracting Parties."*

[1068] Council Regulation 2007/2004 of 26 October 2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

This was followed by the Council Directive 2001/51/EC of 28 June 2001[1069] to harmonize penalties against carriers transporting undocumented passengers.

R. v. Immigration Officer at Prague Airport and another was an exceptional case that pre-clearance measures applied in the airport of a third country since the Member States usually do not need such measures due to the carrier sanctions imposed on carrier companies that fail to control the validity of documentation for entering Member States. Since all refugee creating countries are in the black list of the European Union, it is extremely rare that an asylum seeker will have access to the territory of Member States particularly through air, without possessing a visa. And in the event that there is a visa or documentation requirement, the carrier company is oblidged to make sure that it is valid. In this environment, the carrier sanctions make it impossible for potential asylum seekers from black list countries to travel to EU Member States illegally.

Air carrier sanctions are often justified by States as a tool for controling irregular migration. However, in practice it is observed that these sanctions drive people in the hands of traffickers and smugglers.[1070] This is particularly the case for refugees, since refugees are by definition, persons who are unable to avail the protection of their governments. In most cases, it is the government that causes the well-founded fear of persecution. Hence, Article 31 of the 1951 Refugee Convention acknowledged that a refugee may not be able to obtain a valid passport necessary for travelling legally. Therefore, the ability to identify and distinguish persons in need of protection is of grave importance for the asylum systems. The carrier sanctions are criticised for not being adequately capable of differentiating refugees from illegal migrants. This complex task that requires technical skills cannot be performed sufficiently by carrier personnel who lacks the necessary formation and the means for making such assessment. Furthermore, 1951 Refugee Convention imposes the

[1069] Council Directive 2001/51/EC of 28 June 2001 Supplementing the Provisions of Article 26 of the Convention Implementing the Schengen Agreement of 14 June 1985, OJ L 187/45 of10.7.2001.
[1070] Amnesty International, Comhlămh, Irish Commission for Justice and Peace et al., The Denial of Protection: A Joint Statement on Proposed Carriers' Liability Legislationin Ireland, December 2001, p. 2, available at http://www.irishrefugeecouncil.ie/policy01/carriersliability.doc [23.09.2006]
. See also Ruwantissa I.R. Abeyratne, *"Smuggling of Illegal Migrants by Air – Air Carrier Liability"*, Air & Space Law,Vol. XXV, No. 4-5, 2000, p. 6.

responsibility for refugee status determination to the States Parties. Whereas, imposition of carrier sanctions results in the privitization of such services since they force the staff of carrier companies to adopt the role of the immigration authorities of Member States. Therefore, carrier sanctions are also conducive to accoutability problems.[1071]

b) Removal From the Territory of a Member State

The European asylum acquis also shows a tendency of shifting the burden of protection seekers towards third countries through secondary legislations that directly or indirectly serve for this purpose. Several instruments adopted in this context form a comprehensive system covering variety of statuses and capable of mobilizing all relevant resources and actors including the immigration authorities of transit or source countries.

(1) Enforced Return Under the Temporary Protection Directive

The Temporary Protection Directive establishes a return mechanism with exceptionally high standards within the EU asylum acquis. Having been adopted before the 11 September 2001, the Direcitve is characterized by the Tampere spirit which has a clear fundamental rights perspective that gradually became less visible in the subsequent instruments. Unfortunately, this Directive does not have a dominant position in the overall asylum framework of the Union as an apparatus to be activated in exceptional cases subject to a political negotiation process. The temporary protection regime is established by a Council decision adopted by qualified majority on a proposal from the Commission. The process is commenced by a proposal of the Commission including a description of the specific groups of persons to whom the temporary protection will apply, the date on which the temporary protection will take effect and an estimation of the scale of the movements

---

Jean-Francois Durieux (Deputy Director, Bureau for Europe, UNHCR), Opening Statement of the Round Table on Carriers' Liability Related to Illegal Migration, 30 November 2001, Burssels, available at http://www.stranieriinitalia.it/briguglio/immigrazione-e-asilo/2001/dicembre/unhcr-vettori.html [visited on 09.09.2006].

of displaced persons.[1072]

Upon receiving such proposal, the Council may introduce the temporary protection for the displaced persons concerned, by a decision which shall include a description of the specific groups to whom the temporary protection applies, the date on which the temporary protection will take effect, information received by Member States on their reception capacity, information from the Commission, UNHCR and other relevant international organizations.[1073]

The duration of the temporary protection is initially one year. Unless terminated by a decision of the Council. This period may be extended automatically by six monthly periods for a maximum of one year. It is possible however, to extend the temporary protection for another year by a decision of the Council in the event that the reasons for temporary protection persist.[1074] Consequently, the maximum period of protection provided under the Directive is three years.

The temporary protection can be ended in two ways. The first one is the expiry of the maximum duration above. And the second one is by a decision adopted by the Council by qualified majority on proposal from the Commission, which shall also examine any request by a Member State. Upon receiving such a proposal from the Commission, the Council has to examine whether the situation in the country of origin is such as to permit the safe and durable return of those granted temporary protection with due respect to human rights and fundamental freedoms and further, the Member States' obligations regading non-refoulement.[1075]

A critical question to be answered with regard to the non-refoulement principle is what to do after the ending or termination of the temporary protection regime. In this respect, Article 20 of the Directive provides that the general laws on protection and on aliens in the Member States should apply when the temporary protection ends. Considering the express references to the non-refoulement principle

[1072] See Temporary Protection Directive, Article 2.
[1073] *Ibid.,* Article 3.
[1074] *Ibid.,* Article 4.
[1075] *Ibid.,* Article 6.

in Articles 3(2) and 6(2) of the Directive, it is possible to conclude that the Directive imposes the Member States to make an assessment according to their non-refoulement obligations both under the 1951 Refugee Convention and the human rights instruments. On the other hand, Article 20 reserves the Articles 21, 22 and 23 which, contain specific rules governing the return of displaced persons whose temporary protection status has ended. Accordingly, Member States shall try to achieve the voluntary return of persons enjoying temporary protection status. At the end of the temporary protection, Member States may decide to extend the obligations individually to persons who have been covered by the temporary protection and are benefiting a voluntary return programme. The responsiblities of the Member State that are extended as such does continue until the date of return.[1076]

The rules on the enforced return of the persons are of more relevance to the prohibition of refoulement. In this regard, the Directive provides that return has to be conducted with due respect for human dignity. Member States shall consider any compelling humanitarian reasons which make return impossible or unreasonable in specific cases.[1077] Continuation of the conflict in a country of origin, for instance, can be considered as a compelling humanitarian reason that should prevent return in this context. This rule provides a much wider protection formula compared to the one in the Article 33 of the 1951 Refugee Convention.[1078]

The text initially proposed by the Commission was changed during the drafting process as to include more detailed rules on the procedure and rights of those persons being forced to return, in line with the comments of the UNHCR.[1079] Accordingly, Member States have to take the necessary measures concerning the conditions of residence of persons who have enjoyed temporary protection and who cannot, in view of the state of health, reasonably be expected to travel; where for instance they would suffer serious negative effects if their treatment was interrupted. They shall not be expelled as long as this situation continues.[1080] This provision is

[1076] *Ibid.,* Article 21.
[1077] *Ibid.,* Article 22.
[1078] See Kerber, p. 209.
[1079] See UNHCR, Annotated Comments on Council Directive 2001/55/EC of 20 July 2001, p. 15.
[1080] See Temporary Protection Directive, Article 23 (1).

clearly influenced by the jurisprudence of the ECtHR which treated this topic under the Article 3 of ECHR.[1081]

(2) Prohibition of Refoulement Under the Qualification Directive

The rules regarding non-refoulement stipulated in the Qualification Directive concern both refugees and those who enjoy the subsidiary protection status created by this Directive. Therefore, it has a central role in the entire asylum framework of the Union together with the Asylum Procedures Directive. Prohibition of refouelement is expressly stipulated in Article 21 of the Qualification Directive. This provision however, contains certain exceptions that raise concerns that can be grouped under two titles.

Firstly, although the Article (2) of the Recital speaks of *"full and inclusive application of the Geneva Convention"* and affirms the principle of non-refoulement thereof, the exceptions set forth in Article 21 does not exactly correspond to the standards under the 1951 Refugee Convention.

Article 21 (2) provides:

"[w]here not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognized or not, when: (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or (b) he or she, having been convicted by a final judgement of a particularlly serious crime, constitutes a danger to the Community of that Member State.

The Council Directive has been criticised for lacking a procedural safeguard that is of complementary nature to the principle of non-refoulement. Article 32 of the 1951 Refugee Convention stipulates that a refugee lawfully residing in the host country shall be allowed *"a reasonable period within which to seek legal admission into another country"* in the event of expulsion. This safeguard is particularly

[1081] See sub-title 'Prohibition of Torture, Inhuman or Degrading Treatment or Punishment' under the title of 'European Convention on Human Rights.'

important when explusion to the country origin is envisaged.[1082] The Asylum Procedures Directive which was subsequently adopted for the prupose of regulating the procedural aspects of asylum is far from satisfying this requirement as well. The Proposal for a Directive on common standards and procedures in Member States for Returning Illegally Staying Third-Country Nationals[1083] however, will solve this problem if adopted as it contains a two step procedure which provides for leaving an appropriate period for voluntary departure to a transit or another third country as well as the country of origin upto four weeks.[1084]

Secondly, altough the complementary approach is among the *reason d'etre* of this Directive, it is not clear how the exceptions therein would be compromised with the absolute protection provided by the human rights instruments such as ECHR, CAT and the ICCPR. Recital (36) indicates that the implementation of the Directive should be evaluated taking into consideration the evolution of the international obligations of Member States regarding non-refoulement. It appears however that by confining itself to the standards of 1951 Refugee Convention, in this respect, the Directive might have missed the changes in their international obligations which have already taken place. As noted above, the only reasonable explanation for not having reflected the absolute potection of human rights instruments may be the potential gaps between the protected scope of the refugee protection and that of the human rights instruments, particularly with regard to the definitions of persecution and torture, inhuman or degrading treatment or punishment.

(3) Prohibition of Refoulement Under the Asylum Procedures Directive

Asylum Procedures Directive constitutes one of the cornerstones of the European asylum acquis. It is however, a disappointment in many respects for reflecting EU's decreasing commitment to the spirit of the 1951 Refugee

[1082] See UNHCR, Annotated Comments on the Qualification Directive, p. 35.
[1083] Proposal from the Commission COM/2005/0391 final of 1 September 2005 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-country Nationals, COD 2005/0167. (Herein after referred to as 'Draft Return Directive'.)
[1084] See *Ibid*., Articles 3(c) and 6(2).

Convention. It undermines many of the gains of the asylum framework after the adopion of the Amsterdam Treaty, particularly that of the Qualification Directive.[1085] The deficiencies of the hybrid decision making mechanism of the transition period had deep impacts particularly on the way 'first country of asylum', 'safe third country' and 'safe country of origin' provisions were formulated in the Asylum Procedure Directive. The Commission had to revise its initial proposal of 2002 due to lack of political agreement and had to lower the standards and expand the exceptions in order to achieve consensus among Member States.[1086] These restrictions further contributed to the burden shifting tendency of the European Union. This title focusses on the threats posed by such restrictive mechanisms over the non-refoulement rule.

According to the Article 7 of the Directive, applicants are allowed to remain in the Member State until the determining authority has made a decision in accordance with the procedures at first instance. Unlike the enforced return provisions of the Temporary Protection Directive, no detailed provisions on the safe return of rejected asylum seekers are provided in this context. The Draft Return Directive aims at restoring this deficiency by introducing certain additional safeguards.

Secondly, exceptions to the right to remain set forth in Article 7 (2) of the Asylum Procedures Directive has been subject to criticism. This paragraph provides:

"2. Member States can make an exception only where, in accordance with Articles 32 and 34, a subsequent application will not be further examined or where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations in accordance with a European arrest warrant or

[1085] See Costello, p. 36; See also a press release of High Commissioner for Refugees, Ruud Lubbers who *"expressed concerns about …. draft European Union legislation, warning that several provisions … would fall short of accepted international legal standards…could lead to an erosion of the global asylum system, jeopardizing the lives of future refugees."* (UNHCR press release, "*Lubbers Calls for EU Asylum Laws not to Contravene International Law"*, 29 March 2004).

[1086] The Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status 24 October 2000 [2001], OJ C62 E/231 had to be amended by the Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 18 June 2002 [2002], OJ C291 E/143.

otherwise, or to a third country, or to international criminal courts or tribunals."

This paragraph raises concerns about standards applicable for protection seekers who are subject to an extradition request. UNHCR warned Member States that implementing legislation should ensure that extradition does not directly or indirectly contribute to refoulement of an asylum seeker.[1087] Extradition procedures are not among the exceptions of non-refoulement principle under the Qualification Directive however, denying the persons concerned the right to remain under the Asylum Procedures Directive is a step backwards from the standards enshrined in the Qualification Directive and it is conducive to indirect refoulement. It is also important to recall that extradition is not excluded from the prohibition of refoulement under the human rights instruments either, therefore, textual interpretation of Article 7 (2) would inevitably constitute a violation of these instruments as well. It is further noticeable that similar to the Article 7, Article 35(3)(a) of the Directive also recognizes the right to remain at the border or transit zones of a Member State, as part of the border procedures and subject to the limitations in Article 7.

The major threat to the non-refoulement principle under the Asylum Procedures Directive however, is not posed by the exceptions to the right in Article 7, but by the mechanisms that hinder the effectiveness of the decision making procedures through considering the applications inadmissible and forcefully returning the applicants to third countries or the country of origin.

The practice of returning asylum-seekers to countries that are deemed to be safe is a European invention[1088] which is based on the vaguely formulated Article 31 of the 1951 Refugee Convention providing that:

[1087] UNHCR, Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, p. 10.

[1088] Joanne Van Selm Thornburm, Access to Procedures 'Safe Third Countries', 'Safe Countries of Origin' and 'Time Limits'(Background Paper Global Consultations), Geneva 2001, p. 4; As indicated above, The Council adopted three Resolutions in 1992, commonly known as the 'London Resolutions' which, intended to approxiamate the Member States' practice on manifestly unfounded cases, safe third country and safe third country of origin rules. 'Council Resolution on a Harmonized Approach to Questions Concerning Host Third Countries'; the 'Council Resolution on Manifestly Unfounded Applications for Asylum' and 'Conclusions on Countries in Which There is no Serious Risk of Persecution'.

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

The reference to 'coming directly' is interpreted as to imply a requirement that asylum seekers shall apply for asylum at the first opportunity. This mode of interpretation obviously goes against the purpose of Article 31, which is to protect asylum seekers who are forced to enter the territory of a State Party illegally from being subject to penalties.

Article 24(2) of the Directive lists the circumstances that a Member State may consider an application for asylum inadmissible. Accordingly an asylum application will be considered inadmissible if:

- Another Member State has granted refugee status;
- A non-member State is considered as a first country of asylum;
- A non-member State is considered as a safe third country according to Article 27;
- The applicant has been granted a status equivalent to the rights and benefits of the refugee status by virtue of theQualification Directive
- The applicant is allowed to remain in the territory of the Member State concerned on some other grounds which protect him/her against refoulement pending the outcome of a procedure for the determination of status pursuant to the last mentioned point,
- the applicant has lodged an identical application after a final decision;
- a dependant of the applicant lodges an application, on his/her behalf, where no justification for a separate application exists.

Among these grounds of inadmisibility, the second and third are particularly problematic with regard to the non-refoulement principle. The 'safe country of origin' concept in Article 31 where a Member State is allowed to consider an application unfounded and the 'European safe third country' concept in Article 36 which, is applied as part of the border procedures where a Member State may reject examining the asylum application must also be added to this group of problematic concepts in the Directive.

(a) First Country of Asylum

A country can be considered as a 'first country of asylum' under Article 26 of the Directive if the applicant has been recognised in that country as a refugee and he/she can still avail himself/herself of that protection or he/she otherwise enjoys sufficient protection in that country, including benefiting from the principle of non-refoulement. The applicant must be re-admitted to the country concerned in order for Article 26 to be applicable in a particular case. In applying the concept of first country of asylum to the particular circumstances of an applicant for asylum Member States may take into account Article 27(1).

A 'first country of asylum' is distinguished from a 'safe third country' on the point that the applicant has already been granted some legal status alowing him/her to remain as an asylum seeker or as a refugee in a non-member State with all the guarantees which international standards attach to such status.[1089]

In its Conclusion No. 58 the Executive Committe of UNHCR underlined the need for preventing the irregular movements of refugees. In this regard, the Committee established that Refugees and asylum seekers who have found protection in a particular country, should normally not move from that country in an irregular manner in order to find durable solutions elsewhere but should take advantage of durable solutions available in that country. Thus refugees and asylum seekers may be returned to the first country of asylum if they are protected there against refoulement

[1089] UNHCR, Background paper No. 2, The Application of the "Safe Third Country" Notion and its Impact on the Management of Flows and on the Protection of Refugees, May 2001, available at http://www.unhcr.bg/global_consult/background_paper2_en.htm [visited on 11.09.2006].

and they are permitted to remain there and be treated in accordance with recognized basic human rights until a durable solution is found for them. On the other hand, the Committee warned that there might be exceptional cases in which a refugee or asylum seeker may justifiably claim that he/she has reason to fear persecution or his/her physical safety or freedom may be endangered in a country where he/she has previously been found protection. [1090]

In the light of the perspective above, UNHCR welcomed the incorporation of the 'first country of asylum' in the Asylum Procedures Directive. However, it criticised the fact that the term 'sufficient protection' in Article 26(b) was not defined in the text. Therefore, this term alone could not represent adequate safeguard or criterion when determining whether an asylum seeker or refugee could be returned safely to a first country of asylum. UNHCR further recommended to replace the term 'sufficient protection' with 'effective protection'. In this context, UNHCR sets forth a very concrete criterion to determine the effectiveness of protection, namely the countries where the UNHCR is engaged in refugee status determination under its mandate should not be accepted as first countries of asylum as UNHCR often undertakes such functions because the State concerned has neither the capacity to conduct status determination nor to provide effective protection.[1091]

While the 'first country of asylum' concept found some support from UNHCR, its compatibility with the 1951 Refugee Convention is still debated by schaolars. For instance, Legomsky rejects the use of 'first country of asylum' due to its certain common characterstics and consequences with the 'safe third country' concept. The writer first notes that there might be serious deifciencies in the procedures by which the destination country itself decides whether return is approapriate in a particular case. Secondly, he observes that resorting to the 'first asylum country' results in the effect of distributing the responsibility for refugee protection disproportionately on developing countries and on countries whose

[1090] See EXCOM Conclusion No. 58 (XL), 1989, Articles e, f and g.
[1091] See UNHCR, Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, p. 35.

frontiers are geographically the most accessible.[1092]

Van Selm has not rejected the concept totally however, warned that measures for sharing the responsiblity for protection could and should be considered if the number of applicants in the 'first country of asylum' appears significant in relation to its economic, social and political capacity to grant protection.[1093] Hence, UNHCR has also recommended, with regard to the Article 26 of the Directive, that the capacity of States to provide effective protection should be taken into consideration, particularly if they are already hosting large refugee populations.[1094]

It appears that the debate is to a great extent focussed on the burden of first asylum countries. In this respect, the answer to the problem must be given in the light of two recognized interests in the practice of 1951 Refugee Convention. The first one is 'voluntariness' of return. This principle should also be applied, as much as possible, in the case of return to third countries as well as the country of origin. And the second one is the burden sharing principle which has been expressed in a number of conclusions of the Executive Committee and in the asylum acquis of the Union. The 'first country of asylum' concept does serve neither of these principles but to the interest of the target countries which intend to shift the responsbility of refugees towards the transit countries which are already overburdened due to their geographical position.[1095] Therefore, 'first country of asylum' is also a part of the mechanism which is jeopardizing the lives of refugees.

(b) Safe Third Country

A 'safe third country' is differentiated from the 'first country of asylum' on the fact that, the applicant concerned has not yet found protection in a third country

[1092] See Legomsky, pp. 571-572.
[1093] See Van Selm, Access to Procedures 'Safe Third Countries', 'Safe Countries of Origin' and 'Time Limits', p. 57.
[1094] See UNHCR, Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, p. 35.
[1095] According to the figures provided by UNHCR the transit countries close to the refugee creating countries are already hosting vast majority of the refugees: *"Asia hosted more than a third of all the people of concern to UNHCR, 6.9 million or 36%, followed by Africa 4.9 million (25%), Europe 4.4 million (23%), North America 853,300 (5%), Latin America 2 million (11%) and Oceania 82,400 (0.4%)."* (see supra, UNHCR, Refugees by Numbers: 2005).

he/she had transited on the way to the host country. But it is presumed that he/she could have found protection there if he/she had claimed.[1096]

The Directive contains two types of 'safe third country' concepts. One of them is defined in Article 27 as part of the procedure inside the State territory, whereas the other one is the 'European safe third country', the so called 'super safe third country' defined in Article 36 which is formulated as a border procedure.

According to Article 27(1) Member States may apply the 'safe third country' concept only where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:

- Life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;

- The principle of non-refoulement in accordance with the Geneva Convention is respected;

- The prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and

- The possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the 1951 Refugee Convention.

Article 27 (2) contains further instructions to the national legislatures in transposing this rule into their domestic laws. Accordingly, the Member States have to adopt rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go that country. Secondly, Member States are expected to adopt rules on methodology which shall include a case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered

[1096] See UNHCR, Background paper No. 2, The Application of the "Safe Third Country" Notion and its Impact on the Management of Flows and on the Protection of Refugees.

to be generally safe. Thirdly, the applicant has to be permitted to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.

On the other hand, the Member States may apply the 'European safe third country' concept according to the Article 36(2) if the country concerned:

- Has ratified and observes the provisions of the 1951 Refugee Convention without any geographical limitations;

- Has in place an asylum procedure prescribed by law;

- Has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies; and

- Has been so designated by the Council in the common list of third countries in accordance with Article 36(3).

Unlike the 'safe third country' concept in Article 27, Article 36 (3) authorizes the Council, acting by qualified majority on a proposal from the Commission and after consultation of the European Parliament, to adopt or amend a common list of third countries that shall be regarded as safe third countries for the purposes of paragraph 1.

It is left to the Member States concerned however, to lay down in their respective domestic laws the modalities for implementing the provisions of paragraph 1 which, allows them to provide that no, or no full, examination of the asylum application of a person illegally entering from a safe third country, and the consequences of such decisions. These modalities must be adopted in accordance with the principle of non-refoulement under the 1951 Refugee Convention.[1097]

UNHCR has been less willing to accept the 'safe third country' concept compared to the 'first country of asylum' notion. In this regard, it has consistently

[1097] See Asylum Procedures Directive, Article 36(4).

expressed that the primary responsibility to provide protection remains with the State where the application is made and that a transfer of responsibility may only be possible between States with comparable protection systems subject to certain conditions. Accordingly, UNHCR sets forth the following conditions for the application of the 'safe third country' concept:[1098]

- The applicant should be protected against refoulement and be treated according to the international standards including the 1951 Refugee Convention. 'Safety' shall be determined according to the countrys' practice, but not formal obligations alone,

- The applicant should have a genuine connection or close links with the third country concerned. This link should be stronger than the link with the host country so that it must be fair and reasonable to have his application examined in the third country. The Asylum seeker should have transited through the third country concerned, however, UNHCR is of the view that mere transit does not establish sufficient link with the country. The intentions of the asylum seeker with regard to the place where he/she wished to live, should also be taken into consideration,

- The third country must expressly agree to admit the applicant to its territory and to examine the appllicants' asylum claim in a fair procedure. It should also provide access to durable solutions.

- Exceptions shall be made for the vulnerable groups.

Given the conditions above, UNHCR has criticed Article 27 mainly on the ground that the Directive established a mechanism where the 'safe third country' concept would be applied through a unilateral decision by the host State to invoke the responsibility of a third State. Therefore, the Office has recommended formal

[1098] UNHCR, Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, p. 36. Also see UNHCR Position Relating to the Resolution on Safe Countries of Origin, 30 November – 1 December 1992, available at http://www.unhcr.org [visited on 05.09.2005].

agreements for the allocation of responsibilities.[1099]

UNHCR has expressed serious concerns about the 'safe third country' concept adopted as a border procedure in Article 36. Unlike the inadmissibility decision in Article 27, Article 36 provides the possibility of denying access to an asylum procedure completely. The Office indicated that some form of assessment, at least involving a minimum examination of admissibility should be required in order to ensure the access to the rights in the 1951 Refugee Convention. In the view of UNHCR, the mere transit through a presumed 'safe third country' can be a basis for the transfer of responsibility in certain limited cases where an agreement exists between the host country and the third country. However, in this case the applicant must have a genuine opportunity to challenge the reasons concerning the transfer of responsibility prior to return. Therefore, the Office strongly recommended the deletion or non-application of this Article. [1100]

The 'safe third country' rules of the Asylum Procedures Directive have also been subject to criticism by the academia and human rights defenders. In this respect, two main lines of though are visible. The first school accepts the possibility of applying 'safe third country' rule without breaching the non-refoulement obligations under the 1951 Refugee Convention and thus focuses on the deficiencies concerning the procedural safeguards of the Asylum Procedures Directive. For instance, Gilbert accepts that there is nothing intrinsically wrong with returning anyone to a safe third country, given the definition of non-refoulement. The writer however, observed that the proposal for Asylum Procedures Directive denied all applicants arriving from designated safe third contries access to the status determination procedures Therefore, he concluded that the draft directive would leave Member States in breach of their obligations under the 1951 Refugee Convention.[1101]

The second school which in fact represents the vast majority of the scholars, focussed on the concept of 'safe third country' and questioned its validity against the

[1099] *Ibid.,* pp. 36-37.
[1100] *Ibid.*
[1101] Geoff Gilbert, *"Is Europe living up to its obligations to refugees?"*,The European Journal of International Law, Vol. 15, No. 5, 2004, p. 981.

non-refoulement principle in the 1951 Refugee Convention. For instance, Goodwin-Gill opposes the legal justification of 'safe third country' practices namely, the Article 31 of the 1951 Refugee Convention. The author argues that the reference to 'coming directly' in this provision cannot provide a legal basis for the 'safe third country' practices. Asylum seekers are not required to have come directly from territories where their life or freedom was threatened in order to be eligible for protection. Article 31 was intended to provide immunity from penalties to persons who have briefly transited other countries or who were unable to find effective protection in the countries enroute to the host country. The drafters of the 1951 Refugee Convention only intended that immunity from penalty should not apply to asylum seekers who found protection and stayed temporarily or permanently in a third country on the way to the host country.[1102]

Several scholars focussed on the consequences of the practice of 'safe third country' rule. Since this rule has already been part of the legal practices of the Member States for more than a decade, the existing practice provided commentators a solid ground for assessing the effects of this mechanism. For instance, Lavenex assessed the effects of safe third country practice on the Central European Countries in her book titled 'Safe Third Countries' and came to the conclusion that the normative provisions of the European asylum regime, particularly the safe third country rules have weakened the Member States' commitment under the international refugee regime in so far as they establish a system of redistribution which diffuses responsibility and blurs accountability among the Member States. In the case of Central European countries, this result appeared due to the lack of national tradition of asylum. These countries were not part of the international refugee regime before their accession and thus lacked the basic institutional and legal infrastructure necesary to examine asylum claims. In the viewe of the author, this has not only lead to a serious blurring of the questions of responsibility and accountability in refugee law protection, but also caused the breach of international

[1102] See Goodwin-Gill, The Refugee in International Law, pp.88-91.

law through the refoulement of persons.[1103]

Noll also underlined the need to focus on the effects of the 'safe third country' practice stating:

"[u]ltimately, it is a matter of taste whether such ['safe third country'] arrangements are considered measures inhibiting entry or speeding up exit. The decisive issue is that they impact the actual number of beneficiaries present in the host country."[1104]

The author observed significant deterioration in the possibility of having access to a fair refugee status determination procedures in Europe after the 'safe third country' practices were initiated and the burden was shifted towards the Central European Countries. In his view, the countries at the eastern border of the EU such as the Czeh Republic, Hungary and Poland sought to limit their burden through more restrictive recognition practices when they faced rising numbers of asylum applications as a result of the 'safe third country' rule. For instance, in the year 2000, the Czeh Republic only recognized 1.9 per cent of all applications while in Germany the recognition rate was 10.8 percent. The recognition rate was 2 per cent for Poland and 2.2 per cent for Hungaryat the same time.[1105]

Costello describes the 'safe third country' practices as *"unjust, unfair and inefficient"*. The author argues that these rules result in direct and indirect refoulement and gives examples from the practice of the United Kingdom Courts indicating that removal to countries where onward removal to unsafe countries were likely.[1106] She observed that especially in the case of 'super safe third countries' there are no safeguards in place and no legal accountability for such decisions which eventually leads to a real risk of violation of the of the non-refoulement principle.

[1103] See Lavenex, Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe, pp. 165-167.
[1104] Gregor Noll, Negotiating Asylum: the EU Acquis, Extraterritorial Protection and the Common Market of Deflection, The Hague 2000, Martinus Nijnoff Publishers, p. 105 at Van Selm, p. 8.
[1105] Gregor Noll, *"Protection in a Spirit of Solidarity?",* New Asylum Countries?: Migration Control and Refugee Protection in an Enlarged European Union", Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen (eds.), the Netherlands 2002, Kluwer Law International, pp. 322-323.
[1106] See Costello, pp. 47-48.

She expressed her concerns about the term 'modalities' in Article 36(4) which in her view is an unusual reference. Accordingly, this term reflects an attempt on the part of the drafters to allow implementation by way of administrative practice, rather than legal rules. She adds however that such an interpretation would conflict with the established principles of EC law which require directives to be implemented by means of national provisions of binding nature. Given such considerations, the author councludes that the 'super safe country' provision does not address the issue of ensuring that an asylum applicant is admitted to a proper asylum procedure.[1107]

Van Selm states that the goals of safe third country rules are not objectionable however, the implementation of the measures turns them into practices to which a range of objections can and must be raised, as they deny access to procedures for those persons in need of protection, and may lead to refoulement. The author also touched on a different aspect of 'safe third country' concept by criticising that this rule implies that the person seeking protection should have no freedom of choice about where he or she would be protected and live. In this respect, she considers that the argument that, as long as asylum can be sought somewhere, the applicant shall be satisfied with it, is unacceptable as it has very bad impacts on the integration policy and has the potential of causing the applicant become irregular in order to avoid being sent to an unwanted destination.[1108]

Finally, the opinion of the European Committe on Refugees and Exiles on 'safe third country' practice is respectable to reveal the the perspective of European human rights defenders on this matter. The Committee has published its comments on the draft Asylum Procedures Directive in March 2005 where it stated:

"...no country can be labelled as a: "safe third country" for all asylum seekers. A decision on safety of a country for the particular applicant must always be reached within an individual examination on the claim and not on a general

[1107] *Ibid.,* pp. 63-64.
[1108] See Van Selm, Access to Procedures 'Safe Third Countries', 'Safe Countries of Origin' and 'Time Limits', p. 23.

presumption of safety based on country-related criteria." [1109]

In the light of the above considerations, it shall be concluded that the 'safe third country' rule is incompatible with the focus of the 1951 Refugee Convention as well as the human rights instruments which all require the assessment of claims individually, within their own circumstances which is not about what happens generally. As noted in each of the respective chapters on asylum and human rights instruments above, general situation in a country is only one of the elements of assessment in considering claims for protection but not alone sufficient to decide on the outcome of the claim. Therefore, a legal mechanism designed, to a great extent, to ignore the rest of the elements of assessment is clearly contradictory with the obligations of Member States under those instruments. The effects of the 'safe third country' practices on the existing asylum procedures, as noted by scholars above, further confirms that such projected incompatibility exist in facts as well as in norms.

In practice, the problems that this concept creates are two folded: From an institutional point of view, it contributes to the burden-sharing problem which, is one of the black holes of the entire asylum system. The burden of protection seekers is shifted towards less developed, less equipped countries. Secondly, with regard to the standard of protection offered to protection seekers, 'safe third country' rule causes unacceptable results since the such so called 'safe third countries' proved to be never as prepared to provide the standard of protection offered by the Member States. This argument was illustrated in the case of the Central European Countries and there is no indication that the result will be different in the new potential 'safe third countries' in North Africa.

(c) Safe Country of Origin

'Safe country of origin' can be defined as a country which it can clearly be shown, in an objective and verifiable way, normally not to generate refugees.

[1109] European Council on Refugees and Exiles, Comments on the Amended proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, March 2005, p. 7, available at http://www.ecre.org/ECRE%20PD%20comments.pdf [visited on 12.09.2006].

Article 31 of the Asylum Procedures Directive contains a 'safe country of origin' clause which may result in an application to be considered unfounded. Accordingly, a third country designated as a safe country of origin by the Council (Article 29) or by the Member State concerned (Article 30) may, after an individual examination of the application, be considered as a 'safe country of origin' for a particular applicant if he/she is a citizen of that country or he/she is a stateless person and was formerly habitually resident in that country. The applicant is however, allowed to challenge this by submitting serious grounds for considering that the country not to be a safe country of origin in his/her particular circumstances and in terms of qualification as a refugee. Similar to the situation in 'super safe third countries', Member States are required to lay down further rules and modalities for the application of a vague concept in their national legislations. Article 31, on the other hand, varies from Article 36 for requiring an individual examination of the claim in substance and enables the applicant to resort to the safeguards in the Chapter II of the Directive.

UNHCR opposes the use of 'safe country of origin' concept as an automatic bar to access to the asylum procedures. It considers the concept to be contrary to the requirement of determining the status individually under the 1951 Refugee Convention. On the other hand, the Office has no objection for using 'safe country of origin' as a procedural tool to assign certain applications to accelerated procedures or where its use has an evidentiary function.[1110]

Given the views above, Article 31 of the Directive falls short of satisfying the conditions for compatibility with the 1951 Refugee Convention as understood by UNHCR. Hence, UNHCR criticised this provision for placing the burden of proof entirely on the applicant, who is made responsible for submitting any evidence that a country is not safe. Thus, the provision involves much more than prioritizing or accelerating the procedure for the applicant. Accordingly, each applicant should be given an effective opportunity to contest the presumption of a 'safe country of origin'

[1110] UNHCR, Position Relating to the Resolution on Safe Countries of Origin (London 30 November-1 December, 1992), available at http://www.unhcr.org [visited on 13.09.2006].

without increasing the burden of proof on him/her.[1111]

Van Selm considers 'safe country of origin' rule as a method for States to turn off the point of entry for a presumed immigration back door. It is based on the idea that if a person comes from a given State of origin then it is impossible for him/her to be a refugee since that State does not normally produce refugees.[1112] The author observes that 'safe country of origin' rule leads to, citizens of those countries who are designated as such, either being automatically excluded from the procedure or need to rebut a presumption against their claims. She further points out that even a country which, is safe for 99.99 per cent of its residents, might fail to protect a small minority in which case they should have a right to seek protection. Another point that the author raised in this context is 'discrimination on the basis of nationality' which, she regards as a key factor of concern. If citizens of certian countries will be subject to a different treatment than others as a result of 'safe country of origin' rule, this treatment clearly conflicts with the prohibition of discrimination on the basis of country of origin as stipulated in Article 3 of the 1951 Refugee Convention. [1113]

Costello raises another point of objection concerning the 'safe country of origin' concept. According to the author, 'safe country of origin' rule could amount to a reservation to Article 1A (2) of the 1951 Refugee Convention and create a new geographical reservation in so far as it might exclude entire groups from the asylum determination process.[1114] She further observes with concern that the procedural consequences of 'safe country of origin' rule were continueing to deteriorate in the Europe where applications from 'safe countries of origin' are more and more treated as manifestly unfounded.[1115]

The European Council on Refugees and Exiles expressed that assessment of risk in the country of origin should always be conducted on an individual basis rather

[1111] See UNHCR, Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, p. 43.
[1112] See Van Selm, Access to Procedures 'Safe Third Countries', 'Safe Countries of Origin' and 'Time Limits', p. 4.
[1113] *Ibid.,* p. 41.
[1114] See Costello, p. 50.
[1115] *Ibid.,* p. 52.

than on a general presumption on country-related criteria and thus rejected the 'safe country of origin' concept totally.[1116]

In the light of the above considerations, 'safe country of origin' rule shall be regarded as a component of the deterrence mechanism of the Directive having a similar character with the 'safe third country' rule. It is, in certain respects even more dangerous than the two mechanisms above since it leaves an asylum seeker face to face with a situation that he/she may be directly returned to the country of origin.

A noticeable aspect of 'safe country of origin' practice is that the Member States are considered as such for each others' citizens according to the Protocol on Asylum. In fact, drafting process of the Protocol reveals that this is an unjustified approach to asylum matters. The Protocol was adopted after the reaction of the Spanish government for some EU Member States, particularly Belgium and France, which granted refugee status to ETA (Basque nationalist organization) members.[1117] This is a proof that even the EU citizens might not be safe enough for the likes of the Directive, had the Protocol not exist.

(d) The External Dimension

'First country of asylum' and 'safe third country' rules have no foundation in international law since international customary law only imposes the obligation on States to take back their own citizens,[1118] but not the ones of third countries.[1119] The Member States had first introduced this rule in their domestic laws and recently in the Asylum Procedures Directive unilaterally without consulting the potential countries who may as a result bear the burden. Therefore, a Member State could not effectively use the 'first country of asylum' or 'safe third country' rules without

[1116] See ECRE Comments on the Amended proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, p. 8.
[1117] See Van Selm, Access to Procedures 'Safe Third Countries', 'Safe Countries of Origin' and 'Time Limits', p. 38.
[1118] Although the Western European governments persistently claim that international law obliges States to take back their own citizens, some States manifestly refuse to comply with this oligation. Therefore, the European Community also had to conclude readmission agreements including provisions on the admission of their own nationals. See Noll, Rejected Asylum Seekers: the Problem of Return, p. 16.
[1119] See Lavenex, Safe Third Countries, p. 78.

having convinced the third countries concerned to admit the person. Hence, each of the provisions in the Asylum Procedures Directive regulating the 'first country of asylum'[1120], 'safe third country'[1121] and 'super safe third country'[1122] rules contains a condition of admission by the third country as a condition of invoking such concepts throughout the asylum procedure. Accordingly, in the event that the third country refuses to admit the person concerned, the Member State must bear the responsiblity of the protection seeker and let him/her have access to the ordinary procedure.

In this legal environment, the external dimension of protection becomes one of the pillars of the mechanism which is designed to shift the responsibility of protection seekers to third countries. Readmission agreements appeared as a solution to make such rules operable by creating a mechanism capable of forcing the third country to admit the persons concerned.[1123] A readmission agreement can be defined as an agreement whereby both parties undertake to admit their own citizens illegally residing on each others' territory and/or third country citizens who illegally entered each others' territory transiting through their own territories. These agreements generally have a reciprocal structure; they establish rights and obligations for both parties.[1124] On the other hand, it is possible to speak of the existance of an asymmetrical reciprocity in the agreements between the Community, Member States, and the non-member States as non-member States would not normally expect to expel illegal migrants to the Community or to the Member States. Therefore, the Community had to offer benefits to these countries other than those within the confines of a simple readmission agreement. In this respect, it is observed that readmission agreements have been signed with non-member countries in larger contexts.[1125] These agreements can be grouped under three major categories:

[1120] See Asylum Procedures Directive, Article 26.
[1121] *Ibid.,* Article 27(4).
[1122] *Ibid.,* Article 36(6).
[1123] See Kjaerum, p. 518.
[1124] See Noll, Rejected Asylum Seekers: The Problem of Return, p. 16.
[1125] The Commission's following statements in the 'Communication COM(2002) 703 final of 3.12.2002 on Integrating Migration Issues in the European Union's Relations with Third Countries, p. 25' reveals the Commissions' parallel understanding on this matter: "to negotiate a readmission agreement, which is seen as being in the sole interest of the Community, should not be underestimated and no quick results should be expected. They can only succeed if they are part of a broader co-

- Agreements signed in the context of development cooperation with the African, Caribbean and Pacific countries;

- agreements signed in the context of accession association as a part of the framework of enlargement negotiations with the new member States of Central and Eastern Europe, Malta and Cyprus and with Turkey and countries of the western Balkans;

- Neighbourhood association with the Mediterranean and the new eastern neighbours.

Third countries are motivated to incur readmission obligations in various ways according to the type of relationship. In development cooperation, the Community imposes readmission obligations as a condition for granting development aid. For instance, Article 13(c) of the Cotonou Agreement between the EU and African, Caribbean and Pacific States provides:

"Each of the ACP States shall accept the return of and readmission of any of its nationals who are illegally present on the territory of a Member State of the European Union, at that Member State's request and without further formalities."[1126]

The format of relationship in the neighbourhood association with the Mediterranean and the new eastern neighbours has a similar character with the above mentioned development cooperation agreements with the only difference that the relationship is at more advanced level in the neighbourhood policy which, includes intensive institutional cooperation. In this context, the readmission obligations are also imposed in return of financial benefits and development aid. The European

---

operation agenda, which takes duly into account the problems encountered by partner countries to effectively address migration issues. This is the reason why the Commission considers that the issue of "leverage" – i.e. providing incentives to obtain the co-operation of third countries in the negotiation and conclusion of readmission agreements with the European Community – should be envisaged on a country by country basis.", available at http://www.statewatch.org/news/2002/dec/MIGR.DOC [visited on 13.09.2006].

[1126] Cotonou Agreement between the EU and African, Caribbean and Pacific States [2000] OJ L 317.

Neighbourhood Policy Strategy Paper which, was prepared by the Commission in 2004 provides: *"Action Plans should also reflect the Union's interest in concluding readmission agreements with the partner countries.*"[1127]

In the case of, accession process of the Central European Countries, the incentive was the relaxation of visa requirements towards their citizens.[1128] The readmission agreement which has been initialled with Russia recently also exhibits a similar character with regard to its motives.[1129] As the Comission noted however, applying a more generous visa policy is not a feasible option most of the time.[1130] Therefore, a growing tendency of compulsion rather than encouragement in the Community's strategy towards third countries can be observed in the recent documents. For instance, the Seville European Council of June 2002 adopted a conclusion which provided that each future association and cooperation agreement should include a clause on joint management of migration flows and compulsory readmission in the event of illegal migration. It was further expressed that inadequate cooperation by a third State could hamper further development of relations with the Union, following a systematic assessment of relations with that country. In the event of unjustified lack of cooperation the Union might adopt measures or positions while honouring the Union's contractual committments but not jeopardizing the objectives of development cooperation.[1131]

The European Community is involved in such agreements in two different ways:

First, the Community has inserted readmission clauses into the association

---

[1127] See European Neighbourhood Policy Strategy Paper, p. 17.
[1128] Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen, "*Western European Asylum Policies For Export: The Transfer of Protection and Deflection Formulas to Central Europe and the Baltics*," Byrne, Noll, Vedsted- Hansen (eds.), p. 7.
[1129] Please note that the text of a readmission agreement with Russia namely, the 'Agreement between the Russian Federation and the European Community on Readmission' has been initialled on 13 October 2005 and it is waiting to be adopted by the Council by qualified majority after consulting the Parliament. It is linked to the agreement on visa facilitation, therefore both agreements will be signed, concluded and entered into force simultaneously. See Proposal for a Council Decision COM/2006/0188 final on the Conclusion of the Agreement between the European Community and the Russian Federation on the Facilitation of Issuance of Short-stay Visas.
[1130] See Communication from the Commission COM(2002)703 final of 3.12.2002, p. 26.
[1131] Presidency Conclusions 13462/02 of Seville European Council of 21-22 June 2002, paras. 35-36.

and cooperation agreements it signed with non-member states. Before the entry into force of the Treaty of Amsterdam, the Community did not have competence to conclude binding agreements with non-members States on behalf of the Member States. However, the 'safe third country', 'first country of asylum' and 'safe country of origin' practices as appeared in the London resolutions in 1992 necessitated a harmonized action on the readmission policy. Therefore, the Council made a recommendation in December 1994 on specimen bilateral readmission agreement between a Member State and a third country.[1132] This was followed by other recommendations such as the Recommendation on the Guiding Principles to be Followed in Drawing up Protocols on the Implementation of Readmission Agreements in July 1995[1133] and Council Conclusions Concerning Readmission Clauses to be Inserted in Future Mixed Agreements in March 1996.[1134] In practice, since 1995 the Community has been persistent on inserting clauses into the cooperation and association agreements involving an obligation for non-member States to readmit their own citizens when approached by an EU Member State and further to negotiate bilateral readmission agreements with Member States on the details of such readmission of their own citizens and/or readmission of citizens of third countries.[1135] By the end of 1999, 130 readmission agreements were in force between 15 EU Member States plus Iceland and Norway on the one hand and 58 third countries on the other hand.[1136]

Secondly, after being granted competence by the Amsterdam Treaty, the Community itself has entered into readmission agreements in its own name. In April 2002, the Justice and Home Affairs Council identified five selection criteria for

[1132] Council Recommendation Concerning a specimen Bilateral Admission Agreement between a Member State of the EU and a Third Country of 1 December 1994, [1996] OJ C 274, p. 20.
[1133] Council Recommendation of 24 July 1995 on the Guiding Principles to be Followed in Drawing up Protocols on the Implementation of Readmission Agreements ,1996, OJ C274/25.
[1134] Council Conclusions of 4 March 1996 Concerning Readmission Clauses to be Inserted in Future Mixed Agreements docs No. 4272/96 ASIM 6 and 5457/96 ASIM 37.
[1135] Steve Peers, Readmission Agreements and EC External Migration Law, Statewatch Analysis No. 17, available at http://www.statewatch.org/news/2003/may/readmission.pdf [visited on 13.09.2006].
[1136] Council Doc. 11486/2/99 of 24 November 1999 on the Inventory of Readmission Agreements.

signing such Community readmission agreements:[1137]

- Migration pressure exerted by flows from or via third country,
- Countries with which accession negotiations were continueing were exluded,
- Geographical position in relation to the Union,
- Added value of a Community agreement compared to the agreements signed by individual Member States,
- Geographical balance shall be maintained between various regions of origin and transit of illegal migration flows.

In this context, the Community has until so far entered into readmission agreements[1138] with Hong Kong[1139], Sri Lanka[1140], Macao,[1141] Albania.[1142] The Commission received the mandate for negotations with Morocco, Sri Lanka, Russia, and Pakistan in September 2000, with Hong Kong and Macao in May 2001, with Ukraine in June 2002 and with Albania, Algeria, Turkey and China in November 2002.[1143]

It is interesting to note that although Turkey is a candidate country and therefore, did not fit the above mentioned criteria, a mandate was granted to the

[1137] Council Doc. 7999/02 of 15 April 2002 on the Criteria for the Identification of Third Countries With Which New Readmission Agreements Need to be Negotiated.
[1138] A readmission agreement with Russia has been initialled but has not been ratified yet see supra 'Agreement Between the Russian Federation and the European Community on Readmission'.
[1139] Agreement between the Government of Hong Kong Special Administrative Region of the People's Republic of China and the European Community on the Readmission of Persons Residing without Authorisation, 27 November 2002, OJ C 31 E/163.
[1140] Agreement Between the Democratic Socialist Republic of Sri Lanka and the European Community on the Readmission of Persons Residing without Authorisation, 21 March 2003, SEC (2003) 255.
[1141] Agreement Between the European Community and the Macao Special Administrative Region of the People's Republic of China on the Readmission of Persons Residing without Authorisation 30 April 2004 OJ 2004 L143/97.
[1142] Agreement between the Republic of Albania and the European Community on the Readmission of Persons Residing without Authorisation COM (2004) 92, 12 February 2004.
[1143] Martin Schieffer, *"Community Readmission Agreements with Third Countries: Objectives, Substance and Current State of Negotiations*", European Journal of Migration and Law, Vol. 5, 2003, p. 344.

Commission to negotiate a Community readmission agreement with this country.

Readmission Agreements have been criticised for being damaging, unbalanced, unrealistic and contradictory policy tools.[1144] They constitute an integral part of safe 'country of origin', 'first country of asylum' and 'safe third country' practices of the Union which creates a legal environment conducive to violations of international law obligations of the Member States. In this respect, it is apparent that these agreements force non-member States to participate in such violations as well.

Secondly, these agreements do not ensure that the third countries who receive the returned persons treat them fairly, according to the internationally recognized standards as recommended by UNHCR. Serious concerns have been raised with regard to the human rights practices of countries with whom the European Commission has received a mandate of negotiation. For instance, the European Parliament called for human rights impact assessment and requested the Commission and the Council to adopt an appropriate monitoring mechanism in its report on the readmission agreement signed with Hong Kong.[1145] Another similar case is the situation of Libya, which the Council has initiated a dialogue and cooperation on migration issues which is leading to a closer cooperation.[1146] Libya which is a major transit country towars Europe has already reached a provisional (draft) readmission agreement with Malta and has a concluded a general agreement to fight against illegal migration with Italy.[1147] The Human Rights Watch has recently released a report concerning the treatment of illegal migrants and refugees in this country. Accordingly, in the years of 2003-2005 Libya has deported approximaltely 140,000 persons to their home coutries as indicated in the official records of the Government. It is observed that while the majority of these people

[1144] See Peers, p.5; Schieffer, p. 343; Daphne Bouteillet-Paquet, *"Passing the Buck: a critical analysis of the readmission policy implemented by the European Union and its Member States",* European Journal of Migration and Law, 2003, p. 359; Nazare Albuquerque Abell, "The Compatibility of Readmission *Agreements with the 1951 Convention Relating to the Status of Refugees*, International Journal of Refugee Law, 1999, p. 60.
[1145] See Bouteillet-Paquet, p. 371.
[1146] See Draft Council Conclusions 9413/1/05 of 27 May 2005 on Initiating Dialogue on Cooperation with Libya on Migration Issues.
[1147] Report from the Commission on the Technical Mission to Libya on Illegal Immigration, 27 November – 6 December 2004, p. 58, available at http://www.europa.eu.int [visited on 18.09.2006] .

were economic migrants, some of them were potential asylum seekers and refugees who faced the risk of persecution back home.[1148] This is an indication that the consequences of cooperation with the North African countries may well be much worse than the one in the Central European Coutries in the last decade.

Thirdly, readmission agreements have also been criticised for not addressing the root causes of protection claims in the countries of origin.[1149] They are unbalanced instruments as noted above. This character is best illustrated by the following observation of Vahl with regard to the recently initialled Community readmission agreement with Russia:

"The readmission agreement is far more important to the EU than the relatively minor concessions given on visa facilitation. For Russia, the readmission agreement represents a significant challenge for Russian policy concerning the security of and beyond its borders to the South and East, to avoid becoming a centre for illegal immigrants heading from South and East Eurasia towards the EU."[1150]

Therefore, the readmission agreements shall be reformulated as a burden sharing instrument and further equipped with monitoring mechanisms in order to ensure compliance with the international law obligations of the Member States.

c) Burden Sharing Within the EU

Burden sharing is among the founding concepts of the entire European Union asylum framework. The considerable differences between the standards of protection offered by the Member States were seen as the cause of uneven share of refugee burden that some countries born. Accordingly, this discrepency has caused a competition between the Member States in order to shift their excessive burden towards other States by adopting more restrictive asylum laws. This policy was based on the idea that asylum seekers, being rational actors would prefer to go to other

[1148] Human Rights Watch, Stemming the Flow: Abuses Against Migrants, Asylum Seekers and Refugees, Vol. 18, No. 5(E), September 2006, available at http://www.hrw.org/reports/2006/libya0906/ [visited on 14.09.2006].
[1149] *Ibid.,* p. 360; see Peers, p. 5.
[1150] Marius Vahl, A Privilidged Partnership? EU-Russian Relations in a Comparative Perspective, 2006, Danish Institute for International Studies, Working Paper No. 2006/3, Copenhagen, p. 26.

States instead of coming to theirs when they encounter more restrictive laws.[1151] Therefore, it was believed that harmonization of the asylum laws of the Member States would solve this problem of competition. Empirical studies however, showed that the legal engineering efforts for harmonizing the asylum standards of Member States would not alone be sufficient for a fair distribution of the burden, because there were other pull factors for an asylum seeker to target a certain Member State. For instance, Thieleman observed a positive but an omittable corellation between the 'relative restrictiveness' of a States laws and distribution of asylum seekers.[1152] Therefore, other legal mechanisms were needed in order to redistribute the refugee burden in a more fair manner. This problem of distributing the responsiblity in a fair fashion however, had proved to be the most difficult question of asylum law that found no answer in the 1951 Refugee Convention. In this respect, the Dublin Convention[1153] that was signed in 1990 and entered into force in 1997, has been a significant attempt and experience for dealing with this matter.[1154]

The Convention sought to determine which country should be responsible for dealing with the asylum seeker's application, on the basis of a set of criteria agreed by the parties. It contained a distribution system which would decrease the pressure on certain favorite refugee destination Member States. The basic principle of the Dublin system is that States parties mutually recognize each other as 'safe third countries'. However, Dublin regime varies from a typical 'safe third country' on the ground that it is based on a Conventional mechanism rather than on the unilateral decision of a State.[1155] In fact, in some respects, the Convention has the character of an advanced readmission agreement. The Convention also aimed at eliminating the phenomenon of 'refugee in orbit' which, refers to a situation where asylum seekers are sent back and forth betwen countries, by establishing the

---

[1151] See Costello, p. 37.
[1152] Eiko Thielemann, *"Why Asylum Policy-Harmonization Undermines Refugee Burden-Sahring"*, European Journal of Migration and Law, 2004, p. 59 at Costello, p. 38.
[1153] See Dublin Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities.
[1154] Reinhard Marx, *"Adjusting the Dublin Convention: New Approaches to Member State Responsibility for Asylum Applicants"*, European Journal of Migration and Law, 2001, Vol. 3, p. 9.
[1155] Agnes Hurwitz, *"The 1990 Dublin Convention: A Comprehensive Assessment",* International Journal of Refugee Law, 1999, Vol 11, No. 4, p. 647.

responsiblity of single Member State. This would give the applicant assurance that his/her application will be examined by at least one Member State.[1156]

The Convention stipulated that in principle the first Member State on the EU territory should have the responsiblity of processing an asylum seekers claim, except for the cases where the applicant has a family member residing as a refugee on another Member State, or another Member State had issued him/her a visa or a residence permit.

The heirearchy of the criteria was set in the Dublin Convention, from the top to the bottom, as follows:

- Member State where a family member is recognized as a refugee,[1157]

- Member State which provides residence permits/ visas/ waiver of visa requirement/ multiple visas/ expired visas (to be applied in a heirearchy from the beginnging to the end),[1158]

- Member State where the applicant entered the EU territory irregularly by land, sea or air from the territory of a non-member State, if the applicant has been living in the Member State where he/she lodged the application for less than six months,[1159]

- The Member State which waived the visa requirement after entry/the Member State where application is made in transit in a transit zone,[1160]

- Member State where the applicant lodged his/her application, if no other criteria applies,[1161]

- Member State which accepts another States' request to examine the application for humanitarian reasons, although not being responsible under the

[1156] See Dublin Convention, Recital 4 of preamble.
[1157] See Dublin Convention, Article 4.
[1158] *Ibid.,* Article 5.
[1159] *Ibid.,* Article 6.
[1160] *Ibid.,* Article 7.
[1161] *Ibid*., Article 8.

Dublin criteria.[1162]

Complex procedural rules have been adopted in order to implement the Convention where a Member State would make a request from another according to the criteria indicated above, to admit the person concerned to its own territory for RSD. The EURODAC fingerprint system was also added to the procedural rules as a support mechanism.[1163] Various problems appeared however, during the implementation of the Convention.

The conditions for family unification were too strictly defined. A family is defined as the unit comprised of parents and children under 18.[1164] The broader understanding of family which comprises 'persons living in the same household' was not accepted. Article 4 of the Convention gave priority to family unification over all other grounds. If an applicant had recognized family members in another Member State that State should be responsible for examining his/her asylum claim in all conditions. However, in the United Kingdom for example other States accepted only one case on the ground of Article 4 among 4,695 requests in the years 1998 and 1999.[1165]

The difficulty of providing strong evidence of illegal entry to the Member State concerned appeared as a significant problem. In theory, Article 6 should be the most frequently used provision, however, the dificulty of presenting strong evidence of an illegal crossing made using this Article impractical.[1166]

The Convention Could not eliminate the orbit situation since, it is a fact that only about 40 per cent of the approved transfers were could be effected under this framework since, in many cases, upon learning of the transfer decisions, the

[1162] *Ibid.,* Article 9.
[1163] Council Regulation 2725/2000 of 11 December 2000 Concerning the Establishment of 'EURODAC' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention, OJ L316, 15 December 2000.
[1164] See Hurwitz, p. 646.
[1165] Michael Collyer, *"The Dublin Regulation, Influences on Asylum Destinationsand the Exception of Algerians in the UK"*, Journal of Refugee Studies, 2004, Vol. 17, No. 4, p. 380.
[1166] See Hurwitz, p. 657.

applicant disappeared.[1167] Moreover, since it allowed the Member State responsible to return an asylum seeker to a host third country(safe third country) even if it could end the orbit situation within the EU, it would contribute to the orbit phenomenon in the rest of the World.[1168]

Another reported problematic area is the withdrawal of an asylum application. It is noted that when an asylum seeker withdraws his/her application, no further examination could be possible. Hailbronner and Thiery discuss the applicability of the Dublin Convention in this case and concludes that although this issue has not been solved definitively, it should, in principle, be possible to transfer the applicant to another Member State in the event that a criteria in the Dublin Convention occurs after withdrawal.[1169]

Considering such deficiencies, the Commision decided to initiate a new proposal in order to re-formulate the Dublin Convention. After a lengthy consultation process, the Commission initiated with the publication of a working paper titled 'Revisiting the Dublin Convention' in March 2000.[1170] The Working Paper considered four other possible methods of determining the Member State responsible for an asylum seeker. The first two of the methods involved the use of the asylum seeker's route across the EU, whereas the third one suggested settling particular groups in specific Member States and the last one gave priority to the Member State where asylum claim was first lodged so that the applicant's choice would be given priority. All responses to this working paper from UNHCR and from NGOs preferred the last option.

The Commission accepted that this option would clearly provide the basis for a workable system in relation with objectives of speed and certainty, avoiding 'refugees in orbit' situation, preventing multiple applications and maintaining family

---

[1167] See Legomsky, p. 580.
[1168] See Hurwitz, p. 650; see also Costello, p. 41.
[1169] Kay Hailbronner, Claus Thiery, *"Schengen II and Dublin: Responsiblity for Asylum Applications in Europe"*, Common Market Law Review, 1997, Vol. 34, p. 970.
[1170] Commission Working Paper titled 'Revisiting the Dublin Convention: Developing Community Legislation for Determining Which Member State is Responsible for Considering an Application for Asylum Submitted in One of the Member States', Document SEC (2000)522 final, 21 March 2000.

unity. The Commission however, concluded that the use of this model would necessitate complete harmonization on other topics of asylum law such as refugee definition, subsidiary protection, asylum procedures etc. in order to be successfull at avoiding the elimination of pressure on particular countries. At that stage of development in the year 2000 none of them were at place.[1171]

Following lengthy discussions in the Council, the new Regulation has very minor changes over the Dublin Convention.[1172] Both the Dublin II Regulation and the EURODAC Regulation are instruments adopted in the form of a 'regulation'. This indicates the central role of the Dublin regime within the Union's newly developing asylum framework.[1173] These two regulations are complemented by the Regulation No. 1560/2003 of 2 September 2003[1174] which elaborated on the procedural aspects of the Dublin II Directive by laying down detailed rules on the request and trasfer mechanism. The Dublin II Regulation sets the heirerchy of responsibility similar to the one between Articles 3 to 9 of the Dublin Convention.

The Regulation contains three new articles on the family unity principle. According to the new Article 6, where the applicant is an unaccompanied minor, the Member State where a family member is resident will be responsible for examining the minor's asylum application. In the absence of a family member, the responsibility falls on the Member State where the application was lodged. Moreover, Article 7 clarifies that a family need not have been formed in the country of origin in order to apply the rules attached to the family member status. Article 14 provides a mechanism to avoid the same family members being sent to different countries, by setting forth some family specific criteria. Accordingly, if such a situation arises; first it is the State which takes the responsibility of largest amount of family members will be responsible for the others as well. Secondly, if the first option fails,

[1171] See Collyer, p. 379.
[1172] *Ibid.,* p. 378.
[1173] See Collyer, p. 376.
[1174] Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 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, OJ L 222 , 05.09.2003.

the State which is responsible for the oldest family member will take the responsibility for the rest of the family.

Another noticeable amendment is the extension of the 6 months period in Article 6 to 12 months in the new Article 10. With this amendment, the responsibility of the Member States which fail to control their borders against irregular crossings has been broadened.

Despite the above mentioned amendments in the Dublin regime still some problems are reported in the implementation of the Regulation. For instance, there are still noteworthy differences in the form and content of Dublin II decisions issued by States. It is observed that some Statesa do not fully comply with the requiements of Articles 19(1) and 20(1) of the Regulation. UNHCR underlined in a recent report that uniformity of the terminology in the decisions is important for the asylum seeker to appreciate the consequences, to utilise the available means of redress and to prepare for his/her departure to the responsible Member State.[1175]

Problems have also been reported on determining the age of applicants with regard to the application of Article 6 of the Regulation on unaccompanied minors, before sending them to the responsible Member States according to the Dublin criteria. Some Member States namely, France, United Kingdom and the Netherlands, tend not to make distinction between adults and minors within the Dublin procedure.[1176]

With regard to the application of new Articles 7 and 8 on family issues, three main areas have been identified with inconsistent practices. Accordingly, the marital status, proof of family links and the status of family members with whom unification is requested topics need further attention of the Member States. For instance, as to the last problem, Austrian, Belgian and Swedish authorities did not require documentation if the statements were credible and consistent, whereas the

[1175] UNHCR, The Dublin II Regulation: A UNHCR Discussion Paper, April 2006, Belgium, p. 18.
[1176] European Council on Refugees and Exiles, European Legal Network on Asylum, Summary Report on the Application of the Dublin II Regulation in Europe, March 2006, p. 157, available at http://www.ecre.org/ [visited on 10.09.2006].

Czeh authorities were requiring documentation to establish a family link between two applicants. Furthermore, the new Article 14 which was adopted for the purpose of avoiding situations that may lead to the seperation of family members, is applied very rarely. [1177]

Similarly, Article 15(1) of the Regulation which allows Member States to bring together family members on humanitarian grounds based in particular on family or cultural considerations could not be used effectively since many Member States had reported that they had never made or received an Article 15 request.[1178]

The Regulation has further been criticised for lacking a time limit for submitting a request to take back asylum seekers. Thus, this resulted in long delays in processing the claims of applicants.[1179]

With regard to the transfers, it is observed that Member States make very little use of the possiblity of traveling voluntarily to the responsible Member State. Therefore, UNHCR recommended Member States to conduct escorted flights only if there are clear indications that the applicant would not voluntarily return.[1180]

A problem that Hailbronner pointed to during the implementation of the Dublin Convention with regard to the withdrawal or absconding of the applicant before his case is examined on merits, still remains. It is observed that Member States, namely Belgium, France, Ireland, Italy, the Netherlands, Slovenia and Spain close the files in this case and do not re-open them upon the reappearance of the applicant. This practice raises concerns since it may lead to indirect refoulement.[1181]

Given the above points of concern, it is notable that the Member States are still trying to make the challenging burden sharing mechanism of the Dublin II Regulation work with the assistance of UNHCR and a number of NGOs closely observing the developments and the deficiencies of the system.

[1177] See UNHCR, The Dublin II Regulation: A UNHCR Discussion Paper, p. 26.
[1178] *Ibid.,* p. 34.
[1179] *Ibid.,* p. 40.
[1180] *Ibid.,* p. 45.
[1181] See UNHCR, The Dublin II Regulation: A UNHCR Discussion Paper, p. 50; See European Council on Refugees and Exiles, European Legal Network on Asylum, p. 151.

In addition to the Dublin and EURODAC regulations, a very significant element of the Union's burden sharing mechanism is the European Refugee Fund which, has been created for financial burden sharing among the Member States. The Council Decision 2004/904/EC established the European Refugee Fund for the period of 2005 to 2010.[1182] Article 2 of the Decision indicates the purpose of the Fund as *"to support and encourage the efforts made by the Member States in receiving and bearing the consequences of receiving refugees and displaced persons…".* In order to achieve this aim, the Fund supports actions of Member States relating to reception conditions and asylum procedures, integration of persons and voluntary return of persons.[1183] In addition to the stated actions, the Fund supports emergency measures under the Temporary Protection Directive.[1184] A fair distribution of the funding is envisaged according to the actual refugee burden each Member States bears. Accordingly, each Member State will receive a fixed amount of EUR 300,000 from the Fund's annual allocation. The remainder of the annual resources will be divided between the Member States according to the number of refugees dealt with as indicated in Article 17 of the Decision.

A general assessment of the instruments above indicate that unlike the relationship with third countries, the Member States maintain the common objective of burden sharing on asylum matters among themselves. This aim has resulted in the establishment of peculiar burden sharing mechanisms which still have certain deficiencies despite the Member States' tremendous efforts.

C. LEGAL ENVIRONMENT OF NON-REFOULEMENT IN THE TURKISH LAW

1. Evolution of the Principle of Non-Refoulement in the Turkish law

Turkey is a country with a tradition of asylum. As it is noted above with regard to the Central European Countries this is an essential factor in establishing a

[1182] Council Decision 2004/904/EC of 2 December 2004 Establishing the European Refugee Fund for the Period 2005 to 2010, OJ L 381, 28.12.2004; Also see Council Decision 2000/596/EC on the European Refugee Fund Established for the Period 2000 to 2004 OJ L 106 23.04.2002.
[1183] See Council Decision 2004/904/EC, Article 4.
[1184] *Ibid.,* Article 9.

fair and efficient asylum system. The Ottoman Empire has been a safe heaven for asylum seekers from a variety of countries of origin throughout its history, due to its strategic position and tolerant treatment of minorities. In this regard, the arrival of 300,000 Jewish refugees from Spain and Portugal in 1492 is often cited as an example by practitioners[1185] as well as academics.[1186] The influx of Jewish asylum seekers was in fact not confined to the era of Beyazid II; this wave was followed by many others. For instance, a group of Spanish Jews who were forced to convert to the Catholic faith sought refuge in the Ottoman Empire after 1532 and they were settled in the Island of Rodos. In 1674 and 1782, Polish Jews were settled in Istanbul and Edirne. Similarly, in 1891-1892, a group of Jewish refugees escaping from torture in Russia were settled in Istanbul.[1187] It was not only Jews who found refuge in the Ottoman land, the Polish and Hungarian revolutionaries after 1848, White Russians fleeing the Bolshevik Revolution in 1917,[1188] and almost one and a half million people displaced due to the rising nationalism in the Balkans and the emergence of new nation States such as Greece, Serbia, Romania, Montonegro and Bulgaria[1189] and approximately four milion displaced persons from the Caucasus, Crimea and Tataristan[1190] between the years 1859-1922, found refuge in the Ottoman Empire.[1191]

On the other hand, the Ottoman Empire's admission policy reflected the general character of the period as it was State-centric and ad hoc. Although the Ottomans were conscious of the humanitarian character of asylum, they did not

[1185] Mehmet Terzioğlu, *"Göçmen Ülkesi Olarak Türkiye: Hukuksal Yapı ve Uygulamalar"*, 8-11 December 2005 International Migration Symposium Communique, July 2006, Zeytinburnu Municipality, p. 169; Taner Kılıç, *"Bir İnsan Hakkı Olarak İltica"*, 8-11 December 2005 International Migration Symposium Communique, p. 173.
[1186] Kemal Kirişçi, *"Migration and Turkey"*, The Collection of Turkish Jurisprudence on Asylum, Refugees and Migration, December 2000, Boğaziçi Üniversitesi Vakfı, p. 3.
[1187] Ergun Hiçyılmaz, Meral Altındal, Büyük Sığınak: Türk Yahudilerinin 500 Yıllık Serüveninden Sayfalar, 1992, pp. 14-16; also see Naim Güleryüz, *"Türkiye'ye Yahudi Göçleri",* 8-11 December 2005 International Migration Symposium Communique, pp. 107-111.
[1188] Çiğdem Altınışık, Mehmet Şahin Yıldırım, Mülteci Haklarının Korunması, Ocak 2002, Ankara Barosu Yayınları, p. 42.
[1189] See Kirişçi, *"Migration and Turkey"*, p. 3.
[1190] For detailed information on influxes from Crimea and Tataristan see Hakan Kırımlı, *"Kırım'dan Türkiye'ye Kırım Tatar Göçleri",* 8-11 December 2005 International Migration Symposium Communique, pp. 147-152.
[1191] See Terzioğlu, p. 169.

regard this notion in a normative framework. There are examples that the Ottomans rejected or returned asylum seekers as well. For instance, Küçük Kaynarca Treaty of 1774 between the Ottoman Empire and Russia which marked the ending of the 1768 -1774 Ottoman–Russian War contained a provision indicating that the parties should not harbour and immediately send back, asylum seekers from each others' subjects who escaped from prosecution or treason unless the person concerned had converted to Islam or to the Christian faith respectively.[1192]

The Settlement Law of 14 June 1934 is the first Turkish national law that addresses to refugees after the establishment of the Republic.[1193] This law in fact aimed at attracting those migrants who identified themseves with the Ottoman Empire but were left in those territories that were seperated from the Empire.[1194] This Law however, also contained a refugee status in its Article 3 which defined a refugee as *"persons who take shelter in Turkey in order to reside temporarily on account of compelling reasons without the intention to settle permanently..."*

The definition of 'refugee' under this Article varied considerably from the definitions in the international instruments of its time. It is notable that this definition was much broader than the definitions of the 1933 Convention Relating to the International Status of Refugees that was based on the lack of protection and effective non-nationality and that only covered Russian, Armenian and Spanish refugees, and the 1938 Convention on the Status of Refugees Coming from Germany that covered only people fleeing from Germany for reasons of pure personal convenience in order to become refugees.[1195] This was probably due to the rather inviting approach of the Settlement Law designed for compensating the human element of the depopulated Anatolia. The broad definition however, resulted in a confusion of the refugee status with the status of migrants who had to be either of Turkish descent or attached to the Turkish culture according to the Article 3, which were used interchangeably in the case-

[1192] Ahmet Cevdet Paşa, Cevdet Paşa Tarihinden Seçmeler I, Sadi Irmak, Behçet Kemal Çağlar (eds.), Milli Eğitim Bakanlığı Yayınları, 2176, İstanbul, 1994, p. 93.
[1193] Settlemet Law, Law No. 2510 of 14 June 1934, R.G. No. 2733, 21.06.1934.
[1194] See Kirişçi, *"Migration and Turkey",* pp. 6-7.
[1195] See Barnett, p. 5.

law of the Turkish judiciary.[1196] Although, the textual interpretation does not necessarily indicate so, the Settlement code has only been applied for migrants of Turkish descent or attached to Turkish culture in practice.[1197] The holders of this status were wrongly referred to as 'national refugees' in Turkish legal and academic circles.[1198]

Turkish government however, had developed the practice of providing humanitarian visas and residence permits during the Second World War out of the Settlement Law framework.[1199] This practice enabled providing protection to refugees who were neither of Turkish descent nor attached to the Turkish culture. Thousands of jewish refugees were granted humanitarian transit visa according to a decree of the Council of Ministers adopted on 20 February 1941 in order to enable them to travel to their final destinations.[1200] Moreover, approximately 800 German speaking jews including university professors, scientists, artists were granted residence permit during this period on humanitarian grounds.[1201] These refugees left deep marks in the Turkish education system. Hence, the Turkish Government even resisted the pressure from the United Kingdom and France that declared war against Germany for dismissing these experts from the service of State as they were considered German.[1202] Most of these jewish refugees left to Palestine, Cairo, Tehran and the United States after 1943,[1203]

[1196] Turgut Tarhanlı, Sığınmacı, *"Mülteci ve Göç Konularına İlişkin Türkiye'deki Yargı Kararları Konusunda Hukuki Bir Değerlendirme"*, Sığınmacı, Mülteci ve Göç Konularına İlişkin Türkiye'deki Yargı Kararları, Published by Boğaziçi Üniversitesi Vakfı, December 2000, p. 2.

[1197] The Explanatory Memorandum of the Draft Amendment for Settlement Law Submitted to the Presidency of the Turkish Grand National Assembly on 07.01.2003 Attached the Document No. B.02.0.KKG/196-279/117 by the Prime Minister Abdullah Gül provides a list of figures indicating the application of the Settlement Code from the date of entry into force. The document refers hundreds of thousands of migrants of Turkish descent ot attached to Turkish culture coming from Bulgaria, Yugoslavia, Romania, Greece, China, Turkmenistan and others however, not one single incident referring to non-Turkish aliens.

[1198] Toplumsal Araştırmalar Vakfı, *"Türkiye'de İltica Politikaları"*, Sığınma Hakkı ve Mülteciler: İltica Hakkı ve Mülteciler Atölyesi Ankara 24-26 Mart 2001, İnsan Hakları Derneği, p. 59.

[1199] See Terzioğlu, p. 169.

[1200] Çağrı Erhan, Yunan Toplumunda Yahudi Düşmanlığı, 2001, Ankara Stratejik Araştırma ve Etüdler Milli Komitesi, http://www.saemk.org/yayin_detay.asp?sbj=icerikdetay&id=11&dba=005&dil=tr [visited on 18.09.2006]; Kemal Kirişçi gives an estimated number of 100,000 jews who transited Turkey during the Second World War (Kirişçi, *"Migration and Turkey",* p. 16).

[1201] See Kirişçi, *"Migration and Turkey"*, p. 16.

[1202] Ernst E. Hirsh, Anılarım: Kayzer Dönemi, Weimar Cumhuriyeti, Atatürk Ülkesi, Eyül 1997, Tübitak Popüler Bilim Kitapları, p. 306.

[1203] *Ibid.,* p. 307.

while a few of them obtained Turkish citizenship and stayed longer.[1204] Temporary protection was also provided to Bulgarians, Greeks and Italians from the Dodecanese Islands during the Second World War. It is observed that the number of internees and refugees in Turkey at the end of the Second World War amounted to approximately 67,000 persons.[1205]

Meanwhile in 1941, the Turkish legislator also adopted a law governing the specific treatment of the foreign military staff who sought asylum in Turkey.[1206]

As a major destination and a transit country for refugees, Turkey did not stay out of the negotiations of the 1951 Refugee Convention. She was among the active negotiators of the 1951 Refugee Convention.[1207] The Convention was however ratified by the Turkish Grand National Assembly with some delay by the Law No. 359 in 1961.[1208] Turkey published a declaration on the basis of Law No. 359, indicating that she perceived the words "events occuring before 1 January 1951" in Article 1(B) as "events occuring in Europe before 1 January 1951"1. Thereby, the definition of refugee was confined to events that occurred in Europe for the practice of the Republic.[1209] Such geographical limitation was maintained while ratifying the Protocol Relating to the Status of Refugees by the Council of Ministers Decree in 1968.[1210]

[1204] *Ibid.,* pp. 305-317

[1205] Jacques Vernant, The Refugee in the Post-War, 1953, London, p. 242 at Kirişçi, *"Migration and Turkey"*, p. 12

[1206] Law No. 4104 of 11 August 1941 on Combatant Members of Foreign Armies Seeking Asylum in Turkey, R.G. 4887, 15.08.1941. The implementation of this law was shown in the By-Law No. 7473 of 7 November 1995 on Combatant Members of Foreign Armies Seeking Asylum in Turkey, R.G. No. 22456, 7.11.1995.

[1207] See Turkish representative Mr. Kural's statements in the Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Third Meeting Held at Lake Success, New York, on Tuesday, 17 January 1950, at 3 p.m http://www.unhcr.org/ [visited on 21.05.2006]

[1208] Law No. 359 Regarding the Ratification of the Convention Relating to the Status of Refugees of 28 July 1951, adopted on 29 August 1961, R.G. No. 110898, 05.09.1961.

[1209] Turkey's declaration contains two other limitations. Firstly, Turkey declared that she would adopt the Convention regardless of the obligations arising from the references to the two treaties cited in Article 1(A) dated 12 May 1926 and 30 June 1928. Secondly, Turkey declared that she would understand the words *"[h]e has volutarily re-availed himself of the protection of the country of his nationality"* and *"[h]aving lost his nationality, he has voluntarily reacquired it"* as not merely based on the claim of the persons concerned but also on the consent of the State concerned.

[1210] Council of Ministers Decree No. 6/10266 of 1 July 1968 on Ratification of the Protocol Relating to the Status of Refugees, R.G. No. 12968, 5 August 1968.

Adoption of the 1951 Refugee Convention marked a new era in Turkish asylum law; as Turkey's Action Plan for Asylum and Migration[1211] comments on it *"[p]rior to the adoption of 1951 Geneva Convention, various pieces of legislation contained –though inadequately- provisions on the entrance, admission, naturalization settlement, work/residence permits and deportation of foreigners in Turkey"*.[1212] The provisions of the Settlement Law which, was predominantly designed for immigration purposes proved to be inadequate for coping with the refugee flows during and after the Second World War. Turkey had reformed the general legal framework of aliens by adopting the Passport Law[1213] and the Law on Residence and Travel of Aliens in Turkey.[1214] Although, both of the said legislations provided a broad margin of discretion to the Ministry of Interior, they did not contain asylum specific mechanisms. Therefore, adoption of the 1951 Refugee Convention can be regarded as the Turkey's first comprehensive undertaking with regard to asylum matters.

The adoption of the 1951 Refugee Convention raised an interesting discussion concerning the conflict between the definitions of refugee in the Settlement Law and the Convention. Altınışık and Yıldırım argued that the 1951 Refugee Convention abolished the refugee definition in the Settlement Law when it entered into force.[1215] This argument can be confronted with suspicion due to the nature of the suggested conflict between these two norms. It is true that under the Article 65 of the 1961 Constitution of the Republic of Turkey, international law treaties were at the same level with domestic laws in the heirearchy of norms,[1216] thus *lex posterior derogat legi priori* rule should apply in the event of any conflict between these two norms. However, it is doubtfull whether such a conflict existed

[1211] 'Turkey's Action Plan on Asylum and Migrantion' which, was prepared by Task Force for the Asylum-Migration Action Plan bringing together officials from relevant Ministries, Institutions and Organizations entered into force on 25.03.2005 upon the approval of the Prime Minister Tayyip Erdoğan of the document no. B.05.1.EGM.0.13.03.02.
[1212] *Ibid.,* Article 3.1.
[1213] Passport Law No. 5682 of 15 july 1950, R.G. 24 July 1950, R.G. No. 7564, 24 July 1950.
[1214] Law No 5683 of 15 July 1950 on Residence and Travel of Aliens in Turkey, R.G. No. 7564, 24 July 1950.
[1215] See Altınışık, Yıldırım, p. 35.
[1216] Seha L. Meray, Devletler Hukukuna Giriş, Ankara, 1968, Vol. I, p. 132; Tahsin Bekir Balta, Avrupa İnsan Hakları Sözleşmesi ve Türkiye, Türkiye'de İnsan Hakları, Ankara, 1970, p. 278.

between the refugee definition in the Settlement Law and the definition in the 1951 Refugee Convention. In this respect, it is notable that the short definition in the Settlement Law was broader than the definition in the 1951 Refugee Convention. Unlike the Convention, the Settlement Code contained neither temporal nor geographical restrictions. Furthermore, it did not confine the refugee status to the five grounds in the Convention and it did not specify a 'well-founded fear of persecution" formula, but merely referred to "compelling reasons" to take shelter. A noticeable aspect of the of the Convention definition in this respect is that it provides the minimum standards for defining refugee status and therefore, States Parties were allowed to adopt broader definitions such as the one in the OAU Convention. Finally, the intention of the Turkish legislator and the practice also has to be taken into consideration in assessing the possibility of conflict between the two definitions. In this respect, it is notable that the Turkish legislator did not adopt an express provision for annulling the definition in the Settlement Law until 19.09.2006. The Settlement Law was amended several times with the laws no. 1306, 3583, 3805, 4057 and 4629 after the entry into force of the 1951 Refugee Convention, however, the refugee definition was not removed from the text of the Law. Moreover, the 1994 Bye-law which is the only domestic legal instrument regulating specifically asylum matters adopted for the purpose of implementing the 1951 Refugee Convention, reserves the definitions in other laws, regulations and by-laws in its Article 3.[1217] This provision clearly refers to the definition in the Settlement Law which was the only instrument in Turkish law defining refugees other than the 1994 By-law. Therefore, it can be cocluded that the refugee definition in the Settlement Law survived along with the definition in the 1951 Refugee Convention until it was amended in September 2006[1218] The refugee definition has recently been taken out of the text in the amendment as it stood as a major obtacle for harmonization with the EU asylum framework that is predominantly based on the definition of the 1951 Refugee Convention.

[1217] By-Law No. 94/6169 of 30 November 1994 on the Procedures and Principles Related to Population Movements and Aliens Arriving in Turkey Either as Individuals or in Groups Wishing to Seek Asylum Either From Turkey or Requesting Residence Permits in Order to Seek Asylum from Another Country, R.G. No. 22127, 30.11.1994.
[1218] Law No. 5543 of 19.09.2006, R.G. 26301, 26.09.2006.

The 1951 Refugee Convention has been an asset for Turkey in the years of Cold War as a country at the external borders of the NATO. The Convention status was granted to asylum seekers escaping the Eastern European countries.[1219] On the other hand, starting from the Iranian Revolution in 1979, Turkey faced new waves of asylum seekers in larger numbers which era İçduygu names as the 'fertilization period'.[1220] Turkey avoided taking the responsibility of asylum seekers coming from the East by virtue of the geographical limitation to the 1951 Refugee Convention. The geographical limitation meant that Turkey did not consider itself prepared to take over the responsibility of refugees coming form outside Europe. Since the 1951 Refugee Convention did not impose an asylum procedure itself, Turkey had not established detailed asylum specific procedures in its domestic law. The solution was to defer this responsibility to the UNHCR Branch Office Ankara which had been operating since 1960[1221] and ultimately to third countries which would be willing to receive refugees recognized by the UNHCR.[1222] However, as the number of asylum seekers rose towards the end of 1980s and the beginning of 1990s this solution turned out to be insufficient. Turkey had difficulty in responding to mass influxes of 51,542 asylum seekers from Iraq in 1988, 369.000 asylum seekers from Bulgaria in 1989, 467,489 asylum seekers from Iraq in 1991 and 20,000 asylum seekers from Bosnia starting from 1992.[1223] These experiences showed that two major problems prevailed under the Turkish legal framework. First, there was no status or any protection mechanism available for those non-European asylum seekers during their stay in Turkey through the UNHCRs' RSD procedure. Therefore, the Turkish authorities had difficulty in getting syncronized with the UNHCR procedure. Asylum seekers who were registered with the UNHCR could face the risk of deportation for staying illegally in the Turkish territory as no special status was envisaged for those refugees under the Turkish law.[1224] The second major problem was the lack of any

[1219] See Kirişçi, *"Migration and Turkey",* p. 17.
[1220] Ahmet İçduygu, *"Demographic Mobility and Turkey: Migration Experiences and Government Responses"*, Mediterranean Quarterly, Fall 2004, p. 90.
[1221] http://www.unhcr.org.tr/turkiyedebmmyk.asp [visited on 19.09.2006].
[1222] See Bill Frelick, *"Barriers To Protection: Turkey's Asylum Regulations",* International Journal of Refugee Law, 1997, Vol. 9, No. 1, p. 8.
[1223] The figures are taken from Terzioğlu, p. 169.
[1224] See title 'Removal from the Turkish Territory' below.

legal mechanism for responding to the situations of mass influx which required a special organization. Turkish Government did not grant Convention status not even to the European asylum seekers such as the Bosnians or Bulgarians[1225]during this period but tried to cope with the situation by resorting to the general rules designed for aliens. This meant that in most cases the asylum seekers were granted a humanitarian residence permit that unlike the 1951 Refugee Convention, did not entail specified protection responsibilities for the Government. The consequences of this legal environment was much worse in the case of Iraq War in 1991 where many of the Iraqi asylum seekers of Kurdish origin perished at the Turkish border as the border was closed.[1226]

These deficiencies forced the Turkish Government to take further steps for establishing new statuses and procedures concerning asylum matters. The 1994 By-Law is the product of this effort. The 1994 By-Law established a specific status for non-European asylum seekers in addition to the Convention status and envisaged a particular procedure to be followed with respect to such statuses.

Particularly, the special deportation procedure envisaged in Article 29 of the By-Law for individual asylum applicants both from European and non-European countries represented an important step forward from the general deportation clause in Article 19 of the Law on Residence and Travel of Aliens in Turkey which containes exceptionally broad deportation powers to the Ministry of Interior.[1227] The value of this exceptional mechanism was however, hindered to some extent by procedural barriers set for having access to the procedure and particularly the 5 days time limit for asylum application after entry from the border. The last paragraph of Article 4[1228] was especially dangerous since it made reference to the general provisions of the Passport Law which enabled the applicant to be penalized for

[1225] 229,548 of the Bulgarian asylum seekers were granted Turkish citizenship since they were Bulgarian citizens of Turkish origin. (See Terzioğlu, p. 169)
[1226] For a detailed analysis of the developments during the 1991 Iraq War see Zieck, pp. 171-260.
[1227] For more detailed analysis of this topic see infra title 'Removal from the Turkish Territory'.
[1228] The version of Article 4 before the Amendment of the 1994 By-Law by the Council of Ministers Decree No. 2006/9938 of 16.01.2006, R.G. No. 26062, 27.01.2006.

illegal entry[1229] and the Law on Residence and Travel of Aliens which included a deportation procedure on broadly set grounds and disregarding any risk that the applicant might be subjected to in the territory where the persons would be returned.

The By-Law further contains detailed provisions on admission and deportation of asylum seekers in mass-influx situations. In this respect, Article 8 sets the principle that population movements shall be stopped at the border and that asylum seekers be prevented from crossing over into the Turkish territory unless a political decision is taken to the contrary and provided that Turkey's obligations under international law are maintained. This provision is concerning as well as being incoherent within itself as it is discussed below under the title of 'Mass-influx situations'. On the other hand, Article 26 contains a specific deportation procedure for those persons who are provided temporary protection.[1230]

The said deficiencies of the 1994 By-Law resulted in several disputes being brought before the Turkish administrative courts particularly starting form 1997. The Turkish Council of State took a rather liberal interpretation of such problematic Articles to the benefit of asylum seekers which to a great extent deemed such obstacles ineffective.[1231] The said case-law however, could not be reflected into the practice immediately. Instead, the time limit in Article 4 was extended to 10 days by a Council of Ministers Decree on the amendment of the 1994 By-Law at begining of 1999.[1232] The case-law of the Turkish administrative courts however, show that this amendment did not solve the problems since the Courts continued to receive applications with regard to asylum seekers who were left outside the asylum procedure and were subject to deportation orders while being registered or even

[1229] See Passport Law, Article 34; see also Halim Yılmaz, *"Mültecilerin Sınırdışı Edilmesi ve Yargısal Denetim"*, Türkiye'deki Geçici Sığınmacı Kadın ve Çocukların Psikososyal Durumlarının Tespiti ve Yaşam Koşullarının İyileştirilmesi İçin Çözüm Önerileri, Şubat 2005, MAZLUMDER, p. 36.
[1230] For an anlysis of this procedure see infra title 'Removal from the Turkish Territory'.
[1231] For detailed analysis of the said cases see infra the title 'Return'.
[1232] Council of Ministers Decree No. 98/12243 Concerning the Amendment of the By-Law on the Procedures and Principles Related to Population Movements and Aliens Arriving in Turkey Either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permits in order to Seek Asylum from Another Country, R.G. No. 23582, 13.01.1999.

recognized as a refugee by the UNHCR.[1233]

The year 2000 however, is a turning point in Turkish practice on non-refoulement. In July 2000, the European Court of Human Rights rendered its Judgment on the Jabari case which found a violation of Articles 3 and 13.[1234]Jabari was one those many cases where the applicant faced a deportation order despite being recognized as a refugee by the UNHCR. A significant aspect of the judgement was the part indicating that Turkey could not invoke the geographical limitation under the 1951 Refugee Convention in order to justify deportation orders where substantial grounds can be shown for the existance of a real risk of torture, inhuman or degrading treatment or punishment in the country of origin.[1235] Similarly, the same year, references to the Article 3 of CAT appeared in the jurisprudence of Turkish Administrative Courts.[1236] This is a period that complementary effect of human rights instruments started to influence the Turkish practice on the prohibition of refoulement. Complementary use of human rights instruments has been particularly important in the case of Turkey as the 1951 Refugee Convention couldnot be applied for non-European asylum seekers due to the geographical limitation. Gradually, a closer cooperation was established between the Ministry of Interior and UNHCR. Two significant developments in this respect contributed to the sycronisation between these two institutions. Firstly, a mechanism has been established in practice where the information concerning non-European asylum seekers are is mutually shared and the status of the applicants are collectively debated.[1237] Secondly, the new mechanism required that those asylum seekers arriving the Turkish territory through legal or illegal means should be allowed to reside in Turkey pending for the decision to be made.[1238]

This new policy framework inevitably lead to new amendments in the 1994

[1233] For the analysis of the relevant cases see infra title 'Return'.
[1234] See *Jabari v. Turkey*.
[1235] *Ibid.,* para. 36-38.
[1236] For the analysis of the relevant cases see infra title 'Return'.
[1237] See Turkey's Action Plan on Asylum and Migrantion, para.3.1.1.
[1238] *Ibid.*

By-Law in January 2006.[1239] It is noticeable that the 10 days time limit for application was replaced with the words 'shall apply without delay'. Thereby the Article 4 of the By-Law which constituted a major barrier for accessing to the asylum procedure has been given the flexibility that the European Court of Human Rights asked for in the Jabari judgement. Another noteworthy change has been the amendment of the last paragraph of Article 4 which used to expose asylum seekers to the risk of being penalized and deported without the relevant risk assessment. This paragraph has been totally taken out of the Article. Therefore, the risk of being exposed to the general deportation procedure for aliens before having acess to the asylum procedure has been prevented. On the other hand, a new paragraph has been inserted to the Article 6 which paves the way for introducing accelerated procedures similar to the one in the EU Asylum Procedures Directive.

Finally, a detailed directive has been sent to the provincial directorates on 22 June 2006 that provides a description of how the 1994 By-Law shall be implemented in line with the new amendments.[1240] This Directive adds two statuses namely, the 'subsidiary protection' and 'residence permits on humanitarian grounds' to the ones enshrined in the 1994 By-Law through the Article 6 of the By-Law which, refers to the general provisions. These developments show that Turkish asylum law is going through a transition stage similar to the one that the EU Member States have passed in the last decade due to the complementary effect of human rights mechanisms. Accordingly, the risk analysis under the asylum procedure can not be confined to the refugee status which is in some respects narrower than the protection under the human rights instruments. Therefore, risk assessment under the human rights instruments, particularly the ECHR is in the process of becoming a part of the asylum procedure in Turkish practice.

The mechanism in question has been established by making more efficient use of the existing legal structures and predominantly by administrative instruments rather than a legislative reform process which took place in the other areas of human

[1239] See supra amendment to the 1994 By-Law by the Council of Ministers Decree No. 2006/9938 of 16.01.2006.
[1240] General Directorate of Security of the Ministry of Interior of Turkey, Directive No. 57 of 22 June 2006, Document No. B.05.1.EGM.0.13.03.02./16147.

rights law and democratization in Turkey. Regulating an area as such, that is deeply related to the fundamental rights and freedoms, by administrative instruments can be criticised. On the other hand, ironically the answer for the question why a full fledged reform process has not yet taken place in this field of law can be found in the European Unions' asylum acquis and Turkey's accession process.

2. EU Asylum Law and the Turkish Accession Process

As explained in detail in the previous chapter, asylum law has appeared as a major area of the European Community law in the last decade. Considering substantial deepening of the Community acquis in this area, it has undoubtfully become one of the most challenging areas of the EU accession process for Turkey.

The road map for Turkey's harmonization of asylum legislation was initially drawn by the Accession Partnership document which, was adopted firstly on 8 March 2001[1241] and subsequently revised on 26 March 2003.[1242]

This document sets forth the following objectives on migration and asylum policy concerning Turkey's accession to the European Union:

- In the short term: Struggle against illegal migration will be further strengthened and a readmission agreement will be negotiated with the Commission,

- In the medium term: the EU Acquis and practices on migration (permission for entrance and re-entrance to the territory and deportation) will be adopted and put into force for the purposes of preventing illegal migration and alignment in the field of asylum will be ensured, activities striving for lifting the geographical limitation to the 1951 Refugee Convention will commence, the system for evaluating and deciding on

[1241] Council Decision 2001/235/EC of 8 March 2001 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey, OJ L 85/13, 24.03.2001.
[1242] Council Decision 2003/398/EC of 19 May 2003 on the Principles, Prorities, Intermediate Objectives and Conditions in the Acession Partnership with the Republic of Turkey, OJ L145, 12.06.2003.

the asylum claims will be strengthened and accomodation centres and social assitance will be provided for asylum seekers and refugees.

Shortly after the adoption of the revised Accession Partnership Document the Turkish Government published the National Programme for the Adoption of the Acquis which was published in the Official Gazette on 24 July 2003.[1243] This document provides a detailed list of undertakings by the Turkish Government on asylum and migration issues including a comprehensive legislative reform. In this respect, the Turkish Government had planned the adoption the Law on Aliens by the 1st January 2005 and the Law on Asylum within the year 2005 and lift the geographical limitation under the 1951 Refugee Convention.

Both the time frame and the anticipated content of the Law on Asylum showed that the Turkish side was not yet prepared for the asylum harmonization by the year 2003. Hence, the Program indicated that the Law on Asylum which would be adopted until the end of 2005 should include provisions corresponding to the implemetation of the Dublin Treaty and the Dublin II Regulation, EURODAC and the Council Decision of European Refugee Fund.[1244] It was not however, meaningfull to adopt rules corresponding to those instruments in 2005 since they were all exclusive to the EU Member States and could only be applied with mutual consent. For instance, establishing the criteria for determining the State responsible for asylum applications would only be meaningfull if a State was part of the Dublin regime which is only possible after full membership. Even if it was possible, introducing such criteria into the domestic law would be meaningless as this area was governed by a Council regulation which was directly applicable and thus would not require transposition of the norms concerned into the domestic law. This was also the case for the EURODAC Regulation. Furthermore, the European Refugee Fund was established in order to assist financial burden sharing of the Member States through funding specific asylum related activities of the Member States. Therefore, adopting rules concerning the European Refugee Fund in 2005 under Turkish domestic law would not be meaningfull either since Turkey did not qualify as a beneficiary of the

[1243] Turkey's National Programme for the Adoption of the Acquis, R.G. No. 25178 bis., 24.07.2003.
[1244] *Ibid.,* table 24.1.1.

Fund. On the other hand, Turkey's Action Plan on Asylum and Migration that was adopted in 2005[1245] shows that the Turkish side had come to realize the dynamics of the European asylum framework with regard to its effects on the neigbouring countries including Turkey. The Plan has revised some important objectives set forth in the 2003 National Programme. For instance, the deadlines for adoption of the Law on Asylum and Law on Aliens have been postponed to 2012.[1246] It is indicated that the fate of these two codes are strongly linked to the negotiations between the European Commission and the Turkish Government on burden sharing. This point has been criticized by Amnesty International which, published a media briefing on the Action Plan.[1247] The Plan further indicates that a proposal for lifting the geographical limitation might be expected to be submitted to the Turkish Grand National Assembly in 2012 in line with the completion of Turkey's negotiations for accession to the E.U.[1248] It is noticeable that the objectives concerning the Dublin II Regulation, the EURODAC and the European Refugee Fund have been replaced with more realistic ones such as the establishment of an asylum and migration specialization unit, a training academy, a COI system, reception and accommodation centres for asylum seekers, initiation of accelerated prodecures for asylum decisions, standards regarding applying to administrative justice against asylum decisions, setting standards on non-refoulement, introducing family unification procedures, setting standards on subsidiary protection, establishing an integration system for refugees[1249] etc.

The revisions on Turkey's future plans for improving its asylum system demonstrates a visible hesitation in taking steps that may result in an overall change in the asylum law framework. The grounds for this hesitation can be found in the EU

[1245] See supra Turkey's Action Plan on Asylum and Migration.
[1246] *Ibid.,* see annexed table titled 'Ministries, Institutions, and Agencies Responsible for Implementing the National Action Plan.
[1247] Amnesty International Turkey Branch, Iltica ve Göç Ulusal Eylem Planı: Eksik Olan Insani Duyarlilik, 19 May 2005, http://www.amnesty-turkiye.org/sindex.php3?sindex=vifois2405200501 [visited on 25 August 2005].
[1248] *Ibid.,* para. 4.13.
[1249] For a detailed analysis of the current situation in Turkey see Lami Bertan Tokuzlu, *"Integration of Aliens Under the Turkish Law"*, Integration Policies: The View from Southern and Eastern Mediterranean Countries, Articles submitted in the CARIM Consortium Seminar Tunis 12-15 December 2005, Robert Schuman Centre, European University Institute, available at http://www.carim.org [visited on 20.09.2006].

asylum acquis itself. It is rather interesting to note that on the one hand, the Union appears to be a strong supporter of Turkey's efforts for developing its asylum laws and on the other hand, it constitutes the biggest obtacle for Turkey in achieving this aim.

This conclusion is reached by a simple assessment of the European Union's existing asylum acquis and the position of Turkey as a transit country. The current Turkish asylum law is designed as to give Turkey a transit role for asylum seekers rather than allowing them to stay permanently. It is true that theoretically it is possible for European asylum seekers to obtain refugee status and stay in Turkey however, this has not been granted even to Chechnians[1250] or Bosnians who remain/remained in Turkey with humanitarian residence permits granted under the general provisions of the Law on Residence and Travel of Aliens. The number of asylum seekers getting involved to the asylum procedure in Turkey per year is approximately 5,000.[1251] The number of illegal migrants apprehended in Turkey annually was around 100,000 at the begining of 2000s which declined to 56,000 in 2003.[1252] The number of smugglers captured since 1998 reflects the significance of Turkey as a route for illegal migrants which, probably include asylum seekers as well. Within this period Turkey apprehended 5961 smugglers of 32 different nationalities.[1253]

Turkey is a State party to the ECHR[1254], CAT[1255] and ICCPR[1256] and accepted the supervisory and/or judicial competences of the monitoring bodies

[1250] For the status of Chechens in Turkey, see Terzioğlu, p. 170.
[1251] İçduygu, *"Demographic Mobility and Turkey: Migration Experiences and Government Responses"*, p. 89.
[1252] *Ibid.,* p. 91.
[1253] See Terzioğlu, p. 171.
[1254] See Law No. 6366 of 10 March 1954, R.G. No. 8662, 19.03.1954. Declaration the competence of the Commission to receive individual complaints (Council of Ministers Decree No. 87/11439 of 22 January 1987, R.G. No. 19438, 21.04.1987) and declaration recognizing the competence of the Court (Council of Ministers Decree No. 89/14861 of 12 December 1989, R.G. 20384, 26.12.1989.)
[1255] Council of Ministers Decree No. 88/13023 of 17 July 1988, R.G. No. 19895, 10.08.1988. Declaration recognizing the competence of the Committee Against Torture according to Article 21 CAT is available at http://www.ohchr.org/english/countries/ratification/9.htm#reservations [visited on 29.09.2006]
[1256] Council of Ministers Decree No. 2003/5451 of 7 July 2003, R.G. No. 25175, 21.07.2003. Turkey recognized the competence of the Human Rights Committee by ratifying the Optional Protocol (Council of Ministers Decree No. 2006/10692 of 29.06.2006, R.G. No. 26250, 05.08.2006.)

thereof. Thus, She is arguably the most democratic transit country of asylum seekers that the European Union is currently dealing with. Given such human rights standards, Turkey still does not qualify and function as a safe third country according to the criteria set forth in the Asylum Procedures Directive of the European Union.[1257] There are two grounds for supporting this conclusion that can be noticed immediately: Firstly, Turkey maintains its geographical limitation under the 1951 Refugee Convention. Therefore, for the vast majority of asylum seekers there is no possibility to receive protection according to the 1951 Refugee Convention. Secondly, Turkey only has a readmission agreement with Greece[1258] which does not work properly in practice, as it will be examined in further detail herein below. Therefore, Turkey has no obligation to readmit third country citizens who use its territory to travel to the territories of the EU Member States, except for Greece. Consequently, for the time being, the European Union cannot, effectively implement the burden shifting tools that it has developed unilaterally against Turkey. It is not possible to send asylum seekers back to Turkey without examining their asylum claims. This situation puts Turkey at the position of an ideal potential safe third country for the European Union.

The road map which was drawn for Turkey in the Accession Partnership document implies Turkey's special position as a candidate for the European Union in asylum maters. Turkey is required to lift the geographical limitation and to negotiate a Community readmission agreement with the Commission. Compliance with these two requirments will definitely bring Turkey in the domain of a safe third country.

In this respect, it is noticeable that Turkey has been the only candidate country which was imposed a Community readmission agreement throughout the accession process. As noted above, the Council had decided to exclude the candidate countries from the countries with which Community readmission agreements would be concluded.[1259] However, conclusion of a Community readmission agreement with

[1257] See Kjaerum, p. 291.
[1258] Protocol on Readmission of Illegal Migrants, Council of Ministers Decree 2002/3914 of 12 March 2002, R.G. No. 24735, 24.04.2002.
[1259] Council Doc. 7999/02 of 15 April 2002 on the Criteria for the Identification of Third Countries With Which New Readmission Agreements Need to Be Negotiated.

Turkey was endorsed only a few months after such decision, by the Seville European Council in June 2002. The Council formally authorized the Commission in November 2002 to start negotiations on the conclusion of a Community readmission agreement with Turkey. The Draft text was officially transmitted to the Turkish Government in March 2003.[1260]The negotiations have opened in May 2005[1261] however, they have not yet been finalized.

As noted above, the Central European Countries which, have recently become full members to the Union were merely encouraged to sign bilateral readmission agreements with the Member States and among each other in return of visa facilitations towards their own citizens by the then existing Member States. This gave such candidate States the possibility to choose the countries with which they would establish this relationship. Whereas, in the case of a Community readmission agreement that Turkey faces, all Member States would have the possibility to send asylum seekers back to the country through which they come from.

Another risk that concluding the proposed readmission agreement entailes is that such agreements are notorious for causing problems in practice. Having a closer look at the readmission agreement between Turkey and Greece does give some insight about the potential problems that may be carried to the relationship between the EU and Turkey if a standard readmission agreement is signed with the Community.

In ECRE's 2003 Country Report for Greece, it was indicated that "out of the 2,500 occasions that Greece invoked the agreement, Turkey refused 2,486 cases, arguing that there was no evidence that asylum seekers had travelled through Turkey".[1262] On the other hand, it has been repeatedly reported by the Turkish

[1260] See Shieffer, p. 346-347.
[1261] European Commission, COM(2005)561 final, Turkey 2005 Progress Report, 9 November 2005, p. 111.
[1262] European Council on Refugees and Exiles (ECRE) Country Report for Greece 2003, p. xvi, http://www.ecre.org/ [Last visited on 02.09.2005]. According to the information note of the Turkish Ministry of Interior dated 2 September 2005 since the conclusion of the Protocol the Greek Government claimed the readmission of 18199 persons 2816 of which were accepted by the Turkish side. The number of illegal migrants delivered to the Turkish authorities however, are 1023. On the other hand, the Turkish authorities have made 859 readmission claims from the Greek side 19 of

authorities that the Greek side have been prefering not to use the readmission procedure in the Protocol but to send asylum seekers informally to Turkey by either pushing the boats of illegal migrants apprehended at the borders towards Turkish waters or release them in order to let them escape towards Turkey. An information note of the Turkish Ministry of Interior dated 2 September 2005 adresses to three recent incidences that illegal migrants were sent to Turkey informally.[1263] One of those instances was the case of a sinking boat captured clause to Kusadasi on 13 July 2004 from which, 56 Somalian, 2 Morrocon and 6 Moritanian nationals were rescued. Turkish authorities noticed that there were two Greek coast guard boats beside the boat in question when they approached to the place. The Somalian and Moritanian nationals in question were interviewed by UNHCR officials upon the request of the Turkish Ministry of Interior. According to the information provided by the Turkish authorities, they had told in their interviews that they had paid 1400 – 2000 USD to smugglers who brought them to Greek waters from Libya where, they were apprehended by the Greek authorities, taken to another boat and been towed towards Turkish waters and released. This incidence was taped by a FLIR video camera of the Turkish coast guard helicopter. Another similar incident reported by the Turkish Ministry of Interior took place on 11 July 2005 when 29 Moritanian, 4 Somalian and 1 Algerian nationals were apprehended by Turkish authorities in a boat close to Izmir Province. They had crossed to the Turkish waters with a boat carrying a Turkish flag which was known to have been confiscated by the Greek authorities in 2002 due to the fact that it was used for smuggling purposes. In their interview, the migrants told the officials that they had departed from Libya and crossed the Greek waters illegally where they were apprehended and detained for three days. Later on they were put in the boat and taken to the Turkish waters. The Turkish authorities indicate that many other similar incidences are taking place in the area.[1264]

---

which, were accepted. (Readmission Bureau of the Population Movements Branch under the Head of the Aliens, Border and Asylum Unit, Information Note: Greece – Turkey Readmission Protocol, 02.09.2005)

[1263] The information note concerned was prepared by the General Directorate of Security of Ministry of Interior upon the author's request on 2 September 2005.

[1264] See for instance, Soner Gürel, *"Mülteci Operasyonu"*, Hürriyet, 20 September 2006.

The dispute has been high up in the agenda of the European Commission as well. 2004 Regular Report on Turkey's progress towards accession prepared by the European Commission indicates that the Turkish and Greek authorities have held the first meeting of the Co-ordination committee established under the Readmission Protocol in July 2004 and discussed the implementation of this document. The Parties agreed to take measures to implement the protocol more effectively and to convene further meetings at expert level.[1265] Given the above mentioned recent incidences however, it appears that the problem still remains to be solved by the parties.

The system apparently fails due to the two reasons: Firstly, there is no comprehensive database such as EURODAC where parties can exchange trustworthy entry records concerning asylum seekers. Secondly, Article 9(3) of the Protocol indicates that each requesting State is oblidged to bear all expenses of the third country national until he/she arrives to his/her country of origin. Therefore, using an informal channel for returning asylum seekers become more profitable for the potential requesting State. In this respect, the lack of a comprehensive financial burden sharing arrangement such as the European Refugee Fund appears as a factor hindering the process.

In any case, as noted in the previous chapter, the readmission agreements that the European Union proposes[1266]have neither the burden sharing perspective nor any mechanism for safeguarding the rights of asylum seekers. It is undoubtfully a burden shifting tool for the European Union. The fact that the European Union imposes a burden shifting tool to a candidate State which is in the process of becoming a part of the burden sharing system within the European Union raises questionmarks on this policy. Considering the senstivity of the matter in the agenda of the Member States, this may well work agains Turkey's full membership in the long run since having shifted the burden of asylum seekers to Turkey, Member States

[1265] European Commission, 2004 Progress Report COM(2004) 656 final on Turkey's Progress Towards Accession, 6.10.2004 SEC(2004), p. 120.
[1266] See Council Recommendation of 30 November 1994 Concerning a Specimen Bilateral Readmission Agreement Between a Member State and a Third Country OJ C 274 , 19.09.1996.

may be discouraged from allowing her to become a part of a legal framework that will require re-sharing it.

Since Turkey has already undertaken to negotiate this agreement with the Commission, the solution could be the reformulation of the agreement in such a way that would bring it closer to the burden sharing relationship that exists among the EU Member States. In this context, establishement of a joint database similar to the EURODAC between the EU and Turkey, establishment of an institutionalized funding arrangement such as the European Refugee Fund, and most importantly, incorporating the Dublin criteria for determining the State responsible of asylum seekers into the readmission agreement can be recommended. With regard to the last point, it is crucial that the only criteria for assuming responsiblity is not the transit of an asylum seeker from Turkey.

As one of the negotiators of the 1951 Refugee Convention Turkey is one of the few countries in the world maintaining the geographical limitation. Therefore, developing its asylum law by lifting the geographical limitation would be a solid opportunity for Turkey to show the international community its commitment to human rights in a time that the Western States are more and more introducing restrictive laws in this area. However, the fact that Turkey is a part of the competition on asylum among the European countries is a reality which cannot be ignored. Turkey may well be forced to adopt a more restrictive approach when/if she encounters a burden that cannot be born by her limited resources as in the case of Central European countries that were allowed to have a more controlled transition to the safe third country status.

Turkey has already adopted some of the criticised features of the European Asylum system such as the accelarated procedures[1267]and also she has been following a policy of concluding readmission agreements with primarily the source countries and progressively transit countries and countries of destination since 2001 which may shift a potential increase in the burden of Turkey towards the transit

[1267] See infra title 'The Procedure'.

countries. Turkey has signed readmission agreements with Greece[1268], Ukraine[1269], Syria[1270], Kirghizistan[1271] and Romania[1272] until so far.[1273] There are ongoing negotiations with the Russian Federation, Uzbekistan, Belarus, Hungary, Macedonia, Ukraine, Lebanon, Egypt, Libya and Iran are underway. Readmission agreements were proposed to Pakistan, Bangladesh, India, People's Republic of China, Tunisia, Mongolia, Israel, Georgia, Ethiopia, Sudan, Algeria, Morocco, Nigeria and Kazakhstan.[1274]

It is a foreseeable reality that developing the relationship with the Euoprean Union as requested, carries the risk of ruining the positive image created by the human rights reforms through the EU accession process. Therefore, establishing a system that would enable Turkey and the EU Member States to share the burden of asylum seekers in a fair fashion from the outset is of great importance.

3. Beneficiaries of Non-Refoulement Rule in the Turkish Law

Turkey is passing through a transition period which exactly corrollates to the one that the EU Member States had passed in the last decade before incorporating the subsidiary protection status into their domestic legislations. In this regard, Turkey has been compelled by the human rights instruments, particularly the ECHR, for changing its position towards asylum seekers who do not qualify as a refugee.

The first step of this transition was the adoption of the 94 By-Law which added a so called 'asylum seeker' status to the refugee status as defined in the 1951 Refugee Convention. This was not only due to the pressure of the of the human rights monitoring mechanisms but at that stage, may be it was more to comply with the way the Executive Committe and the UNHCR interpreted the non-refoulement obligation in the 1951 Refugee Convention. As mentioned above, the prohibition of

[1268] Council of Ministers Decree 2002/3914 of 12 March 2002, R.G. No. 24735, 24.03.2002.
[1269] See Council of Ministers Decree 2005/9535 of 17 October 2005, R.G. No. 25996, 17.11.2005.
[1270] See Law No. 4901 of 17 June 2003, R.G. No. 25148, 24.06.2003.
[1271] See Law No. 5097 of 12 February 2004, R.G. No 25376, 17.02.2004.
[1272] See Law No. 5249 of 21 October 2004, R.G. No. 25626, 27.11.2004.
[1273] Council of Ministers Decrees ratifying the readmission agreements with Syria, Kirghizistan and Romania have not been published in the Official Journal until so far.
[1274] See Turkey's Action Plan on Asylum and Migration, para. 3.2.7.

non-refoulement was interpreted as to cover refugees even though they were not officially recognized as such by the State concerned. This is a consequence of the declaratory nature of refugee status. The 1994 By-Law also introduced special provisions on temporary protection of asylum seekers in mass influx situations.

On the other hand, even the 'asylum seeker' status did not satisfy the more recently established higher standards of the human rights mechanisms which are neither confined to the five grounds of refugee status, nor did they allow exceptions for the non-refoulement principle. Therefore, Turkey had to take one more step to adopt the subsidiary protection status, through administrative instruments.

Finally, another type of protection that exists in practice is based on the general provisions of the Law on Residence and Travel of Aliens. It is noted that certain groups of persons who would normally be regarded as refugees such as the Chechens and Bosnians were granted residence permits on humanitarian grounds without being involved in the asylum procedure.

Each of the above mentioned statuses provide some form of protection against refoulement, however, it has to be noted that there are major differences between these statuses with regard to overall protection standards, particularly the social and economic rights where human rights monitoring mechanisms are comparably weaker. While asylum seekers seem to be treated equally with refugees with regard to the rights enshrined in the 1994 By-Law, this instrument does not regulate the entire catalogue of rights in the 1951 Refugee Convention. Therefore, different treatment of refugees and asylum seekers can be justified with regard to many rights.

It is noticeable that the beneficiaries of the subsidiary protection[1275] and residence permit on humanitarian grounds are not subject to the standards in the 1994 By-Law. Unlike the Qualification Directive of the European Union, no Turkish instrument stipulates the rights attached to the subsidiary protection status. Therefore, the persons holding any of these statuses are subject to the general rules

[1275] See General Directorate of Security of the Ministry of Interior of Turkey, Directive No. 57 of 22 June 2006, para. 12.

concerning aliens which may not necessarily serve the special needs of those persons who have experienced exceptionally traumatic conditions. This protection gap is the result of a non-refoulement oriented asylum system.

a) Refugee Status

The definition of 'refugee' in the 1951 Refugee Convention was not transposed into Turkish law correctly due to a translation error which occurred through the ratification process. The term 'persecution'[1276] that is the core element of the refugee definition was mistakenly written as 'prosecution'.[1277] Surprisingly, the same mistake was repeated in the Article 3 of the 1994 By-Law the purpose of which was to determine the principles and procedures under the 1951 Refugee Convention.[1278] A strict interpretion of this concept could result in excessively narrowing down the refugee definition to only cases involving a prosecution or risk of prosecution. However, this has never been a point of dispute before the Turkish courts since both the Ministry of Interior and the Courts perceived the term as 'persecution' as stipulated in the English version of the Convention.[1279]

A crucial question with regard to determination of refugee status under the Turkish law is which countries to be considered 'European' in the framework of the 1994 By-Law. A circular of the Ministry of Foreign Affairs in 1996 clarifies this point by referring to the States that are Members of the Council of Europe.[1280] Therefore, the term 'European' is broadly defined as to include the existing 46 Member States of the Council of Europe.[1281]

Despite this broad definition, the Convention refugee status has rarely been granted in practice by the Turkish authorities. Only the figures regarding the persons who were granted this status during the Cold War are publicly available.

[1276] 'zulüm' in Turkish.
[1277] 'takibat' in Turkish.
[1278] Bülent Çiçekli, Yabancılar ve Polis: Polisin Görev ve Yetkileri Çerçevesinde Yabancıların Hukuki Durumu, 2003, Seçkin Yayınları, Ankara, p. 129.
[1279] For instance see Council of State, 10th Chamber, E:1998/1481, K: 2000/131, 20.01.2000; 9th Administrative Court of Ankara, E: 1996/1356, K: 1997/1321, 03.11.1997.
[1280] Ministry of Foreign Affairs of Turkey, Circular No. BMGY III 2542-3799 of 13 August 1996.
[1281] See The Council of Europe's Member States, available at http://www.coe.int/T/e/com/about_coe/member_states/default.asp [visited on 22.09.2006].

Accordingly, Kirişçi quotes a statement of the Ministry of Interior indicating that the number persons granted refugee status as such was approximately 13,500 between 1970 and 1996.[1282]

The Turkish authorities made extensive use of the geographical restriction to limit application of the 1951 Refugee Convention to people who came from non-European countries. There are also reports indicating that the asylum seekers coming from European countries who are not covered by the geographical limitation such as the Chechens and Belarusians are encoutering difficulty in having acces to the procedure.[1283]

b) Asylum Seeker Status

The 1994 By-Law has caused a conceptual confusion due to the meaning it attributes to the term 'asylum seeker'. 1951 Refugee Convention does not contain a seperate status called 'asylum seeker'. The term 'refugee' however is normally used in international practice to refer to an alien who has been officially recognized as the beneficiary of the rights enshrined in the 1951 Refugee Convention. Whereas an 'asylum seeker' normally describes a person who has applied for protection as a refugee and is awaiting the determination of his or her status. On the other hand, the 1994 By-Law differentiates these two terms on the basis of the geographical position of the applicant's country of origin. Hence, the term 'refugee' is used to refer to those persons coming from Europe, while 'asylum seeker' is used for persons coming from non-European countries. In the international practice, an asylum seeker would become a refugee after recognition, whereas this is not possible for an asylum seeker under the Turkish law. In this context, being recognized as an 'asylum seeker' merely enables an alien to remain in Turkey until he/she is recognized by UNHCR and is resettled to a third country.[1284]

Due to the position of Turkey as a transit country mainly for asylum seekers

[1282] See Kirişçi, *"Migration and Turkey"*, p. 17.
[1283] European Commission, COM(2005)561 final, Turkey 2005 Progress Report, 9 November 2005, p. 112.
[1284] See Çiçekli, pp. 129–130.

coming from non-European countries, the vast majority of the case-law of administrative courts are related to asylum seekers. However, it is still quite rare that the grounds for qualifying as an asylum seeker is discussed before the courts as in most of the cases the status determination for asylum seeker is made by the UNHCR, whereas the Ministry of Interior has a decision making role on matters such as issueing of residence permits or deportation orders. Therefore, most of these cases are focussed on disputes arising from disregarding an assessment made by UNHCR or an asylum seeker's pending application during deportation procedures. There are still a few cases which reflect the understanding of the Turkish judiciary on the definition of the 'asylum seeker' concept.

For instance, the Ankara Regional Administrative Court made an interesting assessment on fear of persecution in a case[1285] where the Ministry of Interior had rejected to grant an applicant residence permit on account of his violation of peace and order in Turkey. In its judgement, the Court referred to two points that affected the risk assessment. Firstly, the Court noted the Article 3 of CAT obliged the States Parties not to refoule a person to a country where there are well founded reasons to fear that he would be subjected to torture. The Court further noted that the second paragraph of this Article required the authorities to consider all pertinent issues as systematically as possible, including the existance of wide spread, apparent and mass violations of human rights in the country of origin. From these statements, it is possible to conclude that the Court attributes great importance to the general conditions in the country of origin, particularly the existance of mass human rights violations.

On the other hand, the Court was not convinced about the existance of subtantial grounds for believing that he would be persecuted if he was deported considering the fact that he had been deported to Iran once and another time to Iraq in the past and each time he managed to return to Turkey illegally. The Court gave not further detail on this reasoning. However, considering the facts of the case, it is

[1285] Ankara Regional Administrative Court, Y.D. Appeal No. 2000–1190, 16.04.2000 at The Collection of Turkish Jurisprudence on Asylum, Refugees and Migration, December 2000, Boğaziçi Üniversitesi Vakfı, pp. 153–155.

possible to conclude that the Court has put emphasis on the applicants' experiences in the country of origin subsequent to his deportation as he had stayed in Iran for more than three years without suffering any substantial treatment that would prevent his return to Turkey.

Another notable judgment was rendered by the 9th Administrative Court of Ankara on claims regarding persecution on the ground of membership of a particular social group and by non-state agents. The applicants were an Iraqi man and a women of Turkoman ethnic group whose request for asylum seeker status was rejected by the Ministry of Interior. They were subsequently required to leave Turkey within 15 days. It was noted that the applicants had sought refuge in Turkey due to the pressures they faced in Iraq on account of their ethnic origin. The Ministry had considered that the applicants had not submitted sufficient grounds for substantiating their fear of persecution. The Court however, came a different conclusion than the Ministry considering that the applicant Ramiye was a member of the Independent Women's Organization in Iraq. She had referred to the Organization the case of her divorced niece, whom she had helped to become a member of the Organization. Her niece was killed by the family as a matter of honour. This case was published in the publication of the Organization and for this reason her family had decided to kill her as well. The judgement contains no detailed assessment on whether the applicant could avail any kind of protection by the authorities, of the country of origin, but it concluded that the threat in question was sufficient to substatiate the applicant's well founded fear of persecution under the 1994 By-Law. This ruling is significant to show that the Turkish judiciary accepted gender-based discrimination as a part of the 'membership of a particular social group' ground even before some of the EU Member States. This is aslo the case for accepting 'asylum seeker' status on account of the acts of non-State actors.[1286]

Turkey is not only a transit country for refugees but also for economic migrants. Some of these migrants do try to misuse the protection mechanism under the 1994 By-Law in order to have access to the destination countries in Europe. A

[1286] See explanations under the subtitle 'Refugee Status' under the title 'The Legal Environment of Non-Refoulement in the European Union Law'.

ruling[1287] of the 4th Administrative Court Ankara rendered in 2003 is important to show the response of the Turkish judiciary for such claims. The applicant was a national of Uzbekistan who contested the decision of the Ministry of Interior rejecting his application for asylum seeker status. He explained the reason for his flight as encountering financial problems after having been dismissed from his position in the University that he had been working for as an academic for the last thirty years. In response to this claim, the Court rejected the applicant's request considering that the 1994 By-Law did not cover aliens who sought to reside in Turkey for economic purposes.

The Turkish judiciarys' liberal appraoch in its jurisprudence concerning asylum seekers is noticeable. Due to the difficulties in practice on having access to justice however, very few applicants could contest the administrative acts and decisions before the courts.[1288]

c) Subsidiary Protection Status

Turkey's Action Plan on Asylum and Migration had revealed the plans for incorporating some new procedures from the European Union asylum laws such as the procedures relating to "Subsidiary Protection", "Tolerated Aliens" and "Residence Permits based on Humanitarian Grounds"[1289] that were noted as positive steps by the Amnesty International.[1290]

Subsequently, the subsidiary protection status has been introduced by the

[1287] 4th Administrative Court of Ankara, 21.10.2003. Due to the fact that most of the administrative court judgments related to asylum matters are not published by the Ministry of Justice, the writer of this study approached to the Ministry of Interior with a request for receiving the administrative court's case-law in the archives of the Ministry. As a result, several recent court judgements, which are of great value for this study, have been made available to the author by Emin Arslan, Undersecretary of the General Directorate of Security of the Ministry of Interior, attached to the letter numbered B.05.1.EGM.0.13.03.02. 71810-12/Gnl.6-5. The Ministry however, had deleted the names of the parties, and the reference numbers of the judgments in question due to the senstivity of the topic. Therefore, the author can only provide the Court's name and the date of such judgments. The texts of the judgments are held by the writer and attached to this thesis as "Annex I".

[1288] See Mehmet Şahin, *"Mülteci Hukuku Uygulamasında Karşılaşılan Sorunlar ve Çözüm Önerileri",* Türk Mülteci Hukuku ve Uygulamadaki Gelişmler, February 2004, İstanbul Barosu Yayınları, p. 93.

[1289] See Turkey's Action Plan on Asylum and Migration, para. 4.6.8.

[1290] See Amnesty International Turkey Branch, Iltica ve Göç Ulusal Eylem Planı: Eksik Olan Insani Duyarlılık.

Directive No. 57 of 22 June 2006 from the General Directorate of Security of the Ministry of Interior. The Directive adds a new component to the asylum procedure in the 1994 by-Law since it provides a further examination requirement on behalf of the State concerning asylum claimes which are found inadmissible throughout the asylum procedure. Incorporation of this status has been possible due to the latest amendment of Article 6 the 1994 By-Law in January 2006. The last paragraph of the amended Article 6 provides that the situation of those persons whose administrative asylum appeals are rejected conclusively, shall be examined under the legal framework concerning aliens generally. The subsidiary protection is considered in the Directive as part of this general legal framework.

The scope of subsidiary protection in the Directive is remarkably narrower than the subsidiary protection status under the Qualification Directive of the European Union. The Directive stipulates that procedure under the title of subsidiary protection should involve a compatibility analysis under the European Convention on Human Rights. The most striking distinction between this status and the subsidiary protection under the Qualification Directive is the fact that the status created under the Turkish law does not cover persons escaping from indiscriminate violence in situations of international or internal armed conflict. Accordingly, Turkish authorities may only grant subsidiary protection status if there are substantial grounds for believing that the applicant will be facing a real risk individually as explained in detail above in the context of European Convention on Human Rights.

The narrow scope of the definition of subsidiary protection under the Directive can be explained by the intention to avoid contradiction with Article 8 of the 1994 By-Law which, in principle aims at stopping population movements arising from circumstances of indiscriminate violance at the border.

On the other hand, the subsidiary status in question is of the same character with the subsidiary status of the Qualification Directive with regard to its subsidiarity within the protection procedure. Therefore, examination of a claim for subsidiary protection must always be carried out after the completion of the asylum procedure. In this context, it is crucial to point out that a claim for protection may not always be

formulated as an asylum application due to the protection seeker's lack of information about the national laws of Turkey. This is in fact inherent in the spirit of administrative Court jurisprudence which disregarded the 10 days time limit in the Article 4 of the 1994 By-Law before it was amended.[1291] An alien may after realizing that he/she is going to be deported by the authorities, express that he/she would be tortured if returned to the country of origin. In this case, the person concerned must first be allowed to have his/her case examined under the asylum procedure and if it fails, the negative decision on the asylum claim must be followed by an examination for subsidiary protection.

d) Residence Permit on Humanitarian Grounds

Residence permits on humanitarian grounds is another status that Turkey's Action Plan on Asylum and Migration has referred to along with the subsidiary protection.[1292] This status has also been introduced by the Directive No. 57 of 22 June 2006 from the General Directorate of Security of the Ministry of Interior. Accordingly, the Directive refers to the grounds of health, education, family unification purposes inorder to justify a residence permit on humanitarian grounds. These grounds however, are not listed in an exhaustive fashion as the text continues by "etc. humanitarian grounds". Another very crucial function of this procedure is that it enables the Ministry allow an applicant to remain in Turkey, if he/she has applied to the administrative court against the administrative decisions concerned. The signifcance of this mechanism lies in the deficiencies in the administrative justice system. According to Article 27 of the Administrative Justice Procedure Law[1293] applying to the administrative court does not have a suspensory effect under the Turkish law. The applicant needs to file a seperate application to the administrative court in order to obtain an injunction for suspending the execution of the administrative orders. Especially in the case of deportation orders it is extremely important to have an efficient system of rendering suspensory orders since otherwise

[1291] Zafer Kantarcıoğlu, *"Mülteci Hukuku İle İlgili Yargısal Uygulamlarda Karşılaşılan Sorunlar ve Danıştay'ın 10 Günlük Süreye Genel Yaklaşımı"*, Türk Mülteci Hukuku ve Uygulamadaki Gelişmeler, 2004, İstanbul Barosu Yayınları, pp. 74-75.
[1292] See Turkey's Action Plan on Asylum and Migration, para. 4.6.8.
[1293] Law No. 2577 on Administrative Justice Procedure, R.G. No. 17580, 06.01.1982.

it is likely that the applicants may encounter irreparable damages. There have however, been cases in the past, of delays in Turkish administrative courts for providing such suspensory orders with cases where the applicants were deported before the court made a suspensory order.[1294]

Finally, it shall be noted that unlike the subsidiary protection, the residence permits on humanitarian grounds do not necessarily have to be of a subsidiary character. It is possible to grant this status without going through the asylum procedure.

4. Procedural Aspects of Non-Refoulement

a) Protection Procedure Under the 1994 By-Law

(1) The Procedure

The protection procedure under the By-Law starts with an application of the alien without delay, after arrival to the Turkish territory, to the Governorship in the province they reside if they have arrived through legal means or to the Governorship in the province they enter the Turkish territory if they have arrived through illegal means.[1295] The By-Law does not clarify whether there is a possibility to apply at the border or not. This lacuna has been filled by the Directive No. 57 of 22 June 2006 from the General Directorate of Security of the Ministry of Interior which provides that in the event of an application for refugee or asylum seeker status is received at the borders or the border gates or within the territory of the State by any security unit, such unit shall ensure that the alien concerned applies personally to the relevant governorship or the Aliens/Passport Department of the Directorate of Security

[1294] 9th Administrative Court of Ankara, E. 2001/863, K. 2002/1151, 26.09.2002; In this respect, reforming the judicial process for deportation orders is also advisable. The Action Plan makes reference to the reform of the judiciary and proposes measures such that *the "actions for nullity of asylum decisions should be regarded as urgent cases and a time limit should be introduced for both the application procedures and accelerated rulings. The required legal arrangements should be made for this purpose."* Furthermore, it is also proposed that a group of expert judges should be formed to examine the appeals against asylum decisions. (See Turkey's Asylum and Migration Action Plan, para. 4.6.5.). It would be useful to consider such reform not only for asylum decisions but also for other deportation orders related to subsidiary protection or humanitarian grounds.

[1295] See 1994 By-Law, Article 4.

without delay. This is a major improvement considering the complaints in the European Commission's 2005 Turkey Progress Report on this matter. The Report referred to some incidents that asylum seekers at the border were prosecuted for illegal entry and deported. Moreover, some aliens were apprehended away from the border were not always permitted to submit an application for asylum.[1296] After release of the Directive in question such acts should engage the responsiblity of the officer who does not comply with the orders enshired therein.

The Directive further stipulates that the officer in charge shall not reject receiving or processing an asylum application on the ground that the it has not been made without delay, even though no reasonable excuse has been provided.[1297]

Upon the establishment of his/her identity, the applicant will be interviewed individually[1298] after which an interview report shall be prepared and sent to the Ministry of Interior together with the view of the Governorship. Asylum seekers coming from non-European countries shall be informed about the requirement to register at the UNHCR in order to commence the parallel procedure under the UNHCR framework.[1299]

Aliens who apply for refugee or asylum seeker status shall be granted *ex officio* six months residence permit which is automatically renewable for another six months. At the end of this second period, the Ministry of Interior may decide for the extention of the residence permit. It is important to note that applicants are required to reside in specified sattelite cities during the course of the procedure.[1300]The applicant will be accommodated in this specified address until a response from the

[1296] Turkey 2005 Progress Report, p. 112.
[1297] See 1994 By-Law, Article 5; Directive No. 57 of 22 June 2006 from the General Directorate of Security of the Ministry of Interior, para. 2.
[1298] The applicant will initially be subject to pre-screening where he/she will be informed about her rights and responsibilities and the course of the procedure to be followed and general information will be asked to him/her about the motives and means of refuge. Moreover, an appointment will be given for the main interview.(Directive No. 57 of 22 June 2006 from the General Directorate of Security of the Ministry of Interior, para. 5.)
[1299] *Ibid.,* para. 2.
[1300] *Ibid.,* para. 11.

Ministry of Interior is received.[1301]

The first decision that is received from the Ministry shall be notified to the applicant. If it is positive he/she will be allowed to continue to reside in Turkey. If the first decision is negative however, then the notification will involve an indication informing the applicant of his/her right to appeal to the relevant Governorship within 15 days according to Article 6 of the 1994 By-Law. In case that the applicant appeals within the specified time, he/she will be allowed to reside in Turkey, the Governorship shall act as ordered by the Ministry of Interior. [1302]

In case that the applicant does not appeal within 15 days, he/she will be notified to leave Turkey within 15 days unless otherwise odered by the Ministry. If the applicant does not comply with the order he/she will be deported by force.[1303]

The applicant who has appealed to the first negative decision, will be allowed to continue to reside in Turkey if the second decision of the Ministry is positive. If the second decision is also negative, the applicant will be notified about the outcome of his/her application, but will not be required to leave the country as the Ministry shall further examine the claim under the subsidiary protection and residence permit on humanitarian grounds. Finally, if the outcome of this examination under subsidiary protection and residence permit on humanitarian grounds is also negative, than the applicant will be notified to leave the country within 15 days unless the Ministry decides on some other deadline.[1304]

The above mentioned is the ordinary procedure which is applied for standard applications. The Directive contains a special procedure for unaccompanied minors in its 6th paragraph which more or less summarises an already existing procedure that was developed by practice. Formulation of these rules in the form of a Directive a positive development in order to reaffirm the duties of the relevant

[1301] *Ibid.,* para. 5.
[1302] *Ibid.,* para. 12.
[1303] *Ibid.*
[1304] *Ibid.*

institutions particularly the Social Services and Child Care Institution.[1305] Furthermore, the Directive introduced an accelerated procedure that became possible after the amendment to the Article 6 of the 1994 By-Law in January 2006. The amended Article 6 provides that in the event that an asylum applicant receives a negative decision, the Ministry of Interior may determine shorter time limits than 15 days for appeal, when it is considered necessary. The Turkey Branch of Amnesty International had expressed concerns about the intention of the Ministry of Interior to introduce accelerated procedures applied in the EU Member States. The NGO was concerned about the potential problems that such procedure might cause in Turkey as it was not defined under Turkish law.[1306] The Directive specified the circumstances which may result in an applicant's case be subject to the accelarated procedure in its paragraph 13. Accordingly, an alien who applies for asylum in the following circumstances will be subject to the accelerated procedure:

- After being required to leave Turkish territory due to the loss of conditions for legal residence such as the expiration of work permit, completion of education, expiration of residence permit, expiration of the visa immunity period,
- After a deportation order has been issued due to his/her conviction of a crime,
- After being apprehended due to his/her illegal residence in Turkey,
- Who had previously been deported due to his/her involvement in illegal migration or other crime or prohibited from entry,
- Who was apprehended in the course of his/her illegal departure from Turkey,
- While serving a sentence due to his/her conviction of a crime committed in Turkey or having been released thereafter,

[1305] See Law No. 2828 on Social Services and Child Care Institution of 24 May 1983, R.G. No. 18059, 27.06.1983.
[1306] See Amnesty International Turkey Branch.

- Who had previously applied for asylum,

- For whom the Governorship considers not to grant residence permit upon the pre-screening interview.

Particularly the last item appears to be a provision in the line of Amnesty International's concernes as it provides an open ended ground for subjecting asylum seekers to this dramatically disadvantaged status. The pre-screening, interview and all other relevant documention shall be completed within 5 days and sent to the Ministry of Interior in the accelerated procedure. The alien will not be granted a residence permit *ex officio*. Instead he/she will be granted an identity card which shall be renewed in the sattelite city where the he/she will be transferred. The Ministry may however, order the applicant to be granted a residence permit.

Under the accelerated procedure, in case that the Ministry renders a negative decision, the applicant will be given onbly two days time in order to appeal against the decision.

(2) Assessment of the Procedure

Although the Ministry of Interior appears to be taking over more responsibility of asylum seekers under the new Directive, the main structure of the asylum system that is dependent on the UNHCR's decision remains unchanged unless Turkey decides to change its role as a transit country, because it is always UNHCR that has to recognize asylum seekers and seek to resettle them to the destination countries. Moreover, Turkish authorities are forced to wait for and to respect the decision of UNHCR since failing to do so resulted in a violation of Article 3 of ECHR in the Jabari case.[1307]

On the other hand, the mechanism that is dependent on UNHCR's decision causes accountability problems both within the domestic law and under the international human rights instruments. It causes accountability problem within the domestic law because UNHCR is not an administrative body. Therefore, it is not

[1307] See *Jabari v. Turkey*.

possible to challenge the decisions thereof before an administrative court. It would only be possible to bring a case against the Ministry of Interior for basing their decisions on UNHCR's defected decision. This option is also quite problematic as UNHCR's procedure is rather untransparent. The organization published its rules of procedure for RSD for the first time in its history on 1 September 2005.[1308] Paragraph 2.1.3. of this document provides:

"Host country authorities have a legitimate interest in receiving information regarding individuals who are registered by UNHCR on their territory. In principle, the information shared by UNHCR should be limited to basic bio-data and final RSD decisions... Where UNHCR Offices conduct RSD on behalf of authorities in the host country, or where UNHCR is transfering functions related to RSD to the host country authorities, it may be appropriate to share certain information relating to the substance of individual refugee claims. Where this is the case, as a general rule, UNHCR may disclose edited summaries of RSD interviews and RSD assessments, but should not disclose the entire file."

According to the above mentioned standard, Turkish authorities shall not have access to the entire files in the UNHCR but only to the editted summaries. This lack of transparency may engage the responsiblity of the Turkish Government for such data that they do not even have total access to. This scenario has recently appeared in a case before the European Court of Human Rights namely, D. and Others v. Turkey. The applicants had fled from Iran and applied to the Turkish authorities as described above and to the UNHCR. In their petition, they argued that the UNHCR interview was not conducted properly; the husband was not able to express himself conveniently, nor could he present the evidence supporting his claim. The wife was interviewed very briefly only to check her husbands testimony. The applicants were subsequently interviewed by police officers in the presence of another asylum seeker working as an interpreter. Upon this interview, they were granted asylum seeker status after which they were settled in the Kastamonu province.

[1308] See UNHCR, Procedural Standards for Refugee Status Determination Under UNHCR's Mandate.

On the other hand, the applicant's asylum application was rejected by UNHCR. The wife's application to get her case examined seperately was rejected as well. The applicants appealed to the decision but the appeal was also futile. They were informed by UNHCR that the file could not be reopened unless there were new and relevant facts. The applicants still attempted to reopen the case but it was not successful.[1309]

As a result, the Turkish Ministry of Interior refused to extend their residence permits. The applicants were notified that as unsuccessful applicants for asylum seeker status they were free to return to Iran or make their way to a third country of their choice and failure to do so, would result in their deportation. [1310]

The applicants argued before the ECtHR that the national authorities never carried out an examination independent from the UNHCR before they refused their claim for asylum.[1311] They further claimed that an ultimate recourse to the Council of State would not involve any examination on the merits of their asylum claim. In this respect, the applicants pointed out that the Government was not able to answer clearly the questions that the Court addressed to it in order to establish the reality, nor even produce copies of the files concerning their various claims for asylum.[1312] Therefore, the applicants based their claims on the mis-judgments of the UNHCR on assessing the risk of persecution rather than that of the Government. As a result, the ECtHR found that a possible deportation would violate Article 3 of the Convention.

This is a concrete example of the risk that is mentioned above. The Turkish authorities did not seem to have the entire file nor could they know the manner in which the interviews were conducted in UNHCR since they did not have access to the interview files. Concerns arising from such files however, were brought before the European Court in order to engage the responsibility of the Government. The consequences of this judgement can be projected as the Turkish Governments' seeking to take over control and inevitably the responsibility of refugees.

[1309] *Ibid.,* paras. 20 – 22.
[1310] *Ibid.,* para. 23.
[1311] *Ibid.,* para. 41.
[1312] *Ibid.,* para. 42.

b) Admission and Barriers of Entry

The admission system adopted under the Turkish law is considerably liberal and flexible compared to the EU Acquis.[1313] Therefore, Turkey is having difficulty in compromising the interests for accession to the European Union and being a country that has a boosting Tourism sector with clear support of the liberal visa policies. Turkey has been under constant pressure of the European Union for tightening the entry regime in order to bring its laws in line with the acquis.[1314]

The conditions for admission of aliens under the Turkish law is governed by the Passport Law.[1315] Accordingly, aliens may only enter and leave Turkey through places determined by the Board of Ministers upon a proposal of the Ministry of Interior.[1316] They are obliged to present valid passports or a passport substitute document to enter Turkey and leave Turkey.[1317] The aliens who come to the Turkish borders without passport or documents or invalid passport or documents are returned.[1318] The last paragraph of Article 4 however, makes an exception for asylum seekers. Accordingly, the admission of refugees who come to Turkey for the purpose of settlement, with or without passports, is subject to the permission of the Ministry of Interior.

The Article 8 of the Passport Law is likely to raise a crucial debate related to the admission requirement. This provision provides a list of the persons who are forbidden from entry to Turkey. Accordingly, the following categories of persons are prohibited from entering Turkey:

"tramps and beggars, persons who are insane and who suffer from contagious diseases (of these persons exceptions may be applied to the ones who come for the purpose of treatment or change of air by their means of transport or under the financial

[1313] Kirişçi strongly supports this liberal and flexible visa system and suggests that the European Union would benefit from liberalizing its own Schengen visa system in a recent article that he has published. (Kemal Kirişçi, *"A Friendlier Schengen Visa System as a Tool of "Soft Power": The Experience of Turkey"*, European Journal of Migration and Law, 2005, Vol. 7, No. 4, pp. 343-367.)
[1314] See Turkey 2005 Progress Report, p. 111; Turkey 2004 Progress Report, p. 139.
[1315] See Passport Law.
[1316] Article 1
[1317] Article 2.
[1318] Article 4.

protection of their legal guardian and their health are not hazardous for the public health and peace); the persons who are accused or sentenced for a crime that would give rise to his her extradition according to the extradition treaties that Turkey is a party to; the persons who have previously been deported from Turkey; the persons who are perceived that they come for the purpose of destroying the security and public order of the Republic of Turkey or helping or participating in with the persons who want to destroy the security and public order of the Republic of Turkey; prostitutes and the persons who incite women to prostitution and persons who are involved in white women trafficking and all types of smugglers; the persons who cannot prove that they have sufficient funding to live in Turkey during the period of stay and for departing from Turkey and that they had someone to support them or the persons who cannot prove that they will not engage in any of the jobs prohibited to aliens."

Asylum seekers would easily fit in one of the categories listed above due to the conditions they flee from the country of origin. For instance, they may look insane or suffer from contagious diseases, they would probably not have sufficient funding to live in Turkey, they could have been deported earlier etc. Therefore, this Article could appear as a majour barrier for entry if it was applicable for asylum seekers as well. Çiçekli cites a Directive from the General Directorate of Security[1319] that requires the police officers who conduct asylum interviews to make an assessment on Articles 4 and 8 of the Passport Law. It is clear that this reasoning could also prevent an asylum seeker's entry from the border on the grounds of Article 8. Since Article 8 does not make an express exception for refugees, it does conflict with the admission requirement under the 1951 Refugee Convention as well as the human rights instruments such as the CAT and ICCPR. This conflict between the Passport Law and the international instruments must be solved according to Article 90 of the Constitution of the Republic of Turkey.[1320] As the 1951 Refugee Convention itself allowes exceptions, on certain grounds, to the prohibition of refoulement, it is more preferrable take the human right instruments that provide

[1319] Directive from the General Directorate of Security, 2002, EGM Yayın Katalog No. 255, Ankara, p. 1153 at Çiçekli, Yabancılar ve Polis: Polisin Görev ve Yetkileri Çerçevesinde Yabancıların Hukuki Durumu, p. 145.
[1320] Law No. 2709 Constitution of the Republic of Turkey of 7 November 1982, R.G. 17863 bis, 09.11.1982.

absolute protection against refoulement in order to determine the extent of conflict in question. Accordingly, rejection of entry for a person who seeks protection as such, would result in a human rights violation regardless of the ground of rejection. The international human rights treaties concerned would prevail over the Passport Law even before the amendment in the Article 90 of the Constitution, on account of the *lex posterior derogat legi priori* rule, since the treaties concerned were adopted after the Passport Law. After the amendment of Article 90 in 2004 a new pragraph has been inserted to the Article 90 providing that in the event of a conflict between a law and an international law treaty regulating human rights, the later shall be given priority.[1321] Therefore, today there is no doubt that Article 8 of the Passport Law shall be inapplicable where it conflicts with treaties regulating human rights norms such as the CAT and ICCPR. The Directive No. 57 of 22 June 2006 does not contain an explicit provision on this topic, however, it implies that it gives priority to the human rights treaties as it stipulates one of the grounds of rejection in Article 8 namely, *"having been previously deported from Turkey"* among the circumstances where the applicant shall be subject to accelerated procedure that requires the admission of the person concerned.

Given the powers of the Ministry of Interior on the admission of refugees according to Article 4, the 1994 By-Law and the Directive No. 57 of 22 June 2006 provide more specific provisions on the admission of asylum seekers.

(1) Individual Entry

As explained in the section concerning the asylum procedure above, 1994 By-Law does not expressly impose an admission requirement to the authorities. It simply referres to application to the Governorship in the province they reside if they have arrived through legal means or to the Governorship in the province they enter the Turkish territory if they have arrived through illegal means.[1322] This could either be interpreted as a provision which presumes existance of the applicant within the territory of Turkey during the application. The possibility of applying at the border

[1321] Law No. 5170 on the Amendment of Certain Articles of the Constitution of the Republic of Turkey of 7 May 2004, Article 7, R.G. No. 25469, 22.05.2004.
[1322] See 1994 By-Law, Article 4.

however, has been recognized in the Directive No. 57 of 22 June 2006. The Directive does not establish a border procedure as in the case of the Asylum Procedures Directive of the EU where the applicants are accommodated in the reception centers at the border gate. The Turkish Directive speaks of the possibility of applying to the authorities in charge of the standard asylum procedure. Accommodation within the satellite cities during the process is a part of the ordinary procedure. Therefore, application at the border does imply an admission requirement.

(2) Mass-Influx Cases

Establishing a legal framework for responding to mass influx situations was among the *reason d'etré* of the 1994 By-Law. As explained in the part concerning the evolution of the Turkish asylum law framework, the end of 1980s and the beginning of 1990s were times that the Turkish authorities encountered extreme difficulty in coping with the mass influxes from both the west and the East.

Turkey had difficulty in responding to mass influxes of 51,542 asylum seekers from Iraq in 1988,[1323] 369.000 asylum seekers from Bulgaria in 1989, 467,489 asylum seekers from Iraq in 1991 and 20,000 asylum seekers from Bosnia starting from 1992.[1324] However, despite the difficulties Turkey had welcomed the first two waves of asylum seekers from Iraq and Bulgaria.[1325] On the other hand, Turkeys' response was different in 1991 during the Gulf War. On 2 April 1991, the Turkish National Security Council discussed the issue and established that more than 200,000 people were face to face with a life threatening situation in Northern Iraq and recommended the Government to urgently request the United Nations Security Council to convene in order to discuss the measures for the prevention of human rights violations in the region, to invite the representatives of the permanent members of the UN Security Council and request their assistance for taking appropriate

1323 Turkey granted temporary protection to these refugees who fled from the Iraq Governments' chemical attacks in the Northern Iraq, particularly in Halabja. (1989 UNHCR Activities Financed by Voluntary Funds: Report for 1988-89 and Proposed Programmes and Budget for 1990: Part II. Executive Committee of the High Commissioner's Programme, 40th Sess. UN Doc. A/AC.96/724, part II, 1989, para. 3.10.2.)
1324 The figures are taken from Terzioğlu, p. 169.
1325 See Terzioğlu, p. 169.

measures, to call the Embassador for Iraq in Ankara for a meeting in the Ministry of Foreign Affairs and urge the need to end the hostilities towards the Kurdish population and finally to provide urgent needs of those refugees who were left on the Iraqi side of the border. The press briefing however, made no mention of providing temporary protection to the refugees concerned within the Turkish territory.[1326] Accordingly, Turkey did not open its border gates for the asylum seekers coming from Iraq.[1327] Only some Iraq citizens of Turkish descent were reportedly allowed to enter Turkey who were settled in a refugee camp in Şemdinli.[1328] Despite, Turkey's position to keep the refugees out of the Turkish territory, a number of refugees managed to cross the border and reach the border towns of Silopi, Uludere, Çukurca and Beytüşşebap.[1329] As a result, 467,489 asylum seekers from Iraq obtained de facto refuge in Turkey.

Although Turkey had applied an open door policy towards the mass influx situations in 1988 and 1989, Turkey had maintained the position that non-refoulement might not be claimed in exceptional cases where a massive influx constitutes a serious problem to the security of the State from as early as 1970s. For instance, this approach was adopted in the UN Conference on Territorial Asylum in April 1977 upon a proposal by the Turkish Government.[1330] In this respect, Turkey's position in 1991 does not represent a turning point on Turkey's policy towards mass influx situations. This experience however, forced the Turkish Government to seek to establish a legal framework for responding to mass influx situations more efficiently. The 1994 By-Law, to some extent, is a product of this need. Accordingly, a considerable share of the By-Law has been devoted to measures to be taken in mass influx situations. In this respect, Article 8 of the By-Law which is titled *"Precautions to be taken in the event of the beginning of a population movement for asylum and the arrival of aliens at our borders"* has a key

1326 General Secretariat of the National Security Council, Press Release on the meeting of 2 April 1991, available at http://mgk.gov.tr/Turkce/basinbildiri1991/02nisan1991.htm [visited on 24 September 2006].
1327 See Zieck, p. 189; UNHCR's Division of International Protection, UNHCR's Operational Experience With Internally Displaced Persons, 1994, p. 37.
1328 See Zieck, p. 189.
1329 *Ibid.* p. 193.
1330 See UN Doc. A/CONF.78/C.1/L.28/Rev.1

role for dealing with mass influx situations. It provides:

"As long as there are no political decisions taken to the contrary, and provided that Turkey's obligations under international law are maintained, and taking into account its territorial interests, it is essential that population movements be stopped at the border, and that asylum seekers be prevented from crossing over into Turkey. Necessary and effective measures shall be taken by the relevant bodies on this matter."

This provision suffers from an integrity problem as stopping population movements of asylum seekers at the border would inevitably conflict with Turkey's international obligations. As mentioned in the first chapter of this study, the 1951 Refugee Convention does not stipulate mass influx situations among the exceptions to the non-refoulment principle. Furthermore, the Executive Committee of the UNHCR has repeatedly emphasized that States Parties to the 1951 Refugee Convention should provide at least temporay protection in mass influx situations.[1331] The provision is striking on the point that it seems to have dropped the ground of justification that Turkey had set forth in the UN Conference on Territorial Asylum of 1977, namely that the influx should pose 'a serious problem to the security of the State'. Moreover, it did not regulate the measure of 'stopping at the border' as an exceptional situation, but as the main rule in mass influx of asylum seekers. The provision however, left an open door for admitting asylum seekers even in mass influx situations by subjecting it to a political decision. Turkey's response to the situation of the Iraq War in 2002 illustrates how the content of this provision is perceived by the Turkish authorties.

In November 2002, the Turkish Government announced a plan in order to counter the potential refugee influx from Iraq.[1332] The plan aimed at providing protection and humanitarian services within the border of Turkey and right at the

[1331] For a view supporting this argument see Çiçekli, Yabancılar ve Polis: Polisin Görev ve Yetkileri Çerçevesinde Yabancıların Hukuki Durumu, p. 144.

[1332] Human Rights Watch Briefing Paper, Iraqi Refugees, Asylum Seekers, and Displaced Persons: Current Conditions and Concerns in the Event of War, February 13, 2003, available at http://www.hrw.org/backgrounder/mena/iraq021203/3.htm [visited on 16.06.2006]

border of two countries for an estimated 280,000 refugees. The Turkish Red Crescent was appointed by the Government to coordinate and run the humanitarian operation in Turkey on behalf of the Turkish Government. The National Society had prepared initially to handle 80,000 incoming refugees.[1333] It appears that Turkey had planned a dual stage operation to counter the influx of asylum seekers. The planned humanitarian operation involved actions both at the border and inside the border. Therefore, it is possible to conclude that Turkey did not aim at stopping the population movement to the detriment of human lives as in the case of the influx in 1991.

(3) Non-Entrée Measures Under the Turkish Practice

Turkey does not apply a visible non-entré policy for the time being, despite the pressures form the European Union to bring its legislations and practices on visa policy as well as border control issues closer to that of the EU Acquis that has a strong non-entré perspective as explained in the chapter concerning the EU Law above.

(a) Visa Requirement

Turkey applies a rather complex and flexible visa system for the admission of aliens, based on the provisions of the Passport Law. Before examining the Turkish visa system in this framework, it has to be noted that even where a visa requirement is imposed under the Turkish law, access to the standard asylum procedure is not blocked under the Directive No. 57 of 22 June 2006. Therefore, not possessing an entry visa does not constitute a barrier to have access to the standard protection procedure, unlike the border procedures under the Asylum Procedures Directive as explained in detail in the chapter concerning the EU asylum acquis.

Except for the exceptions declared by law, aliens are required to obtain a visa from the authorized Turkish representations abroad in order to be admitted to the

[1333] International Federation of Red Cross and Red Crescent Societies, Iraq and Neighbouring Countries: Humanitarian Crisis Emergency Appeal No. 8/03 Operations Update No. 10, 19 June 2003, available at http://www2.reliefweb.int/rw/RWB.NSF/db900SID/ACOS-64BMDD?OpenDocument [visited on 25.09.2006].

Turkish territory.[1334] The Ministry of Foreign Affairs and the Ministry of Interior share the responsibility on the control of entry to the territory of the Republic of Turkey. The Ministry of Foreign Affairs is responsible for issuing the visas abroad through the Consulates. Granting or rejecting such visa applications are, in principle, within the discretion of the relevant Consulate, however, there are certain cases where the authorities of the Consulate are required to to obtain the approval of the Ministry of Foreign Affairs Headquarters in Ankara. On the other hand, the Ministry of Interior is responsible for controlling the validity of the travel documents and the visas at the borders.[1335]

Admission of those persons who come without obtaining a visa however, is also possible subject to a permission by the relevant security officials.[1336] In this context, Turkish authorities have developed the practice of issueing sticker visas[1337] at the borders for the citizens of certain countries.[1338] The practice of issuing sticker visa at the border is at the heart of the flexible Turkish visa system and it has played a crucial role in the gradual liberalization of the Turkish visa system starting from the early 1990s.[1339] On the other hand, the European Union considers this practice as one that seriously undermines the effectiveness of border control.[1340] The Union has been putting pressure on Turkey to expand the practice of imposing the requirement to obtain visas from the representations of Turkey abroad instead of issuing sticker visas at the border.[1341] However, the Turkish Government has until so far ressisted this pressure.

Another aspect of Turkish visa policy is the visa immunity mechanism which is based on Article 10 of the Passport Law. Accordingly, the Government is authorized to conclude international treaties for the purpose of lifting passport and visa

[1334] See Passport Law, Article 5.
[1335] Rona Aybay, Yabancılar Hukuku, 2005, İstanbul Bilgi University Publications, pp. 120-121.
[1336] See Passport Law, Article 5.
[1337] 'bandrol vizesi' in Turkish.
[1338] The list of those countries whose citizens may be granted a sticker visa is available of at the following address of the General Directorate of Security of the Ministry of Interior http://www.egm.gov.tr/hizmet.yabancilar.vize.asp [visited on 04.11.2006].
[1339] Joanna Apap, Sergio Carrera, Kemal Kirişçi, Turkey in the European Area of Freedom, Security and Justice, EU-Turkey Working Papers, 2004, No. 3, p. 27.
[1340] *Ibid.,* p. 29.
[1341] The Commission indicated in the 2002 Regular Report that granting of visas at the borders and transit visas at airports were not in line with the EU Acquis (European Commission, COM(2002) 700 final, Regular Report on Turkey's Progress Towards Accession, p. 119.

requirements or providing immunities from visa fees. This provision also authorizes the Government to lift visa requirements for the citizens of third countries unilaterally. Turkish Government has concluded many bilateral treaties and adopted decrees for this purpose.

Combined with the sticker visa practice, a complex visa system appeared in the Turkish legal practice which provides the following three categories of treatment under the visa regime:

- Countries citizens of which are not subject to visa requirement in Turkey for specified periods (variying between 30, 60 and 90 days according to the country and the type of travel document),[1342]

- Countries citizens of which, may be granted sticker visas at the Turkish borders,[1343]

- The rest of the citizens of Countries are required to obtain a visa through the Turkish embassies or consulates abroad before their arrival at the Turkish borders.

With regard to the countries citizens of which are not subject to visa requirement, the European Union expects Turkey to harmonize its practices with the Union's negative visa list, so called 'black list'.[1344] By the year 2002, there were a discrepency of 21 countries between the EU negative visa list and the countries whose citizens Turkey required a visa.[1345] Turkey had introduced visa requirements in 2002 for six Gulf countries (Bahrain, Qatar, Kuwait, Oman, Saudi Arabia and United Arab Emirates) that the EU subjects to visa requirements.[1346] As a second step, thirteen countries (Indonesia, Republic of South Africa, Kenya, Bahamas, Maldives, Barbados, Seychelles, Jamaica, Belize, Fiji, Mauritius, Grenada and Santa

[1342] See http://www.egm.gov.tr/hizmet.yabancilar.vize.asp [visited on 04.11.2006].
[1343] *Ibid*.
[1344] For further information on the so called black list see chapter on European Union Law.
[1345] See Turkey's 2002 Progress Report, p. 119.
[1346] International Civil Aviation Organization, Doc. No. FAL/12-IP/27, Updated Country Report of Turkey on Illegal Migration, 19 March 2004, p. 2.

Lucia) had been listed for visa requirements in 2003.[1347] In Turkey's 2004 Progress Report, the European Commission indicated that Turkey had continued alignment with the EU negative visa list and introduced a visa requirement for citizens of Azerbaijan in November 2003.[1348] In 2005, Turkey introduced visa requirement for Marshall Islands and Micronesia.[1349] Accordingly, by the end of 2005, the discrepancy between EU visa obligations list and that of Turkey was down to six countries.[1350]

Therefore, it is possible to conclude that the EU has managed to get Turkey impose visa requirements for more than twenty countries in its black list. However, the Turkish visa regime still remained liberal due to the possibility to obtain sticker visa at the borders.

(b) Border Control Measures

Border control is among the most intricate issues of Turkish accession process to the European Union due to Turkey's extensive borders with a number of unstable and refugee generating countries. It is quite likely that this topic will gradually gain even more importance after Turkey's full membership to the EU for, as explained above, the Dublin Regulation imposes responsibility for refugees who manage to enter the EU territory illegally to the Member State which allows such illegal entry by failing to control its borders properly. In any case, being situated at the external borders with so many unstable neighbours is always conducive to an environment that calls for more responsiblity for a Member State at the external borders of the EU. Therefore, border control is one of the first issues that the Turkish authorities were interested in throughout the EU accession process.

On the other hand, the border control measures are relavent to this study to the extent that they are used as a tool for excluding asylum seekers from asylum procedures. As mentioned in the chapter concerning the EU Acquis, the Union has

[1347] European Commission, COM(2003) 676 final, 2003 Regular Report on Turkey's Towards Accesion, p. 110.
[1348] See Turkey's 2003 Progress Report, p. 139.
[1349] See Turkey's 2005 Progress Report, p. 111.
[1350] *Ibid.*

been resorting to the border control measures for the purpose of preventing illegal migrants from having access to the territorial waters of the Member States without drawing a distinction between illegal migrants and refugees. This practice is criticised above for being leading to chain refoulement.

The 2001 Progress Report of the Commission describes the activities of the Turkish government for the reinforcement of external border controls as follows:

"...a process of co-operation and co-ordination between the various ministries and bodies involved has begun. A number of actions have been taken to strengthen border management, in particular to prevent and deter illegal border crossings. Such measures relate to the setting-up of new check points, the assignment of of additional sea petrols and the enchancement of vigilence and pursuit of suspicious vessels anchored at harbours. The construction of watchttowersalong the Iranian border has been started."[1351]

In April 2003 Turkey adopted the 'Strategy Paper on the Protection of External Borders in Turkey' which intends to identify the needs for staffing and training and what further equipment and infrastructure should be needed in order to have a high level of protection at the border.[1352] The Strategy Paper stipulates that the aliens arriving at borders must be provided the possibility to request asylum in the course of taking measures for border protection and combating illegal migration and that no time limitation will be imposed on asylum requests.[1353] In this respect, the Turkish authorities seem to be aware of the consequences of not differentiating asylum seekers from illegal migrants.

On the other hand, considering the death toll at the borders, particularly the border between Turkey and Greece, there seems to be a long way to go in establishing a border management system which is both effective and humane.

1351 European Commission, 2001 Regular Report on Turkey's Progress Towards Accession, 13.11.2001, SEC(2001)1756, p. 82.

1352 See Turkey's Asylum and Migration Action Plan, para. 1.

1353 Bülent Çiçekli, *"Impact of Turkish-EU Accession Process on the Development of Turkish Immigration Law"*, Turkish Weekly, Journal of Turkish Weekly, 02.11.2004, available at http://www.turkishweekly.net/articles.php?id=21 [visited on 25.09.2006]

According to a fact sheet published by UNESCO in 2005, 463 migrants were reported dead en route Turkey and Greece between 1 January 1993 and 10 April 2005. These figures show that the route between Turkey and Greece is among the most dangerous ones for illegal crossings. Whereas, the figures for crossings from Asia to Turkey demonstate the lowest figure in the chart with 43 deaths during the period concerned.[1354] These figures inevitably bring the debate to two major causes of such fatalities. The first such cause has been the landmine fields both on the Turkish and Greek sides of the land border.[1355] In order to prevent such human suffering, both Turkey[1356] and Greece[1357] ratified the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction in 2003.

The second cause of such fatalities is, as in the case of many other Southern European countries, the fact that asylum seekers travel to the Western shores of Turkey by unseaworthy vessels and the lack of sufficient search and rescue mechanisms. As explained in detail in the section concerning the readmission agreement between Greece and Turkey, the reluctance of the authorities and passing vessels to assist those persons in distress also contributes to the problem. The practice of towing boats of asylum seekers towards Turkish territorial sea by the Greek authorities best illustrates the reluctance concerned. Considering the fatality of these acts and the documents provided by the rescued persons proving their previous stay on the Greek territory and the video feeds recorded during such acts by the Greek Navy, Turkish Government should consider using the inter-State complaints mechanisms under the human rights instruments.

[1354] UNESCO, Fact Sheet: Death at the Border – Statistics on Migrant Fatalities Attributed to Unatuhorized International Border Crossings, 2005, p.3, available at http://portal.unesco.org/ [visited on 23.09.2006].

[1355] Elizabeth Frantz, Report on the Situation of Refugees in Turkey: Findings of a Five-Week Exploratory Study December 2002-January 2003, 2003, Forced Migration and Refugee Studies American University of Cairo, p. 32, available at www.aucegypt.edu/fmrs/documents/frantz.pdf [visited on 26.09.2006].

[1356] Anti-Personnel Mines Convention, Council of Ministers Decree No. 2003/5427 of 28.03.2003, R.G. No. 25079, 14.04.2003.

[1357] Greece signed the Ottowa Convention on 3 December 1997 and ratified it on 25 September 2003. (Foreign Affairs and International Trade Canada, Country Profiles, available at http://www.mines.gc.ca/country_profiles-en.asp#greece [visited on 26.09.2006])

On the other hand, efficient implementation of the Law of the Sea instruments examined in the first chapter of this study have a critical role for preventing fatalities in the Aegean Sea. It is notable albeit insignificant in this context that Turkey is not party to the UNCLOS as the relevant provisions are considered to be codifications of possibly the oldest rules of shipping.[1358] She is party however, to the SAR[1359], SOLAS[1360] Conventions including the recent amendments thereof.

As explained in detail in the first chapter, the amendments to SOLAS and SAR Conventions which contain provisions on the treatment of persons rescued at sea entered into force on 1st of July 2006[1361] and 1st of January 2006[1362] consequetively. These amendments entered into force for Turkey through the tacit amendment procedure[1363] as she did not object to the amendments in question. While the amended SOLAS Convention elaborated on the definition of search and rescue and imposed the obligation to the ship master to provide assistance regardless of the nationality or status of the persons or the circumstances in which they are found, the amendments to the SAR Convention introduced an obligation to coordinate and to cooperate in releasing the master of the responsiblity to provide care of survivors and to deliver the persons rescued at sea promptly to a place of safety.[1364] Turkey had already adopted a detailed Communication on National Search and Rescue Plan by the year 2002 for the purpose of establishing a more effective search and rescue system at the blue borders surrounding it.[1365]

Accordingly, it is notable that although the SAR Convention does not impose a strict disembarkation requirment but merely an obligation to cooperate and

---

[1358] Bernard H. Oxman, *"Human Rights and the United Nations Convention on the Law of the Sea"*, Columbia Journal of Transnational Law, 1997, Vol. 36, pp. 414-415.
[1359] R.G. No. 19057, 24.03.1986.
[1360] R.G. No. 16998, 25.05.1980.
[1361] Chapter V (Safety of Navigation) Resolution 33, new para. 1-1 is inserted after the existing para. 1. (Resolution MSC 153(78), 20 May 2004)
[1362] New para. 3.1.9 is added after existing para. 3.1.9. (Resolution MSC 155(78), 20 May 2004)
[1363] SAR Convention Article III/para. 2(h); SOLAS Convention Article VIII (b).
[1364] For further information on these Conventions and the amendments thereof see the relevant section above.
[1365] Undersecretary for Maritime Affairs, Communication No: 2002/4 on National Search and Rescue Plan, R.G. No. 24812, 11.07.2002.

coordinate, Turkey generally allows disembarkation of asylum seekers as indicated in the above mentioned Strategy Paper. A recent example of this has been the Noordam incidence[1366] at the Agean Sea when a passenger ship, the Noordam, rescued 22 persons of various nationalities including Somalia and Iraq after their boat sunk in the Aegean Sea between the Greek Island of Samos and the coast of Turkey. The rescued people were allowed to disembark in Kuşadası, Turkey which was the ships' next port of call several hours after the rescue. The incident caused reaction internationally; the United Nations High Commissioner for Refugees António Guteres thanked the Turkish Government for receiving the people in need.[1367]

Another relevant instrument of the Law of the Sea is the FAL Convention which, contains provisions on the treatment of stowaways as[1368]amended by the Resolution FAL.7(29) in 2002. Turkey has however, not become a party to this Convention. The official web site of the Undersecretary For Maritime Affairs of the Prime Ministry[1369]contained a note indicating that Turkey was preparing for acceeding to the Convention concerned as of 14.06.2003, however such note has subsequently been removed. Thus, there is as yet no data available concerning the Turkish legal practice on stowaways.

(c) Carrier Sanctions

Turkey has adopted the Civil Aviation Directive on the Treatment of Inadmissible Persons at the Border Gates in Airport Zones in 2003.[1370] This Directive is based on the Annex 9 of the Convention on International Civil

[1366] "*Ölümden Dönen Kaçaklar Türkiye'de: Bahama Bandıralı Noordam Adlı Dev Turistik Geminin Kuşadası Açıklarında Kurtardığı 22 Yabancı Uyruklu Kaçağı Türkiye Kabul Etti"*, Milliyet, 08.06.2006; Boy Dies As Immigrant Boat Sinks, Kathimerini(English Edition), 07.06.2006, available at http://www.ekathimerini.com [visited on 26.09.2006].
[1367] UNHCR News Stories, Cruise Ship Which Saved 22 People in Aegean Sea Praised by UNHCR, 12.06.2006, available at http://www.unhcr.org [visited on 26.09.2006]
[1368] For further information on this Convention and the amendment thereof see the relevant section above.
[1369] http://www.denizcilik.gov.tr/tr/
[1370] Civil Aviation Directive on the Treatment of Inadmissible Passengers at the the Border Gates in Airport Zones, 20.05.2003, available at http://www.egm.gov.tr [visited on 27.09.2006].

Aviation,[1371] Document 30 of the European Civil Aviation Conference and Resolution 701 of the International Air Transport Association.[1372] The Directive establishes the responsibility of the air carriers on detecting inadmissible passengers at the points of departure in third countries before arriving at the Turkish territory, the return of the persons concerned and the procedures to be applied during their stay.[1373] The Directive clearly has a non-entrée perspective in its Article 5 that is titled *"Prevention of Inadmissible Passenger Abroad"*. Accordingly, air carriers are obliged to check the passenger documents before boarding the aircraft and ensure that inadmissible passengers are not carried to Turkish territory. Similar to the EU practice on carrier sanctions mentioned above, the task of detecting inadmissible passengers is delegated to private companies that are not competent to differentiate asylum seekers from illegal migrants.

The problems that the air carrier sanctions posed was discussed at the 32nd Session of the Assembly of the International Civil Aviation Organization, held in Montreal in 1988. The Assembly addressed a claim by the International Transport Workers' Federation that States faced a dilemma between their rights to protect the borders against passport fraud and other relevant crimes and the protection of refugees.[1374] The question was whether a genuine refugee who leaves his/her country under the fear of persecution would always be in a position to collect the proper documentation in to leave the country. The following statement of the International Transport Workers' Federation describes the problem more clearly:

"It is well established that it is unreasonable to demand that refugees have proper documentation. These carrier liability laws have the effect of obstructing people genuinely at risk from arriving in a safe country and seeking protection as a

[1371] Convention on International Civil Aviation was signed at Chicago on 7 December 1944 and entered into force on 4 April 1947. Turkey deposited the instrument of ratification on 20 December 1945. (www.icao.int/icao/en/adb/wla/arch.htm [visited on 27.09.2006].)
[1372] See Civil Aviation Directive on the Treatment of Inadmissible Passengers at the Border Gates in Airport Zones, Article 1.
[1373] *Ibid.*
[1374] Ruwantissa I.R. Abeyratne, *"Air Carrier Liability and State Responsibility for the Carriage of Inadmissible Persons and Refugees"*, Air and Space Law, 1999, Vol. XXIV, No. 1.

refugee."[1375]

The Federation argued that the carrier liability laws adopted by States in order to discourage insincere applicants of refugee status in their territories, posed serious problems for carriers which wished to avoid the fines imposed for failing to make such detection efficiently. Therefore, the Federation requested that the relevant ICAO body to consult the UNHCR on this issue and to remind the ICAO member States of their obligations under the 1951 Refugee Convention and Annex 9 to the Chicago Convention. In response to this request the ICAO Assembly agreed to refer these proposals to the ICAO Council.[1376] The problem however, still remains to be solved.

Vested observed in a working paper that he prepared for UNHCR that in the recent practice of industrialized States, the focus of identity information has moved away from the merits of an asylum claim, it has rather become an issue of technical control as a part of the admissibility of person to the territory of the destination State. The author considered that the underlying rationale of these measures were simply to prevent asylum seekers to have access to the jurisdiction of a potential country of protection and expressed his concerns about the fact that this practice has resulted in increasing further rejections through non-entrée measures.[1377]

These observations and concerns are also valid for Turkish practice under the Directive concerned. In this respect, Turkish legal practice followed the waves of restrictive policies in the industrialized countries.

c) Removal from the Turkish Territory

The Turkish law is complicated with profusion of legal texts applicable to the measures which may result in the removal of an alien for the Turkish territory. Apart from many international law treaties, the provisions in the Passport Law,

[1375] A32-WP/54, EC/7, 02.06.1998, pp. 1-2 at Ruwantissa I.R. Abeyratne.
[1376] *Ibid.*
[1377] Jens Vedsted-Hansen, Europe's Response to the Arrival of Asylum Seekers: Refugee Protectionand Immigration Control, 1999, New Issues in Refugee Research: Working Paper No. 6, p. 4.

Turkish Citizenship Law, Turkish Criminal Law, Law on Residence Travel of Aliens in Turkey and the 1994 By-Law are considerable with regard to the removal of aliens from Turkey.

(1) Passport Law

Article 34 of the Passport Law provides:

"Any person who has managed to enter from the borders of the Republic of Turkey without passport shall be imposed a fine starting from 250 Liras upto 1250 Liras, to and/or sentenced to imprisonment from 1 month upto 6 months.[1378]*The alien concerned shall be deported after serving the sentence."*

These fines however, shall not be applicable for a refugee as Article 31 of the 1951 Refugee Convention expressly prohibits imposing penalties to refugees on account of illegal entry or presence provided that they come directly from a territory where his/her life or freedom was threatened and he/she presented himself/herself to the authorities without delay and show good cause for their illegal entry or presence. Hence, the protection procedure under the 1994 By-Law and the Directive No. 57 of 22 June 2006 does not anymore refer to the Passport Law in this respect. Before the amendment of the 1994 By-Law in January 2006 however, the last paragraph of Article 4 thereof indicated that those aliens who did not apply to the specified authorities within the 10 days time limit would be treated according to the Passport Law. Therefore, even genuine refugees could be excluded from the asylum procedure and be penalized according to the Passport Code. Turkey's 2005 Progress Report prepared by the European Commission for instance expresses concerns about the reports indicating that the practice of prosecuting asylum seekers for illegal entry still continued during 2005. The amendments in the 1994 By-Law and the introduction of the Directive No. 57 of 22 June 2006 should contribute to solving this problem. It is notable that the mentioned Directive contains clear instructions to the border guards in this regard.[1379] It is particularly significant that any delays in the application should not result in the rejection of the claim without examining its

[1378] See Passport Law.
[1379] For further information on this topic see supra title 'The Procedure'.

merits according to the Directive.

On the other hand, a clarification is necessary for the status of subsidiary protection in this regard since a person who is granted the subsidiary protection status is a certified non-refugee who deserves another form of protection according to the European Convention on Human Rights. While the 1951 Refugee Convention provides a legal basis for refugees and asylum seekers to be immune from the penalty under the Passport Law as *lex specialis*, no such legal basis is available for subsidiary protection. Considering the strict terminology of the Passport Law, holders of subsidiary protection should be subject to the penalty thereof if they had entered the Turkish territory without a passport. Therefore, a legal amendment in the Passport Law excluding subsidiary protection status from the penalty in question is advisable.

(2) Turkish Citizenship Law

Article 33 of the Turkish Citizenship Law[1380] that regulates the consequences of annulment of citizenship stipulates a possibility of deportation. The grounds for the annulment decision are stated in Article 24 of the Law. Accordingly, if it is established that the person concerned had been granted Turkish citizenship as a result of false declaration or concealing some important information his/her citizenship may be annulled by the Council of Ministers. This remark should be included in the decision of annulment. The person concerned cannot invoke the prohibition of expulsion of citizens stipulated in the Article 23 of Constitution of the Republic since he/she will become an alien after the decision. In this case, the prohibition of refoulement may well appear as a mechanism the use of which is dictated by the conditions in a territory where the person would potentially be sent. For instance, this is more likely to happen where the applicant had not lost his/her existing citizenship while gaining the Turkish citizenship. The Turkish Citizenship Law however, does not refer to the principle of non-refoulement and the procedure in question is not the one under the 1994 By-Law as it is the Council of Ministers which is the organ authorized by law to make such decision. In any case, the non-

[1380] Turkish Citizenship Law No. 403 of 11 February 1964, R.G. 11638, 22.02.1964.

refoulement principle shall be considered by the Council of Ministers in its decision with reference to Turkey's international human rights obligations. Article 33 provides the possibility of appealing to the Council of State against the decision in which case, unlike there general rule in Article 27 of the Administrative Justice Procedure Law,[1381] the deportation decision is automatically suspended. Non-refoulement claim can be put forward before the Council of State.

(3) Turkish Criminal Law

The Turkish Criminal Law[1382] contains rules concerning two significant grounds of removal from the Turkish territory namely, those aliens who have committed a crime in Turkey and extradition of aliens to other countries.

Article 59 of the Law sets forth the deportation procedure concerning those aliens who commit a crime in Turkey. The criminal laws of the Republic have been part of an intensive reform process that followed a series of constitutional amendments starting from 2001.[1383] In this regard, the Law No. 5237[1384] has replaced the 1926 Turkish Criminal Law.[1385] The drafting history of Article 59 is noticeable to show the spirit of the said reform process and that of the Turkey's Action Plan on Asylum and Migration which indicates that the principle of non-refoulement would be applied with the same level of sensitivity within the framework of the 1951 Convention, European Convention on Human Rights and other relevant international standards.[1386]

The first version of Article 59 provided: *"The judge shall decide to deport an alien immediately, who is sentenced to imprisonment for a term of two years or more as a result of an offence he/she committed, following the execution of his/her*

[1381] See Administrative Justice Procedure Law.
[1382] Turkish Criminal Law No. 5237 of 26 September 2004, R.G. No. 25611, 12.10.2004.
[1383] For a detailed analysis of the constitutional amendments concerned see Ergun Özbudun, Serap Yazıcı, Democratization Reforms in Turkey (1993-2004), 2004, TESEV Publications.
[1384] For further information on the deportation procedure applicable, before the entry into force of the Law No. 5237, for aliens who commit a crime in Turkey under the ex Article 18 of the Law No. 647 on the Execution of Penalties see Nuray Ekşi, *"Yabancıların Türkiye'den Sınırdışı Edilmesi"*, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni: Prof. Dr. Sevin Toluner'e Armağan, Vol. 24 No. 1-2, 2004, p. 509, note 33.
[1385] Law No. 765 of 1 March 1926, R.G. No. 320, 13.03.1926.
[1386] See Turkey's Action Plan on Asylum and Migration, para. 4.6.6.

punishment." This provision could be criticised for conflicting with the jurisprudence of the European Court of Human Rights as it did not involve any risk analysis concerning the receiving country or family unity issues.[1387] As such deficiency of the provision was realized, the Turkish Grand National Assembly reacted swiftly to amend the Article 59 that allowed automatic deportation of foreign nationals one day before the Law entered into force on 1st April 2005.[1388] Accordingly, the amended Article 59 of the Turkish Criminal Law provides that the file of an alien, who is sentenced to imprisonment and served his sentence or released on condition, shall be transferred to the Ministry of Interior in order to be considered for expulsion. In this regard, the Ministry of Interior will consider deportation of the person concerned according to the standards applicable to the individual circumstances of the case. If the alien concerned claims a risk of persecution in the country of origin, the Ministry should treat the person according to the procedure set by the 1994 Regulation and the Directive No. 57 of 22 June 2006. Consequently, the claim will be examined under the accelerated procedure as the Directive concerned lists the case of persons having been released after conviction of a crime in Turkey, among the grounds where accelerated procedure shall be initiated.[1389]

The second possibility that the Turkish Criminal Law stipulates as a ground for removal from the Turkish territory is extradition in Article 18. The area of extradition is predominantly regulated by multilateral and bilateral treaties that Turkey is party to. For instance, Turkey is a party to the European Convention on Extradition.[1390] On the other hand, the report of the Justice Commission on the Draft Criminal Code[1391]indicates that the minimum standards on extradition had to be

[1387] For instance, see *Amrollahi v. Denmark*. where the Court had found a violation against Denmark under Article 8 for deporting an Iranian citizen convicted of 3 years imprisonment due to drug trafficking, since the applicant had established a family life in Denmark which could not continue after deportation. It is noteable that, had the same incident occurred in Turkey the Turkish judge would have no discretion but to deport him according to the first versiton of Article 59 as the penalty rendered was over 2 years imprisonment.

[1388] Law No. 5328 of 31 March 2005, R.G. No. 25772 bis, 31.03.2005; Selim Levi, *"Yabancıların Sınır Dışı Edilmesi: Yeni Türk Ceza Kanunu'nun Tartışma Yaratacak Bir Hükmü Nasıl Değişti?",* Türkiye Barolar Birliği Dergisi, 2005, No. 58, pp. 29–39.

[1389] For further information on the accelerated procedure see title 'The Procedure' above.

[1390] Law No. 7376 of 18 November 1959, R.G. No. 10365, 26.11.1959.

[1391] Justice Commission of the Turkish Grand National Assembly, Report on the Draft Criminal Code, 14 July 2004, p. 164 available at http://www.tbmm.gov.tr [visited on 28.09.2006].

established in the domestic law in order to develop a coherent appraoch in concluding those internation law treaties.

In this regard, Article 18 of the Law No. 5237 provides that:

"an alien who has been convicted or for whom prosecution has been initiated on charges of a crime committed or claimed to be committed in a foreign country may be extradited, upon request, for prosecution purposes or execution of the punishment."

The Article however, further provides a list of circumstances where the extradition request shall not be accepted. Among those, paragraph 3 is particularly relevant to the purposes of this study which requires rejection of any extradition request where:

"there are substantial grounds for suspecting that, upon extradition, the person would be prosecuted or punished on account of his/her race, religion, nationality, membership of a particular social group or political opinion or shall be exposed to torture or ill-treatment."

As it is also noted by the Justice Commission, non-refoulement perspective is a new phenomenon in the Turkish ciminal law.[1392] Due to the absence of a non-refoulement clause in the text of the Law No. 765,[1393] the debates concerning extradition of aliens were predominantly centred around whether the crime attributed to the person was of political nature or not.[1394] Although, this is relevant to the non-refoulement principle, it sure is not the only element to be considered in this respect. Therefore, the new provision is a significant step for bringing non-refoulement perspective to the Turkish ciriminal law.

Furthermore, the wording of the Article allowes a liberal interpretation of the non-refoulement principle, even compared to the case-law of the ECtHR. It is noticeable that the expression *"substantial grounds for believing"* in the case-law of

[1392] See *ibid.*
[1393] See Article 9 on extradition of aliens.
[1394] See Tarhanlı, pp. 14-18.

the ECtHR is corresponded with the expression *"substantial grounds for suspecting"* in the text of Article 18. Therefore, even a suspicion could give rise to rejection of an extradition request, thus a lesser degree of risk could be considered within the protected domain of non-refoulement under the Turkish Criminal Law.

The new formulation should prevent re-occurrence of situations such as the one that gave rise to the case of Mamatkulov and Abdurasulovic v. Turkey[1395]where the European Court of Human Rights found a violation of Article 34 against Turkey. The circumstances of this case revealed clearly the deficiencies of the extradition procedure under the Article 9 of Law No. 765.

Both of the applicants were citizens of Republic of Uzbekistan who were accused for causing injuries by the explosion of a bomb in the Republic of Uzbekistan and an attempted terrorist attack on the President of Uzbekistan. They were arrested in Turkey under an international arrest warrant and were further requested by Uzbekistan. The Turkish Criminal Courts which considered the extradition request concerning the persons in question merely determined their nationality and the nature of the offences pursuant to Article 9 of the Turkish Criminal Code. They both held that the offences for which the applicants had been charged were not political or military in nature but "ordinary criminal" offences. Both applicants had argued that political dissidents in Uzbekistan were arrested by the authorities and were subjected to torture in prison. These claims however, were dismissed by the Courts.

Subsequently, the Council of Ministers of the Republic of Turkey adopted a decree for the applicants' extradition and accordingly the applicants were transferred to the Uzbek authorities despite the existence of an interim measure of the European Court requesting the Turkish authorities not to extradite the applicants pursuant to Rule 39 of the Rules of Court.

The Turkish authorities then informed the European Court that they had received assurances from the Uzbek authorities that the applicants would not be

[1395] See *Mamatkulov and Abdurasulovic v. Turkey.*

subjected to acts of torture or sentenced to capital punishment.

Meanwhile, the Supreme Court of the Republic of Uzbekistan found both applicants guilty of the offences charged and had sentenced them to terms of imprisonment. A few months after the Supreme Courts' judgement however, the applicants' representatives complained that they were unable to contact them in the Uzbek prison. They indicated that the conditions in Uzbek prisons were bad and that prisoners were subjected to torture. On the other hand, the Turkish Government informed the Court that two officials from the Turkish Embassy had visited the applicants and observed that they were in good health and had not complained about the prison conditions.

The Uzbek authorities however, continued to prevent the representatives from contacting the applicants. Therefore, it was not possible to provide the Court with any evidence about the treatment that the applicants were exposed to in the Uzbek prison.

As a result, the European Court found a violation of Article 34 on the ground that the applicants were unable to take part in the proceedings before the Court or to speak to their lawyers hindered them in contesting the Government's arguments on the factual issues and in obtaining evidence. The Court further indicated that failure to comply with the interim measure of the European Court also contributed to this violation.

It is clear that, had the Turkish courts or the Council of Ministers carefully examined the practices towards the dissidents in the prisons of Uzbekistan, they would not have extradited the applicants, since as the European Court noted, there were credible reports from NGOs pointing to the human rights violations committed by the Uzbek authorities. The fact that the applicants were involved in terrorist attacks did not exclude them from the protection under Article 2 or 3 ECHR as these articles provided absolute protection. The Turkish authorities tried to avoid inhuman treatment by receiving assurances and visiting the applicants in the prison; however, as explained above, the mere existence of an assurance is not sufficient to avoid

responsibility under the ECHR.

The Article 18 of new Turkish Criminal Code provides the legal basis for incorporating a proper examination mechanism with a non-refoulement perspective under the Turkish extradition procedures. Hence, the new provision has immediately changed the jurisprudence on the Turkish criminal courts in cases similar to the Mamatkulov case. The 7th Criminal Court of Istanbul, Aggravated Crimes Division has recently rendered a judgement concerning the extradition of an Uzbek citizen to this country on account of a terrorist attack in Tashkent which resulted in the death of 15 persons.[1396] The Court noted that the person had a pending case before the European Court of Human Rights and also he had applied to the UNHCR with the claim that he would be persecuted if he was extradited to Uzbekistan and that he was subsequently recognized as a refugee by UNHCR. Given these facts affecting the persons' file, the Court decided to reject the extradition request filed by the Government of Uzbekistan.

The procedure in the new Article 18 is comprised of a combination of judicial and administrative actions. Accordingly, an extradition request shall first be examined by a Court. Wording of the Article implies that the Court shall look into the matter from a human rights perspective assessing the risk of torture, inhuman or degrading treatment or punishment. Furthermore, an asylum perspective is also inherent in the Article as it includes the five grounds of persecution in the 1951 Refugee Convention.

On the other hand, it is noteable that the Article does not expressly refer to death penalty or the right to life. The right to life is undoubtfully part of the assessment as paragraph 4 of the Article provides that the *"judge shall decide on extradition request according to the international law treaties that Turkey is party to"*. Turkey has ratified the Protocol No. 13 of the ECHR which abolished death penalty in all circumstances.[1397] Therefore, extradition to a country where the person

[1396] 7th Criminal Court of Istanbul, Aggravated Crimes Division, Revised Task No. 2005/540, 08.09.2005.
[1397] Council of Ministers Decree No. 2005/9684 of 17 November 2005, R.G. 26022, 13.12.2005.

concerned would face the risk of death penalty would be incompatible with the human rights law obligations of Turkey. It is however, advisable to insert an express provision into the text of Article 18 on death penalty in order to avoid misinterpretations in practice.

In the event that the Court finds the extradition request acceptable, the request shall further be examined by the Council of Ministers. The Council of Ministers may still reject the request on political grounds.

(4) Law on Residence and Travel of Aliens in Turkey

The Law on Residence and Travel of Aliens in Turkey[1398] is the general legislative instrument on administrative deportation matters. Therefore, the deportation rules herein apply to an alien where no other specific procedure exists. In this regard, since there is a specific deportation procedure concerning cases where the principle of non-refoulement is in question, the provisions of this Law only apply to support the procedure under the 1994 By-Law where no other specific rule exists under the asylum procedure. For instance, a person who is determined not to be an asylum seeker through the procedure under the 1994 By-Law would be deported according to the rules under this Law.

Article 19 of the Law provides extensive discretionary powers to the administrative authorities in ordering the deportation of aliens from Turkey. The Article provides:

"Aliens whose stay in Turkey is considered to be contrary to public security, political and administrative requirements shall be invited to leave the country within a specified period. Those who do not comply with this order may be deported."

Both of the concepts 'public security' and 'political and administrative requirements' are dramatically vague in nature and the scope of these concepts are subject to debate. Article 21 further refers to 'public order' while determining the deportation powers of the authorities. Duran argues that the scope of the concepts

[1398] See Law on Residence and Travel of Aliens in Turkey.

'public security' and 'public order' are easier to define as the borders of these concepts have been more or less drawn by the existing jurisprudence of Turkish courts. Accordingly, since both of these concepts are regarded as a part of preventive administrative policing powers, they should only be resorted in order to prevent activities threatening the material order of the public. If these concepts were to be interpreted as broader than preventive policing powers, then the concept of 'political and administrative requirements' would have become scopeless.[1399] The author indicates that it is rather difficult to deduce legal norms out of this later concept as it is hard to think of any cause that cannot be considered within the scope of this concept. Therefore, he suggests that the concepts of 'public good' and 'requirements of public service' should be utilised to limit the scope of these concepts.[1400]

On the other hand, Aybay suggests to perceive the concept of 'political and administrative requirements' as a concept correllating to 'public order' which is regarded as a valid ground for restricting fundamental rights in the contemporary legal systems.[1401]

In fact, Aybay's argument does have a valid legal basis in the Law since Article 21 does not intend to bring additional grounds for deportation as Duran suggests, it is rather a provision which shows the implementation of Article 19 as it regulates which administrative bodies are authorized for rendering deportation orders or how such powers may be delegated.

Accordingly,

"[t]he Ministry of Interior has the power to award the decision to deport an alien from of Turkey. The Ministry of Interior may delegate this power of deporting aliens who are required to leave Turkey on the grounds of public security and order,

---

[1399] Lütfi Duran, *"Yabacıların Türkiye'den Sınırdışı Edilmesi",* İnsan Hakları Yıllığı, 1980, Year 2, p. 10.

[1400] *Ibid.;* please note that Turkey has signed but not yet ratified Protocol No. 7 of the ECHR which contains safeguards for expulsion of aliens on account of grounds other than the interests of public order or the reasons of national security as mentioned in the section related to ECHR above.(http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=117&CM=7&DF=9/30/2006&CL=ENG [visited on 30.09.2006].

[1401] See Aybay, Yabancılar Hukuku, p. 240.

to the border or coast provinces."

The wording of the Article implies that it tends to repeat the grounds in Article 19. While doing so, the Article refers to 'public security' and 'order'. 'Public security' is already one of the grounds expressed in Article 19. Therefore, there are valid reasons to believe that the concept of 'order' refers to the other ground in Article 19 that is 'political and administrative requirements'.

Article 21 further provides that *"the Ministry of Interior is authorized to deport the Roma who are stateless or citizens of third countries or migrants who are not attached to the Turkish culture."* This provision reflects clearly a discriminatory approach with regard to deportation orders. In this case, the provision bases the deportation measure to an act attributable to the persons concerned, but it merely takes into consideration what they are or what they are not.[1402]

In the administrative practice, the concept of 'political and administrative requirements' is often interpreted in the context of Article 8 of the Passport Law that lists the persons who are prohibited from entry as mentioned above and Article 7 of the Law on Residence and Travel of Aliens in Turkey that lists the conditions in which residence permit shall be rejected for aliens.[1403]

According to the Article 7 residence permit shall not be granted to aliens:

"(A) who intend to come merely for working in a field which is exclusively spared for Turkish citizens according to the law, (B) who are in a position or involved in activities which do not conform with the Turkish Law, customs and traditions or political requirements, (C) who do not have the funds to finance their living expenses on legally acceptable grounds during the period of their intended stay in Turkey, (D) who have managed to enter somehow to Turkey although being prohibited to do so, (E) who violate peace and order during their stay in Turkey."

[1402] Rona Aybay, *"Bir İnsan Hakkı Sorunu Olarak Sınırdışı Edilme",* Maltepe Üniversitesi Hukuk Fakültesi Dergisi, 2003, No. 2, p. 150.
[1403] See Çiçekli, Yabancılar ve Polis: Polisin Görev ve Yetkileri Çerçevesinde Yabancıların Hukuki Durumu, pp. 103-104.

Ekşi observes that in the jurisprudence of the Turkish Administrative Courts deportation orders are generally accepted for aliens who commit crimes that violate public order.[1404]

For instance, an alien who was convicted for posession of canabis by the Nevşehir Criminal Court for 1 year and 3 months imprisonment was subsequently deported according to Article 19 of the Law on Residence and Travel of Aliens in Turkey. The alien however, entered Turkish territory once more illegally despite the fact that he had been listed as an alien who should not be admitted to Turkey according to the Article 8 of the Passport Law. As a result, the Council of State found his deportation from Ankara Esenboğa Airport in conformity with the law.[1405]

In another case, the Council of State found deportation of an alien based on account of his activities for spreading Christian faith among Turkish citizens in conformity with the law. The Chamber considered that the order was given within the discretionary powers of the administration arising from Article 7(B) and Article 19 of the Law on Residence and Travel of Aliens in Turkey as well as Article 8(5) of the Passport Law.[1406]

The Council of State did not find a violation for the deportation of an Iranian citizen who was deported for entering Turkey illegally with forged documentation contrary to Article 8 of the Passport Law, as he had been prohibited from entry due to his previous deportation on account of his conviction for possession of two boxes of smugglled cigarettes.[1407]

Deportation of a German journalist on account of his illegal entry after his previous deportation due to his false propaganda against the Turkish army was

[1404] See Ekşi, p. 515.
[1405] 10th Chamber of the Council of State, E. 1996/1001, K. 1998/4077, 23.09.1998 at Vahit Doğan, Hasan Odabaşı, Yargı Kararları Işığında Vatandaşlık ve Yabancılar Hukuku, 2004, Ankara, 2004, pp. 303-304.
[1406] 10th Chamber of the Council of State, E. 1997/6513, K. 2000/128, 20.01.2000, available at http://www.danistay.gov.tr [visited on 29.09.2006].
[1407] 10th Chamber of the Council of State, E. 1996/7506, K. 1997/3074, 24.09.1997, available at http://www.danistay.gov.tr [visited on 29.09.2006].

similarly found lawfull by the Council of State.[1408]

On the other hand, the Council of State indicated in a judgment in 1995 that the act attributed to an alien does not necessarily need to constitute a crime in order to justify his/her deportation under Article 19 of the Law on Residence and Travel of Aliens in Turkey.[1409]

It is noteable that all of the judgements above are based on either the grounds in Article 8 of the Passport Law or the Article 7 of the Law on Residence and Travel of Aliens in Turkey or both. The grounds listed in the said provisions however, are generally not compatible with the exceptions to the non-refoulement principle and conflict with the 1951 Refugee Convention. Furthermore, none of those grounds can be invoked for deporting a person who risks being subjected to death penalty, torture, inhuman or degrading treatment in the country of origin as protected under the human rights instruments examined in this study.

A common feature of all of the above mentioned court rulings is that due to the formulation of the rules concerned, they only consider the causes of deportation but not the consequences thereof. On the other hand, as it is explained in detail above, the prohibition of non-refoulement requires a thorough examination of the consequences of removal from the territory of a State. This justifies the existance of a seperate deportation menchanism designed for refugees and other protected persons under the human rights instruments.

(5) 1994 By-Law

1994 By-Law contains a special deportation procedure for refugees and asylum. Article 29 of the By-Law provides:

"A refugee or an asylum seeker who is residing in Turkey legally can only be deported by the Ministry of Interior under the terms of the 1951 Geneva

[1408] 10th Chamber of the Council of State, E. 1993/4197, K. 1995/2552, 22.05.1995, available at http://www.danistay.gov.tr [visited on 29.09.2006].
[1409] 10th Chamber of the Council of State, E. 1993/3535, K. 1995/4616, 19.10.1995, available at http://www.danistay.gov.tr [visited on 29.09.2006].

Convention relating to the Status of Refugees or for reasons of national security and public order. An appeal against a deportation order may be made to the Ministry of Interior within fifteen days. The appeal shall be reviewed and ruled upon by an official one rank above the officer who previously made the deportation order, and this ruling shall be communicated to the person concerned by the competent Governorate."

A noticeable feature of this provision is that the asylum seekers as well as the refugees are covered by the deportation rule which is more advantageous for the alien compared to the procedure under the general provisions of Law on Residence and Travel of Aliens in Turkey.[1410] This feature of the provision is in line with the interpretation of the UNHCR which, regards Article 33 of the 1951 Refugee Convention as a provision applicable for refugees regardless of the official recognition as such by a State Party. Asylum seekers, as defined under the 1994 By-Law do fit the eligibily criteria under the 1951 Refugee Convention, but cannot be officially recognized as such by Turkey due to the geographical limitation. Therefore, Turkey is expected to not to deport asylum seekers unless one of the exceptions in Article 33 is in question. On the other hand, although asylum seekers are covered in Article 29, Article 28 of the By-Law stipulates a specific ground for deportation of asylum seekers. Accordingly, in the event that an individual asylum seeker who has been granted a residence permit for the purpose of resettlement to a third country cannot manage to go to a third country within a reasonable time, his/her residence permit may not be renewed. In this case, the asylum seeker is invited to leave Turkey. This is clearly not among the exceptions to non-refoulement in Article 33. Therefore, it is difficult to conclude that Article 28 complies with the rules of the 1951 Refugee Convention.

Furthermore, the holders of the subsidiary protection status or those persons who are granted residence permit on humanitarian grounds which are the statuses recently introduced by the Directive No. 57 of 22 June 2006, are outside the scope of this specific provision concerning deportation as these statuses are not regulated in

[1410] See infra, explanations on the deportation procedure in the Law on Residence and Travel of Aliens in Turkey.

the By-Law itself but incorporated into the asylum procedure through the Directive. At a first glance, excluding these categories from the scope of Article 29 may seem to be inappropriate as particularly the subsidiary protection status serves identical interests with the refugee status. A detailed analysis of the legal environment however, leads to the conclusion that this approach could be justified for the purpose of retaining coherence of the law. Firstly, as indicated in its Article 1, the 1994 By-Law has been adopted for the sole purpose of implementing the 1951 Refugee Convention. Subsidiary protection however, is not a status contained in this Convention. Secondly, although the 1951 Refugee Convention allows certain exceptions to the principle of non-refoulement, this is not the case in the European Convention on Human Rights on which subsidiary protection is based. It is true that in most cases the refugee status would overlap with the grounds of subsidiary protection. For instance, an alien who fears to be tortured by the authorities of the country of origin on one of the five grounds will probably be considered within the protected domain of both the 1951 Refugee Convention and the ECHR. However, as noted above, exceptionally these two statuses may not overlap, especially where the host State applies a broad interpretation of the term 'persecution' as to include losing the means of subsistance or a cumulative approach based on denial of minority rights or freedom of assembly or freedom of speech. In this case, it is possible that a person who can not avail the protection of ECHR be granted refugee status. The fact that Article 18 of the Turkish Criminal Law seperately expresses both the grounds of refugee status on the one hand, and torture, inhuman or degrading treatment or punishment on the other, among the situations where an extradition request shall be rejected, implies that these two statuses may not always overlap under the Turkish law either. Therefore, there is an interest in differentiating refugee status from subsidiary protection with regard to the deportation procedure. On the other hand, the general rules under the Law on Residence and Travel of Aliens in Turkey are far from satisfying the needs of the persons holding the subsidiary protection status. Therefore, insertion of a rule to the Law on Residence and Travel of Aliens in Turkey parallel to Article 18 (3) of the Turkish Criminal Law on extradition cases specifically regulating the deportation of persons holding subsidiary protection status is advisable.

In this case, however a risk analysis under the human rights instruments is inevitable each time a refugee is deported as well, since a great majority of refugees would be eligible for the protection under those instruments.

With regard to aliens who are granted residence permit on humanitarian grounds, the first argument concerning the coherence of law indicated in the paragraph above is also valid. Moreover, the grounds of residence permit do not in principle, involve a risk in the country of origin. Therefore, subjecting this category to the general rules is justifiable.

The grounds for deportation in Article 29 of the By-Law should be in line with the exceptions in Article 33 of the 1951 Refugee Convention as the By-Law intends to show the implementation of the Convention. However, it is notable that this is not the case. In addition to the exceptions in Article 33 namely *"reasonable grounds for regarding as a danger to the security of the country"* or *"having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country",* the By-Law contains the grounds *of "reasons of national security"* and *"public order"*. As explained under the title 'Exceptions to the Non-Refoulement Principle' above, there is a consensus among scholars that the exceptions to the non-refoulement principle should be interpreted narrowly and only be resorted as the last option for avoiding the danger to the community in the host country. Furthermore, a proportionality test is advisable involving the assessment of the risk that the refugee is likely to face in the country of origin when deported and that of the danger he/she poses to the host country. In this respect, the grounds of *"reasons of national security"* and *"public order"* can not be interpreted as broadly as covering all acts in Article 8 of the Passport Code and Article 7 of the Law on Residence and Travel of Aliens in Turkey as the refugees can not be expected to hold passports, have sufficient amount of finances to survive, satisfy a health standard requirement or conform with customs and traditions or political requirements etc.[1411]

Article 26 of the 1994 By-Law contains a specific provision for the enforced return of aliens who are admitted to Turkey upon a mass influx. The provision has

[1411] See supra explanations related to the Passport Law.

the titled of 'extradition' which is not the true terminology for expressing the measure described in this provision, as it refers to a unilateral measure by the Republic of Turkey.[1412] Article 26 provides:

"At the conclusion of a war, armed conflict or crisis the repatriation of refugees and those who seek asylum in groups shall be carried out by the Ministry of Interior in co-ordination with the Turkish General Staff and the Ministry of Foreign Affairs. Repatriation of individual cases shall be carried out by the Ministry of Interior."

The fact that it brings the requirement to wait for the conclusion of war, armed conflict or crisis, shall be regarded as a postive aspect of this provision. On the other hand, unlike the Temporary Protection Directive of the European Union, this provision does not contain the right to apply for refugee status. Furthermore, despite the strong wording for carrying out the return of the persons concerned, there is no emphasis on the voluntariness of return.

Finally, it has to be noted that collective expulsion of aliens is prohibited under that Protocol No. 4 to the European Convention on Human Rights that Turkey is party to.[1413] Accordingly, each alien concerned has to been given the opportunity to put arguments against his/her expulsion to the competent authorities on an individual basis.

The jurisprudence of the Council of State concerning the time limitation in the 1994 By-Law below must be utilised as to provide guidence for all standards in the 1994 By-Law that contradict with the 1951 Refugee Convention.

The jurisprudence under the 1994 By-Law, for a long time, reflected the lack of syncronization between the procedures of the Ministry of Interior and that of the UNHCR. Turkish administrative courts received a number of claims based on deportation orders concerning asylum seekers whose cases were either pending before the UNHCR or were recognized as refugee by UNHCR and waiting for

[1412] In Turkish 'iade'.
[1413] Council of Ministers Decree No. 94/5749 of 9 June 1994, R.G. 21990, 14.07.1994.

resettlement. The major cause for the lack of syncronization between the procedures was the time limitation in Article 4 of the 1994 By-Law which required asylum seekers to apply to the relevant authorities within a specified period.[1414] The asylum applications of those aliens who did not apply within the time limit used to be rejected immediately by the authorities in which case they were treated according to the general provisions of the Passport Law and the Law on Residence and Travel of Aliens in Turkey by virtue of the last paragraph of the ex-Article 4. As illustrated by the following jurisprudence of administrative courts, this often meant that they would be deported from Turkey immediately.

On the other hand, the administrative courts took a liberal approach from the outset and rejected such restrictive practices under the 1994 By-Law. A cornerstone judgement in this respect was rendered by the 10th Chamber of the Council of State in 2000. The applicant was an Iranian citizen who had been recognized as a refugee by UNHCR. The Ministry of Interior however, did not allow the refugee to leave Turkey for the purpose of ressettling in the United States which accepted to receive him as a refugee. Furthermore, the Ministry had initiated a deportation procedure against him on the ground that he had entered the Turkish territory illegally and had not applied to the Turkish authorities within the specified time limit. The 1st Administrative Court of Ankara had decided to annull the deportation order indicating that the refugee concerned should have been allowed to leave to his safe heaven according to the Article 31 of the 1951 Refugee Convention. The Ministry subsequently brought the case before the Council of State with the same arguments. The Council of State however, rejected the uphold the Ministrys' arguments with the following reasoning: The fact that asylum seekers shall benefit the rules of the 1951 Refugee Convention as well as refugees is not only a requirement imposed by international treaties but also that of the rule of law principle as expressed in the Constitution. Article 4 of the By-Law which requires asylum seekers to apply to the authorities within 5 days must be interpreted in the light of the relevant rules of the 1951 Refugee Convention. Therefore, an asylum seeker shall not be deported on the

[1414] As explained above, the time limit was 5 days after the entry to the territory in the initial text. This was subsequently extended to 10 days and finally replaced with the prase 'without delay' in the latest amendment.

sole ground of his/her illegal entry to the territory of the Republic of Turkey. His application must be examined to find out whether he/she has a well founded fear of persecution according to the Article 1 of the 1951 Refugee Convention. Furthermore, Although, illegal entry to the territory of the Republic is regulated as a crime under the Passport Law, such provision becomes inapplicable in the case of refugees as Article 31(1) of the 1951 Refugee Convention imposes States Parties the obligation not to penalize refugees due to their illegal entry.[1415]

The reasoning of the Council of State is striking as it considers one of the grounds in the Passport Law inapplicable for refugees due to its conflicting nature with the 1951 Refugee Convention. Secondly, the Court has disregarded the time limitation in Article 4 as it contradicted with the purposes of the 1951 Refugee Convention. This line of interpretation paves the way for giving priority to the interests protected by the 1951 Refugee Convention against many other contardictions that do or may arise with the domestic rules, particularly the 1994 By-Law.

Another landmark case was decided by the Council of State in the year 2000. The applicant who was a citizen of Iraq had entered the Turkish territory legally but he had not applied for asylum within the specified time limit. He was recognized as a refugee by UNHCR however, as in the case above, the Ministry of Interior did not allow the applicant to leave Turkey to go to Norway which had accepted to receive him as a refugee. As the applicant had not entered Turkey illegally, this time the Ministry invoked another ground for deportation that shows how broad the term 'public security' could be interpreted in practice. According to the Ministry, granting residence permit to those asylum seekers who used Turkey as a transit territory for reaching the destination countries in the West entailed the risk of carrying the crime rates of their countries of origin to Turkey. This reasoning clearly justified deportation of any Iraq citizen and possibly citizens of many other countries, who were excluded from the asylum procedure. The Council of State however, rejected this argument stating that the asylum seeker concerned should

[1415] 10th Chamber of the Council of State, E. 1997/6373, K. 2000/130, 20.01.2000. See also 8th Administrative Court of Ankara, E. 1997/276, K. 1997/967, 09.10.1997.

have been allowed to leave to Norway by virtue of Article 31 of the 1951 Refugee Convention.[1416]

On the other hand, it is noticeable that the jurisprudence of Ankara Administrative Courts have not always been consistent in determining the scope of the Ministrys' scope of responsibility for examining the risk in the country of origin. In one particular case, the 9th Administrative Court of Ankara found the deportation of an alien whose asylum application had been rejected for the second time by UNHCR, lawful without further questioning whether such deportation measure could be contrary to the human rights instruments or not.[1417] In another case however, the 5th Ankara Administrative Court referred to the Article 3 of the Convention Against Torture that provided absolute protection against refoulement in addition to the 1951 Refugee Convention. In this judgement that was rendered only two months before the Jabari Judgement, the Court found that the administration had failed to investigate and examine the applicants' case in sufficient detail.[1418]

As the Directive No. 57 of 22 June 2006 brought the examination for subsidiary protection that involves examination of each application under ECHR in addition to the asylum procedure, such inconsistency has been settled through administrative initiative.

A very dangerous aspect of the EU accession process for Turkey is the adaption of some of the restrictive burden shifting mechanisms of the European Union into the Turkish domestic law.[1419] The mechanism that has the worst effects in this respect is the 'safe third country' rule that has appeared neither in the amendments of the 1994 By-Law nor the Directive No. 57 of 22 June 2006 until so far. In a relatively recent judgement of the Ankara 4th Administrative Court however, has dramatically applied this concept. The Court considered that the

[1416] 10th Chamber of the Council of State, E. 1998/6373, K. 2000/2717, 24.05.2000.
[1417] 9th Administrative Court of Ankara, 27.11.2002. (Letter No B.05.1.EGM.0.13.03.02. 71810-12/Gnl.6-5. See Annex I).
[1418] 5th Administrative Court of Ankara, 15.05.2000 (Letter No. B.05.1.EGM.0.13.03.02. 71810-12/Gnl.6-5. See Annex I).
[1419] For more information on this point, see supra the section where the effects of EU accession process is analyzed.

applicant who was a citizen of Uzbekistan, should have applied for asylum in Turkmenistan that was the first safe country he entered or in Iran where he transited before coming to Turkey.[1420] The Court came to this conclusion by a misinterpretation of Article 31 of the 1951 Refugee Convention which provides: *"[t]he 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..."*

As explained above, this article is only related to penalization of illegal entry but not the granting of refugee status. Applying the 'safe third country' rule without any standards or analysis on determining safety may have very adverse effects on the right to access to the asylum mechanisms. Moreover, this practice has no legal basis in Turkish law. Finally, it is striking to note that Turkey has no readmission agreement with any of the countries concerned, therefore, it is quite doubtfull that this judgement can be implemented in practice.

[1420] 4th Administrative Court of Ankara, 21.10.2003 (Letter No. B.05.1.EGM.0.13.03.02. 71810-12/Gnl.6-5. See Annex I).

CONCLUSION

The principle of non-refoulement evolved into a normative framework from an *ad hoc* and State centric practice by the efforts of States that started under the domain of the League of Nations. After several unsuccessful attempts for attracting State support, the principle finally appeared under the 1951 Refugee Convention drafted under the United Nations umbrella, which eventually received World-wide acceptance as it has become a customary rule of international law. The flexibly worded provisions of the 1951 Refugee Convention however, confronted with new challenges particularly after the beginning of 1990s when the destination countries, having lost the spirit in 1951, created new mechanisms such as the 'safe third country' rules in order to reduce their refugee burdens by going around the rules of the Convention. Therefore, UNHCR felt the need to start a campaign called 'Global Consultations' in 2001 to reaffirm the commitment of States and to maintain the integrity of the 1951 Refugee Convention.

Meanwhile, human rights instruments such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and UN Covenant of Civil and Political Rights and the European Convention on Human Rights have gradually introduced the non-refoulement rule to the field of human rights law starting from the mid-1980s either by expressly codifying it or through jurisprudence. Complementary use of these instruments, which bear certain advantages over the 1951 Refugee Convention both in terms of substance and the monitoring procedure, has been a great asset for the protection seekers against the gradually emerging deterrent laws and policies of the destination countries. Analysis of the above mentioned instruments and the case-law thereunder conveys results concerning certain advantages and disadvantages of using each of these human rights instruments. Accordingly, the CAT for instance, confined the protected scope of the non-refoulement in its Article 3 to acts categorized as torture, and therefore, it does not protect acts of inhuman or degrading treatment or punishment that do not amount to torture. Moreover, CAT only protects protection seekers from the acts of State agents, therefore, claims based on acts of non-State actors such as honour crimes are

generally not covered by this Convention. On the other hand, while ICCPR protects inhuman or degrading treatment or punishment in addition to torture in non-refoulement cases, the Human Rights Committee has developed a foreseeability test which requires the 'presence of a violation' and the 'certainty of a violation'. Such narrowly formulated risk analysis hinders the effectiveness of this instrument to a great extent. In practice, this restrictive approach only allowed punishment cases to succeed before the Human Rights Committee. Finally, the jurisprudence of the European Court of Human Rights does not have the disadvantages of the two instruments above; however, it seems to be less inclined to accepting extra-territorial State responsibility compared to the others.

While the deterrent policies regarding refugees have been developed in the industrialized countries, a considerable number of developing and transit countries are reluctant to take over the responsibility of refugees according to the 1951 Refugee Convention, but these countries prefer to allow them to stay on their territory for a temporary period until they seek refuge in the destination countries. This could be possible, to a certain extent, by the efforts of UNHCR which initiated implied or formal co-operation agreements with those countries. As a result, UNHCR appeared as an entity which processes the largest amount of refugees in the World through its refugee status determination procedure. Currently, UNHCR holds RSD interviews over 60 countries. This situation has caused a dilemma in UNHCR's functions as its decision making function started to prevail over and sometimes conflicted with its original monitoring function.

In this new environment, the European Union represents the industrialized countries that show a strong tendency to deter refugees from seeking asylum in their territories. The legal developments within the asylum acquis of the European Union demonstrate two clear tendencies in this respect. The first one is to limit asylum seekers' access to the asylum procedures and the possibility of succeeding in asylum claims within the Member Sates and thus shift the burden of those refugees towards the transit countries. The second tendency is to share the burden in an equal fashion among the Member States for those refugees who could manage to have access to the

asylum procedures as all EU Member States are party to the 1951 Refugee Convention that they cannot avoid responsibility entirely. These two interests lead to an intensive harmonization process within the EU law as a result of the Amsterdam Treaty which has transferred the asylum and migration topics from the third pillar to the so called 'first pillar'. The Treaty set forth a 5-year transition period through which all fundamental asylum laws were to be harmonized. As the Member States were not prepared to give up their entire sovereign powers on such a strategic area, the powers vested in the Community Institutions throughout the transition stage were not the typical powers thereof under the Community framework. A hybrid decision making structure was adopted for this period which allowed Member States to prioritize their national interests while drafting the fundamental rules of the European asylum system. This national interest oriented structure generated excessively restrictive asylum rules combined with the wave of restrictive policies particularly targeting aliens after the terrorist attacks of September 11, 2001 in the United States.

With regard to the tendency of deterring asylum seekers in the Member States, the rules adopted by the Community can be grouped under two categories: The first category of rules aim at preventing the entry of asylum seekers to the territory of the Member States. These measures are usually intended to be justified by the purpose of preventing illegal migration, however, they apparently result in the prevention of seeking asylum due to their indiscriminate application. Protected entry measures, tight visa regulations, jointly organized interception and other border control measures on the high seas or land, air carrier sanctions imposed on air carriers which fail to control the validity of the required documentation of aliens at the departure points of third countries before aliens arrive in the EU territory, are measures that shall be considered within this category. As a result of these measures, traveling by sea appears to be the only viable option today for reaching the EU territory. However, as the interception measures by sea are intensified, the asylum seekers take more and more risks by traveling to the European coasts by unsafe vessels. The death toll is constantly rising as many boats sink on their way to the EU territories, while the instruments of the law of the sea such as the UNCLOS, SOLAS and SAR Conventions as well as the asylum law framework fail to respond to such

deaths and casualties.

The second category is comprised of the measures that reduce the possibility of succeeding in the asylum procedure. The rules of 'first country of asylum' and 'safe third country' which generally result in the applicant's case to be considered manifestly unfounded without an examination on the merits and being returned to a third country as well as the accelerated procedures and border procedures which lack the safeguards of standard asylum procedures, reduce the possibility of being granted refugee status within the EU Member Sates. One constraint on the ability of the Member States for effectively implementing the rules of 'first country of asylum' and 'safe third country' was that these rules would require the co-operation of the third countries in readmitting and processing the claims of the asylum seekers concerned. In the event that a third country rejects to admit the asylum seeker, the Member State concerned would not be able to transfer the responsibility thereof to this country. In order to solve this problem, the Union encouraged and in some cases forced third countries to sign readmission agreements either with the Member States individually or with the Community. In this respect, readmission clauses sometimes appeared in economic cooperation treaties and sometimes as an incentive for candidate countries in return of visa facilitations towards their citizens. The dramatic consequences of shifting the responsibility of refugees to third countries, which are not as prepared as the EU Member States to protect the persons concerned, have been repeatedly stressed by scholars. For instance, in the case of Central European Countries that lacked asylum tradition in their laws, the recognition rate was reported to be as low as 10 percent of that in the major EU Member States. Thus, a considerable portion of the refugees sent to third countries faced the risk of chain refoulement. The specimen readmission agreements lacked the mechanisms to ensure that the asylum seekers transferred as such were treated according to the internationally accepted standards.

On the other hand, unlike the policy of shifting the burden of refugees towards the countries outside the EU, Member States have put considerable effort in sharing the burden of refugees among themselves whose responsibility cannot be

shifted to the countries outside the EU territory due to their international law obligations under the 1951 Refugee Convention and the human rights instruments mentioned above. Human rights instruments played an important role in limiting the Union's authority for introducing further restrictions denying the prohibition of refoulement. Therefore, it is not a coincidence that the Qualification Directive of the European Union appeared as the first supranational instrument which regulates 'subsidiary protection status', - a status originated predominantly from human rights instruments – along with the refugee status. Regarding the burden sharing perspective, the Union has adopted the Dublin Convention which was subsequently replaced by the so called Dublin II Regulation which sets forth the criteria for determining the Member State responsible for examining the claims of an asylum seeker. The EURODAC Regulation which established the fingerprint database of refugees is a notable support mechanism for sharing evidence concerning asylum seekers. Finally, the European Refugee Fund has been established for the purpose of financial burden sharing among the Member States.

As a prominent transit country for migrants and asylum seekers, Turkey inevitably has a significant place in the external aspects of the European Union's asylum policy. Turkey had defined its role to a great extent as a transit country similar to many other developing countries, between the refugee generating countries and the industrialized countries. The legal formulation that allowed Turkey to retain its transit role is the geographical limitation that it applies to asylum seekers coming from the non-European countries under the 1951 Refugee Convention. Accordingly, Turkey had deferred the responsibility for refugees coming from non-European countries to the UNHCR. The Convention refugee status was merely granted to an omitable number of refugees by Turkey during the Cold War. Adoption of the 1994 By-Law however, implies a transition in Turkey's attitudes towards non-European asylum seekers. By introducing this By-Law, Turkey took over limited responsibility of non-European asylum seekers during their temporary stay in Turkey. A parallel procedure has been established according to which both the Turkish police and UNHCR interviewed asylum seekers. This system had caused certain problems in practice due to the lack of synchronization between Turkish Ministry of Interior and

UNHCR. Many cases have been reported that asylum seekers recognized or registered with the UNHCR were deported for not having applied to the authorities within the specified time period in the By-Law. Jabari case has been a turning point in this respect where the European Court of Human Rights found a violation against Turkey for its intention to deport a woman who was a refugee recognized by UNHCR, to Iran where she would face a real risk of being subject to inhuman punishment. After this judgment, Turkish authorities established a closer co-operation with UNHCR and showed its intention to develop its asylum procedure. A recent case that has been decided by the European Court of Human Rights showed that this close cooperation had its own constraints. In this procedure, Turkey's decisions on deportation were based entirely on the decisions of UNHCR which was criticized for not being sufficiently fair and transparent itself. UNHCR could not even share the entire case file with the Turkish authorities due to its own asylum procedure rules. In D. v. Others case, the European Court found a violation of Article 3 against Turkey for deporting a refugee who was rejected by the UNHCR. This judgment forces Turkey to take over the responsibility of refugees from UNHCR.

The European Union has been the strongest supporter of Turkey in this regard. The Accession Partnership Document of 2001, which was revised in 2003 and adopted by the Council, had already contained the requirement of lifting the geographical limitation, which would eventually change Turkey's role as a transit country. Turkey initially showed her willingness to develop asylum law by responding to this request immediately by inserting plans for adopting an asylum law and an aliens law, by the end of the year 2005 and January 1st 2005 respectively in the National Programme for the Adoption of the Acquis in 2003. However, it was soon understood that developing asylum law was not a task as simple as the other comprehensive reforms on human rights. In this regard, Turkey had to revise her National Programme's objectives in the Action Plan for Asylum and Migration in 2005. Accordingly, adoption of the two above-mentioned laws as well as the lifting of geographical limitation has been postponed until 2012. After this date, Turkey continued to develop the conditions of the asylum seekers in her territory within the framework of the existing legal structures by introducing administrative instruments.

Regulating a matter that is closely related to fundamental rights and freedoms by administrative instruments does raise concerns, especially when the limited accessibility of such instruments is considered.

Ironically, however, the basis for this approach lies within the European Union's asylum acquis itself. Apparently, if Turkey lifts the geographical limitation and develops its asylum framework and signs a Community readmission agreement as proposed, she would become a "European safe third country" according to the Asylum Procedures Directive which was adopted by the Council in December 2005. This meant that any asylum seeker who passes through the Turkish territory would be directly returned to Turkey. In other words, the European Union would have shifted its refugee burden to Turkey. Turkey would not be able to benefit from the burden sharing mechanisms of the Union such as the Dublin Regulation, EURODAC or the European Refugee Fund since she has not yet become a Member State of the EU. Instead, unlike the other candidate countries, Turkey has been proposed a standard Community readmission agreement, through which any EU Member State will be able to request readmission of any asylum seeker who has allegedly passed through Turkey. Therefore, it is advisable that as the negotiations for the readmission agreement are currently pending with the European Commission, Turkey should be persistent on reformulating the specimen readmission agreement as to include such support mechanisms that are comparable to the burden sharing instruments within the European Union.

In the meantime, it is essential that the principle of non-refoulement is not solely viewed from a burden sharing perspective. As a negotiator of the 1951 Refugee Convention, Turkey is one of the few countries in the World maintaining the geographical limitation. Therefore, developing its asylum law by lifting the geographical limitation would be a good opportunity for Turkey to show the international community its commitment to human rights in a time when the Western States are introducing more and more restrictive laws in this area. However, the fact that Turkey is a part of the competition on asylum among the European countries is a reality that cannot be ignored. Turkey may well be forced to adopt a more restrictive

approach when or if she encounters a burden that cannot be born by her limited resources as in the case of Central European countries that were allowed to have a more controlled transition to the safe third country status. Unprepared and unequipped welcome is definitely not in the best interest of asylum seekers.

BIBLIOGRAPHY

Books and Monographs

Ahmet Cevdet Paşa, Cevdet Paşa Tarihinden Seçmeler I,(eds.) Irmak, S., Çağlar, B.,K., Milli Eğitim Bakanlığı Yayınları, 2176, İstanbul, 1994.

Altınışık, Ç., Yıldırım, M., Ş., Mülteci Haklarının Korunması, Ocak 2002, Ankara Barosu Yayınları.

Aybay, R., Yabancılar Hukuku, 2005, İstanbul Bilgi University Publications.

Balta, T., B., Avrupa İnsan Hakları Sözleşmesi ve Türkiye, Türkiye'de İnsan Hakları, Ankara, 1970.

Bedford, V., Overseeing the Refugee Convention: Complaints, Working Paper No. 2, James C. Hathaway (research director), International Council of Voluntary Agencies and the Program in Refugee and Asylum Law University of Michigan, 2001, http://www.icva.ch/cgi-bin/browse.pl?doc=doc00000485 [visited on 09.06.2006].

Boeles, P., Fair Immigration Poceedings in Europe, The Hague; Boston 1997, Martinus Nijhoff Publishers.

Chimni, B.S., International Refugee Law: A Reader, Sage Publications, New Delhi 2000.

Çiçekli, B., Yabancılar ve Polis: Polisin Görev ve Yetkileri Çerçevesinde Yabancıların Hukuki Durumu, 2003, Seçkin Yayınları, Ankara.

Crawley, H., Lester, T., Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe, May 2004, UNHCR Evaluation and Policy Analysis Unit, UN Doc. EPAU/2004/05, pp. 83.

Eggli, A., V., Mass Refugee Influx and the Limits of Public International Law, The Hague 2002, Martinus Nijhoff Publishers.

Goodwin-Gill, G., S., The Refugee in International Law, Oxford 1998, Oxford University Press.

Gorlick, B., Human Rights and Refugees: Enhancing Protection Through International Human Rights Law, New Issues in Refugee Research, UNHCR Working Paper No. 30, October 2000.

Hathaway, J, (ed.), Reconceiving International Refugee Law, The Hague 1997, Martinus Nijhoff Publishers, xvii-xxix.

Hirsh, E., E., Anılarım: Kayzer Dönemi, Weimar Cumhuriyeti, Atatürk Ülkesi, Eyül 1997, Tübitak Popüler Bilim Kitapları.

Jackson, I., C., The Refugee Concept in Group Situations, Martinus Nijhoff Publishers, The Hague Hague 1999.

Lavenex, S., Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe, Budapest 1999, Central European University Press.

Mac Éinrí, P., Migration Policy in Ireland: Reform and Harmonisation , December 2002, National Consultative Committee on Racism Publication.

Madsen, G., Commentary on the Refugee Convention 1951: Articles 2-11, 13-37, Geneva 1997, reprinted by UNHCR.

McAdam, J., Complementary Protection: A Comparative Perspective, Discussion Paper No. 2, 2005, UNHCR, Geneva.

Meray, S., L., Devletler Hukukuna Giriş, Ankara, 1968, Vol. I.

Mole, N., Asylum and the European Convention on Human Rights, 2000, Council of Europe Publishing, Human Rights Files No. 9.

Nathwani, N., Refugees and Human Rights: Rethinking Refugee Law, The Hague; Boston 2003, Martinus Nijhoff Publishers.

Hiçyılmaz, E., Altındal, M., Büyük Sığınak: Türk Yahudilerinin 500 Yıllık Serüveninden Sayfalar, 1992, İstanbul, Cep Kitapları.

Noll, G., Fagerlund, J., Safe Avenues to Asylum?: The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests, the Danish Centre for Human Rights and UNHCR, April 2002.

Noll, G., Fixed Definitions or Framework Legislation? The Delimitation of Subsidiary Protection Ratione Personae, New Issues in Refugee Research, Working Paper No. 55, February 2002.

Noll, G., Rejected Asylum Seekers: The Problem of Return, New Issues in Refugee Research, UNHCR Working Paper No. 4, May 1999.

Nowak, M., U.N. Covenant on Civil and Political Rights: CCPR Commentary, Arlington 2005, N. P. Engel Publishers.

Özbudun, E., Yazıcı, S., Democratization Reforms in Turkey (1993-2004), 2004, TESEV Publications.

Röhl, K., Fleeing Violence and Poverty: Non-Refoulement Obligations Under the European Convention of Human Rights, New Issues in Refugee Research: UNHCR Working Paper No. 111, 2005.

Rutinwa, B., The End of Asylum? The Changing Nature of Refugee Policies in

Africa, New Issues in Refugee Research, UNHCR Working Papers on New Issues in Refugee Research, Working Paper No. 5, May 1999.

Şahin, M., Mülteci Hukuku Uygulamasında Karşılaşılan Sorunlar ve Çözüm Önerileri, Türk Mülteci Hukuku ve Uygulamadaki Gelişmler, February 2004, İstanbul Barosu Yayınları.

Van Selm-Thorburn, J., 'Access to Procedures 'Safe Third Countries', 'Safe Countries of Origin' and 'Time Limits', Background Paper Global Consultations, Geneva 2001.

Vedsted-Hansen, J., Complementary or Subsidiary Protection? Offering an Appropriate Status Without Undermining Refugee Protection, New Issues in Refugee Research, Working Paper No. 52, February 2002.

Von Sternberg, M., R., The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared, Martinus Nijhoff Publishers, 2002.

Weis, P., The Refugee Convention, 1951: The Travaux Preparatoires Analysed with a Commentary, Cambridge; New York 1995, Cambridge University Press.

Vahl, M., A Privilidged Partnership? EU-Russian Relations in a Comparative Perspective, 2006, Danish Institute for International Studies, Working Paper No. 2006/3, Copenhagen.

Vedsted-Hansen, J., Europe's Response to the Arrival of Asylum Seekers: Refugee Protectionand Immigration Control, 1999, New Issues in Refugee Research: Working Paper No. 6, UNHCR, Geneva.

Zieck, M., UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis, Martinus Nijhoff Publishers, The Hague 1997.

Zwaan, K., UNHCR and the European Asylum Law, Netherlands 2005, Wolf Legal Publications.

Articles, Chapters, Reports, and Occasional Papers

Abell, N., A., "*The Compatibility of Readmission Agreements with the 1951 Convention Relating to the Status of Refugees*", International Journal of Refugee Law, 1999, 60-83.

Abeyratne, R., I.,. R., *"Air Carrier Liability and State Responsibility for the Carriage of Inadmissible Persons and Refugees"*, Air and Space Law, 1999, Vol. XXIV, No. 1., 3-16.

Aleinikoff T., A., "*Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'membership of a Particular Social Group*", Feller,E., Türk,V.,

Nicholson, F., (eds.), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambridge 2003, Cambridge University Press, 263-311.

Aleinikoff T., A., "*The Meaning of "Persecution*", Chimni ,B.S., (ed.), International Refugee Law: A Reader, Sage Publications, New Delhi 2000, 27-30.

Allain, J., "*The Jus Cogens Nature of Non-refoulement*", International Journal of Refugee Law, Vol. 13., No.4, 2001, 533-558.

Amnesty International, 2001 Report on Australia, http://web.amnesty.org/report2001/webasacountries/AUSTRALIA?OpenDocument, [visited on 12.07.2006]

Amnesty International, AIDE-MEMOIRE in view of the 21-22 February 2006 JHA Council: Amnesty International's concerns regarding an EU list of safe countries of origin, http://www.amnesty-eu.org/static/documents/2006/b525-aide_memoire-_safe_countries_of_origin-Feb_06.pdf [visited on 03.09.2006]

Amnesty International, Comhlămh, Irish Commission for Justice and Peace et al., The Denial of Protection: A Joint Statement on Proposed Carriers' Liability Legislationin Ireland, December 2001.

Amnesty International, Asia: Etnicity and Nationality, 10.10.1997 AI Index: ASA 01/01/97.

Amnesty International EU Office, A Bird's Eye View: Interception and Rescue at Sea, The Framework of International Law Principles, 28 September 2005, available at www.amnesty-eu.org [visited on 15.09.2006].

Amnesty International EU Office, Amnesty International's Comments on the Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country National and Stateless Persons as Refugees or as Persons Who are Otherwise in Need of International Protection, 2 October 2002.

Amnesty International Turkey Branch, Iltica ve Göç Ulusal Eylem Planı: Eksik Olan Insani Duyarlilik, 19 May 2005, http://www.amnesty-turkiye.org/sindex.php3?sindex=vifois2405200501 [visited on 25 August 2005].

Andrijasevic, R., How to Balance Rights and Responsibilites on Asylum at the EU's Southern Border of Italy and Libya, Centre on Migration, Policy and Society, Working Paper No. 27, University of Oxford, 2006.

Apap, J., Carrera, S., Kirişçi, K., Turkey in the European Area of Freedom, Security and Justice, EU-Turkey Working Papers, 2004, No. 3.

Arenas, N., "*The Concept of 'Mass Influx of Displaced Persons' in the European Directive Establishing the Temporary Protection System*", European Journal of

Migration and Law, Vol. 7, 2005, 435-450.

Aybay, R., "*Bir İnsan Hakkı Sorunu Olarak Sınırdışı Edilme*", Maltepe Üniversitesi Hukuk Fakültesi Dergisi, 2003, No. 2, pp. 141 – 172.

Bailliet, C., "*The Tampa Case and its Impact on Burden Sharing at Sea*", Human Rights Quarterly, Vol. 25, 2003, 741-774.

Barnes, R., "*Refugee Law at Sea*", International and Comparative Law Quarterly, Vol. 53, 2004, 47-77.

Barnett, L., "*Global Governance and the Evolution of the International Refugee Regime*", International Journal of Refugee Law, Vol. 14, No. 2/3, 2002, 238-262.

Barrett, J., "*The Prohibition of Torture under International Law; Part 1: The Institutional Organization*", International Journal of Human Rights, Vol. 5, No.1, 2001, 1-36.

Bateup, C., "*Can Reproductive Rights be 'Human' Rights? Some Thoughts on the Inclusion of Women's Rights in Mainstream Human Rights Discourse*", Australian Journal of Human Rights, Vol. 6, No. 2, 2000, available at http://austlii.law.uts.edu.au/au/journals/AJHR/2000/19.html#Heading159 [visited on 09.07.2006].(no page number)

Bayefsky, A., Farrior, S., Hanrahan, K., Landgham, A.,"*Protection Under the Complaint Procedures of the United Nations Treaty Bodies*", Fitzpatrick, J., (ed.)., Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures, New York 2002, Transnational Publishers, 23-128.

Black, J., "Greek Diplomacy and the Hunt for Abdullah Ocalan", http://www.wws.princeton.edu/cases/papers/greekdiplomacy.html [visited on 09.06.2006]

Blake, N., "*Exclusion from Refugee Protection: Serious Non Political Crimes After 9/11*", European Journal of Migration and Law, Vol. 4, 2003, 425-447.

Boed , R., "*State of Necessity, as a Justification for Internationally Wrongful Conduct*", Yale Human Rights and Development Law Journal, Vol. 3, No. 1, 2000, 1-43.

Bouteillet-Paquet, D., "*Passing the Buck: a critical analysis of the readmission policy implemented by the European Union and its Member States*", European Journal of Migration and Law, 2003, 359-377.

"Boy Dies As Immigrant Boat Sinks", Kathimerini(English Edition), 07.06.2006, available at http://www.ekathimerini.com [visited on 26.09.2006].

Bruin, R., and Wouters, K., "*Terrorism and the Non-Derogability of Non-*

refoulement", International Journal of Refugee Law, Vol. 15, No. 1, 2003, 5-29.

Bruin R., H.,M., Working Party on Non-State Agents of Persecution: 2002 Report, Presented at 5th Biannual World Conference of the International Association of Refugee Law Judges, 22-25 October 2002, New Zealand.

Byrne, R., Noll, G., Vedsted-Hansen, J., "*Western European Asylum Policies For Export: The Transfer of Protection and Deflection Formulas to Central Europe and the Baltics*" , New Asylum Countries?: Migration Control and Refugee Protection in an Enlarged European Union, Byrne, R., Noll, G., and Vedsted-Hansen, J., (eds.), the Netherlands 2002, Kluwer Law International, 1-28.

Coleman, N., *"Non-Refoulement Revised Renewed Review of the Status of the Principle of Non-Refoulement as Customary International Law"*, European Jounal of Migration and Law, Vol. 5, 2003, 23-68.

Colville, R., "*Asylum in Europe: Percecution Complex*", Refugees Magazine, Issue 101, 1995, available at http://www.unhcr.org/publ/PUBL/3b543f784.html [visited on 25.08.2006] (no page number)

Collyer, M., "*The Dublin Regulation, Influences on Asylum Destinationsand the Exception of Algerians in the UK*", Journal of Refugee Studies, 2004, Vol. 17, No. 4, 375-400.

Costello, C., "*The Asylum Procedures Directive and the Proliferation of Safe Country Policies: Deterrence, Deflection and the Dismantling of International Protection*", European Journal of Migration and Law, Vol. 7, 2005, 35-69.

Çiçekli, B., "*Impact of Turkish-EU Accession Process on the Development of Turkish Immigration Law*", Turkish Weekly, Journal of Turkish Weekly, 02.11.2004. Available at http://www.turkishweekly.net/articles.php?id=21 [visited on 25.09.2006] (no page number)

Donald, J., Vanheule, D., "*Canada*," , Carlier, J.,Y., Vanheule, D., Hullmann, K., and Galiano, C.,P., (eds.), Who is a Refugee: A Comparative Case Law Study, Boston 1997, Kluwer Law International, 165-224.

Duran, L., "*Yabacıların Türkiye'den Sınırdışı Edilmes"i*, İnsan Hakları Yıllığı, 1980, Year 2, 3-33.

Durieux, J.,F., (Deputy Director, Bureau for Europe, UNHCR), Opening Statement of the Round Table on Carriers' Liability Related to Illegal Migration, 30 November 2001, Burssels, available at http://www.stranieriinitalia.it/briguglio/immigrazione-e-asilo/2001/dicembre/unhcr-vettori.html [visited on 09.09.2006].

Durieux, J.,F., Mc Adam, J., "*Non-Refoulement Through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies*", International Journal of Refugee Law, Vol. 16, No. 1, 2004, 4-24.

Editorial Comments "*The Tampere Summit: The Ties That Bind or The Policemen's Ball"*, Common Market Law Review, Vol. 36, the Netherlands 1999, Kluwer Academic Publishers, 1119-1126.

Ekşi, N., "*Yabancıların Türkiye'den Sınırdışı Edilmesi*", Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni: Prof. Dr. Sevin Toluner'e Armağan, Vol. 24 No. 1-2, 2004, 503 – 522.

Erhan, Ç., Yunan Toplumunda Yahudi Düşmenlığı, 2001, Ankara Stratejik Araştırma ve Etüdler Milli Komitesi, http://www.saemk.org/yayin_detay.asp?sbj=icerikdetay&id=11&dba=005&dil=tr [visited on 18.09.2006]

European Council on Refugees and Exiles, Position on Exclusion from Refugee Status, March 2004, PP1/03/2004/Ext/CA. available at http://www.ecre.org/ [visited on 027.09.2006].

European Council on Refugees and Exiles, Analysis of the Treaty of Amsterdam in so far as it relates to asylum policy, http://www.ecre.org/research/Analysis.doc [visited on 03.09.2006].

European Council on Refugees and Exiles, Comments on the Amended Proposal for a Council Directive on Minimun Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 5 March 2003, available at http://www.ecre.org/ [visited on 023.09.2006].

European Council on Refugees and Exiles, Comments on the Amended proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, March 2005, p. 7, available at http://www.ecre.org/ECRE%20PD%20comments.pdf [visited on 12.09.2006].

European Council on Refugees and Exiles, Memorandum to the Finnish Presidency: The Hague Programme and beyond, August 2006, No. AD6/8/2006/EXT/RW,

http://www.ecre.org/eu_developments/presidencies/memofinnishpresaug06.doc [visited on 04.09.2006].

European Council on Refugees and Exiles, European Legal Network on Asylum, Summary Report on the Application of the Dublin II Regulation in Europe, March 2006, p. 157, available at http://www.ecre.org/ [visited on 10.09.2006].

European Council on Refugees and Exiles, Country Report for Greece 2003, p. xvi, http://www.ecre.org/ [Last visited on 02.09.2005].

Fatemi, S.,M., G., S., "*Who is a Refugee?: Comparison of a Misconstrued Concept in International Human Rights Shi'i Figh and the Iranian Legal System*", International Journal of Human Rights, June, 2005, Vol. 9, No. 2, 183-223.

Fitzpatrick, J., "Temporary Protection of Refugees; Elements of a Formalized

Regime", The American Journal of International Law, Vol. 94. 2000, 279-306

Fletcher, M.,"*EU Governance Techniques in the Creation of a Common European Policy on Immigration and Asylum*", European Public Law, Vol. 9, No. 4, 2003, 533-562.

Frantz, E., Report on the Situation of Refugees in Turkey: Findings of a Five-Week Exploratory Study December 2002-January 2003, 2003, Forced Migration and Refugee Studies American University of Cairo, p. 32, available at www.aucegypt.edu/fmrs/documents/frantz.pdf [visited on 26.09.2006].

Frelick, B., "*Barriers To Protection: Turkey's Asylum Regulations*", International Journal of Refugee Law, 1997, Vol. 9, No. 1, 8-34.

Garcia, M., J., Renditions: Constraints Imposed by Laws on Torture, US Department of State: Congressional Research Service Report for Congress, 5 April 2006.

Gibney, M., J., "*Between Control and Humanism: Temporary Protection in Contemporary Europe*", Georgetown Immigration Law Journal, Vol. 14, 2000, 689-709.

Gilbert, G., "*Is Europe living up to its obligations to refugees?*",The European Journal of International Law, 2004, Vol. 15, No. 5, 963-987.

Goodwin-Gill, G., S., "*Refugees and Responsibility in the Twenty-First Century: More Lessons Learned From the South Pacific*", Pacific Rim Law and Policy Jounal, Vol. 23, 2003, 23-47.

Grahl-Madsen, A., Melander, G., Ring, R., "*Article 13*", Alfredsson, G., Eide, A., (eds), The Universal Declaration of Human Rights: A Common Standard of Achievement, The Hague 1999, Martinus Nijhoff Publishers, 265-276.

Güleryüz, N., "*Türkiye'ye Yahudi Göçleri*", 8-11 December 2005 International Migration Symposium Communique, July 2006, Zeytinburnu Municipality, 107-111.

Gürel, S., "*Mülteci Operasyonu*", Hürriyet, 20 September 2006, available at http://www.hurriyet.com.tr/ [visited on 20 September 2006].

Hailbronner, K., "*European Immigration and Asylum Law under the Amsterdam Treaty*", Common Market Law Review,Vol. 35, 1998, 1047-1067.

Hailbronner, K., "*The Treaty of Amsterdam and Migration Law*", European Journal of Migration and Law, Vol. 1, 1999, 9-27.

Hailbronner, K., Thiery, C., "*Schengen II and Dublin: Responsiblity for Asylum Applications in Europe*", Common Market Law Review, 1997, Vol. 34, 957-989.

Haines, R., "*Gender-Related Persecution*", Feller,E., Türk,V., Nicholson, F., (eds.), Refugee Protection in International Law: UNHCR's Global Consultations on

International Protection, Cambridge 2003, Cambridge University Press, 319-350.

Hans, A., Suhrke, A.,"*Responsibility Sharing*", Reconceiving International Refugee Law, Martinus Nijhoff Publishers, 1997, Hathaway (ed.), 83-109.

Hathaway, J., C., Dent J.,A., "*Refugee Rights: Report on a Comparative Survey*", B.S. Chimni (ed.),International Refugee Law: A Reader, Sage Publications, New Delhi 2000, 117-124.

Hathaway, J. C.,"*Who should watch over refugee law?*", Forced Migration Review, Vol. 14, 2002, 23-26.

Helton, A.,C., Loescher, G., Turkey Prepares for a Refugee Influx from Iraq, 11 March, 2003, http://www.cfr.org/publication/5714/turkey_prepares_for_a_refugee_influx_from_iraq.html [visited on 16.06.2006].

Hudson, P., "*Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law*", European Journal of International Law, Vol. 11, No. 4, 2000, 833-856.

Hullmann, K., "*Austria*", Carlier, J.,Y., Vanheule, D., Hullmann, K., and Galiano, C.,P., (eds.), Who is a Refugee: A Comparative Case Law Study, Boston 1997, Kluwer Law International, 11-56.

Human Rights Watch Report on Malaysia, 2000, http://www.hrw.org/reports/2000/malaysia/maybr008.htm [visited on 10.07.2006]

Human Rights Watch Briefing Paper, Iraqi Refugees, Asylum Seekers, and Displaced Persons: Current Conditions and Concerns in the Event of War, February 13, 2003, http://www.hrw.org/backgrounder/mena/iraq021203/3.htm [visited on 16.06.2006];

Human Rights Watch, Stemming the Flow: Abuses Against Migrants, Asylum Seekers and Refugees, Vol. 18, No. 5(E), September 2006, available at http://www.hrw.org/reports/2006/libya0906/ [visited on 14.09.2006].

Hurwitz, A., "*The 1990 Dublin Convention: A Comprehensive Assessment*", International Journal of Refugee Law, 1999, Vol 11, No. 4, 646-677.

International Federation of Red Cross and Red Crescent Societies, Iraq and Neighbouring Countries: Humanitarian Crisis Emergency Appeal No. 8/03 Operations Update No. 10, 19 June 2003, available at http://www2.reliefweb.int/rw/RWB.NSF/db900SID/ACOS-64BMDD?OpenDocument [visited on 25.09.2006].

İçduygu, A., "*Demographic Mobility and Turkey: Migration Experiences and Government Responses*", Mediterranean Quarterly, Fall 2004, 88-99.

Jaegler, G., "*On the History of the International Protection of Refugees*", International Review of the Red Cross, Vol. 83, No. 843, 2001, 727-737.

Jaquemet, S., "*The Cross-Fertilization of International Humanitarian Law and the International Refugee Law*", International Review of the Red Cross, Vol. 83, No. 843, 2001, 651-674.

Justesen P., L., "*Denmark*", Carlier, J.,Y., Vanheule, D., Hullmann, K., and Galiano, C.,P., (eds.), Who is a Refugee: A Comparative Case Law Study, Boston 1997, Kluwer Law International, 291-336.

Kagan, M., "*The Beleaguered Gatekeeper: Protection Challences Posed by UNCHR Refugee Status Determination*", International Jurnal of Refugee Law, 2006, Vol.18, No.1, 1- 29.

Kantarcıoğlu, Z., "*Mülteci Hukuku İle İlgili Yargısal Uygulamlarda Karşılaşılan Sorunlar ve Danıştay'ın 10 Günlük Süreye Genel Yaklaşımı*", Türk Mülteci Hukuku ve Uygulamadaki Gelişmeler, 2004, İstanbul Barosu Yayınları, 73-78.

Keller. K.,M., "*A Comparative and International Law Perspective on the United States (Non)Compliance With Its Duty of Non-Refoulement*", Yale Human Rights and Development Law Journal, 1999, 183-208.

Kennedy, F., "*Italy's Illegal Migrant Conundrum: The Sinking of a Boat Full of African Migrants Off the Coast of Tunisia Underlines the Difficulties for Nations Like Italy of Stopping Illegal Migrants Before They Reach Their Shores*", BBC News, 21 June 2003, http://www.bbc.co.uk/ [visited on 5 July 2006]

Kerber, K., "*The Temporary Protection Directive*", European Journal of Migration and Law, Vol. 4, 2002, 193-214.

Kılıç, T., "*Bir İnsan Hakkı Olarak İltica*", 8-11 December 2005 International Migration Symposium Communique, July 2006, Zeytinburnu Municipality, 173-191.

Kırımlı, H., "*Kırım'dan Türkiye'ye Kırım Tatar Göçleri*", 8-11 December 2005 International Migration Symposium Communique, July 2006, Zeytinburnu Municipality, 147-152.

Kirişçi, K., "*A Friendlier Schengen Visa System as a Tool of "Soft Power": The Experience of Turkey*", European Journal of Migration and Law, 2005, Vol. 7, No. 4, 343-367.

Kirişçi, K., "*Migration and Turkey*", The Collection of Turkish Jurisprudence on Asylum, Refugees and Migration, December 2000, Boğaziçi Üniversitesi Vakfı, 1-35.

Kirişçi, K., "Provide Confort and Turkey: Decision Making for Humanitarian Intervention", http://www.kent.ac.uk/politics/research/kentpapers/kirisci.html [visited on 19.07.2006].

Kjaerum, M., "*Article 14*", Alfredsson, G., Eide, A., (eds), The Universal Declaration of Human Rights: A Common Standard of Achievement, The Hague 1999, Martinus Nijhoff Publishers, 279-296.

Kjaerum, M., "*Refugee Protection Between State Interests and Human Rights: Where is Europe Heading*?", Human Rights Quarterly, Vol. 24, 2002, 513-536.

Kuijper, P., J., "*Some Legal Problems Associated with the Communitarization of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen Acquis*", Common Market Law Review, Vol. 37, 2000, 345–366.

Lauterpacht, E., Bethlehem, D., "*The Scope and Content of the Principle of Non-Refoulement: Opinion*", Feller, E., Türk,V., Nicholson.,F., (eds.), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambridge 2003, Cambridge University Press, 87-177.

Leckie, S., "*The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?*", Human Rights Quarterly, Vol. 10, No. 2, 1988, 249-303.

Levi, S., "*Yabancıların Sınır Dışı Edilmesi: Yeni Türk Ceza Kanunu'nun Tartışma Yaratacak Bir Hükmü Nasıl Değişti?*", Türkiye Barolar Birliği Dergisi, 2005, No. 58, 29-39.

Lowe,V., "*Jurisdiction*", Malcolm D. Evans (ed.), International Law, Oxford; New York 2003, Oxford University Press, 329-355.

Mantouvalou, V., *"Extending Judicial Control in International Law: Human Rights Treaties and Extraterritoriality"*, International Journal of Human Rights, Vol. 9, 2005, 147-163.

Marx, R., "*Adjusting the Dublin Convention: New Approaches to Member State Responsibility for Asylum Applicants*", European Journal of Migration and Law, 2001, Vol. 3, 7-22.

Mathew, P., "*Legal Issues Concerning Interception*", Georgetown Immigration Law Journal, Vol. 17, 2003, 221-249.

McAdam, J., "*The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*", International Journal of Refugee Law, Vol. 17, No. 3, 2005, 461-516.

McNamara,D.,"*The Protection of Refugees and the Responsibility of States: Engagement or Abdication*", Harvard Human Rights Journal, Vol.11, 1998, 355-361.

Nachilo, A., "*Activities of the Parliamentary Assembly of the Council of Europe and its Committee on Migration, Refugees and Population in the Field of Migration and Refugees*", European Journal of Migration and Law, Vol. 6, 2004, 157-159.

Nascimbene, B., Galiano, C., P., "*Italy*" , J.,Y., Vanheule, D., Hullmann, K., and Galiano, C.,P., (eds.), Who is a Refugee: A Comparative Case Law Study, Boston 1997, Kluwer Law International, 457-469.

Naskou-Perraki, P., "*Greece*", Carlier, J.,Y., Vanheule, D., Hullmann, K., and Galiano, C., P., (eds.), Who is a Refugee: A Comparative Case Law Study, Boston 1997, Kluwer Law International, 441-456.

Nathwani, N., "*The Purpose of Asylum*", International Journal of Refugee Law, Vol. 12, No. 3, 2000, 354-379.

Noll, G., "*Protection in a Spirit of Solidarity?*", New Asylum Countries?: Migration Control and Refugee Protection in an Enlarged European Union, Byrne, R., Noll, G., and Vedsted-Hansen, J., (eds.), the Netherlands 2002, Kluwer Law International, 305-324.

Noll, G., "*Seeking Asylum at Embassies: A Right to Entry under International Law?",* International Journal of Refugee Law,Vol. 17, No. 3, 2005, 542-573.

Ochoa-Llido, M., "*Recent and Future Activities of the Council of Europe in the Fields of Migration, Asylum and Refugees*", European Journal of Migration and Law,Vol. 5, 2004, 497-500.

Oxman, B., H., "*Human Rights and the United Nations Convention on the Law of the Sea*", Columbia Journal of Transnational Law, 1997, Vol. 36, pp. 399 – 429.

"Ölümden Dönen Kaçaklar Türkiye'de: Bahama Bandıralı Noordam Adlı Dev Turistik Geminin Kuşadası Açıklarında Kurtardığı 22 Yabancı Uyruklu Kaçağı Türkiye Kabul Etti", Milliyet, 08.06.2006, available at http://www.milliyet.com.tr/ [visited on 08.06.2006].

Pallis, M., "*Obligations of States Towards Asylum Seekers at Sea: Interactions and Conflict Between Legal Regimes*", International Journal of Refugee Law, Vol. 14, No. 2/3, 2002, 329-364.

Peers, S., Readmission Agreements and EC External Migration Law, Statewatch analysis No. 17, available at http://www.statewatch.org/news/2003/may/readmission.pdf [visited on 13.09.2006].

Piotrowicz, R., van Eck, C., "*Subsidiary Protection and Primary Rights*", International Comparative Law Quarterly, Vol. 53, 2004, 107-138.

Ralf Alleweldt, "*Protection Against Expulsion Under Article 3 of the European Convention on Human Rights*", European Journal of International Law, Vol. 4, 1993, 360-376.

Rigaux, F., "*Foreword",* Who is a Refugee?: A Comparative Case Law Study, Boston 1997, Kluwer Law International, Carlier, J.,Y., Vanheule, D., Hullmann, K., Galiano, C., P., (eds.), xix-xxxi.

Sainz-Pardo, P., V., "*The Contemporary Relevance of the 1951 Convention Relating to the Status of Refugees*", The International Journal of Human Rights, Vol. 6, No. 2, 2002, 23-34.

Saul, B., "*Definition of Terrorism in the UN Security Council: 1985-2004*" Chinese Journal of International Law, Vol. 4, No. 1, 2005, 1-26.

Schank, K., Carlos, P., G., "*France*", Carlier, J.,Y., Vanheule, D., Hullmann, K., and Galiano, C.,P., (eds.), Who is a Refugee: A Comparative Case Law Study, Boston 1997, Kluwer Law International, 373-439.

Schieffer, M., "*Community Readmission Agreements with Third Countries: Objectives, Substance and Current State of Negotiations*", European Journal of Migration and Law, Vol. 5, 2003, 343-357.

Steinbock, D., J., "*The Refugee Definition as Law: Issues of Interpretation, Refugee Rights and Realities: Evolving International Concepts and Regimes*", Refugee Rights and Realities: Evolving International Concepts and Regimes, Nicholson, F., Twomey, P., (eds.), Cambridge University Press, 1999, 13-36.

Sztucki, J., *"The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme",* International Journal of Refugee Law, Vol. 1, No. 3, 1989, 285-318.

Sztucki, J., "*Who is a Refugee? The Convention Definition: Universal or Obsolete?*", Refugee Rights and Realities: Evolving International Concepts and Regimes, Nicholson, F., Twomey, P., (eds.), Cambridge University Press,1999, 55-80.

Tarhanlı, T., Sığınmacı, "*Mülteci ve Göç Konularına İlişkin Türkiye'deki Yargı Kararları Konusunda Hukuki Bir Değerlendirme*", Sığınmacı, Mülteci ve Göç Konularına İlişkin Türkiye'deki Yargı Kararları, Published by Boğaziçi Üniversitesi Vakfı, December 2000, 1-34.

Telöken, S., "*Europe: The Debate Over Asylum, It's a Long Way to Harmonization*", Refugees Magazine, 1999, Issue 113, http://www.unhcr.org/cgibin/texis/vtx/publ/opendoc.htm?tbl=PUBL&id=3b810f2e4 [visited on 2 September 2006]. (no page number).

Terzioğlu, M., "*Göçmen Ülkesi Olarak Türkiye: Hukuksal Yapı ve Uygulamalar*", 8-11 December 2005 International Migration Symposium Communique, July 2006, Zeytinburnu Municipality, 168-172.

Tokuzlu, L., B., "*Integration of Aliens Under the Turkish Law*", Integration Policies: The View from Southern and Eastern Mediterranean Countries, Articles submitted in the CARIM Consortium Seminar Tunis 12-15 December 2005, Robert Schuman Centre, European University Institute, available at http://www.carim.org [visited on 20.09.2006], 119-122.

Toplumsal Araştırmalar Vakfı, "*Türkiye'de İltica Politikaları*", Sığınma Hakkı ve

Mülteciler: İltica Hakkı ve Mülteciler Atölyesi Ankara 24-26 Mart 2001, İnsan Hakları Derneği, 58-69.

Türk, V., "*The Role of UNHCR in the Development of International Refugee Law*", Refugee Rights and Realities: Evolving International Concepts and Regimes, Nicholson, F., Twomey, P., (eds.), Cambridge University Press,1999, 153-174.

Vanheule, D., "*Belgium*" ,Carlier, J.,Y., Vanheule, D., Hullmann, K., and Galiano, C.,P., (eds.), Who is a Refugee: A Comparative Case Law Study, Boston 1997, Kluwer Law International, 57-110.

Vanheule, D., "*The Netherlands*" , Carlier, J.,Y., Vanheule, D., Hullmann, K., and Galiano, C.,P., (eds.), Who is a Refugee: A Comparative Case Law Study, Boston 1997, Kluwer Law International, 479-525.

Van Selm-Thorburn, J., "*Asylum in the Amsterdam Treaty: a harmonious future?*" , Journal of Ethnic and Migration Studies, Vol. 24, No. 4, October 1998, 627-638.

Vedsted-Hansen, J., "*Non-admission Policies and the Right to Protection: Refugees' Choice Versus State's Exclusion?*", Nicholson,F., Twomey,P., (eds.), Refugee Rights and Realities: Evolving International Concepts and Regimes, Cambridge 1999, Cambridge University Press, pp.

Vedsted-Hansen, J., *"The Borderline Between Questions of Fact and Questions of Law"*, Proof, Evidentiary Assessment and Credibility in Asylum Procedures, Noll, G., (ed.), Leiden; Boston 2005, Martinus Nijhoff Publishers, 57-65.

Wilkinson, I.., "*EU Fleet is Launched to Head Off Immigrants"*, The Telegraph, 29.01.2003 [visited on 5 July 2006].

Wilsher, D., "*Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?*", International Journal of Refugee Law, Vol. 15, No. 1, 2003, 68-112.

Weissbrodt, D., Hörtreitere, I., "*The Principle of Non-Refoulement: Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-refoulement Provisions of Other International Human Rights Treaties*", Buffalo Human Rights Law Review, Vol. 5, 1999, 1-73.

Yılmaz, H., *"Mültecilerin Sınırdışı Edilmesi ve Yargısal Denetim",* Türkiye'deki Geçici Sığınmacı Kadın ve Çocukların Psikososyal Durumlarının Tespiti ve Yaşam Koşullarının İyileştirilmesi İçin Çözüm Önerileri, Şubat 2005, MAZLUMDER, 27-42.

Case-Law

Communications of the Commitee Against Torture

A. v. the Netherlands, Communication No. 91/1997, Decision of 13 November 1998, UN Doc. CAT/C/21/D/91/1997.

A.A. v. the Netherlands, Communication No. 198/2002, Decision of 30 April 2003, UN. Doc. CAT/C/30/D/198/2002.

A. D. v. the Netherlands, Communication No. 96/1997, Decision of 12 November 1999, Un Doc. CAT/C/23/D/96/1997.

A.F. v. Sweden, Communication No. 89/1997, Decision of 8 May 1998, Doc. CAT/C/20/D/89/1997.

Agiza v. Sweden, Communication No. 233/2003, Decision of the Committee Against Torture, 20 May 2005 , UN Doc. CAT/C/34/D/233/2003.

A.L.N. v. Switzerland, Communication No. 90/1997, Decision of 19 May 1998, UN Doc. CAT/C/20/D/90/1997.

A.R. v. the Netherlands, Communication No 203/2002, Decision of 14 November 2003, Un Doc. CAT/C/31/D/203/2002.

A. S. v. Sweden, Communication No. 149/1999, Decision of 24 November 2000, UN Doc. CAT/C/25/D/149/1999.

B. Avedes Hamayak Korban v. Sweden, Communication No. 88/1997, UN Doc. CAT/C/21/D/88/1997.

Halil Haydin v. Sweden, Communication No. 101/1997, Decision of 20 November 1998, UN. Doc. CAT/C/21/D/101/1997.

Ismail Alan v. Switzerland, Committee Against Torture, Communication No. 21/1995, Decision of 31 January 1995, UN Doc. CAT/C/16/D/21/1995.

M.K.O. v. the Netherlands, Communication No. 134/1999, Decision of 9 May 2001. UN Doc. A/56/44.

Mutombo v. Switzerland, Communication No. 13/1993, Decision of 27 April 1994, UN Doc. A/49/44.

Sadiq Shek Elmi v. Australia, Communication No. 120/1998, Decision of 14 May 1999, UN Doc. CAT/C/22/D/120/1998.

Tahir Hussain Khan v. Canada, Communication No. 15/1994, Decision of 15 November 1994, UN Doc. A/50/44.

T.P.S. v. Canada, Communication No. 99/1997, Decision of 16 May 2000, UN Doc. CAT/C/24/D/99/1997.

V.X.N. and H.N. v. Sweden, Communication Nos. 130/1999 and 131/1999, Decision of 15 May 2000, UN Doc. CAT/C/24/D/130 & 131/1999.

Communications of the Human Rights Commitee

A v. Australia, Communication No. 560/1993, Decision of 3 April 1997, U.N. Doc. CCPR/C/59/D/560/1993.

Anna Maroufidou v. Sweden, Communication No. R.13/58, Decision of 5 September 1979, UN Doc. Supp. No. 40 (A/36/40).

A.R.J. v. Australia, Communication No. 692/1996, Decision of 28 July 1997, UN Doc.CCPR/C/60/D/692/1996.

C. v. Australia, Communication No. 900/1999, Decision of 28 October 2002, UN Doc. CCPR/C/76/D/900/1999.

Chitat Ng v. Canada, Communication No. 469/1991, 5 November 1993; U.N. Doc. CCPR/C/49/D/469/1991 (1994).

Cox v. Canada, Communication No. 539/1993, Decision of 31 October 1994, U.N. Doc. CCPR/C/52/D/539/19930.

Daljit Singh v. Canada, Communication No. 1315/2004, Decision of 28 april 2006, CCPR/C/86/D/1315/2004.

Delia Saldias de Lopez v. Uruguay, Communication No. 52/1979, 29 July 1981, UN Doc. CCPR/C/OP/1.

Eric Hammel v. Madagascar, Communication No. 155/1983, Decision of 3 April 1987, U.N. Doc. Supp. No. 40 (A/42/40) at 130.

Francis v. Jamaica, Communication No. 606/1994, Decision of 25 July 1995, U.N. Doc. CCPR/C/54/D/606/1994.

G.T. v. Australia, Communication No. 706/1996, Decision of 4 November 1997, CCPR/C/61/D/706/1996.

Higginson v. Jamaica, Communication No. 792/1998, Decision of 28 March 2002, CCPR/C/74/D/792/1998.

Ismet Celepli v. Sweden, Communication No. 456/1991, Decision of 18 July 1994, UN Doc. CCPR/C/51/D/456/1991.

Kindler v. Canada, Communication No. 470/1991, 11 November 1993, U.N. Doc. CCPR/C/48/D/470/1991.

Lilian Celiberti de Casariego v. Uruguay, Communication No. 56/1979, Decision of 29 July 1981, UN Doc. CCPR/C/OP/1.

Mansour Ahani v. Canada, Communication No. 1051/2002, U.N. Doc. CCPR/C/80/D/1051/2002.

Roger Judge v. Canada, Communication No. 829/1998, 20 October 2003, U.N. Doc. CCPR/C/78/D/829/1998 .

Sholam Weiss v. Austria, Communication No. 1086/2002, Decision of 3 April 2003, U.N. Doc. CCPR/C/77/D/1086/2002.

T. v. Australia, Communication No. 706/1996 Decision of 4 November 1997 UN Doc. CCPR/C/61/D/706/1996.

Torres v. Finland, Communication No. 291/1988, Decision of 2 April 1990, UN Doc. CCPR/C/38/D/291//1988.

V. M. R. B. v. Canada, Communication No. 236/1987, Decision of 18 July 1988, U.N. Doc. Supp. No. 40 (A/43/40).

Judgements of the International Court of Justice

Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports, 2004, 9 July 2004.

Case Concerning Military and Paramilitary Activities in and Against Nicaragua, Judgement of 26 November 1984, ICJ Reports 1984.

North Sea Continental Shelf Case, Judgement of 20 February 1969, ICJ Reports 1969.

The Aegean Sea Continental Shelf Case, Judgement of 19 December 1978, ICJ Reports 1978.

Judgements of the European Court of Justice

Germany, France, Denmark, and the United Kingdom v. Commission, Joined Cases, 282, 283-285, 287/85 [1987] ECR 3203.

Decisions and Judgements of the European Commission of Human Rights and the European Court of Human Rights

Ahmed v. Austria, Judgement of 17 December 1996, European Court of Human Rights, http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en [visisted on 17. 07.2006].

Afrim Šijaku v. Former Yugoslav Republic of Macedonia, ECtHR, Admissiblity Decision of 27 January 2005, Application No. 8200/02.

Aksoy v. Turkey, ECtHR, Judgement of 18 December 1996, Application No. 21987/93.

Alla Raidl v. Austria, European Commission of Human Rights, Admissibility Decision of 4 September 1995, Application No. 25342/94.

Amrollahi v. Denmark, ECtHR, Judgement of 11 July 2002, Application No. 56811/00.

Amuur v. France, Judgement of 25 June 1996, 19776/92 [1996] ECHR 25.

Arcila Henao v. Netherlands, ECtHR, Admissibility Decision of 24.06.2003, Application No. 13669/03.

Aspichi Dehwari v. the Netherlands, Admissibility Decision of 12 March 1998, Application No. 37014/97.

Bahaddar v. the Netherlands, ECtHR, Judgement of 19 February 1998, Application No. 25894/94.

Bankovic and Others v. Belgium and 16 Other Contracting States, Application No. 52207/99, Decision of 12 December 2001.

Bensaid v. the United Kingdom, ECtHR, Judgement of 6 February 2001, Application No. 44599/98.

Boultif v. Switzerland, ECtHR, Judgement of 2 August 2001, Application No. 54273/00.

Chahal v. the United Kingdom, ECtHR, Judgement of 15 November 1996, Application No. 22414/93.

Čonka v. Belgium, EctHR, Judgement of 5 February 2002, Application No. 51564/99.

Cruz Varas v. Sweden, ECtHR, Judgement of 20 March 1991, Application No. 15576/89.

Cyprus v. Turkey, Application Nos. 6780/74 and 6950/75, Decisions and Reports 2, 125, 136

D. v. the United Kingdom, ECtHR, Judgement of 21 April 1997, Application No. 30240/96.

D. v. the United Kingdom, ECtHR, Judgement of 2 May 1997.

D. and Others v. Turkey, ECtHR, Judgement of 22 June 2006, Application No. 24245/03.

Drozd and Janousek v. France and Spain, ECtHR, Judgement of 26 June 1992, Application No. 12747/87.

Dougoz v. Greece, ECtHR, Judgement of 6 March 2001, Application No. 40907/98.

Fashkami v. the United Kingdom, EctHR, Decision of 22. June 2004, Application No. 17341/03.

Hilal v. the United Kingdom, ECtHR, Judgement of 6 March 2001, Application No. 45276/99, para. 67.

H.L.R. v. France, ECtHR, Judgement of 29 April 1997.

Ilse Hess v. the United Kingdom, Application No. 6231/73, Decisions and Reports 2, 72, 73.

Ireland v. the United Kingdom, ECtHR, Judgement of 18 January 1978, Application No. 5310/71.

Issa and Others v. Turkey, ECtHR, Judgement of 16 November 2004, Application No. 31821/96 .

Jabari v. Turkey, ECtHR, Judgement of 11 July 2000, Application No. 40035/98.

Jakupovic v. Austria, ECtHR, Judgement of 6 February 2003, Application No. 36757/97.

J.E.D. v. the United Kingdom, ECtHR, Admissibility Decision of 2 February 1999, Application No. 42225/98, para. 5.

Klass and Others v. Germany, ECtHR, Judgement of 6 September 1978, Application No. 5029/71.

Kolompar v. Belgium, ECtHR, Judgement of 24 September 1992, Application No. 11613/85.

Loizidou v. Turkey, ECtHR, Judgement of 23 February 1995, Application No. 15318/89.

Lupsa v. Romania, ECtHR, Judgement of 8 June 2006, Application No. 10337/04.

Mamatkulov and Abdurasulovic v. Turkey, ECtHR, Judgement of 6 February 2003, Application Nos. 46827/99 and 46951/99.

M.A.R. v. the United Kingdom, European Commission of Human Rights, Admissibility Decision of 16 January 1996, Application No. 28038/95.

Müslim v. Turkey, ECtHR, Judgement of 26 April 2005, Application No. 53566/99.

N. v. Finland, ECtHR, Judgement of 26 July 2005, Application No. 38885/02.

Ndangoya v. Sweden, ECtHR, Admissibility Decision of 22 June 2004, Application No. 17868/03.

Ould Barar v. Sweden, ECtHR, Decision of 19 January 1999 Application No. 42367/98.

Öcalan v. Turkey, ECtHR, Judgement of 12 March 2003, Application No. 46221/99.

Pančenko v. Latvia, ECtHR, Admissibility Decision of 28 October 1999, Application No. 40772/98.

Peers v. Greece, ECtHR, Judgement of 19 April 2001, Application No. 28524/95.

Richard Lee Goldstein v. Sweden, ECtHR, Admissibility decision of 12 September 2000, , Appl. No. 46636/99.

Piermont v. France, ECtHR, Judgement of 20 March 1995, Application Nos. 15773/89 and 15774/89.

Pranjko v. Sweden, ECtHR, Admissibility Decision of 23 February 1999, Application No. 45925/99.

Ramzy v. the Netherlands, ECtHR, Pres Release issued by the Registrar dated 20.10.2005, Application No. 25424/05.

Razaghi v. Sweden, ECtHR, Admissibility Decision of 11 March 2003, Application No. 64599/01.

Saadi v. the United Kingdom, ECtHR, Judgement of 11 July 2006, Application No. 13229/03.

Salkic and Others v. Sweden, ECtHR, Admissibility Decision of 29 June 2004, Application No. 7702/04.

S.C.C. v. Sweden, ECtHR, Admissibity Decision of 15 February 2000, Application No. 46553/99.

Selmouni v. France, ECtHR, Judgement of 28 July 1999, Application No. 25803/94.

Shamayev and 12 Others v. Georgia and Russia, ECtHR, Judgement of 12 April 2005, Application No.36378/02.

Soering v. the United Kingdom, ECtHR, Judgement of 7 July 1989, Application No. 14038/88.

Sunday Times v. the United Kingdom, Judgment of 26 April. 1979, Series A, No. 30;

(1979-80) 2 EHRR 245, Application. No. 6538/74.

Thampibillai v. the Netherlands, Judgement of 17 February 2004, Application No. 61350/00.

T.I. v. the United Kingdom, ECtHR, Admissibility Decision of 7 March 2000, Application No. 43844/98.

Ülker v. Turkey, ECtHR, Judgment of 24 January 2006. Application No. 39437/98.

X and Y v. Switzerland, Application Nos. 7229/75 and 7349/76, Decisions and Reports 9, 57-76.

Van Der Ven v. the Netherlands, ECtHR, Judgement of 4 February 2003, Application No. 50901/99.

Venkadajalasarma v. the Netherlands, ECtHR, Judgement of 17 February 2004, Application No. 58510/00.

Vilvarajah and Others v. the United Kingdom, ECtHR, Judgement of 30 October 1991, Application Nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87.

W. v. Ireland, European Commission of Human Rights, Application No. 9360/81, Decision of 28 February 1983.

Y v. the Netherlands, European Commission of Human Rights, Admissibility Decision of 16 January 1991, Application No. 16531/90.

Yang Chun Jin Alias Yang Xiaolin v. Hungary, ECtHR, Judgement of 11 January 2001, Application No. 58073/00.

Judgements of the Turkish Courts

4th Administrative Court of Ankara, 21.10.2003.(Letter No. B.05.1.EGM.0.13.03.02. 71810-12/Gnl.6-5. ANNEX I).

5th Administrative Court of Ankara, 15.05.2000 (Letter No. B.05.1.EGM.0.13.03.02. 71810-12/Gnl.6-5. ANNEX I).

7th Criminal Court of Istanbul, Aggravated Crimes Division, Revised Task No. 2005/540, 08.09.2005.

8th Administrative Court of Ankara, E. 1997/276, K. 1997/967, 09.10.1997.

9th Administrative Court of Ankara, E. 2001/863, K. 2002/1151, 26.09.2002.

9th Administrative Court of Ankara, 27.11.2002. (Letter No B.05.1.EGM.0.13.03.02. 71810-12/Gnl.6-5. ANNEX I).

10th Chamber of the Council of State, E. 1993/3535, K. 1995/4616, 19.10.1995, available at http://www.danistay.gov.tr [visited on 29.09.2006].

10th Chamber of the Council of State, E. 1993/4197, K. 1995/2552, 22.05.1995, available at http://www.danistay.gov.tr [visited on 29.09.2006].

10th Chamber of the Council of State, E.1996/1001, K. 19984077, 23.09.1998 at Vahit Doğan, Hasan Odabaşı, Yargı Kararları Işığında Vatandaşlık ve Yabancılar Hukuku, 2004, Ankara, 2004.

10th Chamber of the Council of State, E. 1996/7506, K. 1997/3074, 24.09.1997, available at http://www.danistay.gov.tr [visited on 29.09.2006].

10th Chamber of the Council of State, E. 1997/6373, K. 2000/130 20.01.2000.

10th Chamber of the Council of State, E. 1997/6513, K. 2000/128, 20.01.2000, available at http://www.danistay.gov.tr [visited on 29.09.2006].

10th Chamber of the Council of State, E. 1998/6373, K. 2000/2717, 24.05.2000.

Ankara Regional Administrative Court, Y.D. Appeal No. 2000-1190, 16.04.2000 at The Collection of Turkish Jurisprudence on Asylum, Refugees and Migration, December 2000, Boğaziçi Üniversitesi Vakfı, pp. 153-155.

Other Case-Law

Acosta v. Immigration and Naturalization Service, Board of Immigration Appeals of the United States, Decision of 1 March 1985, No. A-24159781 available at http://www.refugeecaselaw.org [visited on 27.07.2006].

Arrechea Gonzalez v. Ministry of Employment and Immigration, Federal Court of Appeal of Canada, Judgement of 8 May 1991, at http://www.refugeecaselaw.org [visited on 26.07.2006].

Cardoza-Fonseca v. Immigration and Naturalization Service, United States Supreme Court, Judgement of 9 March 1987, No. 85-782, available at http://www.refugeecaselaw.org [visited on 30.07.2006].

Chan v. Minister for Immigration and Naturalization Service, Judgement of 12 September 1989, No. 169 CLR 379, http://www.refugeecaselaw.org [visited on 26.07.2006].

Hoxha v. Secretary of State for the Home Department of the United Kingdom, Court of Appeal Civil Division, Judgement of 14 October, 2002. available at http://www.refugeecaselaw.org [visited on 25.07.2006].

Gomez v. The Minister for Immigration&Multicultural Affairs, The Federal Court of Australia, Judgement of 22 April 2002, No. FCA480, available at

http://www.refugeecaselaw.org [visited on 25.07.2006].

Guo v. Minister for Immigration and Ethnic Affairs, Australian High Court, Judgement of 29 October 1999, No. 191 CLR 559, available at http://www.refugeecaselaw.org [visited on 26.07.2006].

Ivcher Bronstein Case, Inter-American Court of Human Rights, Judgment of 24 September 1999, (Ser. C) No. 54 (1999).

L.F. (Ukraine) v. Ministry of Interior, Supreme Administrative Court of the Czech Republic, Judgement of 25.02.2004, No. 5A2s 38/2003-58. available at http://www.refugeecaselaw.org [visited on 25.07.2006].

Liu v. Attorney General, United States Court of Appeals for the Seventh Circuit, Judgement of 17 August 2004, No. 03-3870, available at http://www.refugeecaselaw.org [visited on 27.07.2006].

Kalala v. Ministry for Immigration&Multicultural Affairs, Federal Court of Australia, Judgement of 12 November 2001, No. 1594 available at http://www.refugeecaselaw.org [visited on 25.07.2006].

Korablina v. Immigration and Naturalization Service, United States Court of Appeals for the Nineth Circuit, Judgement of 23 October 1998, No. 9770361, available at www.refugeelawreader.org/120/Korablina_v._INS.pdf [visited on 28.07.2006].

Mei Dan Liu v. Attorney General, United States Court of Appeals for the Seventh Circuit, Judgement of 17 August 2004, No. 380 F3d. 307, available at http://www.refugeecaselaw.org [visited on 26.07.2006].

NAAV of 2002 v. Minister for Immigration and Multicultural Indigenous Affairs, Federal Court of Australia, Judgement of 29 November 2002, available at http://www.refugeecaselaw.org [visited on 26.07.2006].

NACB of 2002 v. Minister for Immigration&Multicultural Affairs, Federal Court of Australia, 21 May 2002, No. 94 of 2002, available at http://www.refugeecaselaw.org [visited on 26.07.2006].

Pushpanathan v. Minister of Citizenship and Immigration, Supreme Court of Canada, Judgement of 4 June 1998, No. 25173, available at http://www.refugeecaselaw.org/ [visited on 03.08.2006].

R. (ex parte European Roma Rights Centre et al.) v. Immigration Officer at Prague Airport and another (UNHCR intervening), House of Lords of the United Kingdom, Judgement of 9 December 2004.

Refugee Appeal No. 71427/99, Refugee Status Appeal Authority of New Zealand, Decision of 16 August 2000, available at http://www.refugeelawreader.org/index.d2?target=getpdf&id=117 [visited on

27.07.2006]

Sale v. Haitian Ctrs. Council, 113 S. Ct. 2549, 113 S. Ct. 2549, 125 L. (92-344), 509 U.S. 155 (1993), available at http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=509&invol=155 [visited on 25.09.2006].

The decision of the Refugee Status Appeals Authority of New Zealand, Decision of 18 November 2004, No. 75139.

The Haitian Centre for Human Rights et al. v. United States, Case 10.675 Report No. 51/96, Inter-American Commission on Human Rights., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997).

Ward v. Canada, Supreme Court of Canada, Judgement of 30 June 1993, No. S.C.R. 689, para. 79, available at http://www.refugeecaselaw.org [visited on 28.07.2006].

Win v. Minister for Immigration & Multicultural Affairs, Federal Court of Australia, 2001, 132 available at http://www.refugeecaselaw.org [visited on 28.07.2006].

Yayeshwork Abay and Burhan Amare v. Immigration and Naturalization Service, United States Court of Appeals fort he Sixth Circuit, Judgement of 19 May 2004, No. FED App. 0145P, available at http://www.refugeecaselaw.org [visited on 25.07.2006].

Yi Quan Chen v. Immigration and Naturalization Service, United States Court of Appeals fort he Nineth Circuit, Judgement of 11 September 2001, No. 00-70478, available at http://www.refugeecaselaw.org [visited on 25.07.2006].

United Nations and League of Nations Documents

1933 Convention Relating to International Status of Refugees, 159 LNTS No. 3663.

1989 UNHCR Activities Financed by Voluntary Funds: Report for 1988-89 and Proposed Programmes and Budget for 1990: Part II. Executive Committee of the High Commissioner's Programme, 40th Sess. UN Doc. A/AC.96/724, part II, 1989.

Ad hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Twentieth Meeting Held at Lake Success, New York, on Wednesday, 1 February 1950, (E/AC.32/SR.20).

Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General, 3 January 1950, (E/AC.32/2).

Agenda for Protection Addendum of the General Assembly of the United Nations dated 26 June 2002, UN Doc. A/AC.96/965/Add.1.

Arrangement of 30 June 1928 Concerning the Legal Status of Russian and Armenian

Refugees, 89 LNTS No. 2005.

Background Discussion Paper Prepared by UNHCR informing the Expert Roundtable on Rescue at Sea and Maritime Interception in the Mediterranean; Athens, 12-13 September 2005.

Commission on Population and Development of the U.N. Economic and Social Council, Report of the Secretary-General on the Activities of Intergovernmental and Non-Governmental Organizations in the Area of International Migration, 10 January 1997, UN. Doc. E/CN.9/1997/5, para. 14.

Committee Against Torture, Special Report of Israel, 9 May 1997, UN Doc. CAT/C/SR.297/Add.1

Committee Against Torture, Concluding Observations of the Committee Against Torture: Norway, 26 June 1993, UN Doc. A/48/44.

Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, 19 May 2006, UN Doc. CAT/C/USA/CO/2.

Commitee Against Torture, Conclusions and Recommendations of the Committee Against Torture: France, 3 April 2005, UN Doc. CAT/C/FRA/CO/3.

Committee Against Torture, General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22, 21 November 1997, UN Doc. A/53/44, Annex IX.

Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirty-fifth Meeting, Second Reading of the Draft Convention Relating to the Status of Refugees (A/CONF.2/102 and Add. 1 and 2 thereto)

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA Res. 39/46, 10 December 1984.

Convention Concerning the Status of Refugees coming from Germany, signed in Geneva on 10 February 1938, 192 LNTS No. 4461.

Convention on Facilitation of International Maritime Traffic, 1965, 591 U.N.T.S. 265.

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, UNGA Res. 36/55, 36 U.N. GAOR Supp. (No. 51) at 171, U.N. Doc. A/36/684, 1981.

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, UNGA Res. 47/135, annex, 47 U.N. GAOR Supp. (No. 49) at 210, U.N. Doc. A/47/49,1993.

Convention Relating to the Status of Refugees, adopted 28 July 1951, U.N. Doc. A/CONF.2/1087(1951), 189 U.N.T.S. 150.

ECOSOC Res. 116 (VI) D, (1st and 2nd March 1948).

EXCOM Conclusion No. 2(XXII) 1976 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 3-4.

EXCOM Conclusion No. 6 (XXVIII), 1977 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 2005, Geneva, 8.

EXCOM Conclusion No. 8 ((XXVIII), 1977, 28th Session, Article (b) at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 10-11.

EXCOM Conclusion No. 14 (XXX) 1979 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 20-21.

EXCOM Conclusion No. 17 (XXXI) 1980, para. (c) at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 27.

EXCOM Conclusion No. 19 (XXXI) – 1980 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 30-31.

EXCOM Conclusion No. 22 (XXXII) 1981 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 36-40.

EXCOM Conclusion No. 23 (XXXII) 1981 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 41-42.

EXCOM Conclusion No. 25 (XXXIII) 1982, para. (b) at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 45-46.

EXCOM Conclusion No. 26 (XXXIII) 1982 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 47.

EXCOM Conclusion No. 31 (XXXIV) 1983 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 56.

EXCOM Conclusion No. 34 (XXXV) 1984 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 60.

EXCOM Conclusion No. 38 (XXXVI) 1985, at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 65.

EXCOM Conclusion No. 44, 1986 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 78-79.

EXCOM Conclusion No. 48, 1987 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 88-90.

EXCOM Conclusion No. 58 (XL), 1989, at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 109-111.

EXCOM Conclusion No. 79 (XLVII) – 1996 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101) 169-173.

EXCOM Conclusion No. 80 (XLVII) – 1996 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 174-176.

EXCOM Conclusion No. 81 (XLVIII) – 1997 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 177-181.

EXCOM Conclusion No. 85 (XLIX), 1998, at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 189-195.

EXCOM Conclusion No. 87 (L) 1999 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), p. 197-201.

EXCOM Conclusion No. 93 (L111) -2002 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 216-218.

EXCOM Conclusion No. 94, (L111) – 2002 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 219-223.

EXCOM Conclusion No. 97 (LIV) 2003 at UNHCR, Conclusions Adopted by The

Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 233-237.

EXCOM Conclusion No. 99 (LV), 2004 at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 244-250.

EXCOM, Conclusion No. 100 (LV) 2004. at UNHCR, Conclusions Adopted by The Executive Committee on the International Protection of Refugees: 1975-2004 (Conclusion No. 1-101), 251-258.

Executive Committee of the High Commissioner's Programme, Sub-Committee of the Whole on International Protection, Note on Non-Refoulement (Submitted by the High Commissioner), UN Doc. EC/SCP/2, 1977.

Executive Committee of the High Commissioner's Programme, Note on International Protection, 7 July 2000, UN Doc. A/AC.96/930.

Human Rights Committee, General Comment No. 7, Article 7, 1982, U.N. Doc. HRI\GEN\1\Rev.1 at 7.

Human Rights Committee, General Comment No. 15, 1986, The position of aliens under the Covenant, U.N. Doc. HRI\GEN\1\Rev.1 at 18 .

Human Rights Committee, General Comment No. 20, 1992, UN. Doc. HRI\GEN\1\Rev.1.

Human Rights Committee, General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion (Art. 18), 30 July 1993, UN Doc. CCPR/C/21/Rev.1/Add.4.

Human Rights Committee, General Comment No. 23: The Rights of Minorities, 8 April 1994, UN Doc. CCPR/C/21/Rev.1/Add.5

Human Rights Committee, General Comment No. 24, 2 November 1994, UN Doc. CCPR/C/21/Rev. 1/Add. 6.

Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 21 April 2004, UN Doc. CCPR/C/21/Rev.1/Add.13.

Human Rights Committee, Concluding Observations on the Report of France, 4 August 1997, UN Doc. CCPR/C/79/Add.80.

Human Right Committee, Concluding Observations on the Report of Israel, 5 August 2003, UN Doc. CCPR/CO/78/ISR.

Human Rights Committee, Concluding observations on the Report of Japan, 19 November 1998, UN Doc. CCPR/C/79/Add.102.

Human Rights Committee, Concluding Observations on Switzerland, 8 November 1996, CCPR/C/79/Add.70.

Human Rights Committee, Concluding Observations on the Report of the United States of America, 3 October 1995, UN Doc. CCPR/C/79/Add.50; A/50/40.

Human Rights Committee, Concluding Observations on the Report of the United Kingdom of Great Britain and Northern Ireland, 6 December 2001, UN Docs. CCPR/CO/73/UK; CCPR/CO/73/UKOT.

IMO Res. MSC.167(78), Guidelines on the Treatment of Persons Rescued at Sea, 20 May 2004.

IMO Circulars on periodic reports to IMO on number of stowaway cases, www.imo.org/includes/blastDataOnly.asp/data_id%3D11176/86.pdf [visited on 12.07.2006]

International Convention for the Safety of Life at Sea (SOLAS), 1974, 1184 U.N.T.S. 278.

International Convention on the Elimination of All Forms of Racial Discrimination adopted and opened for signature and ratification by UNGA Res. 2106 (XX), 21 December 1965.

International Convention on Maritime Search and Rescue (SAR) , 1979, 1405 U.N.T.S. 97.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, UNGA Res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), Article 20.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,

ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, Responsibility of States for Internationally Wrongful Acts, 2001, Official Records of the General Assembly, Supplement No. 10 (A/56/10). The text was reproduced as it appears in the annex to UNGA Res. 56/83,12 December 2001.

Maritime Conventions Amended to Facilitate Search-and-Rescue at Sea, UNHCR News Stories, 30 June 2006, available at www.unhcr.org [visited on 07.07.2006]

Memorandum of Understanding between the United Nations High Commissioner for Refugees and the International Organization for Migration, May 1997 at Refugee Survey Quarterly,1998, Vol. 17, No. 3, pp. 70-78.

Model Treaty on Extradition, adopted by the United Nations General Assembly on 14 December 1990, UN Doc. A/RES/45/116.

Model UNHCR Cooperation Agreement, Rev. MNW 24.10.2001, available at http://www.unhcr.org [visited on 18.06.2006].

Official Records of the Economic and Social Council, Third Year, Sixth Session, Supplement No. 1, 1946.

Optional Protocol to the International Covenant on Civil and Political Rights, UNGA Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302.

Press briefing dated 18 April 2006 by the UNHCR spokesperson Jennifer Pagonis at the Palais des Nations in Geneva Concerning the amendment of the Migration Act of 2001 by the Australian Federal Government, available at http://www.unhcr.org/ [visited on 12.07.2006].

Press briefing dated 10 June 2005 by the UNHCR spokesperson Jennifer Pagonis at the Palais des Nations in Geneva Concerning the Forcible Return of the Uzbek Asylum Seekers by the Kyrgyz Government, available at http://www.unhcr.org [visited on 03.07.2006].

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (Vol. I) (2001).

Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime, G.A. res. 55/25, annex III, 55 U.N. GAOR Supp. (No. 49) at 65, U.N. Doc. A/45/49 (Vol. I) (2001).

Provisional Arrangement concerning the Status of Refugees coming from Germany, signed in Geneva on 4 July 1936, 171 LNTS No. 3952.

Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, 1967**,** p. 267.

Report of the UN Conference on Territorial Asylum in April 1977, UN Doc. A/CONF.78/C.1/L.28/Rev.1.

Report of the Committee Against Torture on Turkey, UN Doc. CAT A/48/44/Add.1,1994.

Report of the Committee Against Torture on Egypt, UN Doc. CAT A/51/44, 1996.

Report of the Committee Against Torture on Peru, UN Doc. CAT A/55/44, 2000.

Report of the Committee Against Torture on Mexico, UN Doc. CAT /C/75, 2003.

Report of the Committee Against Torture on Republic of Serbia, UN Doc. CAT A/59/44, 2004.

Report of the Committee Against Torture on Sri Lanka, UN Doc. CAT A/57/44,

2002.

Rome Statute of International Criminal Court adopted in the Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, U.N. Doc. A/CONF.183/9.

San Remo Declaration on Non-Refoulement on the occasion of the 50th Anniversary of the Convention relating to the Status of Refugees of 28 July 1951, the International Institute of Humanitarian Law, in co-operation with the United Nations High Commissioner for Refugees, organised the 25th Round Table, between 6-8 September 2001, in Sanremo, Italy.

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, GA Res. 44/128 of 15 December 1989.

Standing Committee of the Executive Committee of the High Commissioner's Programme, 18th Meeting, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, 9 June 2000, UN Doc. EC/50/SC/CRP.17.

Standing Committee of the Executive Commitee of the High Commissioner's Programme, Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime, 9 June 2006, UN Doc. EC/50/SC/CRP.18.

The Statute of International Criminal Tribunal for Former Yugoslavia established by the Resolution 827 of the United Nations Security Council on 25 May 1993.

The Statute of the International Criminal Tribunal for Rwanda established by the Resolution 955 of the United Nations Security Council in November 1994.

UN Covenant on Civil and Political Rights, UNGA Res. 2200A (XXI) of 16 December 1966.

UN Doc. E/1112:E/1112/Add.1, A Study of Statelessness, August 1949.

UNGA Res. 429 (V), on Draft Convention Relating to the Status of Refugees.

United Nations Convention on the Law of the Sea (UNCLOS), Montego Bay, Jamaica, 10 December 1982,1833 U.N.T.S. 3.

United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 9 December 1975 UNGA Res. 3452 (XXX).

UN Declaration on Territorial Asylum, UNGA Res. 2312 (XXII), 14 December 1967.

UNESCO, Fact Sheet: Death at the Border – Statistics on Migrant Fatalities

Attributed to Unatuhorized International Border Crossings, 2005, available at http://portal.unesco.org/ [visited on 23.09.2006].

UNGA Res. 8(I), Question of Refugees (12 February 1946).

UNGA Res. 62 (I), Constitution of the International Refugee Organization, and Agreement on Interim Measures to be Taken in Respect of Refugees and Displaced Persosns (14 December 1946).

UNGA Res. 52/103, Office of the United Nations High Commissioner for Refugees, (9 February 1998).

UNGA Res. 53/125, Office of the United Nations High Commissioner for Refugees, (12 February 1999).

UNHCR, Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Mininmum 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, January, 2005.

UNHCR, Annotated Comments on Council Directive 2001/55/EC of 20 July 2001, available at http://www.unhcr.org/ [visited on 05.09.2006].

UNHCR, Background Note on the Protection of Asylum Seekers and Refugees Rescued at Sea, Expert roundtable Rescue-at-Sea: Specific Aspects Relating to the Protection of Asylum-Seekers and Refugees, held in Lisbon, Portugal on 25-26 March 2002.

UNHCR, Background Discussion Paper Prepared by UNHCR for informing the Expert Roundtable on Rescue at Sea and Maritime Interception in the Mediterranean; Athens, 12-13 September 2005.

UNHCR, Background Paper No. 2, The Application of the "Safe Third Country" Notion and its Impact on the Management of Flows and on the Protection of Refugees, May 2001, available at http://www.unhcr.bg/global_consult/background_paper2_en.htm [visited on 11.09.2006].

UNHCR, Comments Relating to Serious Criminals and Statutory Review Nationality Immigration and Asylum Bill 2002 of the United Kingdom, para. 2, available at http://www.unhcr.org.uk/legal/positions/UNHCR%20Comments/comments_2002_clause20.htm , [visited on 17.07.2006]

UNHCR, Discussion Paper, The Dublin II Regulation, April 2006, Belgium.

UNHCR, Executive Committee Membership, http://www.unhcr.org/cgi-bin/texis/vtx/excom?id=40111aab4 [visited on 24.07.2006].

UNHCR, Global Appeal 2004, 2004, Geneva.

UNHCR, Guidelines on International Protection: Religion-Based Refugee Claims under Article 1 A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees, 28 April 2004, UN Doc. HCR/GIP/04/06.

UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, 4 September 2003, UN Doc. HCR/GIP/03/05.

UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, 1979; (re-edited in 1992).

UNHCR News Stories, UNHCR Calls on Leaders at EuroMed Summit to End Humanitarian Crisis in the Mediterranean, 25 November 2005, available at http://www.unhcr.org/ [visited on 11.07.2006]

UNHCR News Stories, "As Thousands Risk Their Lives at Sea to Reach Europe, UNHCR Calls for a Broad Joint Response to Deal with the Challenge", 24 May 2006, available at http://www.unhcr.org/ [visited on 09.09.2006].

UNHCR News Stories, Cruise Ship Which Saved 22 People in Aegean Sea Praised by UNHCR, 12.06.2006, available at http://www.unhcr.org/ [visited on 26.09.2006]

UNHCR, Observations on the Communication from the Commission to the Council and the European Parliament on Strengthened Practical Cooperation - New Structures New Approaches: Improving the Quality of Decision Making in the Common European Asylum System [COM (2006) 67 final, 17 Febrary 2006] available at http://www.unhcr.org/ [visited on 17.08.2006]

UNHCR, Position Paper Prepared for the 18th Meeting of Standing Committee of the Executive Committee titled "Internally Displaced Persons: The Role of the United Nations High Commissioner for Refugees", 20 June 2000, UN Doc. EC/50/SC/INF.2.

UNHCR Position Relating to the Resolution on Safe Countries of Origin, 30 November – 1 December 1992, available at http://www.unhcr.org/ [visited on 05.09.2005].

UNHCR, Procedural Standards for Refugee Status Determination under the UNHCR's Mandate, 1 September 2005, available at http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.htm?tbl=PUBL&id=4316f0c02 [visited on 23.09.2006].

UNHCR: Protection Policy and Legal Advise Section, Department of International Protection, Note on the Cancellation of Refugee Status, 22 November 2004, in International Journal of Refugee Law,Vol. 17, No. 3, 2005, pp. 630-642.

UNHCR, Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 10 February 2005.

UNHCR Press Releases, *"Lubbers Proposes "Convention Plus" Approach"*, 13 September 2002, http://www.unhcr.org [visited on 20.07.2006]

UNHCR, Refugees by Numbers: 2005 Edition, http://www.unhcr.org/cgi-bin/texis/vtx/basics/opendoc.htm?tbl=BASICS&id=3b028097c [visited on 23.07.2006].

UNHCR, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b73b0d63 [visited on 22.07.2006].

UNHCR, The complete list of the Executive Committe Member States are available in the following link: http://www.unhcr.org/cgi-bin/texis/vtx/excom?id=40111aab4 [visited on 23.07.2006].

UNHCR, The Haitian Interdiction Case 1993: Brief Amicus Curiae, International Journal of Refugee Law, Vol. 6. No. 1, 1994, p. 92.

UNHCR Doc.,The International Protection of Refugees: Complementary Forms of Protection: April 2001.

UNHCR, The State of the World's Refugees 2006, Chapter 2 Safeguarding asylum: Box 2.2 Outsourcing refugee protection: extraterritorial processing and the future of the refugee regime.

UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law, Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, available at http://www.unhcr.org [visited on 20.08.2006]

UNHCR, The Refugee Situation in Latin America: Protection and Solutions Based on the Pragmatic Approach of the Cartagena Declaration on Refugees of 1984, document prepared in order to facilitate the discussion between the participants of the regional preparatory meetings for the final commemorative event of the 20th anniversary of the Cartagena Declaration on Refugees of 1984, to be celebrated in Mexico City, on November 15th and 16th of 2004. (International Journal of Refugee Law 2006 Vol. 18(1), p. 252-270.)

UNHCR, Update on UNHCR's Operations in Asia and the Pacific, Executive Committee 2005,http://www.unhcr.org/cgi-bin/texis/vtx/excom/opendoc.pdf?tbl=EXCOM&id=432fcbeb2 [visited on 23.07.2006].

Vienna Convention on the Law of Treaties, 23 May 1969, 1155, U.N.T.S. 331.

Council of Europe Documents

Committee of Ministers of Council of Europe, Recommendation Rec(2005)6 on Exclusion from Refugee Status in the Context of Article 1 F of the Convention Relating to the Status of Refugees of 28 July 1951, 23 March 2005.

Committee of Ministers of the Council of Europe, Resolution ResDH (2002) 99, 8 October 2002, Human Rights Information Bulletin, No. 57, 2002, pp. 12-13.

Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 005. The text of the Convention has been amended according to the provisions of Protocol No. 3 (E.T.S. 45), which entered into force on 21 September 1970, of Protocol No. 5 (E.T.S. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (E.T.S. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (E.T.S. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (E.T.S. 155), as from the date of its entry into force on 1 November 1998.

European Agreement on the Abolition of Visas for Refugees, 20 April 1959, E.T.S. 031.

European Agreement on Transfer of Responsibility for Refugees, 16 October 1980, E.T.S. 107.

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Swedish Government on the Visit to Sweden Carried out from 15 to 25 February 1998, 3 July 1998, CPT/Inf(99)4[EN] Part 1.

European Convention on Extradition, 1957, ETS No. 24.

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, E.T.S. 126.

European Convention on Establishment, 1955, ETS No. 19.

European Convention on Social and Medical Assistance, 1953, ETS No. 014.

European Convention on the Suppression of Terrorism, 1977, ETS. No. 090.

Parliamentary Assembly of the Council of Europe, Recommendation 434 (1965) on the Granting of the Right of Asylum to European Refugees, 1 October 1965.

Parliamentary Assembly of the Council of Europe, Recommendation 1334 (1997) on Refugees, Asylum-Seekers and Displaced Persons in the Commonwealth of Independent States (CIS), 24 June 1997.

Parliamentary Assembly of the Council of Europe, Recommendation 1475(2000) on Arrival of Asylum Seekers at European Airports, 26 September 2000.

Parliamentary Assembly of the Council of Europe, Recommendation 293(1961) on the Right to Asylum, 26 September 1961.

Parliamentary Assembly of the Council of Europe, Recommendation 1088(1988) on the Right to Asylum, 7 October 1988.

Parliamentary Assembly of the Council of Europe, Recommendation 1236(1994) on the Right to Asylum, 12 April 1994.

Parliamentary Assembly of the Council of Europe, Recommendation 1278(1995) on refugees and asylum-seekers in central and eastern Europe 25 September 1995.

Parliamentary Assembly of the Council of Europe, Recommendation 842 (1978) on the 21st Report on the Activities of the Office of the United Nations High Commissioner for Refugees, 30 September 1978.

Parliamentary Assembly of the Council of Europe, Recommendation 1088 (1988) on the Right to Territorial Asylum, 7 October 1988.

Protocol Amending the European Convention on the Suppression of Terrorism, 2003, ETS No. 190.

Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, 16.09.1963, Strasbourg, E.T.S. No. 46.

Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, E.T.S. No. 114.

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 22.11.1984, E.T.S. No. 117.

Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, ETS No. 155.

Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in All Circumstances, E.T.S. No. 187.

European Union Documents

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 Controls at the Common Frontiers (the Schengen Agreement), June 14, 1985, 30 I.L.M 73.

Agreement between the Government of Hong Kong Special Administrative Region of the People's Republic of China and the European Community on the Readmission of Persons Residing without Authorisation, 27 November 2002, OJ C 31 E/163.

Agreement Between the Democratic Socialist Republic of Sri Lanka and the European Community on the Readmission of Persons Residing without Authorisation, 21 March 2003, SEC (2003) 255.

Agreement Between the European Community and the Macao Special Administrative Region of the People's Republic of China on the Readmission of Persons Residing without Authorisation 30 April 2004 OJ 2004 L143/97.

Agreement between the Republic of Albania and the European Community on the Readmission of Persons Residing without Authorisation COM (2004) 92, 12 February 2004.

Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 18 June 2002 [2002], OJ C291 E/143.

Charter of Fundamental Rights of the European Union of, O.J. C 364, 7.12.20001.

Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 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, OJ L 222 , 05.09.2003.

Communication from the Commission COM(2003) 104 final of 11 March 2003 on Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours.

Communication from the Commission COM(2004) 373 final on European Neigbourhood Strategy Paper 12.05.2004.

Communication from the Commission COM (2001)252 final of 8 May 2001 to the Council and the European Parliament, The European Union's Role in Promoting Human Rights and Democratisation in Third Countries.

Communication from the Commission COM(2002) 703 final of 3.12.2002 on Integrating Migration Issues in the European Union's Relations with Third

Countries.

Communication from the Commission COM (2006) 333 final of 28 June 2006 to the Council and the Parliament: Report on the Implementation of the Hague Programme for 2005.

Communication from the Commission COM (2006)26 final to the European Parliament and the Council, Thematic Programme for the Cooperation with Third Countries in the Areas of Migration and Asylum, Brussels 21 January 2006.

Communication from the Commission COM (2004) 410 final of 4 June 2004 to the Council and to the European Parliament on the Managed Entry in the EU of Persons in Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin: Improving Access to Durable Solutions.

Communication from the Commission COM(2004) 4002 final to the Council and the European Parliament titled: Assessment of the Tampere Programme and the Future Orientations 2 June 2004.

Communication from the Commission, to the European Parliament, the Council, the European Economic and Social Committee, the Committee of Regions and the Court of Justice of the European Communities of 28 June 2006 on Adaptation of the Provisions of Title IV of the Treaty Establishing the European Community Relating to the Jurisdiction of the Court of Justice With a View to Ensuring More Effective Judicial Protection, COM(2006) 346 final.

Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, 15 June 1990,1997, OJ C254/1.

Convention Applying the Schengen Agreement of 14 June 1985 Between the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, June 19, 1990, 30 I.L.M. 84.

Convention from 19 June 1990 Applying the Schengen Agreement of 14 June 1985.

Cotonou Agreement between the EU and African, Caribbean and Pacific States [2000] OJ L 317.

Council Conclusions of 30 November 1992 Concerning Countries in Which There is Generally No Serious Risk of Persecutions, Doc. No. WG I 1281.

Council Conclusions of 4 March 1996 Concerning Readmission Clauses to be Inserted in Future Mixed Agreements docs No. 4272/96 ASIM 6 and 5457/96 ASIM 37.

Council Decision of 4 March 1996 on an Alert and Emergency Procedure for Burden Sharing with Regard to the Admission and Residence of Displaced Persons on a

Temporary Basis, OJ L 63/10 of 13 March 1996.

Council Decision 2000/596/EC on the European Refugee Fund Established for the Period 2000 to 2004 OJ L 106 23.04.2002.

Council Decision 2001/235/EC of 8 March 2001 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey, OJ L 85/13, 24.03.2001.

Council Decision 2003/398/EC of 19 May 2003 on the Principles, Prorities, Intermediate Objectives and Conditions in the Acession Partnership with the Republic of Turkey, OJ L145, 12.06.2003.

Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Unification, OJ L 251/12.

Council Decision 2004/904/EC of 2 December 2004 Establishing the European Refugee Fund for the Period 2005 to 2010, OJ L 381, 28.12.2004.

Council Decision 2004/927/EC of 22 December 2004 on Providing for Certain Areas Covered by Title IV of Part Three of Three of the Treaty Establishing the European Community to be Governed by the Procedure Laid Down in Article 251 of that Treaty, OJ L 396/45.

Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof, OJ L 212/12, 07.08.2001.

Council Directive 2004/83/EC of 29 April 2004 on Minimum Standardsfor the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Prtection and the Content of the Protection Granted, OJ L 304/12, 30.09.2004.

Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, OJ L 326/13 of 13 December 2005.

Council Doc. 11486/2/99 of 24 November 1999 on the Inventory of Readmission Agreements.

Council Doc. 7999/02 of 15 April 2002 on the Criteria for the Identification of Third Countries With Which New Readmission Agreements Need to be Negotiated.

Council Programme 13791/03 of 21 October 2003 on Measures to Combat Illegal Migration Across the Maritime Borders of the European Union, , available at http://www.statewatch.org/news/2003/nov/137911.en03.pdf#search=%2213791%2F03%20%20migration%22 [visited on 09.09.2006].

Council Recommendation Concerning a specimen Bilateral Admission Agreement between a Member State of the EU and a Third Country of 1 December 1994, 1996, OJ C 274.

Council Recommendation of 24 July 1995 on the Guiding Principles to be Followed in Drawing up Protocols on the Implementation of Readmission Agreements ,1996, OJ C274/25.

Council Regulation 2725/2000/EC of 11 December 2000 concerning the establishment of EURODAC for the comparison of fingerprints for the effective application of the Dublin Convention on the State responsible for examining applications for asylum lodged in one of the European Union Member States, OJ L 316 of 15 December 2000.

Council Regulation 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, OJ L 50/1 of 25.2.2003.

Council Regulation 453/2003 of 6 March 2003 OJ L 069/10 of 13.03.2003.

Council Regulation 539/2001 of 15 March 2001 Listing the Third Countries Whose Nationals Must Be in Possession of Visas When Crossing the External Borders and Those Whose Nationals are Exempt From That Requirement, OJ L 81/1 of 21.3.2001.

Council Regulation No 851/2005 of 2 June 2005, OJ L 141/3 of 04.06.2005.

Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349/1 of 25 November 2004.

Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries, Doc No. WG I 1283.

Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum, Doc No. WG I 1282 REV 1.

Council Resolution of 25 September 1995 on Burden Sharing with Regard to the Admission and Residence of Displaced Persons on a Temporary Basis, OJ C 262/1 of 7 October 1995.

Draft Council Conclusions 9413/1/05 of 27 May 2005 on Initiating Dialogue on Cooperation with Libya on Migration Issues.

Draft Report 2000/0238(CNS) by the European Parliament of 11 May 2005 on the Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status.

EU/Tunisia Action Plan, available at http://ec.europa.eu/world/enp/documents_en.htm [visited on 08.09.2006].

European Commission, European Neighbourhood Policy: A Year of Progress (press release, reference IP/05/1467), 24.11.2005, Brussels. Available at http://www.europa.eu/rapid/ [visited on 08.09.2006].

European Commission, 2001 Regular Report on Turkey's Progress Towards Accession, 13.11.2001, SEC(2001)1756.

European Commission, COM(2002) 700 final, Regular Report on Turkey's Progress Towards Accesion.

European Commission, COM(2003) 676 final, 2003 Regular Report on Turkey's Towards Accesion.

European Commission, Progress Report COM(2004) 656 final on Turkey 2004 Progress Report, 6.10.2004, SEC(2004).

European Commission, COM(2005)561 final, Turkey 2005 Progress Report, 09.11.2005.

Explanatory Memorandum from the Commission COM(2001) 510 of 12 September 2001 on the Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection.

Joint Position of 1996, Defined by the Council On the Basis of Article K.3 of the Treaty on European Union on the Harmonized Application of the Definition of the Term "Refugee" in Convention Relating to the Status of Refugees, Article 1, adopted 28 July 1951, U.N. Doc. A/CONF.2/1087(1951), 189 U.N.T.S. 150 (96/196/JHA).

Laeken European Council, Presidency Conclusions, 14-15 December 2001, para. 26, available at http://europa.eu/european_council/conclusions/index_en.htm [visited on 09.09.2006].

Partner countries of the European Neighbourhood Policy http://ec.europa.eu/world/enp/documents_en.htm [visited on 08.09.2006].

Political Declaration by the Governments of the Member States on the free movement of persons. (Single European Act, 28.02.1986, OJ L 169 of 29.06.1987.)

Presidency Conclusions of the Nice European Council meeting 7, 8 and 9 December 2000 http://europa.eu/european_council/conclusions/index_en.htm [visited on 10 September 2006]

Presidency Conclusions 13462/02 of Seville European Council of 21-22 June 2002, http://europa.eu/european_council/conclusions/index_en.htm [visited on 10 September 2006]

Proposal for a Council Decision COM/2006/0188 final on the Conclusion of the Agreement between the European Community and the Russian Federation on the Facilitation of Issuance of Short-stay Visas.

Proposal for a Council Directive COM(2005) 391 final of 1 September 2005 of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals.

Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status 24 October 2000 [2001], OJ C62 E/231.

Report from the Commission on the Technical Mission to Libya on Illegal Immigration, 27 November – 6 December 2004, available at http://www.europa.eu.int [visited on 18.09.2006].

Tampere European Council, Presidency Conclusions, 15 – 16 October 1999, http://europa.eu.int/council/off/conclu/oct99/oct99_en.htm [visited on 04.09.2006].

The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, published on 03.03.2005, OJ C 053.

The Treaty Establishing a Constitution for Europe, OJ C 310, Vol. 47, 16.12.2004.

The Treaty of Nice 2001/C 80/01 of 10 March 2001 amending the Treaty on European Union, the Treaties Establishing the European Communities and certain related acts, OJ LC 325.

Working Paper from the Commission titled 'Revisiting the Dublin Convention: Developing Community Legislation for Determining Which Member State is Responsible for Considering an Application for Asylum Submitted in One of the Member States', Document SEC (2000)522 final, 21 March 2000.

Documents From the Republic of Turkey

Amendment of the 1994 By-Law by the Council of Ministers Decree No. 2006/9938 of 16.01.2006, R.G. No. 26062, 27.01.2006.

By-Law No. 94/6169 of 30 November 1994 on the Procedures and Principles Related to Population Movements and Aliens Arriving in Turkey Either as Individuals or in Groups Wishing to Seek Asylum Either From Turkey or Requesting Residence Permits in Order to Seek Asylum from Another Country, R.G. No. 22127, 30.11.1994.

By-Law No. 7473 of 7 November 1995 on Combatant Members of Foreign Armies Seeking Asylum in Turkey, R.G. No. 22456, 7.11.1995.

Civil Aviation Directive of the General Directorate of Security on the Treatment of

Inadmissible Passengers at the Border Gates in Airport Zones, 20.05.2003, available at http://www.egm.gov.tr [visited on 27.09.2006].

Council of Ministers Decree No. 6/10266 of 1 July 1968 on Ratification of the Protocol Relating to the Status of Refugees, R.G. No. 12968, 5 August 1968.

Council of Ministers Decree No. 98/12243 Concerning the Amendment of the By-Law on the Procedures and Principles Related to Population Movements and Aliens Arriving in Turkey Either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permits in order to Seek Asylum from Another Country, R.G. No. 23582, 13.01.1999.

Council of Ministers Decree No. 2003/5427 of 28.03.2003 on the Ratification of the Anti-Personnel Mines Convention, R.G. No. 25079, 14.04.2003.

Council of Ministers Decree No. 87/11439 of 22 January 1987, R.G. No. 19438, 21.04.1987 (Declaration the competence of the Europea Commission of Human Rights to receive individual complaints).

Council of Ministers Decree No. 89/14861 of 12 December 1989, R.G. 20384, 26.12.1989 (Declaration recognizing the competence of the ECtHR).

Council of Ministers Decree No. 88/13023 of 17 July 1988, R.G. No. 19895, 10.08.1988. (Ratification of CAT).

Council of Ministers Decree No. 2003/5451 of 7 July 2003, R.G. No. 25175, 21.07.2003. (Ratification of ICCPR).

Council of Ministers Decree No. 2006/10692 of 29.06.2006, R.G. No. 26250, 05.08.2006. (Ratification of the Optional Protocol to the ICCPR).

Council of Ministers Decree 2005/9535 of 17 October 2005, R.G. No. 25996, 17.11.2005. (Ratification of the Readmission Agreement Between Turkey and Ukraine).

Council of Ministers Decree Concerning the Ratification of the SAR Convention R.G. No. 19057, 24.03.1986.

Council of Ministers Decree Concerning the Ratification of the SOLAS Convention R.G. No. 16998, 25.05.1980.

Council of Ministers Decree No. 2005/9684 of 17 November 2005 on the Ratification of Protocol No. 13 of the ECHR Abolishing Death Penalty in All Circumstances, R.G. 26022, 13.12.2005.

Council of Ministers Decree No. 94/5749 of 9 June 1994 on the Ratification of Protocol No. 4 of the ECHR, R.G. 21990, 14.07.1994.

Declaration recognizing the competence of the Committee Against Torture according

to Article 21 CAT is available at http://www.ohchr.org/english/countries/ratification/9.htm#reservations [visited on 29.09.2006]

General Directorate of Security of the Ministry of Interior of Turkey, Directive No. 57 of 22 June 2006, Document No. B.05.1.EGM.0.13.03.02./16147.

General Secretariat of the National Security Council, Press Release on the meeting of 2 April 1991, available at http://mgk.gov.tr/Turkce/basinbildiri1991/02nisan1991.htm [visited on 24 September 2006].

Justice Commission of the Turkish Grand National Assembly, Report on the Draft Criminal Code, 14 July 2004, p. 164 available at http://www.tbmm.gov.tr [visited on 28.09.2006].

Law No. 359 Regarding the Ratification of the Convention Relating to the Status of Refugees of 28 July 1951, adopted on 29 August 1961, R.G. No. 110898, 05.09.1961.

Law No. 765 of 1 March 1926, R.G. No. 320, 13.03.1926.

Law No. 2577 on Administrative Justice Procedure, R.G. No. 17580, 06.01.1982.

Law No. 2709 Constitution of the Republic of Turkey of 7 November 1982, R.G. 17863 bis, 09.11.1982.

Law No. 2828 on Social Services and Child Care Institution of 24 May 1983, R.G. No. 18059, 27.06.1983.

Law No. 4104 of 11 August 1941 on Combatant Members of Foreign Armies Seeking Asylum in Turkey, R.G. No. 4887, 15.08.1941.

Law No. 5170 on the Amendment of Certain Articles of the Constitution of the Republic of Turkey of 7 May 2004, Article 7, R.G. No. 25469, 22.05.2004.

Law No. 5328 of 31 March 2005, R.G. No. 25772 bis.

Law No. 5543 of 19.09.2006, R.G. 26301, 26.09.2006.

Law No 5683 of 15 July 1950 on Residence and Travel of Aliens in Turkey, R.G. No. 7564, 24 July 1950.

Law No. 6366 of 10 March 1954, R.G. No. 8662, 19.03.1954.

Law No. 4901 of 17 June 2003, R.G. No. 25148, 24.06.2003. (Law Approving the Ratification of the Readmission Agreement Between Turkey and Syria).

Law No. 5097 of 12 February 2004, R.G. No 25376, 17.02.2004.(Law Approving the Ratification of the Readmission Agreement Between Turkey and Kirghizistan).

Law No. 5249 of 21 October 2004, R.G. No. 25626, 27.11.2004.(Law Approving the Ratification of the Readmission Agreement Between Turkey and Romania).

Law No. 7376 of 18 November 1959, R.G. No. 10365, 26.11.1959.

Letter No. B.05.1.EGM.0.13.03.02. 71810-12/Gnl.6-5 of Emin Arslan, Undersecretary of the General Directorate of Security of the Ministry of Interior.

Ministry of Foreign Affairs of Turkey, Circular No. BMGY III 2542-3799 of 13 August 1996.

Passport Law No. 5682 of 15 july 1950, R.G. 24 July 1950, R.G. No. 7564, 24 July 1950.

Protocol Between Turkish and Governments on Readmission of Illegal Migrants, Council of Ministers Decree 2002/3914 of 12 March 2002, R.G. No. 24735, 24.04.2002.

Readmission Bureau of the Population Movements Branch under the Head of the Aliens, Border and Asylum Unit, Information Note: Greece – Turkey Readmission Protocol, 02.09.2005.

Settlemet Law, Law No. 2510 of 14 June 1934, R.G. No. 2733, 21.06.1934.

The Explanatory Memorandum of the Draft Amendment for Settlement Law Submitted to the Presidency of the Turkish Grand National Assembly on 07.01.2003 Attached the Document No. B.02.0.KKG/196-279/117.

'Turkey's Action Plan on Asylum and Migrantion' prepared by Task Force for the Asylum-Migration Action Plan bringing together officials from relevant Ministries, Institutions and Organizations entered into force on 25.03.2005 upon the approval of the Prime Minister Tayyip Erdoğan of the document no. B.05.1.EGM.0.13.03.02.

Turkey's National Programme for the Adoption of the EU Acquis, R.G. No. 25178 bis., 24.07.2003.

Turkish Citizenship Law No. 403 of 11 February 1964, R.G. 11638, 22.02.1964.

Turkish Criminal Law No. 5237 of 26 September 2004, R.G. No. 25611, 12.10.2004.

Undersecretary for Maritime Affairs, Communication No: 2002/4 on National Search and Rescue Plan, R.G. No. 24812, 11.07.2002.

Miscellaneous Documents

African (Banjul) Charter on Human and Peoples' Rights, adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5.

Agreement Relating to Refugee Seamen, 1957, 506, U.N.T.S. 125, and Amending

Protocol of 1973, 965, U.N.T.S. 445.

American Convention on Human Rights, Signed at San José, Costa Rica, 22 November 1969 OAS Treaty Series No. 36.

Cartagena Declaration on Refugees, 22 November 1984, Annual Report of the Inter-American Commission on Human Rights, (1984-85), (OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1).

Final Report and Draft Guidelines on Temporary Protection of the Delhi Conference in 2002, adopted by the Committee on Refugee Procedures of the International Law Association, available at http://www.ila-hq.org/ [visited on 18.07.2006].

Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287.

Greece signed the Ottowa Convention on 3 December 1997 and ratified it on 25 September 2003. (Foreign Affairs and International Trade Canada, Country Profiles, available at http://www.mines.gc.ca/country_profiles-en.asp#greece [visited on 26.09.2006])

Information about Right of Abode in the United Kingdom. http://www.nationalarchives.gov.uk/ERO/records/ho415/1/ind/roa.htm [visited on 02.08.2006].

Inter-American Convention on Extradition, Caracas, 25 February 1981, OAS Treaty Series No. 60.

International Catholic Migration Commission (ICMC)'s web site: http://www.icmc.net/docs/en [visited on 15.06.2006].

International Civil Aviation Organization, Doc. No. FAL/12-IP/27, Updated Country Report of Turkey on Illegal Migration, 19 March 2004.

'McCarran-Walter Act' of the United States of America, Public Law No. 82-414; 8 U.S.C. 1158.

OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (Adis Ababa, 10 September 1969, 1001 U.N.T.S. 45)

Principles concerning Treatment of Refugees, adopted by the Asian-African Legal Consultative Committee in Bangkok, Report of the Eighth Session of the Asian-African Legal Consultative Committee, Bangkok, 8–17 August 1966.

The Constitution of Belgium, as coordinated on February 14, 1994, as amended on April 4, 2005, translated by Dirk Vanheule of the Faculty of Law, University of Antwerp,

http://home.tiscali.be/dirkvanheule/compcons/ConstitutionBelgium/ConstitutionBelgium.htm [visited on 27.06.2006].

The Constitution of Bosnia and Herzegovina, of December 1, 1995, a translation by Sienho Lee, published by the European Journal of International Law http://www.ejil.org/journal/Vol7/No2/art3.html [visited on 27.06.2006].

The Constitution of Denmark, of 5 June 1953, http://www.oefre.unibe.ch/law/icl/da00000_.html [visited on 27.06.2006].

The Constitution of Estonia, of 18 June 1992, from the International Constitutional Law Project at the University of Bern, http://www.oefre.unibe.ch/law/icl/en00000_.html [visited on 27.06.2006].

The Constitution of Finland of 11 June 1999, based on the text of the official government translation, http://www.oefre.unibe.ch/law/icl/fi00000_.html [visited on 27.06.2006].

The Constitution of Greece, http://www.hri.org/MFA/syntagma/ [visited on 27.06.2006].

The Constitution of Iceland, As amended in 1995 and 1999, http://government.is/constitution/ [visited on 27.06.2006].

The Constitution of Ireland, of 1 July 1937, http://www.taoiseach.gov.ie/upload/publications/297.htm [visited on 27.06.2006].

The Constitution of the Republic of Latvia, of 1922, as amended in 1998, from the Constitutional Court of the Republic of Latvia, http://www.satv.tiesa.gov.lv/Eng/satversme.htm [visited on 27.06.2006].

The Constitution of Liechtenstein of 1921, http://www.geocities.com/dagtho/lieconst19211005.html [visited on 27.06.2006].

The Constitution of Lithuania, of 25 October 1992, as amended 13 June 2004, translated and published by the Constitutional Court of the Republic of Lithuania, http://www.lrkt.lt/Documents2_e.html [visited on 27.06.2006].

The Constitution of Luxemburg dated 17 October 1868, http://www.oefre.unibe.ch/law/icl/lu00000_.html [visited on 27.06.2006].

The Constitution of Malta, dated 1964, based on the official English language version of the constitutional text, first published by the Department of Information in 1992. Includes amendments adopted in 1994 (Section 101A) and in 1996, http://www.oefre.unibe.ch/law/icl/mt00000_.html [visited on 27.06.2006].

The Constitution of the Kingdom of the Netherlands, dated 2002, published by the Ministry of Interior, and Kingdom Relations, Constitutional Affairs and Legislation Department , in collaboration with the Translation Department of the Ministry of

Foreign Affairs, http://www.minbzk.nl/contents/pages/6156/grondwet_UK_6-02.pdf [visited on 27.06.2006].

The Swedish Constitution, http://www.riksdagen.se/templates/R_Page____6357.aspx [visited on 27.06.2006].

The Constitution of the Turkish Republic of Nothern Cyprus, http://www.cm.gov.nc.tr/servet/cons/consin.htm [visited on 27.06.2006].

The Constitution of Bulgaria, dated 12 July 1991, http://www.oefre.unibe.ch/law/icl/bu00000_.html [visited on 27.06.2006].

The Constitution of the Republic of Croatia, Published by the Constitutional Court of the Republic of Croatia, based on the text provided to the public by the Constitutional Court, http://www.oefre.unibe.ch/law/icl/hr00000_.html [visited on 27.06.2006].

The Constitution of the Federal Republic of Germany, dated 23 May 1949, http://www.jurisprudentia.de/jurisprudentia.html [visited on 27.06.2006].

The Constitution of the Republic of Hungary, dated 20 August 1949, http://www.oefre.unibe.ch/law/icl/hu00000_.html [visited on 27.06.2006].

The Constitution of Italy, based on a translation provided by the Italian Embassy in London, dated 22 December 1947, http://www.oefre.unibe.ch/law/icl/it00000_.html [visited on 27.06.2006].

The Constitution of the Republic of Macedonia, http://faq.macedonia.org/quicklinks/quicklinks2.html [visited on 27.06.2006].

The Constitution of the Republic of Poland, dated 2 April 1997, http://www.oefre.unibe.ch/law/icl/pl00000_.html [visited on 27.06.2006].

The Constitution of the Portuguese Republic, http://www.parlamento.pt/ingles/cons_leg/crp_ing/ [visited on 27.06.2006].

The Constitution of the Republic of Romania, http://www.oefre.unibe.ch/law/icl/ro00000_.html [visited on 27.06.2006].

The Constitution of the Slovak Republic, dated 1 September 1992, http://www.oefre.unibe.ch/law/icl/lo00000_.html [visited on 27.06.2006].

The Constitution of the Republic of Slovenia, http://confinder.richmond.edu/country.php [visited on 27.06.2006].

The Inter-American Commission on Human Rights, Report on the Situation of Human Rights in the Dominican Republic (Chapter IV, para. 135, OAE/SER.L/V/III.104 Doc. 49 Rev. 1, 7 October 1999).

ANNEX - I

T.C.
İÇİŞLERİ BAKANLIĞI
Emniyet Genel Müdürlüğü

Sayı :B.05.1.EGM.0.13.03.02.
71810-12/Gnl.6-5 92888
Konu :Hukuk Fakültesi Öğretim
Görevlisinin Bilgi Talebi.

İSTANBUL BİLGİ ÜNİVERSİTESİNE
(Hukuk Fakültesi Öğretim Görevlisi Lami Bertan Tokuzlu)

İlgi :İstanbul Bilgi Üniversitesi Hukuk Fakültesi Öğretim Görevlisi Lami Bertan Tokuzlu'nun 09.05.2005 tarih ve bila sayılı faks yazısı.

İstanbul Bilgi Üniversitesi'nden alınan ilgi'de kayıtlı yazı ile;

Michigan Üniversitesi nezdinde yürütülmekte olan "mülteci hukukuna ilişkin yargı kararları veritabanı projesi"nin Türkiye koordinatörü sıfatıyla Türk mahkemelerinin vermiş olduğu ilgili kararları araştırmakta olduğu belirtilerek, bu yöndeki yargı kararlarından örnek suret gönderilmesi talep edilmektedir.

Söz konusu iltica-sığınma talebinde bulunanlardan yargı yoluna başvuran yabancılarla ilgili yargı kararlarının birer sureti EK'te gönderilmiştir.

Ayrıca, Avrupa İnsan Hakları Mahkemesi'ne (AİHM) yapılan başvurular hakkında Yargıtay Başkanlığı'nın www.yargitay. gow.tr adresinden ulaşılma imkanı bulunmaktadır.

Bilgilerinizi rica ederim.

Emin ARSLAN
Emniyet Genel Müdürü a.
Emniyet Genel Müdür Yardımcısı
1.Sınıf Emniyet Müdürü

EKİ : 1 Adet Zarf (Karar suretleri)

İlkadım Cad.No:89 Dikmen 06100 ANKARA
Telefon: (0312) 412 32 81-412 32 82
http//egm1ydbmmb01

Ayrıntılı Bilgi İçin İrtibat:İ.SEMİZOĞLU
Faks: (0312) 466 90 11
Elektronik Ağ:yhidb@egm.gov.tr

T.C.
ANKARA
4.İDARE MAHKEMESİ

ESAS NO
KARAR NO

DAVACI

VEKİLİ

İSTANBUL

DAVALI

DAVANIN ÖZETİ : Özbekistan vatandaşı olan davacının, Türkiye'ye iltica talebinin reddine ilişkin işlemin; Fen doktoru olan davacının bilimsel çalışmalarına destek aramak yurt dışından bilim çevreleriyle tanışmak için Türkiye'ye geldiği, ülkemize geldikten sonra kendisinin fotoğraflarının çekilmesi ve takip edilmesi nedeniyle iltica talebinde bulunduğu, bu talebi ile ilgili olarak Dışişleri Bakanlığı'ndan herhangi bir görüş sorulmadığı, eksik incelemeye dayanılarak verilen ret kararının açıkca hukuka aykırı olduğu iddialarıyla iptali istenilmektedir.

SAVUNMANIN ÖZETİ : Davacı hakkında tesis edilen işlemin mevzuata uygun olduğu, açılan davanın yersiz ve mesnetsiz olduğu ileri sürülerek davanın reddi gerektiği savunulmaktadır.

TÜRK MİLLETİ ADINA

Hüküm veren Ankara 4.İdare Mahkemesince işin gereği görüşüldü:

Dava, Özbekistan vatandaşı olan davacının Türkiye'ye iltica talebinin reddine ilişkin davalı idare işleminin iptali istemiyle açılmıştır.

1951 Tarihli Mültecilerin Hukuki Durumuna Dair Cenevre Sözleşmesi 29.08.1961 tarih ve 359 sayılı Kanun ile Onaylanarak yürürlüğe giren Cenevre Sözleşmesinin 1. maddesininin A fıkrasının (2)'nci bendinde; "mülteci tabiri: "1 Ocak 1951'den önce meydana gelen olayların sonucunda ve ırkı,dini,milliyeti yada siyasal görüşü nedeniyle zulüm görmekten haklı sebeplerle korkan, vatandaşı olduğu ülkenin dışında bulunan ve bu korkudan dolayı veya kişisel tercihi dışındaki sebeplerden dolayı söz konusu ülkenin korunmasından yararlanamayan veya yararlanmak istemeyen; ya da bir ülkenin vatandaşlığına sahip olmayan ve eskiden sürekli ikamet ettiği ülkenin dışındaki sebeplerle bu ülkeye dönemeyen veya dönmek istemeyen herhangi bir kişiyi kapsar" denilmekte, 31. maddesinde de; " iltica memleketinde usulsüz durumda bulunan mülteciler" başlığı altında "1-Akid Devletler, hayatları veya hürriyetleri birinci maddede gösterilen şekilde tehdit altında bulunmuş olan memleketten doğruca müsaadesiz ülkelerine giren veya ülkelerinde bulunan mültecilere usulsüz girişlerinden veya bulunuşlarından dolayı ceza vermezler; bunların vakit geçirmeden resmi makamlara müracaatla usulsüz girişlerini veya bulunuşlarını mucip makbul sebepleri anlatmaları şarttır. 2- Akid Devletler, bu mültecilerin hareketlerini

lüzumlu olanlardan başka tahdit etmeyeceklerdir.Bu tahditler ancak işbu mültecilerin iltica memleketindeki durumları düzelinceye veya bunlar diğer bir memlekete kabullerini temin edinceye kadar olunacaktır.Akit Devletler, bu mültecilerin diğer bir memlekete kabullerini temin etmeleri için makul bir müddet ve lüzumlu bütün kolaylıkları bahşederler" hükmünün yer aldığı; 30.11.1994 tarih ve 22127 sayılı Resmi Gazete'de yayımlanan ve 94/6169 sayılı Bakanlar Kurulu Kararı ile yürürlüğe konulan Türkiye'ye İltica Eden veya Başka Bir Ülkeye İltica Etmek Üzere Türkiye'den İkamet İzni Talep Eden Münferit Yabancılar ile Topluca Sığınma Amacıyla Sınırlarımıza Gelen Yabancılara ve Olabilecek Nüfus Hareketlerine Uygulanacak Usul ve Esaslar Hakkında Yönetmeliğin 1. maddesinde "Bu yönetmeliğin amacı; 1951 tarihli Mültecilerin Hukuki Durumuna Dair Cenevre Sözleşmesi ile Mültecilerin Statüsüne İlişkin 31 Ocak 1967 tarihli Protokol gereğince ülkemize münferiden iltica eden veya başka ülkelere iltica etmek üzere ülkemizden ikamet izni talep eden yabancılar ile topluca iltica veya sığınma amacıyla sınırlarımıza gelen yabancılara ve olabilecek nüfus hareketlerine uygulanacak usul ve esasların tespiti ile görevli kuruluşların belirlenmesidir" düzenlemesine yer verildiği, aynı Yönetmeliğin 3.maddesinde, "sığınmacının, ırki,dini, milliyeti, belirli bir toplumsal gruba üyeliği veya siyasi düşünceleri nedeniyle takibata uğrayacağından haklı olarak korktuğu için vatandaşı olduğu ülke dışında bulunan ve vatandaşı olduğu ülkenin himayesinden istifade edemeyen veya korkudan dolayı istifade etmek istemeyen ya da uyruğu yoksa ve önceden ikamet ettiği ülke dışında bulunuyorsa oraya dönmeyen veya korkusundan dolayı dönmek istemeyen yabancı olarak" tanımladığı; 4.maddesinde, Türkiye'ye iltica eden veya üçüncü bir ülkeye iltica etmek üzere Türkiye'den ikamet izni talep eden yabancılardan, Türkiye'ye yasal olmayan yollardan gelenlerin, giriş yaptıkları yer valiliklerine en geç beş gün içinde müracaat edecekleri, 6. maddesinde ise, Türkiye'ye iltica eden veya başka bir ülkeye iltica etmek üzere Türkiye'den ikamet izni talep eden münferit yabancıların taleplerinin, 1951 tarihli Mültecilerin Hukuki Durumuna Dair Cenevre Sözleşmesi ile Mültecilerin Hukuki Statüsüne İlişkin 31.1.1967 tarihli protokol gereğince Dışişleri Bakanlığı ile ilgili diğer Bakanlıklar ve Kuruluşların görüşü alınarak, İçişleri Bakanlığınca karara bağlanacağı, iltica veya ikamet izni talebi uygun görülmeyen yabancıların İçişleri Bakanlığının talimati ile valiliklerce Türkiye'den çıkarılacağı düzenlemesine yer verilmiştir.

Bakılan Uyuşumazlıkta; Özbekistan vatandaşı olan ülkesinde Fen doktoru olarak görev yapan davacının, öğrencilik yıllarından beri hazırladığı Türki dilleri ailesinden olan Özbek dilindeki eşanlamlı kelimeleri içeren sözlük çalışmaları ile birlikte, 13.9.2001 tarihinde Türkiye'ye giriş yaptıktan sonra 28.12.2001 tarihinde Azerbeycan üzerinden ülkesine geri döndüğü, 8.7.2002 tarihinde ülkesinden ayrılarak önce Türkmenistan'a, daha sonra İran'a gittikten sonra 13.7.2002 tarihinde yeniden ülkemize giriş yaptığı, 18.7.2002 günlü dilekçe ile iltica talebinde bulunduğu, mülteci-sığınma kayıt formunda da, 30 yıldır pedagog olarak çalıştığı devlet üniversitesinden 2000 yılında atılması nedeniyle parasız kaldığını bu nedenle ülkesini terketmek zorunda kaldığını, üçüncü bir ülkeye gitmek istediğini bunun için Birleşmiş Milletlere müracaat ettiğini üçüncü bir ülkeye gidene kadar Türkiye'de kalmak istediğini belirttiği, durumunun incelenmesi sonucunda, davacının ülkemize gelmeden önce ilk önce Türkmenistan'a daha sonra İran'a gittiği dolayısıyla

T.C.
A N K A R A
4.İDARE MAHKEMESİ

ESAS NO :
KARAR NO :

Cenevre Sözleşmesinin 31. maddesi uyarınca ülkelerinden ayrıldıktan sonra ilk giriş yaptığı güvenli ülke olan Türkmenistan ve İran'da mülteci talebinde bulunması gerektiği, mülteci kayıt formunda tahdit veya takip nedeniyle iltica talebinde bulunduğu yolunda da bir beyanı bulunmadığı, ülkesini terketme gerekçesi olarak ekonomik nedenler ileri sürdüğü ve üçüncü bir ülkeye gitmek için Türkiye'ye geldiğini açıkça belirttiğinden bahisle davacının iltica talebinin reddedildiği vizesi bitiminde ülkemizi terketmesi gerektiği istemesi halinde ülkesine dönebileceği gibi vize temin etmesi halinde 3. bir ülkeyede gidebileceğinin davacıya bildirildiği, davacının üçüncü bir ülkeye gitmek için Birleşmiş Milletler Mülteciler Yüksek Başkomiserliğine yaptığı müracaatında kabul edilmeyerek dosyasının kapatıldığı dosyanın incelenmesinden anlaşılmaktadır.

Bu durumda, 1951 Cenevre Sözleşmesine taraf olurken ülkemizin beyan ettiği coğrafi çekince nedeniyle yanlızca Avrupa'dan ülkemize sığınma amacıyla gelen yabancılara mülteci statüsü tanıma yükümlülüğü getirilmiş olup Avrupa ülkeleri dışındaki ülkelerden gelenleri mülteci kabul etme yükümlülüğü bulunmadığı gibi Cenevre Sözleşmesinin 31. maddesinde öngörülen şekilde davacının ülkesinden ayrıldıktan sonra doğrudan ülkemize giriş yapmamış olması ayrıca ülkesinden ekonomik nedenlerle ayrılmış olduğunu beyan etmesi karşısında davacının iltica talebinin reddedilmesinde hukuka aykırılık görülmemiştir.

Açıklanan nedenlerle, davanın reddine, aşağıda dökümü yapılan 53.040.000 lira yargılama giderinin davacı üzerinde bırakılmasına,posta ücretinden artanın istemi halinde davacıya iadesine, 21.10.2003 tarihinde oybirliğiyle karar verildi.

BAŞKAN	ÜYE	ÜYE
BİRİZ ÖZDEMİR	H.NEŞE SARI	BİLGE APAYDIN
27396	27055	32668

Aslı gibidir.

YARGILAMA GİDERLERİ :

Başvurma	Harcı	: 7.880.000.TL
Karar	Harcı	: 7.880.000.TL
YD	Harcı	: 12.840.000.TL
Vekalet	Harcı	: 1.440.000.TL
Posta Gideri		: 23.000.000.TL
TOPLAM		: 53.040.000.TL

S.E- 25.10.2003

18

T.C.
ANKARA
4.İDARE MAHKEMESİ

ESAS NO

DAVACI VE YÜRÜTMENİN
DURDURULMASINI İSTEYEN

VEKİLİ :

11

KARŞI TARAF (DAVALI)

İSTEMİN ÖZETİ : Özbekistan doğumlu olan davacının Türkiye'ye iltica talebinin reddine ilişkin işlemin iptali ve yürütmenin durdurulması istemidir.

TÜRK MİLLETİ ADINA

Hüküm veren Ankara 4.İdare Mahkemesince işin gereği görüşüldü:

2577 sayılı idari Yargılama Usulü Kanunu'nun 27. Maddesinin 2.fıkrasında, İdari Mahkemelerin, idari işlemin uygulanması halinde telafisi güç veya imkansız zararların doğması ve idari işlemin açıkça hukuka aykırı olması şartlarının birlikte gerçekleşmesi durumunda, gerekçe göstererek yürütmenin durdurulmasına karar verilebileceği hükme bağlanmıştır.

Dosyanın incelenmesinden, olayda yukarda açıklanan kanun hükmünde öngörülen şartların gerçekleşmediği anlaşıldığından, yürütmenin durdurulması isteminin reddine ve tebligatın tamamlanmasına, 21.05.2003 gününde oybirliği ile karar verildi.

BAŞKAN	ÜYE	ÜYE
BİRİZ ÖZDEMİR	H.NEŞE SARI	HASAN GÜZELER
27396	27055	33628

Asıl gibidir

S.E- 21.05.2003

T.C.
ANKARA
9. İDARE MAHKEMESİ

ESAS NO:
KARAR NO:

DAVACI

VEKİLİ

DAVALI

DAVANIN ÖZETİ : İran uyruklu olan davacının geçici sığınma talebinin 1951 tarihli Cenevre Sözleşmesi ve 94/6169 sayılı yönetmeliğe göre yapılan değerlendirme sonucunda sığınmacılarda aranan nitelikleri taşımadıkları kanaatine varıldığından bahisle sınır dışı edileceklerine ilişkin 1.4.2002 tarihinde tebliğ edilen 26.3.2002 gün ve 070156 sayılı davalı Bakanlık işleminin iptali istenmektedir.

SAVUNMANIN ÖZETİ : Birleşmiş Milletler Mülteciler Yüksek Komiserliğince sığınma talebi reddedilen davacı hakkında tesis edilen işlemin mevzuata uygun olduğundan bahisle davanın reddi gerektiği savunulmaktadır.

TÜRK MİLLETİ ADINA

Karar veren Ankara 9. İdare Mahkemesi'nce işin gereği görüşüldü.

Dava, İran uyruklu olan davacının geçici sığınma talebinin 1951 tarihli Cenevre Sözleşmesi ve 94/6169 sayılı yönetmeliğe göre yapılan değerlendirme sonucunda sığınmacılarda aranan nitelikleri taşımadıkları kanaatine varıldığından bahisle sınır dışı edileceklerine ilişkin 1.4.2002 tarihinde tebliğ edilen 26.3.2002 gün ve 070156 sayılı davalı Bakanlık işleminin iptali istemiyle açılmıştır.

1951 tarihli mültecilerin Hukuki Durumuna Dair Cenevre Sözleşmesinin 29.8.1961 tarihinde 359 sayılı Türkiye Büyük Millet Meclisinde onaylanarak kabul edildiği, 30.11.1994 tarihinde 6169 sayılı Bakanlar Kurulu Kararı ile onaylanan "Türkiye İltica Eden Veya Başka Bir Ülkeye İltica Etmek Üzere Türkiye'de İkamet İzni Talep Eden Münferit Yabancılar ile Topluca Sığınma Amacıyla Sınırlarımıza Gelen Yabancılara ve Olabilecek Nüfus Hareketlerine Uygulanacak Usul ve Esaslar Hakkındaki Yönetmeliğin 28.maddesinde; "Başka bir ülkeye iltica etmek üzere Türkiye'den ikamet izni talep eden münferit yabancılara verilen ikamet izninin yabancının makbul bir süre içinde 3.ülkelere gidememesi halinde uzatılmayabilir. Bu durumdaki yabancı ülkeyi terke davet edilir" kuralı yeralmıştır.

Dosyanın incelenmesinden, İran uyruklu davacı ve ailesinin 3.1.1999 tarihinde Ağrı Gürbulak kara hududu kapısından Türkiye'ye giriş yaptıktan sonra, üçüncü bir ülkeye gitmek üzere Ankara Valiliğinden sığınma talebinde bulunduğu, talebi hakkında bir karar verilinceye kadar Eskişehir ilinde ikamete başladıkları, davacı ve ailesinin Birleşmiş Milletler Mülteciler Yüksek Komiserliği hakkında yaptığı araştırmada, 1999 ve 2000 yılından başvuruda bulundukları ve başvurusunun reddedildiğinin anlaşılması üzerine dava konusu işlem ile sınır dışı edilmelerine karar verilmesi sonucu bakılan davanın açıldığı anlaşılmıştır.

T.C.
A N K A R A
9. İDARE MAHKEMESİ

ESAS NO:
KARAR NO:

Bu durumda, üçüncü bir ülkeye gitmesi Birleşmiş Milletler Yüksek Komiserliğince ikinci kez reddedilmesi nedeniyle mülteci statüsü taşımadığı anlaşılan davacı ve ailesinin sınır dışı edilmesine ilişkin işlemde hukuka aykırılık görülmemiştir.

Açıklanan nedenlerle davanın reddine, aşağıda dökümü yapılan 36.810.000.-lira yargılama giderinin davacı üzerinde bırakılmasına, artan posta giderinin istemi halinde davacıya iadesine, 27.11.2002 tarihinde oybirliğiyle karar verildi.

BAŞKAN	ÜYE	ÜYE
NURBEN ÖMERBAŞ	CENGİZ AYDEMİR	NURETTİN YUNUS UYSAL
26431	33773	37981

YARGILAMA GİDERLERİ	:
Başvurma Harcı	: 4.960.000.-
Karar Harcı	: 4.960.000.-
Vekalet Harcı	: 910.000.-
YD Harcı	: 8.080.000.-
Posta Gideri	: 17.900.000.-
	: 36.810.000.-

M.Y.

ASLI GİBİDİR

T.C.
ANK
9. İDARE M

ESAS NO :

DAVACI VE YÜRÜTMENİN
DURDURULMASINI İSTEYEN :

VEKİLİ

KARŞI TARAF (DAVALI)

İSTEMİN ÖZETİ : İran uyruklu olan davacının geçici sığınma talebinin 1951 tarihli Cenevre Sözleşmesi ve 94/6169 sayılı yönetmeliğe göre yapılan değerlendirme sonucunda sığınmacılarda aranan nitelikleri taşımadıkları kanaatine varıldığından bahisle sınır dışı edileceklerine ilişkin 1.4.2002 tarihinde tebliğ edilen 26.3.2002 gün ve 070155 sayılı davalı Bakanlık işleminin iptali ile yürütmenin durdurulması istemidir.

TÜRK MİLLETİ ADINA

Karar veren Ankara Nöbetçi İdare Mahkemesince işin gereği görüşüldü.

2577 Sayılı İdari Yargılama Usulü Kanunu'nun 27 nci maddesinin 2 nci fıkrasında, İdare Mahkemelerinin, idari işlemin uygulanması halinde telafisi güç veya imkansız zararların doğması ve idari işlemin açıkça hukuka aykırı olması şartlarının birlikte gerçekleşmesi durumunda gerekçe göstererek yürütmenin durdurulmasına karar verebilecekleri hükme bağlanmıştır.

Dosyanın incelenmesinden; olayda yukarıda anılan kanun hükmünde öngörülen şartların gerçekleşmediği anlaşıldığından, yürütmenin durdurulması isteminin REDDİNE, 22.8.2002 tarihinde oybirliğiyle karar verildi.

NÖBETÇİ BAŞKAN	ÜYE	ÜYE
Asuman YET	Cengiz AYDEMİR	Ercan AHİ
26425	33773	33605

B.Ö.
23.08.02

ASLI GİBİDİR

T.C
ANKARA
5.İDARE MAHKEMESİ
ESAS NO:
KARAR NO:

Davacı.....
Vekili.....

Davalı.....
Davanın Özeti.....: İran Vatandaşı olan ve Birleşmiş Milletler Mülteciler Yüksek Komiserliğince mülteci statüsü tanınan davacının, üçüncü bir ülkeye gidinceye kadar ikamet izni verilmeyerek, ülkesine gönderilmek üzere sınır dışı edilmesine ilişkin davalı idare işleminin iptali istenilmektedir.
Savunmanın Özeti.: Davacının müracaatının yabancılara ilişkin mevzuatta öngörülen şekil ve süreye uymadığı, ülkeye giriş tarihinin belli olmadığı, ayrıca üçüncü bir ülkeye gidiş vizesinin bulunmadığı, davanın reddi gerekeceği savunulmaktadır.

TÜRK MİLLETİ ADINA

Karar veren Ankara 5.İdare Mahkemesince işin gereği görüşüldü;
Dava; İran Vatandaşı olan ve Birleşmiş Milletler Mülteciler Yüksek Komiserliğince mülteci statüsü tanınan davacının, üçüncü bir ülkeye gidinceye kadar ikamet izni verilmeyerek, ülkesine gönderilmek üzere sınır dışı edilmesine ilişkin davalı idare işleminin iptali istemiyle açılmıştır.

1951 yılında düzenlenen Mültecilerin Hukuki Durumuna Dair Sözleşmenin "mülteci" tabirinin tarifine ilişkin 1.maddesinin (A) fıkrasında iş bu sözleşme bakımından "mülteci" tabirinin bu bentte gösterilen şahıslara tatbik edileceği (B) fıkrasında ise (A) fıkrasında yer alan "1 Ocak 1951'den evvel cereyan eden hadiseler" ibaresinin "1 Ocak 1951'den evvel Avrupada'da cereyan eden hadiseler" veya "1Ocak 1951"den evvel Avrupada veya başka bir yerde cereyan eden hadiseler" manasında anlaşılacağı ve her Aktid Devletin bu sözleşmeyi imzaladığı, tasdik ettiği veya iltihak eylediği sırada bu sözleşmeye göre taahhüt ettiği vecibeler bakımından bu ibarenin şümulünü belirten bir beyanda bulunacağı belirtilmiş, 29.8.1961 günü kabul edilen 359 sayılı Cevnevre'de 28 Temmuz 1951 Tarihinde İmzalanmış olan Mültecilerin Hukuki Durumuna Dair Sözlesmenin Onaylanması Hakkında Kanunun 1.maddesinde anılan

T.C
ANKARA
5.İDARE MA
ESAS NO:
KARAR NO:

sözleşmenin ilişik deklarasyonla birlikte onaylandığı hükmüne yer verilmiş, kasaya ekli deklarasyonla iş bu sözleşmenin tahmil ettiği vaeibeler bakımından Türkiye Cumhuriyeti Hükümeti'nin 1.maddenin (B) fikrasındaki " 1 Ocak 1951"den evvel cereyan eden hadiseler" ibaresini 1 Ocak 1951'den önce Avrupa'da cereyan eden hadiseler" şeklinde anladığı vurgulanmış, sözleşmede yer alan 1 Ocak 1951 sınırlamasına bakılmaksızın sözleşmedeki tarifin kapsamına giren "bütün mültecilerin" eşit hukuki durumdan faydalanmaları amacıyla Birleşmiş Milletler Genel Kurulu kararıyla kabul edilen Mültecilerin Hukuki Durumuna Dair Protokol'a katılmamıza dair 1.7.1968 günlü ve 6/10266 sayılı Bakanlar Kurulu kararında da coğrafi sınırlama bakımından sözleşmenin " sadece Avrupa'da cereyan eden hadiseler neticesinde vaki sığınmaları uygulayacağı yolunda yapılmış olan deklorasyon baki kalmak şartıyla sözü edilen protokola katılmamızın kararlaştırıldığı belirtilmiştir.

Sözleşmenin 1.maddesinde mülteci tabirinin "sadece Avrupa'da meydana gelen olaylar sonucunda veya "Avrupa'da veya başka bir yerde" meydana gelen olaylar sonucunda vatandaşı olduğu veya mutaden ikamet ettiği memlekete dönemeyen veya dönmek istemeyen kişilerden hangilerinin kapsadığını belirleme konusunda her Akit Devlete yetki verildiğine ve bu yetkinin kullanılmasına ilişkin olarak 359 sayılı Kanun ekinde yer alan deklarasyonda Türkiye Cumhuriyetinin sadece Avrupa'da meydana gelen olaylardan etkilenenlerin mülteci sayılacağını kabul ettiği açıklandığına ve ayrıca aynı sınırlama Protokol'a katılmamıza ilişkin Bakanlar Kurulu kararında da tekrarlanmış bulunduğuna göre Avrupa dışında meydana gelen olaylardan etkilenenlerin hukukumuza göre mülteci sayılmalarına ve dolayısıyla Sözleşme ve Protokol ile mütlecilere tanınan haklardan yararlanmalarına olanak bulunmamaktadır.

30.11.1994 gün ve 22127 sayılı Resmi Gazete'de yayımlanan ve 94/6169 sayılı Bakanlar Kurulu kararı ile yürürlüğe konulan Türkiye'ye İltica Eden ve Başka Bir Ülkeye İltica Etmek Üzere Türkiye'den İkamet İzni Talep Eden Münferit Yabancılar ile Topluca Sığınma Amacıyla Sınırlarımıza Gelen Yabancılara ve Olabilecek Nüfus Hareketlerine Uygulanacak Usul ve Esaslar

.../...

T.C
ANKARA
5.İDARE MA
ESAS NO:
KARAR NO:

Hakkında Yönetmeliğin 1.maddesinde "Bu yönetmeliğin amacı; 1951 tarihli Mültecilerin Hukuki Durumuna Daier Cenevre Sözleşme ile Mültecilerin hukuki Statüsüne ilişkin 31 Ocak 1967 tarihli Protokol gereğince ülkemize münferiden iltica eden veya başka ülkelere iltica etmek üzere ülkemizden ikamet izni talep eden yabancılar ile topluca iltica veya sığınma amacıyla sınırlarımıza gelen yabancılara ve olabilecek nüfus hareketlerine uygulanacak usul ve esasların tesbiti ile görevli kuruluşların belirlenmesidir." kuralına yer verilmiş aynı yönetmeliğin 3.maddesinde sığınmacı; ırkı, dini, milliyeti, belirli bir toplumsal gruba üyeliği veya siyasi düşünceleri nedeniyle takibata uğrayacağından haklı olarak korktuğu için vatandaşı olduğu ülke dışında bulunan ve vatandaşı olduğu ülkenin himayesinden istifade edemeyen veya korkudan dolayı istifade etmek istemeyen ya da uyruğu yoksa ve önceden ikamet ettiği ülke dışında bulunuyorsa oraya dönmeyen veya korkusundan dolayı dönmek istemeyen yabancı olarak tanımlanmakta, 4.maddesinde Türkiye'ye iltica eden veya üçüncü bir ülkeye iltica etmek üzere Türkiye'den ikamet izni talep eden yabancılardan, Türkiye'ye yasal olmayan yollardan gelenlerin giriş yaptıkları yer valiliklerine en geç on gün içinde müracaat edecekleri, 6.maddesinde de, Türkiye'ye iltica eden veya başka bir ülkeye iltica etmek üzere Türkiye'den ikamet izni talep eden münferit yabancıların talepleriniin, 1951 tarihli Mültecilerin Hukuki Durumuna Dair Cenevre Sözleşmesi ile Mültecilerin hukuki Statüsüne ilişkin 31.1.1967 tarihli protokol gereğince Dışişleri Bakanlığı ile ilgili diğer bakanlık ve kuruluşların görüşü alınarak, İçişleri Bakanlığı'nca karara bağlanacağı, iltica veya ikamet izni talebi uygun görülmeyen yabancıların İçişleri Bakanlığı'nın talimatı ile valiliklerce Türkiye'den çıkarılacakları belirtilmiştir.

Öte yandan, 21.4.1988 tarihli ve 3441 sayılı Kanunla onaylanmasının uygun bulunması üzerine 16.6.1988 tarihli ve 88/13023 sayılı Bakanlar Kurulu kararı ile 30.maddesi dışında ihtirazi kayıt konmaksızın onaylanan ve 10.8.1988 günlü ve 19895 sayılı Resmi Gazete'de yayınlanarak yürürlüğe giren İşkenceye ve diğer Zalimane; Gayriinsani veya Küçültücü Muamele Veya Cezaya Karşı Birleşmiş Milletler Sözleşmesi'nin 3.maddesinde 1) Hiç bir Taraf Devlet, bir

.../...

şahsı işkenceye tabi tutulacağı tehlikesinde olunduğuna dair esaslı sebeplerin bulunduğu kanaatını uyandıran başka Devlete geri göndermeyecek, sınırdışı etmeyecek veya iade etmeyecektir. 2) Bu gibi esaslı sebeplerin bulunup bulunmadığını tayin maksadıyla yetkili merciler söz konusu Devlete mümkün olduğu kadar sistemli biçimde yaygın, açık seçik veya kütlevi insan hakları ihlalleri bulunup bulunmadığı dahil tüm hususları gözönünde tutacaktır" hükmüne yer verilmiştir.

Bu düzenlemeler gereğince, 94/6169 sayılı Bakanlar Kurulu kararı ile yürürlüğe giren yönetmeliğin 3.maddesi uyarınca sığınmacı olarak tanımlanan bir kişinin, işkenceye tabi tutulacağı tehlikesinde olduğuna dair esaslı sebeplerin bulunduğu kanaatini uyandıran başka devlete geri gönderilmesi mümkün olmadığından, bunların anılan yönetmeliğin 4.maddesinde yer alan 10 günlük süre içerisinde başvurmamaları, durumları incelenmeksizin sınır dışı edilmelerine esas teşkil etmeyecektir.

Dava dosyasındaki bilgi ve belgelerin incelenmesinden; İran vatandaşı olan davacının Irak'da kaldığı,bu ülkede İran'daki rejim aleyhine faaliyetlerde bulunduğu gerekçesiyle 1987 yılında tutuklanarak 1993 yılında aynı suçtan 15 yıl hapse mahkum edildiği, cezaevi koşullarına ve işkenceye dayanmamadığından 1996 yılında kaçarak bir süre Tahran'da saklandıktan sonra Türkiye'ye giriş yaptığı, mülteci olarak kabul edilmek üzere Birleşmiş Milletler Mülteciler Komiserliğine yaptığı başvuru sonucu mülteciliğin kabulüne karar verildiği, üçüncü bir ülkeye yerleştirilinceye kadar geçici ikamet izni verilmesi isteğinin reddi ile ülkesine gönderilmek üzere sınırdışı edilmesine karar verildiği, davanında bu işlemin iptali istemiyle açıldığı anlaşılmaktadır.

Bu durumda, davacının yukarıda belirtilen iddiaların doğru olup olmadığı ve İran'a gönderilmek üzere sınırdışı edilmesi halinde işkence tehlikesine maruz kalacağına inanmak için esaslı sebeplerin bulunup bulunmadığı ve Birleşmiş Milletler Yüksek Komiserliği'nce başlatılan işlemler hakkında gerekli araştırma yapılmadan ülkesine iade edilmek üzere sınırdışı edilmesine ilişkin işlemde hukuka uyarlık görülmemiştir.

.../...

T.C
ANKAR
5.IDARE MA
ESAS NO:
KARAR NO

Açıklanan nedenlerle dava konusu işlemin iptaline, aşağıda dökümü yapılı 12.645.000-lira yargılama gideri ile Avukatlık Asgari Ücret Tarifesine göre belirlenen 36.000.000-lira avukatlık ücretinin davalı idareden alınarak davacıya verilmesine, artan posta giderinin istemi halinde davacıya iadesine, 15.5.2000 gününde oybirliğiyle karar verildi.

BAŞKAN	ÜYE	ÜYE
Hayrettin ÖZDEMİR	Lütfiye BOCUTOĞLU	Öznur TURAN
26447	27507	38337

Yargılama	Giderleri :	
-Başvurma	Harcı :	1.370.000-TL
-Karar	Harcı :	1.370.000-TL
-Y.D.	Harcı :	2.230.000-TL
-Posta	Gideri :	7.675.000-TL
	+	
TOPLAM	:	12.645.000-TL

Y/B-29.5.2000