

Lund University  
Department of Political Science

STV004  
Spring 2005  
Supervisor: Annika Björkdahl

# Refugees and the European Union

A study of the discrepancy between the asylum policies of the European Union  
and the human rights norm of the Geneva Refugee Convention

Charlotta Linebäck

## ABSTRACT

In the late 1990s, the member states of the European Union decided to establish a Common European Asylum System (CEAS), in order to enhance refugee protection. However, the emerging common asylum policies have been deeply criticized for breaching international norms and principles. In this thesis I argue that a discrepancy does exist between the international human rights norm expressed as the Geneva Convention and the common EU asylum policies. I also suggest several explanations to this situation. In applying the spiral-model of human rights change, which is based on a social constructivist theoretical approach, I explore the process of implementation and socialization of international norms into local contexts. The failure of the European Union to fully comply with the Geneva Convention and the norm of non-refoulement can arguably be explained by insufficient pressure from transnational advocacy networks and international organizations such as the UNHCR, as well as Western powers. Thus, the continuation of processes of argumentation, persuasion, moral consciousness-raising and institutionalization are crucial for the norm to be fully implemented. Other factors hampering the norm implementation process are the constitution of secretive and undemocratic decision-making bodies, as well as conflicting national norms and values of security/protectionism and xenophobia.

Keywords: norm implementation, the spiral-model of human rights change, the Geneva Convention, the European Union, transnational advocacy networks

## LIST OF ABBREVIATIONS

CEAS	Common European Asylum System
ECHR	1950 European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11
ECRE	European Council on Refugees and Exiles
EU	European Union
HRW	Human Rights Watch
NGOs	Non-governmental Organizations
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

## TABLE OF CONTENTS

<b>LIST OF ABBREVIATIONS</b>	<b>1</b>
<b>1. INTRODUCTION</b>	<b>3</b>
1.1 Statement of Purpose	3
1.2 Methodology	4
1.3 Limitations, Definitions and Disposition	6
<b>2. THEORETICAL POINT OF DEPARTURE</b>	<b>8</b>
2.1 The Increasing Importance of International Norms	8
2.1.1 The Human Rights Norm	10
2.1.2 The Norm of Non-Refoulement	10
2.2 The Spiral-model of Human Rights Change	12
<b>3. IN A PHASE OF RULE-CONSISTENT BEHAVIOR?</b>	<b>16</b>
3.1 The Tampere Presidency Conclusions	16
3.2 The First Phase of the Harmonization, 1999-2004	17
3.2.1 The ‘Safe Country’ Principle	19
3.3 Chapter Conclusions	20
<b>4. IN WHAT PHASE, THEN?</b>	<b>22</b>
4.1 The Fourth Phase of ‘Prescriptive Status’	22
4.1.1 The Ratification of International Human Rights Conventions and Norm Institutionalization	23
4.1.2 Institutionalized Mechanisms for Complaints	24
4.1.3 Dialogue between the European Union and Its Critics	24
4.2 Chapter Conclusions	26
<b>5. WHY A DISCREPANCY BETWEEN NORM AND PRACTICE?</b>	<b>27</b>
5.1 ‘World Time’	27
5.2 International Pressure, Transnational Networks and the UNHCR	29
5.3 ‘Societal openness’	31
5.4 ‘Blocking Factors’	32
5.4.1 Xenophobia and Security	32
5.5 Chapter Conclusions	35
<b>6. CONCLUDING REMARKS</b>	<b>38</b>
<b>REFERENCES</b>	<b>40</b>

# 1. INTRODUCTION

Recently, Human Rights Watch and other non-governmental organizations<sup>1</sup> have been criticizing the European Union<sup>2</sup> for violating and circumventing their obligations towards asylum seekers and refugees, as stated in the Geneva Convention<sup>3</sup> (Human Rights Watch, 2005). The establishment of a Common European Asylum System (CEAS) in the late 1990s and early 2000s has been scrutinized by several non-governmental and transnational organizations working to protect refugees. The draft European Council ‘Procedure Directive’<sup>4</sup> and especially the ‘safe country’ principle is arguably violating the basic international human rights principle of non-refoulement, that is, the guarantee that asylum seekers are not refused entry and sent back to countries where they might not be safe. According to Human Rights Watch, the most puzzling part of the present situation is that the EU member countries which today attempt to circumvent their obligations are the very same ones that fifty years ago established and adopted the Geneva Convention. When refugees’ human rights are neglected, the European Union as an area of “freedom, justice, and security” (Directorate-General for Justice, Freedom and Security, 2005) is threatened. In this thesis I attempt to learn more about the asylum situation and refugees’ rights in the European Union as well as the proposed discrepancy between the international norm of human rights expressed as the Geneva Convention and the developing common EU asylum policies. I hope you will find the reading informative and rewarding.

## 1.1 Statement of Purpose

As already mentioned, the emerging European common asylum system is being criticized for not respecting the international norm of refugees’ rights. In this thesis I attempt to throw light upon the development of the common European asylum system and how it affects refugees’ rights to protection. The main purpose of this thesis is to explore the process of implementation of international norms into local contexts, and in

---

<sup>1</sup> Non-governmental organization, henceforth abbreviated ‘NGO’

<sup>2</sup> The concepts of the ‘European Union’ and the ‘EU’ are used interchangeably

<sup>3</sup> The Geneva Convention of 28 July 1951 relating to the Status of Refugees, as amended by the New York Protocol of 31 January 1967

<sup>4</sup> Refers to the (draft) 2000, ‘Council Directive on minimum standards for procedures in Member States for granting and withdrawing refugee status’ (amended in 2002)

particular the implementation of the Geneva Convention into the common EU asylum policies. In order to investigate and obtain explanations for the proposed discrepancy between norm and practice, I employ a model developed by Kathryn Sikkink, Thomas Risse and Steven C. Ropp which explains norm socialization and human rights change from a social constructivist theoretical approach. The aim of this master thesis is to merely provide a possible explanation for the proposed discrepancy between the developing common asylum policies of the European Union and the international Geneva Convention. The following two questions are guiding the thesis:

- How can we describe and explain the implementation of international norms into the policies of the European Union?
- To what extent does the Geneva Convention influence the common asylum policies of the European Union? What are the consequences, and how can we explain the scope of implementation?

## 1.2 Methodology

It is important to realize that the results obtained during research depend on the methods used, the material, and the researcher herself. Hence, there are no given facts which exist independently; they are always contingent on the scholarly methods used. (Lundquist 1993:132) In this section I discuss methods, materials, the theoretical approach, and my ontological and epistemological standpoints, since they are of great importance for the validity of the study conducted.

This thesis is a case study of the European Union's asylum policy and its compliance with the Geneva Convention. The study is qualitative and in investigating the case I have exclusively utilized primary and secondary sources of literature such as European Union documentation in the form of Conventions and Directives, previous research and statements and evaluations by non-state actors. Qualitative methods are often designed as case studies where one single case is thoroughly studied. According to Robert K. Yin, a case study is an empirical inquiry that, "investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident." (Yin 2003:13) According to Lundquist, case studies and qualitative methods are today given more credit than was previously the case, especially among advocates of quantitative research. For instance, some researchers argue that case studies can be used for generalizing phenomena. (Lundquist 1993:105) According to Yin, "... case studies can generalize theoretical propositions, but not empirical entities. Often case studies try to illuminate a decision or set of decisions: why they were taken, how they were implemented, and with what result." (Yin in Jönsson 2002:38) However, researchers clinging to the hermeneutic

scholarly approach question the usefulness of generalizing. According to Flyvbjerg, formal generalizing is overestimated as a source of scientific development, at the same time as 'the power of the good example' is underestimated. (Flyvbjerg in Lundquist 1993:105) Nevertheless, in analyzing the issue area, and in applying the theoretical spiral-model of human rights change developed by Risse, Ropp and Sikkink, this thesis contributes in a modest way to the extension of the theory's applicability. To my knowledge, the model has so far merely been used in analyzing single states and not a cooperation between states as the European Union is an example of. Moreover, the implementation of the norm of refugees' rights has, to my knowledge, as yet never been investigated from this particular angle of approach. However, as evident in the theory chapter, research on international norms in general has been extensive and is a developing area in political science, and particularly in the field of social constructivism. Thus, to investigate norm implementation from a social constructivist approach came natural.

A case study has to deal with a situation "in which there will be many more variables of interest than data points, and as one result [it] relies on multiple sources of evidence, with data needing to converge in a triangulating fashion." (Yin 2003:14) As a result, the theoretical framework is crucial as a guide to "...data collection and analysis." (Yin 2003:14) In approaching the issue area from a social constructivist angle, and in utilizing the specific spiral-model which explains the implementation of international norms and human rights change, I am able to single out important events and data to analyze. The spiral-model provides tools for operationalizing international norms and their implementation, and involves process-tracing of "... domestic and international normative, political, and institutional developments to try to explain the [observed, or the lack of,] changes [in human rights practices]." (Risse and Sikkink 1999:8) The theoretical approach is further discussed in chapter two.

The theoretical approach as well as the method and the author's world view, are all important to the results obtained. My social background and active interest in refugees and human rights issues were important when deciding on the topic of this thesis. Hopefully, my enthusiasm for the issue area will show, however, to be aware of my 'previous understanding of the subject area' [förförståelse] is crucial for the validity of the study and possible bias is minimized. In choosing a social constructivist theoretical approach, my perception of the social world as "... constructed by actors creating intersubjective meanings (culture, norms, common understandings) through interaction in a community", is apparent. "In this sense, the 'structure' of the social world is ideas." (Green 2002:11) Further, the relation between ideas and matter is that of how beliefs and expectations "... provide the meaning with which actors understand the so-called material world and develop material interests." (Green 2002:11) To treat ideas and norms as real objects makes it easier to conduct 'normal', or positivist, science. (Green 2002:11) However, it is widely debated whether opposed ontological and epistemological standpoints are compatible. Constructivism, although there is more than one version, is one answer to this question since it is in itself a compromise, as expressed by Emanuel Adler: "the true middle ground between rationalist and relativist

interpretive approaches is occupied neither by an interpretive version of rationalism, nor by some variety of ‘reflectivism’ ... but by constructivism.” (Green 2002:15)

Further, the selection of materials depends on the milieu of the researcher, her personality and the methodology. (Lundquist 1993:107) The material consists of data which the researcher selects from ‘the real world’ when he or she, starting out from the dilemma, utilizes the preferred theory and method. (Lundquist 1993:95) I use primary material such as the Geneva Convention, the Dublin Convention, and regulations and directives issued by the European Commission and the European Council concerning the common asylum and migration policy of the European Union. However, most of the text material used in this essay is previous research, more or less adapted and revised, as well as statements and comments by various NGOs. When using sources that are not primary material but previous research, it is important to reflect over its credibility. What interest might the composer have in exaggerating, giving an idealized description, or reducing the issue to something lesser than is justifiable? (Bergström and Boréus 2000:38) I am aware of how many of the authors and the literature about the European Union and human rights are, to varying degrees, criticizing the present human rights situation in the European Union. However, although this critique may not be unjustified, in using primary sources and information material from the European Union as well, I attempt to make the potential information bias smaller.

### 1.3 Limitations, Definitions and Disposition

When investigating the European Union’s compliance with the Geneva Convention and the norm of refugees’ rights, I have been forced to be selective in choosing material due to large amounts of EU documentation. Thus, I focus largely on the draft Council Procedure Directive to illustrate the proposed discrepancy with the norm. However, since this Directive is considered one of the most important in building the new common EU asylum policy, (Boccardi 2002:190) this delimitation may be justified. Moreover, since the focus is on the development of the Common European Asylum System, my focus on the last six years is self-evident. Nevertheless, a brief historical review of the intergovernmental asylum cooperation of the late 1980s and the 1990s, when the foundations for the present cooperation were set, is necessary in order to reach plausible explanations of the proposed discrepancy.

Most of the important concepts, such as ‘international norms’ and the ‘principle of non-refoulement,’ are extensively defined and discussed when appearing in the text, however, a few are defined already in this section. ‘Asylum seekers’ or ‘asylum applicants’ refer to “persons wishing to apply for refugee status and to formally submit an asylum claim”, and ‘immigrant’ refers to a voluntary migrant. (Lavenex 1999:10) ‘Refugee’ is defined in the 1951 Geneva Convention and its 1967 Protocol, and applies to any person who, “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...” (25+ Human Rights Documents, 2001:58) Finally, ‘to implement’ is ‘to put into effect’, while, ‘to institutionalize’ is ‘to make into an institution/custom/practice or established law’. (Oxford American Dictionary, 1980)

In the following chapter I discuss what international norms are, and in particular the evolvement of the human rights norm and the norm of non-refoulement. The chapter further entails a discussion about the spiral-model of human rights change. In chapter three, I analyze the European Union’s compliance with the Geneva Convention and conclude that the EU is not as yet in a phase of rule-consistent behavior. Chapter four includes a discussion about how far in the process of norm implementation the EU has come and an extensive investigation of the criteria for the phase where human rights have ‘prescriptive status.’ In chapter five I explore several possible explanations to the discrepancy between norm and practice, and, finally chapter six concludes the thesis.

## 2. THEORETICAL POINT OF DEPARTURE

A fundamental requirement in all scholarly work is precision, and the concepts used by the researcher ought to be derived from theory and theoretical concepts. Moreover, in order to be useful in the analysis of the empirical data, the concepts need to be operationalized, that is, possible to test practically and apply to real situations. (Bjereld et al 1999:77, 93-94) When operationalizing norms, Annika Björkdahl points out the importance of separating the norm from the changes of the behaviour it generates, since this is the connection one attempts to demonstrate. (Björkdahl 2002:15) In utilizing the spiral-model of human rights change, which I further describe and discuss in this chapter, the various phases and mechanisms working in the process of norm implementation can be observed and analyzed. To obtain a better understanding of the spiral-model of human rights change, developed by Risse, Ropp and Sikkink, I begin this chapter by discussing norms and the increasing recognition of their importance. I proceed by discussing the human rights norm and in particular the norm of refugees' rights, expressed as the Geneva Convention, and its relation to the European Union.

### 2.1 The Increasing Importance of International Norms

According to Martha Finnemore and Kathryn Sikkink, norms and normative issues have been central to political studies for at least two thousand years. (Finnemore and Sikkink 1998:889) However, during the 1970s and 1980s, economic models and methods were becoming more common in the studies of politics, and realists started to view the "balance of power" in terms of utility maximization, and tended to search for explanations for behavior in material instead of ideational factors. (Finnemore and Sikkink 1998:889) During this span of years, norms were exclusively looked upon as "information", useful in helping the utility maximizers to make better decisions. During the 1980s, norms started to make their way back into the study of politics, and today, social constructivism is the theoretical approach which there is most focus on and which keeps extending the knowledge of norms. (cf. Björkdahl 2002:9)

There are a considerable number of definitions of norms circulating in the social sciences. In line with Jepperson, Wendt, Katzenstein (1996) and Risse and Ropp (1999), I define norms as "collective expectations about proper behavior for a given

identity”. (Risse and Ropp 1999:236) This, in turn, “influences the behavior and domestic structure of states.” (Risse and Sikkink 1999:7) That is, norms make behavioral claims on individuals, while ideas merely are about cognitive commitments. (Katzenstein 1996) According to Bernstein, actors, state interests and the social context are closely connected, and interests are partly derived from the “... social structure of norms and institutions in which actors participate.” (Bernstein 2000:482) Since there can never be any direct evidence of a norm it may be difficult to recognize. However, “[m]ost international norms are stated explicitly in treaties, resolutions, declarations ... and in rules and standards established by international organizations”, (Bernstein 2000:467), that is, norms are leaving behavioral traces in the form of treaty commitments and policies, and are in these circumstances easier to observe.

In the social sciences it is common to categorize norms as regulative and/or constitutive. Regulative norms restrict and regulate behaviour, and constitutive norms create new interests, actors, and new categories of action. (Finnemore and Sikkink 1998:891) Human rights norms, as which the Refugee Convention is an expression for, have “... a special status because they both prescribe rules for appropriate behaviour, and help define identities of liberal states. [Hence], human rights norms have constitutive effects because good human rights performance is one crucial signal to others to identify a member of the community of liberal states.” (Risse and Sikkink 1999:8)

Due to the definition of norms as shared assessments, the process of ideas becoming norms does by necessity involve a critical mass of actors. (Finnemore and Sikkink 1998:892) This critical mass required is difficult to establish in numbers, since, according to Finnemore and Sikkink, different norms command different levels of agreement. (Finnemore and Sikkink 1998:892) Furthermore, international norms have to “... work their influence through the filter of domestic structures and domestic norms, which can produce important variations in compliance and interpretation of these norms.” (Finnemore and Sikkink 1998:893) Amitav Acharya describes this phenomenon as ‘localization’, a process in which foreign norms “... are incorporated into local norms.” Acharya argues further that the success of norm diffusion strategies “... depends on the extent to which they provide opportunities for localization.” (Acharya 2004:241) In my opinion, ‘localization’ may offer a good explanation for how well international human rights norms are complied with in regions where they are a “new phenomenon”. However, norm localization, that is, norm adaptation or transformation, might not be relevant in explaining the (non-) compliance with refugees’ rights norms in the European Union since the EU member states were among the countries adopting the Geneva Convention in the first place.

Finally, according to Finnemore and Sikkink, norm diffusion and influence “... may be understood as a three-stage process.” (Finnemore and Sikkink 1998:895) The first stage is ‘norm emergence’, the second stage ‘norm cascade’, and the third stage involves norm internalization. The second stage of ‘norm cascade’ explains how an international norm, such as human rights or democracy, suddenly gains broad acceptance. (Finnemore and Sikkink 1998:895) In the following sub-sections I give an

account for the development of the human rights norm as well as the specific norm of refugees' rights in the context of the European Union.

### 2.1.1 The Human Rights Norm

In October 1945, in a post World War II context, states assembled to establish the United Nations in an effort to preserve peace and security, and “to reaffirm faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small [...]” (25+ Human Rights Documents 2001:1) The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly in December of 1948, and consists of a collection of principles. Although the UDHR is not a binding treaty, Eleanor Roosevelt predicted how the Declaration “might well become the international Magna Carta of all mankind.” (Humphrey 1984:73) The basic principle embodied in ‘human rights’ is the equal importance of every human being, as well as the equal rights to freedom and justice of every individual. Moreover, human rights protect the individual against the state and guard human dignity. (Hedlund Thulin 1996:14) As discussed in the previous section, “[m]ost international norms are stated explicitly in treaties, resolutions, declarations ... and in rules and standards established by international organizations.” (Bernstein 2000:467) After being institutionalized into the Universal Declaration of Human Rights and other international documents, the human rights principle was apparently regarded as prescribing appropriate behavior and was soon incorporated into the legal frameworks of states all around the globe, and thus, the principle of human rights evolved into an international norm. Moreover, international treaties focusing on specific rights such as the rights of minorities, the right to be protected against torture and the rights of refugees, which I focus on, have been adopted. The concept of ‘human rights’ is politically and philosophically controversial, and despite vivid debates about its proposed universality, I will not further dedicate any time to that discussion. (cf. e.g. Shestack 1998:228) The purpose of this thesis is to analyze the European Union’s compliance with the norm of refugees’ rights, and since the legitimacy of human rights is not an issue in the western, or European, region of the world, I will largely leave that debate open.

### 2.1.2 The Norm of Non-Refoulement

The notion of asylum as protection from persecution has existed for at least two thousand years, and can be traced back to the times of the Greeks and the Romans. Nevertheless, it was not until the first half of the twentieth century that the refugee problem was recognized as a concern requiring international co-operation. (Lavenex

1999:4) The newly established United Nations decided in 1949 to create a new tool particularly devoted to the protection of refugees, and thus, the Office of the United Nations High Commissioner for Refugees was established. Under its auspices "... the central principles, norms, rules and procedures of the international refugee regime became institutionalized." (Lavenex 1999:8) The principle of non-refoulement is fairly recent; "[o]nly after 1945 did the principle appear to have been more widely accepted and it was finally incorporated into the [Geneva] Convention." (Boccardi 2002:11) Due to the codification of the "universal" principles of human rights and dignity into international law, they have today gained normative status in many parts of the world, including Europe. The most important instrument defining how to treat refugees are the 1951 United Nations Convention relating to the Status of Refugees (the Geneva Convention), and its 1967 Protocol relating to the Status of Refugees. (Human Rights and Refugees 1994:6-7) In The Preamble of the Geneva Convention refugee law is clearly connected to the universal principles of human rights, and "... international solidarity, co-operation and burden-sharing" is called upon. (Lavenex 1999:9) The central principle of the Geneva Convention, which today has gained the status of an international norm, is the principle of non-refoulement as defined in Article 33. This principle states that, "[n]o 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." (25+ Human Rights Documents 2001:64) The normative status of the principle of non-refoulement may be confirmed by the fact that the principle is incorporated in many international and regional texts and conventions which, according to Goodwin-Gill, always have been adopted unanimously (Goodwin-Gill 1996:168). In addition, the principle of the right to asylum, although this right is interpreted as the "right of the state" to grant asylum, as well as the principle of international cooperation and solidarity, are part of the "international refugee regime." (Lavenex 1999:14) In practice, most signatories to the Geneva Convention have adopted a broad interpretation of the principle of non-refoulement, allowing "... large numbers of asylum seekers to cross their borders". (Boccardi 2002:11)

Possibly, the perception of the international Geneva Convention as a "regional" European convention is the reason for the lack of success in establishing a European human rights convention particularly concerning the rights of refugees. According to Boccardi, Europe has been "... notable in its inability to follow the examples of other regional initiatives and expand its own concept of refugee protection." The European human rights convention most relevant to the protection of refugees is the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR), and its Article 3 which contains "the prohibition of torture and cruel or inhuman treatment." (Boccardi 2002:23) This prohibition is absolute and applies both to asylum seekers and extradition cases, and therefore it affords even wider protection than is provided by Article 33 of the Geneva Convention. (Boccardi 2002:24) However, the EU Charter of Fundamental Rights, approved of at the European Council meeting in Nice in 2000, is the latest proclamation of the endorsement of human rights on EU level. (cf. Boccardi

2002:xvii) This Charter is incorporated in the Treaty establishing a Constitution for Europe, which probably enters into force in 2006, and will thereby be legally binding upon the EU member states.

## 2.2 The Spiral-model of Human Rights Change

Thus, to ask ‘when do ideas, as opposed to power and interest, matter?’ is to ask the wrong question. Ideas always matter, since power and interest do not have effects apart from the shared knowledge that constitutes them as such. (Wendt 1995:74)

The social constructivist approach to norms is different from rationalist, or realist theories, since norms and institutions, like international conventions and organizations like the United Nations, are considered constitutive and therefore able to create new interests, and change the preferences and thereby the behavior of states. Risse and Sikkink point out that social constructivist approaches do *not* ignore material and structural factors, however, they do not consider them as the primary reason for how identity, interests and preferences of states are generated. The causal relationship between material and ideational factors has to be turned around, since ideas and communicative processes are decisive for which material factors are considered important and worth fighting for. (Risse and Sikkink 1997:7) To a realist, on the other hand, international institutions merely mirror the balance of power in the world, (Mearsheimer 1994/1995:7), and further, human rights are implemented in states merely due to the will of powerful states. (Krasner 1993) However, the realist approach may be criticized for not being able to explain why the human rights norm is implemented and complied with in states where no international financial institutions or powerful states pressure for compliance, or when pressure has been exerted simply for a short period of time. (cf. Risse and Sikkink 1999:36) Moreover, when powerful states condition foreign aid with a requirement of the implementation of the international norms of democracy or human rights, this might be due to the work of transnational networks or non-governmental organizations successful in changing the interests, morals, and finally policies *of the powerful state*.

Norms influence political change through a socialization process that combines instrumental interests, material pressures, argumentation, persuasion, institutionalization, and habitualization. (Risse and Sikkink 1999:37)

The spiral-model of human rights change, developed by Risse, Ropp and Sikkink, explains how international norms, through processes of ‘norm socialization’, are implemented into local contexts. The spiral-model explains how the process of implementation consists of five stages, and takes as its point of departure a repressive

regime, followed by 'denial', 'strategic concessions', 'prescriptive status', and 'compliance with the norms in practice'. (Risse and Sikkink 1999:5) Three kinds of causal mechanisms help the international norms to get implemented in a local context. The first one is distinguished by "processes of instrumental adaptation and strategic bargaining", the second is characterized by "processes of moral consciousness-raising, argumentation, dialogue, and persuasion", and the third by "processes of institutionalization and habitualization". (Risse and Sikkink 1999:5) One of the strengths of the social constructivist approach is its ability to combine rational and reflectivist approaches, and to be "a middle ground," (cf. Björkdahl 2002), and further, the spiral-model draws on knowledge from both rationalist and constructivist approaches. Thus, in the early phases of the implementation where denial, tactic and strategic concessions are common, a rationalist or rational choice logic can by using instrumental or strategic reasoning probably best explain the norm implementation. Often, states initiate the implementation of an international norm to receive military or financial aid, or they are concerned about their international reputation. In later stages of the process of implementation, theories emphasizing communicative rationality, argumentation, persuasion, norm institutionalization and adaptation are more useful. Thus, a constructivist approach better explain the full implementation and compliance with the norm. (cf. Risse and Ropp 1999:273) In analyzing the situation of the European Union, its asylum policies and compliance with the Geneva Convention, the focus will be on the latter stages of the process, and hence, on the processes of argumentation, dialogue and institutionalization.

In addition to local and international non-governmental organizations, international powers and the domestic public, transnational networks are particularly important in order for human rights change to occur. The first purpose these networks serve is to raise moral consciousness by putting the norm-violating states on the international agenda. Simultaneously, as a "bonus", liberal states are reminded of their identity as promoters of human rights. Secondly, the organizations empower and legitimate, and consequently mobilize, the domestic opposition in target countries. And thirdly, by pressuring the regimes simultaneously "from above" and "from below", the incentives for change is greater. (Risse and Sikkink 1999:5) According to Risse and Ropp, the spiral-model also indicates when the logic changes from a rationalist to a constructivist. However, I believe it might be difficult to establish exactly when this shift takes place, and it would be interesting to examine the reasons why preferences and interests are changing first in a later phase. This is clearly an area where more research is necessary. (cf. Checkel 2001:558) Further, to establish whether a government implements a norm as a result of new interests or preferences, or whether the implementation is simply strategic and performed to gain international respect, Risse and Sikkink point to certain signs suggesting the reason behind the implementation. The ratification of conventions and the implementation of international law into national policies suggest that the preferences of a government have changed. In addition, mechanisms to ensure that citizens can complain if the norm is not complied with, and whether the government recognizes the norm unconditionally, are important criteria to judge how well a norm is

implemented. (Risse and Sikkink 1999:29)

The spiral-model has been criticized for simply demonstrating that “transnational actors matter”, and for not sufficiently explaining the conditions for their influence. (Cortell and Davis 2005:7) However, the spiral-model presupposes that ‘norm resonance’ is a precondition for the full implementation of norms, and it does “theorize the stages through which a ‘fit’ between international norms and domestic understandings and institutions can eventually be achieved.” (Risse and Ropp 1999:272) According to Cortell and Davis, domestic entrepreneurs are important in order to convince the national arena of the necessity of implementing the norm and its national interest in doing so, and further, they emphasize the importance of the ‘openness’ of prevailing domestic institutions for human rights change to take place. Thus, “[i]f domestic institutions do not provide for the participation of norm entrepreneurs in decision-making debates, then efforts of these actors to effect normative change are likely to fail.” (Cortell and Davis 2005:23) This factor is similar to the one of ‘societal openness’, suggested by Risse and Ropp, and will be further explored in chapter five, along with other “contextual factors”. Risse and Ropp do recognize that in addition to observing the norm socialization process itself and drawing conclusions from applying the model on the empirical case, “contextual factors” may be utilized to better understand why norms are implemented and complied with differently. That is, why does it take longer time for a norm to be implemented in certain countries or regions, and why is the scope of changes taking place not similar in all cases? In order to explain the differences in scope and time, “world time”, “societal openness” and “blocking factors” may be helpful. (Risse and Ropp 1999:260) When investigating a case of norm implementation it is important to consider the “world time” in which this process takes place. The international human rights regime and the transnational advocacy network have gained strength and robustness over time, and the norm implementation process is arguably more rapid the later in history it takes place. (Risse and Ropp 1999:260) Norm robustness and specificity are both, according to Jeffrey T. Checkel, important preconditions for norm effectiveness. (Risse and Ropp 1999:264) Moreover, “blocking factors” may delay the process of norm implementation and human rights change, or, if they are absent, be an explanation for rapid norm implementation. Opposing national norms and value structures emphasizing for example sovereignty, nationalism or domestic cohesion more than human rights principles, are examples of “blocking factors”. According to Risse and Ropp, the existence of “blocking factors” may be an indication of whether the regime investigated is in one of the early phases of the spiral-model. The “blocking factors” might be viewed as “arguments put forward by norm-violating governments in a public discourse with their critics during the phases of denial or tactical concessions.” (Risse and Ropp 1999:262) Lastly, “societal openness to external processes of argumentation and persuasion” is a factor contributing to explain the difference in time and scope of human rights change. (Risse and Ropp 1999:262) According to Risse and Ropp, various case studies have shown how network socialization works particularly well in regions where the culture and the institutions are, “responsive to and can accommodate some

meaningful degree of internal debate and external influence.” (Risse and Ropp 1999:263)

Despite suggestions of several alternative causal ‘mechanisms’ to explain how international norms spread to local contexts, such as socialization, social learning, propaganda, communication and institutionalization, the social constructivist approach has been criticized for not being able to fully explain “the independent explanatory power of norms.” (Björkdahl 2002:9-12) More research is needed to establish the precise constitution of the mechanisms inherent in a norm to make it spread and get implemented in specific contexts and thereby change behavior. In accordance, Checkel criticizes the spiral-model of human rights change for not sufficiently explaining the mechanisms that change the preferences and behavior of states. (Checkel 2001:560) Therefore, Checkel argues, an important input from social constructivism could be to explain the way new preferences are created in the social interaction and mutual learning which exist among actors in a society. (Checkel 2001:560) To Checkel, in-depth research on processes of ‘argumentative persuasion’ and the ‘process of social learning’ could bring new knowledge to the field, but since the research on psychology and communication today, more than social constructivism, focus on these issues, we need to learn from those fields. I agree with Checkel that further research in this area would be fruitful to exactly pin down all the aspects of how norms change state behavior. Nevertheless, I find the spiral-model developed by Risse, Ropp and Sikkink useful when analyzing how far the European Union has come in the process of implementing the international norm of refugees’ rights, and moreover, in conjunction with the “contextual factors”, I find it useful in suggesting explanations for non-compliance.

### 3. IN A PHASE OF RULE-CONSISTENT BEHAVIOR?

The phase of rule-consistent behavior is the final stage of the spiral-model of human rights change. In this phase, the implemented international human rights norm ought to have changed the values and principles of EU activists and decision-makers, and moreover, have led to a change of behavior which is now consistent with the principles imbedded in the norm. To successfully implement and comply with the norm of refugees' rights would implicate to, at a minimum, respect the principle of non-refoulement and to *not* institute policies that quite possibly would be harmful to the safety of refugees. Since the member countries of the European Union are all liberal states advocating human rights, it would be natural to assume that policies established on a European Union level therefore would be in compliance with the human rights norm. However, there is an important difference between advocating a norm and actually complying with it in practice. Among European states there has, of course, been wide variations in how well the norm of refugees' rights has been complied with at the national level, however, I will not investigate this further since my focus is on the European Union. First, I observe the Tampere Presidency Conclusions in which the ambitions of the Common European Asylum System (CEAS) is established, and after that, I turn to observe some of the European Commission proposals and European Council Directives adopted to design the policies to be incorporated in the new EU Constitution possibly entering into force in 2006.

#### 3.1 The Tampere Presidency Conclusions

Asylum and migration policies practiced among the member states of the European Union, and in particular the Schengen and Dublin Conventions, were widely criticized during the 1990s for not sufficiently respecting the international norm of non-refoulement. (cf. Boccardi 2002:175) Thus, the expectations were high on the outcome of the European Council to be held in Tampere in October 1999. This meeting of heads of states and governments was a follow up on the Treaty of Amsterdam and expanded on a European Commission Action Plan published in July 1998 and entitled 'Towards and Area of Freedom, Security, and Justice'. At the Tampere meeting the Council produced a document titled the 'Presidency Conclusions' including a proposal of

building a common policy in the areas of asylum, immigration, and temporary refugee protection. (Vachudová 2000:159) The aim of the proposal was to standardize the treatment of asylum seekers and the way asylum applications are processed, (Vachudová 2000:159), and hence, improving the protection of refugees and asylum seekers. In the short term, this Common European Asylum System (CEAS) would include “a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers, and the approximation of rules on the recognition and content of the refugee status.” (Tampere European Council, 1999, Presidency Conclusions A.II.14) The policies and priorities that were agreed upon reaffirmed the EU’s commitment to freedom based on democratic institutions, human rights, and the rule of law. (Boccardi 2002:173) As stated in the Presidency Conclusions, the aim was to realize “an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and the [ability] to respond to humanitarian needs on the basis of solidarity.” (Tampere European Council, 1999, Presidency Conclusions) Further, the European Council reaffirmed the importance of respecting the right to seek asylum, and explicitly endorsed the principle of non-refoulement in ensuring that nobody will be “... sent back to persecution.” (Tampere European Council, 1999, Presidency Conclusions A.II.13) Finally, the European Council stressed the importance of “consulting UNHCR and other international organizations” in matters relating to refugee policies. (Tampere European Council, 1999, Presidency Conclusions A.II.14) The UNHCR, as well as NGOs defending the rights of asylum, approved of the Presidency Conclusions since it did not in any foreseeable way violate the norm of non-refoulement.

Arguably, the Common European Asylum System, as lined out in the Tampere Presidency Conclusions, is in principal in line with the international Geneva Convention and the regional 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as far as this document concerns refugees. In observing some of the legislation which was later agreed upon, and in considering the evaluations of particularly the draft Council Procedure Directive conducted by various NGOs advocating refugees’ rights, I attempt to estimate the actual compliance with the Geneva Convention in the following section.

### 3.2 The First Phase of the Harmonization, 1999-2004

The Amsterdam Treaty, which entered into force on 1 May, 1999, is the legal ground for the gradual transferal of asylum policies from an ‘intergovernmental’ to a ‘pan-European’ level of cooperation. In a five-year period, ending on 1 May 2004, legislation setting out minimum standards for how to handle asylum applicants and migrants was

supposed to be adopted. (ECRE 2004) To evaluate the European Union's compliance with the Geneva Convention I focus mainly on the aspect of asylum procedures and the policy directive proposed in this specific field.

The Tampere European Council held in October 1999 had, following the principles of the 1998 Action Plan, established the goal of the harmonization of national *asylum procedures* to be part of the new Common European Asylum System (CEAS). This challenge had already been brought up half a year earlier by the European Commission in the formulation of the Working Paper 'Towards common standards on asylum procedures'. The purpose of The Paper was to be "a sounding board for Member States, NGO's and the UNHCR to put forward their specific ideas and concerns." (Boccardi 2002:184) The Working Paper suggested "abolishing the 'safe country of origin' concept, [a] harmonization of the means of proof and [to] attempt to restrict the application of the notion of 'manifestly unfounded' claims". However, these suggestions were later criticized by the member states. (Boccardi 2002:185) During fall 2000, the Commission presented a proposal for a 'Council Directive on minimum standards for procedures in Member States for granting and withdrawing refugee status' [hereafter, the Procedure Directive]. (Boccardi 2002:185, COM 2000/578) This draft Procedure Directive was intended to function as a cornerstone in the project of establishing a Common European Asylum System, (Boccardi 2002:190), and is today "... the missing element in the finalization of a Common EU Asylum System as provided for in the Amsterdam Treaty and in the 1999 Tampere European Council Conclusions." (2579<sup>th</sup> Council meeting 2004) The draft Procedure Directive was widely debated in the European Council and in the Parliament, as well as among NGOs, and was amended in 2002. (COM 2002/326) Although the Directive is not yet ratified, the European Council did agree on a final text on April 30, 2004, the last day before the dead-line set out for the first phase of the process of establishing a Common European Asylum System, and this Agreed Text is, according to both the Council of Ministers and the European Commission, expected not to get further modified in any significant manner. (cf. EC 8771/04 Agreed Text) Consequently, I do not consider the text inappropriate for illustrating the proposed discrepancy between norm and practice.

The purpose of the draft Procedure Directive is to establish comparable procedures for granting and withdrawing refugee status in all EU member states, and thereby *enhancing the protection* of refugees. The Procedure Directive is established to guarantee common standards regarding the asylum process, that is, equivalent access to the asylum process, the right to an interview, access to interpretation, and access to legal representation and detention. Moreover, it regulates procedures in the first instance, as for example provisions for examination procedures, criteria for the prioritization and acceleration of applications, the 'safe third country' and 'safe country of origin' principles and border procedures. Lastly, equivalent appeal procedures are emphasized. (2579<sup>th</sup> Council meeting 2004)

### 3.2.1 The 'Safe Country' Principle

The principal criticism directed towards the draft Procedure Directive concerns the 'safe country' principle. The content and outline of the 'safe country' principle may, when the principle is being implemented, lead to the violation of the obligation of non-refoulement enshrined in Article 33 of the Geneva Convention, Article 33 of the European Convention of Human Rights (ECHR), and Article 47 of the Charter of Fundamental Rights of the European Union. NGOs such as the ECRE, the Amnesty International EU Office, the Human Rights Watch, Caritas Europa, Churches' Commission for Migrants in Europe, ILGA Europe, Medicins sans Frontiers, Pax Christi International, and Save the Children, have raised concerns about the use of the concepts of 'safe countries of origin', 'safe third countries', 'super safe third countries', and the appeal system as outlined in the draft Directive, and they call for the withdrawal of the Procedure Directive. (Joint Letter 2004:2) Also, the European Council has not been able to agree upon which states that are to be included in the list of 'safe countries of origin' since the human rights situation in some of the proposed states is considered disputable, (Statewatch 2004), and this further points to the danger of utilizing the concept.

The 'safe country' principle implicates that certain countries are 'safe', and that there is 'generally no serious risk of persecution'. A 'safe country' could therefore not possibly produce any refugees, and accordingly, no person from such a country can be recognized as a refugee. As stated in the Procedure Directive, a member state may apply the 'safe third country' principle on the "basis of a national list and/or and individual examination", provided that the member state is satisfied that "the third country treats the applicant in accordance with international obligations", and moreover, that there is a connection between the asylum applicant and the third country. (The European Commission, 2005, cf. EC 8771/04, Agreed Text) Moreover, if an asylum applicant is a citizen of, or has travelled through a 'supersafe' third country, that is, a member state of the European Union, the state in which the applicant filed the application can refuse an examination. (The European Commission, 2005) The main objections to these provisions are that no country can be labeled safe for *all* asylum seekers; "a decision on a country's safety for a particular applicant must always be the outcome of an individual examination of the claim, as opposed to a general presumption based on country-related criteria." (Joint Letter 2004:3) Hence, in applying the concept of 'supersafe' third country, potential refugees run the risk of being deprived from their fundamental right to seek and enjoy asylum, as stated in Article 14 of the Universal Declaration of Human Rights. (Lavenex 2001:134)

The risk of refoulement is considerable when a 'safe third country' is not required to have ratified any human rights conventions, and merely appear to treat asylum seekers in accordance with international obligations. (cf. the European Commission, 2005) According to the European Council on Refugees and Exiles (the ECRE), the criteria for 'safe third countries' do not ensure that refugees are sent only to countries which have ratified and implemented the full Geneva Convention or other human rights

instruments, and moreover, there are no guarantees for there being any asylum procedure in place prescribed by law. (ECRE 2004) Lavenex points out that the ‘safe third country’ principle extends the system of redistributing responsibility for handling asylum claims “from the circle of the EU member states to potentially all third countries which fulfill the requirements.” (Lavenex 1999:54) Hence, the importance of stronger criteria for ‘safe third countries’ can not be ignored.

The ‘safe country of origin’ concept is, as well as the ‘safe third country’ concept already being practiced by some EU member states at national level, (ECRE 2004), despite the criteria not yet being fully agreed upon. “This [safe country of origin] concept allows applications from nationals of such countries to be considered ‘unfounded’<sup>5</sup>, and Member States to *restrict access to a regular asylum procedure* by putting them through an ‘accelerated procedure’.” (ECRE 2004) This provision fundamentally conflicts with the principle of the “right to lodge an asylum application and have it considered on an individual basis,” enshrined in the Geneva Convention. (ECRE 2004) As stated in Article 3; “[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or *country of origin*” [my italics]. (25+ Human Rights Documents 2001:60) In the accelerated procedure the burden of proof lies with the applicant who has to prove that he or she feared persecution in the supposedly ‘safe country’ in order to not be sent back. This requirement is in many cases too great a burden for an asylum applicant to bear, especially since time is always limited, and may therefore cause refoulement. According to ECRE, the burden of proof regarding the safety of the third country for each applicant “should ... lie entirely with the country of asylum.” (ECRE 2004)

### 3.3 Chapter Conclusions

The emerging common EU asylum policies cannot fully be regarded as being in compliance with the international human rights norm concerning refugees’ rights and the norm of non-refoulement. As argued above, the Procedure Directive is in establishing a ‘safe country’ policy breaching international human rights law, and the EU has not yet reached the phase of rule-consistent behavior, in the words of the spiral-model of human rights change. Although I have found a discrepancy at the EU ‘Directive level’, it is possible to localize a discrepancy between norm and practice also at the ‘national’ level of implementation. All asylum policies adopted by the Council presuppose equivalent conditions in member states in order to function as intended. A ‘European Refugee Fund’ has recently been established, (Lavenex 2001:122), to improve the situation of member states’ unequal situations regarding resources to handle the asylum procedure; however, this might not be enough to support the most ‘burdened’ member states to successfully comply with the Geneva Convention and the

---

<sup>5</sup> Manifestly Unfounded Application for Asylum

norm of non-refoulement. Moreover, according to the ECRE, even the safeguards established to ensure fair and efficient asylum procedures, such as access to free legal advice, may not be guaranteed since there are many conditions under which members states can derogate from them. (ECRE 2004)

Although certain local conditions in the EU member states might lead to the violation of the international principle of non-refoulement, I have in this chapter argued for how the discrepancy between norm and practice can be found even “earlier” in the process of norm implementation. A discrepancy is found already in the draft Council Procedure Directive, which establishes the design of policies which are later to be implemented in member countries.

## 4. IN WHAT PHASE, THEN?

To establish in which phase of the spiral-model of human rights change the European Union could arguably be located, is a prerequisite for the discussion about the reasons for non-compliance with the international norm of refugees' rights to protection. As explained in the theory chapter, the spiral-model consists of five phases through which the regime moves: repression, denial, tactical concessions, prescriptive status, and rule-consistent behavior. Sometimes, there is no distinct line between the phases, or a phase may be skipped. Moreover, a regime does not necessarily proceed through the process of human rights change in a linear manner, but can retreat to a 'lower' phase. In the previous section, I argued for how the EU does not fully, in practice, comply with the human rights norm regarding refugees, that is, the EU can not at present be described as belonging to the phase of 'rule-consistent behavior'. To establish whether the EU fits in the fourth phase of 'prescriptive status', I turn to observe a range of criteria.

### 4.1 The Fourth Phase of 'Prescriptive Status'

In the fourth phase of 'prescriptive status' "the validity claims of the norm are no longer controversial, even if the actual behavior continues violating the rules". (Risse and Sikkink 1999:29) As described in the previous section, the aim of a future common EU asylum policy is "an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention ...". (Tampere European Council, 1999, Presidency Conclusions) Hence, the Tampere Presidency Conclusions made clear how the norm of non-refoulement and the right to seek asylum is far from controversial in the European Union. Still, as argued above, the actual behavior is not rule-consistent.

Risse and Sikkink argue that it is difficult to distinguish whether the prescriptive status has been achieved through "discursive processes of argumentation and persuasion [or by] purely instrumental or rhetorical support for a principled idea ...". (Risse and Sikkink 1999:29) Furthermore, it is "... ultimately impossible ... to establish without doubt that actors believe in what they say." (Risse and Sikkink 1999:29) Keeping this in mind, in the following sub-sections I observe four main criteria in order to establish whether or not the EU is in a phase of prescriptive status regarding adherence to the norm of refugees' rights.

#### 4.1.1 The Ratification of International Human Rights Conventions and Norm Institutionalization

The first two criteria to establish whether or not the European Union belongs to the fourth phase of 'prescriptive status,' concerns the ratification of the international Geneva Convention and its 1967 Protocol, and the institutionalization of the norm of refugees' rights into the constitution or laws of the European Union. Importantly, the EU consists of twenty five member states which have all ratified the Geneva Convention and its 1967 Protocol, and moreover, many of them were among the countries adopting the Convention in the late 1940s. From the early times of the cooperation in the asylum policy area, the Geneva Convention has explicitly been referred to; in the 1990 Dublin Convention the contracting parties set out to "guarantee adequate protection to refugees in accordance with the terms of the Geneva Convention ..." (Bunyan 1997:49) However, not until the Tampere Presidency Conclusions did the member states agree upon establishing a Common European Asylum System where supra-national laws would, for the most part, regulate national asylum policies. The European Council and the Tampere Presidency Conclusions confirmed once again the validity of the norm of refugees' rights, and "... the importance the Union and Member States attach to absolute respect of the right to seek asylum. [The EU] has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement." (Tampere European Council, 1999, Presidency Conclusions, A.II.13) Further, the 'Treaty Establishing a Constitution for Europe' is expected to enter into force on 1 November 2006, and incorporates the EU Charter of Fundamental Rights from year 2000. (Presentation of the EU Constitution, 2004) The institutions and agencies of the European Union as well as the member states are bound to respect the rights written into the Charter once they implement the EU's legislation, and it is the task of the Court of Justice to ensure that the Charter is adhered to. Article II-78 states that "[t]he 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 Constitution." Moreover, article II-113 states that "[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions." (Presentation of the EU Constitution, 2004) Arguably, an even stronger indicator of the validity of the norm of refugees' rights on EU level would have been the establishment of a specific European convention particularly addressing refugees. However, as discussed in section 2.1.2 ('The Norm of Non-Refoulement'), the perceived need for such a convention may be negligible, since the Geneva Convention is arguably regarded as a European convention anyway.

#### 4.1.2 Institutionalized Mechanisms for Complaints

The third criterion to establish whether or not a norm has prescriptive status, is the existence of “institutionalized mechanism[s] for citizens to complain about human rights violations”. (Risse and Sikink 1999:29) Usually, in cases regarding human rights violations, citizens are the target of the abuse; it is citizens who are tortured or denied their rights to freedom of expression. However, in this case refugees are the subjects of the human rights abuses, that is, individuals who are not citizens of the European Union and therefore have even fewer opportunities to make their voices heard.

If the issues cannot be solved at national level, there are several human rights bodies relevant to refugee protection at a European level: the Human Rights Committee (responding to the UN Covenant on Civil and Political Rights), the Committee against Torture (UN Convention against Torture), and the European Court of Human Rights (European Convention on Human Rights). (Clancy 2001) Moreover, the ratification of the ‘Treaty Establishing a Constitution for Europe’ will grant the European Union and the European Court of Human Rights more power and a stronger mechanism to enforce compliance with human rights principles. The compliance with the EU Charter of Fundamental Rights, as mentioned in the previous section, is ensured by the Court of Justice. More importantly, the draft Council Procedure Directive establishes the “principle of a right to appeal before a court of law...” (ECRE 2003a) However, this principle, aimed for asylum applicants, is being compromised when EU member states are permitted to derogate from it due to national laws or in cases of “threats” to national security. (cf. ECRE 2003a) To grant such exceptions is inconsistent with international refugee and human rights law requirements. “The obligation of states not to expose an individual to a danger to his or her life, or degrading treatment, [should be] absolute.” (ECRE 2003a) This failure to fully guarantee protection is in line with the EU not yet being in a phase of rule-consistent behavior. Despite some relevant mechanisms for refugee protection, James Hathaway points out that “under the Refugee [Geneva] Convention ... no external body has been set up to receive and comment on periodic [state] reports, much less to adjudicate interstate or individuated complaints.” (Hathaway 2001) To be able to file complaints directly with a UN human rights supervisory body, instead of a mechanism at state level, would greatly increase the chances of refugees receiving adequate protection since it is the breakage of the state-citizen link that in the first place “... rendered him/her ‘in need of international protection’.” (Clancy 2001)

#### 4.1.3 Dialogue between the European Union and Its Critics

The fourth criterion useful to establishing whether or not the norm of refugees’ rights to protection and non-refoulement has yet gained prescriptive status, is the ‘discursive

practices' of the government. To evaluate the compliance with this last criterion, I observe the extent of the dialogue which the EU engages in with its critics. The way the European Union responds to accusations of human rights violations is decisive for the determination of the status of the norm. "If they engage in a dialogue with their critics, try to legitimize their behavior by referring to the norm, apologize, or promise and deliver compensation, the normative validity of the idea can be inferred." (Risse and Sikkink 1999:30)

A first example of the dialogue between the EU and its critics is the Working Paper issued by the European Commission six months previous to the 1999 Tampere Presidency Conclusions. The Paper, 'Towards Common Standards on Asylum Procedures', aimed to be "a sounding board for Member States, NGO's and the UNHCR to put forward their specific ideas and concerns", as mentioned earlier. (Boccardi 2002:184) Despite the Working Paper suggesting the abolition of the 'safe country of origin' concept, as well as advocating a stricter application of the notion of 'manifestly unfounded claims', the EU member states did not share these concerns (Boccardi 2002:185), and therefore caused four years of the UNHCR and NGOs protesting against the ratification of the draft Procedure Directive.

Further, the webpage of the 'Directorate-General of Justice and Home Affairs' maintains that the Common European Asylum System is created in consultation with both partners and stakeholders, including the UNHCR, expert NGOs such as ECRE and Amnesty, and academic experts and representatives of the judiciary. (DG JHA 2004) In accordance, the main objective of the ECRE is "to make the voice of refugee assisting organizations heard", and to this end "the ECRE is in regular contact with the EU institutions, including the DG of Justice and Home Affairs." (Kana, ECRE EU Office) Further, a Commission communication on the Common Asylum Policy and the Agenda for Protection explicitly "contains reactions to the UNHCR 'Convention +' ideas on the need to modernize the international protection system [...]." (The European Commission 2003) A meeting to discuss the proposed institutionalization of a 'Fundamental Rights Agency', connected to the Charter of Fundamental Rights, further illustrates the will of European Commission's Directorate-General for Justice and Home Affairs to involve non-governmental organizations in the procedure leading up to a decision. A first meeting with NGOs was held on April 20, 2004, and "[o]ther such meetings could take place if more NGOs and civil society representatives wish to be consulted by the European Commission." (The European Commission, 2004) Moreover, another example of how the EU encourages critical assessment of their policies from civil society is the "Working Paper by the European Council on Refugees and Exiles [ECRE] for the European Refugee Fund conference 30-31 October 2003". The ECRE states that it is pleased to be invited to a discussion on the Fund, but it also criticizes the EU for being left out of the process of planning how to use the Fund, and wishes for greater involvement in the future. (ECRE 2003b) Finally, the Commission established in 2004, after the first five-year period of implementation of the aims set out in the Tampere Presidency Conclusions, a "public consultations process" and invited interesting parties to comment on and come with suggestions of improvements in the

area of freedom, security and justice, and the future of Justice and Home Affairs. (COM 2004/4002 final, p 3)

## 4.2 Chapter Conclusions

This chapter confirms the importance of transnational networks and NGOs in the process of norm diffusion and implementation. One important task of these networks and organizations is to “raise moral consciousness” (cf. Risse and Sikkink 1999:5) in the target regime, and to draw the attention of the decision-makers to policies possibly in breach with human rights obligations. As pointed out above, the draft Procedure Directive has been extensively criticized by NGOs, and they also managed to cause debate among the member states in the European Council. However, the examples of dialogue between the EU decision-makers and NGOs give a differentiated view on the ‘discursive practices’ of the EU. To a certain extent, channels providing a dialogue do exist, and still, it is difficult to estimate whether or not the EU are really providing for critical assessment in crucial stages of the process of developing asylum policies, and this again points to the not yet rule-consistent behavior of the EU. Yet, the “communicative behavior between the national governments and their domestic and international critics [does] resemble notions of dialogue.” (Risse and Sikkink 1999:29) According to the spiral-model, the phase of ‘prescriptive status’ involves the first steps of norm institutionalization into domestic law and practices. The incorporation and institutionalization of the norm of refugees’ rights into Council Directives and EU laws on common asylum policies point to the realization of this criterion. Finally, the mechanisms to ensure that refugees and asylum seekers can “complain about human rights violations”, (Risse and Sikkink 1999:29), is at best weak at the EU level. The draft Procedure Directive does establish the right to appeal before a court of law, and other mechanisms provide opportunities to file individual complaints, however, these rights may in certain situations be compromised. Even though “[n]ew institutions to protect human rights are created...” (Risse and Sikkink 1999:30), mechanisms particularly protecting refugees are still few. Nevertheless, in general the European Union fits into the fourth phase of the spiral-model where the norm of refugees’ rights has ‘prescriptive status.’

Since the criteria of the fourth phase of ‘prescriptive status’ are, in general, fulfilled, I do not consider an analysis of “earlier” phases relevant to *establish the phase* in which the EU at present turns out to be. Still, the criteria of the earlier phases may be helpful when analyzing and discussing the reasons why the EU is not yet in a phase of ‘rule-consistent behavior’, and this will further be discussed in the section of ‘world time’ included in chapter five.

## 5. WHY A DISCREPANCY BETWEEN NORM AND PRACTICE?

As concluded above, the European Union is at present found in a stage of ‘prescriptive status’ where the norm of refugees’ rights to asylum and non-refoulement is not at all denied, but instead considered valid and important. As also concluded, the EU is still not in a phase of ‘rule-consistent behavior’, and the task must now be to investigate the reasons for this. Also, as evident in the previous chapters, norm socialization processes of dialogue, argumentation and institutionalization have been significant for the process of implementation of and (non-) compliance with the international norm.

What are the reasons behind the European Union’s failure to completely comply with the important principles of the Geneva Convention? Why are policies created that are in breach with the internationally recognized norm of non-refoulement and the principle of the right to asylum? Why does the EU persist in utilizing the ‘safe country’ concept despite pressure from the UNHCR and NGOs to remove such asylum policies? What is missing in the process of socialization of the norm of refugees’ rights in the European Union? Several factors can together contribute to reach possible explanations for the EU’s non-compliance with the Geneva Convention, and the example of the Procedure Directive illustrating the discrepancy may specifically point to the explanatory value of “blocking factors” or “competing norms”. Moreover, the number of years that have passed since the socialization process began, “international pressure”, or “contextual factors” such as “world time” and “societal openness”, are all important factors contributing to an explanation.

### 5.1 ‘World Time’

According to Risse and Sikkink, “world time” is a factor that strongly affects, not the process itself, but *the pace of* the norm socialization process. This factor may explain why the prescriptive status of the norm of refugees’ rights was reached seemingly immediately, and *why the previous steps were not necessary* in the case of the European Union. The ‘world time’ factor refers to “the increasing strength and robustness of both the international human rights regime and the transnational advocacy networks.” (Risse and Ropp 1999:260) According to Risse and Ropp, the international and regional normative context was much weaker in the 1970s than it was in the 1990s, and

consequently also in the 2000s. Moreover, international norms and transnational advocacy networks have to be created before they can be mobilized or invoked, and that might be one explanation for the longer period of time that was generally needed for a regime to go through the phases of the spiral-model forty years ago, than what is required today. (Risse and Ropp 1999:265) In addition, Risse and Ropp argue that in the late 1990s, the human rights norms had reached consensual, or prescriptive, status at international level. Thus, it appears as if Kathryn Sikkink's and Martha Finnemore's concept of 'norms cascading' correctly describes the reality of the evolvement of human rights norms, and consequently refugees' rights.

The 1999 Tampere Presidency Conclusions established that the European Union was to create a common system to handle asylum issues at a supranational level. At this time, pressure from various transnational organizations to respect the Geneva Convention, not only in rhetoric but also in practice, was exerted on the European Commission and Council. The criticism confirms that the norm of refugees' rights already had a prescriptive status among *the member states* of the European Union, which can be shown when observing the Schengen, and especially the 1990 Dublin Convention which was the first comprehensive co-operation in the area of asylum and migration at an *intergovernmental* EU level. In the preamble of the 1990 Dublin Convention, it is stated that the EU countries which are signatories to the Dublin Convention will "guarantee adequate protection to refugees in accordance with the terms of the Geneva Convention ..." (Bunyan 1997:49) The criticism directed towards the 1990 Dublin Convention from NGOs such as Statewatch, that the "Convention undermined the Geneva Convention principle ... that all asylum claims be substantively investigated" (Bunyan 1997:49), was similar to the criticism that currently is directed towards the draft Procedure Directive. Moreover, as argued by Risse and Sikkink, "no state in Western Europe has denied the prescriptive status of human rights norms since the military junta in Greece in the late 1960s." (Risse and Sikkink 1999:24) As stated in the introduction, the Human Rights Watch considers the present situation of human rights violations in the EU to be puzzling since the EU today consists of the very same states that fifty years ago established and adopted the Geneva Convention. Consequently, the validity of human rights norms has been recognized for a long time by the member states of the European Union. Thus, the prescriptive status of the refugees' rights norm also at the EU level was from the very beginning of the co-operation expected, although not self-evident. The first phases of the spiral-model of human rights change: repression, denial and tactical concessions, have all been "skipped". This is arguably due to the human rights norm cascade that swept over the world in the 1980s and 1990s.

Arguably, the "skipping" of the first three phases of the spiral-model of human rights change does *not* affect, or automatically result in, the stalled position of the EU in phase four of 'prescriptive status'. There is, arguably, nothing that indicates the validity of such reasoning. Rather, the European Union does, as was shown in chapter 4, in the process of establishing a Common European Asylum System endorse the validity of the norm of refugees' rights in fulfilling all the criteria pointing to the 'prescriptive status.'

As a result, the lack of previous phases or the process of strategic bargaining connected to these, do not appear logical as an explanation for non-compliance with the norm.

When considering the factors of ‘world time’ and the phenomenon of ‘norms cascading’, it is easier to understand how and why the European Union immediately entered the ‘prescriptive phase’ of norm implementation. Both the increasingly robust global human rights regime, and the fact that many of the member states had earlier ratified the Geneva Convention and thus already were in the prescriptive phase regarding refugees rights and the principle of non-refoulement, together explain this rapid advancement through the spiral-model. However, the ‘world time’ factor does merely explain why the first phases of the spiral-model were “skipped”, and subsequently, why these phases were not a necessary condition for the EU to reach the fourth phase of ‘prescriptive status’. The ‘world time’ factor can not alone explain why the fifth phase has not yet been reached; rather it would point to the EU already fully complying with the norm of refugees’ rights. Let us now turn to a discussion on transnational networks and the role of the UNHCR.

## 5.2 International Pressure, Transnational Networks and the UNHCR

A “critical moment comes in phase [four] when human rights have gained prescriptive status on the national level, but actual behavior still lags behind.” (Risse and Sikkink 1999:34) According to Risse and Sikkink, the keeping up of the international pressure is the main solution to moving forward towards the phase of ‘rule-consistent behavior’. When, in chapter four, arguing for the European Union being in a phase of ‘prescriptive status’, I described the EU as “only just” complying with the criteria required for norm implementation. For the norm of refugees’ rights to fully be complied with, the EU needs to put more effort into improving this situation, and to better fulfill the criteria.

Since the norm already has a prescriptive status, the seemingly “good behavior” of the European Union arguably erodes the international attention that still is required for compliance to take place. However, Risse and Sikkink argue that the domestic opposition and the local NGO network by this time usually are strong enough, and are therefore not a primary concern. (Risse and Sikkink 1999:34-35) The frequently quoted ‘ECRE’, the European Council on Refugees and Exiles, may be one example of the strong local (and transnational) NGO network. ECRE is a pan-European network, or, umbrella organization, consisting of 76 refugee-assisting agencies in thirty countries, and is “working towards fair and humane policies for the treatment of asylum seekers and refugees.” (ECRE 2005) International pressure in the area of human rights change usually consists of, according to Risse and Sikkink, “human rights regimes, international organizations, human rights NGOs, and Western powers.” (Risse and Sikkink 1999:19) The particular situation of the EU is that it is not *one* norm violating

state, but a cooperation of twenty-five states where the asylum policies agreed upon are violating basic principles of the Geneva Convention. One problematic aspect is how the Western powers that are usually advocating human rights when it comes to other regions of the world, or even Eastern Europe, in this situation are members of the very same organization (the EU) that, to move forward in the norm socialization process, needs the international pressure which they themselves normally constitute. To explain the lack of progress, one can argue that the pressure from the EU member states upon the EU as an organization, is not sufficiently strong. In the section of 'blocking factors' I further discuss possible explanations for this lack of pressure.

Although domestic opposition and local human rights NGO networks may be strong enough, international organizations or the international human rights regime may not be able to put enough pressure on the European Union, or may not consider the EU asylum policies a prioritized area. The United Nations and the ECOSOC, and in particular the UNHCR, (The Office of the United Nations High Commissioner for Refugees), which was set up in 1951 to prevent refoulement and to in other ways assist asylum seekers, (Human Rights and Refugees, p 12), is currently "the leading global refugee protection agency". (Boccardi 2002:25) However, the UNHCR lacks mandate to enforce its recommendations through binding interpretations. (Boccardi 2002:25) In the EU, this is "partly solved" by the capacity attributed to the EU and its European Court of Human Rights to enforce minimum human rights mechanisms. (Curran 2003:320) The UNHCR has from the start been ascribed the task to advocate the rights of refugees, since they in general have no opportunities to speak for themselves. Article 35 of the Geneva Convention establishes that the contracting states to the Convention are obliged to cooperate with the Office of the United Nations High Commissioner for Refugees and to provide all information and data required for the UNHCR to properly conduct their task of protecting refugees. (25+ Human Rights Documents 2001:65) In the region of the European Union, the UNHCR is supplemented by a number of regional NGOs and international organizations, all with the intentions to protect the rights of refugees and compel the member states of the EU to respect human rights.

The effectiveness of the UNHCR as an advocate of refugees, or in supervising the signatories' compliance with the Geneva Convention "continues to be limited by its forced dependence on the willingness of States to provide the agency access and sufficient funding for its operations." (Clancy 2001) Boccardi argues that "one of the most pressing challenges of future international refugee protection would no doubt be the reform of the UNHCR's mandate." (Boccardi 2002:19) Moreover, Hathaway draws attention to alternative mechanisms to the UNHCR and points to "the implementation in the 1970s of a range of United Nations Human Rights Committees which are external to states." (Curran 2003:321-322) Hathaway further argues that also refugee law requires committee supervision in line with "the practice of human rights law more generally." (Curran 2003:321-322) Arguably, unless the effectiveness of the UNHCR is improved or any alternative mechanism is established to effectively persuade the European Union to act in accordance with its moral commitments, the moving into the fifth phase of 'rule-consistent behavior' may not occur within any foreseeable future.

### 5.3 ‘Societal openness’

The extent of ‘societal openness’, which obviously corresponds to the ‘discursive practices’ of the European Union as discussed in section 4.1.3, may further explain the effectiveness of the norm socialization process. The lack of sufficient possibilities for “... the participation of norm entrepreneurs in decision-making debates”, necessarily lead to the failure of these actors to change policies regarding the protection of refugees. (cf. Cortell and Davis 2005:23) Also Risse and Ropp argue that network socialization works particularly well in regions where the culture and the institutions are, “responsive to and can accommodate some meaningful degree of internal debate and external influence.” (Risse and Ropp 1999:263)

As discussed earlier, it is difficult to establish to what extent the EU decision-making bodies today take into account criticism directed towards the asylum policies. The lack of compliance with the norm of refugees’ rights does however point to a failure from the part of the EU Commission and Council to sufficiently include human rights norm entrepreneurs in their policy formulating debates. A historical review of the development of asylum policies in the European Union reveals undemocratic and closed intergovernmental meetings to which the European Commission, the Parliament and NGOs, had no access; and institutional legacies from this time may explain the difficulties to fully implement the human rights norm today (further discussed in section 5.4.1). However, after the Treaty of Amsterdam and the 1999 Tampere Presidency Conclusions, most of the cooperation on asylum issues moved from the “third pillar” of intergovernmental cooperation to the “first pillar” of supranational cooperation, which makes possible a more democratic and inclusive style of decision-making since the asylum policy now is part of the European Union, and not outside the formal EU structure. (cf. Lavenex 2001:107) As argued in section 4.1.3, more room for debate between the EU and its critics *has* been provided for since the Tampere Presidency Conclusions and the move from the intergovernmental towards a supranational mode of cooperation. However, 2004 is the earliest year when major organizational changes can occur, and during the transitional period, 1999-2004, “crucial intergovernmental elements are being maintained”, (Lavenex 2001:127), hampering the possibilities of democratic scrutiny and the extent to which advocates of refugees’ rights are able to affect the asylum policy formulation process. The fact that merely six years have passed since the change of mode of cooperation was established, may explain the lack of rule-consistent behavior with the refugee norm. More time may be needed to develop more inclusive decision-making bodies where external voices advocating the rights of refugees are given opportunities to put pressure on the Commission and Council to also in practice comply with the norm of refugees’ rights.

## 5.4 ‘Blocking Factors’

In addition to the explanations discussed in previous sections, ‘blocking factors’ may make a contribution to explaining the “delayed” implementation of the norm of refugees’ rights at EU level, and why the EU is not, yet, behaving in a fully rule-consistent manner.

According to Risse and Ropp, “popular nationalism and nationalist undercurrents,” are examples of ‘blocking factors’ or blocking phenomena imposing “severe limitations on the effectiveness of human rights socialization processes.” (Risse and Ropp 1999:261) For example, in East Timor, “[f]rom 1976 through 1991, network effectiveness was limited by countervailing national norms and value structures which emphasized sovereignty and domestic cohesion more than human rights principles.” (Risse and Ropp 1999:261) To some extent the situation of the EU is comparable to this example: racism and xenophobia gained ground in the EU member states in the 1980s and 1990s, which have arguably been evident in arguments proposing stricter EU immigration policies, and which have consequently hampered the effectiveness of the human rights socialization process. In addition, and connected to the norm of xenophobia, security concerns have, from the early cooperation on asylum issues in the 1980s and onwards, arguably been the focus of the common EU asylum and migration policies, and have since the 2001 terrorist attacks in the USA become even more prominent in the European Union. The perceived threat of ‘uncontrollable migration flows’ to the safety of the EU member states degrades in practice the norm of refugees’ rights to an issue of secondary priority. The fact that the development of the EU asylum policies has largely taken place in an intergovernmental forum consisting of the Interior ministers of the member states’, arguably explains how national norms of xenophobia and securitization have been able to influence present EU asylum policies, and thus hamper the work of human rights advocates to enforce compliance with the human rights norm. The next sub-section explores the specific ‘blocking factors’ of xenophobia and security.

### 5.4.1 Xenophobia and Security

Norms of xenophobia and the perceived threats to the internal security of the European Union and its member states are inextricably linked, and have since the terrorist attacks in the USA (September 11<sup>th</sup> 2001) and Spain (March 11<sup>th</sup> 2004) gained ground, as evident in recent policy proposals affecting asylum and migration. One week after the September 11<sup>th</sup> attack, the extraordinary Justice and Home Affairs Council meeting asked the Commission “... to examine urgently the relationship between safeguarding

internal security and the complying with international protection obligations and instruments [COM (2001) 743 final].” (Levy 2003:7) Moreover, a Commission Working Document from December 5<sup>th</sup>, 2001, encouraged member states to “scrupulously and rigorously’ apply the exclusion clauses contained in Article 1(F) of the Geneva Convention in order to prevent persons suspected of terrorist acts from seeking asylum.” (Levy 2003:8) On 27 December 2001, a Council Common Position on Combating Terrorism (2001/931/CFSP), “required that Member States investigate refugees and asylum seekers ‘for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts.” (Levy 2003:8, Statewatch 2002)

Observing under what conditions the EU asylum and migration policies have developed, further explains the influence of the norms of security and xenophobia, and its ‘blocking’ effects on the socialization of the norm of refugees’ rights today. As explained earlier, the early cooperation on asylum and migration issues took place in intergovernmental meetings under the Schengen Group and Ad Hoc Group on Immigration, originally established to deal with a new European Union without inner borders (due to the Single Market project). The member states’ Interior Ministries were the main characters in the play and they were naturally concerned with state sovereignty and the security situation of their states. Asylum seekers and refugees were in this context perceived as a ‘problem’ or a ‘burden’ and a potential danger to the inner security of the state, and hence, the early Schengen Agreement<sup>6</sup> and the 1990 Dublin Convention<sup>7</sup> generated a comprehensive system of regulations for the admittance and refusal of migrants, which also affected asylum seekers and refugees, and established which state was responsible for examining an asylum application lodged in one of the EU member states. Many provisions applied, without discrimination, to both refugees and illegal immigrants, while no mention was made to improve protection standards in Europe. (Lavenex 2001:96-97)

National sentiments of xenophobia reinforced the perceived threats of ‘uncontrollable migration flows’ to the national security since the fall of the Iron Curtain in 1989, as well as “...the persistence of ethnic and political conflicts all over the world, [and] growing economic disparities” (Lavenex 2001:2), generated large amounts of asylum seekers. Consequently, “[t]he popularity of extreme right-wing parties, who blamed foreigners for rising unemployment, violent crime, and other forms of social malaise, rose sharply in the early 1990s.” (Vachudová 2000:156) The National Front in France, the Freedom Party in Austria and ‘New Democracy’ [Ny Demokrati] in Sweden, are only a few examples of such parties. (Ny Demokrati, 2005) To be able to deal with the “crisis of xenophobia” without undermining democracy, and to neutralize the extreme right, leaders of mainstream parties adopted “... some of the rhetoric of the

---

<sup>6</sup> The Schengen Agreement (1990) is a Convention applying the Schengen Agreement of 14 June 1985 between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the gradual abolition of checks at their common borders (Bunyan 1997:110)

<sup>7</sup> Convention determining the State responsible for examining Applications for Asylum lodged in one of the Member States of the European Communities (Dublin, 15 June 1990), (Bunyan 1997:49)

extreme right.” (Vachudová 2000:156) Arguably, however, the mainstream parties legitimized at the same time the xenophobic political discourse. (Vachudová 2000:156)

The constitutive effect of the norms of securitization and xenophobia is evident when observing the many border control mechanisms developed during the 1990s. Among the control mechanisms utilized in the EU, the visa policies have the strongest impact on the possibilities of refugees’ to reach the EU and hence receive protection. (cf. Noll 2000:476-479) The establishment of common visa policies and mechanisms, developing from 1995 and onwards at the EU level, not as directives but as ‘regulations’<sup>8</sup>, indicates how entrenched the security norm promoting stricter asylum and migration policies is. On the contrary, the mechanisms established in the European Council to create a Common European Asylum System, which aims to protect refugees (such as the Procedure Directive), are mainly ‘directives.’<sup>9</sup> (cf. Cars 2004:33) Evidently, the urge among member states to rapidly establish mechanisms to restrict immigration flows and the number of asylum applicants, is strong, and this is further apparent in the extended ‘visa policy regime’ proposed by the Commission in 2004. (COM 2004/99 and COM 2004/4002 final, p 9) Further, the earlier discussed draft Procedure Directive exemplifies the conflicting norms in the EU asylum and migration policy. On the one hand, the proposed list of ‘safe countries’ arguably undermines the norm of non-refoulement, and on the other hand, it restricts the inflow of migrants and asylum applicants to the European Union. Moreover, the ratification of the Procedure Directive is the last step towards the establishment of the Common European Asylum System, and the failure to agree upon its content points to the conflicting norms prevailing in this policy area.

Due to the perceived threat to inner security and sentiments of xenophobia, refugees and asylum applicants were in the early cooperation on asylum and migration issues perceived, as already mentioned, as a ‘problem’ and a ‘burden’, and this framing of refugees and asylum applicants is *today* still evident in the European Union policies. (cf. Lavenex 2001:75) The asylum issue is often mentioned in the same sentences as ‘control’ and ‘crime’, as apparent on the website of the Council of the EU stating that its main objective is to develop the EU into “... an area of freedom, security and justice, in which there would be free movement for persons combined with suitable measures pertaining to the control of external borders, asylum, immigration, as well as the prevention and combating of crime.” (The Council of the European Union, 2005) Thus, norms of xenophobia and the context of securitizing the European Union, in which the asylum policies developed as a side issue, may explain the slowing down of the process of fully implementing human rights norms in the asylum policy area.

In addition, despite the Treaty of Amsterdam and the moving of the asylum and migration issues towards the first pillar of ‘supranational’ cooperation in the

---

<sup>8</sup> Regulations are “directly applicable in all Member States and [do] not need to be transposed into domestic law.” (A Constitution for Europe, 2005)

<sup>9</sup> Directives “lay down the results to be achieved, but leaves it to the Member States to choose the measures to be taken to achieve these results within a given time limit.” (A Constitution for Europe, 2005)

establishment of a Common European Asylum System, and despite "... a substantial Communitarization of major elements of their justice and home affairs" (Monar and Wessels 2001:2-3), the member states have been reluctant to completely let go of their national control of these important issues. Thus, intergovernmental elements have been transferred to the Council of Justice and Home Affairs, which enables the "national" norms of "xenophobia and securitization" to directly influence the asylum policy making. The most prominent legacy from the purely intergovernmental cooperation on asylum issues is the unanimity voting in the decision-making Council. (cf. COM 2004/4002 final, p 4-5) Unanimity voting in the Council is the greatest obstacle for the Commission to propose directives or regulations favorable to the rights of refugees and asylum seekers; on the one hand, the Commission holds a "sceptical attitude towards the restrictive approach of the Schengen and Dublin Conventions", and on the other hand, in order to maximize the chances for policy adoption, it is reactive and "cautious of the member states' reluctance towards deeper harmonization and high standards of refugee protection." (Lavenex 2001:125) Since the members of the decision-making Council of Justice and Home Affairs is made up by national ministers of Interior and Justice, (The Council of the European Union, 2005), this style of voting normally favors policies regulated by the norms of xenophobia and securitization, and restrict immigration and refugees' rights to protection. According to Lavenex, "[t]his dominance of national interior ministries has greatly contributed to the framing of the asylum question as an issue of internal security rather than human rights in the EU context." (Lavenex 2001:128) Hence, the construction of the decision-making Council, as also discussed in the section of 'societal openness', is enabling national norms of xenophobia and securitization to hamper the process of implementing the norm of refugees' rights.

Despite merely pointing out a few examples, I have demonstrated the complex mix of intergovernmental and supranational cooperation on asylum and migration issues in the European Union, and identified several conflicting norms. Despite the 'prescriptive status' of the norm of refugees' rights in the European Union, a rule-consistent behavior is not yet obtained. At the same time as the EU endorses the human rights norm, and arguably fits into the fourth phase of 'prescriptive status', it also pursues a strict migration policy negative to the safety of refugees'. The clashing norms of refugees' rights and xenophobia and securitization are all manifest in EU asylum policies such as the Procedures Directive, where the rights and safety of refugees' still appear to have a status of second priority. Thus, for a proper norm socialization process to take place, these identified 'blocking factors' need to be removed.

## 5.5 Chapter Conclusions

In this chapter I have discussed several possible explanations to the European Union's

failure to fully comply with the Geneva Convention and the norm of refugees' rights to protection. Arguably, what is missing in the socialization process of the human rights norm is the continued pressure from international organizations and powers, such as the UNHCR and the member states of the European Union. Since the criteria pointing to norm implementation are only just fulfilled, as discussed in chapter four, further dialogue, persuasion and institutionalization of the norm is apparently needed in order to remind the European Union of its moral and normative commitments, and to further change practices and move the EU to the phase of rule-consistent behavior. The specific circumstances of analyzing not one state but a cooperation of twenty-five states, caused me to place emphasis on the impact of the specific European context in which the norm socialization process takes place. Thus, 'world time', 'societal openness' and 'blocking factors,' such as xenophobia and securitization were helpful in further shedding light on the "delayed" implementation of the norm of refugees' rights into the present EU asylum policies. As Cortell and Davis argue (Cortell and Davis 2005:7), the spiral-model in itself does not explain the specific circumstances in which transnational actors and norm entrepreneurs actually have an impact, and hence leaves out explanations for why time and scope of the implementation may differ. Further, I dedicated much space to the discussion on 'blocking factors,' since they by definition slow down the compliance with the norm of non-refoulement. The hampering impact of the contextual factors of undemocratic and secretive decision-making institutions, as also discussed in the section of 'societal openness', and these institutions' particular constitution of the member states' Interior ministers arguably enable the continued influence of "national norms" of xenophobia and securitization. Despite Risse and Ropp arguing that 'blocking factors' demonstrate a regime being in a phase of 'denial' or 'tactical concession' (Risse and Ropp 1999:262), I claim that they may also hinder the last step of norm implementation when a regime already is in a phase of 'prescriptive status.' Evidently, the fit, or resonance with domestic norms regarding the specific issue area, is crucial for the successful implementation of an international norm. (cf. Risse and Ropp 1999:272)

In addition to restructuring EU decision-making bodies and institutions, to ensure the moving of the European Union into the phase of rule-consistent behavior with the refugees' rights norm, what is needed is, arguably, better information campaigns on the "... roots of persecution and the relative insignificance of overall refugee numbers in the EU compared to world figures." (Boccardi 2002:212) NGOs as well as the media have a great task in informing the public and forming opinion in order to avoid protectionism, racism and xenophobia. (Curran 2003:317-318) According to the spiral-model, the causal mechanism characterized by "processes of moral consciousness-raising, argumentation, dialogue, and persuasion" (Risse and Sikkink 1999:5), is crucial in order to move the EU towards the final phase of full compliance with the human rights norm. In fact, work is continuously being done within the European Union to *change perceptions* of migrants and refugees as "threats" to internal security. And to this end, in 2004 the Commission proposed to extend the already existing European monitoring Centre on Racism and Xenophobia to become a Human Rights Agency with

larger mandate. (COM 2004/4002 final, p 8)

The constant processes of dialogue and persuasion is particularly important after the terrorist attacks in the USA and Spain, as evident when the Commission and the Council openly contradicted refugees' rights to protection to the inner security of the EU. (Levy 2003:7) If the EU does not constantly work to reach compliance with the norm of refugees' rights and to remove the blocking national norms, it may well reduce to a phase of tactical concessions, even further from the goal of the norm socialization process. However, even in the aftermath of the terrorist attacks, there are events pointing to the still highly valid norm of refugees' rights, when, for example, member states before adopting a policy involving asylum seekers asked for the "... blessing of Ruud Lubbers, UNHCR High Commissioner." (Levy 2003:24-25) Moreover, the Commission answers in a communication to criticism regarding the EU overemphasizing security aspects in the aftermath of the terrorist attacks, and argues that the policies in the "area of freedom, security and justice" *are* based on the concept of the protection of fundamental rights. (COM 2004/4002 final, p 4) Despite also emphasizing the importance of security measures in this statement, the willingness of the European Union to engage in a dialogue with its critics is a typical sign of a norm having, at least, 'prescriptive status.'

## 6. CONCLUDING REMARKS

The main purpose of this thesis is to explore the process of implementation of international norms into local contexts, and particularly how well the Geneva Convention is implemented and complied with in the European Union's emerging common asylum policies. In order to get an insight into the world of norms and their importance, I have employed a social constructivist approach. In applying the spiral-model of human rights change developed by Risse, Ropp and Sikkink, I have sought to describe and explain the extent to which the Geneva Convention is complied with, and moreover, to find plausible explanations to the suggested discrepancy between norm and practice. I have found the spiral-model useful in establishing to what extent the Geneva Convention is implemented in the EU policies, since the process of norm implementation in the model is operationalized into observable mechanisms and processes. In applying the spiral-model and in considering the contextual factors particular to the European Union, I have suggested that the European Union is not yet fully complying with the Geneva Convention and the norm of refugees' rights. Moreover, I have proposed several factors causing this "delayed" implementation of the refugees' rights norm, such as the lack of sufficient transnational and international pressure exerted upon the European Union, secretive and undemocratic decision-making bodies as well as the significance of their particular constitution of members, and conflicting "national" values and norms. The mix of intergovernmental and supranational elements in the area of the EU asylum policies may explain why the Geneva Convention has prescriptive status, at the same time as "national" values and norms largely influence the common asylum policies and thus prevent the full compliance with the norm of refugees' rights. Further, the largely overlooked factor of 'time' may contribute to explaining the not yet rule-consistent behavior, given that merely six years have passed since the decision to build a Common European Asylum System was taken.

The spiral-model of human rights change provides a comprehensive approach to observing and explaining the norm implementation process, however, some aspects need more research in order to increase its explanatory power. To fully understand the processes of argumentation and socialization, and how international norms change behavior, Checkel (2001:560) suggests the importance of incorporating knowledge from research carried out in the fields of psychology and communication. To further investigate the communicative processes taking place between individuals and state actors resulting in new preferences and behavior, would increase the spiral-models' applicability. This thesis does not contribute to research of that kind and has merely

focused on the mechanisms of the norm socialization process and the criteria already provided by the spiral-model to establish norm compliance.

Furthermore, the spiral-model has been criticized for only explaining that “transnational actors matter”. (Davis and Cortell 2005:7) Therefore, I have in addition to attempting to prove the importance of these actors and communicative processes also been observing other norm entrepreneurs as well as several specific circumstances conditioning their impact. The results pointing to the importance of factors such as the constitution of the decision-making EU institutions as well as their ‘openness’ to external influence, and the fit/clash with national norms in order for the international norm to be fully implemented, calls for more extensive research. Thus, to further investigate the EU member states’ national normative contexts and their influence upon the common EU asylum policies would be fruitful. Another area of research could be to explore the impact of the ‘norms operating at the fundamental level’ on the prevalence or selection of a certain norm, and this could possibly further explain why the norm of refugees’ rights is not yet fully complied with. (cf. Bernstein 2000:483) In this thesis I have merely pointed to and suggested possible factors which are important when explaining the extent of the implementation of the Geneva Convention into the common EU asylum policies, and further research is needed to fully investigate their explanatory values.

Last of all, the prospect of enhanced refugee protection in the European Union is encouraging. Primarily, because the European Union has begun to institutionalize the norm of refugees’ rights into its common asylum policies, which is a precondition for full implementation. (Risse and Ropp 1999:248) Also, in arguing that human rights advocates or “transnational actors matter” to the changing of norms and behavior, the prediction of a future where greater compliance with the Geneva Convention and the norm of refugees’ rights to protection is a reality, is not far-fetched.

# REFERENCES

- Acharya**, Amitav, 2004. "How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism" in *International Organization*, Vol. 58, spring 2004, pp. 239-275
- Bergström**, Göran – Boréus, Kristina, 2000. *Textens mening och makt. Metodbok i samhällsvetenskaplig textanalys*. Lund: Studentlitteratur
- Bernstein**, Steven, 2000. "Ideas, Social Structure and the Compromise of Liberal Environmentalism" in *European Journal of International Relations*, Vol. 6, No. 4, pp. 464-512
- Bjereld**, Ulf – Demker, Marie – Hinnfors, Jonas, 1999. *Varför vetenskap?* Lund: Studentlitteratur
- Björkdahl**, Annika, 2002. "Norms in International Relations: Some Conceptual and Methodological Reflections", in *Cambridge Review of International Affairs*, Vol. 15, No. 1, pp. 9-23
- Boccardi**, Ingrid, 2002. *Europe and Refugees: Towards an EU Asylum Policy*. The Hague: Kluwer Law International
- Bunyan**, Tony, 1997. *Key Texts on justice and home affairs in the European Union: Volume 1 (1976-1993) From Trevi to Maastricht*. Nottingham: Statewatch publication
- Checkel**, Jeffrey T., 2001. "Why Comply? Social Learning and European Identity Change" in *International Organization*, Vol. 55, No. 3, pp. 553-588
- Cortell**, Andrew P. – Davis, James W., 2005. "When Norms Clash: International Norms, Domestic Practices, and Japan's Internalisation of the GATT/WTO", in *Review of International Studies*, Vol. 31, pp. 3-25
- Curran**, Liz, 2003. "Global Solutions" in *The Refugees Convention 50 Years On: Globalization and International Law*, Kneebone, Susan (ed.). Aldershot: Ashgate
- Finnemore**, Martha – Sikkink, Kathryn, 1998. "International Norm Dynamics and Political Change" in *International Organization*, Vol. 52, No. 4, pp. 887-917
- Goodwin-Gill**, Guy S., 1996. *The Refugee in International Law*. Oxford: Clarendon Press
- Green**, Daniel M., 2002. *Constructivism and Comparative Politics*. Armonk, N.Y.: M.E. Sharpe

**Hedlund**, Thulin, Kristina, 1996. *Lika i värde och rättigheter: om mänskliga rättigheter*. Stockholm: Norstedts Juridik AB

**Human Rights and Refugees**, Fact Sheet No. 20. Geneva: United Nations, Centre for Human Rights

**Humphrey**, John P., 1984. *Human Rights and the United Nations: A Great Adventure*. Dobbs Ferry, NY: Transnational Publishers

**Jönsson**, Kristina, 2002. "Translating Foreign Ideas into Domestic Practices: Pharmaceutical Policies in Laos and Vietnam", Ph.D. Thesis at Lund university, Department of Political Science

**Kana**, Espérance, ECRE EU Office, 17-02-2005, private e-mail conversation

**Katzenstein**, Peter J., 1996. *Cultural Norms and National Security. Police and Military in Postwar Japan*. Ithaca, NY: Cornell University Press

**Krasner**, Stephen D., 1993. "Sovereignty, Regimes, and Human Rights" in *Regime Theory and International Relations*. Rittberger, V. – Mayer, P. (eds.) Oxford: Oxford University Press

**Lavenex**, Sandra, 2001. *The Europeanization of Refugee Policies: Between human rights and internal security*. Aldershot: Ashgate

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

**Levy**, Carl, 2003. "The European Union after 9/11: The Demise of a Liberal Democratic Asylum Regime?", National Europe Centre Paper No. 109, Panel 9-8, EU Migration and Refugee Policy: After Tampere, Fortuyn and Le Pen – Where Next? Political Studies Association 53<sup>rd</sup> Annual Conference, University of Leicester, 15<sup>th</sup> – 17<sup>th</sup> April 2003

**Lundquist**, Lennart, 1993. *Det vetenskapliga studiet av politik*. Lund: Studentlitteratur

**Mearsheimer**, John, 1994/1995. "The False Promise of International Institutions" in *International Security*, Vol. 19, No. 3, pp. 5-49.

**Monar**, Jörg – Wessels, Wolfgang, 2001. *The European Union after the Treaty of Amsterdam*. London: Continuum

**Noll**, Gregor, 2000. *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*. The Hague: Martinus Nijhoff Publishers

**Oxford American Dictionary**, 1980. New York: Avon Books

**Risse**, Thomas – Ropp, Stephen C, 1999. “International human rights norms and domestic change: conclusions” in *The Power of Human Rights: International Norms and Domestic Change*, Risse, Thomas – Ropp, Stephen C. – Sikkink, Kathryn, (Eds.), Cambridge: Cambridge University Press

**Risse**, Thomas – Sikkink, Kathryn, 1999. “The socialization of international human rights norms into domestic practices” in *The Power of Human Rights: International Norms and Domestic Change*, Risse, Thomas – Ropp, Stephen C. – Sikkink, Kathryn, (Eds.), Cambridge: Cambridge University Press

**Shestack**, Jerome J., 1998. “The Philosophic Foundation of Human Rights” in *Human Rights Quarterly*, Vol. 20, No. 2, pp. 201-234

**Vachudová**, Milada Anna, 2000. “Eastern Europe as Gatekeeper: The Immigration and Asylum Policies of an Enlarging European Union” in *The Wall Around the West: State Borders and Immigration Controls in North America and Europe*, Andreas, Peter – Snyder, Timothy (Eds.), Lanham: Rowman & Littlefield Publishers, Inc.

**Wendt**, Alexander, 1995. “Constructing International Politics,” in *International Security*, Vol. 20, No. 1, pp. 71-81

**Yin**, Robert K., 2003. *Case Study Research, Design and Methods*. Thousand Oaks: Sage Publications

**25+ Human Rights Documents**, 2001. Center for the Study of Human Rights, Columbia University

## PUBLISHED ON THE INTERNET

**Cars**, Emma, 2004. “Beslutsprocesser i Europeisk Migrations- och Asylpolitik: Rättighets- och kontrollrelaterad politik.” Magisteruppsats, Stockholms universitet, 2004, <http://www.paraplyprojektet.se/upload/Emmas%20magisteruppsats.doc>

**Clancy**, Deirdre, 2001, “Talk Back, The Newsletter of the International Council of Voluntary Agencies (ICVA)”, Volume 3-5, 1 October 2001, <http://www.icva.ch/cgi-bin/browse.pl?doc=doc00000432#hathaway>

**A Constitution for Europe**, 2005, “A Constitution for Europe, The Union’s founding principles, The legal acts”, [http://europa.eu.int/scadplus/constitution/legislation\\_en.htm](http://europa.eu.int/scadplus/constitution/legislation_en.htm), downloaded 16-02-2005

**The Council of the European Union**, 2005  
[http://ue.eu.int/cms3\\_fo/showPage.asp?id=249&lang=en](http://ue.eu.int/cms3_fo/showPage.asp?id=249&lang=en)

**DG JHA**, 2004, “The Creation of a Common European Asylum System, The Amsterdam Treaty and beyond”, 1 April 2004, [http://forum.europa.eu.int/irc/Download/k5eGAhJVmdGBd47\\_XHqpbpEr0Xk0rCV7VuK8RIddfevnG6BtAYot5Gb5Yv-/1](http://forum.europa.eu.int/irc/Download/k5eGAhJVmdGBd47_XHqpbpEr0Xk0rCV7VuK8RIddfevnG6BtAYot5Gb5Yv-/1)

**Directorate-General for Justice, Freedom and Security**, 2005, [http://europa.eu.int/comm/justice\\_home/fsj/asylum/fsj\\_asylum\\_intro\\_en.htm](http://europa.eu.int/comm/justice_home/fsj/asylum/fsj_asylum_intro_en.htm)

**ECRE**, 2005, <http://www.ecre.org/>

**ECRE**, 2004, “Broken Promises – Forgotten Principles: An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection, Tampere 1999 – Brussels 2004”, June 2004, [http://www.ecre.org/positions/Tampere\\_June\\_04.shtml](http://www.ecre.org/positions/Tampere_June_04.shtml)

**ECRE**, 2003a, “Summary Comments from the European Council on Refugees and Exiles on the Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status”, <http://www.ecre.org/statements/apcsummapr03.shtml>

**ECRE**, 2003b  
[http://europa.eu.int/comm/justice\\_home/news/events/conference\\_erf/ecre\\_en.pdf](http://europa.eu.int/comm/justice_home/news/events/conference_erf/ecre_en.pdf)

**The European Commission**, 2005  
[http://europa.eu.int/comm/justice\\_home/fsj/asylum/fsj\\_asylum\\_intro\\_en.htm](http://europa.eu.int/comm/justice_home/fsj/asylum/fsj_asylum_intro_en.htm)

**The European Commission**, 2004  
[http://europa.eu.int/comm/justice\\_home/news/intro/wai/news\\_0404\\_en.htm#30-04-04](http://europa.eu.int/comm/justice_home/news/intro/wai/news_0404_en.htm#30-04-04)

**The European Commission**, 2003  
[http://europa.eu.int/comm/justice\\_home/news/intro/news\\_0303\\_en.htm#26-03-03](http://europa.eu.int/comm/justice_home/news/intro/news_0303_en.htm#26-03-03)

**Hathaway**, James C., 2001, “Talk Back, The Newsletter of the International Council of Voluntary Agencies (ICVA)”, Vol. 3-5, 1 October 2001, <http://www.icva.ch/cgi-bin/browse.pl?doc=doc00000432#hathaway>

**Human Rights Watch**, 2005, <http://www.hrw.org/campaigns/migrants/>.

**Joint Letter**, 2004, “Call for withdrawal of the Asylum Procedures Directive”, signed by ECRE, Amnesty International EU Office, Human Rights Watch, Caritas Europa, Churches Commission for Migrants in Europe, ILGA Europe, Quaker Council for European Affairs, Mediciens sans Frontiers, Pax Christi International & Save the Children, March 22, 2004, <http://hrw.org/english/docs/2004/03/22/eu-letter032204.pdf>

**Ny Demokrati**, 2005, <http://www.nydemokrati.se/>

**Presentation of the EU Constitution**, 2004,  
[http://europa.eu.int/constitution/download/presentation\\_citizens\\_010704\\_en.pdf](http://europa.eu.int/constitution/download/presentation_citizens_010704_en.pdf)

**Statewatch**, 2004, “EU divided over list of ‘safe countries of origin’ – the list should be scrapped”, press release 27 September 2004,  
<http://www.statewatch.org/news/2004/sep/07safe-countries-prel.htm>

**Statewatch** 2002, analysis no 8, “New EU measure on terrorism criminalizes all refugees and asylum-seekers”, <http://www.statewatch.org/news/2002/jan/refugee.pdf>

## EU DOCUMENTATION

**COM 2004/4002 final**, “Communication from the Commission to the Council and the European Parliament: Area of Freedom, Security and Justice: Assessment of the Tampere Programme and future orientations” {SEC(2004)680 et SEC(2004)693}, Brussels, 2.6.2004

**COM 2004/99** (12 February, 2004) “Commission Proposal for Decision Establishing Common Visa Information System”

**COM 2002/326** (18 June, 2002) Commission of the European Communities, “Amended Proposal for a Council Directive on Minimum Standards on Procedures in Members States for Granting and Withdrawing Refugee Status”

**COM 2000/578** (20 September, 2000) Commission of the European Communities, “Proposal for a Council Directive on Minimum Standards on Procedures in Members States for Granting and Withdrawing Refugee Status”

**EC 8771/04 Agreed Text** (30 April, 2004) Council of the European Union, “Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status”

**Tampere European Council**, 1999, Presidency Conclusions, The European Council in Tampere, 15-16 October, 1999

**2579<sup>th</sup> Council meeting**, 2004, 29-04-2004, pp. 9-10, regarding the draft Directive (COM (2000) 578) ‘Minimum standards on procedures in member states for granting and withdrawing refugee status,’ PRES/2004/123/