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**Refugee Protection in the
Framework of the Common
European Asylum System**

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Summary

The foundation of International Refugee Law was laid down in the early 1950s by the creation of the UNHCR and the Geneva Convention of July 28 1951 Relating to the Status of Refugees (hereinafter the Geneva Convention) and its 1967 Protocol Relating to the Status of Refugees. Refugees and asylum seekers are not only protected through the relatively limited refugee law but also through general human rights instruments. The most significant Convention in Europe is the European Convention on Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter the ECHR). The Member States are committed to the ECHR and the 1951 Geneva Convention, which are binding instruments under international law. These instruments are the legal framework for community action in the field of asylum and policy.

Western Europe saw a great number of protection seekers to and within it since 1985. After a decade of steady growth, the number of asylum applications took a sharp turn upwards at the end of eighties. Within the EC, applications increased almost tenfold in the period between 1985 and 1992. The peak of protection claims in 1992 was unprecedented in the post-war period: almost 700 000 protection seekers sought refugee in European countries. Statistics show that the vast majority of protection seekers originated from European countries, one of the main causes being the conflict in Former Yugoslavia.

Western European began to reinforce and to diversify multilateral institutions seized with migration and protection issues. Western Europeans put the asylum issues into the European integration process.

Steps by steps, the European integration moved from the so-called 1985 White Paper, the Schengen process, the Maastricht Treaty and, the Treaty of Amsterdam and, finally the Convention for Europe. It is not easy to catch the European integration because it is a complex thing. I am not going into details about all these European instruments. I am going to focus on various fundamental changes brought by the Amsterdam Treaty. The latter entered into force on May 1999 and presently governs the multilateral co-operation on asylum and immigration in the Union.

The establishment of a Common European Asylum System (CEAS) has become a priority in the European Union. This priority has its legal base in the Treaty of Amsterdam, which moved the issue of asylum from the third pillar to the first pillar where EU institutions play a prominent role. The fundamental change brought about by the Amsterdam Treaty is that influential tools of Article 251 EC Treaty, such as regulation, directives and decisions, are available to use for harmonising EC asylum policy. Protocols to the Treaty give the UK, Ireland and Denmark possibility to “opt out” of participating in these measures. The ability to “opt out” means that adopted

measures or interpretative decisions in the area of asylum, immigration and visa does not apply to them.

My work focuses on the development of a Common European Asylum System. It explains and examines the progress that has been made until recently in agreeing two pieces of the EU law that will make up the first phase of the CEAS: the Asylum Qualification Directive and the Asylum Procedures Directive.

Article 63(1c) EC Treaty obliges the Council to adopt minimum standards with respect to the qualification of third country nationals as refugees. The Asylum Qualification Directive has been adopted and consists only of minimum standards, which means that the Member States can have more liberal rules on the definition of refugees. This is contrary to the idea of a harmonised refugee definition under the 1951 Geneva Convention in Community law. It is difficult to see how agreements can be reached on the other directives without deciding whom they apply to.

The aim of the harmonization is to ensure that laws and policies of the Member States are harmonized to provide a minimum level of protection to persons determined to be Convention refugees or beneficiaries of subsidiary protection and prevents refugee flows to certain Member States based solely on differing levels of protection in their legal framework.

The Asylum Procedures Directive lies in the heart of the asylum system. The final provisions are still under discussion. The text represents improvements of procedures standards in some areas, but still allows for practices which put refugees in danger, hence, safe country of origin, safe third country practice and accelerated procedures with insufficient legal and procedure safeguards to prevent refoulement are all allowed. At this level, the European Union diverts from international principles such as the principle of non-refoulement, *inter alia*, when it comes to the extensive possibilities to derogate from the principle of suspensive effect of appeals, allowed under the Asylum Procedures Directive, and in some certain cases of border procedure where no minimum principles or guarantees appear to apply and access to the asylum procedure can be denied altogether.

The purpose of this thesis is to analyse the impact of the CEAS on refugee protection in Europe. More specifically, this work highlights the relation between domestic asylum reform and European co-operation and investigates the real scope for a Common European Asylum System in France.

I have chosen France as a country, which applies a very restrictive asylum policy. France interprets very restrictively the “agents of persecution” and adopts the concepts of “safe country of origin”, “internal asylum”, and implements the simplified procedures in “manifestly unfounded” cases and detains the protection seekers in administrative retention centres. As regard the procedures, the asylum applications do not require a personal interview

with an applicant and a negative decision allows for an immediate execution of the expulsion order.

As far as appeals are concerned, they can be lodged, but they have no suspensive effect and have to be made outside the territory. Although the question of asylum seekers from the so-called “ safe countries of origin” in accordance with the 1992 London Resolutions is not addressed in the French law, accelerated procedures have been adopted by the OFPRA, which effectively implements these Conclusions.

The Schengen and Dublin Conventions and the 1992 London Resolutions marked a radical change in the French domestic asylum policy. The implementation of these European instruments occurred in the form of highly symbolic 1993 constitutional reform of the right to asylum.

The effects of the Schengen /Dublin Conventions and the London Resolutions on the system of the refugee protection in France have been three-fold:

- (1) Asylum policies have moved closer to the field of immigration control and asylum seekers have been increasingly subsumed under instruments aimed at the fight against illegal immigrants.
- (2) The impact of the executive and particularly the interior ministry on the asylum system has been strengthened *vis-à-vis* the traditional agencies in charge of the asylum procedure;
- (3) The impact of the judicial on the asylum procedure has been weakened.

The analysis of legislative measures that France has adopted so far regarding the common definition and the criteria for qualification as a refugee and the standards of asylum procedures gives a mixed picture of the governmental policy *vis-à-vis* the European Common Asylum System.

Now, there is a big discussion in the French Senate on a new right of asylum. The bill on a new right of asylum contains many changes that reflect a clear Europeanization of French refugee protection. It appears that the provisions of the EU Asylum Qualification Directive inspire the French bill on a new right of asylum.

The provisions in these Directives are only minimum rules, but even minimum rules need to be interpreted in a uniform way. The Treaty of Amsterdam has accredited the ECJ to interpret and rule on the validity of Community instruments adopted in the field of asylum. The question of uniform harmonisation of the refugee definition will be one of the most important elements of the European harmonisation process where the ECJ will have an important role through its binding interpretations of Community rules.

The most important work of the ECJ is its jurisdiction to give “ preliminary rulings” under Article 234 EC treaty.

The question can be raised whether the existing procedure established by the Amsterdam Treaty is adequate enough to provide for an efficient judicial review of an individual's rights in asylum matters.

The Asylum Qualification Directive and the Asylum Procedures Directive are not compatible with International Refugee Law and Human Rights Law.

Asylum Community Law must be based on the various international obligations affecting the EU in the areas of General International Law, International Law on Human Rights and Refugee Law. Specifically, those EU Directives must follow the provisions contained in the 1951 Geneva Convention and in the ECHR.

The failure to effectively standardize practices to ensure equitable treatment of asylum seekers in the European Union has created one of the most significant challenges to refugee protection. Meanwhile, Member States continue to reduce and violate the well-established protections principles, such as the principle of non-refoulement and the right to suspensive effect on appeal. This is the case of practice and refugee protection in France.

Furthermore, the possibilities that an asylum seeker would be able to challenge any rules of the Asylum Qualification Directive or the Asylum Procedures Directive through remedy under the ECJ are very limited.

These limitations currently imposed on the opportunity to request an ECJ preliminary ruling should be lifted in order to allow the ECJ to cope with the applications lodged by asylum seekers in relation with their claims.

The European Charter of Fundamental Rights represents a new era in the future of the Community and should be, *de lege ferenda*, incorporated into the Constitution for Europe so that the Community pursue the Human Rights implications of its border-free Single Market project.

Abbreviations

CEAS	Common European Asylum System
CRR	Commission Recours aux Réfugiés
DAF	Division Asile aux Frontières
DC	Dublin Convention
DICCILEC	Direction Centrale du Contrôle de l'Immigration et de la Lutte contre l'Emploi des Clandestins
EC	European Community
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
EU	European Union
IGCARMP	Inter-Governmental Consultations on Asylum, Refugees and Migration Policies in Europe, North America and Australia
GC	Geneva Convention
NGO	Non Governmental Organization
OFPRA	Office Français pour la Protection des Réfugiés et des Apatrides
SA	Schengen Agreement
TEU	Treaty of the European Union
QMV	Qualified Majority Voting
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commission for Refugees
UNTS	United Nations Treaty Series

1. Introduction

This thesis deals with refugee protection in the framework of the Common European Asylum System (hereinafter the CEAS). The Geneva Convention of July 28 1951 (hereinafter the Geneva Convention), its Protocol Relating to the Status of Refugees of 31 January 1967 and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR) are the legal framework for community action in the field of asylum law and policy.

They are serving as a starting point for the EU asylum law and policy.

The Member States of the European Union started the harmonisation of asylum and refugee law in the late 1980s by the concluding of agreements and conventions, the adoption of non-legally binding instruments and the creation of committees to deal with the problems of a European asylum and refugee policy. The goal of harmonisation of Member State was first mentioned in the Palma Document from 1989.

The greatest innovation in the EU approach to asylum issues was the introduction into the Amsterdam Treaty of a new EC competence on asylum policy. The new Part III, Title IV of the Treaty establishing the European Community (hereinafter the EC Treaty) deals with visas, asylum, immigration and other policies related to the free movement of persons.

While building the so-called “European Common Asylum System”, how can the European Community provide for a true refugee protection?

I will give a contribution to answer to this question.

This thesis focuses on the effects of the EC Legislation on Member States in domestic law and practices in the sphere of asylum. There are a lot European Member States but only the case of France will be dealt with here. The Asylum Qualification Directive and the Asylum Procedures Directive are at the heart of the CEAS. Some key issues related to the compatibility of these EU Directives with Human Rights and International Refugee Law will also be dealt.

This thesis is divided into 7 chapters. The first chapter contains the introduction. The second chapter deals with the refugee protection and European integration. The third chapter relates to the development of the present EC-Competencies in the light of the Convention for Europe.

The fourth chapter deals with the effects of the EC legislation on State practices and refugee protection in France.

The fifth chapter deals with the contents of the commitments undertaken by the community under the European and Geneva Conventions. I will also analyse the relationship between the ECtHR and the ECJ.

The sixth chapter deals with compatibility of the EC Directives with Human Rights and International Refugee Law.

Chapter seven contains the Conclusion.

2. REFUGEE PROTECTION AND EUROPEAN INTEGRATION

2.1 Introduction

The first section of this chapter deals with some fundamental principles of the 1951 Geneva Convention. The study analyses the impact of European integration in asylum and immigration matters on changes in the integrative principles of refugee policy. There are some problems in this area. Is the fundamental principle of non-refoulement adapted to the main purposes of the integration?

2.2 The Refugee Definition under the 1951 Geneva Convention

Article 1 of the Geneva Convention says that for the purpose of the Geneva Convention, the term refugee shall apply 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; or who not having a nationality and being outside the country of his former habitual residence as result of such to return to it.¹

Convention refugees are thus identifiable by their possession of four elemental characteristics: (1) they are outside their country of origin; (2) they are unable or unwilling to avail themselves of the protection of that country, or to return there; (3) such inability or unwillingness is attributable to a well-founded fear of being persecuted; and (4) the persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.²

¹ O. Bring and G. Lysén, *Materialsamling i Folk rätt Traktater, FN-resolutioner mm* (Iustus, Internationell rätt, 2001) pp.4-5.

² G.S.Goodwin-Gill, *The Refugee in International Law* (Oxford University Press Inc., New York, 1996) pp.19-20.

The first element requires that the claimant to the refugee status must be outside his or her country of nationality. The fact of having fled, or having crossed an international border, is an important part of the quality of refugee.

Concerning the second element, Article 1 of the Geneva Convention contains separate provisions for refugees with a nationality and for those who are stateless. For the former, the relevant criterion is that they should be unable or unwilling to return to their State of former residence. In cases of dual or multiple nationality, refugee status will only arise where the individual in question is unable or unwilling, on the basis of well-founded fear, to secure the protection of any of the States of nationality.

Statelessness and refugee status are by no means identical phenomena. On occasion, those fleeing may be deprived of their nationality, but it is quite common also for the formal link to remain.

Fear for persecution for reason of race or religion falls within Article 1.

Regarding race, account should be taken of Article 1 of the 1965 Convention on the Elimination of All Forms of Racial Discrimination which defines that practice to include distinctions based on race, colour, descent, or national or ethnic origin. Given the legal developments over the last thirty years, the broad meaning can be considered as valid also for the purposes of the Geneva Convention. Persecution on account of race is all too frequently the background to refugee movements in all parts of the world.

Further the 1951 Geneva Convention also makes reference to persecution for reasons of nationality.

This reference is somehow strange, given the absurdity of States persecuting its own nationals on account of their membership of the body politic. Those who possess the nationality of another State will, in normal circumstances, be entitled to its protection and fall outside the refugee definition. Imaginably, the nationals of State B resident in State A could find themselves persecuted on account of their nationality, driven out to a neighbouring country and yet still denied the protection of State B, particularly that aspect which includes the right of nationals to enter their own State. However, nationality in the meaning of the Geneva Convention is usually interpreted broadly, to include origins and the membership of particular ethnic, religious, cultural, and linguistic communities. It is not necessary that those persecuted should form a minority in their country, for oligarchies traditionally tend to have recourse to oppression.

Nationality, interpreted broadly, illustrates the points of distinction, which can serve as basis for the policy and practice for persecution. There may be some overlap between the various grounds and,

likewise, factors derived from two or more of the criteria may contribute to a well-founded fear of persecution.³

Moreover, persecution for reason of membership of a particular social group falls within Article 1.

Finally, the 1951 Geneva Convention makes reference to fear of persecution of political opinion.

The term “political opinion” should be understood in the broad sense, to incorporate, within substantive limitations now developing generally in the field of human rights, any opinion of any matter in which the machinery of State, government, and policy may be engaged. The typical refugee is one pursued by the government of a State or other entity on account of his or her opinions, which are an actual or perceived threat to that government or its institutions, or to the political agenda and aspirations of the entity in question. Political opinions may or may not be expressed, and they may be rightly or wrongly attributed to the applicant for refugee status. If they have been expressed, and if the applicant or others similarly placed have suffered or threatened with repressive measures, then a well-founded fear may be made out. Problems arise, however, in assessing the value of political act, particularly if the fact itself stands more or less alone, unaccompanied by evident or overt expressions or opinions.⁴

Well-founded fear is the third element of the refugee definition. This element comprises two factors. Subjective and objective elements are thus combined. Fear depends on the factors personal to the claimant.

It may be exaggerated or understated, but still reasonable, all the circumstances of the case have to be considered, including the relation between the nature of the persecution feared and the degree of the likelihood of its happening. At each stage, hard evidence is likely to be absent, so that finally the asylum seekers own statement, their force, coherence, and credibility must be relied on, in the light of what is known generally.⁵

2.3 The Principle of Non-Refoulement

Article 33 of the Geneva Convention says that, no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, have been

³ *Ibid.*, pp.45-46.

⁴ *Ibid.*, pp.48-49

⁵ *Ibid.*, pp.40-41.

convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.⁶

Article 33 of the Geneva Convention affirms the principle of non-refoulement. This fundamental principle could be defined as the prohibition on returning refugees to countries where they would be like to face persecution.⁷

The principle of non-refoulement applies clearly and categorically to refugees within the meaning of Article 1 of the Geneva Convention. It also applies to asylum seekers, for otherwise there would be no effective protection. Those with a presumptive or prima facie claim to refugee status are therefore entitled to protection. Equally irrelevant is the legal or migration status of the asylum seeker. It does not matter how the asylum seeker comes within the territory or jurisdiction of the State; what counts is what results from the actions of States. If the asylum seeker is forcibly repatriated to a country in which he or she has a well-founded fear of persecution or faces a substantial risk of torture, then that is refoulement contrary to international law.

National security and public order, for example, have long been recognized as potential justifications for restriction to the principle of non-refoulement.

Article 33(2) says that a refugee may not claim the benefit of non-refoulement whom there is reasonable grounds for regarding, as a danger to the security of the country or who, having been by a final judgement of a particularly serious crime, constitutes a danger to the community of that country. The exceptions to non-refoulement are thus formed in terms of the individual, but whether he or she may be considered a security risk appears to be left much to the judgement of the State authorities. It is unclear to what extent, if at all, a person found guilty of a particularly serious crime must also be shown to constitute a danger to the community.

The jurisprudence is relatively sparse and the notion of particularly serious crime is a principle of natural justice and due process of law require something more than mere mechanical application of the exception. An approach in terms of the penalty imposed alone will be somewhat arbitrary, and the application Article 33(2) ought always to involve the question of proportionality, with account taken of the nature of the consequences likely to affect the refugee on return. The offence in question and the perceived threat to the community would need to be extremely grave if danger to the life of the refugee were to be disregarded,

⁶ Lysén, *supra* note 1.

⁷ I.Boccardi, *Europe and Refugees Towards an EU Asylum Policy* (Kluwer Law International, The Hague, 2002) p.10.

although a less serious offence and a lesser threat might justify the return of an individual likely to face only some harassment or discrimination.

This approach has not always been understood or endorsed by national tribunals, although overall practice appears compatible with such an interpretation.⁸

2.4 The European Integration and Refugee Protection

The period 1985-9 must be regarded as relatively peaceful for host states in Western Europe. But after a decade of steady growth, the number of asylum applications took a sharp turn upwards at the end of the eighties. Within the EC, applications increased almost tenfold in the period between 1985 and 1992.⁹ The peak of protection claims in 1992 was unprecedented in the post-war period: almost 700 000 persons sought refuge in European Countries¹⁰.

The 1992 statistics indicate that the majority of protection seekers originated from European Countries, one of the main causes being the conflict in Former Yugoslavia, flaring since 1991.¹¹ The implications of this conflict for migration and protection in Europe can hardly be overestimated, and certainly represents the decisive event of the 1992-7 periods.¹² For the first time since the Hungarian crisis in 1956, Western Europe was confronted with a substantial outflow of *Europeans*.¹³

In 1997-9 periods, Bosnia gave way to Kosovo. After a successive build-up, of aggression and persecution, the conflict erupted in 1999, forcing a wave of over 800 000 protection seekers to seek refuge abroad. The period 1997-9 saw rising demands, mostly due to the conflict in Kosovo.

Western Europeans had to realise that they could no longer profit from the control exercised by the socialist regimes in the East: borders

⁸ Goodwin- Gill, *supra* note 2, pp. 139-140.

⁹ By the end of 1992, the Member States hosted some 1.2 million refugees of a world refugee population comprising almost 19 million people. UNHCR, 1993, pp.151-3.

¹⁰ Source: IGCARMP, 1997, P.21.

¹¹ A survey of ten European countries shows that in 1992, 35 % of asylum applications were made by nationals of former Yugoslavia (Austria, Belgium, Denmark, France, Germany, the Netherlands, Norway, Sweden, Switzerland and the United Kingdom), UNHCR, 1993, PP.37, 158.

¹² G. Noll, *Negotiating Asylum The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Kluwer Law International, The Hague, 2000) p.120.

¹³ The conflict in the former Yugoslavia exceeded the 1956 Hungarian outflow by a factor of five. European Commission, Explanatory Memorandum to the Proposal to the Council for a Joint Action adopted by the Council on the basis of Article K.3 2(b) of the Treaty of the European Union concerning the Temporary Protection of Displaced Persons, 4 March 1997, p.2, para.2.

had become permeable, and the dismantling of state structures had led to the first large-scale refugee crises in decades. In that sense, 1989 and 1992 are pivotal dates for the history of refugee protection in Europe¹⁴.

Five steps marked the development in the process of European integration. I shall give a brief highlight of these steps: the 1985 White Paper, the Schengen process, the Maastricht Treaty and, finally the Treaty of Amsterdam.

2.4.1 The 1985 White Paper and the Single European Act.

Although the harmonization of asylum systems in different European states had seized the Council of Europe, it was the emerging Common Market without internal border control that inspired serious work on common rules regarding asylum issues.¹⁵ The 1985 White Paper on the Completion of the Internal Market¹⁶ laid down the goal of the complete abolishment of internal border controls¹⁷ and pointed out that asylum law and the situation of refugees had to be considered in the discussion on measures compensating for the loss of control due to their abolishment.¹⁸

The Single European Act¹⁹ provided for the political determination of Member States to complete the internal market by 1992.²⁰ Furthermore, the Member States laid down the following statement in the Final Act of the SEA.

In order to promote free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries.²¹

2.4.2 Schengen

Five EC Member States signed the Schengen Agreement²² drawing up a framework for the abolishment of internal border controls and the adoption of compensatory measures. This instrument introduced a number of

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¹⁵ Noll, *supra* note 12, p.122.

¹⁶ European Commission, Completing the Internal Market. White Paper from the Commission to the European Council, COM (85) 310 final [henceforth White Paper]

¹⁷ White Paper, para 27.

¹⁸ White Paper, para 11.

¹⁹ Single European Act, 9 September 1985, OJ (1987) L 169/1.

²⁰ See Art.8a (1) TEC. In a declaration on Art.8, the Member States clarified that the specification of a date for the completion of the common market would not imply a legal obligation.

²¹ Final Act, Political Declaration by the Governments of the Member States on the Free Movement of Persons, annexed to the Single European Act. OJ (1987) L169/26.

²² Agreement between the Governments of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders, June 14, 1985[hereinafter Schengen Agreement].

concrete measures facilitating cross-border traffic among Contracting Parties and established a work programme for the complete abolishment of internal borders among its Contracting Parties. Among the necessary compensatory measures, the harmonization of visa policies and of certain areas of domestic aliens legislation were listed.²³

Schengen Convention²⁴ was signed by Belgium, France, Germany, Luxembourg and the Netherlands. Article 2 states that the internal borders of Contracting Parties may be passed at any point without any checks on persons being carried out. As compensatory measure, the Schengen Convention contains *inter alia* provisions on the control of external borders, on visa requirements, on the responsibility for the processing of asylum applications, on information exchange under the so-called Schengen Information System (SIS) and on the introduction of carrier sanctions.

Both the Schengen Agreement and the Schengen Convention are products of intergovernmental cooperation outside the Community framework.²⁵ Additional Member States acceded to both Schengen instruments.²⁶ Successively, Accession Protocols and Agreements were signed with some countries. Ireland and United Kingdom remained outside.

2.4.3 The Dublin Convention

The Dublin Convention²⁷ was signed by all Member States on 15 June 1990, and is still the core instrument in the area of asylum and migration law. The Dublin Convention deals exclusively with the allocation of asylum applications. The Dublin Convention represents a gain over the Schengen Convention thanks to its expanded geographical scope, comprising all EU Member States.²⁸

The Dublin Convention entered into force on 1 September 1997. It remains an instrument of international law, outside the EC framework. The Dublin Convention triggered the conclusion of bilateral agreements between Member States to facilitate its implementation.²⁹

²³ Art.20 of the Schengen Agreement.

²⁴ 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, 19 June 1990[hereinafter Schengen Convention, abbreviated SC].

²⁵ Noll, *supra* note 12, p.126

²⁶ According to Art.140 (2) SC, a prerequisite for accession is membership in the European Union.

²⁷ Convention Determining the States Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities, 15 June 1990[hereinafter Dublin Convention].

²⁸ Noll, *supra* note 12, p.127.

²⁹ See, e.g., the German-Swedish agreements, determining the modalities of readmission, and the precedence of the Dublin Convention over an older readmission agreement

2.4.4. The London Resolutions.

The 1992 London Resolutions marked the debut of soft law.

The text dealt with

- Manifestly unfounded applications for asylum;
- The concept of safe third countries;
- The concept of safe countries of origin; and
- The expulsion of illegal third country nationals.

They have collectively become known as the London Resolutions.

2.4.5. The Maastricht Treaty

The delegations to the 1991-2 Inter-governmental conference (henceforth IGC) prepared the Treaty of Maastricht. Under Article K.1, Member States agreed to consider the following items as issues of common interest:

- (1) Asylum policies;
- (2) Rules on the passage of persons of the external borders of the Member States, and the exercise of control thereon;
- (3) Immigration policy and policies towards third country nationals as regards their entry and movement, conditions for their residence on the territories of Member States, including family reunification and access to employment, and combating illegal immigration.
- (4)

Under Article 100(c) TEC, the Community got the power to adopt a list of third countries whose nationals must be in possession of visas when crossing the external borders of the Member States.

By means of *passerelle* in Article K.9 TEU, measures concerning asylum and immigration could have been moved over the community competence. The *passerelle* was never used.

Three issues dominated the Maastricht era. In the areas of asylum, external border control and migration, the latter clearly dominated by the sheer number of adopted instruments, most of which relate to the topics of readmission and return. In the asylum area, two instruments merit special mention, as they directly allude to the legal classification and the standing of individual protection seekers: the 1995 Resolution on Minimum Guarantees in Asylum Procedures and the 1996 Joint Action on the Harmonized Application of the Refugee Definition. Instruments adopted

between the two countries: *Överenskommelse med Tyskland angående tillämpningen av konventionen den 15 juni 1990 rörande bestämmandet av den ansvariga staten för prövning av en ansökan om asyl som framställs i en av medlemstaterna i Europeiska gemenskaperna* (SÖ 1997:4), Stockholm 19 november and 9 december 1998, SÖ 1998:28.

during the Maastricht period are still applicable today and play an important role in the enlargement process.³⁰

2.4.6 The Amsterdam Treaty

The new Treaty was eventually agreed by the Amsterdam Council of June 1997. It entered into force on 1 May 1999 and presently governs the multilateral co-operation on asylum and immigration in the Union. In the following sections, we shall look into the competencies and obligations produced by Amsterdam. Further exceptions were introduced by several Protocols that regulated the participation of some countries to the new Title IV and integration of the Schengen framework within the Union.

2.4.6.1 Competencies and Obligations

The greatest innovation in the EU approach to asylum issues was the introduction into the Amsterdam Treaty of a new competence on asylum policy. The new Part III, Title IV TEC (here and after referred to as Title IV TEC) dealt with visas, asylum, immigration and other policies related to the free movement of persons (Art 61-69) and it was added to the section of the EC Treaty concerning “Community policies”.

Article 61 of the TEC delimits the competencies of the community under this title:

In order to establish progressively an area of freedom, security and justice, the Council shall adopt:

(a) Within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly flanking measures with respect to external border controls, asylum and immigration, in accordance with the provisions of Article 62(2) and (3) and Article 63(1) and (2)(a), and measures to prevent and to combat crime in accordance with the provisions of Article 31(e) of the Treaty of the European Union;

(b) Other measures in the field of asylum, immigration and safeguarding the rights of nationals of the third countries, in accordance with the provisions of Article 63;³¹[...]

However, the competencies meted out in the provision come with obligations. The Council is assigned to adopt both categories of measures within five years after the entry into force of the Amsterdam Treaty.³²

³⁰ Noll, *supra* note 12, p.135.

³¹ Noll, *supra* note 12, p. 136

³² *Ibid.*

Article 62 and 63 TEC enumerate the issues within the EC competence in an exhaustive manner.

Thus, there is no comprehensive EC competence in the area of visa, asylum, immigration and external border. Those issues not specified in Articles 62 and 63 TEC remain within the competence of the Member States. The enumerative approach is markedly different from the sweeping competencies meted out in the third pillar by the Maastricht Treaty.³³

Moreover, as long as the Community has not made use of its competence, Member States remain free to legislate.

The competence of Member States is also retained in areas where the Community has adopted measures setting out minimum standards, as long as domestic legislation accommodates those standards.³⁴

The Council is assigned to adopt the following measures within the period of five years after the entry into force of the Treaty of Amsterdam:

- a) Measures on the crossing of internal borders³⁵;
- b) Measures on the crossing of the external borders of the Member State, establishing standards and procedures to be followed by Member States in carrying out checks on persons at such borders³⁶ as well as rules on visas for intended stays of no more than three months³⁷;
- c) Measures setting out conditions under which nationals of third countries shall have freedom to travel within the territory of the Member States during a period of no more than three months³⁸;
- d) Criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States³⁹;
- e) Minimum standards on the reception of asylum seekers in Member States⁴⁰;
- f) Minimum standards with respect to the qualification of nationals of third countries as refugees⁴¹;
- g) Minimum standards on procedures in Member States for granting and withdrawing refugee status⁴²;

³³ *Ibid.*

³⁴ Article 63 TEC specifies this repartition of competencies further. Measures on immigration and policy defining the rights and conditions under which nationals of third countries which are legally resident in one Member State may reside in other Member State do not prevent any Member State from maintaining or introducing national provisions which are compatible with TEC and international agreements.

³⁵ Art.62 (1) TEC

³⁶ Art 62(2)(a) TEC

³⁷ Art 62(2)(b) TEC

³⁸ Art.62 (3) TEC

³⁹ Art.63 (1)(a) TEC

⁴⁰ Art.63 (1)(b) TEC

⁴¹ Art.63 (1)(c) TEC

h) Minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection⁴³; and

i) Measures on illegal immigration and illegal residence, including repatriation of illegal residents.⁴⁴

Article 63 TEC exempts three types of measures from the obligation to legislate within five years:

1. Measures promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons (burden-sharing)⁴⁵;

2. Measures on the conditions of entry and residence, and standards on procedures for the issues by Member States of long term visas and residence permits, including those for the purpose of family reunion (legal immigration)⁴⁶; and

3. Measures defining the rights and conditions under which nationals of third countries that are legally resident in a Member State may reside in other Member States (mobility rights for legally present aliens).⁴⁷

2.4.6.2 Decision Making under Title IV

Title IV offers two distinct decision-making procedures. One turns on the unanimity voting in the Council and is applicable to most of the measures enumerated in Articles 62 and 63 TEC. The other is based on a vote by qualified majority in the Council and applies to certain measures on visas⁴⁸.

The unanimity procedure comes into varieties- one applicable before 1 May 2004 and another thereafter. Before 1 May 2004, the procedure envisages that the Council takes a unanimous decision on proposals from the Commission or on initiative by a Member State and after consultation of the European Parliament.⁴⁹

After 1 May 2004, and without any further decision, the Commission acquires a monopoly right of initiative. From that date on the Council shall act on proposals from the Commission, and the Commission shall examine any request made a Member State that it submits a proposal to the Council.⁵⁰

⁴² Art.63 (1)(d) TEC

⁴³ Art.63 (2)(a) TEC

⁴⁴ Art.63 (3)(b) TEC

⁴⁵ Art.63 (2)(b) TEC

⁴⁶ Art.63 (3)(a) TEC

⁴⁷ Art.63 (4) TEC

⁴⁸ Art.67 (3) TEC

⁴⁹ Art.67 (1) TEC

⁵⁰ Art.67 (2) TEC

Article 67(2) TEC provides for an optional transition to the co-decision procedure after 1 May 2004:

“The Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this Title to be governed by the procedure referred to in Article 251 and adapting the provisions relating to the powers of the Court of Justice”.

Since the adoption of the Treaty of Nice, the spectre of transition to Qualified Majority Voting (QMV) and the co-decision procedure under Article 251 TEC also looms large. However, an automatic transition will take place only in limited areas, and further political decisions by unanimous Council are required to subject core competencies for the development of the CEAS to the co-decision procedure.⁵¹

In particular, a transition in core areas would require that “ the common rules and basic principles governing these issues”⁵² have been defined, which can arguably be understood to imply that the first stage of the CEAS has to be complete.

2.4.6.3 The Role of the ECJ

The Amsterdam Treaty has given the ECJ competence of interpretation in the areas circumscribed in Title IV TEC.

⁵¹I. Byrne *et al* , ‘Understanding Refugee Law in a Enlarged European Union’, 15 European Journal of International Law (2004) p.357.

Only one subject matter is certain to move from consensus to Qualified Majority Voting: on 1 May 2004, administrative co-operation according to Art.66 TEC will be decided through Qualified Majority Voting after consultation of the European Parliament (Protocol on Article 67 of the Treaty Establishing the European Community, 24 December 2002, OJ V 325/184). As provided in Article 67(4), measures on the issuing of visas under Art.62 (2)(b)(ii) and (iv) shall be automatically transferred to the co-decision procedure, as already stipulated in the Treaty of Amsterdam. The transition of the important competencies to Qualified Majority Voting or co-decision is, however, contingent on political agreement on several levels:

-Regarding all measures under Article 63(1) and (2) (a) TEC, a precondition for the transition to the co-decision procedure is that the Council has previously adopted Community legislation defining the common rules and basic principles governing these issues (Art.67 (5), 1st indent TEC).

-Regarding measures relating to external border control under Art.62 (2)(a) TEC, the co-decision procedure shall be triggered by the Council decision from the date on which agreement is reached on the scope of the measures concerning the crossing by persons of the external borders of the Member State (Art.67 (2) TEC; Declaration on Article 67 of the Treaty Establishing the European Community, 10 March 2001, OJ C 80/78).

-According to a rather vague statement of intent, the Council will, moreover, endeavour to make the procedure referred to in Article 251 applicable from 1 May 2004 or as soon as possible thereafter to the other areas covered by the Title IV or to parts of them. It should be noted that the more committing statement of intent in the first indent of the declaration does not relate to core areas of asylum harmonization. (Declaration on Article 67 of the Treaty Establishing the European Community, 10 March 2001, OJ C 80/78).

⁵² Art 67(5) 1st indent TEC.

It opens measures on asylum, external borders and immigration to judicial review.

In principle, the ECJ may be seized and acts through the procedures laid down for it in the TEC⁵³, with two important modifications, of which one is relevant in the present context.⁵⁴ The threshold for seizing the ECJ for purposes interpretation has been elevated.

Article 68(1) TEC expounds when a referral to the ECJ shall take place:

Article 234 shall apply to this Title under the following circumstances and conditions: where a question on the interpretation of this Title or on the validity or the interpretation of acts of the institutions of the Community based on this Title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

The difference with respect to the standard procedure under Article 234 TEC is obvious. Not any court, but only such courts, against whose decisions there is no judicial remedy in the domestic system, may refer a question to the ECJ. This opens a margin of discretion to the relevant domestic court.

An innovation for the whole area of EC law is the competence of the ECJ to give advisory rulings on interpretative questions under Title IV. According to Article 68(3) TEC,

The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this Title or acts of the institutions of the Community based on this Title. The ruling given by the Court of Justice in response to such a request shall apply not only to judgements of courts or tribunals of the Member States, which have become *res judicata*.

After the transitory period of five years, the Council may adapt the rules on the competence of the ECJ.

⁵³ The relevant norms can be found in Part Five, Title I, Chapter 1, Section 4 TEC.

⁵⁴ Following Art.68 (2) TEC, the ECJ does not have jurisdiction to rule on any measure or decision on the crossing of internal borders under Art.62 (1) TEC relating to the maintenance of law and order and the safeguarding of internal security. This exception is of no further importance for the areas of asylum, external borders and immigration. Accord: Bank, 1999,p.25, Noll and Vedsted-Hansen, 1999, p.374. See also Hailbronner, 1998, p.192.

Article 67(2) TEC states that,

The Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this Title to be governed by the procedure referred to in Article 251 and adapting the provisions relating the powers of the Court of Justice.

Thus, provided that the Council decides to move all or parts of the relevant areas over to the co-decision procedure after the transitory period, this decision must also provide for a congruent adaptation of the ECJ competencies.

However, the provision does not prescribe the precise nature or extent of such an adaptation.⁵⁵

2.4.6.4 The Position of Denmark, Ireland and the U.K.

The Amsterdam Treaty contained several examples of specific *à la Carte* participation. In relation to the general regime introduced by Title IV TEU and Art.11 TEC, those examples could have defined as instances of “predetermined flexibility”.⁵⁶

To overcome national resistance over some of the Union’s new areas of competence, the participation of the United Kingdom, Ireland and Denmark to the Amsterdam Treaty was regulated by a series of special Protocols. Those Protocols concerned mainly the incorporation of the Schengen framework into the Union and the participation of these countries in the new Title IV.

Special Protocols also regulated the participation of the United Kingdom, Ireland and Denmark with regard to Title IV TEC.

The Protocol on the position of the United Kingdom and Ireland stipulated that neither country would in principle take part in the new Title IV EC measures.⁵⁷

However, both countries had the option at any time to participate in any measure adopted under this Title if the matters being decided were of interest to them. This position could therefore be summarized as a total “opt-out” with selective “opt-in” possibilities.

⁵⁵ Noll *supra* note 12, p.144.

⁵⁶ Boccardi, *supra* note 7, p.146

⁵⁷ Therefore, in principle no measure adopted under this Title, no decision of the ECJ on these matters and no international agreement agreed on this basis would have been applicable to them. The voting methods of the Council were to be amended accordingly.

The two countries had to notify their wish to take part in the adoption and application of a Title IV TEC measure within three months of a proposal for action having been presented to the Council.⁵⁸

If a decisional compromise could not be found after a “reasonable period of time”(Art.3.a UK-Ireland Protocol), the Council could adopt the decision without their participation. In this event they would not be bound by such decision.

According to the Protocol, Ireland had the further opportunity of completely renouncing this Protocol and taking part fully in Title IV TEC.⁵⁹

The position of Denmark according to its Protocol could be defined as a complete “opt-out”⁶⁰, without any possibility of “opt-in”, except in the case of the measures based on the Schengen *acquis*⁶¹.

Thus, on issues relating to Title IV TEC, the Member States are not a homogenous group.⁶²

⁵⁸ Boccardi, *supra* note 7, p.147

⁵⁹ Once again the position of Ireland was different from the UK, inevitably conditioned by the Common Travel Area Agreement. Therefore, Ireland always reserved for itself the possibility of abandoning the Protocol’s provisions in the event of the travel agreement with the UK coming to an end. Ireland made it clear during the negotiations that it wished to join all EU asylum initiatives and so far has done so.

⁶⁰ It should be recalled that, due its particular constitutional arrangements, Denmark had particular difficulties in participating in the Maastricht provisions. After one unsuccessful national referendum to ratify the Treaty, Denmark obtained considerable concessions on its participation with regard to the Third Pillar (see Edinburgh Summit Council Press Release 1867/92).

⁶¹ Boccardi, *supra* note 7, p.148.

⁶² Noll, *supra* note 12, p.145

3.THE DEVELOPMENT OF THE PRESENT EC-COMPETENCIES IN THE LIGHT OF THE CONVENTION FOR EUROPE

Once the first stage of harmonization is complete, it is logical, in theory, that Member States will start work on stage two of the CEAS. Negotiations will begin to establish a single asylum system for the whole of Europe, including a unified status for all people granted asylum within the EU.

Ten new countries⁶³ have joined the EU in May 2004. *Mutatis mutandis* they will participate fully in stage two of the negotiations.

However, if the first stage of harmonization is not complete then the new Member States will be able to join negotiations on the two directives.

As far as the decision-making about the stage two of the CEAS is concerned, Heads of States or Government gave their agreement on the Qualified Majority Voting⁶⁴ at their meeting on 17/18 June 2004 in Brussels.

This chapter will deal with the transition process from the system for decision-making in the Council by Qualified Majority Voting as defined in Treaty of Nice and set out in Article 2, paragraph 2 of the Protocol on the transitional provisions relating to the institutions and bodies of the Union annexed to the Constitution.

At their meeting, Heads of States or Government gave agreement to the texts, which contain modifications to the text of the Constitution. These documents constitute the outcome of the Intergovernmental Conference.

⁶³ Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia

⁶⁴ Council of the European Union, Doc CIG 81/04, 18 June 2004:

Under Qualified Majority Voting votes are weighted according to the population size of the various countries. The weighting of Member States votes is one of the most contentious issues being discussed in the framework of the new EU Constitution, which has not yet been agreed.

3.1 Definition of the Qualified Majority Voting

The Article I-24 defines the Qualified Majority Voting as follows:

“ A Qualified Majority Voting shall be defined at least 50% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union.

A blocking majority must include at least four Council members, failing which the Qualified Majority Voting shall be deemed attained.

By derogating from the paragraph1, when the Council is not acting on a proposal from the Commission or from the Union Minister for Foreigner Affairs, the qualified majority shall be defined as 72% of the members of the Council, representing Member State comprising at least 65% of the population of the Union’.

However, in cases where only some members of the Council have the right to vote (for example enhanced cooperation or Euro zone), the provisions of the Constitution, which specifically define qualified majority in such cases, will be adapted.

Such adaptation will consist of inserting in these provisions the percentages provided for in Article I-24 paragraph 1 and in paragraph 2,so as to be applicable only to Council members who have the right to vote and to the population of the Member States, which they represent. As regards the adaptation of the figure in the second subparagraph of the paragraph 1, the number of the Council members will be the minimum number capable of constituting a blocking through the population criterion plus one.

3.2 Implementation of Article I-24⁶⁵ regarding the Qualified Majority Voting

The Council of the European Union considered appropriate to adopt provisions allowing for a smooth transition from the system for decision-making in the Council by qualified majority as defined in the Treaty of Nice and set out in Article 2,paragraph 2 of the *Protocol on the transitional provisions relating to the institutions and bodies of the Union* annexed to the Constitution, which will continue to apply until 31 October 2009 and the voting system foreseen under Article I-24 of the Constitution, which apply with effect from 1 November 2009.

⁶⁵ The draft Decision will be adopted on the day the Treaty enters into force.

While adopting the decision relating to the implementation of Article I-24 the Council seemed to devote every effort to strengthening the democratic legitimacy of decisions taken by qualified majority.

Furthermore, the Council of European Union judged appropriate to maintain the decision as long as is necessary to ensure smooth transition to the new voting system foreseen in the Constitution,

Article 1 of the Draft Decision Relating to the Implementation of Article I-24 provides as follows:

“ If members of the Council, representing at least three-quarters of the level of the population, or at least three-quarters of the number of Member States necessary to constitute a blocking minority from the application of Article I-24 or indicate their opposition to the Council adopting an act by a qualified majority, the Council shall discuss the issue”.

However, Article 2 of the decision states that

“The Council shall, in the course of these discussions, do all in its power to reach, within a reasonable time and without prejudicing obligatory time limits laid down by Union law, a satisfactory solution to address concerns raised by the members of the Council referred to in Article 1”.

Article 3 provides as follows:

“To this end, the President of the Council, with the assistance of the Commission and respecting the Rules of Procedure of the Council, shall undertake any initiative necessary to facilitate a wider basis of agreement in the Council. The members of the Council shall lend him or her assistance”.

Article 4 of the decision states

“The adopted decision shall take effect on 1 November 2009. It shall remain in force at least until 2014. Thereafter the Council may adopt a European decision repealing it.”

The Conference declares that the Council will adopt the European decision relating to the implementation of Article I-24 on the day the Treaty establishing a Constitution for Europe enters into force.

In sum, I may observe that some biggest countries within the European Union like France or Germany have managed to forge a Qualified Majority Voting to the detriment of the smallest ones.

4. THE EFFECTS OF EC LEGISLATION ON REFUGEE PROTECTION IN FRANCE

The alternation of dynamic intergovernmental cooperation leading to the Schengen and Dublin Conventions and the 1992 London Resolutions and reluctant Communitarization under the Maastricht and Amsterdam Treaties is reflected in the ambivalent impact of Europeanization on domestic asylum regime in France

Although the emergence of a multi-level polity initially remained screened from public and policy discourses in France, it facilitated the implementation of restrictive policies culminating in the amendment of the French constitutional asylum rights in 1993. On the one hand, the development of a multi-level polity strengthened the role of particular government actors to the detriment of the opponents of restrictive reforms at the domestic level. On the other, the definition of asylum and immigration as common European matters altered the context of refugee question in policy discourses.⁶⁶

4.1 Policy Discourses and Europeanization in France

In order to highlight the ways in which Europeanization impacted on the perception and definition of the asylum issue in France, this section retraces the political discourses leading to the incisive reforms of the constitutional asylum rights in 1993, which were legitimated with the need of implementing the EU *acquis* and, more precisely, the Schengen Convention.

The following analysis starts with an examination of the institutional impact of transgovernmental cooperation on the distribution of power and authority in domestic law and, in a second step, retrace the ideational impact of European integration on the factual and normative justification of the asylum reform in parliamentary debates.

France's revision of its constitutional asylum right took place in 1993. However, the major concern in the French political discourse was not refugees, but rather illegal immigration and question of integration, multiculturalism and citizenship⁶⁷. This wide scope of the immigration discourse was fuelled by the traditionally strong ideological cleavage

⁶⁶ S. Lavenex, *The Europeanization of Refugee Policies in Germany and in France* (Ashgate Publishing Limited, Hampshire, 2001) p. 149.

⁶⁷ *Ibid.*

between the Left, with its commitments to internationalism and solidarity, and the Right, which traditionally focuses on the “national” interest.

Thus, restricting the highly symbolic constitutional asylum right and implementing restrictive European policies posed two major challenges in France: *firstly*, it required a modification of the original foreigner discourse, implying the construction of an asylum problem; and *secondly*, the political leadership had to be persuaded

The European integration impacted on the French asylum discourse in the period between the ratification of Schengen in June 1991 and the revision of the constitution in December 1993. The French Interior Minister Charles Pasqua set up a package of reforms to “reduce immigration to zero”. The full implementation of the Schengen as well as the London Resolutions launched a heated and polemical debate on the status of the constitutional asylum right, which culminated in a reform of the French Constitutional being passed in November 1993.⁶⁸

The link between Schengen and the reform of the asylum right only entered the policy discourse with the debate on the “Pasqua laws” in 1993.

4.2 The Development of EU refugee policies until the Amsterdam Treaty in France

The implementation of the EU “acquis” in asylum matters yielded a radical transformation of the post-World War II refugee regime, this found its most symbolic expression in the 1993 Constitutional revision. This transformation concerns a crucial aspect of the refugee regimes, namely the provisions related to entry into the territory and access to asylum provisions.

The European texts do not, however, affect the French material asylum law; the normal recognition procedure and the criteria for recognising an asylum seeker as refugee remain within the full competence of the individual Member States.

The changes introduced to domestic asylum policy in France can be divided into two categories: *firstly*, policy limiting access to the territory and the asylum procedures; and, *secondly*, “simplified procedures” for certain categories of asylum seekers.

This transformation concerns a crucial aspect of the refugee regime, namely the provisions related to entry into the territory and access to asylum provisions.

⁶⁸ Ibid., p.148.

4.2.1 Access to the Asylum Regimes

The Schengen/Dublin Conventions and London Resolutions contain three instruments inhibiting the access of asylum seekers to asylum regimes in Member States: visa policies, carrier sanctions, and non-admission to asylum procedure on the basis of the Schengen/Dublin system and the “safe third country rule”.

4.2.2 Visa policies

The Schengen Convention stipulates that third country nationals who want to enter the common territory must be in possession of valid travel documents, a visa where applicable, as well as means of subsistence which also covers return to the place from which they have to come. Furthermore, the Schengen States have agreed to harmonize their visa policies (Art.20 SA) and have established a list of 133 States whose citizens need a visa to enter a Schengen State. With the introduction of Schengen into the EU Treaty, the JHA Council translated this list into a regulation, based on Article 100c EC.⁶⁹ In addition, the EU Member States retain the right to require visas from countries other than those on common list.

This harmonization and the introduction of a common visa is of course a constraint for asylum seekers, since the State which issues the visa is the only state responsible for examining that particular case; in case of a State denying the issue of a visa, the applicant will not have access to another Member State either.

While *de jure*, the absence of a valid visa does not exclude access to an asylum procedure as such⁷⁰, it can be reason for the application of a simplified procedure under the heading of “manifestly unfounded” claims which then limits the rights of the applicants.

In France, the application of visa requirements towards refugee producing countries began in 1986 with the unilateral suspension of bilateral agreements on free movement of persons and the introduction of visa requirements.⁷¹ In 1990s, French visa policies were increasingly adapted to the Schengen list.

⁶⁹ Council Regulation (EC) No 574/1999 of 12 March 1999 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States.

⁷⁰ This derives from Article 31 Geneva Convention, which prohibits the imposition of legal sanctions on the illegal entry and stay of persons who have arrived directly from places where their lives or freedom have threatened.

⁷¹ De Jure, the absence of a visa does not impede access to an asylum procedure when the applicant is already in the country; this is confirmed in the rulings of the Constitutional Council (no.79-109 DC of 9.1.1970 and no.86-216 DC of 3.9.1986), the Council of State (ruling of 27.9.1985) and in Article 31 *bis* of the ordinance of 2.11.1945.

However, the redistributive clauses of the Schengen/Dublin Conventions and the “safe third country rule” were introduced in 1993 with the “Pasqua Law” (law no.93-1417), together with the new Article 53 in the Constitution (Law no.93-1256).

The possibility of rejecting an asylum seeker prior to the examination of his claim by the competent authorities –the OFPRA, the CRR, and the Courts–was introduced both in the procedure applying at the border and in that applying inside the country. In both cases, applicants must be denied access to the asylum procedure if another State is responsible in accordance with the Schengen/Dublin Conventions. If the application is made at the border⁷², which concerns only 2-4 % of all applications in France (see Brachet 1997:12), the minister of interior, after consultation with the minister of foreign affairs, may deny entry and thus access to the OFPRA in four cases:

- i) If the applicant falls under the responsibility of another member state according to the Schengen and Dublin Conventions;
- ii) If the application is manifestly unfounded;
- iii) If he represents a threat to public order, for instance if he or she figures on the list of undesired aliens of the Schengen Information System; or
- iv) If the applicant has passed through a third country in which he or she can effectively be readmitted.

These four grounds of rejection are not enumerated in the law but constitute the administrative practice of the border officials; basically, these officials are the DICCILEC (Direction Centrale du Contrôle de l’Immigration et de la Lutte contre l’Emploi des Clandestins), established as part of the interior ministry by Pasqua in 1994, and the DAF (Division Asile aux Frontières), which in turn depends on the Foreign Ministry.⁷³

During the examination period on whether one of these four exclusion grounds applies, the applicants, like other voluntary migrants, have to be detained in so-called waiting zones.⁷⁴ The head of the border police or a deputy takes decisions regarding their maintenance in waiting zones. Retention centres have been established at airports, ports and, since 1994, also railway stations with international traffic. Pending admission to the territory, the asylum seekers have no access to the agency responsible for examining their cases, the OFPRA.

⁷² Applications at the border are regulated by the Decree of 27.5.1982, which introduced Art.35 *quarter* in the Ordinance of 2.11.1945

⁷³ The four grounds for exclusion are enumerated Ministère de l, Intérieur 1996; on the entry procedure at the border and waiting zones, see Amnesty International/France Terre d, Asile 1997; Anafé 1997 and 1998; Brachet 1997:11 and Julien-Laferrrière 1996:41.

⁷⁴ Law of 6.7.1992 legalising the already existing practice of waiting zones: On the retention practice and the risk of violations to individual liberties in French waiting zones, see the case *Amour* against *France* decided by the European Court of Human Rights on 26.6.1996, case no.17/1995/523/609.

Lawyers and human rights associations face difficulties in contracting asylum seekers in waiting zones: strict authorizations for access by the UNHCR and NGOs were only introduced in 1995 and can be withdrawn at any time by the minister of interior.⁷⁵

If the request is considered manifestly unfounded, the applicant is denied entry into the territory; legal remedies are possible through the administrative tribunal, but they have no suspensive effects. If none of the exclusion grounds apply, the asylum seeker is referred to the prefectures, where the common asylum procedure for applications inside the country applies.

Applications inside the territory were regulated in the new Chapter VII inserted by the Pasqua Law of 1993 in the ordinance of 2.11.1942 entitled “On Asylum Seekers”.⁷⁶ Up to this time, asylum seekers could immediately present their claim to the OFPRA, but this reform made access to an asylum procedure conditional on the accordance of a provisional admission permit by the prefectures, the local branch of the interior ministry. According to Article 31 *bis*, the prefect could deny provisional admission:

- (a) If the applicant falls under the responsibility of another Member State according to the Schengen/Dublin Conventions;
- (b) If the applicant can effectively be admitted to a third country in which he or she can effectively be protected, in particular against refoulement-this provision was altered by the 1998 reform;
- © .If the presence of the applicant in France represents a serious threat to public order; or
- (d) If the asylum claim is based on deliberate fraud, is abusive or is presented only in view of an imminent expulsion.

The existence of the first criteria, the responsibility of another Member State according to the Schengen and Dublin Agreements, excludes access to the asylum procedure and the applicant is returned to the responsible State without possibility of calling the OFPRA. This procedure is regulated in a *circulaire* of 21.3.1995. Legal remedies against expulsion are possible, however they have no suspensive effect and any claim would thus have to be made from outside the territory.

4.2.3. Simplified Procedures

The introduction of simplified procedures for certain categories of asylum seekers corresponds to the implementation of the formally non-binding

⁷⁵ Decree of 2.5.1995 no.95-507 regarding the access of the UNHCR and NGOs to asylum seekers in waiting zones. The NGOs authorized to enter the waiting zones were fixed by an interior ministry “arrêt” of 7.12.1995.

⁷⁶ With the 1998 reform, these provisions were introduced into the 1952 law on the OFPRA.

London Resolutions of 1992. This sub-section concerns the application of simplified procedures in “manifestly unfounded” cases and with regard to the rule of “safe countries of origin”.

In France, the London Resolutions on manifestly unfounded asylum claims were translated into accelerated procedures for asylum seekers representing a threat to the public order and fraudulent or abusive asylum claims (points 3 and 4 of the above mentioned Art.31 *bis*). In these cases, the prefect may impose an expulsion order without delay; however, the prefect must await the decision of the OFPRA for its execution. Under these conditions, asylum seekers are usually detained in administrative retention centres and are obliged to present their application to the OFPRA “immediately” (interior minister circular of 8.2.1994). This means that it is very difficult in practice for these asylum seekers to gather the necessary documents, to find legal counselling, or to find an interpreter in order to prepare an orderly application.

As far the procedure within the OFPRA is concerned, these cases do not require a personal interview with the candidate and a negative decision allows for the immediate execution of the expulsion order. Appeals can be lodged with the CRR, but they have no suspensive effect and have to be made from outside the territory.⁷⁷

This contrasts with the “full” normal procedure, which contains a preliminary right to stay in the territory until the definitive decision on an application –including an examination by the OFPRA, the CRR, and in some cases the Council of State- has been taken.

Although the question of asylum seekers in provenance from the so-called “safe countries of origin” in accordance with the 1992 London Conclusions is not addressed in the law, accelerated procedures have been adopted by the OFPRA, which effectively implement these Conclusions.

If an applicant comes from a country in which no serious human rights violations are reported, the OFPRA may renounce the personal interview stage and simplify the examination of the case (Amnesty International/France Terre d, Asile 1997:36f).

I may observe that the implementation of the Schengen and Dublin Conventions and the 1992 London Resolutions marked a radical change in the French domestic asylum policy. The implementation of these European instruments occurred in the form of highly symbolic 1993 constitutional reform of the right to asylum.

The effects of the Schengen/Dublin Conventions and the London Resolutions on the system of the of refugee protection in France have been three-fold: (1) asylum policies have moved closer to the field of

⁷⁷ Lavenex, *supra* note 67, p.175

immigration control and asylum seekers have been increasingly subsumed under instruments aimed at the fight against illegal immigration; (2) the impact of the executive and particularly the interior ministry on the asylum system has been strengthened *vis-à-vis* the traditional agencies in charge of the asylum procedure; and (3) the impact of the judiciary on the asylum procedure has been weakened.⁷⁸

Consequently, the introduction of simplified procedures lead to a downgrading of legal and procedural safeguards in estimating the validity of claims and limit the impact of the judiciary. If legal remedies are foreseen, they have no suspensive effects, so that counter-claims have to be made from outside the country. The weakening of the judiciary has been further helped by the formalized use of so-called “extraterritorial” waiting- zones at airports and borders, which, by definition, are excluded from the domestic legal system. The strongest manifestation of this weakening of the judiciary has been illustrated in the political processes leading to the constitutional revisions.

The French government actively supported the establishment of a redistributive system for the handling of asylum claims, through the Schengen and Dublin Conventions and its extension to other safe third countries, although domestic constitutional constraints guaranteed every asylum seeker access to the asylum procedures.

The implementation of the European instruments also indicates important differences, which point at the persistence of particular national traditions.

The *first* difference concerns the wording of the French Constitutional revision. Article 53 of the French Constitution maintains the asylum right and contains parallel provisions allowing for the implementation of the European agreements. On the other hand, the French revision also expresses typical French concern with the safeguarding of sovereignty when it stipulates in paragraph two that France retains the right to grant asylum even if it is not responsible under those agreements (thereby iterating the exclusion clause of Art.29 IV SA).

A *second* difference refers to the implementation of the “safe third country” rule. In France, the possibility of rejecting an asylum seeker on the ground that he or she can receive protection in a “safe third country”- even if that person has been there only in transit- was contained both in the criteria for admission to the asylum procedure at the border and also on the territory.

However, this rule may lead to that person’s immediate return without substantive examination of their claim only if the application has been presented at the border; inside the territory, an accelerated procedure with the OFPRA applied which was amended in 1998.

⁷⁸ Lavenex, *supra* note 67, pp.175-176.

Finally, a *third* difference concerns the application of the London Conclusions on the “ safe countries of origin”. Although these have not been explicitly dealt with in the 1993 French reforms, these principles have been adopted in practice by the OFPRA, which examines such cases in accelerated procedures.

In conclusion, it appears that the French reforms leave more leeway for an interpretation of the European *acquis* and are less closely connected with European policies. This conclusion finds supports in France’s broader attitude to the Schengen Convention, which, since its early ratification in 1991, has characterized by a high degree of reluctance regarding its full implementation.

This reluctance is all the more ironic considering the fact that constitutional revision was justified and legitimated by the “need” to implement the Schengen Agreement fully.

At the European level, apart from the achievements of the “first generation” of intergovernmental cooperation, progress under the Maastricht Treaty has been much slower and has generated only limited and legally non-binding agreements.⁷⁹

4.3 Impact of Europeanization on French practices and Refugee Protection after the Amsterdam Treaty.

The analysis of the development of EU refugee policies until the Amsterdam Treaty with their repercussions on refugee policy in France leads to the conclusion that the major effects of Europeanization happened already in 1992 and 1993 in the context of the incisive asylum reforms in France which culminated in an amendment of the national constitution. At the same time, the analysis of this development shows a lack of progress towards substantive policy harmonization at the European level.

Today, it is good to revisit these conclusions and to reflect whether they are still valid

The analysis of legislative measures that France has adopted so far regarding the common definition and the criteria for qualification as a refugee and the standards of asylum procedures gives a mixed picture of the governmental policy vis-à-vis the European Common Asylum System.

Until recently France has been interpreting restrictively the Refugee definition. However, the restrictive interpretations of “ agents of

⁷⁹ Lavenex, *supra* note 67, p.178.

persecutions” illustrate the dangers they pose to asylum seekers when they fear non- governmental persecutors.

The following section will highlight the issue of restrictive interpretation of agents of persecutions in France. In the eyes of the French legislators, the identity of the persecutor is the primary criterion for evaluating asylum claims, rather than the risk of the persecution.

4.3.1 Restrictive Interpretation of ”Agents of Persecution “ in France.

Restrictive interpretations of non-state agents of persecution in France illustrate the dangers they pose to asylum seekers when they fear nongovernmental persecutors. France interprets the word persecution to include only human rights abuses that originate with, or are encouraged or tolerated by, governments or “states like” authorities.

This interpretation excludes from consideration for asylum the victims of persecution committed by opposition groups in civil wars. It also excludes persecuted individuals from countries where civil war has disintegrated government authority, or from countries where much of the international community does not recognize the de facto governmental authorities.⁸⁰

However, the French government does not provide protection to the victims of non-governmental entities that are equally capable of abusing people and that people fleeing such abuse are not entitled to protection.

While France has recently liberalized its adjudications of non-state persecution asylum claims, this trend does not represent any official change in policy, but remains informal and discretionary. As a result, France continues to deny asylum to some victims of non-state persecution.⁸¹

The French policies on agent of persecution recklessly risk lives. They result in the forced repatriation of people who should be considered refugees by any standards people with every reason to fear persecution, and worse, upon return to their home countries.

The legal and policy implications of the protection gap for victims of non-state persecution are also stark. While France remains today in the minority in its pursuit of agents-of persecution policies, its policies fit neatly with other Western European trends that challenge the very right to

⁸⁰ S. Edminster, ‘ Recklessly Risking Lives: Restricting Interpretations of “ Agents of Persecution” in Germany and in France’, *Worldwide Refugee Information*, 1999, p.1.

⁸¹ *Ibid.*

asylum and question the continued relevance of the UN Refugee Convention on which the concept of asylum is based.

4.3.1.1 Agents of Persecution and International Refugee Law

The fact of having fled from civil war is not compatible with a well-founded fear of persecution in the sense of the 1951 Refugee Convention. Too often, the existence of civil conflict is perceived by decisions-makers as giving rise to situations of general insecurity that somehow exclude the possibility of persecution.⁸²

France has always rejected Algerians fleeing civil strife and abuses committed by Algerian radical “Islamic” groups. Thus, a gap exists between the French positions on agents of persecution and international refugee law. Although the UN Refugee Convention does not specifically address the question of agents of persecutions, UNHCR, the agency charged with supervising the Convention’s application, has consistently taken the position that persecution perpetrated by non-state entities may fall within the Convention’s meaning. In its Handbook on Procedures and Criteria for Determining Refugee Status (along with the UNHCR’s Executive Committee Conclusions, the Handbook is generally accepted as providing the main international guidelines for interpreting the UN Refugee Convention), UNHCR states that:

It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned... Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities or if the authorities refuse, or prove unable to offer effective protection.⁸³

According to UNHCR, the wording of the Convention refugee definition itself “expressing the notion that certain individuals may be unable to avail themselves of the protection of their countries of origin” accounts for the real possibility that certain governments may not be able to protect their citizens from persecution by private parties. “ Thus the essential element for the extension of international protection,” UNHCR concludes, “is the absence of national protection against persecution...”⁸⁴

UNHCR also affirmed that the “ object and purpose” of the UN Refugee Convention supports the inclusion of non-state persecution in its mandate. According to Article 31 (1) of the Vienna Convention on the Law

⁸² Goodwin-Gill, *supra* note 2, p.75

⁸³ Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, (UNHCR Geneva, 1979, Reedited January 1992), p.28.

⁸⁴ An overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken By UNHCR, p 28.

of Treaties, “ a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”⁸⁵.

The ordinary meaning of the term “persecution,” UNHCR states, is that “ it embraces all persecutory acts irrespective of whether or not the complicity of the state is involved.”⁸⁶ UNHCR adds that “ the object and purpose of the 1951 Refugee Convention is to ensure that individuals who have a well-founded fear of persecution on the grounds enumerated in the Convention be granted international protection as substitute for the, lacking, national protection.”⁸⁷

Based on this logic, UNHCR concludes that refusing to consider victims of non-states persecution for refugee status clearly contravenes the object and purpose of the UN Refugee Convention.

Various experts on international refugee law and reputable nongovernmental refugee organizations agree with UNHCR’s position.⁸⁸

4.3.1.2 France’s Mixed Treatment of Non-State Persecution Claims

French treatment of non- state victims of persecution has marginally improved in recent years. France’s current official position on agents of persecution dates back to the case of Esshak Dankha (May 27, 1983), in which France’s High Administrative Court (Conseil d’ Etat) recognizes only persecution that originates with, or is encouraged, or tolerated, by the state authorities.⁸⁹

Until recently, the French position on agent of persecution has meant that French denied asylum are individuals persecuted by opposition groups, such as militant” Islamic” groups in Algeria, irrespective of how serious their protection problems may have been. France has adopted a relatively liberal approach to what constitutes a de facto authority capable of perpetrating persecution. For example, France has recognized acts carried out by militia in Bosnia as persecution under the UN Refugee Convention, finding that such persecution derives from the de facto authorities that have replaced the legal authorities no longer able to control all the territory within their jurisdiction.

⁸⁵ Vienna Convention on the Law of the Treaties, 24 May 1969, 1155 UNTS 331 [hereinafter Vienna Treaty Convention, abbreviated VTC].

⁸⁶ An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken By UNHCR, p. 29.

⁸⁷ Ibid. p.29.

⁸⁸ S. Edminster, *supra* note 81, p.6.

⁸⁹ Conseil d’ Etat, Decision N. 42.074, May 27, 1983.

France has also recognized the existence of the facto authorities in Liberia and Afghanistan. However, France continued to deny asylum to applicants from countries where it determines that no de facto authorities exist, such as Somalia (with the exception of Somaliland).

The Conseil d'Etat confirmed its approach on the question of agents of persecution originally set forth in the Dankha decision twice in 1996. France's agents-of-persecution policy has been pernicious for victims of non- state persecution whose governments are unable to protect them.⁹⁰

France continues to forcibly repatriate asylum seekers based on restrictive interpretations of agents of persecution despite repeated UNHCR appeals for the defence against *refoulement*.

The risk of persecution, rather than the identity of the persecutor, should be the primary criterion in evaluating non-state persecution asylum claims.

Thus, persecution that does not involve State complicity is still, nonetheless, persecution.

4.3.2. Territorial Asylum

The Ministry of Interior may grant "territorial asylum" to victims of non-state persecution or other rejected asylum seekers at risk of torture as defined by Article 3 of the European Convention on Human Rights, or alternatively to individuals whose life or freedom is under threat in their country on account of threats of violence from non-state or state agents.

When territorial asylum was introduced in 1988, it was intended to benefit mainly Algerian asylum seekers who feared persecution at the hands of Islamist radicals.

Unlike applicants for regular asylum, those requesting territorial asylum in France may not work and are not entitled to housing, meals, or pocket money. Applicants apply to their *préfecture* for territorial asylum, and often wait for about one year before their application is sent to the French Ministry of Interior. During this time, applicants are without authorization to stay in France.

The rare successful applicants receive one-year residence permit, renewable twice. After three years, the holder is entitled to apply for permanent residence status.

In 2000, 11,810 applications for territorial asylum were submitted representing an increase of 59 % compared to 1999 (6,984 applications). 9,232 of these applications were from Algerians. Territorial

⁹⁰ *Ibid.*, p.34.

asylum was granted in 762 cases, 353 of which were delivered for the first time (the others represent renewal of residence permits).

In 2001, this happened in about 7 cases (6 Algerians and 1 Bangladeshi).⁹¹

Territorial asylum has been granted so restrictively that the National Consultative Committee for Human Rights has called for its suppression as a status distinct from that of the Refugee Convention.

While the standards of persecution for territorial asylum is, in theory, broader than that of the Convention, the government has not been noticeably more generous in granting it, despite its weaker rights and benefits.

4.3.3 Constitutional Asylum

The Interior Ministry may also grant “constitutional asylum” to individuals “persecuted because of their activities in support of freedom”. The right to asylum on this basis is enshrined in the 1946 French Constitution, which states that, “every person persecuted on the grounds of his action for freedom has a right to asylum within France”. The requirements and benefits of constitutional asylum and regular asylum are virtually identical. In practice, very few people request constitutional asylum.

4.3.4 Asylum Procedures.

The Minister of Interior screens asylum seekers entering France, but detained asylum seekers must be brought before a judge if no decision is reached within four days. Applicants may appeal negative screening decisions, but this does not suspend removal.

France uses an expedited procedure for manifestly applications. Authorities use this procedure in the cases of nationalities that fall under the Refugee Convention’s cessation clause (Article 1C), which states that when the circumstances in the country of origin that caused them to be refugees no longer exist, they are no longer entitled to international protection. Negative decisions in the expedited procedure can be appealed, but this does not suspend removal.

After reaching a decision on admissibility, the *préfecture* either issues a deportation order and detains the applicant, or provide a one-month residence permit and an asylum application form.

⁹¹ *Legal Conditions for Asylum seekers and Refugees in France*, 2003, ECRE, <www.ecre.org./conditions/2003/france.shtml>.

The individual has one month to submit the form to OFPRA, which is responsible for adjudicating cases on merits. France offers free legal assistance only if the asylum seeker entered the country legally, which is usually not the case.

Asylum seekers may appeal negative OFPRA decisions to the CRR. The CRR comprises three adjudicators representing the Conseil d'Etat (France's Highest administrative court), OFPRA, and UNHCR. Applicants may appeal CRR rejections to the Conseil d'Etat, but only on procedural grounds and this does not suspend removal.

At this level, I may conclude that, Europeanization transforms not so much the French domestic asylum law and indirectly but consists more in a shield which is being built up it.

As an illustration, when you look at the state's practice and refugee protection in France until recently, it appears evident that these reforms follow exclusively domestic priorities and show little progress towards the Common European Asylum System.

4.4 French Policy Discourses on a new Right of Asylum

France ratified the Geneva Convention Relating to the Status of Refugees of 28 July 1951. Asylum in the meaning of the Geneva Convention was supplemented in 1998 by the Réséda Act and new forms of protection: constitutional asylum, granted to anyone persecuted for actions to promote liberty; and territorial asylum, offered to foreigners under threat in their own country or subject to inhuman or degrading treatment.

“Now this sacred right, this fundamental freedom, this value of the Republic, is in crisis, deep crisis, according to the very terms of the Commissions des Lois”.⁹²

“The confusion between a choice, immigration, and a right, that of asylum is making nonsense of our policies. It is encouraging the misuse of official procedures and aide sociale, and penalizing those who have greatest need of France's protection”.⁹³

Disorder is compounded by injustice. President Chirac said as much on 14 July 2002, when he described the system as absurd and intolerable.⁹⁴

⁹² Discussion on the Senate in the bill on the right of Asylum in France, preliminary remarks by Dominique de Villepin, Minister of Foreigner Affairs, October 22, 2003, p.2.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

However, a bill on a modernized right of asylum is being built on the following elements:

1. To apply the Geneva Convention more effectively and strengthen the protection of asylum seekers. The French government is proposing to abandon the criterion of the State of origin of persecution linked to the court's interpretation of Article 1 of the Convention. Refugee status may be granted even if non-states agents practise the persecution, as is more and more frequently the case. This a change long desired by the UNHCR.
2. To substitute subsidiary protection for territorial asylum. The subsidiary protection will be considered only if the applicant does not meet the conditions of conventional asylum provided by the Geneva Convention. The criteria for subsidiary protection are more specific than for territorial asylum, which should reduce the risk of arbitrary decisions. Moreover, whereas with territorial asylum the Interior Ministry enjoyed a wide measure of discretion, OFPRA will be bound to grant subsidiary protection once the criteria are met. The provisions of the EU Asylum Qualification Directive inspire the criteria for this subsidiary protection⁹⁵. Protection officers, specialists in asylum law, independent in their judgements and having a good knowledge of their countries of origin, will henceforth be responsible for examining applications. Appeals may be made to the Refugee Appeals Commission, with suspensory effect, which is not today the case with appeals to the administrative courts.
3. To rationalize the procedures. As a one- stop shop, OFPRA will have sole jurisdiction in regard to conventional asylum and subsidiary protection. A single procedure: OFPRA will determine the nature of each asylum application when processing the case, thus precluding the submission of successive applications for the same reason but on different legal grounds. There will be a single appeal, to the Refugee Appeals Commission. This rationalization of the asylum system will expedite the processing of applications, without reducing the protection afforded asylum seekers. Guarantees to asylum seekers will be extended, notably as concerns

⁹⁵ *Ibid.*, p. 37.

consideration on the merits of their application, the presence of counsel at hearings, and judicial appeal with suspensory effect for both types of asylum.

4. To incorporate the new concept of safe country of origin into the French legal system in line with the provisions of the Asylum Qualification Directive, whose adoption has been agreed at the European political level.
5. To take account of the realities of the new law of asylum in a spirit of EU harmonization.
6. Internal asylum will be enforced. Authorities will not allow asylum application from a person who would have access to protection in a part of the territory of his or her country of origin and could reasonably be sent back there without fear of harm. International Organization or Regional Organizations should provide protection for endangered population groups in areas, which have been made secure. France proposes to contribute to the successes of these missions.

By this bill on a new right of asylum, France hopes to integrate concepts such as “ safe country of origin” and “internal asylum” and to change the complimentary form of protection called “ territorial asylum “ into “subsidiary protection”.⁹⁶

It appears that these changes seem to reflect a clear Europeanization of French refugee protection.

⁹⁶ *Ibid.*, p. 38.

5. THE CONTENT OF THE COMMITMENTS UNDERTAKEN BY THE COMMUNITY UNDER THE EUROPEAN AND GENEVA CONVENTIONS

The Geneva Convention of July 28 1951 relating to the Status of Refugees and the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms are the legal framework for community action in the field of asylum law and policy. These are serving as a starting point for the EU asylum law and policy.

As we have already discussed, the Treaty of Amsterdam has accredited the ECJ to interpret and rule on the validity of Community instruments adopted in the field of asylum.

This chapter highlights the relationship between Luxembourg and Strasbourg Courts in the field of asylum.

Are the two jurisdictions competing in this field or not? This chapter will deal with this issue.

It has been disputed to what extent the Community is bound by its obligations to the ECHR. The Community, it has been stated, is forced to respect not only the conditions of the ECHR as such but also any relevant jurisprudence of the European Court of Human Rights.

However, taking into consideration the supposition of the European Court of Justice that the Community legal order is autonomous, bearing in mind, further, that Article 6(2) of the TEU means equal legal force of human rights irrespective of whether they are retained in the ECHR or as they result from the constitutional traditions common to the Member States, as general principles of Community law, and, finally, having respect to the possible conflicts between human rights derived from these sources which must be solved within the framework of the structure and objectives of the Community it is hardly imaginable that either Member States have intended to bind European Court to the European Court of Human Rights' jurisprudence or that the Luxembourg Court will accept position inferior to that of the Strasbourg Court.⁹⁷

⁹⁷ K. Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (Kluwer Law International, The Hague, 2000) p. 44.

Rather the European Court of Justice will in due course consider, as a guideline, relevant jurisprudence of the European Court of Human Rights.

So far the European Court of Justice has done so⁹⁸. The idea of construing human rights as independently as other parts of the Community legal order derives additional supports from the character of the judgements handed down by the European Court of Human Rights.

Under Article 46 of the ECHR such judgements are binding between the parties of a dispute only; complaints under the ECHR are not to solve abstract conflicts of law, but those of a particular case. Although Strasbourg judgements mean that the defendant States should discontinue a breach of the ECHR and change national law and practices it is still a question of debate whether the Strasbourg jurisprudence has a binding effect for States not involved in a particular case.

Such binding effect could certainly be derived from the provisions entrusting power such as to authentically interpret the ECHR. Nothing, however, in the ECHR indicates that such general power exists. Similarly, the European Court of Justice will be autonomous when interpreting the Geneva Convention.

At the same time, Member States practice under the Geneva Convention will inform the interpretation of Article 63(1) of the ECT. When deciding the meaning of Geneva Convention provisions the European Court of Justice should apply a technique similar to the elaboration of general principles of Community law.

5.1 The Competing Jurisdictions of the Strasbourg and Luxembourg Courts

Community action taken under Title IV ECT is subject to judicial review by the European Court of Justice with a view to the commitments taken under Articles 6(2) TEU and 63(1) ECT. At the same time, however, Member States related conduct is subject to review by the European Court of Human Rights with a view to the commitments taken by way of accession to the European Convention of Human Rights regardless of the fact that the Strasbourg Court does not directly review Community legislation. As a result, parallel review of Community legislation in Luxembourg and of related legislation or administrative practice of Member States may lead to conflicts where the Courts involved reach different conclusions.

⁹⁸ See the ECJ cases 46/87 and 227/88 *Hoechst* [1989] ECR 2859, para 18. In this case, the ECJ rendered its own interpretation of Article 8 ECHR and stated that the provision did not apply to business premises. The Court emphasized that no relevant jurisprudence of the European Court of Human Rights existed. (In the meantime, however, the European Court of Human Rights has decided on this issue and applies Article 8 ECHR also to business premises: judgement of 16 December 1992, *Niemitz v Germany*, Series A Vol. 256, 23.

Moreover, where only national conduct has been under review the question may arise of whether the EU has to change relevant legislation in order to enable defendant States to discontinue the breach of the Convention by way of changing national law and practices. This question will arise with respect to both directives (*Cantoni v France*) and regulations. In turn, where regulations govern Member States, administrative practice this practice seems to meet the test of reviewability applied by the European Court of Human Rights in *Ireland v. United Kingdom*.

5.2 Position of the ECHR

The Strasbourg Court held that breaches of the European Convention on Human Rights can result from either the mere existence of the law which introduces, directs or authorizes measures incompatible with the rights and freedoms safeguarded therein, provided that-

The law challenged ...is couched in terms sufficiently clear and precise to make the breach immediately apparent⁹⁹

Or, where such clear and precise law does not exist,

The decision of the Convention institutions must be arrived at by reference to the manner in which the respondent State interprets and applies in *concreto* the impugned text or texts.¹⁰⁰

Accordingly, the lack of a clear and precise law at the national level the application of which results in breach of the Convention does not amount to an excuse or justification of the conduct under review. It seems that, in the light of *Cantoni v France*, the lack of a clear and precise law at the national level, and the lack of legislation as such at the national level for reason of the existence of a relevant regulation adopted by the Community must be treated similarly.

Otherwise Member States could evade their obligations under the European Convention on Human rights by mere choice of instrument of Community legislation. Consequently, conduct of national authorities is reviewable and can be in breach of the Strasbourg Convention.¹⁰¹

As matter of fact, the consequences of adopting legislation at the EU level, which fails to meet ECHR standards, are three fold:

⁹⁹ See ECHR, judgement of 18 January 1978, *Ireland v United Kingdom*, Series A no.25, para 240. See also V.Dijk and V.Hoof (eds.), *Theory and Practice of the European Convention on Human Right* (Kluwer Law International, The Hague, 2000) p.33; see also travaux préparatoires (document H (61) 4, 384, 502, 703 and 706).

¹⁰⁰ ECHR, judgement of 18 January 1978, *Ireland v United Kingdom*, Series A no.25, para 240.

¹⁰¹ Hailbronner, *supra* note 98, p.45

First, failure to get it right in relation to the ECHR impacts on the constitutional integrity of the Union. A finding by the ECHR that Community law does not meet the requirements of the ECHR could have the effect of triggering a reaction from the constitutional courts in the Member States which have already, in some countries more loudly than in others, signalled their concern about the respect for fundamental rights in the EU framework.

Secondly, the European Union will be breach of its own Union as contained in Article 6(2) Treaty of the Union “ The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” The measures, which the EU will adopt in Title IV, are subject to the jurisdiction of the European Court of Justice which must interpret those measures in light of Article 6(2) TEU. In light of the above concerns, could the EU be in breach of itself by adopting a minimum standard in the field of asylum, which does not satisfy the minimum requirements of the ECHR?

Thirdly, the European Union prides itself on its record of respect for fundamental freedoms and human rights. In adopting its asylum policy, it has carefully protected its legitimacy in the field by including in the EC Treaty the duty to adopt only minimum measures, leaving it open to the Member States to adopt measures, which provide a higher level of protection for asylum seekers in their territory. However, the legitimacy of the European Union may be undermined if there are real and serious charges that among the first measures, which it adopts as a floor in the field of asylum, the minimum requirements of the ECHR are not fully respected.¹⁰²

¹⁰²E. Guild, ‘ Jurisprudence of the European Court of Human Rights: Lessons for the EU Asylum Policy’: An article in “*The emergence of a European Asylum Policy*”(Brylant, Bruxelles, 2004) p. 341.

6.THE COMPATIBILITY OF THE EC DIRECTIVES WITH INTERNATIONAL REFUGEE LAW AND HUMAN RIGHTS.

6.1 The Asylum Qualification Directive

Article 63(1c) EC Treaty obliges the Council to adopt minimum standards with respect to the qualification of third country nationals as refugees. The Council Directive contains minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Adopted 30 April 2004, the Council Directive has not yet entered into force. The transposition deadline will be 24 months after the date of entry into force.

The main purpose of the Directive is to ensure that the laws and policies of the Member States are harmonized to provide a minimum level of protection to persons determined to be Convention refugees or beneficiaries of subsidiary protection. The goal of harmonization is to prevent refugee flows to certain Member States based solely on differing levels of protection in their legal framework.¹⁰³ Article 63 (1) EC Treaty makes it clear that measures adopted on asylum issues have to be in accordance with the 1951 GC, and consequently other protection measures for refugees and displaced persons shall be placed in a secondary position.¹⁰⁴

However, there are positive and negative provisions in this Directive. I will start with the positive provisions.

6.1.1 The positive provisions

The Asylum Qualification Directive recognises that, for a person to qualify as a refugee under the 1951 Convention, it is immaterial whether the persecution feared stems from the State, or from the parties or organisations controlling the State, or from non-states actors- provided, in the latter case,

¹⁰³“Explanatory memorandum proposal” (n1) 4.

¹⁰⁴ Art.63 (2) EC Treaty.

that the State is unable or unwilling to offer protection.¹⁰⁵ This approach is in conformity with the practice of the vast majority of States, and also reflects UNHCR's long-standing position as set out not least in the Handbook.¹⁰⁶

Further, the Directive recognises that, for a person to qualify as a refugee under the 1951 Convention, it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecutory action, provided that such a characteristic is attributed to him or her by the agent of persecution¹⁰⁷; and the risk of punishment evasion or desertion may, by itself, provide grounds for a refugee claim if the person for the evasion or desertion is the person's unwillingness to participate in military actions incompatible with his or her deeply held moral, religious or political convictions.¹⁰⁸

However, the Directive contains special provisions for the protection of unaccompanied minors, and provides that the "best interest of the child" should be a primary consideration of Member States when implementing the Directive.¹⁰⁹

Concerning the notion of "members of the family" of the refugee, the Directive encompasses not only the spouse and minor children, but also other close relatives who lived together as part of the family unit at the time of leaving the country of origin, and who were wholly or mainly dependent on the applicant at the time.¹¹⁰

Generally, the Directive provides for an adequate level of treatment of refugees and beneficiaries of subsidiary protection, taking into account not only the provisions of the 1951 Convention, but also the development of international human rights law.¹¹¹

While recognizing the pre-eminence of the rights of refugees as set by the 1951 Convention, the Directive only provides for a selective listing of those rights. The right of association, access to courts, liberal professions, administrative assistance and naturalization are but few of the Convention missing from the Directive. It is unthinkable that the Member States of the European Union would deny refugees the exercise of these Convention rights simply by reason of their express non-incorporation into the Community rule. Still, there is a drafting problem to be remedied.

The following observations focus on the negative provisions of the Directive.

¹⁰⁵ Articles 9 (1) and 11 (2)(a)

¹⁰⁶ UNHCR Handbook, paragraph 65.

¹⁰⁷ Art.11 (2)(b)

¹⁰⁸ Art.11 (1)(d)(ii)

¹⁰⁹ Art.28 and Preamble para.23.

¹¹⁰ Art.2 (j)

¹¹¹ Chapter V

6.1.2 The negative provisions

There are provisions in the Asylum Qualification Directive that are in breach of the Member States international obligations.

Member States may require applicants to possess a residence permit in order to have access to benefits with regard to access to employment, social welfare, health care and access to integration facilities.¹¹²

Refugees and persons with subsidiary protection and their family members may be *de facto* prevented from accessing these rights when a residence permit is not renewed or simply when its issuance is delayed. Access to benefits must be given immediately after recognition of status has taken place and until a final decision that status has ceased has been taken.¹¹³

State-like authorities are included as actors of protection.

They are not and cannot be parties to international human rights instruments and therefore cannot be held accountable for non-compliance with international refugee law and human rights obligations. In considering whether an asylum applicant has access to protection in his country of origin, Member States should not automatically deny international protection on the basis that an international organisation is present but should carefully examine whether each individual actually has access to effective protection.¹¹⁴

The Directive allows Member States to not consider an application for international protection if they deem that in another part of their country of origin the applicant will not face persecution and can be “reasonably expected” to stay there. The same provision dealing with “Internal Protection” also states that technical obstacles to return to the country of origin will not prevent a decision to apply this internal protection principle.

The main elements for the application of internal protection are lacking, including the following:

- A de jure not just de facto authority must afford protection;
- The claimant must be able to access the area of internal protection in safety and dignity and legally, both from inside and outside the country of origin;

¹¹² Recital 30

¹¹³ Key and Recommendations made by ECRE to the Qualification Directive p.7

¹¹⁴ Art.7

-Conditions in the area of internal protection must afford at least the same standards of protection of core human rights as the 1951 Refugee Convention does;

-The area of internal protection must be free from conditions, which could force the claimant back into the area of risk of serious harm;

-The absence of a risk of serious harm in the proposed area of internal protection must be objectively established.

The Directive includes national security concerns as grounds not to grant refugee status.

The inclusion of national security concerns as grounds not to grant status to a refugee constitutes an expansion of the exclusion provisions in the 1951 Refugee Convention. Member States should restrict the application of the exclusion clauses to the grounds established by Article 1F of the Refugee Convention only.

This Community instrument maintains a distinction between the Convention refugees and other refugees entitled to and deserving international protection. The experience of the EU Member States with the protection of the so-called “broader category refugees” has brought to the fore a number of important questions that need to be addressed in the context of the developing Community instrument on the subject matter. These questions concern in particular: definition of the categories, standards of treatment and the extent of formal legal obligations owed to this class of persons.

Furthermore, the broad meaning of the term “refugee” for the purposes of the United Nations and UNHCR’s responsibility is not limited to those coming within the ambit of Article 1 of the 1951 Convention; it also covers individuals and groups compelled to leave or to remain outside their country of origin on account of threats to their lives or freedom for reasons and circumstances other than the ones set out in the Convention. The defining characteristic of the refugee in the broader class is like the Convention refugee, the existence of a serious risk of being subjected to measures or actions that affect the person’s physical, moral or intellectual integrity and human dignity in any unendurable way.¹¹⁵

It is significant that EU Member States have over the years repeatedly reaffirmed their commitments to the protection of refugees coming within the broader definition. They have acquiesced to provide international protection and assistance to this category of refugees.

The definition of the broader class of refugees should draw on developments in the field of international human rights and international humanitarian law. Article 3 of the United Nations Convention Against Torture, Article 3 of the European Convention on Human Rights and

¹¹⁵ *Common European Asylum System* submitted by UNHCR P243

Fundamental Freedoms and Article 7 of the International Covenant on Civil and Political Rights have certainly broadened the obligations of EU Member States in regard to protection against expulsion, return or extradition of non-nationals.¹¹⁶

Persons enjoying subsidiary protection are provided substantially lower benefits and rights than those accorded to Convention Refugees. This includes access to only emergency health care and so-called “core benefits” and the possibility of more restricted access to the labour market.¹¹⁷

Furthermore, there are three areas where the Community law should treat beneficiaries of the subsidiary protection differently from the 1951 Convention refugees:

- Their residence permit is only for one year, though with the possibility for automatic renewal, as opposed to five years for the Convention refugees.
- They have to wait six months before they are allowed access to employment, whereas Convention Refugees have immediate access.
- They can access vocational training and other employment-related education programmes, as well as integration programmes and facilities, only after one year, but no such waiting period exists for Convention refugees.

Invoking the primacy of the 1951 Convention as a reason for not treating refugees belonging to the subsidiary protection class on equal footing with 1951 Convention refugees does not seem to be a persuasive argument. It is generally recognized that treaties of humanitarian character are not static instruments, but need to be interpreted in more evolutionary terms taking into consideration the developments that have occurred in the period since their conclusion.

The 1951 Convention, as a “ living instrument,” must accordingly be construed to cover situations, which, whether or not expressly defined by its drafters over five decades ago, clearly come within the spirit of its term This was indeed what the United Nations Conference of Plenipotentiaries that adopted the Convention set out in its Recommendation E. Refugees never were a once-for-all defined class.¹¹⁸

¹¹⁶ In its General Comment 20, for example, the Human Rights Committee underscored that the aim of Article 7 of the *International Covenant on Civil and Political Rights* is to protect the dignity and physical and mental integrity of the individual, that is the duty of the State to afford everyone protection through legislative and other measures, and that the State must not expose individuals to torture or other inhuman and degrading treatments upon return to their home countries.

¹¹⁷ Articles 23, 26, 28, 29, 33 of the EU Asylum Procedures Directive.

¹¹⁸ *Towards a Common European Asylum System*, submitted by UNHCR, p.250.

Persons receiving subsidiary forms of protection should be granted benefits and rights equal to those with 1951 Refugee Convention status. If these derogations are applied they will hinder the integration of persons with subsidiary forms of protection. Member States should implement Recommendations E contained in the Final Act of the Conference of Plenipotentiaries which adopted the 1951 Refugee Convention, and which states that individual not covered by the terms of the Convention should be granted the treatment for which it provides.¹¹⁹

The unified law-based system on subsidiary protection that is being developed to cover this category within a single regime of international protection should fill the protection gap created by the differentiation of refugee protection. For the UNHCR, three overarching considerations remain:

1 Measures to provide subsidiary protection should be implemented with the objective of strengthening, rather than undermining, the existing global refugee protection regime.

2. Beneficiaries of subsidiary protection should be broadly defined so as to include all persons who, although not meeting the 1951 Convention criteria, nevertheless need international protection.

3. The standards of treatment accorded to beneficiaries of subsidiary protection should provide for the protection of basis civil, political, social and economic rights on equal footing with those granted 1951 Convention refugee status.

6.2 The Asylum Procedures Directive

The Asylum Procedures Directive is a proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status.

The final Provisions of the Directive are still under negotiation. A “general approach has been agreed on by the Council of the European Union, 29 April 2004. But the Directive has not yet been adopted. The transposition deadline will be 24 months after the date of its adoption, and for Article13, 36 months after the date of its adoption.

Asylum Community Law must be based on the previous international obligations affecting the EU in the areas of General International Law, International Law on Human Rights and Refugee Law. Specifically, the rules to be adopted by the European Institutions must follow the provisions contained in the 1951 Geneva Convention and in the ECHR.

¹¹⁹ ECRE p8.

However, some of the issues on asylum included in Title IV ECT are not directly mentioned in the Geneva Convention, nor in other international treaties. This is the case of the procedural rules to be followed for refugee status or subsidiary status, to be recognized in the case of an asylum seeker. Therefore, the jurisprudence of the ECtHR will be a very helpful tool when it comes to complying with international law guidelines when developing the EU rules on asylum procedural matters.

Undoubtedly, the two most relevant individual rights on asylum arising from General International Law are the right to seek asylum and the right of *non-refoulement*.

On the one hand, some current issues of the asylum procedures make it impossible to exercise the right to seek asylum, specifically, some interpretations of the concept of manifestly unfounded claims or the issues of safe country of origin.

On the other hand, the ECtHR has given an important insight into the risk of lack of procedural guarantee for asylum seekers in relation to the rule of *non-refoulement*. In the *Jabari* case¹²⁰ the ECtHR considers that there is a link between the right to the alien to non-refoulement, as developed by the ECtHR jurisprudence on Article 3 ECHR, and the asylum seekers right to an effective remedy.

Thus, the ECtHR states in this case that:“(...) given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialized and the importance which is attached to article 3, the notion of an effective remedy under article 13 requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned”¹²¹

To some extent, the provisions of the Directive represent improvements of procedures standards in some area, but still allow for practices, which are controversial. Most elements divert from the international principles such as the principle of non-refoulement and risk violating either the 1951 GC or the ECHR or both.

The right to independent legal advice and representation is limited by the absence of an express requirement to ensure the right to legal assistance of all asylum applicants. Member States have a limited obligation to publicly fund legal assistance and representation at appeal level only- an

¹²⁰ *Jabari v Turkey*, (Appl. No. 40035/98), Judgement of 11 July 2000.

¹²¹ *Ibid*, para 50. Regarding the relationship between the suspension of the implementation of an asylum expulsion (or an order to leave the territory of the State) and the concept of an effective remedy, see *Case of Conka v. Belgium* (Appl. no. 51564/99), Judgement of 5 February 2002).

obligation they are nevertheless allowed to restrict to a few categories of cases including ones where the appeal or review is likely to succeed.¹²²

The right to legal assistance and representation is an essential safeguard in complex European asylum procedures and required throughout the procedure.

With regard to the trial guarantees as far as legal assistance is concerned, the following rights must be contemplated:

- All applicants for asylum have the opportunity to effectively get in touch with organizations or persons who provide legal assistance (this can be a lawyer or another type of legal adviser) during all the stages of the procedure;
- The legal adviser shall have the opportunity to be present during the personal interview on the material grounds of the application and shall enjoy access to the information in the applicant's file;
- The Member States must ensure that all the applicants for asylum have the right to assistance of a legal adviser after his/ her application is rejected. The assistance will be free of charge at this stage of the procedure if the applicant does not have the means to pay.

Quality legal assistance and representation can help to ensure that international protection needs are identified early on, and help improve the efficiency of first instance procedures. Access to free legal assistance should be restricted only for asylum seekers with adequate financial means. However, the amounts of legal assistance could be limited to the average costs of legal assistance for each relevant step in the procedure.¹²³

The Directive allows Member States to declare an application inadmissible if satisfied that a safe third country exists where the asylum seeker will be free from threats to their life and liberty in the third country concerned on account of race, religion, nationality, membership of a particular social group or political opinion; the asylum seeker will not be sent back to persecution, torture, or cruel, inhuman or degrading treatment; and the asylum seeker will be able to request and, if granted, enjoy protection as a refugee.¹²⁴

Under international refugee law, the primary responsibility for international protection remains with the State where the asylum claim is lodged. Member States should therefore ensure that all asylum claims presented in the EU are examined on their merits by a Member State.

¹²² Articles 13 and 14 of the EU Asylum Procedures Directive.

¹²³ Note on key issues of concern to UNHCR on the draft Asylum Procedures Directive p1.

¹²⁴ Art.27 of the Directive.

If Member States choose to apply the safe third country concept, the need for very strict criteria is paramount, in particular:

- The decision to declare an application inadmissible on these grounds should be taken in a fair and efficient individual procedure;

- The presumption of safety must be *rebuttable* by the applicant in the particular circumstances of his/her case;

- For a third country to be considered safe it should have ratified and implement the 1951 Refugee Convention and other international human rights treaties, and have an asylum procedure in place with these minimum guarantees: the asylum procedure is prescribed by law; decisions on applications for asylum are taken objectively and impartially; applicants are allowed to remain at the border or on the territory of the country until their application has been decided; applicants have the right to personal interview and are given the opportunity to communicate with UNHCR or other organizations working on the behalf of the UNHCR; there is an effective possibility to have the decision renewed and the UNHCR, or other organizations working on behalf of it, have access to asylum applicants and to the authorities competent to decide and requesting information;

- The third state must be given its explicit consent to (re) admit the asylum seeker and to provide him/her full access to a fair and efficient determination procedure before any transfer may take place;

- The applicant must have a close link with the third country, such as family ties; mere transit through a country does not constitute a meaningful link.¹²⁵

The Asylum Procedures Directive provides for a common list of safe countries of origin binding on all Member States, which may be amended. Member States may also designate third countries other than those appearing on the minimum common list as safe countries of origin.

The safe country of origin concept can be applied to applicants who have the nationality of the country or are stateless but were formerly habitually resident there, if the applicant “has not submitted any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances in terms of his/her qualification as a refugee...

The use of the “safe country of origin” concept can lead to discrimination among refugees in violation of Article 3 of the 1951 Refugee Convention, Article 21 of the Charter of Fundamental Rights of the European Union and Article 26 of the International Covenant on Civil and Political Rights. No country can be considered safe for all persons.

¹²⁵ Key and Recommendations made by ECRE at the Asylum Procedure Directive p9.

It is for Member State to establish that the country of origin can be considered safe in the particular circumstances of the applicant, by carefully and examining the applicant's *individual* claim, a process most appropriately dealt with in regular procedures.¹²⁶

The Directive allows Member States to deny access to the procedure to all asylum seekers "illegally" arriving from designated countries in the European Union and strips them of any rights to rebut this presumption. Member States are therefore allowed to return asylum applicants to so-called "super safe third countries" before any examination of their claim has taken place and regardless of whether they have meaningful links with the country and whether they will enjoy protection from *refoulement* and access to a fair and efficient asylum procedure.¹²⁷

This provision violates Member State's international obligations to protect against *refoulement* and to guarantee an effective remedy, as enshrined in Article 33 of the 1951 Refugee Convention; Articles 3 and 13 of the European Convention on Human Rights; Article 3 of the Convention Against Torture; Article 7 of the International Covenant on Civil and Political Rights; and Articles 18, 19 and 47 of the Charter of Fundamental Rights of the European Union.

The right to an effective remedy provided for in relation to this measure will remain a "dead letter" in practice. Member States should not implement the "super safe third country" provision when transposing this Directive into their national legislation.

Article 38 of the Directive does not guarantee that appeals will have suspensive effect in all cases.

Standards of due process require an appeal or review mechanism, involving careful considerations of both law and fact, to correct any error and ensure the fair functioning of asylum procedures

Applicants must have the right to effective review or appeal against a negative decision. Such review or appeal should normally have a suspensive effect.

The right to an effective remedy before a court or tribunal is embodied in EC law, in Article 47 of the Fundamental Rights of the European Union and in Article 13 of the European Convention on Human Rights. As held by the European Court of Human Rights, it implies the right to remain in the territory of the Member State until a final decision on the application has been taken. Member States should in all cases grant the right to remain in the asylum country during an appeal procedure.

¹²⁶ ECRE p.10

¹²⁷ Art.35 (A)

An exception to the general rule could be considered in strictly limited categories, namely “manifestly unfounded” and “clearly abusive” claims, which are defined in UNHCR’s Executive Committee Conclusion No.30.

In such cases, however, there must still be access to the possibility of an independent review of the decision to remove the person pending appeal. Such a review could be simplified and fast, taking into account the chances of an appeal.

In sum, since the EU Asylum Qualification Directive is adopted, it is logical, in theory, that these procedures will acquire real meaning.

However, regarding some of the asylum procedural issues under discussion, it would seem as if, through the European harmonization process, the asylum procedures have changed their original purpose, which was to distinguish and protect persons fleeing persecution or inhuman treatment transforming this into a system for preventing the possibility of the irregular entry of an immigrant in all cases.

Finally, it is important once again to emphasize that European Harmonization on asylum is not only nor principally a matter of procedural questions.

Common sense tells that the priority issues are the standardization of the interpretation, which the Member States have to make concerning the Geneva Convention and the achievement of an unequivocal concept of subsidiary protection.

Only when this task has been completed will the right time have come to talk about a Common Procedural Asylum System.

7. CONCLUSIONS

The thesis deals with refugee protection in the framework of the Common European Asylum System (CEAS). As we have seen Community action must be in line with Human Rights Treaties, among other things, the 1951 Geneva Convention. Refugees, as defined by the Geneva Convention, are characterized by four elements; namely, they have fled their country of origin, they are unable or unwilling either to return to it, or to avail themselves of its protection, this impossibility is due to persecution or to well-founded fear of possible persecution and they fear persecution on the grounds of race, religion, nationality, political opinion or membership of a particular social group.

The principle of non-refoulement in the 1951 Geneva Convention states that “no Contracting States shall expel or return (“refouler”) 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”. These principles are covering a wide range of situations under which a person can be threatened and/or persecuted.

France does not provide protection for persons persecuted due to their sexual character. Both the 1951 Refugee Convention and the non-refoulement principle should cover the aspect of sexual character as well. The concept of gender should also be included in the refugee definition and the non-refoulement principle. Women are threatened to life and even killed by their families or by their husbands. In many cases, local authorities are passive concerning the problems of women and unwilling to help them.

Therefore, gender should be added to the Geneva Convention so that persecuted women could be offered protection in other countries.

The greatest innovation in the EU approach to asylum issues was the introduction, as a lead in the harmonization process in the field of asylum law, into the Treaty of Amsterdam of a new EC competence on asylum policy. By communitarization of asylum issues influential legislative tools such as directives became available.

The Asylum Qualification Directive sets out the applicable rules for determining refugee status and subsidiary protection. The main aim of this Directive is to ensure that the laws and policies of the Member States are harmonized to provide a minimum level of protection of persons determined to be Convention refugees or beneficiaries of subsidiary protection.

The goal of the harmonization is to prevent refugee flows to certain Member States based solely on differing levels of protection in their legal framework.

Although there are some positive aspects in this Directive, the latter contains provisions that breach the International Refugee Law and Human Rights Law.

One important distinction that Member States must keep in mind is the difference between refugee status according to the 1951 Refugee Convention and subsidiary protection. This distinction must be operationalized so that the scope of application of the 1951 GC is respected, avoiding that this instrument of refugee protection would be relegated to a *de facto* subsidiary protection mechanism.

Furthermore, refugees and persons with subsidiary protection and their family members should not be *de facto* prevented from accessing their rights when a residence permit is not renewed or simply when its issuance is delayed.

The Community instrument maintains a distinction between the Convention Refugees and other refugees entitled to and deserving international protection. Persons enjoying subsidiary protection are provided lower benefits and rights than those accorded to Convention Refugees.

In my view, this primacy of the 1951 Refugee Convention shall be abolished in order to treat refugees belonging to the subsidiary protection class on equal footing with 1951 Convention refugees. Those persons should be granted benefits and rights equal to those with 1951 Refugee Convention.

The Asylum Procedure Directive is aiming to harmonise asylum procedures in all Member States. Many of its provisions are not compatible with international obligations affecting the EU in the areas of General International Law, International Law on Human Rights and Refugee Law.

Specifically, the rules to be adopted by the European Institutions must follow the provisions contained in the 1951 Geneva Convention and in the ECHR.

However, some of the issues on asylum included in Title IV ECT are not directly mentioned in the Geneva Convention, or in other international treaties. This is the case of procedural rules to be followed for refugee status or subsidiary status, to be recognized in the case of an asylum seeker.

Therefore, the jurisprudence of the ECHR will be a very helpful tool when it comes to complying with international law guidelines when developing the EU rules on asylum procedural matters.

On the other hand, the right to legal assistance and representation should be recognised in complex European asylum procedures. Trial guarantees as far as legal assistance is concerned, shall be contemplated.

Concerning the use of “ safe country of origin” this can lead to discrimination among refugee in violation of International Law.

In my view, no country can be considered safe for all persons.

The biggest challenge for the European Union is to build an effective common asylum system while ensuring a better refugee protection. As indicated by the Tampere Summit, substantive harmonization appears to be the only answer, both to the need to comply with the Single Market project and to the restoration of adequate levels of refugee protection across the Community.

To this purpose, harmonization would necessarily have to be substantive in nature and comprehensive in scope. Partial harmonization or legally binding minimum standards might solve some of the past implementation problems, but would not be able to overcome mutual distrust and lack of solidarity.

Following a minimum common denominator would imply an unacceptable lowering of refugee protection levels, leading to further jurisdictional challenges in national and international Courts.

Therefore, a country like France with lower protection level would necessarily have to rise up to the standards of the majority.

A comprehensive harmonization would by definition entail one asylum procedure, one set of common definitions and one common asylum status covering different instances of persecution¹²⁸. Such a harmonization programme would no doubt appear very ambitious, but it would be the only solution compatible with Member State’s international refugee protection. If the EU Single Market project really imposes on Member States the necessity of sharing such obligations, the only way this can be achieved is by a comprehensive substantive harmonization subject to full jurisdictional scrutiny.¹²⁹

A true CEAS should be the ultimate goal of a fair EU asylum policy. However, it should be clear that this scale of harmonization would realistically require at least a decade, if not longer.

The failure to effectively standardize practices to ensure equitable treatment of asylum seekers in the European Union has created one of the most significant challenges to refugee protection. At this level,

¹²⁸ Boccardi, *supra* note 7, p.209.

¹²⁹ Boccardi, *supra* note 7, p.210.

the harmonization may be regarded as disappointing since Member States lacked the political will to standardize their practices.

In spite of the changes reflecting a clear harmonization of refugee protection in France, the latter still applies more restrictive criteria in determining refugee status. It appears that France will use these changes in order to modify, in a restrictive sense, the possibility of qualifying for refugee.

Yet, during this period, the low standards in the Asylum Procedures Directive gives some Member States a tendency to reduce and violate the well-established protections principles, such as the principle of non-refoulement and the right to suspensive effect on appeal.

In my modest point of view, this Directive should be subjected to the judicial review of the ECJ; otherwise the rights of asylum seekers have been cut down and not even binding principles of international law, such as the principle of non-refoulement, are respected.

The possibilities that an asylum seeker would be able to challenge any rules of the Asylum Qualification Directive or the Asylum Procedures Directive through remedy under the ECJ are very limited. These Directives have never been challenged through annulment proceedings. From the wording of Article 230(4) of the EC Treaty, decisions are the only acts, which can be challenged by private parties. The Directives lay down general standards and it is very difficult to prove individual concern in the legal framework of Article 230(4) when the applicant wants to challenge a directive.

Through preliminary rulings, an asylum seeker can challenge the Directives. The most obvious advantage of the preliminary rulings is that the applicants do not have to fulfil the requirements of direct and indirect concern. Therefore both individual and general Community acts may be challenged. The access to the ECJ for reference of preliminary rulings are limited in the field of asylum, Article 68.1 EC Treaty allows preliminary rulings only by request of national courts or tribunal against whose decisions there are no judicial remedies under domestic law.

The limitations currently imposed on the opportunity to request an ECJ preliminary ruling within the Title IV TEC should be lifted. Great consideration should be given to ways of improving the ECJ's ability to cope with the resulting increase in the judicial case –load, especially in relation to urgent application.

Finally, scrupulous care should be taken in regulating the conflicts of competence that could eventually arise between the ECJ and the ECtHR once the EU Charter of Fundamental Rights is incorporated into the TEU.

The EU Charter of Fundamental Rights represents a new era in the future nature of the community, permanently adding a Human Rights dimension to the traditional economic one of the past.

Therefore, the Community will in future be even better equipped to pursue the Human Rights implications of its border-free Single Market project.¹³⁰

Now, it is time the EU showed that it really takes fundamental rights- and hence refugee protection –seriously.

¹³⁰ Boccardi, *supra* note 7, p.212.

Bibliography

Literature

Boccardi, I; *Europe; Refugee Towards a EU Asylum Policy*, Kluwer Law International, The Hague, 2002.

Dijk, V and Hoof, V; *Theory and Practice of the ECHR*, Kluwer Law International, The Hague, 2000.

Guild, E; *Jurisprudence of the European Convention on Human Rights and Fundamental Freedoms in The Emergence of a European Asylum Policy*, Brylant, Bruxelles, 2004.

Goodwill-Gill, G; *The Refugee in International Law*, Oxford, 1996.

Hailbronner, K; *Immigration and Asylum Law and Policy of the European Union*, Kluwer Law International, The Hague, 2000.

Lavenex, S; *The Europeanization of Refugee Policies Between human Rights and internal security*, Ashgate Publishing Limited, Hampshire, 2001.

Noll, G; *Negotiating Asylum, The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, Kluwer Law International, The Hague, 2000.

Articles

Byrne, R *et al*; Understanding Refugee Law in an Enlarged European Union, *European Journal of International Law*, 2004.

Edminster, S; Recklessly Risking Lives: Restricting Interpretations of “Agents of Persecution in France and in Germany”, *Worldwide Refugee International*, 1999.

International Treaties

Convention relating to the Status of Refugees, 28 July 1951, 189 UNTS 137.

European Convention on Human Rights and Fundamental Freedoms, 4 November 1950, ETS No 5.

Vienna Convention on the Law of the Treaties, 29 May 1969, 1155 UNTS.

International Covenant on Civil and Political Rights, 16 December 1966, 299 UNTS 171.

EU Instruments and Documents

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, 19 June 1990

Convention Determining the States Responsible for Examining Applications for Asylum Lodged in One of the Member States of the Community, Dublin, 15 June 1990, OJ (1997) C 254/1.

Council Regulation (EC) No 574/1999 of 12 March 1999 Determining third countries whose nationals must be in possession of visa when crossing the external borders of the Member States.

Single European Act, 9 September 1985, OJ (1987) L 169/1.

The White Paper from the Commission to the European Council, Milan 28-29 1985, COM 85 310.

Other Documents

Council of the European Union, Doc CIG 81/04, 8 June 2004.

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, Geneva, 1979.

ECRE, *Legal Conditions for Asylum Seekers and Refugees in France*, 2003.

Table of Cases

Amur v France, (Appl. No.17/1995/523/609), Judgement of 26 June 1999.

Cantoni v France, Judgement of 15 November 1996, European Court of Human Rights, Reports 1996-V.

Conka v Belgium, (Appl. No. 51564/99), Judgement of 5 February 2002.

Conseil d'Etat, Décision N. 42.074, May 27, 1983.

Ireland v United Kingdom, Judgement of 18 January 1978, Series A No.25; (1979-80) 2 EHRR 25.

Jabari v Turkey, (Appl. No. 40035/98), Judgement of 11 July 2000.

Niemitz v Germany, Judgement of 16 December 1992, Series A No.251-B; (1993) 16 EHRR 97.