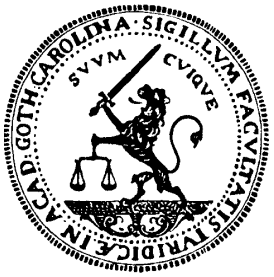


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# Does national legislation in Sweden and in the UK conflict with international law protecting refugees?

Master thesis
20 points

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# Contents

# Summary

This thesis examines the relationship between international law protecting refugees and national legislation in Sweden and in the UK. International protection is afforded by the 1951 Geneva Convention Relating to the Status of Refugees. But also general international human rights instruments are relevant. These include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Cultural and Social Rights, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention for the protection of Human Rights and Fundamental Freedoms. The most important right benefiting refugees is that of non-refoulement, i.e. the right not to be sent back to the frontiers of territories where one's life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion; or where one would risk being subjected to torture or other cruel, inhuman or degrading treatment.

In both Sweden and the UK various measures to keep the number of asylum seekers and refugees down are employed. These can be broadly categorized in measures of containment and measures of deterrence. The former are measures which have as their direct object to keep potential asylum seekers and refugees out of the territory of the country of refuge, or cut short the duration of their stay there. The latter are a mixture of restrictive and punitive measures taken in the country of asylum. National rules in Sweden are found primarily in the 1989 Act on Aliens (*Utlänningslagen*), and in the UK in the "Asylum and Immigration Act".

Measures of containment include visa requirements, carrier sanctions, pre-frontier training and assistance programmes, safe third country and safe country of origin. Visa requirements is the primary measure of containment. There is no possibility to apply for a visa on the grounds of seeking asylum in Sweden. In the UK this is possible, although only to a very limited extent. Denying a potential asylum seeker a visa could violate article 3 of the European Convention on Human Rights. National legislation in Sweden and in the UK on carrier sanctions, pre-frontier training programmes, safe third country and safe country of origin probably conform with international law. To comply with the principle of non-refoulement, the safe third country measure must not be used mechanically. Safe country of origin lists may only be used informally, as an administrative tool raising a presumption that there is no risk of persecution. Neither Sweden nor the UK have formal safe country of origin lists.

Measures of deterrence include detention and retention, limitation of welfare benefits and negative language and propaganda directed towards asylum seekers by State officials. As for detention, policy in the UK results in large numbers of

asylum seekers being kept detained for prolonged periods. This probably often leads to violations of article 9 of the International Covenant on Civil and Political Rights and article 5 of the European Convention on Human Rights, which prohibit arbitrary arrest or detention. Also, there is no proper appeal procedure in detention cases in the UK, only a bail hearing which focuses on guarantees for good behaviour rather than on the lawfulness of the detention. This possibly violates article 5.4 of the European Convention on Human Rights and article 9.4 of the International Covenant on Civil and Political Rights. Welfare benefits for asylum seekers are kept to a minimum in both Sweden and the UK. The system for social assistance to asylum seekers in the UK is possibly discriminatory, in violation of article 26 of the International Covenant on Civil and Political Rights.

Even if discrepancies are found between national legislation and the international instruments, it can be hard for individuals to enforce international law. United Nation's conventions generally have monitoring Committees, but there are only limited possibilities for individual petitions and the Committees lack enforcement power. However, if there is a violation of the European Convention on Human Rights, individual complaints can be made to the European Court of Human Rights. Its decisions are binding on Member States. Neither in Sweden nor in the UK can international law be invoked in national courts.

Clear violations of international law are thus rare in Sweden and the UK. One reason is that national legislation is largely of a procedural nature. Material substance is kept to the level of policy, which it is harder to examine. National legislation on immigration and asylum in Western European States is likely to become even more restrictive in the future. In the UK, calls have been made to have the Geneva Convention rewritten to allow for a limitation to the principle of non-refoulement.

# Preface

"Minister admits asylum system has collapsed"[1], "Thousands of refugees vanished"[2], "The number of asylum seekers up by 50%"[3] [my translation]. These were some of the headlines frequently seen in newspapers in both the United Kingdom and Sweden from November 2000 to February 2001. In the UK a Home Office official admitted to the Times that the asylum system has collapsed[4]. There was a backlog of 74,380 applications for asylum waiting to be examined[5]. Meanwhile several hundred thousands of failed asylum seekers remained illegally in the country[6]. In March 2000 great efforts had been put in. 3,000 asylum applications were dealt with per week[7], but at the end of the year this figure had dropped again, and even as applications were being processed, the authorities claimed they were facing severe difficulties locating the 80% of asylum seekers whose applications had been rejected. to deport them from the country[8]. This was the background for British Home Secretary Jack Straw in February 2001 trying to convince his European colleagues there is a need for tougher laws on asylum.

Also in Sweden the situation was deemed critical according to the media. The number of asylum seekers was said to be up by 50% in 2000 and a further increase was expected in 2001. This lead the Swedish Migration Board to announce that almost SEK one billion was needed to meet budget demands.[9] Public opinion, however, differed between the two countries. While in the UK it was felt that there was an urgent need to rewrite the Geneva Convention on the Status of Refugees to enforce tougher laws on asylum[10], politicians and journalists in Sweden claimed national legislation and policy in the European countries were already violating asylum seekers' rights according to international law[11]. Concerns were expressed about an undesired "fortress Europe".

At this moment Britain is preparing for the June 7 general election. Both Labour and the Conservatives have made the reception of asylum seekers an election topic. The Conservative leader, William Hague, initiated the debate by stating that if the Conservatives were to win the election, asylum seekers would be kept in detention for the duration of the process determining their asylum claim. Labour's

[1] The Times, 8 Nov. 2000.
[2] The Times, 22 Nov. 2000.
[3] Sydsvenska Dagbladet, 2 Feb. 2001.
[4] The Times, 8 Nov. 2000.
[5] The Times, 25 Nov. 2000.
[6] The Times, 8 Nov. 2000.
[7] The Times, 22 Nov. 2000.
[8] The Times, 22 Nov. 2000.
[9] Sydsvenska Dagbladet, 2 Feb. 2001.
[10] The Times, 6 and 7 Feb. 2001.
[11] Sydsvenska Dagbladet 14 March 2001.

Jack Straw countered with a promise to put a fixed annual limit to the number of asylum seekers who would be allowed to stay in the UK. [12]

Considering the current debate and the arguments put forth by both those in favour and those opposed to admitting asylum seekers into Western Europe, what rights do refugees actually have according to international law? Which are the main international legislative instruments in the field? And is it true that the rights they afford asylum seekers are currently violated by national legislation as States try to curb the number of asylum seekers arriving in Europe?

[12] Euronews, Sunday 20 May 2001.

# Abbreviations

| | |
|---|---|
| AIA | Asylum and Immigration Act |
| CAT | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment |
| DSHU | Detainees Support and Help Unit |
| ECHR | European Convention on Human Rights |
| EU | European Union |
| IAA | Immigration Appellate Authority |
| ICAO | International Civil Aviation Organisation |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ITF | International Transport Workers' Federation |
| JECU | Joint Entry Clearance Unit |
| JO | Justitieombudsman |
| UDHR | Universal Declaration of Human Rights |
| UK | United Kingdom |
| UN | United Nations |
| UNHCR | United Nations High Commissioner for Refugees |
| UtlF | Utlänningsförordningen |
| UtlL | Utlänningslagen |

# 1 Introduction

## 1.1 Subject and aim

This thesis will deal with the relation between national law and international law protecting refugees. Western European States are gradually adopting more and more restrictive attitudes towards asylum claims. The thesis will compare the obligations under international refugee and human rights law with national laws and policies aimed at reducing the number of asylum seekers arriving in a nation. The purpose is to determine to what extent such national legislation conflicts with the international obligations of States. In order to reach a conclusion it is necessary to perform an analysis on how far the rights of refugees/obligations on States actually extend. This thesis concentrates on Western European States. The problems concerning Africans and Asians seeking refuge in neighbouring countries raise altogether different issues and will not be discussed here. As it is beyond the scope of this work to investigate the legislation and policies of every single Western European nation, the United Kingdom and Sweden have been chosen to serve as examples. There are a number of reasons why these countries were chosen. Firstly, they are countries with which I am very familiar. Sweden is my native country, but I have also lived in the UK for five years. Secondly, debate on immigration and asylum is intense in both countries, but the historical nature of immigration in the UK differs very much from that of Sweden. Thirdly, the UK has taken on a leading role in the calls for tighter laws on asylum in Europe. It is also the aim of the thesis to give some insight into the possibilities for individuals to invoke rights afforded by international law, should national legislation prove to violate it.

## 1.2 Measures of containment and deterrence

The starting point of the discussion is the notion of measures of containment and measures of deterrence. The former are measures, such as visa requirements, which have as their direct object to keep potential asylum seekers and refugees out of Western States' borders or at least cut short the duration of their stay. Deterrence measures is a mixture of restrictive and punitive measures taken in the country of asylum.

## 1.3 Sources

As a general reference on refugees' rights in international law according to current practice, I have used Goodwin-Gill's "The Refugee in International Law". For explanations on how the Swedish Immigration Act is to be construed, "Utlänningslagen" by Wikrén and Sandesjö (employees of the Swedish Migration

Board) has been used extensively, and for the British Immigration and Asylum Act, "The New Immigration Law" by Macdonald. As for British policy on visa matters and asylum, the British Home Office home page on the internet has been extremely informative. As background reading and for the historical overview "British Immigration Policy since 1939" by Ian Spencer has proved useful. For analysis on the scope of various provisions in international human rights treaties, Noll's Negotiating Asylum has been valuable for the discussion on measures of containment. Apart from that, a large number of articles by inter alia Banks and Cholewinski from periodicals such as the "International Journal of Refugee Law" has been referred to.

## 1.4 Outline

The thesis will start with a fairly concise look at the main international instruments creating rights for refugees, chapter two. This will be followed by an introduction to British and Swedish national laws on immigration and asylum, including a brief historical review, in chapter three. The main part of the thesis, chapters four and five, will deal with various measures of containment and deterrence as they are expressed in the laws of the UK and Sweden. It will analyse the compatibility of in turn: visa requirements; carrier sanctions; pre-frontier training and assistance programmes; the notion of safe third country and safe country of origin; detention and retention; denial or limitation of welfare benefits; negative propaganda and language about asylum seekers and refugees applied by State officials with obligations under international law. In chapter six we will look at the possibilities of enforcement for individual refugees and asylum seekers whose rights, according to international law, have been violated. Finally, in chapter seven, some conclusions will be drawn.

# 2 International law

We shall start out by a brief introduction to international legislation offering protection for refugees and asylum seekers. This will include some general human rights instruments. The provisions of these instruments will be discussed in greater detail in the sections below as they become relevant. We will first look at some universal instruments, before going on to regional European ones. Both the UK and Sweden have ratified all the Conventions described here.

## 2.1 Universal instruments

### 2.1.1 Refugee law

The two world wars created an unprecedented number of refugees. In 1945 the United Nations (UN) was established. The world was anxious to make sure there would never again be war on such a scale. The refugee problem was particularly acute in Europe. The new world organisation was acting to promote the efforts of rebuilding Europe. To deal with the refugee issue, the United Nations' High Commissioner for Refugees (UNHCR) was set up in 1949[13]. In 1951 this was followed by a Convention Relating to the Status of Refugees[14].

#### 2.1.1.1 Geneva Convention Relating to the Status of Refugees

Though there have been calls for its reformation[15], the 1951 Geneva Convention Relating to the Status of Refugees[16] has until today remained the main international instrument benefiting refugees[17]. Art. 1A(2) gives a definition of who is to be regarded as a "refugee". A person shall be seen as a refugee if he

> "[a]s a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."

The definition thus includes a time limit, but the Convention also contains a geographical limitation in article 1B (1), according to which the phrase "events occurring before 1 January 1951" is to be construed as either "events occurring in Europe before 1951", or "events occurring in Europe or elsewhere before 1 January 1951". This reflects the disunity between the Convention parties, some of

[13] Wikrén, p. 26. (References to "Wikrén" are to the 6th edition unless otherwise stated.)
[14] Wikrén, p. 28.
[15] The Times, 7 Feb. 2001.
[16] Convention Relating to the Status of Refugees, 189 UNTS 150 of 28 July 1951.
[17] Goodwin-Gill, p. 20.

which were afraid to commit themselves to too heavy obligations. Contracting parties were to state which of the alternatives they were acceding to. [18]

The most important clause in the Convention and in fact in Refugee Law in general, is art. 33 on **non-refoulement**. It is linked with art. 32 which prohibits expulsion of refugees lawfully in a Contracting State's territory. Art. 33 goes further than art. 32:

"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Though not immediately clear from the provision itself, European States have agreed that the principle of non-refoulement should apply not only to recognised refugees, but to asylum seekers arriving at European States' borders too[19].

Other articles in the Convention provide that it shall be applied in a non-discriminatory fashion (art. 3) and that Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals as regards freedom to practise their religion (art. 4); the right to engage in wage-earning employment (art. 17); to housing (art. 21); to elementary education (art. 22.1); to public relief (art. 23); and as regards labour legislation and social security (art. 24). As for other matters, including access to higher education (art. 22.2), treatment must not be less favourable than accorded to other aliens (art. 7). Refugees shall have free access to the courts of law on the territory of all Contracting States (art. 16), and enjoy freedom of movement within the territory of the Contracting State of refuge (art. 26.).

#### 2.1.1.2 1967 New York Protocol

The 1967 Protocol relating to the Status of Refugees[20], the "New York Protocol", was adopted to give States the possibility of acceding to the Geneva Convention without its limitations on time and geographic area. The Protocol offers an alternative to the Convention refugee definition. In the Protocol the phrase "as a result of events occurring before 1 January 1951" is omitted (art. 1.2), thus making the definition generally applicable in time. States signing the Protocol are also committed to apply the Convention without any geographic limitation (art. 1.3).

[18] Wikrén, p. 28.
[19] Noll, p. 432.
[20] Protocol relating to the Status of Refugees, 606 UNTS 267 of 31 January 1967.

### 2.1.2 Human Rights Law

Human Rights Law is a separate branch of international law, but as its provisions are generally applicable, human rights instruments are of course of relevance in refugee matters too. We will here look briefly at some provisions in human rights law that could potentially be of value to refugees and asylum seekers.

#### 2.1.2.1 Universal Declaration of Human Rights

Two articles in the well-known 1948 Universal Declaration of Human Rights[21] (UDHR) are of particular interest, articles 13 and 14. According to art. 14 everyone has the right to seek and to enjoy in other countries asylum from persecution. Art. 13 gives everyone the right to freedom of movement within the borders of each State. Also, everyone has the right to leave any country, including his own, and to return to his country (art. 13.2). It must be kept in mind that the UDHR is simply a non-binding list of human rights that member States "pledge" themselves to "promote", although parts may have become binding as customary law[22].

#### 2.1.2.2 Convention Against Torture

The 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[23] (CAT) further expands on the non-refoulement provision from the Geneva Convention. It states that no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture (art. 3.1). To determine whether there is such a risk, States have to take into account, among other things, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights (art. 3.2).

#### 2.1.2.3 International Covenant on Civil and Political Rights

The 1966 Covenants on Civil and Political Rights[24] (ICCPR) and on Economic, Social and Cultural Rights (see below), were intended to transform the principles from the UDHR into binding and detailed rules of law[25]. In the ICCPR the principle of non-refoulement (art. 13) and prohibition on torture, cruel, inhuman or degrading treatment and punishment are reiterated (art.7).

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[21] Universal Declaration of Human Rights, UNGA resolution 217 A(III) of 10 December 1948.
[22] Malanczuk, p. 213.
[23] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA resolution 39/46 of 10 December 1984.
[24] International Covenant on Civil and Political Rights, 999 UNTS 171 of 16 December 1966.
[25] Malanczuk, p. 215.

Articles 9 and 10 are important as regards the treatment of asylum seekers during the assessment of their claim. Art. 9 states that everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law (9.1). Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful (art. 9.4). Article 10 gives further provisions on the treatment of detained persons.

States undertake to ensure that any person whose rights or freedoms, as recognised in the Covenant, are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity and that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities. Such remedies shall be enforced when granted (art. 2.3).

#### 2.1.2.4 International Covenant on Economic, Social and Cultural Rights

Like the ICCPR, the International Covenant on Economic, Social and Cultural Rights[26] (ICESCR) was intended to transform principles from the UDHR into detailed rules of law[27]. Art. 2 states that each State Party undertakes "to take steps to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant". Though not all experts agree[28], this is generally thought to mean that the ICESCR does not contain immediately binding obligations, but is rather a programme depending on the goodwill and resources of States. There is only a long-term legal obligation.[29]

The rights protected in the ICESCR are of interest primarily when examining social security and welfare benefits for asylum seekers. Relevant articles include, art. 6 (right to work), art. 9 (right to social security), art. 12 (right to medical service) and art. 13 (right to education).

[26] International Covenant on Economic, Social and Cultural Rights, 14531 UNTS 993 of 16 December 1966.
[27] Malanczuk, p. 215.
[28] Cholewinski, p. 492.
[29] Malanczuk, p. 216.

## 2.2 Regional instruments

### 2.2.1 European Convention on Human Rights

This thesis will, as stated above, concern Western Europe. An important regional European human rights instrument is the 1950 European Convention for the protection of Human Rights and Fundamental Freedoms[30] (ECHR). From the outset no right to receive or even to seek asylum was included in the ECHR. It was not until 1984 that a prohibition against arbitrary expulsion of aliens lawfully resident in the territory of a State was included through Protocol number 7[31] to the European Convention on Human Rights.[32] Art. 3 ECHR is also relevant in this connection. It contains a prohibition against torture similar to those in the Convention against Torture and the ICCPR. Like art. 7 ICCPR, art. 3 ECHR has been interpreted as a non-refoulement clause by the European Commission and Court of Human Rights[33].

The ECHR too includes regulations on detention and right to effective remedy. States may lawfully arrest or detain persons to prevent their effecting an unauthorised entry into the country, and may also arrest or detain persons against whom action is being taken with a view to deportation or extradition (art. 5.1 (f)). But no one shall be deprived of his liberty other than in accordance with a procedure prescribed by law (art. 5.1). Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful (art. 5.4). Art. 13 corresponds to art. 2.3 ICCPR and gives the same right to an effective remedy in general. Art. 6 too, which gives everyone the right to a fair and public hearing in the determination of his civil rights, is of relevance.

## 2.3 Summary

To recapitulate: the most important right benefiting a refugee or asylum seeker is that of non-refoulement where removal would mean his life or freedom would be threatened on grounds of race, religion, political opinion etc, or where he is likely to be subjected to torture. Asylum seekers and refugees have the right not to be deprived of their liberty other than in accordance with a procedure prescribed by law. There is a right to an effective remedy. The Geneva Convention also grant refugees rights equivalent to other nationals of the State of refuge as regards

[30] European Convention on Human Rights and Fundamental Freedoms, ETS 5-1950 of 4 November 1950.
[31] Protocol No. 7 ETS 117-1984.
[32] Plender & Mole, p. 83.
[33] Plender & Mole, p. 87.

employment, housing, elementary education and social security. There is a right of freedom of movement.

Having thus briefly introduced the main international instruments for the protection of refugees and asylum seekers, our attention will now turn to national legislation to investigate whether two Western European States, namely the UK and Sweden, abide by their international obligations. We will return in greater detail to the rights described above and how they are to be construed.

# 3 National legislation - introduction

## 3.1 Background

The debate on asylum almost invariably concerns measures for separating the people in "real need of protection" from "bogus asylum seekers" who are meant to be really just economic migrants[34]. There is, rightly or wrongly, a close relationship between refugee and asylum matters and immigration in general. This is evident not least from the fact that the provisions governing these areas are often collected in a common legislative act. This is the case in both the UK and Sweden. In the UK, these matters are regulated in the "Asylum and Immigration Act", and in Sweden in *Utlänningslagen*[35] (Act on Aliens). As described in the preface, Western States are worried about the increasing number of refugees arriving at their borders. The public does not separate between immigrants and refugees, they see simply a mass of "foreigners" who would like to take residence in "their country". Although officially committed to a universal responsibility to protect refugees and bound by international law, governments still adopt various measures designed to keep the number of asylum seekers down. The measures can broadly be divided in measures of containment and measures of deterrence and it is these two notions that will serve as the basis for this thesis.

### 3.1.1 Containment and deterrence

The purpose of containment measures is to keep people out of the territories of potential countries of asylum or cut short the duration of their stay. These policies aim at "containing" people in the region or country of origin[36]. Deterrence measures is a mixture of restrictive and punitive measures taken in the country of asylum with the combined aim of trying to discourage potential asylum seekers from arriving and encourage asylum seekers who have already arrived to leave[37]. As it is the aim of this thesis to present some common measures of containment and deterrence and how they are being applied in Sweden and the UK, it is helpful to have some insight into the history and nature of immigration in general in these countries. Though the two countries today appear to be experiencing the same kind of "threat" from the large number of asylum seekers arriving at their boarders, the historical nature of immigration differs between them.

[34] See for example The Times, editorial, 7 Feb. 2001.
[35] Utlänningslagen, SFS 1989:529.
[36] Hassan, p. 185.
[37] Hassan, p. 185.

## 3.2 History

When introducing the international treaties protecting refugees we started out from the post-Second World War situation, which acted as the trigger for the formulation of a Convention to protect refuges. It is therefore appropriate that we take the end of the Second World War as the starting point also for our national historical reflection.

### 3.2.1 UK

In the UK, the issue of immigration in the 40's, 50's and 60's was marked by the country's history as a colonial power. The concept of "British subject" was central. Debate openly focused on race. It was "coloured immigration" from West Africa, the Caribbean, India and Pakistan which was at issue. At the outset, there were no restrictions on the immigration of British subjects, which included all the colonial areas. Total permanently resident Asian and black population was 7,000 in 1939[38]. In 1953 this had risen to around 36,000[39], while in 1961 alone, 136,400 new immigrants arrived from these areas[40]. In the 1950's, the government still kept to the policy of free entry[41], as it wanted to keep a feeling of good will to protect British political and financial interests in the Commonwealth[42]. But a number of measures of both containment and deterrence can still be identified already at that time. Containment measures included preventive administrative rules on the issue of travel documents needed to enter the UK[43] and the Merchant Shipping Act, under which seamen deserters could be returned to their vessels. Deterrence measures included publicity in Jamaica about the difficult conditions that would greet immigrants[44] and attempts at restricting the entry of coloured people into the Civil Service[45]. In response to the increasing number of immigrants, the Commonwealth Immigrants Act of 1962 was introduced. This act placed certain restrictions on admissibility to the UK[46]. In 1971, the Immigration Act brought new permanent migration from the Indian sub-continent, the Caribbean and Africa finally to a halt[47].

Asylum seekers, on the other hand, were few in number prior to the 1980's and came primarily from communist countries in Eastern Europe. Due to the political Cold War situation, asylum seekers from these countries were "welcomed to

[38] Spencer, p. 60.
[39] Spencer, p. 60.
[40] Spencer, p. 87.
[41] Spencer, p. 59.
[42] Spencer, p. 75.
[43] Spencer, p. 46.
[44] Spencer, p. 47.
[45] Spencer, p. 59.
[46] Spencer, p. 88 and 129.
[47] Spencer, p. 143.

Britain with open arms".[48] After the fall of communism both the nature of asylum applications and origin of asylum seekers changed. Asylum seeking became linked with the old (immigration) issues of race and race relations within Britain[49].

### 3.2.2 Sweden

In Sweden history looks very different compared to the UK. Sweden was traditionally a country of emigration. Though refugees had arrived during the Second World War[50], the first real wave of immigration did not take place until 1966-67. There was in the 1960's a domestic shortage of labour and until 1972 immigration was an organised process to attract foreign workers, primarily from Finland and Yugoslavia[51]. But as the economic climate changed, the nature of immigration changed too. In the preparatory works to the 1980 Act on Aliens, it was concluded that there was probably not to be any further increase in non-Nordic organised labour immigration[52]. Instead a rising number of refugees arrived. From 1937 onwards there had been strengthened legal protection for political refugees[53]. But persecution due to race, such as the persecution of Jews during the Second World War, could not afford refugee status according to the existing legislation[54]. Therefore, and as it was predicted that the number of refugees would continue to increase, the legal provisions concerning refugee matters were modernised and altered to better meet Sweden's obligations under the Geneva Convention and the New York Protocol[55]. During the 1950's and 1960's the attitude to immigration and to refugees was liberal. The government fixed annual quotas for refugees who were to be offered protection in Sweden. In 1950-67, 17,000 refugees arrived in this way. Only 7,000 came of their own accord[56]. At the end of the 1980's the situation radically changed, with 90% of refugees arriving, not as quota refugees, but on their own initiative. The number of refugee reception centres rose from 9 in 1985 to 47 in 1989.[57]

The development in Sweden is thus marked by early organised labour immigration, early legal protection of political refugees and controlled reception of refugees until the 1980's, when asylum seekers increasingly started to arrive on their own initiative.

[48] Hassan, p. 187.
[49] Hassan, p. 187.
[50] Blixt, p. 16.
[51] Blixt, p. 15.
[52] Wikrén, p. 14.
[53] Wikrén, p. 12.
[54] Blixt, p. 17.
[55] Wikrén, p. 15-16.
[56] Blixt, p. 23.
[57] Blixt, p. 27.

# 4 National legislation - containment

As described in the preface, Western States are worried about the increasing number of refugees arriving at their borders. Though governments will not always openly admit it, various measures designed to keep the number of asylum seekers down are adopted. Policies can broadly be divided in measures of containment and measures of deterrence. In this chapter we will look closer at some measures of containment used by States.

## 4.1 General

The purpose of containment measures is to keep people out of, or cut short their stay in, the territories of potential countries of asylum, often in Western Europe. These policies are intended to localise migration flows and "contain" them in the region or country of origin. Examples of such measures are visa requirements, safe third country and safe country of origin legislation.[58] The core of the international laws protecting the rights of refugees is the principle of non-refoulement, article 33 of the Geneva Convention. The right not to be sent back to a country where one's life or freedom would be threatened is the most powerful right that refugees enjoy. But, and this is central to the measures of containment, it can (at least according to the traditional view) only be enjoyed by persons who have already arrived at the border of the nation of refuge. States have little or no responsibility to refugees who have not yet reached its borders[59]. According to the logic of States, this means that if one wants to keep the number of asylum seekers down, one should act to prevent them from arriving in the first place. If asylum seekers do not arrive, countries are freed of any obligation to non-refoulement. Visa requirements is the central measure of containment in this respect. It is a very effective way of keeping control of who and how many should be allowed to enter the territory of a country.

## 4.2 Visa requirements

To gain protection a potential asylum seeker has to be able to enter the country in which he wants to find refuge. For asylum seekers going to Europe this commonly means having to obtain a visa. How does this work in reality? Do States give visas to people who are being persecuted in their home countries? Can a visa refusal be appealed from abroad? To answer these questions we will examine the legislation in our two example countries, Sweden and the UK. We will focus on

[58] Hassan, p. 185.
[59] Hassan, p. 201.

the provisions for short-term visas as this is by far the most common type of visa and the easiest one to obtain.

### 4.2.1 UK

Provisions on visas are found in the Immigration Act of 1971. Section 4.3 (1(a)) (schedule 3) states that non-patrials shall not enter the United Kingdom unless given leave to do so in accordance with the Act. The Secretary of State shall from time to time lay before Parliament statements of the rules laid down by him as to the practice to be followed in the administration of the Act for regulating the entry into and stay in the UK of persons required by the Act to have leave to enter (section 4.3 (2)). These internal instructions to the Immigration authorities and to British Embassies and Consulates, as well as the complete set of existing visa application forms, are all available on the internet through the homepage of the British Home Office. Parts of the instructions are classified information, though, and blanked out. It is still possible to get a clear picture of the British visa system.

As for short-term visas, applicants have to show that they have sufficient funds both to pay for actual travel expenses and support themselves during their stay. They also have to produce an invitation letter from a UK host or sponsor stating that he will accommodate and support the applicant during the stay (should the applicant fail to do so himself). Visas will be granted only if the Visa Officer has been satisfied that the period and purpose of the journey is as the applicant has stated and that there is no risk to UK public funds. In order to investigate this, the applicant may be asked to produce documentary evidence and attend personal interviews. If the Visa Officer has reason to believe that the applicant will in fact settle in the UK, the application should be refused.[60]

Unlike Sweden, there is in the UK an appeal procedure for decisions on visas for stays intended to be longer than six months. Details on the application procedure and appellant rights are given with refusal notices. Appeals have to be made to the British mission at which they were refused within 28 working days from the date the applicant received the decision. There, applications are re-considered. If unsuccessful at that stage, the appeal will be sent to the Home Office for forwarding to the Immigration Appellate Authority (IAA). The IAA arranges appeal hearings which are heard by Independent Adjudicators.[61] If one is not satisfied with the level of service provided by a Visa Section at one of the British missions abroad one can also make a complaint to the Joint Entry Clearance Unit's (JECU) Visa Correspondence Unit[62]. For short term visas this is the only option.

[60] www.visa.fco.gov.uk/pdf/inf2.pdf
[61] www.fco.gov.uk/visas/dynpage.asp?Page=481
[62] www.fco.gov.uk/visas/dynpage.asp?Page=480

#### 4.2.1.1 Visas for asylum seekers

Unlike most other Western nations, there is actually a limited possibility to apply for a visa at a British Embassy or Consulate on the grounds of seeking asylum. This is not a regular provision, but is rather a possibility for the Visa Officer to accept a visa application "outside the immigration rules" in very special cases. There is no special application form for this type of application. For a visa application to be accepted under this exception from the ordinary rules, the applicant must not yet have been recognised as a refugee by another country or by the UNHCR, but be able to demonstrate that his circumstances meet the definition of the 1951 Convention. The applicant must have close ties with the UK (for example have close relatives there or previously have been a student in the UK), so that it, on the whole, appears that the UK is the most appropriate country of long term refuge.[63]

### 4.2.2 Sweden

#### 4.2.2.1 The Schengen Convention

National Swedish rules regarding visas are found in the Act on Aliens (*Utlänningslagen*, (UtlL)), but in contrast to the UK, Sweden has also recently acceded to the Schengen Convention[64]. Within the Schengen area, internal border checks have been abolished. Visa issues are regulated in chapter 3 (articles 9-18) of the Convention. The Convention contains not only binding procedural rules for issuing visas, but aims at a common visa policy too (art. 9.1), with a uniform visa valid for the entire territory of the Contracting Parties for visits not exceeding three months (art. 10.1). There are binding lists both on countries whose nationals must hold a valid visa to enter the territory and those who shall be allowed entry without one[65]. To obtain a Schengen visa, applicants have to submit documents substantiating the purpose of the planned visit and have sufficient means of support both for the period of the planned visit and to return to their country of origin (art. 5.1). Central to the common visa policy is the visa applicant's true intentions and the risk for the applicant defecting once arriving in the Schengen area[66]. But a Contracting Party may, according to article 16, derogate from these conditions on humanitarian grounds or in the national interest or because of international obligations, in which case the validity of the visa will be restricted to the territory of the Contracting Party concerned.

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[63] www.ind.homeoffice.gov.uk/default.asp?PageId=929

[64] 1990 Convention on the Application of the Schengen Agreement of 14 June 1985 relating to the Gradual Suppression of Controls at Common Frontiers, between the Governments of States Members of the Benelux Economic Union, the Federal Republic of Germany and the French Republic.

[65] Noll, p. 172.

[66] Noll, p. 172.

#### 4.2.2.2 National rules

Section 1:2 UtlL, states that foreigners entering Sweden generally need visas, though the government may exempt the citizens of certain countries from this obligation. The nationalities obliged to apply for a visa are listed in 2:1 *Utlänningsförordningen*[67] (UtlF). Further rules about visas are found in the rest of sections 2 UtlL and 2 UtlF. Visas are issued by the Migration Board (*Migrationsverket*) or by the Foreign Office (*Utrikesdepartementet)* (2:7 UtlL). The Migration Board can also authorize embassies and consulates (and in rare cases the police) to issue visas. Uncertain cases should be referred to the Migration Board[68]. Information about relevant case law is forwarded from the Migration Board to the consular posts[69]. The principles applicable for issuing visas are set out in the preparatory works to the Act on Aliens. An applicant has to be able to fund his visit and he must not be likely to commit any crimes while on Swedish territory. In practice, the visa issuing policy is very restrictive and visas should not be issued if it seems likely that the purpose of the visit is another than the one stated on the application[70]. Unlike the UK, there is no possibility to make a visa application for the purpose of seeking asylum[71]. Swedish consular posts are on the contrary expressly discouraged from issuing visas if there are indications of persecution, as this aggravates the risk of defection[72]. But according to a recent decision by the Swedish Parliamentary Ombudsman (JO), consular posts are not allowed to refuse receiving asylum applications. Although they will (most likely) be rejected - being made from abroad - the applications have to be received and forwarded to the Migration Board. In addition, such an application is to be construed as a claim for a residence permit. Consular posts are therefore also under an obligation to provide asylum seekers with the application form for such a permit.[73] This decision does not appear to materially alter the criteria for granting asylum, but at least it makes the possibility of an appeal available to the asylum seeker.

In contrast, a decision whereby a visa application has been rejected, either by a consular authority or by the Migration Board, cannot be appealed. Not all consular authorities are authorised to reject visa applications. If they are not, applications which the consular post feels ought to be rejected should be referred to the Migration Board.[74]

[67] Utlänningsförordningen, SFS 1989:547.
[68] SOU 1995:55, p.30.
[69] SOU 1995:55, p. 104.
[70] Wikrén, p. 58.
[71] Noll, p. 181.
[72] Noll, p. 182.
[73] 2000/01:JO1, Dnr. 3145-1999.
[74] Wikrén, p. 106.

### 4.2.3 International law

Visa requirements is an effective way of keeping foreign nationals out of a State's territory. With regard to asylum seekers, art. 14 UDHR states that everyone has the right to seek and to enjoy in other countries asylum from persecution. But the UDHR is not a binding legal instrument. Neither the UDHR nor its art. 14 can be said to be customary law either[75], which precludes a discussion on whether art. 14 could be construed as to give asylum seekers right to access to the territory of a potential country of refuge. Commonly, no such right is considered to exist, only a right not to be sent back to a territory where one's life or freedom would threatened on account of race, political opinion etc, in accordance with the principle of non-refoulement. This principle is expressly stated in art. 33 of the Geneva Convention and art. 3 CAT, and in art. 7 ICCPR and art. 3 ECHR according to case law[76].

Could there then be any other possibilities for asylum seekers to claim access to the territory of potential States of refuge and to contend that visa requirements are contrary to international law in asylum cases? Noll suggests three interesting alternatives.

#### 4.2.3.1 A right to emigrate equals a right to immigrate

Art. 12.2-3 ICCPR and art. 2.2-3 Protocol No. 4[77] to the ECHR (signed by Sweden but not by the UK[78]) state inter alia that everyone shall be free to leave any country, including his own. For this provision to have any meaning, Noll and others have suggested (the "universalist" approach) it must be inferred that there is a corresponding right to enter other countries, albeit only temporarily while the claim to asylum is being assessed[79]. A right to immigrate is a necessary corollary of the right to emigrate. But the opposite interpretation is also possible. With a "particularist" approach the wording of the provision limits the reach of its obligations. A right can not be deduced from the silence of a text, in fact silence means the drafters did not want the right to exist.[80] In a further step of analysis, Noll gives contextual and teleological arguments in favour of both approaches and rests on finding the matter inconclusive[81].

The "universalist" interpretation of art. 12.2-3 ICCPR is interesting but unconvincing. In fact, it appears to mix two legal relationships. Art. 12.2-3 ICCPR (and the corresponding provision in the ECHR Protocol) govern the legal

[75] Noll, p. 359-360.
[76] Plender & Mole, p. 87.
[77] Protocol no. 4 ETS 46-1963.
[78] Noll, p. 379.
[79] Noll, p. 419, Puntervold Bø, p. 303.
[80] Noll, p. 386.
[81] Noll, p. 423.

relationship between the individual and his government. The right of the individual, to leave his country, is countered by a duty on the part of his government not to prevent him from doing so, *should the possibility arise*. The individual's right to enter another State concerns a separate legal relationship. One can envisage equivalent situations both where such a "necessary" corollary duty on a third party is legally guaranteed (see Noll, p. 417-8), and where it is not (a State's right to prosecute a person, the prosecuted person's duty to appear before court, no general duty on a foreign State to extradite the prosecuted; the freedom to marry, etc.). The second legal relationship clearly affects the value of the first, but it is still a separate one.

#### 4.2.3.2 Access to territory under art. 3 ECHR

Noll's reasoning about art. 7 ICCPR and art. 3 ECHR is much more viable. These articles provide that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The European Court of Human Rights has already given art. 3 ECHR extra-territorial application (i.e. the actions referred to in a particular case need not take place within the territory of the State in question itself for this State to be bound by a duty under art. 3), see inter alia the Soering case[82]. The Court has also stated that liability under the ECHR may be incurred by a State by reason of it haven taken "action which has as a direct consequence the exposure of an individual to proscribed ill-treatment"[83]. But does this cover the rejection of a visa application too, i.e. does it give a potential asylum seeker right to access to the territory of a foreign State also when the claim for protection is made from outside the territory of a Party to the ECHR/ICCPR? Art. 7 ICCPR cannot be invoked as art. 2.1 ICCPR clearly states that individual claimants must be *within the territory* and subject to the jurisdiction of the Contracting Party in question. But the equivalent provision in the ECHR does not contain the phrase "within the territory". It simply states that everyone within the jurisdiction of the Contracting Parties shall be secured the rights and freedoms of the Convention.[84] Although it was certainly not the intention of the Contracting Parties that potential asylum seekers should be able to claim access to their territories under art. 3, this seems to be a very strong and legally flawless line of argument.

A third alternative, which Noll finds inconclusive, is that visa requirements for some nationalities possibly violate the prohibition on discrimination in art. 14 ECHR. Difference in treatment is not always illegal, but the aim pursued must be legitimate and the means employed to realise this aim must be proportionate[85]. (See also below section 5.3.3.3.) As the aim, to counter clandestine immigration,

[82] Soering v. UK, judgement of 7 July 1989, Series A, No. 161; 11 EHRR, 1989.
[83] Noll, p. 399.
[84] Noll, p. 440-441.
[85] Noll, p. 484.

is legitimate[86], it is a matter of judgement whether visas is a proportionate means. It would presumably be very hard, not to say impossible, to gain any support in an international court of law for declaring the entire custom of requiring some nationalities to obtain visas to gain entry illegal. The visa system is universally used.

#### 4.2.3.3 Conclusion - access to territory

It is openly stated in the preparatory works to the Swedish Act on Aliens that one of the purposes of the visa system is to control and limit immigration from certain countries[87]. The Swedish government has addressed the concerns that its policy on visas make it harder for asylum seekers to enjoy protection in Sweden in a rather unconcerned way, saying that the visa system only to a very limited extent stops people from seeking protection. It grants that visa requirements may prevent them from seeking protection *in Sweden*, but then, the government continues, there is no right for asylum seekers to choose their country of asylum.[88] Though the government does go on to say, that if as a result some countries receive a disproportional number of refugees this has to be resolved through international co-operation, it still fails to address the potential combined effect for the individual asylum seeker as country after country refine their visa systems. There is as of present no way to hold States legally accountable for such an effect. In the UK calls have been made for a system whereby asylum seekers

[86] Noll, p. 485.
[87] Wikrén, p. 50-51, p. 58.
[88] Wikrén, p. 51.

should be obliged to stay in their region of origin and make their applications for asylum in a Western European country from neighbouring "safe countries" there[89]. Afghanistani applicants should apply from Pakistan, Iraqis from Turkey etc.

Though the visa system does not in itself appear to violate international law, it is possible that the lack of (as regards Sweden) or limitation to (the UK) the possibility for asylum seekers to obtain visas at a UK or Swedish consular post violate art. 3 ECHR, if as a consequence a person were to be subjected to torture or inhuman or degrading treatment of punishment. There is a unique possibility to apply for asylum in Sweden from abroad. According to an article on the homepage of the Migration Board 15 May 2001, other countries' consular posts do not accept such applications[90]. This probably does not increase the chances of actually being granted asylum, as the Migration Board still operates on the basis of asylum only being granted if the asylum seeker has already arrived at the Swedish border. Still, isn't it conceivable that attention could in this way be drawn to particularly deserving cases?

#### 4.2.3.4 Appeal against a rejected visa application

Another, though related, question is that of appeal. The Swedish visa system lacks an appeal process, a fact that has been criticized by the faculty of law at the University of Lund, Sweden. It felt this was a violation of art. 6 ECHR which states that in the determination of a person's civil rights, everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law. In the preparatory works to the legislation on immigration, the responsible minister defended the law, saying that being issued a visa is not a civil right protected by the ECHR, hence art. 6 is not applicable.[91]

## 4.3 Carrier sanctions

Carrier sanctions are a measure closely related to visa requirements. In fact they are a key factor in being able to utilise visas as a measure to regulate immigration and the number of asylum seekers. In short, carrier sanctions means that airlines, train operators and others are made responsible for checking that their passengers are equipped with the necessary travel documents (such as passports) and visas when leaving their country of departure. If it is discovered on arrival that they are not, airlines and operators may be made responsible for the cost of returning passengers whose documents are not in order. Alternatively, the carriers may be fined.

[89] Sydsvenska Dagbladet, 9 Feb. 2001.
[90] www.migrationsverket.se
[91] Wikrén, third edition, p. 214.

### 4.3.1 UK

The question of carrier sanctions is regulated in chapter 33, part II "Carrier liability" of the 1999 Asylum and Immigration Act (AIA). Para. 40 (2) allows for a £2000 fine per passenger, who upon arrival in the UK cannot produce a passport or a required valid visa, being charged to the owner of the ship, aircraft, vehicle or train operator carrying the person in question. Further, a senior officer may, pending payment of any charge imposed under para. 40, detain the transporter in which the person in respect of whom the charge was imposed was carried (42.1 (a)).

### 4.3.2 Sweden

#### 4.3.2.1 The Schengen Convention

According to article 26 of the Schengen Convention, the Contracting Parties undertake to impose rules on carrier sanctions to the effect that carriers shall be obliged to take all necessary measures to ensure that an alien carried by air or sea is in possession of the travel documents required for entry into the territory of the Contracting Parties. Rules shall also be imposed whereby carriers are obliged to assume immediate responsibility of aliens being refused entry to the territory and whereby penalties will be imposed on carriers who do not live up to these undertakings.

#### 4.3.2.2 National rules

According to national Swedish law, carriers can be made responsible for returning passengers lacking the necessary documents and visas (8:6 UtlL). Carriers can be made responsible not only for the cost of the return of the passenger himself, but also for travel costs for State officials escorting refused entrants on their return to the country of departure (9:2 UtlL). There are no provisions whereby carriers can be made to pay penalties. In fact, the position of the Swedish government has been that each Contracting Party should be allowed to have/keep national rules on carrier liability and in refugee cases the government calls for leniency. In the preparatory works to the Swedish law, it is stated that there ought to be no responsibility for carriers where the carrier had good reasons to believe that the foreign national was a refugee[92]. It thus appears as if the Swedish government takes the stance that it is inappropriate to leave refugee matters to be decided by airline staff.

[92] Wikrén, p. 327.

### 4.3.3 International law

States feel the obligation for carriers to check passengers' travel documentation is just as necessary as, and in fact an integral part of, the visa system. Without this measure, States fear that the number of asylum seekers would rise and European airports risk being turned into chaotic places. National carrier liability laws do not seem to violate neither the Geneva Convention nor any international instrument protecting refugees and asylum seekers. As will be remembered, the possible liability on States under art. 3 ECHR discussed above (see 4.2.3.2), only extends to actions by the State which has "as a direct consequence" that a person is exposed to the treatment proscribed in art. 3. Carrier sanctions are not likely to be seen to have more than indirect effect. But it can still be discussed how appropriate it is that carrier staff is made responsible for what is essentially a State matter.

In 1998 the International Transport Workers' Federation (ITF) made a statement at the 32nd Session of the Assembly of the International Civil Aviation Organisation (ICAO), saying that: "[i]t is well established that it is unreasonable to demand that refugees have proper documentation. These carrier liability laws have the effect of obstructing people genuinely at risk from arriving in a safe country and seeking protection as a refugee"[93]. The ITF felt the liability laws posed serious problems for carriers who wished to avoid being fined, as well as for check-in staff who had to make decisions on the legality of passenger documentation. The ITF requested ICAO to consult with the UNHCR on these matters and also to remind ICAO Member States on their obligations under the Geneva Convention[94]. In other words, carrier staff themselves feel making decisions relating to refugee matters ought to be a question not for them, but for States to deal with.

In an analysis of the relevant international rules, including both the multilateral Convention on International Civil Aviation[95] (the Chicago Convention), bilateral air service agreements and case law on carrier liability, R.I.R. Abeyratne concludes that airlines can not be made responsible and fined for bringing in undocumented or inadequately documented passengers unless the airline is shown to be '*prima facie* negligent'[96]. In reality, however, airlines and other types of carriers are probably unlikely to take what they will see as unnecessary risks of being made responsible and allow passengers with inadequate documentation to board. Abeyratne's conclusion still does not free carrier staff from having to make decisions far from their fields of competence.

[93] Abeyratne, p. 676.
[94] Abeyratne, p. 676.
[95] 1944 Convention on International Civil Aviation, ICAO Doc 7300/6.
[96] Abeyratne, p. 686.

## 4.4 Pre-frontier training and assistance programmes

Pre-frontier training and assistance programmes have a lot in common with carrier sanctions and the visa system. They aim in the same way at keeping unwanted aliens in their own countries and fight illegal immigration. Pre-frontier training and assistance programmes exist both within the scope of the EU and within the Schengen co-operation. It entails assistance to local staff performing checks of travel documentation, both official ones and those working for airlines. Local staff is educated in the document and visa requirements of EU/Schengen States and the methods by which validity of such documents and visas may be checked. Joint assistance or training assignments are carried out by specialists appointed by the EU Member States and also paid for by these if costs cannot be covered by the airlines and third States involved. The target countries for this type of programmes are not surprisingly those which produce the greatest number of refugees, such as Turkey and Pakistan. The legal instruments regulating this type of activity do not contain any instructions on how cases involving potential refugees are to be dealt with.[97] The risk here, just as regards rejected visa applications (see above 4.2.3.2), is a violation of art. 3 ECHR if a person in need of protection is stopped at the point of departure by agents of a ECHR State Party.

## 4.5 Safe third country

Another measure to keep the number of refugees down and to prevent asylum seekers from "shopping around" between countries of refuge, is that of "safe third country", i.e. sending back asylum seekers who have already gained protection or had the opportunity to apply for asylum in another State. The notion is interpreted quite differently by States. Some countries consider it sufficient that a person has been in transit in another country where he/she could have applied for asylum. Others mean that only persons who have already obtained effective protection on the basis of the principles of the Geneva Convention in another country should be returned there[98]. The safe third country principle had until the Dublin Convention (see below) mostly been applied unilaterally, in the sense that States had declined to consider asylum applications or extend protection after determining, generally without consultation, that another State was responsible[99].

The principle of safe third country has been applied and developed in the most systematic way in the EU, through the 1990 Dublin Convention determining the

[97] Noll, p. 179-180.
[98] Goodwin-Gill, p. 340.
[99] Goodwin-Gill, p. 341.

State responsible for examining applications for asylum[100]. Through this instrument, the Member States establish an order for which Member State is to assume primary responsibility for an asylum application. Criteria include (in the order mentioned): family connection (art. 4) and the existence of a valid residence permit or visa to a Member State (art. 5). The most important rule is that of art. 6, whereby responsibility for an asylum application is to be assumed by the Member State into which the applicant first entered. A Member State is always free to examine an application for asylum if it wishes. By doing so, it relieves the ordinarily responsible Member State of its obligations (art. 3.4).[101] It is to be noted that the procedure laid out in the Dublin Convention only comes into operation if there is no other *non-Member* State to which the applicant may be sent according to the national laws of the Member State in question[102].

### 4.5.1 UK

Provisions for removing asylum seekers according to the principle of safe third country are made in the AIA 1996, chapter 49.2. The conditions for such removals are (a) that the person is not a national or citizen of the country or territory to which he is to be sent; (b) that his life and liberty would not be threatened in that country or territory by reason of race, religion, nationality, membership of a particular social group or political opinion; and (c) that the government of that country or territory would not send him to another country or territory otherwise than in accordance with the Geneva Convention. The UK has in a paper to the UNHCR stated that in its view, the notion of safe third country means not only investigating if the third country to which the applicant is to be sent back has signed the Geneva Convention, and thereby is bound by the principle of non-refoulement, but also take into account indirect refoulement. "Safe third country removals must take account of receiving country practice, as well as their formal legal obligations"[103]. Reality, however, has proved different. Though practice has now changed, the UK has in the past at times applied at least the Dublin Convention mechanically[104].

### 4.5.2 Sweden

The Migration Board may order the immediate removal of a person if it is clear that there is no ground for asylum (8:8 UtlL). This provision is intended to include the removal of asylum seekers in accordance with the principle of safe third country and the Dublin Convention. It has been claimed that such removal takes

[100] Dublin Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities.
[101] Guild, p. 71-75.
[102] Goodwin-Gill, p. 338.
[103] Goodwin-Gill, p. 335-336.
[104] Noll, p. 501-503.

place in a rather mechanical manner according to Swedish practice, at least as regards removal to other parties to the Dublin Convention[105]. If the third country has signed the major international human rights instruments, and especially the Geneva Convention, it will at least be a presumption for that asylum seekers can be returned there.

### 4.5.3 International law

The UNHCR has stated that return of those who have obtained effective protection in another country is permissible[106] and neither the British nor the Swedish national laws contravene international law in their wording. But there is no consistent State practice creating a rule allowing return of refugees or asylum seekers to safe third countries only on the basis of a transitory contact[107]. In reality, the safe third country measure poses a number of problems. Countries through which refugees often transit have criticised it as being aimed at protecting western European States and shifting the burden to other States. There are also practical problems such as determining whether the third country, in which the asylum seeker should be able to request asylum, will in fact except responsibility for examining the request. Related to this is the problem of return from countries with well developed protection for refugees to those with none or few resources, which is likely to result in a serious risk of denial of protection[108].

Again, it is in national application policy that the answer to the question of whether international law is violated is to be found. This can be illustrated by the statement from Joachim Lentz of the "Asylgruppen i Skåne", a group helping asylum seekers, who, speaking of the Dublin Convention says: "Officially Sweden does not return rejected asylum seekers to Iraq, but we do it through Germany" [my translation] [109]. Both Sweden and the UK have at times applied the Dublin Convention in a mechanical way[110]. But this approach has been rejected by the European Court of Human Rights, which has established that States are always obliged to make their own investigations as to the risk of persecution facing an asylum seeker, was he to be removed. States may not rely automatically on the arrangements made in the Dublin Conventions concerning the division of responsibility for assessing asylum claims[111]. Mechanical returns to what is perceived as safe third countries equate with a risk of violating art. 33 of the Geneva Convention and the other provisions of non-refoulement found in international law[112].

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[105] Noll, p. 499.
[106] Goodwin-Gill, p. 339.
[107] Goodwin-Gill, p. 341.
[108] Goodwin-Gill, p. 340.
[109] Sydsvenska Dagbladet, 21 March 2001.
[110] For examples from Swedish practice, see Noll, p. 499-501.
[111] Noll, p. 502.
[112] Goodwin-Gill, p. 342.

In a recent case, a British court ruled that the removal to France and Germany, respectively, of a Somalian and an Algerian in accordance with the Dublin Convention would violate art. 33 of the Geneva Convention as the Geneva Convention is interpreted differently in France and Germany than in the UK[113]. It thus appears the UK is now fulfilling its obligations in accordance with the principles laid down by the European Court of Human Rights. It is estimated that there are currently 200 similar cases pending in the UK[114].

## 4.6 Safe country of origin

From the 1980's onwards, many Western States have complained of abuse of their asylum procedures with unfounded applications from persons not genuinely in need of protection. The result is said to be not only high costs, but also delays in the processing of applications for all applicants, including those in "real need" of protection[115]. As a result, there was deemed to be a need for accelerated procedures in cases which were clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the Geneva Convention, that is "manifestly unfounded or abusive applications"[116]. Some States, e.g. Germany[117], have in connection with this introduced the notion of "safe country of origin" as a legislated presumption against accepting asylum applications. By "safe countries" are meant those which can be clearly shown normally not to generate refugees.[118]

For the reasons related above, the EU the ministers responsible for immigration in 1992 adopted a non-binding "Resolution on manifestly unfounded applications for asylum"[119] which was complemented by equally non-binding[120] "Conclusions on countries in which there is generally no serious risk of persecution"[121]. According to the Resolution a manifestly unfounded application is an application which clearly raises no substantive issue under the Geneva Convention and New York Protocol as there is clearly no substance to the applicant's claim to fear persecution in his own country; or an application based on deliberate deception or which is an abuse of asylum procedures (art. 1 (a)). The Conclusions set out criteria for determining the general risk of persecution in a particular country. These include: previous number of refugees and recognition rates; observance of human rights; and the extent to which democratic institutions exist (art. 4).

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[113] The Times, 20 Dec. 2000.
[114] The Times, 20 Dec. 2000.
[115] Goodwin-Gill, p. 344.
[116] Goodwin-Gill, p. 345.
[117] Bank, p. 261.
[118] Goodwin-Gill, p. 347.
[119] Resolution on manifestly unfounded applications for asylum, SN 4822/92 WGI 1282 AS 146.
[120] Guild, p. 180.
[121] Conclusions on countries in which there is generally no serious risk of persecution, SN 4821/92 WGI 1281 AS 145.

### 4.6.1 Compatibility with international law

The UNHCR has argued that formal safe country of origin lists which exclude whole groups from the asylum process could amount to a geographical limitation to the application of the Geneva Convention contrary to the New York Protocol. Informal lists working only as an administrative tool, either "channell[ing] "claims into an expedited hearing, or rais[ing] rebuttable evidentiary presumptions"[122] could be permissible though. In the same way, Goodwin-Gill has argued that lists based on "a coherent body of country of origin information which would raise exclusionary presumptions of which the asylum seeker will be aware, but which may be rebutted by the particular facts of the claim"[123], are acceptable. Such lists, he means, would act only to raise the threshold for accepting a claim for asylum and allow easier identification of unfounded cases, while being a deterrent to applicants who are using the asylum procedure for immigration purposes. Safe country of origin lists operated in this way would still leave the door open for accepting asylum applications in exceptional cases.[124] Formal, fixed lists would, as with the safe third country measure, potentially violate art. 33 Geneva Convention, as well as the other human rights instruments safeguarding the principle of non-refoulement.

Neither the UK nor Sweden operate formal safe country of origin lists[125], though both have accelerated procedures for cases of manifestly unfounded or abusive applications. In Sweden, this is done on the basis of the same provisions as described above in relation to safe third country. The nationality of the applicant will, however, in both countries be one of the factors establishing a presumption for or against the success of the asylum claim. Hopefully, this presumption is not so strong as to prevent immigration officials from investigating asylum claims without preconceived notions. Even when dealing with what is commonly a safe country, it does not mean that there can not, in individual cases, still be a well-founded fear of persecution[126].

In the UK, Home Secretary Jack Straw has suggested that asylum should be granted on the basis of three internationally approved lists. Applications from people on one list, including EU States and America, would be inadmissible; those from the second list would be considered automatically; those from a third list, including China, would generally be considered to be unfounded and would have to be made from outside the EU. He has admitted, though, that such a system would require the Geneva Convention to be rewritten.[127]

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[122] Goodwin-Gill, p. 347.
[123] Goodwin-Gill, p. 345.
[124] Goodwin-Gill, p. 345.
[125] Inger Lagerström, Public Relations Officer, Migration Board.
[126] de Jong, p. 693.
[127] The Times, 7 Feb. 2001.

## 4.7 Conclusion - rules of containment

None of the measures of containment discussed here constitute clear cut violations of international law. Carrier sanctions in both Sweden and the UK and pre-frontier training and assistance programmes most likely conform with international law. Safe third country and safe country of origin lists can not be generally condemned, their legality will depend on the way in which they are operated. If implemented in a mechanical way, they may violate the principle of non-refoulement. Both countries at least claim not to apply the Dublin Convention and the presumption of safe country of origin mechanically. In the UK, this is supported by some recent cases where asylum seekers were not returned to Germany and France. The legality of Swedish application policy remain unclear. Only the insufficient possibilities for asylum seekers to obtain visas have been shown to be to a greater extent questionable as they might violate the obligation of States under art. 3 and art. 1 ECHR to offer everyone under their jurisdiction protection against torture, inhuman or degrading treatment or punishment.

# 5 National legislation - deterrence

We have looked at ways in which States try to reduce the number of refugees by keeping them out of their territory. But States also take action within their own territory aimed at discouraging refugees and asylum seekers. Now let us examine some such measures of deterrence.

## 5.1 General

Deterrence measures is a mixture of restrictive and punitive measures taken in the country of asylum[128]. Examples of such measures include detention while the application for asylum is being processed, denial or limitation of welfare benefits, limited access to appeal procedures and the use of negative propaganda and language by State officials. Though rarely admitted by governments, many writers consider these measures as having the direct combined aim of trying to discourage potential asylum seekers from arriving and encourage asylum seekers who have already arrived to leave. [129]

## 5.2 Detention and retention

Swedish and British law give room for as well retention as detention of asylum seekers. Retention is when asylum seekers can be kept at airports, borders and ports upon entry in order to secure law enforcement. This puts authorities in a position to send back persons before they have entered the territory if they submit a claim lacking any prospect for success. Detention is when persons are kept during the asylum assessment procedure itself. Practice vary greatly between countries. According to Bank, some countries, like Austria, Germany and France, do not apply detention during the procedure[130]. Provisions also vary with regard to permissible reasons for retention and maximum time periods. Practice in the UK differs markedly from other countries.

### 5.2.1 UK

One of the most high-profile deterrence measures in the UK is the detention of asylum seekers[131]. The Detainees Support and Help Unit, DSHU, a private organisation giving assistance to imprisoned immigrants and asylum seekers,

[128] Hassan, p. 185.
[129] Hassan, p. 185-186.
[130] Bank, p. 260.
[131] Hassan, p. 188.

writes: "The 1971 Immigration Act gives the Immigration Service the power to detain many foreign nationals. This detention is without charge, trial or time limit. No other European country has or uses such wide ranging powers"[132] Retention and detention is regulated in part II of the Immigration Act 1971, para. 16-25. Asylum seekers may be retained on airports if they do not fulfil the necessary conditions for entry into the UK in order to examine their situation and documents (para. 16). Later on, they may be granted temporary admission while their claims are examined (para. 21.1). This temporary admission may be subjected to certain restrictions, such as residence and an obligation to report to the police (para 21.2) But if immigration officials decide that granting temporary admission involves too much risk, the asylum seeker will be placed in detention (para 16). Police cells or short term facilities at ports may be used for up to 5 days and then the detainee must be moved to a prison or immigration detention centre[133].

There is no appeal process, only the possibility of being released on bail by an adjudicator on the asylum seeker entering into a recognizance, once seven days have elapsed since the date of arrival in the UK (para. 22.1). Alternatively, the adjudicator may fix the amount and conditions of the bail with a view to its being taken subsequently by any such person as may be specified by the adjudicator (para. 22.3).

The average length of detention is 154 days and approximately 11,000 persons are detained per year[134]. Most of these are asylum seekers. Of the persons detained for more than one day approximately 5000 were asylum seekers. It is not unusual for a person to be detained for over a year.[135] The Government has claimed that detention is only used in the latter stages of the asylum process, but a survey from June 1996 showed that of detained asylum seekers 24.1% were waiting initial determination of their cases, 53.3% had an appeal pending, while only 22.6% were awaiting removal.[136]

### 5.2.2 Sweden

In Sweden, the conditions for retention and detention are detailed and these measures may only be applied according to strict criteria. The relevant provisions are found in chapter 6 of the Act on Aliens (*Utlänningslagen*, UtlL). A person may not be retained any longer than necessary and not longer than six hours (6:1 UtlL). An adult (18 years +) may be detained to determine his identity (6.2 (1) UtlL) if it is necessary to establish whether he should be allowed to remain (6:2 (2) UtlL), or if it is probable that he will be removed or expelled (6:2 (3) UtlL). In the preparatory works to the law, it is emphasized that a person may only be

[132] www.dshu.org.uk/immi.htm
[133] www.dshu.org.uk/immi.htm
[134] Hassan, p. 188 and www.dshu.org.uk/immi.htm
[135] www.dshu.org.uk/immi.htm
[136] Hassan, p. 188.

detained in situations where it is not possible to apply less restrictive measures, such as an obligation to report to the police. Also, the reasons for the detention must always be clearly stated to facilitate the possibility for an appeal.[137]

A person may only be detained for 48 hours to have his identity determined (6:4 UtlL) and in normal circumstances the detention should be limited to twelve hours[138]. To establish whether he should be allowed to remain, or if it is probable that he will be removed or expelled, he may be kept no longer than two weeks. If an asylum application has been rejected, the applicant may be detained for a maximum of two months pending his removal from the country. Apart from detention to establish a person's identity, the applicable time limits may be extended if there are particular reasons (6:4 UtlL). Stricter conditions apply for detaining children (6:3-4 UtlL). "Particular reasons" could mean a real risk that the detainee will go into hiding if he were to be released. That the identity of the detainee is unclear can never be deemed a "particular reason".[139] A decision whereby a person is detained to establish his right to remain in Sweden shall be reappraised within two weeks, a decision where a person is detained with a view to being removed from the country, within two months (6:6 UtlL).

Detainees are to be kept in premises intended especially for this purpose and may only be detained in prison if they have committed a crime or if there are otherwise particular reasons for it (6:19 UtlL). 6:8-31 UtlL contain detail provisions aimed at ensuring that conditions during the detention shall be humane.

## 5.2.3 International law

### 5.2.3.1 Reasons for detention

"Provisions of international law only impose few limitations on States' discretion to apply restrictive [reception] policies", Bank says[140]. International law recognises the right of States to decide whom to grant entrance to their territory[141]. As mentioned briefly in chapter two above, both the UDHR (art. 13.1), art. 26 of the Geneva Convention, art. 12 ICCPR and art. 2 Protocol No. 4 to the ECHR safeguard the right to freedom of movement. But according to the Geneva Convention, the ICCPR and the ECHR, this only applies to refugees "lawfully resident [as opposed to "lawfully present"[142]] in the territory" of the State in question. Even writers in favour of "dynamic interpretations"[143] of refugee law accept that this means persons enjoying asylum in the sense of residence and

[137] Wikrén, p. 233.
[138] Wikrén, p. 240.
[139] Wikrén, p. 242.
[140] Bank, p. 259.
[141] Bank, p. 263.
[142] Cholewinski, p. 464.
[143] Cholewinski, p. 464.

lasting protection[144], i.e. asylum seekers with a stay permit[145]. As for refugees unlawfully resident in a country, art. 31.2 of the Geneva Convention states that only restrictions to the freedom of movement which are necessary shall be applied and such restrictions shall only be applied until their status in the country is regularized. Art. 9 of the Convention permits States to take measures which it considers to be essential to national security in the case of a particular person.

Art. 9 ICCPR and art. 5 ECHR state that everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. As can be seen, these two provisions do not prohibit the "restriction of liberty", only "deprivations of liberty"[146]. Retention at airports too have been held to be regarded as "deprivation of liberty" by the European Court of Human Rights, which means that protection under the ECHR may be enjoyed[147].

In other words, international law does not disallow the retention or detention of asylum seekers in general[148]. The provisions have been interpreted by the UNHCR to impose little restrictions on the freedom of States to order detention, for example to verify an applicant's identity, to determine the elements on which the claim to refugee status or asylum is based and in cases where asylum seekers have destroyed their travel or identity documents or have used fraudulent documents to mislead the authorities or to protect national security or public order[149].

It seems Swedish law fulfil all requirements for not unlawfully detaining asylum seekers. Swedish legislation is in line also with UNHCR recommendations on length of detention[150]. British legislation is in itself not contravening international law, but the way the law is applied, it seems international law is violated in individual cases, considering the large number of persons detained and the long duration of those detentions. The ECHR requires the observance of the principle of proportionality[151]. The figures above show 53.3% of detainees had cases pending. This means the reason for their detention could neither be to prevent illegal entry, nor to secure an imminent expulsion[152]. It seems highly unlikely detention was really necessary in all these cases.

[144] Goodwin-Gill, p. 308, de Jong, p. 690.
[145] Bank, p. 273.
[146] Bank, p. 263-4.
[147] Bank, p. 264.
[148] Bank, p. 263.
[149] Bank, p. 263.
[150] Wikrén, p. 240.
[151] Bank, p. 264.
[152] Bank, p. 265.

As for detention conditions, art. 3 ECHR applies[153]. Art. 3, regarding the right to be free from torture or inhuman or degrading treatment or punishment, has, according to the European Commission, the general purpose of preventing interferences of a particularly serious nature. This does not necessarily have to be in the form of violent acts with direct physical effect, but could be other actions too, humiliating a person before others. But such actions can only be regarded as degrading treatment when it reaches a certain level of severity.[154] Therefore the European Court and European Commission on Human Rights have been reluctant to find violations in cases of poor detention conditions. A high threshold applies.[155]

#### 5.2.3.2 "Proceedings before a court"

Art. 9.4 ICCPR and art. 5.4 ECHR provide in much the same words that everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided by a court and his release ordered if the detention is not lawful. Art. 5 ECHR adds that this should be done speedily. Swedish law provides for an appeal process and constant reappraisal of the lawfulness and necessity of the detention. British law only provides for a bail hearing. It seems doubtful whether such a bail hearing can be considered equivalent with the type of proceeding that is required according to art. 9.4 ICCPR and 5.4 ECHR. For the requirements under art. 5.4 ECHR to be fulfilled the European Commission on Human Rights held in the Caprino case that the judicial proceedings must include a review of the substantive ground of the detention[156]. A bail hearing is focussed on guarantees for good behaviour rather than on the lawfulness of the detention[157].

## 5.3 Denial or limitation of welfare benefits

Restrictions on benefits work as a deterrence not only for potential asylum seekers, but also for those who have already arrived by limiting the opportunities for integration and for creating irreversible structures which may constitute obstacles to the expulsion and deportation of rejected asylum seekers[158]. These types of restrictions, especially regarding work permits and freedom of residence, are common. They can also affect the right to social assistance, health care or education.

[153] Bank, p. 266.
[154] Cholewinski, p. 484-485.
[155] Bank, p. 266.
[156] Caprino v. UK, Application No. 6871/75.
[157] Bank, p. 265.
[158] Bank, p. 267.

### 5.3.1 UK

#### 5.3.1.1 Social security and accommodation

In the UK, what was in newspapers described as, "tough government measures... intended to deter people from coming to Britain"[159] were introduced in April 2000. Under this scheme, asylum seekers are no longer to receive cash benefits, but vouchers for food and clothing instead. Destitute asylum seekers have the right to State support, including accommodation[160]. But section 96.3 of the AIA 1999 stipulates that support should not normally be given by way of cash payments. Asylum seekers will be provided either with board and lodging together, or, if they are to cater for themselves, they will be given vouchers - and not cash - to be exchanged for food and other essentials at certain shops or supermarkets. They will still be given a small weekly cash allowance to cover "minor incidental expenses"[161].

Regulations determining whether an asylum seeker shall be entitled to support are strict. Not only any income, support or assets which the asylum seeker or his dependants have themselves will be taken into account. The authorities will also look at assets which might reasonably be expected to be available from other sources. This include support from friends and relatives already in the country or from the voluntary sector.[162] If an asylum seeker has some kind of income this will either disqualify him entirely from support, or he will be required to make contributions[163]. If the asylum seeker was destitute at the time of application for social security but possess assets which subsequently become available, recovery of such sums can be made from him[164]. As mentioned above, the support may include accommodation. But an asylum seeker will be seen to have adequate accommodation if he can stay with friends or relatives, in which case he may be provided with living expenses only[165].

#### 5.3.1.2 Work, health care and education

In the UK, as well as in Sweden (see below), rules on employment are comparatively generous. Asylum seekers in the UK are allowed to take up work six months after they have submitted their asylum application[166].

[159] The Times, 25 Nov. 2000.
[160] Section 95.1 AIA 1999.
[161] Section 96.3 AIA 1999.
[162] Section 95.2 AIA 1999.
[163] Section 95.10 AIA 1999.
[164] Section 95.11 AIA 1999.
[165] Section 96.1 AIA.
[166] Bank, p. 273.

Health care is provided to asylum seekers in the same way as for British nationals. This is generous compared to other countries, some of which provide emergency care only.[167] Asylum seekers are covered by the compulsory education scheme for British nationals[168].

## 5.3.2 Sweden

### 5.3.2.1 Accommodation and work

Welfare benefits in Sweden are comparatively generous, but still limited to bare necessities. Asylum seekers are entitled to free accommodation at refugee centres run by the Migration Board[169]. Alternatively, they may find their own accommodation, in which case they will be afforded a housing benefit of SEK 500 per month (singles) or SEK 1000 per month (couples and families)[170].

Contrary to most other Western countries, asylum seekers and refugees do not need work permits in Sweden if the Migration Board estimates that the claim for asylum can not be determined within four months from the date of application (3a§ UtlF). It they do work, benefits to which they are entitled will be reduced[171]. Asylum seekers and refugees shall be offered to participate in the running of the refugee centre[172]. They may not be offered any wages for this work[173]. If they do not take part, any benefits (apart from those covering the cost of food) to which they are entitled will be reduced[174].

### 5.3.2.2 Social security, health care and education

Apart from free accommodation, asylum seekers and refugees are entitled either to free board and a small daily allowance ("dagersättning") *or* to a higher daily allowance including a sum intended to cover the cost of food[175]. The daily allowance not including food amounts to SEK 24 (single adult)[176]. They are also entitled to receive, on application, a special allowance ("särskilt bidrag") to cover the cost of winter clothing, glasses etc.[177].

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[167] Bank, p 283.
[168] Bank, p. 285.
[169] 3§ Lag om mottagande av asylsökande.
[170] 16§ Lag om mottagande av asylsökande; 4§ Förordning om mottagande av asylsökande.
[171] 15-16§§ Lag om mottagande av asylsökande.
[172] 4§ Lag om mottagande av asylsökande.
[173] 3.1§ Förordning om mottagande av asylsökande.
[174] 10§ Lag om mottagande av asylsökande.
[175] 13§ Lag om mottagande av asylsökande; 5-7§§ Förordning om mottagande av asylsökande.
[176] 6§ Förordning om mottagande av asylsökande.
[177] 18§ Lag om mottagande av asylsökande; 7§ Förordning om mottagande av asylsökande.

The cost of ordinary health care is to be covered by the asylum seeker himself from his daily allowance. This is provided to the same subsidised rate as for Swedish nationals, but only as regards emergency care, including emergency dental care, maternity care and childbirth[178]. Children are covered by the same free primary education scheme as Swedish nationals. The local councils shall be compensated for this from State funds[179].

### 5.3.3 International law

#### 5.3.3.1 Accomodation and the freedom of movement

Denial or limitation of welfare benefits can affect a number of rights protected under international law. Assignment of no choice accommodation will affect the freedom of movement and right to free choice of residence as protected in art. 13.1 of the UDHR, art. 26 of the Geneva Convention, art. 12 ICCPR and art. 2 Protocol No. 4 to the ECHR. But these provisions only affect refugees lawfully resident in the State of refugee, i.e. those with a stay permit, and therefore offers little protection for asylum seekers (se above, 5.2.3.1). Art. 21 of the Geneva Convention states that refugees shall be accorded treatment as favourable as possible as regards housing, and not less favourable than that accorded to aliens generally in the same circumstances. But again, this only applies to refugees lawfully staying in the territory of a Contracting State. For refugees unlawfully in the country of refuge, the Geneva Convention simply provides that Contracting States must only apply restrictions on the free movement that are "necessary" (art. 31.2). The threshold is high and the national laws in both Sweden and the UK fulfil these requirements.

#### 5.3.3.2 Employment and the right to work

Restrictive policies with regard to work permits issued to foreigners do not meet with strong opposition in international law[180]. The Geneva Convention does not establish any obligation on States to permit asylum seekers to engage in wage-earning employment. It only provides that refugees lawfully staying in their territory shall enjoy the most favourable treatment accorded to other nationals of a foreign country in the same situation (art. 17.1, 18 and 19). Moreover, Contracting States shall give "sympathetic consideration" to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals (art. 17.3). 6 ICESCR protects the right to work, but as will be remembered this covenant does not contain immediately binding obligations. As with the other social rights, the level of protection afforded in international law is low. Both the UK and Sweden have comparatively generous legislation with regard to allowing

[178] 2§ Förordning om statlig ersättning för hälso- och sjukvård till asylsökande.
[179] 28a§ Förordning om statlig ersättning för flyktingmottagande m.m.
[180] Bank, p. 274.

asylum seekers to work and fulfil the few obligations established in international law. It is a separate matter that the opportunities for asylum seekers to make practical use of this liberty are very limited due to language barriers, non-recognition of professional qualifications, the high unemployment levels in Europe and discrimination by employers[181].

#### 5.3.3.3 Social assistance

As regards social assistance, the Geneva Convention (art. 23) again only offers protection to refugees lawfully staying in the territory of a Contracting State, i.e. those refugees who have already been offered some form of lasting protection[182]. To those, the Contracting States shall accord the same treatment with respect to public relief and assistance as is accorded to their nationals. The ICESCR stipulates that States shall recognize the right of everyone to social security, including social insurance (art. 9). It has, however, been argued that art. 9 focuses on social security in the sense of "income-based and situation-based cash benefits for workers and their families" and not "need-based basic subsistence benefits financed from general tax revenues"[183]. Asylum seekers' rights according to the ICESCR would instead have to be based on art. 11, according to which States shall recognize the right of everyone to an adequate standard of living.

Prior to 1996, asylum seekers in the UK were entitled to ordinary Income Support Benefit, Council Tax Benefit, Housing Benefit and Child Support on roughly the same basis as nationals. New legislation excluded certain groups of asylum seekers from enjoying any social benefits at all (e.g. those applying for asylum not at border, but applying when they had already entered the country and those waiting for the outcome of an appeal). In a number of cases before British courts this legislation was rejected, and it was reviewed in 1999.[184] As described above, the present system too includes some fairly tough measures, such as providing asylum seekers with vouchers instead of cash. That the only purpose of this reform is to act as a deterrence measure is clear, not least since the British government has itself stated it in so many words. In its White Paper describing the new legislation, the government writes that a voucher system is favourable since a cash based system may serve as "a financial inducement for those who would be drawn by a cash scheme"[185]. Also, it was admitted that the voucher system would be introduced despite a cash system being both cheaper and more administratively convenient[186].

[181] Cholewinski, p. 467.
[182] Bank, p. 283.
[183] Cholewinski, p. 492.
[184] Cholewinski, p. 465.
[185] Cholewinski, p. 496.
[186] Cholewinski, p. 496.

Protection as regards social security for asylum seekers appears to be weak in international law, with the Geneva Convention protecting only "refugees lawfully resident" in the country of refuge and the ICESCR stating simply that everyone shall have the right to an "adequate standard of living". The British system may be restrictive, but appears to meet the standards required by these vague provisions. Cholewinski, though, has argued that international law offers greater protection and that the UK system violates international law. He rests his argument on art. 26 ICCPR and art. 3 ECHR. Art. 26, according to which the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground, he contends, shall be interpreted as meaning that any social security measures introduced by a State must be applied in a non-discriminatory fashion. He accepts that not all distinctions between citizens and aliens are prohibited, but distinctions must be "prescribed by law, pursue a legitimate aim and be strictly proportionate to that aim". Distinctions must be made according to "reasonable and objective criteria"[187]. The difference in treatment between nationals and asylum seekers in the UK is not based on reasonable and objective criteria and is also far too severe and disproportionate in application, he argues[188]. Further, requiring asylum seekers primarily to rely on help from friends and relatives is again discriminatory as this will affect minority community groups which are already disadvantaged in society. Both this particular measure and the whole British system, also violate art. 3 ECHR, since it amounts to degrading treatment of asylum seekers.[189]

As for the applicability of art. 3 ECHR, it has already been explained (see chapter 5.2.3.1) that this provision is directed towards actions reaching a certain level of severity. The system in the UK, whereby both housing and some minimum means of subsistence are provided is unlikely to reach the critical level. The discrimination argument based on art. 26 ICCPR is harder to assess. The aim, deterring false asylum claims, is legitimate. As for the question of proportionality, social assistance to destitute citizens too is kept to a minimum in the UK. But as regards the assistance to asylum seekers being paid, not in cash, but in the form of vouchers and the contributions required from the asylum seeker's relatives, these measures may well be disproportionate.

Under the Swedish system too, there is a difference between the level of assistance given to citizens and to asylum seekers. But the Swedish system lacks some of the more questionable features of the British system. In Sweden, payment is made in cash and there is no question of placing the burden of supporting asylum seekers on their relatives. The system in Sweden therefore most likely conforms with international standards. The requirement in Swedish national law that asylum seekers shall participate in the running of the governmental refugee centres, lest their social benefits be reduced, does,

[187] Cholewinski, p. 480.
[188] Cholewinski, p. 480.
[189] Cholewinski, p. 486-7, 497.

according to the European Commission of Human Rights, not constitute forced labour in the meaning of art. 4 ECHR and art. 8 ICCPR. Neither the intensity of the involuntariness, nor that of the sanction reach the degree required for forced labour[190].

#### 5.3.3.4 Health care and education

The only provision on health care is found in art. 12 ICESCR. States must recognize the right of everyone to the enjoyment of the highest attainable standard of health. To achieve that, they shall take steps to create conditions which would assure to all (including asylum seekers) medical service and medical attention in the event of sickness. The interpretation of art. 12 is unclear. Some argue that it safeguards the right to preventive health care too[191], while others mean that it could be interpreted as a requirement for medical care only in acute cases and not for long term promotion of health by such measures as routine checks[192]. In the UK, asylum seekers and nationals have equal access to health care. The somewhat lower standard in Sweden arguably still fulfils the obligations under international law, considering the wording of art. 12.2 (d) "medical attention in the event of sickness", in comparison with the wording of art. 12.2 (c) which expressly talks of "prevention" of for example occupational diseases. It must also once again be remembered that the provisions in the ICESCR are not of an immediately binding nature.

According to the Geneva Convention, elementary education shall be accorded to (all, lawfully or unlawfully present) refugees on the same basis as for nationals (art. 22). The ICESCR too recognizes the right to education (art. 13.1), which means primary education shall be compulsory and free to everyone (art. 13.2). Both Sweden and the UK live up to this obligation.

[190] Bank, p. 283.
[191] Cholewinski, p. 489.
[192] Bank, p. 285.

## 5.4 Negative propaganda and language

It is perhaps fairly obvious that negative propaganda and language directed at asylum seekers on the part of State officials will not be concrete enough to violate any particular provision in the international human rights instruments. These do contain prohibitions on discrimination due to race, colour etc, but generally only in relation to the rights set forth in the various instruments. See for example, art. 2 of the UDHR and art. 3 Geneva Convention. The limitations on negative propaganda and language are to be found in national legislation related to freedom of speech, freedom of press and racial discrimination, which is outside the scope of this work, but we shall still dwell on this measure of deterrence for a moment.

In a study analysing how refugees, asylum seekers and immigrants are depicted in Swedish media, the authors, talking of criticism of one's sources as a writer, say: "One can never trust the authorities completely. They are not omniscient and the authorities comprise of ordinary people with the weaknesses and prejudices of ordinary people… Therefore it is the duty of the journalist to be suspicious of the authorities in refugee matters too"[193]. Some politicians are openly hostile towards immigrants and asylum seekers. Margaret Thatcher, in a broadly televised interview on Granada television, expressed fears that Britain was being "swamped by people with a different culture"[194]. Other examples include Jörg Haider in Austria and Umberto Bossi in Italy, both in governmental positions. In the present election campaign in the UK, Conservative leader William Hague recently spoke of how he would put an end to Britain being "a soft spot for bogus asylum seekers"[195]. In Sweden the police too, as well as Migration Board staff (Kenneth Sandberg, who was however later removed from his post) have been publicly questioning the truthfulness of refugees, in one case alleging their passports have been attained through bribes[196].

Clearly negative feelings among common citizens in a country can act as a deterrence in itself. This is further enhanced when the negative language and propaganda emanate from State officials; from Migration Board officials, from the police and from politicians - especially those belonging to the government. It must be kept in mind that asylum seekers and refugees are often fleeing precisely because they are being persecuted by the authorities and the police in their country of origin, making the attitudes of the authorities in the (potential) country of refuge an all the more sensitive matter.

[193] Hultén, p. 13.
[194] Hassan, p. 188.
[195] Hague, Euronews, Sun. 20 May 2001.
[196] Hultén, p. 25, p. 27.

## 5.5 Conclusion - rules of deterrence

There are few restrictions in international law on the application of national deterrence measures. The provisions on social assistance give much freedom to States, the demand only being that asylum seekers are being offered an "adequate standard" of living (art. 11 ICESCR). However, measures may not be discriminatory (art. 26 ICCPR). It has been argued that the British benefit system, whereby vouchers have replaced cash and asylum seekers are first to turn to relatives for support, violates this prohibition. The provisions on the detention of asylum seekers and refuges are but marginally stricter than the provisions on social assistance. Still the UK probably violates those provisions, both regarding its policy to keep asylum seekers detained for prolonged periods and as regards the lack of a proper appeal procedure in detention cases. The bail hearing provided for in British law is probably not enough to fulfil the requirement in art. 5.4 ECHR that anyone who is deprived of his liberty by detention shall be entitled to proceedings before a court of law determining the lawfulness of the detention.

# 6 Enforcement

In this chapter we will look at the possibilities for enforcement available to individuals when national legislation violates international law. This is not the main topic of this thesis. In fact it is a separate issue worth its own examination. Still, it feels an investigation into the possible conflicts between Swedish and British national law and the international instruments protecting refugees' rights would not be complete without at least some knowledge of whether the rights provided by international law are actually enforcable.

## 6.1 International mechanisms

### 6.1.1 Universal instruments

In general all modern human rights conventions which have been negotiated under the auspices of the UN have reporting systems with monitoring Committees[197]. This means States have to submit regular reports on the national situation regarding the field covered by the convention in question. Sometimes States will have the right to bring complaints against other States before the Committees[198]. On the whole, these supervision systems do not work satisfactory[199]. There is no monitoring Committee for the Geneva Convention. Instead the UNHCR may point out to a country that it is violating the Geneva Convention.[200] Under some conventions there is a possibility for individual petitions. For example, States may sign an optional protocol to the ICCPR allowing individual petitions to the Human Rights Committee supervising the conformation to that Covenant[201]. Sweden, but not the UK, has signed this protocol[202]. But the number of individual complaints is low, only around 600 (half of which have been rejected as inadmissible[203]) since the protocol came into effect in 1976. The Human Rights Committee can only ask for explanations and make recommendations with regard to the individual complaints. It has no enforcement power, but States are probably bound by customary law to follow its recommendations[204]. The possibility of inter-state complaints has so far never been used.[205] There is also a UN Commission on Human Rights. The Commission can initiate public investigations against particular States, but it can only make recommendations. It has no enforcement power.[206]

[197] Bring & Mahmoudi, p. 106.
[198] Malanczuk, p. 215.
[199] Bring & Mahmoudi, p. 106.
[200] Ehrenkrona, p. 4-5.
[201] Malanczuk, p. 216.
[202] Higgins, p. 55.
[203] Malanczuk, p. 216.
[204] Ehrenkrona, p. 3.
[205] Bring & Mahmoudi, p. 105.
[206] Malanczuk, p. 214.

### 6.1.2 Regional instruments

There are much more effective measures available to individuals under the ECHR. Both States, individuals, groups of individuals and non-governmental organizations under the jurisdiction of State Parties (i.e. not only nationals of Member States[207]) can make complaints before the European Court of Human Rights. The Court's decisions are legally binding and enforcable. The number of complaints so far are in excess of 20,000[208]. One limitation must be kept in mind though: only circumstances protected as a right under the ECHR can be tried by the Court. (Remember for example the discussion above, chapter 5.2.3.1, regarding whether retention at airports should be viewed merely as a "restriction" of liberty - not covered by the ECHR -, or as a "deprivation" of liberty - covered by the ECHR - ). Also, all domestic remedies must have been exhausted before the Court may deal with a matter (art. 35, Protocol No. 11 to the ECHR). In other words, while this is an effective remedy in that States are legally bound to enforce the Court's decisions, it is a very time consuming process. All national remedies must have been exhausted and then the process before the European Court itself may take years.

## 6.2 National mechanisms

Apart from under the ECHR, it has been shown that there are few real possibilities for individuals to claim their rights under international human rights and refugee law. Are there then any chances of claiming these rights in national courts?

### 6.2.1 UK

The traditional Anglo-American view was that international law was to be implemented straight in national courts. International and national law was seen as a single legal system (monism). This was also the approach in Sweden until the early 1900's.[209] In UK today, international law is generally given internal effect only if, and to the extent that, it is explicitly part of national law[210]. To call this dualism, i.e. where national and international law are regarded as two separate legal systems and where one system can not be said to be superior to the other, is, however, according to Higgins, too simplistic[211]. The position in the UK is that international treaties signed by the UK are regarded as consistent with national law[212]. This is in fact a precondition for signing, meaning that national law will

[207] Bring & Mahmoudi, p. 110.
[208] Bring & Mahmoudi, p. 105.
[209] Bring & Mahmoudi, p. 40.
[210] Bring & Mahmoudi, p. 41.
[211] Higgins, p. 38.
[212] Cholewinski, p. 473.

sometimes have to be amended first[213]. Also, customary international law is treated differently in that it can be applied without regard to whether a certain treaty have been incorporated in British law or not[214].

The established general principle of British law is, as mentioned above, that treaties cannot be given internal effect without incorporation. But recently what Higgins call "a new remarkable trend" has been perceived, whereby the issue of non-incorporation is being rendered less and less important[215]. This is especially true of the ECHR. Although previously not incorporated into British law, courts in the UK tended to have the obligations in the ECHR in mind when rendering judgements under national law. But the situation is significantly different with the ICCPR, partly because it is not as well known to British judges, but also because the UK is not a party to the protocol to the ICCPR whereby individual complaints can be made[216]. As for the Geneva Convention which is not in terms incorporated into British law, the Asylum and Immigration Appeals Act 1993 stipulate that as regards refugees, "Nothing in the immigration rules... shall lay down any practice which would be contrary to the [Geneva] Convention"[217]. This renvoi means that, at least concerning refugees, the rules in the Geneva Convention could be invoked in a UK court. As for asylum seekers, this is not necessarily the case, but as will be remembered we have not in this thesis found any violation of the Geneva Convention and Protocol by the UK. Still it is not clear whether the scope of this provision is sufficient to amount to incorporation of the Geneva Convention and the New York Protocol[218].

### 6.2.2 Sweden

Sweden essentially adhere to the dualist view[219]. International treaties can not be invoked in Swedish courts without incorporation into Swedish law, though this can take place according to several methods: transformation, full incorporation or a presumption of consistency[220]. The Geneva Convention has not been incorporated into Swedish law. It is in part transformed into Swedish law, in part presumed to be in consistence with it. But if there are discrepancies, Swedish law will prevail.[221] The fact that the method of full incorporation (especially of international human rights instruments) is sometimes used causes some experts to claim they discern a similar shift towards monism as described by Rosalyn Higgins in the UK[222]. In Sweden too a distinction can be made between treaties and

[213] Higgins, p. 37.
[214] Higgins, p. 38.
[215] Higgins, p. 41.
[216] Higgins, p. 55.
[217] Cholewinski, p. 474 and Higgins, p. 44.
[218] Cholewinski, p. 474.
[219] Bring & Mahmoudi, p. 47.
[220] Bring & Mahmoudi, p. 44.
[221] Ehrenkrona, p. 5.
[222] Bring & Mahmoudi, p. 44.

customary law. As for customary law the monist tendencies are stronger. In practice Swedish courts have sometimes applied "generally recognised principles of international law". This has been the case particularly where a foreign State has been regarded as enjoying immunity against Swedish jurisdiction according to international law.[223] In general it would not be possible for individuals in refugee and asylum matters to invoke international law provisions in Swedish courts, though it has to be kept in mind that the ECHR has been incorporated and is therefore part of national Swedish law.

## 6.3 Conclusion - remedies

Neither in the UK nor in Sweden is it possible to invoke international law directly in national courts. In principle, international treaties need to be incorporated. The ECHR is already incorporated in both British and Swedish law and can be invoked before national courts. In both countries courts give some consideration to general principles of law. Unlike treaties, which contain detailed provisions, these general principles of law are limited to the protection of a "fundamental and unrenounceable nucleus of human rights"[224]. But to what extent the many international human rights instruments has led to the emergence of a binding international customary law of human rights is a matter of debate[225].

It is not easy for individuals successfully to lodge complaints at the international level if they feel national legislation contradicts international law. This is especially true of the universal instruments. Individual petitions are only possible to a limited extent and there are generally no enforcement mechanisms. Complaints before the European Court of Human Rights can be more effective as the Court's decisions are legally binding. For the possible violations of international law discussed above, against art. 3 ECHR (asylum seeker's rejected visa application) and against art. 5.4 (appeal against detention decision), it would be possible for individuals to make claims both in national courts and to the European Court of Human Rights. But a process before the European Court can take years. Few refugees and asylum seekers will have a realistic opportunity and the necessary knowledge to embark on such a process.

[223] Bring & Mahmoudi, p. 47.
[224] Condotti, p. 3.
[225] Malanczuk, p. 216.

# 7 Conclusion

Above, a number of measures used by governments to limit the number of refugees and asylum seekers have been described. The measures, expressing political aims, are sometimes transformed into national law. This thesis has tried to examine the legality of such national legislation in view of the obligations on States according to international law. The measures discussed include both measures of containment and of deterrence. States do their utmost to limit their responsibilities. The reason is mainly to save money and to satisfy public opinion. Figures show that the number of asylum seekers whose claims have been accepted have been reduced in all the Western European countries during the past ten years[226]. Recognition rates for asylum closely follow the financial situation in the Western European countries[227]. It has been shown that, generally, governments keep national legislation used to enforce the measures of containment and deterrence within the bounds of international law. Sometimes this is easy as international law does not offer much, or very detailed, protection. This is true of inter alia social rights, which are affected by measures of deterrence such as limitation of welfare benefits. In other areas the protection offered by international law is more substantial, but States are careful to construe their obligations under international law in the strictest possible sense. The development of the term "refugee" is illustrative. Puntervold Bø writes: "The legal code of "refugee" is today so difficult to obtain, that the great majority of those in need of protection from persecution do not qualify"[228]. In the end, it is the governments of the national States that lay down international law.

## 7.1 Legislation vs. policy

This thesis has mainly focussed on investigating legislation. Despite many measures aimed at reducing the number of asylum seekers, national legislation clearly violating international law is rare in the UK and Sweden. Some explanations to this have already been given. Another reason is that material substance is largely kept to the level of policy. As will be remembered, the conclusion above has often been that the law itself does not violate international obligations, but the way it is applied might. The laws affecting asylum and refugee matters are often of a procedural nature[229]. These laws may conform with international law while application policy violates it. Neither Sweden nor the UK have formal safe country of origin lists. This would violate international law. However, on a policy level, informal lists may still exist. Informal policy can be very hard to examine.

[226] Puntervold Bø, p. 300.
[227] Blixt, p. 29.
[228] Puntervold Bø, p. 297.
[229] Puntervold Bø, p. 297.

## 7.2 Areas of conflict

### 7.2.1 Access to territory

Some possible areas where British and Swedish national legislation is in conflict with international law have been discovered. The first concerns access to territory. The way international law, in this instance art. 1 and 3 ECHR, is worded and has been construed in case law, seems clearly to support the view that visa applications can not be rejected if as a direct consequence the applicant risks being subjected to torture or other cruel, inhuman or degrading treatment or punishment. The potential consequences are far-reaching. Western European States could be made responsible for large numbers of persons who are being persecuted. This is a political impossibility and should, contrary to expectation, a decision in the European Court of Human Rights be made to this effect, the ECHR would no doubt quickly be amended. There is currently strong public opposition in Western European States to receiving refugees and asylum seekers. In fact, already the limited protection offered by the Geneva Convention is under scrutiny. The Convention is criticized as being out-of-date and written to deal with the refugee situation after the Second World War, a situation completely different from the one we face today. Particularly in the UK, calls have been made to rewrite the Convention and establish a stricter system for asylum claims. This system is proposed to include lists of countries whose nationals would be ineligible to apply for asylum and it is proposed asylum should be applied for from the applicant's region of origin, instead of at the borders of the country of refuge.

### 7.2.2 Detention

A second possible conflict between international and national law observed in this thesis concerns British policy and legislation on detention of asylum seekers. It seems obvious from the cumulated figures on average length of detention and the number of detainees, that British detention policy violates art. 9 ICCPR and art. 5.1 ECHR. Also, the possibilities for having the grounds for detention tried in a court of law are too limited in the UK. National law in the UK only provides for a bail hearing, focussing on guarantees for good behaviour rather than on the lawfulness of the detention. Under art. 5.4 ECHR everyone has the right to have the lawfulness, i.e. the material grounds for the detention, tried speedily in a court of law. Britain has on several occasions been convicted in the European Court of Human Rights for violations of art. 5.4 ECHR as regards detention of asylum seekers[230]. It seems clear both British legislation and policy on detention needs a review.

[230] Plender & Mole, p. 94-95.

Two more areas of possible conflict have been indicated, national legislation on social assistance for asylum seekers in the UK and Swedish policy on the application of safe third country and the Dublin Convention. Whether international law is actually violated is more uncertain in these areas.

## 7.3 Enforcement

Another important question is that of enforcement. It is very well to enjoy rights according to international law, but it is not worth much unless those rights can be invoked in practice. To invoke international rights is hard, both internationally and nationally. Nationally, both Sweden and the UK adhere to the principle of dualism. This means international law can only be invoked if it has been incorporated into national law. In both countries, national legislation is presumed to conform with international law. But if a conflict should arise, national law prevails. On the international level, the UN instruments generally have monitoring Committees. This is not the case as regards the Geneva Convention, though. To some of the monitoring Committees individual petitions can be made. The UK has not signed the protocol whereby it is possible to make individual complaints to the Human Rights Committee. Few cases are heard by the Committees. Even if the complainant is right the Committee has no enforcement power, though States generally accept its findings. The most effective way of enforcement internationally is to make a claim to the European Court of Human Rights. This is the most developed of all the regional courts of law in the world. The ECHR is incorporated into both Swedish and British law. The decisions of the European Court of Human Rights are enforcable. Otherwise the most effective way to make States change their law and policies is by international criticism from other States.

## 7.4 A look ahead

If we look ahead, what are the consequences of States trying to limit their responsibilities for refugees and asylum seekers? Probably it will result in a denial of protection for those who really need it. Also, there is a risk of an uneven distribution of the refuges in the world. The likely result is a pattern where the countries closest to wars and oppressive regimes, the majority of which are not found in the Western world, will receive most of the refugees. Within Europe too, the "burden" of refugees is unevenly distributed as a result of for example the Dublin Convention. The countries which can control their borders the best get away with the least, while those with long coast lines and borders to East Europe will receive many more asylum seekers. This adds to the burden of already vulnerable countries and results in that refugees may have to continue fleeing as their presence causes new disturbances in the unstable countries to which they manage to flee. In the end, the solution to the refugee problem can only be to make sure fewer people are forced to flee their countries of origin.

The future will probably bring even tougher legislation on asylum in Western European States. Perhaps the Geneva Convention will be rewritten. The day when persecuted individuals have unfettered right to enter the territory of Western European States is very far off. In the UK, William Hague has pledged to detain all asylum seekers for the duration of the determination of their asylum claims, should he win the upcoming general election. Such a measure would violate more or less every existing human rights instrument and could not be permissible under international law as it stands today. On the contrary, it is not unlikely that the procedure for detention of asylum seekers will have to be reviewed in the UK. Internal debate on immigration and asylum is lively both in the UK and in Sweden. But internationally, primarily within the EU, it is the UK that has taken on a leading role, pushing for stricter laws on asylum. This has to be viewed in a historical context, where, in the UK, questions on race and immigration have been urgently important for centuries. Britain is traditionally a country of immigration and with its colonial links it is still a popular destination. While the UK might be setting the tone for future policies on asylum in Europe, Sweden will probably only follow any new standards thus set.

# Bibliography


Abeyratne, R.I.R: *"Air Carrier Liability and State Responsibility for the Carriage of Inadmissible Persons and Refugees"*, International Journal of Refugee Law, Volume 10, number 4, 1998.

Bank, Roland: *"Reception Conditions for Asylum Seekers in Europe: An Analysis of Provisions in Austria, Belgium, France, Germany and the United Kingdom"*, Nordic Journal of International Law, 2000.

Blixt, Håkan: *"50 år av invandring: En beskrivning & analys av invandring & invandringspolitiken i Sverige 1947-97"*, Lunds Universitet, Historiska institutionen, 1998.

Bring, Ove & Lysén, Göran: *"Materialsamling i Folkrätt"*, 2nd edition, Iustus Förlag, Göteborg, 1996.

Bring, Ove & Mahmoudi, Said: *"Sverige och folkrätten"*, Norstedts Juridik, Stockholm, 1998.

Cholewinski, Ryszard: *"Enforced Destitution of Asylum Seekers in the United Kingdom: The Denial of Fundamental Human Rights"*, International Journal of Refugee Law, Volume 10, number 3, 1998.

Conforti, Benedetto: *"National Courts and the International Law of Human Rights"*, in Conforti, Benedetto (ed.): "Enforcing International Human Rights in Domestic Courts", Kluwer Law International, The Hague, 1997.

de Jong, Cornelis D: *"The Legal Framework: The Convention relating to the Status of Refugees and the Development of Law Half a Century Later"*, International Journal of Refugee Law, Volume 10, number 4, 1998.

Ehrenkrona, Carl Henrik: *"Folkrättsliga hinder mot utvisning enligt utlänningslagen (1989:529) m.m."*, Svensk Juristtidning 84, 1999.

Goodwin-Gill, Guy S: *"The Refugee in International Law"*, 2nd edition, Clarendon Press, Oxford, 1998.

Guild, Elspeth (comp.): *"The Developing Immigration and Asylum Policies of the European Union"*, Kluwer Law International, The Hague, 1996.

Hassan, Lisa: *"Deterrence Measures and the Preservation of Asylum in the United Kingdom and the United States"*, Journal of Refugee Studies, Volume 13, number 2, June 2000.

Higgins, Rosalyn: *"The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom"*, in Conforti, Benedetto (ed.): "Enforcing International Human Rights in Domestic Courts", Kluwer Law International, The Hague, 1997.

http://visa.fco.gov.uk/pdf/inf2.pdf

http://www.dhsu.org.uk/immi.htm

http://www.fco.gov.uk/ukvisas/dynpage.asp?Page=480

http://www.fco.gov.uk/ukvisas/dynpage.asp?Page=481

http://www.ind.homeoffice.gov.uk/default.asp?Pageld=929

http://www.ind.homeoffice.gov.uk/default.asp?Pageld=1013

http://www.migrationsverket.se/load.htm?inter_sivnews/article.html?Id_id=10&id=3751

Hultén, Britt & Lugn, Anders & Thurén, Torsten: *"Journalister, invandrare, flyktingar"*, Allmänna Förlaget, Stockholm, 1998.

Lagerström, Inger, Public Relations Officer, Migration Board, e-mail, 22 May 2000.

MacDonald, Ian A: *"The New Immigration Law"*, Butterworths, London, 1972.

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

Plender, Richard and Mole, Nuala: *"Beyond the Geneva Convention: constructing a de facto right of asylum from international human rights instruments"*, in: Nicholson, Frances (ed.): "Refugee rights and realities", Cambridge University Press, Cambridge 1999.

Puntervold Bø, Bente: *"Law and asylum: The use of legal means to limit the responsibility of the nation State towards refugees"*, in: Bulygin, Eugenio & Leiser, Burton M. & Van Hoecke, Mark (ed.): "Changing Structures in Modern Legal Systems and the Legal State Ideology", Duncker & Humblot, Berlin, 1998.

SOU 1995:55: *"Ett samlat verksamhetsansvar för asylärenden. Delbetänkande av Utredning om verkställighet av beslut om avvisning och utvisning"*, Stockholm, 1995.

Spencer, Ian R.G: *"British immigration policy since 1939: The making of multi-racial Britain"*, Routledge, London, 1997.

Sydsvenska Dagbladet: *"Britterna vill stoppa asylsökande tidigt"*, 9 February 2001.

Sydsvenska Dagbladet: *"Flyktingströmmen till Sverige ökade med 50 procent"*, 2 February 2001.

Sydsvenska Dagbladet: *"Livsviktig hjälp till de asylsökande"*, 21 March, 2001.

Sydsvenska Dagbladet: *"Riv murarna runt Europa"*, 14 March 2001.

The Times: *"Asylum 'run as criminal racket"*, 7 February 2001.

The Times: *"Judges prevent Straw deporting refugees"*, 20 December 2000.

The Times: *"Minister admits asylum system has collapsed"*, 8 November 2000.

The Times, leading article: *"Straw's asylum. Long-term answers, short-term troubles"*, 7 February 2001.

The Times: *"Straw seeks tough asylum laws"*, 6 February 2001.

The Times: *"Straw's efforts to curb asylum-seekers fail"*, 25 November 2000.

The Times: *"Thousands of refugees "vanished", says Straw"*, 22 November 2000.

Wikrén, Gerhard & Sandesjö, Håkan: *"Utlänningslagen med kommentarer"*, Norstedts Juridik, Stockholm, 3rd edition, 1990.

Wikrén, Gerhard & Sandesjö, Håkan: *"Utlänningslagen med kommentarer"*, Norstedts Juridik, Stockholm, 6th edition, 1999.

# International instruments

Conclusions on countries in which there is generally no serious risk of persecution, SN 4821/92 WGI 1281 AS 145.

Convention on International Civil Aviation, ICAO Doc 7300/6.

Convention on the Application of the Schengen Agreement of 14 June 1985 relating to the Gradual Suppression of Controls at Common Frontiers, between the Governments of States Members of the Benelux Economic Union, the Federal Republic of Germany and the French Republic.

Convention Relating to the Status of Refugees, 189 UNTS 150.

Dublin Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities.

European Convention on Human Rights and Fundamental Freedoms, ETS 5-1950.

Geneva Convention relating to the International Status of Refugees, 189 UNTS 150.

International Covenant on Civil and Political Rights, 999 UNTS 171.

International Covenant on Economic, Social and Cultural Rights, 14531 UNTS 993.

Protocol No. 4 ETS 46-1963.

Protocol No. 7 ETS 117-1984.

Protocol relating to the Status of Refugees, 606 UNTS 267.

Resolution on manifestly unfounded applications for asylum, SN 4822/92 WGI 1282 AS 146.

United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNGA resolution 39/46, 10 December 1984.

Universal Declaration of Human Rights, UNGA resolution 217 A(III).

# National legislation

Asylum and Immigration Act 1996

Asylum and Immigration Act 1999

Immigration Act 1971

SFS 1989:529. Utlänningslag.

SFS 1989:547. Utlänningsförordning.

SFS 1994:137. Lag om mottagande av asylsökande m.fl.

SFS 1994:361. Förordning om mottagande av asylsökande m.fl.

SFS 1996:1357. Förordning om statlig ersättning för hälso- och sjukvård till asylsökande.

# Table of Cases

Caprino v. UK, Application No. 6871/75.

JO-ärende 2000/01:JO1, Dnr 3145-1999.

Soering v. UK, judgement of 7 July 1989, Series A, No. 161; 11 EHRR, 1989.