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The Dublin Convention

A Contemporary Asylum System Within the European Union

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Summary

The need of a European immigration policy within the EU appear to be evident. Until fairly recently, immigration and asylum policy was strictly the concern of every national state but since the mid-80s, a clear intensification of cooperation has taken place. The measures taken in this field the last 15 years have been concentrated on exclusion of foreigners. The Single European Act introduced an area without internal frontiers but created at the same time a fear of promoting a territory where illegal activities would be rampant, due to the lack of checks at internal borders. To compensate for the security risks, France, Germany and the Benelux countries instituted a common policy with respect to immigration, police and criminal justice, Schengen. In Maastricht, matters falling within the sphere of justice and home affairs were brought into the Treaty on the European Union. However, a majority of them they did not fall under Community competence. The regulation listing visa requirement for third country-nationals is an important exception but other adopted instruments are not legally binding and their impact of minor significance. Hopefully, these negative aspects will be diminished by the ToA. The Area of Freedom, Security and Justice brought with it a new title in the EC Treaty on free movements, asylum and immigration. Immigration policy has been transferred from the third to the first pillar and the Schengen aquis has partly been incorporated into the first pillar. This development will facilitate the adopting of binding measures, which will be completed five years after the entry into force, May 2004.

The most prominent instrument which has taken a leading role in the current debate is the Dublin Convention. The purpose is to allocate the responsibility for asylum applications to one Member State and to prevent undesirable elements, such as 'refugee-in-orbit' situations and 'asylum-

shopping'. Unfortunately, the instrument has not worked out as well as one hoped for. The Convention may certainly be seen as an effort to harmonise the existing approaches among the Member States but it took place without guaranteeing a common standpoint as to both substantive and procedural aspects. As a result, the harmonisation is limited. The 'safe country' concept is not as such legally incorporated in the DC but has nevertheless a heavy impact on the asylum policy within the EU. The shortage of a common position as to determine a country safe, is experienced as a serious scarcity as it may lead to a violation of the prohibition of refoulement. An aspect which, until very recently, has been unharmonised and therefore treated differently among the Member States is temporary protection, linked to access to status determination and social rights and the lack of a common refugee definition. The latter is troublesome, not only in respect of recognition rates but also regarding transfer from one country to another under the Dublin Convention, since the mutual trust in respective legislation is assumed. A Member State faced with deportation of an asylum seeker to another Member State because of the hierarchical order pointing out the responsible state, may find the situation rather unfortunate if the interpretation made by the two states differ strikingly. In such a situation, the affected state can choose to act according to its conscience, stopping the deportation or act in the interest of the Community, i.e. prevent the beginning of a schism which may lead to disruption, by complying the transfer decision. Another aspect of the procedure which raises major concern can be found in the rarely granted suspensive effect a pending decision has. Consequently, an asylum seeker may find himself deported to a third country before the outcome of a case is announced.

Finally, it remains to see whether the development after Amsterdam involves any improvement and convergence or not. At long last, the Community institutions have realized the necessity of a renewed asylum approach, shown in Tampere where the work towards a Common European Asylum System was established.

Preface

I would like to thank my parents, Monica and Ulf Sandgren, for their moral and financial support which has facilitated the completion of this thesis.

Abbreviations

CAT	Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment
CFSP	Common Foreign and Security Policy
CMLRev	Common Market Law Review
CSR51	Convention Relating to the Status of Refugees
DC	Dublin Convention
DRC	Danish Refugee Council
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EctHR	European Court of Human Rights
ECJ	European Court of Justice
ECRE	European Council for Refugees and Exiles
ECSA	European Community Studies Association
ECSC	European Coal and Steel Community
EEA	European Economic Area
EEC	European Economic Community
EMU	Economic and Monetary Union
EP	European Parliament
ERCOMER	European Research Centre on Migration and Ethnic Relations
Euratom	European Atomic Energy Community
EU	European Union
EXCOM	Executive Committee of the UNHCR
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IJRL	International Journal of Refugee Law
JHA	Justice and Home Affairs
NGO	Non-Governmental Organization
OECD	Organization for Economic Cooperation and Development

OJ	Official Journal
OPFRA	French Office for the Protection of Refugees and Stateless Persons
SC	Schengen Convention
SEA	Single European Act
SIA	Schengen Implementation Agreement
SIS	Schengen Information System
TEU	Treaty on European Union
UDHR	Universal Declaration of Human Rights
UNHCR	Office of the United Nations High Commissioner for Refugees

1. Introduction

The phenomena of seeking refuge is not new. From time immemorial, people have fled wars and other trouble spots in order to ensure personal safety. The mechanism of fleeing to another state when the life situation is threatened in the country of origin is purely a survival tactic, which has existed as early as the fourth century B.C. in the Greek city-states¹. The usage of the term refugee was coined in France during the seventeenth century but the concept used as early as 1573 in order to help foreigners escape persecution². The Middle Ages are known for the political persecution which took place against all those who cherished a religious view different from the Catholic church and affected protestants, jews and muslims. When the persecution based on religious belief came to an end in general, an individualized persecution based on political views against dissidents grew stronger, a development shown clearly during the French revolution³. The development of getting rid of people seen as disturbing elements continued and reached its peak with the extermination of jews and dissidents in Germany during the World War II. By then, the international Community realized the extent of the persecutions and the necessity of taking measures. An international refugee protection regime saw the light of the day.

¹ Plender, Richard, *International Migration Law*, (1972), A.W. Sijthoff, p. 72.

² Suhrke, Astri et al, *Escape from Violence. Conflict and the Refugee Crisis in the Developing World*, (1989), Oxford University Press, p. 5.

³ Bergström, Börje, *Alla Tiders Historia*, (1989), Gleerups, p. 182.

1.1 Legal development in the field of asylum and refugee protection.

A controversial topic which has been subject for lengthy discussions for decades is whether a *right* to be granted asylum exist. Today, we can draw the conclusion that this view is not accepted in international law since the right of sovereignty is considered being of greater importance. Article 14 of the UDHR⁴ states a right to *seek and enjoy* asylum, not a right to obtain it. In the nature of the concept of sovereignty lies the idea that a state has sovereign power to decide the extent and time of immigration to its territory. The right to control borders is a fundamental aspect of sovereignty, which is considered being the core of international law. Yet, even though no explicit right to asylum exists, it is understood that the international refugee protection would be pointless if asylum would not be the consequence of refugee status.

The foundation of international refugee law was laid down in the early 1950s by the creation of UNHCR 1950 and the Refugee Convention 1951⁵. The role which the UNHCR has played in conflicts all over the world cannot be underestimated, both the acute assistance in places of turmoil and the pressure they put on states and the impact which follows, are of great importance. The basis for the agency can be said to be international protection, such as keeping up the respect for basic human rights for the refugees and to ensure that no one is transferred to the country where he or she fears persecution, known as the prohibition of *refoulement*. This principle, which is stated in Article 33 of the CSR51, is the far most important provision in international refugee law and provides that a refugee shall not be sent to a country where his or her life or freedom is threatened because of race, religion, nationality, membership of a particular social group or political opinion. State practice has shown that this is a provision

⁴ UN General Assembly Resolution 217 A (III), 10 December 1948, (UN Doc. A/810 (III)).

which is taken seriously in international law since the scope is extended to cover not only expulsion and return but also rejection at the frontier and extradition⁶. The instrument is important in its capacity as the sole treaty completely focused on refugees. It does not only provide us with the principle of non-refoulement but also gives guidance in the interpretation of the term 'refugee'⁷. From the definition, it is possible to find two categories of refugees. The first sees the refugee as an activist, whose political engagement is disliked by the state authorities. The second defines the refugee as a target, often belonging to a social or political group singled out for persecution. Also a third group exists, which considers the refugee a victim, often affected by violence, not necessarily directed at them but which makes life in the own country impossible⁸. Of these categories, it can be established that the two former are covered by the CSR51 but the last category belongs to what is called humanitarian refugees. Whether the scope is broadened to cover also humanitarian refugees⁹ as a norm of customary international law seems unclear. Not all scholars support the idea that the principle of non-refoulement covers not only convention refugees but also humanitarian refugees as part of international customary law, since the element of *opinio juris* is uncertain¹⁰. In short, international customary law consists of two parts, *usus* and *opinio juris*. The former shall indicate a regular custom and the latter shall show that the states consider themselves bound by the international law. If these two conditions are met, a norm is part of customary law and therefore binding upon states.

⁵ *Convention Relating to the Status of Refugees*, Geneva 28 July 1951, UNTS No. 2545, Vol. 189, entry into force 22 April 1954

⁶ Goodwin-Gill, Guy S., *Nonrefoulement and the New Asylum Seekers* in Martin, David A. (ed), *The New Asylum Seekers: Refugee Law in the 1980s*, 103-113, p. 105.

⁷ See chapter 3.2.4.1. for the definition

⁸ Suhrke et al, p. 30

⁹ Persons not covered by the definition in Article 1(A), since the individual persecution cannot be established. Instead, they have fled from generalized violence, natural disasters, military occupation etc, and are not regarded as 'refugees'. Often they are given a *de facto* status, since their need of protection is often not disputed.

Refugees and asylum seekers are not only protected through the relatively limited refugee law but also through general human rights instruments. The most considerable convention in Europe is naturally the ECHR¹¹ and its Article 3. The ECtHR has interpreted this provision as containing a prohibition of refoulement. Return to a state where the person concerned is subject to torture or to inhuman or degrading treatment or punishment is a breach of the Article. This was laid down for the first time in the Soering Case¹² where it was established that the plaintiff risked death penalty if convicted for murder if extradited from the U.K. to the U.S. The ECtHR found that the time aspect and the general conditions in the death row where the plaintiff would spend several years awaiting the execution of the death penalty would be a violation of Article 3.

Other instruments which to some extent touch upon the principle of non-refoulement are universal, such as the ICCPR¹³. Article 7 states a prohibition of torture or cruel or inhuman or degrading treatment or punishment. The Convention is absolute but no isolated asylum cases have been reported. Instead, the CAT¹⁴ is a stronger instrument since it contains an explicit prohibition of refoulement and the burden of proof is placed on the CAT Committee, not the applicant.

The number of NGOs which in some ways are involved in the field of refugee protection has increased and their scope stretches from purely field work in areas of turmoil to influential work whose target is both politicians and the public opinion. Amnesty International, Human Right Watch, ECRE and several national refugee councils such as the Danish and the Dutch have all been important actors in trying to inform about factors which force

¹⁰ Hailbronner, Kay, *Nonrefoulement and 'Humanitarian Refugees: Customary International Law or Wishful Legal Thinking?* in Martin, (ed), 124-143, p. 128.

¹¹ Rome, 4.XI. 1950, ETS No. 5

¹² Case of Soering v. The United Kingdom. Application No. 000140388/88

¹³ New York, 19 December 1966, entry into force 23 March 1976, (Trb. 1969 Nr. 99).

¹⁴ New York, 10 December 1984, (1465 UNTS 85).

people to flee their home countries and to put pressure on those in power to be capable dealing with this growing world-wide problem.

1.2 Migration flows after 1945

After the end of the World War II, the immigration to Western European countries has undoubtedly increased, partly the immigration connected to the economies of the receiving states and partly the number of asylum seekers. During the Cold War, the acceptance of refugees from communist countries played a major part in the psychological warfare which went on between East and West¹⁵. The immigration was also influenced by other political factors, such as the decolonization, the North-South conflict, economic factors and humanitarian considerations¹⁶, even though the admittance of European refugees was in focus at that time.

During the last 50 years, the structure of the group of persons seeking refuge has changed. Today, a globalization of migration has occurred. Those in need of protection today do not belong to the same category as the the asylum seekers did at that point. The epicentre has changed from being a topic of European concern to a world problem. This pattern can be seen in the early 1970s, when it became evident that the major reasons for migration movements were not caused by an economic urge for a better standard of living but because of gross human rights violations, civil wars or generalized violence. One could now evidently clear establish that the current world refugee crisis began to develop¹⁷. People were forced to leave their countries of origin, such as Vietnam, Cambodia, Lebanon, Afghanistan, Zaire, Uganda, Chile and flee to democratic states in the West.

¹⁵ Sztucki, Jerzy, *Who is a Refugee? The Convention Definition: Universal or Obsolete?* In Nicholson, Frances and Twomey, Patrick (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge University Press, (1999), 55-79, p. 56.

¹⁶ Salomon, Kim., *Refugees in the Cold War. Toward a New International Refugee Regime in the Early Postwar Era*, Lund University Press, (1991) p. 20.

¹⁷ Castles, Stephen & Miller, Mark J. *The Age of Migration. International Population Movements in the Modern World*, (1993) Macmillan Press Ltd, p. 87

Some statistics are necessary in this context to make the picture complete. Since the end of World War II, 160 wars and armed conflicts in the Third World have been fought. Approximately 18 million refugees have crossed an internal border to escape the consequences of warfare and far more persons are internally displaced. It gives that one out of 125 of the world population is a refugee whereas 90 per cent of these reside in a developing country¹⁸. Recent development shows that the pendulum has oscillated and once again put Europe in limelight. The conflict in the former Yugoslavia produced refugees of such extent not seen since the World War II and faced Europe with an alarming refugee crisis whose consequences reached far outside its immediate conflict area.

1.3 Purpose

The purpose of this thesis, is to give a systematic overview of the development of the immigration policy within the EU, with an emphasis on the legal framework. The focus on the DC is a deliberate choice, since this instrument is debated and its conformity with international obligations has been questioned more than once. I have chosen to concentrate on the topic whether it exists parts of the DC, which are not fully satisfactory yet, from a legal point of view? Suppose the DC standards do not meet the requirements laid down in international refugee protection, which one prevails? Finally, I have tried to draw up an outline of the prerequisites, which will form basis of a new European asylum system.

1.4 Delimitation

The time aspect and the extent of the thesis do not allow an examination of several aspects of the European asylum policy. The omission shall not be seen as an indicator that those topics are of less interest or importance. The

¹⁸ Summerfield, Derek, *Sociocultural Dimensions of War, Conflict and Displacement* in Ager, Alastair (ed), *Refugees: Perspective on the Experience of Forced Migration*, (1999),

limited role of the ECJ after the entry into force of the ToA is not discussed, neither SIS nor Eurodac or the impact they may have on the rights of individuals. Burden-sharing, which has often been emphasized in the immigration debate, naturally by those states which consider themselves to pull a heavy load regarding refugee reception, is an interesting but time-consuming topic, which I have chosen not to focus on. Further, the general human rights situation is an integral part of a contemporary refugee policy as well as the complex social aspect, for which there was neither time nor space for a proper examination. The ECHR is brought up in the thesis but there are other aspects which can be dealt with from a 'refugee perspective', for instance Article 5¹⁹ and Article 8²⁰. Another topic which recently has been subject to mass medial attention is the introduction of carrier sanctions, which results in a heavy fine for the carrier who accepts transporting people without the necessary documents, in the main airline companies. This has been described as a new weapon in the fight against influx of asylum seekers, which put the airline companies' staff in an unfortunate situation. The system makes them officials, but without due competence, to determine the faith of fleeing persons. Another trend which can be discerned in several European countries is the turning of airports into international zones and the establishment of detention centres where asylum seekers are held in detention while the procedure is pending²¹.

1.5 Method

The method used in the thesis is traditional. Doctrine and a limited number of cases compose the basis from which the work has proceeded. With these two components functioning as a base, careful conclusions have been drawn.

Cassall, 111-136, p. 112

¹⁹ Right to liberty and security.

²⁰ Right to respect for private and family life.

²¹ For further reading, see Hughes, Jane & Liebaut, Fabrice, *Detention of Asylum Seekers in Europe: Analysis and Perspective*, (1998), Martinus Nijhoff.

The material stretches from official documents issued by the EU to writs published by interest groups. I believe both are equally important as to presenting the picture as complex as it is. Yet, the main part of the material originate from scholars, leading within their subject field, and can be found in respected periodicals and anthologies. Even though the authors often favour a more generous approach than what the present system indicates, a thoroughful analysis is rather rule than exception and the 'objectivity' requirement therefore not an issue.

1.6 Disposition

The thesis has two main parts, one descriptive and one analytical. The first of these starts in the introductory chapter 1, where a focus on matters of universal application is found and which also sets up limitations for a regional cooperation. In chapter 2, the intention is to describe the legal framework which constitutes the basis for the European asylum policy, in which the DC is an integral part. The second brings up the shortages of the system and will be discussed in chapter 3,4 and 5. Chapter 6 is reserved for a discussion about the future and chapter 7 rounds up the thesis with conclusions and final remarks.

2. THE HISTORICAL AND INSTITUTIONAL BACKGROUND

2.1 Introduction

The European Union we know today, is a product of various historical and institutional changes throughout the years. From the beginning, the European cooperation was partly a peace project, partly an economic collaboration but nowadays the EU is a fully-fledged political great power which touches upon several aspects of the daily life of many European citizens.

This chapter is supposed to show the development which has taken place and still continues in the field of immigration. The last 15 years, the cooperation has proceeded without interruption and what we see today is a development which has gone from an independent standpoint of every Member State to a fully Community based issue with high priority on the legal and political agenda.

2.2 The Treaty of Rome

In 1951, France, Germany and the Benelux countries signed the European ECSC in order to establish a common market. This historical event was the beginning of a European cooperation we have not seen the end of until these days. It took place in the aftermath of the World War II when the whole international community was highly anxious to create a long-lasting peace and prevent future conflicts, mostly between the two former antagonists France and Germany. A strong idea behind the ECSC was not only to secure peace but also to strengthen Europe as a continent, independent of the world around, with special address to the U.S., whose achievements after the war cannot have been easily passed. This goal could be reached by binding the signatory states tighter together by integration of their respective economies and thereby establish an economic and political unity, which would not only prevent conflicts among themselves but also play a considerable role on the international arena.

Even though the agreement of the ECSC was a first important step towards a European integration, it was not until 1957 a real initiative was taken in order to create a more integrated European cooperation, by establishing the EEC and the Euratom, both signed in Rome. The EEC Treaty meant even closer cooperation since it also established a common market with free movement of goods, services, persons and capital in order to facilitate the necessary integration. At this time, the entry of third-country nationals was

highly considered being a topic within the exclusive domain of every Member State, due to the principle of sovereignty.

2.3 The Single European Act and the Establishing of the Internal Market

In 1985, the White Paper on the Completion of the Internal Market²² was presented, known as containing timetables for the establishment of the single or internal market, which would be done before the end of 1992. This can be said to symbolize the starting shot of the immigration harmonisation process. Two years later, the Single European Act was signed and entered into force 1987. In Article 14 TEU, the aim of the internal market is established:

” The internal market shall comprise of an area without internal frontiers in which the free movement of goods, services, persons and capital is assured in accordance with the provisions of this Treaty”

At this stage, the issue concerned was how to conform to the freedom of movement but at the same time not loose control over the people entering the borders?

2.4 Schengen as a Compensatory Measure

Since the establishment of the internal market and the abolishing of remaining barriers of free movement of persons could create some security risks²³, France, Germany and the Benelux countries signed the Schengen

²² The Commission of the European Communities, *Completing the Internal Market. White Paper from the Commission to the European Council*, (Milan 28-29 June 1985), COM (85) 310

²³ No real evidence exist as to the effectiveness of boarder controls as a weapon in combating crime and illegal immigration, den Boer, Monica, *Moving Between Bogus and Bona Fide: the Policing of Inclusion and Exclusion in Europe*, in Miles, Robert & Thränhardt, Dietrich (eds), *Migration and European Integration. The Dynamics of Inclusion and Exclusion*, (1995), Fairleigh Dickinson University Press, 92-111, pp. 97-99.

Agreement in 1985²⁴. The content of the agreement was a hot potato both legally and politically, which the lengthy negotiations are a clear evidence of²⁵. The fundamental idea was the abolition of controls at common internal frontiers between Signatory States and since that step was said creating some serious security risks, Schengen is to be seen as a compensatory measure dealing with a common policy in respect of immigration, police and criminal justice. Finally, in 1990, the Schengen Convention²⁶ was signed and became operative in 1995²⁷.

The cooperation turned out to be a popular one since the Schengen Group expanded in 1997 and hereafter included all Member States of EU, with the exception of the U.K. and Ireland²⁸. Even two non-members were admitted to the Schengen cooperation, Norway and Iceland, in order to maintain the Nordic Passport Union, a decision which has been criticized²⁹.

This means practically that the common borders of the active signatory states can be crossed at any point by citizens of EU, EEA and third-country nationals residing legally within the Schengen territory without any form of

²⁴ The Schengen Agreement of 14 June 1985. Agreement between the Governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of controls at the common frontiers, OJ L 239.

²⁵ Ucarer, M. Emek: *Europe's Search for Policy: the Harmonization of Asylum Policy and European Integration* in Ucarer, M. Emek & Puchala, J. Donald, *Immigration Into Western Societies. Problems and Policies*. ECSA, (1997), 281-307, p. 292.

²⁶ The Schengen acquis-Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the gradual abolition of checks at their common borders, OJ L 239.

²⁷ Here one has to make the distinction between entering into force (the point at which the contracting parties become bound in international law) and the bringing into force (the point at which the Member States actually begin to apply the agreement).

²⁸ The Accession Protocols and Agreements to the 1985 Agreement and the 1990 Implementation Convention with Italy, Spain and Portugal in Bonn 25 June 1991, Greece in Madrid 6 November 1992, Austria in Brussels 28 April 1995 and Denmark, Sweden and Finland in Luxembourg 19 December 1996.

²⁹ See P.J. Kuipjer: *Some Legal Problems Associated With the Communitarization of Policy on Visas, Asylum and Immigration Under the Amsterdam Treaty and Incorporation of the Schengen aquis* CMLRev 2000: 345-366 p. 350.

identity control³⁰. Hereby, the full creation of the so-called "Schengenland" was completed³¹.

Due to the cooperation's decision-making process, which has taken place behind closed doors and thereby lacks parliamentary control, the project has been subject to a lot of criticism, regarding the fact that the decisions taken within the Schengen Group could not be announced due to confidentiality, even though they affected individuals rights³². The cooperation is unique in the sense that the whole process took place outside the Community competence and legal system.

2.5 The Dublin Convention

Both the Schengen Agreement and the Dublin Convention³³ deal with the allocation of responsibility for processing asylum claims, which is the sole purpose of the latter. These agreements have similar provisions and are the results of intergovernmental negotiations in the early 1990s³⁴. The purpose of this concept is to make sure only one single state is responsible for an asylum request. The system is said to prevent both 'refugee-in-orbit situations', i.e. when an asylum seeker is passed from one country to another without anyone prepared to examine the merits of the claim, and the so-called 'asylum-shopping', when an asylum seeker lodges applications in several different countries at the same time. To determine the responsible state, one lists a range of different criteria, such as family reunification³⁵, authorisation of a residence permit or a visa in the past³⁶, illegal border

³⁰ Article 2(1), SC.

³¹ Hailbronner, Kay and Thiery, Claus: *Schengen II and Dublin: Responsibility For Asylum Applications In Europe* (1997) 34 CMLRev 957-989 p. 959.

³² Noll, Gregor: *Negotiating Asylum. The EU acquis, Extraterritorial Protection and the Common market of Deflection*, Martinus Nijhoff Publishers, (2000), p. 124-125.

³³ Convention Determining the State Responsible For Examining Applications For Asylum Lodged In One of the Member States of the European Communities, OJ C 254.

³⁴ Levy, Carl: *European Asylum and Refugee Policy After the Treaty of Amsterdam: The Birth of A New Regime?* in Bloch, Alice & Levy, Carl (eds), *Refugees, Citizenship and Social policy in Europe*, (1999), Basingstoke, Macmillan, p. 25.

³⁵ Article 4 DC

³⁶ Article 5 DC

crossing³⁷ and control of entry³⁸. The DC builds on the principle of authorisation, which means that if a Member State has authorised or given permission for an asylum seeker to enter Community territory, that particular Member State is responsible for examining the individual case³⁹. The idea underlying the concept can also be formulated as the more a Member State has consented to the entry of an asylum seeker to Community territory, the more far-reaching is the responsibility⁴⁰. Otherwise, if the asylum seeker never has been in contact with any state within the EU, the state whose territory he or she first enters is the responsible one⁴¹. Here we can draw the conclusion that the asylum seeker is not allowed to freely choose in which state he or she wishes to lodge an application, instead the hierarchical order must be taken into consideration in order to determine the responsible state⁴².

A logic consequence of the system is that once a negative decision is taken in one of the Member States, it has to be recognized throughout the whole Community, despite the fact that no harmonisation has taken place regarding the material laws among the Member States, an issue which will be discussed in the following chapter.

2.6 The Treaty on European Union: Maastricht

The decision to negotiate a new treaty establishing a European Union, was motivated by the aims of continuing the developing and democratizing of a European Integration⁴³. After several revisions, the Treaty on European

³⁷ Article 6 DC

³⁸ Article 7 DC

³⁹ Kjaerum, Morten, *The Concept of Country of First Asylum*, IJRL Vol. 4 No. 4, (1992), 514-530, p. 526.

⁴⁰ Hurwitz, Agnes, *The 1990 Dublin Convention: A Comprehensive Assessment*, IJRL Vol. 11 No. 4, (1999), 646-677, p. 648.

⁴¹ Article 8 DC

⁴² The list is exhaustive.

⁴³ Church, Clive H. & Phinnemore, David, *European Union and European Community. A Handbook and Commentary on the Post-Maastricht Treaties*, Harvester Wheatsheaf, (1994), p. 14.

Union was signed in Maastricht 1992 and entered into force in November 1993.

The structure of the three-pillar system put EEC, ECSC and Euratom in the first pillar, while the second pillar dealt with CFSP. The topics on asylum and immigration were found in the third pillar, JHA, which remained outside Community competence. They were seen as one of nine matters of common interest under Article K. 1 and included a) conditions of entry and movement by nationals of third countries on the territory of Member States; b) conditions of residence by nationals on the territory of Member States, including family reunion and access to employment; c) combating unauthorised immigration, residence and work by nationals of third countries on the territory of Member States. This cooperation took place on an intergovernmental basis and was consequently held outside the scope of the Community decision-making process. Yet, to some extent, the cooperation involved Community institutions, in particular the Council. A new provision, Article 100(c), which covered the movement of third-country nationals, gave the Community competence to act within certain areas of immigration and asylum policies, for instance the right to adopt a list of a third-country nationals who must be in possession of a visa when crossing the external borders of Member States, measures concerning uniform format for visas, the right to introduce visa requirements for nationals of a country faced with threat of sudden inflow⁴⁴. Under the third pillar, the Council could also adopt joint positions, recommendations, resolutions and decisions, while the Member States could bring about joint actions. As shown, a majority of the adopted instruments were non-binding⁴⁵, which left a wide margin of discretion to the Member States in terms of

⁴⁴ Peers, Steve, *EU Justice and Home Affairs*, Pearson Education Limited, (2000), p.69

⁴⁵ With the exception of Council Regulation No 1683/95 of May 1995 Laying Down A Uniform Format For Visas and Council Regulation No 2317/95 of 25 September 1995 Determining the Third Countries Whose Nationals Must Be In Possession of Visas When Crossing the External Borders of Member States; replaced with Council Regulation No 539/2001 of March 2001 Listing the Third Countries Whose Nationals Must Be In Possession of Visas When Crossing the External Borders and Those Whose Nationals Are Exempt From That Requirement

implementation and interpretation. Besides, the intergovernmental process required unanimity among the Member States for a proposition to pass through and has been described as "a procedural and political halfway house between intergovernmentalism and supranationalism"⁴⁶.

2.7 The Treaty of Amsterdam

2.7.1 The New Title

One of the aims by creating the ToA was to establish a union for the citizens of the Community, which involved fundamental rights, internal security, employment, environment, subsidiary and transparency⁴⁷. The new Treaty created an area of freedom, security and justice. It transferred immigration based issues from the intergovernmental third pillar to the Communitarian first pillar, which must be described as nothing less than a revolutionary change. All decisions taken by the Community are not only binding for the Member States but will also have a direct effect if they meet the necessary requirements⁴⁸. The topics related to asylum have been put in a new Title IV, called 'Free Movement of Persons, Asylum and Immigration' into the TEC. In this Title, Article 61 is considered as the main provision where the

⁴⁶ Ucarer, p. 296.

⁴⁷ Kortenbergh, Helmut, *La Négotiation au Traité: Une Vue Cavalière. Le Traité d'Amsterdam*, (1998) p. 12.

It has been argued that the goal of establishing an even closer Union by the ToA is taken place at the expense of third-country nationals and especially refugees. The TEU granted European Union Citizenship to all citizens of the Member States and therefore a third-country national who wishes to become a Union citizen has to go through a Member State. It is well known that the naturalization process varies among different countries in terms of the waiting time before a process starts and the ability to retain dual citizenship. This means that full access to the freedoms of the EU varies due to the speed of the naturalization process and the material laws. Some authors even argue that the system has created a 'denizenship' for many third-country nationals. For further reading see Levy, Carl, *Asylum Seekers, Refugees and the Future of Citizenship in the European Union* in Bloch & Levy (eds), Brochmann, Grete, *European Integration and Immigration From Third Countries*, Scandinavian University Press (1996) pp. 16-18, Peers, Steve, *Building Fortress Europe: The Development of EU Migration Law*, CMLRev 35: 1235-1272 (1998) and Martiniello, Marco, *European Citizenship, European Identity and Migrants: Towards the Post-National State?* in Miles & Tränhardt, (eds), pp. 37-52.

⁴⁸ The ECJ has declared that directives have direct effect if they are clear, precise and unconditional. van Gend en Loos, C-26/62.

goal of creating an area of 'freedom, security and justice' is spelt out. It also has a time-condition in form of a transitional period of five years after the entry into force during which measures in the field of asylum and immigration shall be taken. The term 'measures' includes not only directives but also regulations. Yet, it must be noted that not all fields relating to asylum and immigration are exposed to Community competence. By reading Article 63, one can draw the conclusion that neither measures on expulsion⁴⁹ nor measures preventing migration flows are mentioned⁵⁰. Moreover, the Member States did not intend to give up all national control. Article 63 provides that measures pursuant to point 3 and 4 shall not prevent the Member States from maintaining or introducing national provisions, which are compatible with the TEU and international agreements. The new Title IV shall therefore not be seen as exclusively belonging to the Community but to the Community and the Member States together, as a result of the principle of subsidiarity⁵¹.

The areas where measures are to be taken within the five-year period are to be found in Article 63 and 64. In short, Article 63 relates to the physical movement, like crossing of both internal and external borders, visas required for third-country nationals who wish to travel in the Union no longer than three months. Article 64 can be said to cover the areas linked to asylum and immigration policy, like pointing out one Member State responsible for an asylum application, minimum standards on the reception of asylum seekers, minimum standards for recognition as refugee, minimum standards on procedure in the asylum process, temporary protection for protection seekers and measures on illegal immigration, illegal residence and repatriation.

The ToA is also unique in the sense that the right to initiative will be shared between the Commission and the Member States during the transitional

⁴⁹ A logic conclusion should be that measures relating to deportation are included since the meaning of 'repatriation' in Article 63(3)(b) cannot be understood as a voluntary departure.

⁵⁰ Hailbronner, p. 1048.

⁵¹ Hailbronner, p. 1051.

period⁵² and afterwards exclusively belong to the Commission. It implies that the Council five years after the ToA entered into force shall act unanimously on proposal from the Commission and after consulting the EP.

2.7.2 The incorporation of the Schengen *aquis*

Since the Member States themselves negotiated and adopted the Schengen *aquis*, it was a natural step to express a request for incorporation of the Treaty into the new Title, even though the Treaty as such still exists under international law⁵³.

Three Member States; Denmark, the U.K. and Ireland did not approve of transferring immigration and asylum issues to the first pillar and thereby expose them to full Community power. The national law of the U.K. requires an asylum seeker to apply for asylum at the frontier and which was the reasons for the country to maintain its control over its borders⁵⁴. Ireland was more or less forced to sign the opt-out protocol because of the Common Travel Area with the UK⁵⁵. The Protocol enables the U.K. and Ireland to continue their checks on persons entering the territory from another Member State, while other Member States may check persons coming from the U.K. or Ireland. Together with Denmark, these states are not bound by the new Title, according to the so-called opt out clauses⁵⁶. However, whenever the

⁵² Article 67(2).

⁵³ It was not clear under which pillar Schengen was to be incorporated: In the end all parts which needed a legal basis were put in the first pillar while the provisions concerning SIS were put under the third pillar, a decision which has been highly criticised since SIS covers data on persons not admitted into the Union and persons wanted for different reasons. The consequence is that an individual who claims to be injured cannot turn to the ECJ. For further reading see Boeles, Pieter, *Data Exchange, Privacy and Legal Protection: Especially Regarding Aliens* in Schermes et al (eds), *Free Movements of Persons in Europe: Legal Problems and Experiences*, Martinus Nijhoff (1991) and Kuijper, P.J., *Some Legal Problems Associated With the Communitarization Of Policy On Visas, Asylum and Immigration Under the Amsterdam Treaty and Incorporation of the Schengen Aquis*, CMLRev 37: 367-400, 2000

⁵⁴ Dinan, Desmond, *Ever Closer Union. An Introduction to European Integration*, Macmillan Press Ltd, (1999) p. 181.

⁵⁵ Hailbronner p. 1058, Levy p. 43.

⁵⁶ Protocol on the Position of the United Kingdom and Ireland, Article 1. Protocol on the Position of Denmark, Article 1.

U.K. or Ireland wish to, they have a possibility to opt-in⁵⁷ and take part of the cooperation. Yet, there is no such provision in the Danish protocol enabling Denmark to adopt measures under the new Title and such measures will neither be binding upon, nor applicable in Denmark. Still, it has to be taken into account that Denmark is a signatory state to the SIA and therefore bound by the existing Schengen aquis as an obligation under international law⁵⁸. It is also worth mentioning that Denmark is still a member of the Community where the free movement of persons is a corner-stone and therefore covered by Article 14 EEC, without having any form of opt-out clause. Denmark is still fully governed by the key provision underlying Title IV⁵⁹.

3. THE DUBLIN CONVENTION: LACK OF SUBSTANTIVE HARMONISATION

3.1 Introduction

The purpose of the Dublin Convention was clearly to prevent two things; the phenomena of 'refugee-in-orbit' and the so-called 'asylum-shopping'. Consequently, it should always exist a country prepared to examine an asylum application and an asylum seeker can only apply for asylum in one country within the Community. In some respect, these objectives can be seen as wishful thinking and underestimation of the situation of the asylum seekers. 'Refugee-in-orbit' situations are prevented, but only within the Community and not between the Community and the rest of the world, approximately 170 states⁶⁰. This is a consequence of the fact that the Dublin regime is not a closed system but allows sending away asylum seekers to countries which are situated outside the Community.

⁵⁷ Protocol on the Position of the United Kingdom and Ireland, Article 4.

⁵⁸ Kuijper, p. 351.

⁵⁹ Peers, p. 61.

Before the Dublin era, it was possible for a protection seeker to lodge applications in different Member States at the same time in order to safeguard the possibility of acceptance in case of rejection in one state. If a decision was rejected, the applicant still had the chance of being admitted to another state. Since the Dublin put an end to this system, the applicant has only one chance within the whole Community, despite the fact that the different Member States' domestic laws vary widely. If an asylum seeker's application is rejected in country A, he or she could have had a realistic chance of being admitted in country B, due to its more generous rules. It has been stated that the present system would by all means lead to transfers under the DC which would be contrary to some Member States' idea of observance of international obligations⁶¹

3.2 Transfer under the Dublin Convention

3.2.1 Introduction

The purpose of the Dublin system is to provide the mechanism which points out only one single Member State responsible for examining an asylum application, whose decision is valid throughout the Community. This fact does not prevent asylum seekers from travelling to another Member State, despite rejection of their claims in the country where they first entered the territory of the EU. The consequence is deportation to the first Member State and if a safe third country is found, the asylum-seeker will be sent back to a state outside the Union. Recently, this automatic return has been challenged. By questioning the return, the whole system is in danger, since the apprehensions touch upon the core of the regime and at the same time clearly points out the most apparent shortage: the lack of substantive harmonisation. The background to the resistance against automatic return

⁶⁰ Kjaergaard, Eva, *The Concept of 'Safe Third Country' in Contemporary European Refugee Law*, IJRL Vol. 6 No 4 (1994) 649-655 p. 652.

⁶¹ Blake, Nicholas, *The Dublin Convention and Rights of Asylum Seekers in the European Union* in Guild, Elspeth & Harlow, Carol, *Implementing Amsterdam. Immigration and Asylum Rights in EC Law*, Hart publications, (2000), 95-120, p. 111.

can be found in how the Member States apply and interpret international instruments respectively. What is an obvious interpretation for one country seems to be less clear cut to another and the asylum seeker finds himself in the loophole. The evident question in a current situation is whether a Member State is under obligation to deport an asylum seeker under the DC or has the right, or even the obligation, to refrain from deportation due to the divergences in legislation between the sending and receiving state.

3.2.2 Article 3(4) DC

The provision which function as a legal foundation for refraining from removals under the DC can be found in Article 3(4) DC, which states:

”Each Member State shall have the right to examine an application for asylum submitted to it by an alien, even if such examination is not its responsibility under the criteria defined in this Convention, provided that the applicant for asylum agrees thereto.”

This provision clearly allows a Member State to examine an application which would have been done by another Member State under the DC. The question remains under which circumstances this provision can and *shall* be used and whether it was intended to be used when two Member States’ legislations show a divergency, which puts the asylum seeker in a very unfortunate situation. The Dublin regime is based, as mentioned above, on a mutual recognition of all Member States’ domestic legislation. If the answer above is given in affirmative, it clearly would challenge the whole concept in its core foundation. Moreover, the provision seems to be used in cases of family reunification and on a strict humanitarian basis rather than as an instrument to revise a divergent asylum policy among the Member States⁶².

⁶² Hurwitz, pp. 659-667.

3.2.3 Relevant case law

3.2.3.1 Introduction

Two British cases have highlighted the legal confusion regarding transfer under the DC from a country with more generous interpretation to a country with stricter approach. In one of the cases, the Dublin system was challenged on the basis of the ECHR's Article 3. Moreover, these cases clearly illustrate in practice, which considerable consequences the divergent asylum policy among the EU's Member States may have. The outcome of the first case showed with clearness that the CSR51 prevails the DC. Its groundbreaking nature cannot be underestimated, since a Member State established that the interpretation of another Member State was not in accordance with international standards and thus did not approve of the notion of mutual trust Member States are suppose to show each other in similar situations.

3.2.3.2 Adan and Aitsegur⁶³

Adan is a Somali woman who entered Germany on 8 August 1997 to apply for asylum, as she belongs to a minority clan and claimed that she was persecuted by majority clans which previously had killed members of her clan. The present government was overthrown in 1991 and after that assumption of power, the official authorities collapsed and no effective government existed at that point of time . A mere civil war went on and the situation in the country was close to regular anarchy. Adan's application was turned down on 25 August 1997 and she was asked to leave Germany. In October she arrived in the U.K. and sought asylum. In accordance with the existing provisions in the DC, Germany was asked by the British Secretary of State to accept responsibility for her asylum claim. The German

⁶³ U.K. House of Lords, *Regina v. Secretary of State For The Home Dearthement, Ex Parte Adan. Regina v. Secretary of State For The Home Departement, Ex Parte Aitseguer.*

authorities accepted and Adan would be transferred back to Germany under the provision of safe third country and then most likely returned to Somalia.

Aitseguer is an Algerian who arrived in France in January 1998, without applying for asylum. Instead, he travelled on to the U.K., where he lodged an application for status determination. He claimed being persecuted by the Group Islamique Armé and that the government could not provide sufficient protection. In February 1998, the Secretary of State's request was answered in affirmative by French authorities and the U.K. could now send him back to France.

The special circumstance which makes these cases so interesting, is the different interpretation of the CSR51 made by France and Germany on one hand and the U.K. on the other. The former are of the opinion that persecution which cannot be attributed to the state falls outside the scope of the CSR51. In both cases, the claimants stated that they will be persecuted for Convention reasons if returned to their respective country of origin by so-called 'non-state agents', while the U.K. is of the opinion that also persecution which cannot be attributed to the state belongs to the categories which can render Convention status. The evident question was naturally whether the Secretary of State may regard France and Germany as safe countries to which the asylum seeker may be returned. Germany held the position that since no state existed, no state can be responsible for persecution and therefore Adan was not subject for formal persecution. France claimed that no state toleration or encouragement took place by Algerian authorities and Aitseguer was accordingly not persecuted by the state. The standpoint of the U.K. advocates the 'protection' theory, a view which is shared by the UNHCR and a majority of the Signatory States to the CSR51. This theory accepts persecution by non-state agents as basis for

Convention status if the state in question is unwilling or unable to protect the claimant or if an effective government does not exist⁶⁴.

3.2.3.3 T.I. vs. The UK⁶⁵

The legal basis for the case of T.I is to be found in the ECHR but the material circumstances have many similarities with the cases of Adan and Aitseguer. The applicant is born in Sri Lanka and lived in Jaffna, which is a region controlled by LTTE, a tamil terrorist organisation. He claimed being held in detention by the guerilla, where he digged bunkers, cooked food and occasionally was beaten. Later, he was also held in detention by the army which asked him about his presumed collaboration with the LTTE and where he was subject to violence from the officers. Short after the release from detention, the applicant fled to Germany where he sought asylum in February 1996. The application was rejected in April on the ground that the exercised activities were not attributable to the Sri Lankan State. The Administrative Court did not only reject his claim on the grounds that the activities of the LTTE were not attributable to the State but also on the ground that it found his application not trustworthy. Instead, the applicant moved on to the U.K., where Germany was requested to take responsibility for his asylum request under the DC, which was accepted. The second application for appeal was accepted but the Court of Appeal approved the position of the Secretary of State, which said that Germany was considered a safe country. The Court also stressed the fact that Sri Lankan asylum seekers enjoy higher recognition rates in Germany than in the U.K. At that moment, the applicant saw no other way than turning to the ECtHR. He challenged the expulsion to Germany under Article 3.

⁶⁴ Court of Appeal, Civil Division, R. V. Secretary of State for the Home Department, ex parte Adan; R. V. Secretary of State for the Home Department, ex parte Aitseguer, in IJRL Vol. 11 No. 4 (1999), 702-729, p. 714.

⁶⁵ ECtHR, Decision as to the Admissibility of Application no. 43844/98 by T.I. against the United Kingdom.

The Court emphasized that the U.K. cannot rely automatically on the provisions regarding transfer under the Dublin Convention as such. When multilateral arrangements are made in certain fields, fundamental rights must be protected. It would not be in accordance with the object and purpose of the Convention if Contracting States would refrain from their obligations, which come with the engagement and signing of the instrument. Moreover, the Court established that the applicant would risk persecution if returned to Sri Lanka, both from the government and from the LTTE. Surprisingly, the Court also reached the conclusion that no real risk existed as to Germany would expel the applicant in contradiction with Article 3 to Sri Lanka. As a consequence hereof, the U.K. had acted in accordance with the ECHR when taking the decision to transfer the applicant to Germany. What is evident is in this case, is the trust which the ECtHR put in the German government's assurances that the applicant would not be faced with immediately or summary transfer to Sri Lanka. The Court never considered the German domestic law, which basically was the reason for the application. The authorities do not accept non-state agents as sources of persecution and therefore the applicant's chances of being admitted into an asylum procedure in Germany, must be considered relatively small. Certainly, it exists a safety net in section 53(6) of the German Aliens Act, which can be applied to persons persecuted by non-state agents. However, the ECtHR observed that section 53(6) has not been applied in a case where an asylum application has been rejected in a second asylum procedure. Despite this uncertainty concerning the application of this provision, the Court decided to put its trust to the assurances given by the German government. Other aspects of this ruling which have raised concern are the negligence by the Court when not bringing up the question of status and the fact that the ECtHR actually allowed a 'margin of interpretation' since the German authorities interpret Article 3 in a manner inconsistent with the Court's own case-law⁶⁶.

⁶⁶ Noll, Gregor, *Formalism vs. Empiricism. Some reflections on the Dublin Convention on the Occasion of Recent European Case Law*, Nordic Journal of International Law, Vol. 70

3.2.4 Persecution by third parties

It is a well-known fact that other sources than state-related may be responsible for persecution and gross human rights violations. Recent violent outburst in conflict areas supports this view and the former Yugoslavia and Algeria are just limited examples of this phenomena. Also the collapse of a functioning state, such as in Somalia, raises the same questions. As has been noticed; it is who you fear, not what they may expose you to, which seems to be the crux of the matter⁶⁷. Inevitably, the different interpretation among Member States whether this phenomena shall be regarded as within the protective scope of the CSR51, a topic which at first glance may seem academic, is of most importance.

3.2.4.1 The Vienna Convention⁶⁸

Of most interest and importance at this stage is naturally the refugee definition which is to be found in Article 1A of the CSR51:

“For the purpose of the present Convention, the term “refugee” shall apply to any person who... (2) [As a result of events occurring before January 1951 and] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country”

A clear shortage of the current international refugee regime is the lack of an international body which can interpret and give rulings on the CSR51.

No. 1, pp. 15-16.

⁶⁷ Colville, Rupert, *Persecution Complex. Asylum in Europe*, Refugees Magazine Issue 101, available at www.unhcr.ch.

The only existing possibility today is the use of the Vienna Convention in the presence of the ICJ, an instrument which has never been used in this context and which will probably not be used in the foreseeable future either.

Article 31(1) of the Vienna Convention states:

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

To interpret Article 1A in accordance with this model requires a thoughtful examination. By this provision, it is possible to identify different methods of interpretation. The first concentrates on the actual text and requires a linguistic analysis, the second emphasises on the intention of the parties and the third looks into the object and purpose of the treaty and adopts a wider perspective than the two previous⁶⁹. Accordingly, one finds the literal interpretation which states that the ordinary meaning of 'persecution' should reasonably consist of persecution without limitation to such things as the nature of the persecutor. The necessity of state-attributed persecution cannot be found in the ordinary meaning of the term 'persecution' and consequently does not give rise to an idea of a division of persecution in one state-attributed part and one non-state attributed part. As pointed out in the House of Lords, if the intention of the CSR51 was to only accept persecution exercised by the state, it would have said so⁷⁰. Naturally, the term covers all situations of persecution for convention reasons, a fact which hardly can be challenged, not even by the most devoted supporter of the accountability theory. An ordinary meaning of the term 'persecution' cannot possibly give a different outcome. Secondly, one has to look upon the intention given to the treaty by the Signatory States. As mentioned above, if the intention was to circumvent the refugee definition as to cover only those persecuted by state agents, the text itself would have said so. Another factor which must be

⁶⁸ The Vienna Convention on the Law of Treaties, 24 May 1969, 1155 UNTS 331.

⁶⁹ Shaw, Malcom N., *International Law*, (1997), Oxford University Press, pp. 655-656.

seen as in favour of the protection theory is the apprehension by the majority of the state parties. Only a minority of those bound by the Convention share the opinion of France and Germany. Thirdly, one has to determine object and purpose of the treaty. In this case, it should be clearly established that the CSR51 is used as an instrument providing international protection for people who fear persecution due to different reasons such as race, religion and political opinion and whose country of origin is unable or unwilling to protect them. Considering these circumstances, it cannot be said to be the purpose to limit the classes of people which might qualify as convention refugees. An interpretation which limits the persecution to acts derived from the state cannot be in accordance with the object and purpose of the convention, since the international system would become less effective. This interpretation is controversial and far from evident. For example, Hailbronner does not support this view. Instead, he means that no interpretation whatsoever gives any clear answers to the dilemma and according to his opinion, the purpose and objective of the convention would not form any foundation for a favourable view that persecution by non-state agents falls within the scope⁷¹.

3.2.4.2 The European approach

In March 1996, the Council adopted a Joint position on the harmonised application of the definition of the term 'refugee'⁷² in Article 1A of the CSR51. In its preamble, the Council establishes that the Handbook of UNHCR⁷³ is a valuable instrument to Member States in determining refugee status. The Joint Position is not a legally binding instrument but must be

⁷⁰ Lord Slynn of Hadley.

⁷¹ Hailbronner, Kay, *Immigration and Asylum Law and Policy of the European Union*, (2000), Kluwer Law International, p. 375.

⁷² Joint Position 96/196/JHA of 4 March 1996 defined by the Council on the basis of Art. K. 3 TEU on the harmonised application of the definition of the term "refugee" in Art. 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees.

seen as an effort to harmonise even the material law among the Member States. Paragraph 5.1. states that persecution in general is an act attributed to the State organ irrespective of its status under international law, or parties or organization controlling the State. Further, in paragraph 5.2 says that persecution by third parties falls within the scope of the CSR51, if the persecution is individual in nature and encouraged or permitted by the authorities. As pointed out by Goodwin-Gill, this formulation supports the restrictive standpoint of France and Germany but says nothing regarding the other Member States' attitude⁷⁴. Consequently, the Joint Position does not include persecution by third parties when the authorities are unable or unwilling to offer protection, just as in the case of Adan and Aitseguer. Consequently, the Member States may claim to apply the CSR51 in a manner consistent with the Joint position

3.2.4.3 The UNHCR's approach

As mentioned above, the UNHCR's Handbook is a valuable instrument when determining refugee status and naturally, the question related to persecution by a third party is brought up. Paragraph 65 states:

"Persecution is normally related to action by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the

⁷³ Handbook on Procedure and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, (1979), Geneva.

⁷⁴ Goodwin-Gill, Guy S., *The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam* in Guild & Harlow (eds), 141-163, p. 153.

authorities, or if the authorities refuse, or prove unable, to offer effective protection.”

This provision clearly shows that UNHCR and EU emphasize differently. Persecution in all its forms and wherever it might be derived from is naturally the most important element for the UNHCR, whilst the EU focuses on the nature of the persecutor and values unanimity instead of facing the consequences of an open disagreement.

3.2.5 Geneva or Dublin: which regime prevails?

Here we are faced with two systems, which both deal with refugee protection, even though their respective way of handling the issue divide. The purpose of the CSR51 can be clearly established, namely to secure protection for refugees persecuted for different reasons and to find permanent solutions for those people in need. The DC represents a different concept. Even though the protection need may be emphasized in various forms, the lack of strong and binding instruments securing basic standards concerning reception, procedure and a common refugee definition speaks its own language. At the present situation, no Member State is willing to stand in the front line and take initiative to a harmonised asylum approach in the terms of binding instruments, even though this scenario will be accomplished by 2004. Unsurprisingly, these two systems are on collision course with each other. The question still remains, which one prevails? The answer should go without saying. Noteworthy in this respect is of course the fact that the DC is governed by the prohibition of refoulement in the CSR51, which consequently has precedence over the former when a topic is being dealt with differently in both instruments. The rulings given by the national courts in the U.K. are logic conclusions. If a transfer under the Dublin regime occur in contravention of international law, the latter will take precedence over the former. This conclusion gives that the Member States are *obliged* to use Article 3(4) in cases of illegal removals to ensure the

rights of the individual. Under these circumstances, a margin of discretion does not exist. The case of persecution by non-state agents, which in France and Germany does not qualify as persecution for convention reasons, shows that this is a topic of great importance, especially since the countries concerned are big and influential on the international arena and above all, host countries for refugees.

3.3 Divergences in recognition rates⁷⁵

The DC was a first step towards a European harmonisation in the field of asylum, a system which can be described as a formalisation of the Member States' respective asylum laws. During the negotiation period, the question of harmonising also the asylum criteria was brought up, but in the end it was found unnecessary⁷⁶. Today, we clearly see this as the far most important shortage of the DC, a shortage which has to be overcome if the regime wants to survive. The system of today has shown to be far from fair and the obtaining of refugee status depends to a large extent on whether the country responsible for an application has generous rules or not. It has also been shown that the lack of convergence among the Member States has given rise to divergences in recognition rates for asylum seekers from the same country or region. Since a decision is valid throughout the Community, it means if an asylum seeker's application is rejected in one state, he or she is prevented from applying in another, even if this state may have more generous rules and there is a considerable chance of admittance. It seems like the acceptance of a claim is based on a haphazardly circumstance. At this stage,

⁷⁵ Based on UNHCR Statistics 1997. Table 13, Asylum applications, status determination and refugee admissions in selected countries, Table 14, Asylum application and status determination decisions in selected asylum countries by region of origin of the asylum applicant 1996. Available at www.unhcr.ch/refworld/refbib/refstat/1997. If other sources are used, a reference hereto will be used. UNHCR also presents a country based statistics, which is preferable instead of region based, but unfortunately it only states the number of admitted asylum seekers to different states and not the number of applicants, whereby no percentage could be calculated and I chose not to use it.

⁷⁶ Vevstad, Vigdis, *Refugee protection. A European Challenge*, Tano Aschehoug, (1998), p. 256.

it may be interesting to take a look upon the consequences of the Member States' different domestic rules and different interpretation of international documents.

Divergences in recognition rates for asylum seekers from the same country or region among the Member States is a well-known problem which has been criticized for a long period of time⁷⁷ and which also well illustrates the necessity of convergence at all levels. As long as these inconsistencies remain, there will always exist a suspicion that different Member States may have different grades of sympathy towards different regions or that factors such as political relations or political domestic priorities and attitudes to migration may affect the admittance. Statistics must be used with caution but can fill a purpose of illumination of the current system and its consequences.

Austria is a country whose number of Convention recognitions has steadily decreased. Since the beginning of the 90s, the admission is under 10 %. As to the origin of the asylum seekers, a big majority is from Asia, and the numbers are in line with the average admission of just below 10 %. The same goes for the other distinctive groups, Africans and Europeans, with asylum seekers from the former USSR as the big exception, with 20 % of the applicants admitted.

A look into German statistics show a little different result. Germany is by tradition and its geographical position a host country to refugees and consequently a large number of asylum applications are lodged. Surprisingly, the recognition rate is far from high. The beginning of the 90s showed that less than 10 % were granted full status but the numbers increased and by the mid 90s, approximately 16 % qualified, even though

⁷⁷ Guild, in Nicholson & Twomey (eds), p. 321, Wallace, Rebecca, *Refugees and Asylum: A Community Perspective*, (1996), Butterworths, p. 9.

the numbers have declined again⁷⁸. Only 5 % of the Africans were admitted, while 26% of the Asians qualified. Asylum seekers from Europe are not in a more favoured position, only 4 % obtained refugee status, while the former USSR only had 2 % of its applications accepted. Noteworthy in this context is the fact that Germany seems to use humanitarian status to a very limited degree⁷⁹.

This can be compared with the Netherlands, which has proportionately high recognition rates under the CSR51 and also accepts asylum seekers on a humanitarian basis to a large extent. As many as 60 % received some sort of protection under the mid-90s⁸⁰.

Also Sweden is a country which uses humanitarian protection to a large extent. In the 90s, less than 5 % of the asylum applicants received protection under the CRS51 but the recognition rates were still high because of the use of humanitarian status. Certain years, 78 % of all applicants qualified for some sort of protection. The pattern above is well illustrated by the fact that no one from Africa qualified for Convention protection, but 38 % received humanitarian protection. Only 3% of the Asians acquired full status protection but as many as 70 % were accepted for humanitarian reasons. None of the applicants from the former USSR received convention status but 17 % obtained humanitarian status.

Spain has generally low recognition rates under the CSR51 but in contrast to Sweden, they use the humanitarian status less frequent. The result is that a relatively small number is provided with protection, certain years less than 5 % under the CSR51 and the total rate less than 10 %. Of those admitted, 5 % were from Africa, who also were accepted on a humanitarian basis of 5

⁷⁸ 3,7 % and 4,5% respectively for 1998-99. The numbers show the *total* recognition rates, i.e., humanitarian refugees as well. ECRE Country Report, *Recognition rates as percentage of total decisions*, (1999), available at www.ecre.org

⁷⁹ Ibid, Africa 2%, Europe 0,3%, Asia 0,1% and USSR 0,5%.

⁸⁰ Ibid, unfortunately this positive development has changed. In 1998 and 1999 only 5% and 2,5% respectively were recognized.

%, while 2 and 4 % respectively goes for the Asians. Surprisingly, only 0,1 % Europeans were provided with Convention status and no one received humanitarian protection, while applicants from the former USSR got 10 % of their applicants admitted, and 5 % reached humanitarian status.

The U.K. is a country which, like Sweden, uses humanitarian protection to a large extent, and its recognition rates under the CSR51 are uneven. Still, until 1990, the recognition rates in general were high, to be followed by a decline in the mid-90s. As to the numbers, only 1 % of the asylum-seekers from Africa were granted CSR51 status while 36 % received humanitarian status. Of the Asians, 8 % acquired CSR51 protection and 7 % humanitarian status. Europeans were admitted to a larger extent, 33 % received full protection status while 9 % were granted humanitarian status. Finally, the applicants from the former USSR were not so successful, only 1,4 % admittance under both protection systems.

As mentioned above, these figures must be used with caution, but a careful conclusion can be made. First of all, it can be established that the use of humanitarian protection is more or less limited to three countries, the Netherlands⁸¹, Sweden and the U.K. and the number of asylum seekers admitted on the basis of humanitarian reasons is high. This approach is not uncontroversial. The frequent usage of humanitarian grounds for protection may be applied instead of protection under the CSR51, also in cases where the claimant would well qualify for the stronger form of protection. Sweden did not admit any African asylum seekers on Convention grounds, while the U.K. admitted 1 %. Instead, 38 % and 36 % respectively were accepted on humanitarian basis. The other countries did not use humanitarian status to a larger extent. Instead, the Africans were granted Convention protection in 5 % of the cases for Spain and Germany, while Austria had a little more generous approach and granted 10 % refugee status. Another striking

⁸¹ Unfortunately, the information regarding the Netherlands was not complete and the region based figures could not be used.

difference regards the applicants from the former USSR. Austria granted 20% refugee status while Germany only accepted 2 %. None of the applicants in Sweden were admitted for convention reasons but 17 % granted humanitarian protection. Spain admitted 10 % and 5 % reached humanitarian status. Lastly, the U.K., which granted protection under both systems in 1,4 % of the cases. The same phenomena goes for the applicants from Asia. Germany accepted 26 % of them on convention basis, and the numbers for Sweden and Spain are only 3 % and 2 % respectively, while Sweden at the same time granted humanitarian status for 17 %. These figures show the need for a fully-fledge convergence. It cannot be acceptable that the divergences are allowed to fluctuate to this extent. To a certain degree the diversity can be explained by mere coincidence but it still remains a considerable inconsistency, which cannot be explained in such an easy way. There must be other explanations and one can simply be that what we see today is a result of an unharmonized definition criteria.

3.4 Temporary protection: the Balkan crisis

The collapse of Yugoslavia in the early 1990s, faced Europe with a crisis not seen since the World War II. The political chaos which followed produced a situation of wars, gross human rights violations and a large stream of refugees. The collapse of the Yugoslav Federation and the calls for independence by Croatia, Slovenia and Bosnia-Herzegovina gave rise to consequences which we have not seen the end of . The wars in Croatia 1991-92, Bosnia-Herzegovina 1992-3, the oppression of ethnic minorities in Serbia and Kosovo produced the largest migration movement since the end of the World War II. Between 1991-92, 5 million were refugees or internally

displaced. Of them, 700 000 fled to Western Europe⁸². A new dimension was reached in 1998, when Kosovo appeared in the limelight because of tensions between the Yugoslav and the Serbian security forces, which led to harassments of the civilian population and escalated in human rights violations⁸³.

The big majority of refugees do not have access to any protection under international law. They belong to the group of humanitarian refugees who seek refuge from civil war, military occupation, natural disasters or gross human rights violations⁸⁴. The CSR51 is based on individual persecution and particular groups persecuted without an individual basis do not fall within the scope of the Convention, even though this idea has been challenged⁸⁵. The tendency of not granting status under the CSR51 but temporary protection, can be described by two major factors, the Yugoslav crisis and the following visa requirements and a general tightening up within the EU⁸⁶. The visa policy turned out to be problematic since different Member States introduced it at different points of time. They adopted a 'Resolution on the certain guidelines as regards the admission of particularly vulnerable groups of persons from the former Yugoslavia'⁸⁷ but it said nothing about burden sharing and maintained a strict visa policy. The result of this inability to act commonly was large divergences in temporary protection among the Member States. Not even access to an asylum

⁸² Fassman, Heinz & Münz, Rainer, *European East-West Migration, 1945-1992* in Cohen, Robin, (ed), *The Cambridge Survey of World Migration*, (1995), Cambridge University Press, 470-480, p. 472.

⁸³ For an analysis of the political, historical and cultural background in Kosovo, see UNHCR, *Background Paper on Refugees and Asylum Seekers From Kosovo*, Centre for Documentation and Research, (1996), available at www.unhcr.ch.

⁸⁴ Hailbronner, in Martin, (ed), p. 123.

⁸⁵ See Vedsted-Hansen, Jens, *Legal or Political Constraints Over Inclusion* in Muus, Philip, *Exclusion and Inclusion of Refugees in Contemporary Europe*, 30-39, (1997) ERCOMER. The author claims that the Convention is interpreted in a manner far more restricted than intended. The individualisation requirement cannot be understood as the protection seeker has to be 'singled out' for persecution. The wording itself in the Convention refers to collective characteristics since of race, religion, nationality, membership of a particular social group and political opinion, only the latter can be described as persecution of a particular individual.

⁸⁶ Levy, p. 16.

⁸⁷ Copenhagen, 1 June 1993.

procedure was uniform⁸⁸. Another aspect of the temporary protection concerns the legal status which followed. Unfortunately, this varied from country to country and some states adopted a very flexible approach towards this influx, which again illustrated the divergent treatment among the European states towards the protection seekers⁸⁹. Sweden and Denmark gave humanitarian refugees similar rights as Convention refugees, while Belgium, France, Germany and the U.K. did not provide them with any legal status at all⁹⁰. Also the UNHCR has stressed the importance of similar arrangements and has observed divergences in access to education, employment, social benefits, family reunion and asylum procedure⁹¹. Reception policies for those whose asylum request are being processed, show less uniformity in those terms and are also considered being below the standard given to Convention refugees⁹². Still, the UNHCR saw many advantages with this new kind of protection, foremost the immediate security which is given without lengthy procedures. Also the fact that protection is given to people at risk, even if they are not considered falling within the scope of the CSR51, makes it useful as a complement to full status determination⁹³. Yet, the question still remains when it is necessary to examine temporary protection on an individual basis. At some point, a greater certainty about the future is unavoidable and when conditions supposed to be applied for a couple of months are prolonged for years, the system has failed. A maximum temporary protection of five years before a

⁸⁸ Joly, Danièle, *Cracks in the Wall: European Harmonization on Asylum in the Nineties* in Joly (ed), *Haven or Hell? Asylum Policies and Refugees In Europe*, (1996), Basingstoke Macmillan, 44-85, p. 76.

⁸⁹ Cels, Johan, *Responses of European States to de facto Refugees* in Loescher, Gil & Monahar, Laila, (eds), *Refugees and International Relations*, (1989), Oxford University Press, 187-215, p. 192.

⁹⁰ Joly, in Joly (ed), p. 76.

⁹¹ van der Klauuw, Refugee Protection in Western Europe: A UNHCR Perspective in Carlier & Vanheule (eds), 226-248, p. 242

⁹² van der Klauuw, Johannes, *The Challenges of the European Harmonisation Process* in Muus, Philip (ed), (1997), 17-29, p. 26.

⁹³ UNHCR, *The state of the World's Refugees. In Search of Solutions*, (1995) Oxford University Press, pp. 86-87.

permanent solution is established, is stated to be acceptable⁹⁴, even though two years have been claimed as maximum duration⁹⁵. Requirements necessary in order to provide a dignified protection start with access to status determination procedure as soon as possible and certainly prior to return⁹⁶. The maintaining of non-refoulement is the most fundamental right and applicable also under temporary protection. Further, right to reunite with family members shall be respected⁹⁷, children have right to education⁹⁸ and regarding the extent of social assistance, it has to cover at least basic need and allow employment while awaiting further procedure⁹⁹. Basic health care should be provided to the same extent as goes for nationals of the receiving state and an identity document issued to facilitate everyday life¹⁰⁰.

At last, the Commission found the current situation precarious and issued a draft Council Directive on temporary protection¹⁰¹ in order to avoid a bottleneck in national asylum systems in case of mass influx, offer immediate protection and fair rights to persons concerned, clarifying the link between temporary protection and the CSR51, obtain burden-sharing among the Member States and finally underline the importance of practical expressions to solidarity¹⁰². It is observed that the greatest inconsistencies lie in the different approaches toward welfare rights and other benefits. For instance, the attitude to family reunification and employment varies¹⁰³. Therefore, the proposal contains provisions which allows employment or

⁹⁴ Angel Castillo, Manuel & Hathaway, James C., Temporary Protection in Hathaway, James C. (ed), *Reconceiving International Refugee Law*, (1999) Martinus Nijhoff, 5-21. p. 17.

⁹⁵ ECRE, *Position Paper on Temporary Protection in the Context of the Need for a Supplementary Refugee Definition*, (1997), available at www.ecre.org, para. 17.

⁹⁶ Ibid, para. 18.

⁹⁷ Ibid, para. 24.

⁹⁸ Ibid, para 25.

⁹⁹ Ibid, para. 26

¹⁰⁰ ibid, para. 28.

¹⁰¹ Commission of the European Communities, *Proposal for a Council Directive On Minimum Standards For Giving Temporary Protection In the Event of A Mass Influx of Displaced Persons and On Measures Promoting A Balance of Efforts Between Member States In Receiving Such Persons and Bearing the Consequences Thereof*, COM (2000) 303 final

¹⁰² Ibid, para. 5.1.

¹⁰³ Ibid, para. 2.4.

self-employment¹⁰⁴. The family definition has extended¹⁰⁵ and covers not only married couples but also unmarried who live in a stable relationship, if the Member State treat both categories equally. Also children to couples above are qualified, if unmarried and dependent, irrespective of born out of wedlock or adopted. Other family members are also entitled to entry and residence, if they are dependent on the applicant or if they have special needs due to traumatic experiences¹⁰⁶.

The Council Directive was finally adopted in July 2001¹⁰⁷ and it can be established that all the most important parts considering the duration of protection, family reunification and the right to employment or self-employment are included in the Directive. Some details are slightly different from the proposal, for instance, the duration of protection which in the Directive can be prolonged for a maximum period of three years, if the reasons for temporary protection remain, compared to two years in the proposal¹⁰⁸. Fortunately enough, the directive also contains a provision which allows a person enjoying temporary protection to lodge an asylum application at any time¹⁰⁹.

The proposal from the Commission, which is only slightly different from the adopted Directive, has generated criticism from different NGOs. ECRE has produced an ambitious document where the most important shortages of the Directive are pointed out¹¹⁰. Several aspects are brought up as important shortcomings, for instance the lack of general provisions on procedure, such

¹⁰⁴ Ibid, para. 10.

¹⁰⁵ If compared to the DC, where only spouses or unmarried children under 18 years or , if the applicant is under 18 and unmarried, his or her mother or father are entitled to residence, Article 4. See also Hurwitz, pp.653-656.

¹⁰⁶ Commission proposal, para. 13.

¹⁰⁷ Council Directive 2001/55/EEC on Minimum Standards For Giving Temporary Protection In the Event of A Mass Influx of Displaced Persons and On Measures Promoting A Balance of Efforts Between Member States In Receiving Such Persons and Bearing the Consequences Thereof.

¹⁰⁸ Ibid, para. 4(2).

¹⁰⁹ Ibid, para. 17(1).

as a right to appeal against a denied temporary protection, the lack of provisions on freedom of movement and the constant important prohibition of refoulement, which is not expressly stated neither in the proposal nor the Directive.

4. THE ‘SAFE COUNTRY’ CONCEPT

4.1 Introduction

The safe country concept is not as such legally incorporated into the DC, since it lies within each Member States’ respective legislation. Still, it is closely connected to the Dublin regime and the European asylum policy, as it touches upon several controversial issues. The fact that all Member States use the safe country notion in their national legislation, in accordance with the London Resolutions, strenghten its importance and convincing force. The starting point of the usage of the safe country concept is to be found in Article 3(5) of the DC, which states:

” Any Member State shall retain the right, pursuant to its national laws, to send an applicant for asylum to a third state, in compliance with the provisions of the Geneva Convention, as amended by the New York Protocol”

4.2 The prohibition of refoulement

To fully understand the complexity underlying the DC and the concept of ‘safe country’, it is necessary to look upon the international obligation, which govern the Dublin regime. Article 33 in the CSR51 states:

¹¹⁰ Observations of the European Council on Refugees and Exiles on the European Commission’s Draft Directive on Temporary Protection and Responsibility Sharing, January 2001, available at www.ecre.org .

” 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 race, religion, nationality, membership of a particular social group or political opinion”

All the EU’s Member States are Signatory states to the Convention and therefore bound not to *refouler* a person to a country where his life or freedom would be threatened. Also indirect refoulement, i.e. the return of an asylum seeker to a country which would send him or her to the country where he or she fears persecution, is included in the prohibition¹¹¹.

4.3 Safe country of origin

The concept of safe country has two meanings, closely connected but still different, safe country of origin and safe third country. The latter builds on the idea that asylum seekers travelling to a Member State from a third country in which they are safe from persecution and can be returned to¹¹². The former is relatively new and the intention by establishing this notion is to prevent asylum applicants from countries generally considered as safe to lodge claims within the territory of the EU¹¹³. The criteria for determining a country of origin safe, was laid down in the Conclusion on countries in which there is generally no serious risk of persecution¹¹⁴. The following has to be taken into account:

- previous numbers of refugees and recognition rates
- observance of human rights
- democratic institutions; and

¹¹¹ Fernhout, Roel, *Status Determination and The Safe Third Country Principle* in Carlier & Vanheule (eds), 187-198 p. 191.

¹¹² Hailbronner, Kay, *The Concept of ‘Safe Country’ and Expeditious Asylum Procedures: A Western European Perspective*, IJRL Vol. 5 No. 1, (1993), 31-65, p. 32.

¹¹³ Byrne, Rosemary & Shacknove, Andrew, *The Safe Country Notion in European Asylum Law*, Harvard Human Rights Journal Vol. 9, (1999), 185-228, p. 193.

¹¹⁴ European Communities, The Council, Conclusions of the Meeting of the Ministers responsible for Immigration, (London, 30 November and 1 December 1992).

- stability¹¹⁵.

The safe country of origin notion facilitates an accelerated asylum procedure in accordance with the Resolution on manifestly unfounded applications for asylum¹¹⁶. If an asylum seeker arrives from a country listed as safe, he or she might not take part in a regular asylum procedure but in an accelerated one. The procedure will be less formal and the decision immediately enforced¹¹⁷. But as has been pointed out, it is not likely that the country of origin information will be specific or objective to the degree that the immigration officials do not need an individual interview to investigate the likelihood of persecution¹¹⁸. A series of concern can be raised in this context. Is it possible on a general basis to establish whether a country is safe for an individual? Is the information trustworthy? Is there a risk that the information only mirrors the situation in major cities and not the whole country? Can the system handle political changes with satisfactory speediness? Is there not a risk that the often complex political situation in a country, which lies in the danger zone of producing refugees, is too complicated to be dealt with from a categorical perspective?

The determination of a country as safe is crucial and the decisions made by the Member States are often met with criticism. For instance, Austria considered countries as safe as soon they had ratified the CSR51 and the ECHR and its protocol, which is exactly the contrary approach to the EXCOM Conclusion and the opinion of several scholars¹¹⁹. After a ruling in the Higher Administrative Court, Austria has an obligation to consider whether the country in question can actually provide effective protection

¹¹⁵ Ibid, para. 4.

¹¹⁶ Ibid, para. 4.

¹¹⁷ Hailbronner, p. 49.

¹¹⁸ Andrew & Shacknove, p. 218.

¹¹⁹ Joly, Danièle, *Haven or Hell? Asylum Policies and Refugees In Europe*, Macmillan (1996), 44-84, p. 57.

against refoulement¹²⁰. Still, it considers countries such as Slovenia, Hungary and the Czech Republic to be safe¹²¹ and presumption of safety for countries like Romania, Ukraine, Russia, Turkey, Algeria, Iran, Pakistan, Congo, Tadjikistan, Niger and Jordan exist¹²². Also Germany considers countries like Poland and the Czech Republic to be safe¹²³ even though this point of view has been challenged¹²⁴.

4.4 Safe third country

The definition of 'safe third country' is vague and not even the term is absolutely clear¹²⁵. It is used to describe what the EU regards as safe countries outside the Community cooperation and to which asylum seekers may be returned to, if they do not face a risk of persecution. The problem lies naturally in the difficulties of obtaining assurances that the asylum seeker will be treated in accordance with basic human rights standards and not be expelled to the country where he or she fears persecution.

4.4.1 International perspective

4.4.1.1 The EXCOM conclusion

Conclusion 58 of the Executive Committee of the UNHCR¹²⁶ states that refugees and asylum seekers may be returned to the country in which they

¹²⁰ DRC, "Safe Third Country" Policies in European Countries: Austria, (1997), www.drc.dk/dk/publikationer/boegeropjec/boeger/safe3rd/austria.html ,

¹²¹ DRC, *The Dublin Convention: Study on Its Implementation In the 15 Member States of the European Union*, (2001), p. 27.

¹²² DRC, "Safe Third Countries" Policies in European Countries: Austria

¹²³ DRC, *The Dublin Convention*, p. 29.

¹²⁴ Achermann, Alberto & Gattiker, Mario, *Safe Third Countries: European Developments*, IJRL Vol. 7 No. 1, 19-38 p. 36.

¹²⁵ The International Community uses the term 'first country of asylum' even though it has been considered misleading since it implies that protection is given in the first country of arrival even though the correct understanding indicates which country is supposed to grant access to the asylum procedure, Vevstad, p. 230.

¹²⁶ Executive Committee Conclusions, No. 58 (XL), 1989, *Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection*.

have already found protection, under certain conditions¹²⁷. According to this instrument, the country in which the asylum seeker has already found protection in is to be seen as the first country of asylum¹²⁸. From this conclusion some minimum standards can be drawn which have to be fulfilled before a state can send an asylum seeker to the first country of asylum. Four minimum requirements can be outlined. Firstly, the asylum seeker must have been granted some sort of protection which guarantees a legal right to remain in the country, i.e. as an asylum seeker or as a refugee. Secondly, the protection seeker must have obtained effective protection against *refoulement*. Thirdly, the protection seeker must be treated in accordance with international human rights instrument and fourthly, the re-admittance and reception must be assured.

4.4.1.2 The UNHCR statements

The UNHCR states that occasionally Member States tend to return asylum seekers to a third country without obtaining guarantees that the person will have access to a 'fair and satisfactory asylum procedure'¹²⁹. The importance of the consent of the third state cannot be enough emphasized in this context. The UNHCR has also stressed that mere transit in a third country cannot be accepted as the only ground on which access to an asylum procedure is rejected¹³⁰ and underlines the importance of guarantees that the third state will examine the asylum application on its merits¹³¹. It can also be pointed out that the Member States consider each other as 'safe countries' since they mutually trust their respective asylum procedures¹³², a fact which

¹²⁷ Ibid, para. f).

¹²⁸ See note 43.

¹²⁹ van der Klaauw, in Carlier & Vanheule (eds), p. 233.

¹³⁰ Executive Committee Conclusion No. 15 (XXX), 1979, *Refugees Without an Asylum Country*, paragraph h) iv) which states that the fact that the asylum seeker could have sought asylum 'en route' does not oblige the transit state to undertake responsibility for examination of the case.

¹³¹ van der Klaauw, in Carlier & Vanheule (eds), p. 233.

¹³² Hailbronner & Thierry, p. 964.

has been criticized as 'reverse discrimination' of the EU citizens¹³³ and may be contrary to the 1967 Protocol, which shall be applied without geographical limitations¹³⁴

4.4.2 The perspective of the EU

In December 1992, the ministers of the Member States of the European Communities responsible for immigration produced a document slightly different than the EXCOM Conclusion- 'Resolution on a harmonized approach to questions concerning host third countries'¹³⁵. At the same time, three other resolutions were adopted, the already mentioned 'manifestly unfounded application for asylum and safe third countries of origin and also expulsion of illegal third country nationals, the so-called 'London resolutions'.

In paragraph 2 of the Resolution concerning safe third countries, one finds the criteria for establishing whether a third country can be considered safe or not. First of all, the protection seeker's life or freedom cannot be threatened within the meaning of Article 33 CSR51. Further, torture or inhuman or degrading treatment in the third country is also disqualifying. The asylum-seeker must have found protection or has had an opportunity to file an application in a third state. Lastly, the asylum seeker must be protected against *refoulement* in the third state. According to this criteria, a safe third country exists if the asylum seeker has already been offered protection or has had the opportunity to seek protection or there exists a clear evidence of

¹³³Jessurun d'Oliveira, Hans Ulrich, *Fortress Europe and (Extra-Communitarians)refugees: Cooperation in Sealing off the External Borders* in Schermes et al (eds), *Free Movements of Persons in Europe: Legal Problems and Experience*, Martinus Nijhoff (1991), 166-182 pp. 177-8. The author claims that even the Member States themselves may produce refugees and points at an example of a possible refoulement, which included members of ETA expelled from France to Spain.

¹³⁴Protocol Relating to the Status of Refugees, New York, 31 January 1967, 606 UNTS 267.

¹³⁵European Communities, The Council, Conclusions of the Meeting of the Ministers responsible for Immigration, London 30 November and 1 December 1992.

admissibility to a third country¹³⁶. This reasoning raises undoubtedly questions. Especially the formulation if the asylum seeker has had the *opportunity* to seek protection in the third country implies a great unawareness of the situation. The mere opportunity a protection seeker might have had to file an application in a third country cannot qualify the country in question as safe, since this reasoning is nothing but hypothetical¹³⁷. No guarantee exists whether the asylum seeker will get access to a status determination process or not when returned. Another problem is that third countries do not see themselves as responsible for an asylum claim, especially if the person concerned has been present in the country just for a short transit stay, which is said to occur relatively often¹³⁸. At this phase, it is not likely that the third state will admit the asylum seeker to an asylum procedure on the grounds that he or she stayed in the country for a very limited period of time. As a matter of fact, the London resolution does not cover, in contrast to the policy of the UNHCR, only those who already have been granted some sort of protection but also those who stopped for a short transit stay in a third country and consequently not given any possibility to obtain a status determination. This approach is also connected with a practical dilemma, since most air lines of today do not have direct links to Europe from all places of turmoil. Instead, the asylum seekers are forced to travel through a third country and by the time they reach the territory of EU, they are already disqualified from lodging an application, since in most cases there exist a third country to which they may be returned¹³⁹.

It can also be established that the EXCOM Conclusion and the EU Resolution do not correspond in the sense that the conclusion requires that the asylum seeker is treated in accordance with recognized humanitarian norms and in case of return, the re-admission and the reception must be

¹³⁶ Achermann & Gattiker, p. 23.

¹³⁷ Fernhout, p. 193.

¹³⁸ Vevstad, p. 235.

accepted. The resolution does not mention these important parts of an acceptable transfer under the EU regime. As a matter of fact, the Resolution does not either require the third state to be a signatory state to the CSR51. Even if such acknowledgement is not a guarantee that the asylum seekers will be treated in accordance hereto, at least it shows a political will to manifest, on paper, good intentions in the field of asylum and refugee law.

From above, we can at least draw the conclusion that a country cannot be regarded as safe only on formal grounds, such as being a signatory state to the CSR51. A safe country must uphold the respect for the prohibition of refoulement under all circumstances. It must as well guarantee that the asylum seeker will be admitted into the asylum procedure and have a chance of being accepted. During the procedure, the person must be treated in accordance with international human rights standards. These requirements exclude automatically mere transit countries which have no interest in granting protection to asylum seekers. Other countries which do not have the capacity to deal with asylum seekers in a proper way because of internal problems are probably also excluded. Unfortunately, this scenario is just wishful thinking since practice shows that the criteria above are far from met¹⁴⁰.

5. ASYLUM PROCEDURE UNDER DUBLIN

5.1 Introduction

A coherent asylum procedure is of greatest importance as to ensure equal rights and equal conditions for the asylum seekers, irrespective of host country in the EU. Despite a knowledge of the unharmonised substantive

¹³⁹ Guild, Elspeth, *The Impetus to Harmonise: Asylum Policy in the European Union* in Nicholson & Twomey (eds), 313-335, p. 321.

¹⁴⁰ Austria, for instance, has been criticized since asylum seekers are immediately returned to the third country they came from without any checking from authorities whether they have a fair chance of admittance in that country or not. Consequently, protection seekers

and procedural national laws, the Member States decided to mutually put their trust in each others system and disregard the unequivalences. Yet, the understanding of the necessity of a harmonised approach has slowly grown stronger and appears to be evident by now. A development which goes from a policy emphasized solely on the interest of the Member States and their wish to exclude people from Community territory, to an approach which focuses on the rights of asylum seekers, is not easy to attain but it seems like a first step has been taken by some actions from the Commission and the Council, as we will see later.

5.2 International obligations

Certainly, the Member States refer to their domestic legislation when applying the DC but that does not in any way exonerate them from the responsibility which can be found in international law. Despite the fact that the core instrument, the CSR51, does not contain any provisions regarding asylum, it is still possible to derive some obligations from Article 33. The most important is of course the prohibition of non-refoulement which does not allow a Member State to send away an asylum-seeker to the country of persecution or to a country which may return him to the former. A fair procedure is necessary in order to examine the circumstances in every case and thereby fulfil this provision. The obligation remains even if the asylum application is considered being manifestly unfounded or abusive or if the asylum seeker entered the territory illegally or without the necessary documentation¹⁴¹. Another important provision can be found in Article 3 of the ECHR which, as mentioned in chapter 4, prohibits return to a country where the asylum-seeker risk torture or inhuman or degrading treatment or punishment. Further, one finds another important provision in the ECHR, the right to appeal, even though this right is not absolute but shall be used

have been rejected access to the Austrian procedure because of transit stays in countries such as Russia, Turkey, Saudi Arabia, Algeria or Iran, Achermann & Gattiker, p. 31.

¹⁴¹ Hailbronner, Kay, *Immigration and Asylum Law and Policy of the European Union*, 2000, p. 439.

when the claim is "arguable"¹⁴². These principles must always leaven a procedure in all the Member States.

5.2 The European approach

The establishment of the ToA obliges the Member States to determine minimum standards for procedures of granting or withdrawing the status of refugees¹⁴³. A step in the right direction was taken when the Resolution on minimum guarantees for asylum procedures¹⁴⁴ was adopted. In this instrument, the universal principles in the CSR51 are emphasized, in particular the non-refoulement in Article 33 and the refugee definition in article 1(A)¹⁴⁵. The procedure is to be found in the domestic legislation of every Member State and will be carried out by fully competent authorities on a case-by-case basis and the asylum-seekers are expected to take an active part in the process, by presenting relevant facts and circumstances. If a decision is negative in the first instance, there must be a provision of appeal or an individual review. A general principle is allowance to remain in the territory as long as no decision has been given.

An evident shortcoming of this instrument is its non-binding nature. Even if the Resolution itself mentions guarantees, no such thing exist in this context, since its legal status is nothing but recommendations and derogations are permitted.

¹⁴² Ibid p. 441.

¹⁴³ Article 63 (1)(d)

¹⁴⁴ Council Resolution of 20 June 1995 on Minimum Guarantees For Asylum procedures, OJ C 274.

¹⁴⁵ It is noteworthy to establish that full compliance with the refugee definition is guaranteed in this context, despite the fact that the definition is far from clear in other aspects, i.e. the persecution by third parties.

The Commission issued a working document in 2000¹⁴⁶ as a result of the Tampere Conclusions where the long-term goal was set: create a common asylum procedure¹⁴⁷. Several issues were outlined to form a basis for the new system:

- adoption of clear guarantees which must uphold the respect for the CSR51 and other relevant human rights instruments
- upholding the respect for the right to seek asylum and the principle of non-refoulement
- ensuring the system be fair and effective and the procedure rapid and characterized by high quality
- creation of a procedure and status which cover all aspects of migration, in particular the continuation of humanitarian admission and the balance between subsidiary protection and combating of illegal immigration
- limitation of secondary movements which will be achieved by harmonised conditions
- allowing the principles of proportionality and subsidiarity to lighten the process
- consultation of relevant international organisations¹⁴⁸.

Before a discussion about the realisation of a common asylum system takes place, a brief description of the current system is necessary in order to locate the differences between a Dublin procedure in practice and a future common system. The current procedure is far from convergent in respect of the suspensive effect pending a case, which is linked to the principle of non-refoulement.

¹⁴⁶ Communication from the Commission to the Council and the European Parliament, *Towards a Common Asylum procedure and a Uniform Status, Valid Throughout the Union, for Persons Granted Asylum*, COM (2000) 755 final

¹⁴⁷ See chapter 6.3.

¹⁴⁸ Commission, pp. 6-7.

5.3 Dublin procedure in practice: first instance procedure

Despite some differences in applying the DC in first instance, the general impression is that the harmonisation is acceptable, even though some parts could improve. To start with, asylum seekers may file an application and register in all Member States until a possible transfer to another country is timely, if they travelled through a safe third country before entering the country where they claim asylum, although the French system is somewhat troublesome¹⁴⁹. The asylum body OFPRA is not included in the process to a wishful extent. Instead the procedure goes through the Prefecture, which issues the residence permit and to which the asylum-seeker must report on a regular basis.

Concerning the legal status during the procedure, a majority of the Member States issue the same residence permit to asylum seekers under the DC as to other claimants and its validity varies from one month up to a year. Austria is an exception and does not issue any temporary residence permit at all¹⁵⁰. Also the French approach is restricted and asylum seekers are provided with a document which gives protection against refoulement but not access to social rights¹⁵¹.

The ways of informing the asylum-seekers of transfer decisions are many and no coherent approach is visible. Some countries do not supply any written information, others only communicate in their own language. In Austria, a request for transfer to another country is not seen as formal and the necessity to communicate with the asylum seekers does not exist. When a decision is made, the notification reaches the person concerned by letter or in person. The decision and the information on appeal rights are translated

¹⁴⁹ DRC, *The Dublin Convention*, p. 35.

¹⁵⁰ *Ibid*, p. 33.

¹⁵¹ *Ibid*, p. 35.

into the person's own language, whilst the reasons of the outcome is in German only¹⁵².

5.4 Appeal procedure

If the first instance procedure is fairly acceptable, the same cannot be said about the appeal procedure, which shows remarkable divergences among the Member states concerning the suspension of transfer during the appeal and the way of handling the non-refoulement.

All countries except Denmark have an independent court or administrative body to which appeals against transfer may be filed. Denmark has chosen another way. An application of appeal must be filed to the Ministry of Interior instead of an authority. The scope is narrow and a negative decision cannot be appealed, which means that the asylum seeker only has one possibility to appeal, which is not even examined by an independent body¹⁵³. The U.K. has for certain a battery of possibilities to challenge a rejection by the Secretary of State but appeal is not granted automatically. All three instances, the High Court, the Court of Appeal and the House of Lords, require a leave to hear a case¹⁵⁴.

When a negative decision in first instance is challenged in a second instance, the common approach among the Member States is that an appeal has no suspensive effect. In other words, a transfer may take place during an ongoing appeal procedure! This can be regarded as a breach of the ECHR's Article 13, which provides for the right to effective remedy before a national court if the decision violates provisions connected to asylum, for example Article 3, 5 and 13¹⁵⁵. Certainly, a possibility to obtain suspension by a request exists, but the outcome of such request varies. Yet, some countries

¹⁵² Ibid, p. 33.

¹⁵³ Ibid, p. 55.

¹⁵⁴ Ibid, p. 66.

¹⁵⁵ Hurwitz, p. 699.

give an automatic suspension as soon as a decision is appealed. The approach by Austria, Greece, Ireland and Portugal is worthy of imitation. The other Member States all require a special request, and the permission is granted to a varying extent. In Denmark it is rarely granted¹⁵⁶. In Finland, the Administrative Court has rejected all requests for suspension¹⁵⁷, whereas Spain usually grant permission¹⁵⁸. Also Germany, Belgium, Italy, Sweden and Luxembourg require special requests.

The most important concern is the standpoint of the prohibition of refoulement, a concern where the lack of coherence in the Member States is the most evident and at the same time the most unfortunate. The unique position of the non-refoulement in international refugee law must be constantly observed, a fact which cannot be stressed enough. Despite this unsurprisingly standpoint, no convergence has taken place among the Member States how to deal with this question when removing an asylum seeker under the DC. It must be considered as an exemption when a Member State investigate the national legislation of another Member State before a transfer is taking place. The mutual trust under the DC has been implied since the start of the cooperation and the fact that some countries have started to doubt the system puts pressure not only on the remaining Member States but also on the Community as such. Within a foreseeable future, we may discover a change of attitude but at present, only the U.K. and to some extent Sweden have challenged the prevailing apprehension.

It is fair to say that the U.K. is the country which has taken up the cudgels for challenging removals under Dublin as inconsistent with international obligations. Even before the DC entered into force in September 1997, the notion of safe third countries was challenged and safety in countries such as France, Italy, Austria, Portugal, Belgium and Greece was considered

¹⁵⁶ DRC, *The Dublin Convention*, p. 55.

¹⁵⁷ *Ibid*, p. 56.

¹⁵⁸ *Ibid*, p. 64.

doubtful¹⁵⁹. After the entrance into force, several cases concerning both the application and the interpretation of the CSR51 have been subject for a discussion whether the removal to another EU state is safe or not.

5.5 The Council Directive

After the working document issued by the Commission, the Council has produced a proposal for a Directive, as the instrument to harmonise minimum standards governing the asylum procedure among the Member States¹⁶⁰. This directive would clearly have a positive effect on the asylum procedure, since the Council has understood many of the uncertainties linked with the present system and made its best to eliminate them. In order to achieve this, a range of guarantees are listed to the benefit of the asylum seeker. Foremost, the applicants must have an effective opportunity to lodge an application and the procedure must be leaven by individuality, objectiveness and impartiality¹⁶¹. One of the most important aspects with this proposal is the entitlement to suspensive effect pending a case¹⁶². In the present system, only a very few states give suspensive effect to asylum procedures which may result in the applicant's deportation before the outcome of the case is known¹⁶³. Guarantees related to communication with authorities are more far-reaching than what most of the Member States apply today. The applicant must be informed about the asylum procedure in a language he understands and is entitled to interpretation service whenever wanted¹⁶⁴. All decisions must be written, a rejection must be completed with summary of facts, reasons for the decision in law and explanation of of the conclusions, together with information on appeal¹⁶⁵. Applicants must have

¹⁵⁹ Nicol, Andrew & Harrison, Stephanie, *The Law and Practice in the Application of the Dublin Convention in the United Kingdom*, European Journal of Migration and Law, (1999), 465-481, p. 466.

¹⁶⁰ Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, COM (2000) 578.

¹⁶¹ Ibid, para. 4.

¹⁶² Ibid, para. 5.

¹⁶³ See chapter 5.3.2.

¹⁶⁴ Proposal for a Council Directive, para. 6.

¹⁶⁵ Ibid, para. 7.

the opportunity to have an interview with a competent official and to choose the sex of the interviewer and if necessary require an interpreter¹⁶⁶. Legal counsel and the right to contact the UNHCR is guaranteed throughout the procedure¹⁶⁷. Further, it would not longer be allowed to hold asylum seekers in detention because of fear that they will go underground. Instead, detention must be motivated by specific reasons, such as ensuring identity¹⁶⁸.

The directive covers all parts which has said to be necessary in order to obtain a fair and satisfactory asylum procedure¹⁶⁹ and must be seen as a big step forward in the struggle for a totally harmonized asylum policy, even though several questions remain, such as shortening the often lengthy process and how to deal with manifestly unfounded or clearly abusive applications in a fair manner¹⁷⁰. Still, it is pleasant to establish that the Council has showed a political will to finally rebuild a common asylum system for the benefit of the asylum-seeker and not in the interest of the Member States.

6. FUTURE DEVELOPMENT: AFTER AMSTERDAM

6.1 Introduction

The ToA lays down an obligation to act for both the Member States and the Commission under Title IV, since the transitional period comes to an end in May 2004. By then, concrete measures in the field of asylum and immigration must be accomplished in order to comply with the time-table. It seems like the EU finally has realized the need for a revised asylum policy

¹⁶⁶ Ibid, para. 8.

¹⁶⁷ Ibid, para. 9.

¹⁶⁸ Ibid para. 11.

¹⁶⁹ van der Klaauw, in Guild & Harlow (eds), pp. 173-177.

¹⁷⁰ Ibid, p. 193.

and that steps towards a full convergence is necessary in order to improve both its reputation and the actual situation for asylum seekers.

6.2 Tampere

In 1999, a special European Council was established in order to deal with the creation of an area of freedom, security and justice¹⁷¹. The meeting provided the Commission with the political guidance necessary to implement the obligations laid down in the ToA.

The Council stressed the importance of this topic and the necessity of transparency and democratic control which involves information to the European Parliament on a regularly basis. The developing of a dialogue with the civil society to get a wider understanding and acceptance among the citizens is also underlined, and it will be interesting to see the forum in which this dialogue will take place.

It is clear that the Council has the ambition of playing a considerable role on the international scene, which requires close cooperation with both other countries and international organisations, such as the Council of Europe, OECD and the UN. The need for a comprehensive approach to migration finds expression in an awareness of political, human rights and development situations in both countries of origin and transit. The Council considers that combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights is required in order to fully understand and deal with immigration. This partnership with other countries is a strong point which relates to asylum policy.

¹⁷¹ Tampere European Council, *Presidency Conclusions*, 15 and 16 October 1999.

The other point of great interest is the work towards a Common European Asylum System¹⁷². The full compliance with the prohibition of refoulement is stressed, as well as the need of a well functioning allocation system for asylum applications. Also minimum conditions of reception, common standards for procedure and the content of refugee status are important factors in an acceptable and workable asylum system. In the long perspective, the system shall be uniform in all these matters and finally result in a totally harmonised approach.

6.3 The Scoreboard

In March 2000, the Commission issued its communication for a scoreboard in order to review the progress made in the field of Title IV¹⁷³. The purpose of the Scoreboard is to inform the citizens of the development in this field, to keep up the momentum generated by the Tampere European Council and finally to highlight any delays which might appear. In short, the Commission is trying to transform treaty obligations and political commitments into a concrete reality.

The content of the Scoreboard is linked to the conclusions of Tampere and its division of topics is copied into the scoreboard. When it comes to the Common European Asylum System, several measures will be taken. First of all, the effectiveness of the DC will be examined, which was accomplished in March 2000 and will be discussed later. The need for a fair and efficient asylum procedure which hopefully will result in a fully convergent asylum approach is emphasized and the opinion of the EP is still awaited as an answer to the Commission's working document. Moreover, the need for temporary protection, which recently has been given a binding form and subsidiary forms of protection is also considered important, just like the

¹⁷² Ibid, para. 15.

¹⁷³ Commission of the European Communities, Commission Communication of 24 March 2000: Scoreboard to review progress on the creation of "Freedom, Security and Justice" in the European Union

burden-sharing between the Member States, which will result in a European Refugee Fund. A majority of these measures have a clear deadline. When it comes to the treatment of third country nationals, which also affects asylum seekers and refugees, the commitments are not so clearly spelled out. The important question of whether and under which conditions third-country nationals could be allowed to settle and work in any Member State, has no high priority since nothing is stated about the activities in this field.

6.4 Rethinking the Dublin Convention

As mentioned above, the scoreboard required an examination of the effectiveness of the DC, which has been done by the Commission¹⁷⁴. In its report, the Commission established that the DC has not worked in practice as one hoped for and some serious concerns were raised. First, the time aspect is troublesome. One of the aims with the convention is to speed up the asylum process but reports from the Member States show the opposite and the Commission points at a clear risk of creating a new orbit phenomena, since some applications would not be examined until the procedure was completed¹⁷⁵. Second, difficulties in establishing the responsible state is a big problem. Quite often, it is impossible to determine a travel route. In many cases, no evidence exists or has been destroyed, which causes obstacles in applying the DC¹⁷⁶. Third, in cases where the Member States have come to an agreement on which state is responsible, transfer cannot always take place because of divergences in the interpretation of the CSR51. Different approaches to persecution by third parties and the application of the safe country notion have forced national courts to challenge and block transfer decisions¹⁷⁷. To sum up, the

¹⁷⁴ Commission of the European Communities, *Revisiting the Dublin Convention: Developing Community Legislation for Determining Which Member State is the Responsible for Considering an Application for Asylum Submitted In one of the Member States*, SEC (2000) 522.

¹⁷⁵ *Ibid*, para. 15-16 and 19.

¹⁷⁶ *Ibid*, para. 43

¹⁷⁷ *Ibid*, para. 51.

Commission is aware of the shortcomings of the DC and realises the necessity of a real improvement if the system will survive. One has also listed possible alternatives to the DC, which have to be based on coherent and justifiable principles.

The first alternative suggests a system which makes the last known transit country within the EU the responsible one. This system would clearly be an improvement in that sense that evidence to show first country entered is not necessary. Yet, the Commission does not support this system because it is said to penalise states for removal of internal frontiers¹⁷⁸

The second alternative is based on other aspects of the applicant's immigration history than the Member State responsible because of entry. Not even the Commission believes that this system has a future since it considers it arbitrary because of lack of other criteria to apply instead.

The third alternative is based on the applicant's country or origin, saying that all asylum seekers from a specific country or origin would be allocated to a specific Member States. The system is controversial, not only because the demographic effect it would have on the Member States but also because an element of arbitrariness is hard to avoid and the obvious difficulties in obtaining a system of burden-sharing.

The fourth and last alternative is the one favoured by a number of NGOs, which advocate a right to choose asylum country and which have been critical towards the DC, since that possibility was left out. This alternative simply establishes the responsible state as the one where the asylum applicant lodged an application, i.e. the free choice of the asylum seeker will govern the process. The problem is that the burden-sharing will be totally played out.

¹⁷⁸ Ibid, para. 56

No matter if one of these alternatives will turn into reality in a near future or if a totally new system will replace the DC, the EU institutions have clearly shown that they are aware of the inadequacies of the present system.

6.4.1 Dublin II

Very recently, the Commission drafted a proposal for a Regulations as a replacement for the DC¹⁷⁹. It was established that a common procedure and uniform status is a long-term project and that differences in terms of , for instance, procedure for granting status and reception conditions will remain, also after the realisation of Dublin II¹⁸⁰. The only solution which the Commission finds trustworthy at the moment as an alternative to the DC, is the scenario in which the responsibility would devolve upon the state where the asylum claim is presented. Yet, the model would require a total harmonisation in order to reduce inadequacies among the Member States and is therefore not realistic at the moment.

Dublin II is built on the same idea as the DC and consequently, the responsibility for examining an application still lies with the Member State which has taken the greatest part in the applicants entry into or residence in Community territory¹⁸¹. What is new is the intention to protect family unity and under certain conditions, an asylum seeker may be transferred to another state than the one responsible for the claim, if family members reside in that state. Unfortunately, it seems like the family definition as such is still far too narrow. The Proposal gives no indications as to an extended definition. Neither the criticized lack of suspensive effect pending a case in an appeal

¹⁷⁹ The Commission of the European Communities, , *Proposal for a Regulation laying down the criteria and mechanism for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.*

¹⁸⁰ *Ibid*, para. 2.2.

¹⁸¹ *Ibid*, Article 9.

procedure will change¹⁸², which is the contrary approach laid down in the Proposal for a Council Directive on minimum standards on procedure¹⁸³

7. CONCLUSION AND FINAL REMARKS

Unsurprisingly, it is easy to establish a clear need for a renewed European immigration policy. The last 15 years, the emphasis has been concentrated on the avoidance of physical entrance of foreigners. This policy resulted in the creation of the DC, with the purpose of designating only one Member State responsibility for an asylum application and whose decision is valid throughout the Union. By adopting this instrument, one would manage the phenomena of 'refugee in orbit' and at the same time prevent 'asylum-shopping'. If scrutinized, 'orbit' situations are likely to arise, as the principle only works within the Community, not between the Community and the rest of the world. Certainly, the 'asylum-shopping' was put to an end when introducing the DC but the question remains whether this omission not had negative consequences for the asylum seekers as only one application could be lodged in the whole Union. The fact that several applications are filed in more than one country at a time is a logic way of behaviour as a result of the disharmonic substantive rules which exist among the Member States and cannot be blamed on the protection seekers. Their behaviour is just a mere consequence of an incomplete system. There lies the weakness of the current approach. In its eagerness to find a solution to a possible mass influx of asylum seekers, no consideration was taken to the fact that no substantive harmonisation took place. Instead, an overall system was adopted but the Member States kept their domestic legislation, both concerning substantive and procedural rules, instead of replacing it with common provisions. The common European policy in the field of refugee

¹⁸² Ibid, para. 3.2.

¹⁸³ See chapter 5.5.

protection is just a mere illusion. What the Member States might have in common is a strong wish to keep foreigners out of their territory.

The concept of safe country clearly shows the weakness of the current regime and supports the suspicion of Member States acting solely on behalf of own interests. The Member States have not succeeded in adopting a common list of countries which can be considered safe by origin and no guarantees exist as to the right of a case-by-case examination of each asylum application. Concerning the safe third country notion, it is completely up to every Member State to determine to which country an asylum seeker can be transferred without risking persecution. Practice has shown that certain Member States occasionally send back people to countries without ensuring that they will get access to a status determination process and thereby have a fair chance of being admitted. The upholding of this policy may result in 'orbit' situations, which in the long run can lead to refoulement, if no other state than the one which the asylum seeker fled from is prepared to take him or her back. By maintaining this order, despite massive protests from several NGOs, the Member States are in the danger zone of violating the far most important instrument in international refugee law; the CSR51.

The interpretation of the CSR51 turned out to be a hot potato, since no common refugee determination exists among the Member State. The recognition rates are from equal, thanks to the shortage of substantive convergence. Another question which has arisen lately is the automatic transfer from one Member State to another under the Dublin Convention. If another Member State than the one in which the asylum seeker is present, is responsible for the application, transfer will take place, even if the Member State which formally is responsible interpret the refugee determination narrower. It must be considered very unlikely that the person will be granted refugee status. Instead, he will probably face deportation to a third country or to the country where he fears persecution. Here, the Member States have a golden opportunity to demonstrate that refugee protection is of serious

concern to them and serves other interest than protecting the own sphere. By refusing transfer to Member States whose interpretation is less generous than prevalent, not only nerve is showed, compliance with international law prevails. The principle of non-refoulement must always be maintained, in contrast to national interests built on the idea that unity outwards covers obvious shortcomings. The prestige cannot be upheld at all costs.

As shown, the DC is far from completed and several areas need an update before it is possible to label the DC as a refugee friendly instrument. Hopefully, several of the inadequacies will be diminished by the ToA, since the Member States put themselves in a situation where they are forced to take concrete measures before May 2004. The biggest problem today, towards the unavoidable harmonisation, is related to the extent of protection among the Member State. Some are more generous than others, both in terms of granted protection and social rights. When convergence will turn into reality, some states may oppose a generous approach and advocate for a stricter ditto and the result can be that a lowest common denominator forms basis for a new asylum regime, which must be seen as a very unfortunate, especially considering the strive of the EU to appear as the guardians of human rights.

Finally, cooperation of the Member States in the field of asylum and immigration is of vital importance. Unfortunately, the phenomena of flight from places of turmoil is not isolated to the European continent. The EU together with the international community must develop durable solutions to the problem. In most cases, a flight is caused by lack of democratic institutions, which is manifested by either regular wars or general human rights violations or both in combination. Democracy has proven to be the strongest weapon in the fight against human rights abuses. Therefore, if root causes shall be tackled in an effective manner, the encouragement of the slightest democratic approach is of most importance. In other cases, the responsible authorities are unable to provide tolerable living-conditions and

the reasons of flight such as famine, poverty or natural disasters are common. Irrespective of reasons for flight, living-conditions must improve in terms of political and social progress in order to maintain a realistic vision of reducing the numbers of refugees around the world.

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