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The right to effective remedies and  
procedural guarantees for people in need of  
international protection

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# Summary

*Ambiguity and controversy abounds the debate over the thousands of people trying to enter the European territory and their rights, especially in their procedural form. This paper explores the latest developments in the context of the European Court of Human Rights' and the European Court of Justice's expansive interpretation of the right to an effective remedy and the procedural guarantees afforded to protection seekers by the pertaining international and regional legislation. In their recent judgments the Courts have determined both the states' obligations on guaranteeing fair and effective procedures for people trying to enter Europe as well as the individuals' corresponding right to seek protection. The paper takes a thorough look at the reasoning of the Courts and emphasizes on the -not any more underlying but- explicit dynamic of the right to an effective remedy in acquiring a separate identity in refugee regime, guaranteeing the right to seek international protection by means of procedure. The majority of the cases discussed holds that a State's failure to offer fair and effective procedures guaranteeing those people's substantive rights such as the right not to be exposed to the risk of persecution and torture can itself be a violation of the right to an effective remedy. The conclusions drawn through a constructive synthesis of the European Convention on Human Rights and the main CEAS instruments such as Dublin II, the Asylum Procedures and Qualification Directives are significant for two reasons. First, they signal new perceptions in the area of international protection highlighting particularly the potential of coherence in the asylum process, by weighing up and balancing partly incompatible demands. Second, they assert the implications of the Courts' judgments on Member States and their intra-EU relations as well as on protection seekers themselves by emphasizing on the adherence to a procedure which the application of the rights and principles premising the contemporary refugee regime is contingent upon.*

***Key words***

*Right to an effective remedy, procedural guarantees, asylum, international protection, CEAS, effective judicial protection, interception.*

# Preface

There are so many things, I learned during the process of writing this thesis. Probably most important to me was the discovery of the potential impact of a constructive synthesis of EU and international law on national asylum procedures. Hopefully, this paper will inspire readers working on refugee law cases by stressing out the significance of the international protection's procedural aspect for asylum applicants in Europe.

Before, I delve into the substance of the thesis I would like to heartily thank all the people that contributed, in one way or another, to the completion of this paper from the inception of the topic, the research and writing to the point of the defense. I am specifically grateful to my supervisor Karol Nowak, as well as to Gregor Noll, Markus Gunneflo and Mariajulia Giuffre who have been of great assistance throughout the process. It was amazing to notice how their comments resulted in great improvements, not only in the content of the research, but also to the coherence and readability of the text. Their invaluable insights, critical view and encouragement determine to a significant degree the character of the present study and made thesis writing a fruitful experience.

I am also indebted to my colleagues from the International Human Rights Law Master Programme at Lund University, Racheal Busingye and Messai Ali for all those inspired discussions we had during the past two years mirrored in the present work.

# Abbreviations

APD	Procedures Directive (2005/85/EC)
CEAS	Common European Asylum System
CFI	Court of First Instance
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EComHR	European Commission of Human Rights
EU	European Union
EXCOM	Executive Committee of the Programme of the High Commissioner
FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
QD	Qualification Directive (2004/83/EC)
RCD	Reception Conditions Directive (2003/9/EC)
RD	Return Directive (2008/115/EC)
RSD	Refugee Status Determination Procedures
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of Treaties

# 1 Introduction

## 1.1 Contextual background

It is beyond any doubt that Europe is deemed as a sanctuary by a rapidly growing number of people fleeing from what seem to be, and often are, intolerable conditions in their countries of origin. The bitter truth is that the current refugee regime falls short of affording adequate protection to those in need. The endemic burdens and responsibilities of refugee protection have increasingly made states willing to avoid the particularized obligations that arise when refugees arrive at their territory. Unconvinced that refugees will ever return home, governments adopt policies that envisage the deterrence of refugees by non-entre and other containment practices, or drive refugees away by offering only an inhumane variety of "protection".<sup>1</sup> The fundamental criticism of the European Union (EU) approach towards refugees is that it has combined asylum with immigration.<sup>2</sup> More specifically the idea of granting protection to those in need has been dangerously blurred with the process of combating illegal migration, a phenomenon best reflected in the area of European border control management. Practices such as turning back, transferring to European front-line states or to non-European coastal states which fail to comply with international human rights standards, as well as offshore processing of asylum determination procedures, have been highly criticized for

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<sup>1</sup> Hathaway, J. & Neve, A., 1997, Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection, 10 Harv. Hum. Rts. J., 209.

<sup>2</sup>Art. 63 European Union's own Annual Report on Human Rights for 2003 lumps asylum and immigration together.

prioritizing security at the expense of protection. However, history has shown that the refugee context is changing, the key change being the apparently permanent refugee crisis, from which no European state is wholly immune.<sup>3</sup> This is a reality which the Courts seem to take seriously into account, pointing to the increased need of addressing the problem with the necessary cautiousness, rejecting securitization policies and emphasizing on solutions aiming at the improvement of the overall level and quality of protection. It was exactly due to states' failure to provide people trying to enter Europe with the procedural guarantees flowing from its substantive rights under international and EU law that left space for the Courts to undertake action and confirm their role as guarantors of the compliance with the legal rules and principles they are adopted to promote. Struggling to pragmatically correspond to current demands the Courts see no reason why consideration of the right to seek protection under international and community standards should be restricted to substantive law. Rather, the basic principles of asylum protection seem to rank among the legal norms that the Courts take seriously into consideration for regulating international protection issues in the context of internal and external activities of the Member States.

## **1.2 Theory and methodology**

As opposed to the old discourse which amalgamates the internal security with the enjoyment of refugee protection by third-country nationals the

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<sup>3</sup> Schuck, P., 1997, Refugee Burden-Sharing: A Modest Proposal, 22 Yale J. Int'l L. 289.

hypothesis running throughout the present paper is that we are witnessing a new dynamic in the way that refugee protection is being interpreted in the Courts' attempt to bridge the gap between the legitimate concerns of states and the realization of an adequate refugee protection framework. Putting it into the sphere of theory, the latest jurisprudential trends seem to indicate a tendency to balance two partly conflicting EU policy frames, *realism* and *liberalism*. To be sure, although it is undeniable that the majority of European states is built upon the ideas of democracy and human rights, one cannot dismiss the fact that states' own interests determine certain boundaries in the pursuit of democratic values.

So, on the one side of the spectrum there is the norm of state sovereignty which requires a tight and controlled entry of third country nationals into the European territory for the sake of internal security and stability (*realism*) and on the other side lies the humanitarian imperative with the individual in central concern, underlining the norms of human rights with focus on the right of individuals to receive protection and to have access to equitable asylum procedures (*liberalism*).<sup>4</sup> Although the Amsterdam Treaty<sup>5</sup> calls for a common European asylum and immigration policy in an '*area of freedom, security and justice*' (Title IV EC) and asserts the common commitment to liberal standards of international law (Art. 6 and Art. 7 EU), the measures adopted at the EU level are mainly instruments which pursue primarily political realism orientations, prioritizing the aim of securing borders

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<sup>4</sup> Lavenex, S., 2001, *The Europeanisation of Refugee Policies. Between Human Rights and Internal Security*, Aldershot/Burlington, Ashgate.

<sup>5</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1 [Treaty of Amsterdam].

against (irregular) immigration and (bogus) refugees, thus relegating the promotion of humanitarian standards, freedom of movement and the rule of law to the background. What follows is that despite being clear in substance, the rules governing democratic standards in the EU are difficult to enforce in practice. Under these circumstances and taking the realist nature of the EU *acquis*<sup>6</sup> into account, the recent developments in the European case law indicate and prioritize the need for certain procedural standards of human rights protection to guaranteeing the liberal freedoms and fundamental human rights for the individuals in question.

With this as the theoretical background, the present study analyzes the right to effective remedies and procedural guarantees for protection seekers through the recent jurisprudence of the European Courts. It uses the method of intertextual chains in order to address common features found in different judgments as well as the contextual analysis in order to understand what kind of ideology emerge in the area of procedure in migration and asylum cases and what are the implications stemming from this type of ideology. In particular, the contextual analysis, namely the whole environment which the judgments discussed come from and aim at, sheds light to the motives, grounds and implications of the Courts reasoning when interpreting the letter and spirit of existing legislation and international protection practices followed by states.

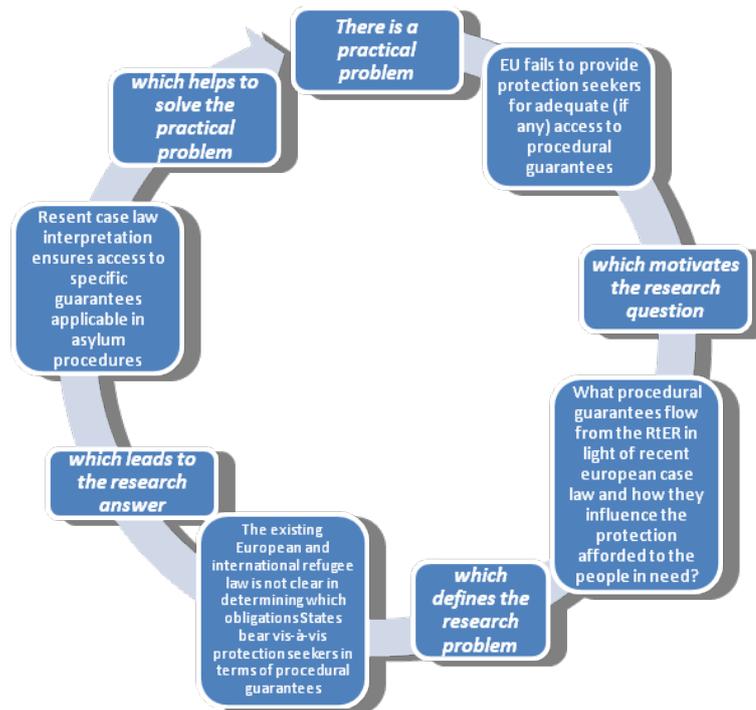
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<sup>6</sup> The term EU *acquis* applies to the totality of measures adopted in the fields of immigration and asylum policy. For a comprehensive account, see Guild, El., Niessen, J., 1996, *The Developing Immigration and Asylum Policies of the European Union*, The Hague: Kluwer.

## 1.3 Research goal and questions

The examination of the latest case law aims to denoting the promising character of the Courts' synthetic and pragmatic interpretation of the rules and principles, either included in national or European instruments or international treaties. Such approach, arguably, comes to strengthen the discussion in favor of the pivotal role of the right to an effective remedy as part of a fair determination procedure offering the individuals involved the right to claim their substantive rights, as well as in favor of coherence in the asylum system.

The present thesis is basically premised on the idea that refugee protection cannot be regarded as substantial, without guaranteeing effective procedural safeguards and remedial mechanisms. In that context, the judgments discussed share a common feature: they create an additional claim for applicants to the related Courts that represents the interests of individuals allegedly deprived by Member States' agents from a procedure enabling them to exercise their right to seek protection. In light of these, the paper aspires to analyze the content of refugee protection in its procedural dimension under the recent case law related to the right to an effective remedy and draw the necessary conclusions as to whether the Courts' interpretation may signal new perceptions in the area of international protection. A schematic depiction of the process of defining the research topic would be as follows:



As far as the research methodology and material is concerned the study was basically conducted through a review of the last two and a half years' (2011 - 2012 - May 2013) case law of the European Court of Human Rights, (hereinafter ECtHR or "European Court") and the Court of Justice of the European Union, (hereinafter CJEU or "Court of Justice") with focus on the right to an effective remedy in relation to protection seekers. The research included a review of available literature, the examination of a selection of the pertaining international and regional instruments, as well as related commentaries and human right organizations reports. It is noteworthy that, amongst the plethora of authors who have touched upon the issues discussed in that paper, I chose to look into the articles focusing on the impact of Community Law into the asylum regime and discuss reflections on relevant judgments.

## 1.4 Scope and delimitations

Admittedly, the ECtHR judgments are strongly case-related.<sup>7</sup> Equally, the CJEU judges on an *ad hoc* and *in concreto* basis. Nevertheless, the argumentation included in their most recent case law addresses practical factual circumstances instead of general and abstract questions which, arguably, contribute to cleaning the cloudy picture of the procedural aspect of EU Member State's obligations towards protection seekers. Having that in mind, I specifically chose to deal with the ECtHR and the CJEU as they have gradually established themselves as the two key refugee law judicial mechanisms in Europe and not to expand -due to the limited space- to cases of other human right mechanisms such as UN Committees.

## 1.5 Outline

As already mentioned, this paper looks into the recent Courts' case law, underlines the innovations related to procedural safeguards in the international protection field and draws some conclusions of more extensive character and application. Particularly, **Chapter 2** provides background on the right to an effective remedy, emphasizing on its role of substantiating and linking together scattered provisions of refugee protection of international and regional character. **Chapter 3** tracks the development of the procedural aspect doctrine through the Courts' case law. It looks thoroughly into the way that Courts are interpreting the content and function of the right to an effective remedy, underlines the innovations and makes

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<sup>7</sup>Fischer-Lescano, A., Löhr, T. & Tohidipur, T., 2009, Border Controls at Sea: Requirements under International Human Rights and Refugee Law, *Int. J Refugee Law* 21(2): 272.

comparisons in terms of the scope of the provision between the rights provided in the European Convention of Human Rights (ECHR)<sup>8</sup> and EU Law. **Chapter 4** attempts a synthesis of findings based on earlier analysis and examines the implications of the Courts' expansive interpretation and its impact on intra-EU relations (Dublin returns) and external border management (interception on the high seas). It further reckons with the complications of the Courts' interpretation and finally, discusses alternatives in an effort to expand Courts' findings and suggest some follow up actions driven by the EU panoply that seem to have the dynamic of strengthening Europe's approach to international protection issues.

## 1.6 Definitions

A word about terminology: The term "asylum" in this paper takes an elastic understanding referring to the institution in its broader sense rather than being limited exclusively to refugee status. It thus, encompasses not only the protection afforded to individuals qualifying as refugees under Article 1A of the Convention relating to the Status of Refugees (hereinafter 1951 or Refugee Convention)<sup>9</sup> but also the subsidiary protection, temporary protection, protection for humanitarian reasons or statelessness. That being said the terms "refugee" and "protection seeker" as used in this paper include everyone who tries to enter Europe in search of protection in a broader sense that is why the terms "asylum" and "international protection" are being used interchangeably throughout the present study. Further, the

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<sup>8</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) ETS 005

<sup>9</sup> Convention relating to the Status of Refugees (adopted 28 Jul. 1951, entered into force 22 Apr. 1954), 189 UNTS 137.

term “country of origin” is used here to mean the country in which the applicant originally feared of being persecuted. The phrase “destination country” refers to the country in which the applicant hopes to settle and is now applying for asylum, while the term “third country” refers to the particular third country to which the destination country is contemplating return, encompassing interchangeably both the first country of asylum as well as mere safe third country.

## **2 International and EU Asylum Law: A “give and take” relationship**

This chapter indicates how the relevant regional and international asylum provisions within the Courts’ jurisprudence are tightly interconnected focusing on the protection afforded to people in need under the Common European Asylum regime and the Charter of Fundamental Rights of the European Union. It mainly aims at presenting the specific framework served as the basis for the Courts’ *ratio decidendi*. Section 2.1 concentrates on the nexus between the *non-refoulement* principle and the right to an effective remedy while section 2.2 discusses the link between EU legislation and the ECHR provisions.

### **2.1 The Right to an effective remedy in International Law: The nexus to *non refoulement* principle**

It is crucial before the analysis of the Courts’ submissions on the matters discussed in this paper, to consider the bigger picture, which will definitely be invoked many times throughout the whole research. This picture cannot but include the link between the right to an effective remedy which is the one pole and the essence of refugee protection, being the other. To that end the contact element of the *non-refoulement* principle has to be discussed. International law and specifically the 1951 Convention provides for refugee status. There is no right to asylum in international law. Art. 14 of the

Universal Declaration of Human Rights (UDHR<sup>10</sup>) provides, only a right to seek and to enjoy asylum, not a right to asylum. Furthermore, the UDHR is only a General Assembly Resolution and is not automatically legally binding. To be sure, some parts of the UDHR reflect customary international law or have been subsumed within rights in the International Covenant on Civil and Political Rights or International Covenant on Economic, Social and Cultural Rights, but Art. 14 was not included in either Covenant and state practice is not sufficiently consistent to suggest that Art. 14 has achieved customary status. The best that can be said is that aspects of Art. 14 are necessary for the proper implementation of *non-refoulement*. On the other hand, the draft Treaty Establishing a Constitution for Europe<sup>11</sup> provides for a right to asylum in Art. II-18 but continues that it shall be ‘*guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Constitution*’ – there is no right to asylum in the 1951 Convention. The right that pursuant to the 1951 Convention refugees do possess is *non-refoulement* under Article 33, namely the right not to be sent back to a state where the refugee’s life or liberty would be threatened. However, it has been established that individuals qualifying as refugees under the 1951 Convention acquire more than the right of *non-refoulement* which undoubtedly stands out as the

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<sup>10</sup> United Nations General Assembly resolution 217 A (III), Paris 10 December 1948.

<sup>11</sup> Adopted by consensus by the European Convention on 13 June and 10 July 2003 Submitted to the President of the European Council in Rome, 18 July 2003 (2003/C 169/01).

centerpiece. Apart from that, they acquire a bundle of associated rights to fair and humane treatment rooted in both domestic and international law.<sup>12</sup>

Following the same line of thought, in his concurring opinion in *Hirsi Jamaa and Others v Italy* (Hirsi) case<sup>13</sup> Judge Pinto De Albuquerque argues that the *non-refoulement* obligation has two procedural consequences: the duty to advise an alien of his or her rights to obtain international protection and the duty to provide for an individual, fair and effective refugee status determination and assessment procedure. Discharging the *non-refoulement* obligation, he continues, requires an evaluation of the personal risk of harm, which can only take place if aliens have access to a fair and effective procedure by which their cases are considered individually. These procedural guarantees apply to all asylum seekers regardless of their legal and factual status, as has been recognized in international refugee law,<sup>14</sup> universal human rights law<sup>15</sup> and regional human rights law.<sup>16</sup> Besides, if

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<sup>12</sup> One of the few provisions of the 1951 Convention which delineates a specific right in nonrelative terms is Art. 16.1 access to court. See Legomsky, S., 2003, Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection, 15 Int'l J. Refugee L. 612.

<sup>13</sup> ECtHR, *Hirsi Jamaa and Others v Italy*, no 27765/09, 23 February 2012.

<sup>14</sup> Executive Committee of UNHCR Conclusion No. 82 (1997), par. d(iii) and Executive Committee Conclusion No. 85 (1998), par. q); UNHCR, Handbook on Procedures and Criteria of Determining Refugee Status, HCR/IP/4/Eng/Rev.1, 1992, par. 189-223 and International Law Association, Resolution 6/2002 on Refugee Procedures (Declaration on International Minimum Standards for Refugee Protection) 2002, par. 1, 5 and 8.

<sup>15</sup> See the judgment of the International Court of Justice of 30 November 2010 in the Ahmadou Sadio Diallo case, A/CN.4/625, par. 82, in the light of Article 13 of the International Covenant on Civil and Political Rights and Article 12 (4) of the African Charter on Human and People's Rights; UN Committee Against Torture, *SH v. Norway*, Communication No. 121/1998, 19 April 2000, CAT/C/23/D/121/1998 (2000), par. 7.4, and *Falcon Rios v. Canada*, Communication No. 133/1999, 17 December 2004, CAT/C/33/D/133/1999, par. 7.3, Conclusions and Recommendations: France, CAT/C/FRA/CO/3, 3 April 2006, par. 6, Conclusions and Recommendations: Canada, CAT/C/CR/34/CAN, 7 July 2005, par. 4 (c) and (d), Consideration of Reports Submitted by States Parties under article 19 of the Convention, China, CAT/C/CHN/CO/4, 21 November 2008, par. 18 (D); UN Human Rights Committee, General Comment No. 15: The position of Aliens under the Covenant, 1986, par. 10; UN Committee on the elimination of racial discrimination, General rec. 30, Discrimination against Non-Citizens, CERD/C/64/Misc.11/rev.3, 2004, par. 26; UN Special Rapporteur on the prevention of

refugee status is accepted to be declaratory rather than constitutive, as is generally acknowledged,<sup>17</sup> then preventing a refugee from accessing the status determination procedures within a state can be the equivalent of *refoulement*; that being said, Article 14 of the UDHR, as such with its right to seek asylum, is a necessary adjunct to *non-refoulement*. This argument is in line with the paper's main submission that refugee protection cannot be regarded as substantial, without guaranteeing the right to seek protection as such through effective procedural safeguards and remedial mechanisms, given that they are so intertwined so as to be regarded as two sides of the same coin. In that context, the right to an effective remedy constitutes a significant component of the procedure provided to a protection seeker as a consequence of his or her fundamental right not to be *refouled*.

Additionally, *non-refoulement* is custom and protects anyone whose life or freedom would be threatened, not just Article 1A(2) refugees who are the beneficiaries of Article 33.<sup>18</sup> Customary *non-refoulement* draws on the prohibition of torture, inhuman or degrading treatment or punishment provided in Article 3 of the UN's Convention against Torture and Article 3 of the ECHR. Returning anyone to where they would face torture, inhuman

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discrimination, final report of Mr. David Weissbrodt, E/CN4/Sub2/, 2003, 23, par. 11; and UN Special Rapporteur on the Human Rights of Migrants Mr Jorge Bustamante, Annual report, Doc. A/HRC/7/12, 25 February 2008, par. 64.

<sup>16</sup> Inter-American Commission, Haitian Centre for Human Rights et al. v. US, case 10.675, par. 163, in view of Article XXVII of the American Declaration of Human Rights, and the judgment of the Court of Justice of the European Union of 28 July 2011, in the Brahim Samba Diouf case (C-69-10), in the light of Article 39 of the Directive 2005/85/CE.

<sup>17</sup> These principles are well settled. See e.g. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCH/IP/Eng/REV.1 (1979, reedited 1992), par. 28; UNHCR, Note on the Treatment of Persons who seek Asylum at a Country's Port of Entry (Nov. 1991) reproduced in UNHCR Refworld – Legal Information (1998), par. 3.1.

<sup>18</sup> See Lauterpacht and Bethlehem, 2003, 'The Scope and Content of the Principle of Non refoulement: Opinion' in E. Feller, V. Türk and F. Nicholson (eds.), Refugee Protection in International Law, 87.

or degrading treatment or punishment from within Europe would breach the State's international human rights law obligations. That is why international law requires an individualized, case-by-case determination of whether to return the applicant to a third country.

It is noteworthy here that the Tampere European Council Meeting of October 1999 added some important parameters for any analysis of the European approach to international refugee law. The Presidency Conclusions provide that the European Council 'reaffirms the importance the Union and Member States attach to absolute respect of the right to seek asylum and that the establishment of the Common Asylum Policy would be 'based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulement*'.<sup>19</sup> In light of that affirmation, it is being established in the Courts' case law that in order to meet its obligations under the 1951 Convention, a destination country may not return an asylum seeker to a third country until the entire determination process, including appeal, has been completed. Only in that case, there can be adequate assurance that the person's Convention rights, including the right of *non-refoulement*, will be observed. Such an approach was adopted in most of the cases discussed below, including those dealing exclusively with deportation issues and not specifically with refugee cases. Thus, I reserve the relevant comments for Chapter 3 where the actual analysis of the issues touched upon here, takes place.

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<sup>19</sup> Tampere European Council, 15 and 16 October 1999, Presidency Conclusions, 16/10/1999 - Nr: 200/1/99.

However and before the analysis, another contact element that will contribute to a large extent to our understanding of the bigger picture here, is the interaction of the ECHR and EU *acquis* provisions related to refugee rights and the right to an effective remedy.

## **2.2 ECHR and its link with EU's internal legal order**

As stated earlier, the novel part of the present thesis is the determination of the procedural aspect of the EU Member State's obligations *vis-à-vis* people seeking protection through a constructive synthesis of the relevant legislation, be it regional and international. In light of this combined with the fact that we are putting two different Courts -the ECtHR and the CJEU- under the microscope, the need to examine both legislative backgrounds that serve as their platform seems absolutely necessary.

To begin with, the Treaty on European Union (TEU),<sup>20</sup> adopted in 1992, is a significant step towards the integration of human rights concerns in EU law, policy and regulation. It converts these concerns for human rights into obligations of the Union to "*respect freedoms, fundamental human rights, in accordance with the protections afforded by the ECHR, as those that arise from the constitutional traditions common to the Member States as general principles of Community law*".<sup>21</sup> By amending much of the Maastricht TEU as well as the other previous treaties, the Amsterdam Treaty formally incorporates fundamental human rights into the institutions of the EU. Additionally, the jurisdiction of the CJEU has been expanded to include

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<sup>20</sup> Treaty on European Union (Maastricht text), July 29, 1992, O.J. C 191/1 [Maastricht TEU].

<sup>21</sup> Article 6.3.

matters relating to immigration, asylum, visas, border crossings, and judicial criminal cooperation, and at one level the EU has established the first international refugee tribunal, which is now required to apply human rights standards as set out in the ECHR to the acts of Community institutions.<sup>22</sup>

Where international law is discussed it is largely confined to the ECHR and the extent to which its provisions form part of the EU's internal legal order (via 'general principles of law' and Article 6 TEU) and the legal weight of the Charter of Fundamental Rights of the European Union ('Charter')<sup>23</sup> rather than by virtue of any obligations which might be incumbent on the EU directly under international law.<sup>24</sup> Scholars tend to concentrate more on this because the EU has progressively brought human rights into its internal regime, giving them a higher profile within the treaties (Arts 6 and 7 TEU) and with the Charter.

It is important to note here that proclaimed in 2000, the Charter has become legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009. According to Guild, the Charter is "*neither a national constitution nor an international human rights treaty. Instead it belongs to the EU legal order and depends for its interpretation and enforcement on the mechanisms of EU law*". In this regard, he continues, "*it imposes obligations on state authorities that are not amenable to modification. Its definitive interpretation is the preserve of the CJEU and when provided is binding on both national administrations across the Member States and*

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<sup>22</sup> Art. 6.2.

<sup>23</sup> Charter of Fundamental Rights of the European Union, 2000/C 364/01.

<sup>24</sup> Alston and Weiler, 1998, An Ever Closer Union in Need of a Human Rights Policy, 9 *EJIL*, 658; Engel, 2001, The European Charter of Fundamental Rights, A Changed Political Opportunity Structure and its Normative Consequences, 7 *ELJ*, 151.

*national courts*”.<sup>25</sup> In that context, it is evident that the rights included in the Charter are to a certain extent a useful complement of the rights embedded in the ECHR.<sup>26</sup>

With regards in particular to the principle of effective judicial protection, it’s settled case-law in the CJEU that it constitutes a general principle of EU law stemming from the constitutional traditions common to the Member States, enshrined in Article 6 of the ECHR.<sup>27</sup> As specifically argued in *Samba Diouf* case, there is a direct link between the right to an effective remedy under Article 47 of the Charter and Article 13 of the ECHR, although the protection afforded in the Charter is more extensive.<sup>28</sup> That being said the content of the right to judicial protection recognized by Article 47 must be defined by reference to the meaning and scope conferred on that right by the ECHR (Article 52(3) of the Charter), but, once defined, its scope must be that described in the words of the Charter itself, the scope enjoyed by the ‘*rights and freedoms guaranteed by the law of the Union*’.<sup>29</sup> What seems to be the basis of the above Court’s reasoning is the model of coherence,<sup>30</sup> namely the conception that a legal justification which is supported by a fairly coherent system contributes to practical rationality and

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<sup>25</sup> E. Guild, 2010, *The European Union after the Treaty of Lisbon: Fundamental Rights and EU Citizenship*, CEPS Liberty and Security in Europe Series, CEPS, Brussels, p. 6.

<sup>26</sup> Brouwer, E., 2005, *Effective Remedies for Third Country Nationals in EU Law: Justice Accessible to All?* European Journal of Migration and Law 7: 221.

<sup>27</sup> See, for example, Case 222/84 *Johnston* [1986] ECR 1651, par. 18 and 19; Case C-50/00 *P Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, par. 39; Case C-279/09 *DEB* [2010] ECR I-0000, par. 29; Case C-69/10, *Brahim Samba Diouf* [2011] par. 35.

<sup>28</sup> CJEU, Case C-69/10, *Brahim Samba Diouf v Ministre du Travail, de l’Emploi et de l’Immigration*, Opinion of Advocate General CRUZ VILLALÓN delivered on 1 March 2011 (2) par. 38; See also the Explanations relating to the Charter of Fundamental Rights (2007/C 303/02), OJ 303.

<sup>29</sup> *Ibid*, Opinion, par. 42.

<sup>30</sup> For the concept of coherence see, among others: Dworkin, Ronald. 1986. *Law's Empire*. London: Fontana.

finally to a more coherent decision. This point us to the main argument of the present thesis that the Courts' reliance on cross-connections between regional and international legislation is of great value to immigration and refugee cases since, if nothing else, it supports elementary demands of justice<sup>31</sup> taking primarily into account the main contextual and factual factors of each and every case. In other words, the product of such a reasoning process is a decision legally justified by virtue of its coherence with established law (letter and spirit) and principles as well as with each case's factual circumstances.<sup>32</sup>

The influence of the activity of the Council of Europe and the jurisprudence of the Strasbourg Court on Article 13 of the ECHR can clearly be traced in the relevant provisions of the Charter. The special significance given to the ECHR is a positive step in the EU's recognition of the relevance of human rights principles outside the Community system to developments within the Community system.<sup>33</sup> However, it should be born in mind that the EU is not bound to comply with the letter of the ECHR or case law of the ECtHR, rather the acceptance of any right as part of the general principles of Community law is taken on a case-by-case basis.<sup>34</sup> On the other hand the EU is pursuing harmonization on an impressive range of fronts,<sup>35</sup> an

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<sup>31</sup> MacCormick, Neil, 1984, Coherence in Legal Justification. In *Theory of Legal Science*. Ed. A. Peczenik et al., 243, Dordrecht: Reidel.

<sup>32</sup> See Amaya, A., 2011, Legal Justification by Optimal Coherence. *Ratio Juris*. Vol. 24 No. 3, p. 317.

<sup>33</sup> Tawhida, A., and Israel de Jesús Butler, 2006, The European Union and Human Rights: An International Law Perspective, *EJIL* Vol. 17(4), 774.

<sup>34</sup> For example, Right to a judicial remedy—Case 222/84 Johnston v. Chief Constable of the RUC [1986] ECR 1651.

<sup>35</sup> For general accounts of the harmonization carried out in the field of asylum in Europe see Carol Harlow and Elspeth Guild (eds), *Implementing Amsterdam: immigration and asylum rights in EC law*, Oxford: Hart Publications 2001; Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen, *New Asylum Countries? Migration Control and Refugee*

objective mirrored in most of the discussed judgments the realization of which remains to be seen after the following analysis. The initiatives under the Common European Asylum System on which the Courts based their interpretation of the right to an effective remedy, discussed in detail below, include the Regulation EC 343/2003 on the responsibility for the application of asylum in the EU Member States (or the Dublin II Regulation)<sup>36</sup> as well as the Council's Qualification (QD)<sup>37</sup> Asylum Procedures (APD)<sup>38</sup> and Reception Conditions (RCD)<sup>39</sup> Directives.

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*Protection in an Enlarged European Union*, The Hague: Kluwer Law International 2002; and Gisbert Brinkmann, 'The Immigration and Asylum Agenda', 10 *European Law Journal* 2004, pp. 182–199.

<sup>36</sup> Council Regulation 343/2003/EC, OJ L 50, 25.02.2003.

<sup>37</sup> Council Directive 2011/95/EU of 13 December 2011 *on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted* OJ L 337 replacing the Council Directive 2004/83/EC of 29 April 2004 *on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or persons otherwise in need of international protection and the content of the protection* OJ L 304.

<sup>38</sup> Council Directive 2005/85/EC of 1 December 2005 *on minimum standards on procedures in Member States for granting and withdrawing refugee status* OJ L 326.

<sup>39</sup> Council Directive 2003/9/EC of 27 January 2003 *laying down minimum standards for the reception of asylum seekers in the Member States* OJ L 31.

### **3 Analyzing the concept of effective protection**

After having looked through the focal points of international protection and the relevant legal background, it seems consistent to continue to the actual analysis of the Courts' findings, in order to draw some conclusions on the right to remedial mechanisms and procedural safeguards which, in combination, compose the concept of effective protection. Looking at the latest trends in the jurisprudence developed by the European Court and the Court of Justice related to refugee protection, one notices the Courts' focus on the right to an effective remedy as enshrined in Article 13 of the ECHR taken alone and in connection with Article 3 (prohibition against ill-treatment), Article 4 Protocol 4 (prohibition of collective expulsions), Article 8 (protection of family life), as well as in connection with Article 47 of the EU Charter (right to an effective remedy), Article 48 (right of defense), Article 41 (right to good administration) and Article 18 (right to asylum). Regard will also be made to Article 39 of the Procedures Directive (the right to an effective remedy) as well as to Articles 3 and 19 of the Dublin II Regulation.

Although Article 6 (right to a fair and public hearing) which lies at the heart of effective judicial protection cannot be ignored, it is fair to note here that it is not directly relevant to the subject of this study since it has mainly been discussed by the Courts in cases of expulsion proceedings, related to the determination of the applicant's civil rights and obligations or of criminal

and administrative offences.<sup>40</sup> In particular it is examined when there seems to be a risk of “flagrant denial of justice” in the country of return,<sup>41</sup> usually together with Article 1 Protocol 7 (procedural safeguards relating to the expulsion of aliens). In light of this, the present analysis will be limited on Article 13 which provides for a more general obligation on States than the obligation to be found in Article 6 or Article 1 of Protocol 7, successfully invoked by protection seekers and refugees.<sup>42</sup>

Having the *M.S.S. v. Belgium and Greece* (M.S.S.)<sup>43</sup> novel judgment as the starting point, I am examining a series of judgments of both the Strasbourg and the Luxembourg Court, dealing with asylum and *non-refoulement* cases and focusing on the notion of effective protection in all its possible dimensions. By digging into the judgments in question I aspire to underline the evolving and rising tendency of the judiciary to intervene -so far as their share allows- and specify the procedural rules which serve as catalysts for the realization of the pertaining substantive rights of the applicants. Both Courts have a rich case law related to violations of the right to an effective remedy, however, it has been in the last three years that this right attained so much attention especially with regard to immigration and refugee law cases. Although mainly examined in conjunction with other rights which serve a supporting role to the legal reasoning of most judgments, the right to an

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<sup>40</sup> Lambert, H., 2005, The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities, *Refugee Survey Quarterly*, Vol. 24; 2 p. 44-45. See for example ECtHR, *Maaouia v. France*, no. 39652/98, 5 October 2000.

<sup>41</sup> See, among others, ECtHR, *Soering v. UK*, par.113; *Drozdz and Janousek v. France and Spain* (1992), par. 110; *Bolat v. Russia*, no 14139/03, 5 October 2006, par. 83.

<sup>42</sup> ECtHR, *Silver and Others v. UK*, no. 7136/75, 25 March 1983, para.109.

<sup>43</sup> ECtHR, *M.S.S. v Belgium and Greece*, no. 30696/09, 21 January 2011.

effective remedy became in some cases the critical point of the Courts' *ratio decidendi*.

Before diving into the merits of each and every case, it is necessary to map the key issues discussed below, the synthesis of which will finally provide us with a codification of the States' obligations towards protection seekers from a procedural standpoint, defining the practical meaning of effective protection. Those issues are related to: i) the principle of subsidiarity and procedural autonomy of states, ii) the content and scope of the right to an effective remedy which includes the discussion of presumptions, burden of proof and good administration, and finally iii) the case of interception on the high seas with procedural guarantees.

### **3.1 The margin of states' discretion in procedural issues**

There is no safer way to begin defining states' duties than by first acknowledging their limits. As it has been stressed out repeatedly by the ECtHR the states enjoy a certain margin of appreciation when dealing with asylum and immigration cases, given that pertaining policies are considered a form of territorial sovereignty exercise. According to the Court's case-law, Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens.<sup>44</sup> Specifically as far as the right to an effective remedy is concerned, in the

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<sup>44</sup> See, among many other authorities, ECtHR *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, no 9214/80, 28 May 1985, par. 67, Series A no. 94, and *Boujlifa v. France*, no 25404/94, 21 October 1997, par. 42, Reports of Judgments and Decisions 1997-VI.

recent *I.M. v. France* (I.M.) judgment the Court reiterated that in asylum and immigration cases it confines itself, in accordance with the subsidiarity principle, to verifying that the domestic procedures are effective and that they safeguard human rights.<sup>45</sup> This argument inspired the CJEU Advocate General in the *H.I.D.* case where he expressed the opinion that as regards the organization of procedures and the determination of the relevant time-limits, it is the national procedural law that must be applied, in accordance with the principle of the procedural autonomy of Member States.<sup>46</sup> Equally, in *M.S.S.* case the ECtHR seems to apply the principle of subsidiarity as it transpires from Article 1 of the ECHR according to which, it falls primarily to the states to guarantee and implement the rights enshrined in the Convention<sup>47</sup>. That is why it did not itself examine the actual asylum applications or verified how the states honor their obligations under the 1951 Convention, rather its main concern was whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled. In particular the Court attaches this subsidiary character of the machinery of complaint in Article 13 -and 35 § 1- of the Convention.<sup>48</sup> As stressed by Judge Villiger in his concurring opinion the function of the Convention and the Court remains to provide a European minimum standard. Relevant to that is the mantra of the Strasbourg Court that the right to asylum is not contained in either the

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<sup>45</sup> ECtHR, *I.M. v. France*, no 9152/09, 2 February 2012, par. 136; See also *M. and Others v. Bulgaria*, no. 41416/08, 26 July 2011, par. 128.

<sup>46</sup> CJEU, Case C-175/11, *H.I.D.*, *B.A. v Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland*, Attorney General, Opinion of Advocate General BOT delivered on 6 September 2012, par. 63

<sup>47</sup> ECtHR, *Handyside v. the United Kingdom*, no 5493/72, 7 December 1976 par. 48, Series A no. 24; *M.S.S. v Belgium and Greece*, no. 30696/09, (GC) 21 January 2011, Concurring Opinion of Judge Villiger.

<sup>48</sup> *M.S.S.* cited above, par. 286-287

Convention or its Protocols<sup>49</sup> the responsibility of states is however engaged in cases of expulsion, extradition or any measure of removal that can give rise to Article 3 of the Convention.<sup>50</sup> That is why the ECtHR maintains that the issue to be examined in refugee cases is whether or not the available domestic remedies meet the requirement of effectiveness under Article 13 and the Court's case-law.<sup>51</sup>

Likewise, the CJEU adopts an almost identical approach. In his opinion in *Samba Diouf* case, the Advocate General underlines that in so far as the EU on the one hand, explicitly provides for the right to an effective remedy in the context of procedures for granting or withdrawing refugee status and on the other hand, requires the Member States to discharge their competence to organize those procedures in particular, and, moreover, to do so under conditions which ensure that that right is fulfilled, then the procedural autonomy of the Member States does not create an obstacle to its effectiveness.<sup>52</sup> Furthermore, in the Joined Cases *N.S. and M.E.* the Court of Justice, concluded that the margin of discretion enjoyed by the Member States as to the specific procedural form of the effective remedy within the

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<sup>49</sup> See ECtHR, *Vilvarajah and Others v. the UK*, no 13163/87, 30 October 1991, par. 102, Series A no. 215, and *Ahmed and Others v. Austria*, no 22954/93, 17 December 1996, par. 38, Reports 1996-VI.

<sup>50</sup> See ECtHR, *Soering v. the UK*, no 14038/88, 7 July 1989, par. 90-91; *Vilvarajah and Others*, cited above, par. 103; *Ahmed*, cited above, par. 39; *H.L.R. v. France*, no 24573/94, 29 April 1997, par. 34, Reports 1997-III; *Jabari v. Turkey*, no. 40035/98, 11 July 2000, par. 38, ECHR 2000-VIII; *Salah Sheekh v. the Netherlands*, no. 1948/04, 11 January 2007, par. 135; *Hirsi Jamaa and Others v. Italy*, no 27765/09, (GC) 23 February 2012, par. 114.

<sup>51</sup> ECtHR, *M. and Others* cited above, par. 128.

<sup>52</sup> CJEU, *Brahim Samba Diouf*, Opinion of Advocate General, cited above, par. 47.

meaning of Article 47 of the Charter is limited by the requirement that the effectiveness of the remedy must always be guaranteed.<sup>53</sup>

The issue of how the Courts adjust the application of the procedural autonomy principle to immigration and refugee law cases is interesting because a double goal is simultaneously achieved. On the one hand they deal with the sovereignty “thorn” with the necessary discretion and at the same time they justify and robust their role as monitoring mechanisms on human rights and protection issues. In that context, it is being suggested that although the general rule is that Member States have procedural autonomy, national procedural rules may not render practically impossible or excessively difficult the exercise of rights conferred by EU law. Consequently, Contracting States are definitely afforded some discretion as to the manner in which they conform to their obligations under both the CEAS and ECHR provisions, but there are certain procedural guarantees that have to have in place so as for the rights of protection seekers to be ensured. For the sake of precision, the meaning of the word “certain” in the previous sentence is to be discussed in the following paragraphs.

## **3.2 The content and scope of the right to an effective remedy**

### **3.2.1 The ‘effectiveness’ test**

In order to give the right to effective remedies flesh and bones, one needs to consider the various elements composing the notion of effectiveness.

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<sup>53</sup> CJEU, Joined Cases N.S. (C-411/10) v Secretary of State for the Home Department and M.E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, (GC) 21 December 2011, par. 160.

Starting from the *M.S.S.* case, the European Court held that Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief.<sup>54</sup> What values here is that although the Court accepts that the scope of the Contracting States' obligations under Article 13 varies depending on the nature of the applicant's complaint it sets the requirement of effectiveness –in practice as well as in law- as a common threshold. Interestingly enough, the Court for the first time in *M.S.S.* case specified the requirements corresponding to the demands of effectiveness under Article 13 of the Convention. Without focusing on the outcome of the remedy, the Strasbourg Court insisted in the procedure that states should have in place in order to enable the applicants to ask and be granted the form of protection they are entitled to. Allow me here to parallel the Court’s findings to a set of principles mainly used for assessing economic, social and cultural rights in a policy framework, namely the principles of availability, accessibility, acceptability and quality.<sup>55</sup>

First of all the Court submitted that the remedies have to be available in the sense that their exercise must not be unjustifiably hindered by the acts or

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<sup>54</sup> ECtHR *M.S.S.* cited above, par. 288; *Auad v. Bulgaria*, no. 46390/10, 11 October 2011, par. 122.

<sup>55</sup> See for example Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health (Art. 12 of the ICESCR) (2000), par. 12.

omissions of the authorities of the respondent State<sup>56</sup> (*availability*). Further, it underlined the respondent State's obligation to facilitate the protection seekers' access to a fair and effective international protection system and their communication with the competent authorities, their access to legal aid if and when necessary and the reception of the necessary information concerning the procedure<sup>57</sup> (*physical, economic, information accessibility*). The Court also pointed out that the procedure has to be sensitive in vulnerabilities and culture, gender or age appropriate, i.e. respectful of the special characteristics of individuals, minorities, as well as designed to respect confidentiality and improve the human right status of those concerned<sup>58</sup> (*acceptability*). And finally it maintained that the system in place should be able to guarantee a proper review of an international protection request and/or deportation order with suspensive effect satisfying the needs of legal certainty and protection required in such matters<sup>59</sup> (*quality*). The assessment of all the above elements led the Court in *M.S.S.* case to conclude that because of the shortcomings of the procedure in Greece<sup>60</sup> the applicant remained without adequate protection.

It is important to note here that *M.S.S.* presents an interesting element as rather decisive: the relationship between rights and procedures, which may

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<sup>56</sup> ECtHR, *M.S.S.* cited above, par. 288-289.

<sup>57</sup> ECtHR, *M.S.S.* cited above, par. 304, 318-319.

<sup>58</sup> ECtHR, *M.S.S.* cited above, par. 263.

<sup>59</sup> ECtHR, *M.S.S.* cited above, par. 293.

<sup>60</sup> ECtHR, *M.S.S.* cited above, par. 301 “*The Court notes, firstly, the shortcomings in access to the asylum procedure and in the examination of applications for asylum: insufficient information for asylum seekers about the procedures to be followed, difficult access to the Attica police headquarters, no reliable system of communication between the authorities and the asylum seekers, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, lack of legal aid effectively depriving the asylum seekers of legal counsel, and excessively lengthy delays in receiving a decision. These shortcomings affect asylum seekers arriving in Greece for the first time as well as those sent back therein application of the Dublin Regulation.*”

include civil and political rights as well as social rights. So, an unfair procedure can breach a social right too. Specifically in this case the Court found that systematic administrative deficiencies combined with the failure of Greek government to satisfy the minimum requirements as regards the asylum seekers reception conditions, amounts to inhuman and degrading treatment. In that context and given that administrative procedures make fundamental rights work, the Court recognized the double perspective of the right to an effective remedy as a fundamental right which is both procedural and substantial.<sup>61</sup>

The spirit of that judgment appears to have influenced the CJEU in the *Cimade and Gisti* Case. The Court held that asylum seekers are allowed to remain not only in the territory of the Member State in which the application for asylum is being examined but also in that of the Member State in which that application was lodged, as required by Article 3(1) of Reception Conditions Directive and that State is obliged to grant the minimum conditions for reception of asylum seekers laid down in RCD to that asylum seeker even though under the Dublin Regulation the State decided to call upon another Member State, as the State responsible for examining his application for asylum, to take charge of or take back that applicant.<sup>62</sup> Following that reasoning the Court interpreted the provisions of the Directive in an expansive way ensuring full respect for human dignity and promoting the application of the Charter. Thus, it concluded that the relevant provisions apply not only with regard to asylum seekers present in

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<sup>61</sup> See here Dr. Juli Ponce, 2005, Good Administration and Administrative Procedures, *Indiana Journal of Global Legal Studies*, V. 12 (2), p. 577.

<sup>62</sup> CJEU, Case C-179/11 *Cimade, GISTI v Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, 27 September 2012, par. 48-50.

the territory of the Member State responsible pending that State's decision on their application for asylum but also to asylum seekers awaiting a decision on which Member State will be held responsible for their application. Such emphasis to the right to enter the territory and remain there under conditions that respect the applicant may definitely signal an inclusive approach of the right to receive protection.

The same and even more advanced approach was maintained by the ECtHR in *Hirsi* case. The challenge for the Court in that case, was undoubtedly of greater scale given that the situation as such (people aboard military ships on high seas) might have possibly allowed for a rather reserved interpretation. Nevertheless, the Strasbourg Court followed the same line of reasoning, suggesting that the procedure is a factor that cannot be bypassed no matter what the particularities of every single case might be, using the right to an effective remedy as the platform from which a series of guarantees for protection seekers begin. In particular the Court emphasized on the right of the applicants to obtain sufficient information, enabling them to gain effective access to procedures and substantiate their complaints, a right essential for anyone subject to a removal measure, the consequences of which are potentially irreversible, according to the judgment's wording.<sup>63</sup>

Additionally, the Strasbourg Court dealt with the right to an effective remedy in relation to detention conditions and removal. In *R.U. v. Greece* and *Ahmade v. Greece* cases, the Court found a violation of Article 13 in conjunction with Article 3 on two grounds: the first related to the appalling detention conditions and the second to the removal itself. It specifically

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<sup>63</sup> ECtHR, *Hirsi*, cited above, par. 202, 204.

submitted that the lack of remedies enabling the applicants to complain about their detention in combination with the deficiencies in Greek asylum system -already observed in *M.S.S.* judgment- form a direct infringement of Article 13. It also found a violation of Article 13 in conjunction with Article 3 in respect of the risk of the applicants' removal, arguing that the applicants were still at risk of being sent back without having the opportunity of their asylum application being properly examined, despite there being substantial grounds for believing that they would be subjected to treatment contrary to Article 3 of the Convention if sent back there.<sup>64</sup>

Pursuant to the reasoning in *M.S.S.*, it seems that it's the *availability* and *quality* criteria that are not met here, due mainly to the lack of a rigorous scrutiny of applicants' complaints by a national authority. In that context, the Court once again emphasized on the absence of an effective procedure accessible for the applicants, given on the one hand that the Greek courts did not have power to examine the living conditions in detention centers for clandestine foreigners or to order the release of a detainee on the grounds of such conditions and on the other hand Greece's asylum legislation was not being applied in practice and the asylum procedure was marked by such major structural deficiencies that asylum seekers had very little chance of having their applications and their complaints under the Convention seriously examined.

Discussing about expulsion it is equally noteworthy the reference to the *M. and Others v. Bulgaria* case, where the ECtHR attached particular importance in the deficiency of proceedings for judicial review of an

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<sup>64</sup> ECtHR, *R.U. v. Greece*, no 2237/08, 7 July 2011, par. 82-83; *Ahmade v. Greece*, no 50520/09, 29 September 2012, par. 88, 112, 114.

expulsion order citing national security grounds. In this case the Court apart from the availability of a remedy criterion, it added the requirement of proper examination of necessity and proportionality issues to the effectiveness test. In particular it held that the failure of the national court to carry out a meaningful scrutiny of the executive's assertion that the applicant presented a national security risk, and to assess whether the interference with the applicants' rights met a pressing social need and was proportionate to any legitimate aim pursued undermined the effectiveness of this remedy with regard to the requirements of Article 13 in conjunction with Article 3.<sup>65</sup>

Due regard should be paid here to the significance that the Strasbourg Court places on the issue of redress, speaking of fair and effective remedial mechanisms. In *M.S.S.* case, it reiterated that while the effectiveness of a remedy does not depend on the certainty of a favorable outcome for the applicant, the lack of any prospect of obtaining adequate redress raises an issue under Article 13.<sup>66</sup> Likewise in *Auad v. Bulgaria* case, the refusal of the national court to deal with the question of risks when determining the lawfulness of the expulsion led the Court to conclude that Bulgaria did not point to any procedure whereby the applicant would be able to challenge the assessment of those claims while at the same time it did not appear possible for him to bring a separate legal challenge against the enforcement of the expulsion order. It in fact emphasized that there existed no avenue of redress

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<sup>65</sup> ECtHR, *M. and Others v. Bulgaria*, no 41416/08, 26 July of 2011, par. 125-126.

<sup>66</sup> ECtHR *M.S.S.*, cited above, par. 394.

that meets the two requirements of effectiveness, namely rigorous scrutiny and access to a remedy with automatic suspensive effect.<sup>67</sup>

In light of the above it is demonstrated that a remedy cannot be considered effective when irreparable harm may be done before the final judgment has been reached. In asylum cases removal of the asylum seeker before the court has reached a final judgment against the removal order or negative asylum decision may lead to such irreparable harm: death, torture or inhuman treatment of the applicant. The remedy is also rendered ineffective by the real chance that asylum seekers who are expelled to their country of origin lose contact with their lawyers and disappear or face difficulties substantiating their case.

By the same token, in establishing a justification of the relevance of the ECHR to expulsion cases, the Court resorts to a teleological interpretation. Referring to its earlier case law and taking into account the special character of the ECHR as a treaty for the collective enforcement of human rights, the Court reminds us that the Convention is intended to guarantee rights that are not theoretical or illusory but rights that are practical and effective.<sup>68</sup> This principle of effective protection, defined by Merills as '*a means of giving the provisions of a treaty the fullest weight and effect consistent with the language used and with the rest of the text in such a way that every part of it can be given meaning*'<sup>69</sup> is masterly used as a way to insert the prohibition

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<sup>67</sup> ECtHR, *Auad v. Bulgaria*, no 46390/10, 11 October of 2011, par. 120-123; See also *Labsi v. Slovakia*, no 33809/08, 15 May 2012, par. 138.

<sup>68</sup> See earlier e.g. ECtHR *Marckx v Belgium*, no. 6833/74, 13 June 1979, par. 31; *Airey v Ireland*, no. 6289/73, 9 October 1979, par. 24 and *Artico v Italy*, no. 6694/74, 13 May 1980, par. 33.

<sup>69</sup> Merills, J.G., 1993, *The Development of International Law by the European Court of Human Rights*, Manchester: MUP, p. 98.

of *refoulement* into Article 3 of the Convention, thereby introducing a counterweight against the legitimate interest of the State to remove someone from its territory. What remains to be examined is the degree to which the Court of Justice shares the same findings or/and whether it has more to add.

### **3.2.2 The interaction between Strasbourg and Luxembourg**

Discussing about the meaning of the right to an effective remedy, a CJEU judgment that requires special attention, is that of *Samba Diouf*, not only because it was the one that followed the logic permeated the *M.S.S.* judgment but rather due to its advanced –until that time- method to interpret that right, bringing together all the various expressions of current law in the context of the EU and the Member States but also in the context of certain international instruments (synthetic interpretation with emphasis to procedure). The Court made a validity test of Article 39 of Asylum Procedures Directive on the right to an effective remedy and the kind of decisions contested and the general principle of the right to an effective remedy deriving from Articles 6 and 13 of the ECHR in relation to (accelerated) national RSD procedures.

According to Advocate General the right to an effective judicial protection as expressed in Article 47 of the CFREU, acquires a separate identity and substance under that article which are not the mere sum of the provisions of Articles 6 and 13 of the ECHR. In other words, once recognized and guaranteed by the EU, that fundamental right goes on to acquire a content of its own, the definition of which is certainly shaped by the relevant

international instruments, including, first and foremost, the ECHR, but also by the constitutional traditions from which the right in question derives.<sup>70</sup>

Thus the Advocate General distinguished between the content of the right to judicial protection and its scope (see above 2.2.) and held that the right is applicable to ‘*decisions taken on an application for asylum*’ given the fact that such decisions are made subject ‘*to an effective remedy before a court or tribunal*’, which, according to recital 27 in the preamble to APD, is simply the reflection of a basic principle of Community law, ultimately established as primary law by the Charter.<sup>71</sup> Such an argument overpasses the limitation posed by Article 13 according to which the independent procedural remedy is required only in respect of the rights guaranteed by the ECHR to the benefit of the applicant. Following the same syllogism, the Court went on to explain **the mandatory content of the right** recognized by Article 47 of the Charter drawn from the ECHR as interpreted by the ECtHR,<sup>72</sup> and found that Article 39 of APD is quite naturally consistent to those interpretations, in that it expressly guarantees the right to an effective remedy against administrative decisions rejecting an application on grounds of substance, form or procedure. The crucial contribution of this provision lies on the fact that it grants the right to an effective remedy against any asylum decision including for example manifestly unfounded cases. It can be thus argued that this right offers broader protection than the right to an effective remedy provided for by international human rights law, which is

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<sup>70</sup> CJEU, Brahim Samba Diouf, Opinion of Advocate General, cited above, par. 39.

<sup>71</sup> Ibid, par. 42.

<sup>72</sup> See generally in this regard van Dijk/van Hoof/van Rijn/Zwaak (eds.), 2006, Theory and practice of the European Convention on Human Rights, 4th ed., Intersciencia, Antwerp.

limited to persons with an arguable claim that their expulsion would lead to a violation of the prohibition of *refoulement*.<sup>73</sup>

Further, the CJEU, in line to *M.S.S.* reasoning, adopts the “overall examination of a system” criterion pursuant to Recital 27 to APD which states: ‘... *The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.*’ The Advocate General emphasized that the decisive factor is that, in so far as it contains elements of a substantive decision, that decision should be amenable to a remedy before the refusal to grant asylum becomes final and definitive and, therefore, enforceable.<sup>74</sup> It is therefore appropriate to determine whether the system put in place by the national rules at issue in the main proceedings observes the principle of effective judicial protection and, in particular, whether every applicant has effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his/her case and sufficient procedural guarantees to pursue his/her case throughout all stages of the procedure.<sup>75</sup> It is obvious that what matters for the comprehensive assessment of a procedure is the actual protection, not the formalities. If for example a country’s system has all the elements of effective protection without the formality of a RSD, then the above requirements should be deemed satisfied. The argument expressed by the Court of Justice as well as by the ECtHR in *M.S.S.*, *Hirsi* and *I.M.* cases is that the necessary guarantees

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<sup>73</sup> Reneman, M., 2010, An EU Right to Interim Protection during Appeal Proceedings in Asylum Cases?, *European Journal of Migration and Law* 12, 433.

<sup>74</sup> CJEU, Brahim Samba Diouf, Opinion of Advocate General, cited above, par. 58.

<sup>75</sup> *Ibid*, par. 5; Recital 13 to 2005/85 Directive.

against arbitrary removal could be afforded by the aggregate of remedies under domestic law, which could accordingly satisfy the requirements of Article 13 even if no single remedy by itself did so.<sup>76</sup>

This requirement seems to robust the paper's main argument, that the right to an effective remedy is seen as a part of a whole mechanism, system or procedure which enables protection seekers to claim their rights towards a State and be granted the necessary protection. For example in *I.M.* case the Court observed with regard to the effectiveness of the domestic legal arrangements as a whole, that while the remedies of which the applicant had made use had been available in theory, their accessibility in practice had been limited by the automatic registration of his application under the fast-track procedure, the short deadlines imposed and the practical and procedural difficulties in producing evidence (inadequate legal and linguistic assistance provided, brief interview despite the fact that the case was complex and concerned a first-time asylum claim). After all the Court concluded that, but for its intervention, the applicant would have been deported without his claims having been subjected to the closest possible scrutiny.<sup>77</sup>

A similar synthetic approach was adopted by the CJEU in *Joint Cases N.S. and M.E.*, where the Luxembourg Court examined the relationship between the rights of asylum seekers under Article 47 of the Charter and the risk of expulsion to a persecuting State, in the context of a transfer of asylum seekers under the Dublin II Regulation. According to Advocate General the distinction between an infringement of the Geneva Convention or the ECHR

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<sup>76</sup> ECtHR, *Hirsi* cited above § 197, *M.S.S.* cited above § 289, *I.M.* cited above, § 127.

<sup>77</sup> ECtHR, *I.M.* cited above, par. 158.

in connection with the transfer of an asylum seeker to a Member State in which there is a serious risk of his expulsion to a persecuting State and any associated infringement of EU law, serves no more than only a limited and strict, *de jure* distinction, since as a rule, there is a *de facto* parallel between the infringement of the Geneva Convention or the ECHR and the infringement of EU law reflected in practice.<sup>78</sup> In this connection, the Court based its reasoning to the *M.S.S.* judgment where the guarantees regarding the transfer of asylum seekers among Member States under the ECHR were thoroughly clarified.

The crucial contribution of CJEU through this judgment is the fact that it dared a direct interference into the EU legislation issues questioning a whole mechanism, namely the transfers under Dublin II Regulation. Yet, with a paradigmatic maneuver managed to provide for a solution derived from the Regulation itself so as not to prove it generally problematic undermining its role within the CEAS. Specifically, the Court maintained that the **conclusive presumption** that a Member State will not expel the asylum seeker to another State in contravention of the ECHR or the Geneva Convention renders excessively difficult or even precludes *de facto* the judicial review of the risk of chain deportation to a persecuting State, contrary to the minimum content of the right to an effective remedy, the principle of effectiveness, and the Charter. For these reasons it found it necessary and appropriate to consider this presumption refutable.<sup>79</sup>

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<sup>78</sup> CJEU, Joined Cases N. S. and M. E. cited above, Opinion of Advocate General TRSTENJAK par. 153.

<sup>79</sup> Ibid, par. 161, 163.

Likewise, in the more recent *K.* case the CJEU held that the competent national authorities are under an obligation to ensure that the implementation of Dublin II is carried out in a manner which guarantees effective access to the procedures for determining refugee status. As to whether and on what conditions the right to intervene provided for in Article 3(2) of Dublin Regulation may crystallize into a duty to intervene, the Advocate's General repeated the argument expressed in the *N. S. and Others* case,<sup>80</sup> that a decision made by a Member State under Article 3(2) of Dublin Regulation whether to examine a claim for asylum is to be regarded, as a national implementing measure, so that in taking such a decision the Member States must comply with the requirements of the Charter. Following that line of reasoning she concluded that under Article 52(3) of the Charter, it must be ensured that the protection guaranteed by the Charter in the areas in which its provisions overlap with those of the ECHR is no less than the protection granted by the ECHR. And, as long as the extent and scope of the protection granted by the ECHR has been clarified in the case-law of the ECtHR, particular significance and high importance are to be attached to that case-law in connection with the interpretation of the relevant provisions of the Charter by the CJEU.<sup>81</sup>

In light of the aforementioned, the interaction among different judicial and instrumental mechanisms, namely courts as well as national, European and

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<sup>80</sup> See the CJEU, (pending) Case C-4/11, Federal Republic of Germany v Kaveh Puid, where the following question is going to be discussed: *Does an enforceable personal right on the part of the asylum-seeker to force a Member State to assume responsibility result from the duty of the Member States to exercise their right under the first sentence of Article 3(2) of Regulation 343/2003?*

<sup>81</sup> CJEU, C-245/11, *K. v Bundesasylamt*, Opinion of Advocate General TRSTENJAK, delivered on 27 June 2012, par. 84, 87.

international pieces of legislation, reflected in the judgments' reasoning, should be seen as an innovation of great significance, reflecting the need for a coherent asylum system with emphasis to procedure. That kind of "synthetic interpretation focusing on procedure" reminds me of the Kantian theory of *analytic-synthetic distinction*.<sup>82</sup> Such a distinction is primarily met in philosophy and distinguishes between analytic and synthetic propositions, the former being those which are true by virtue of their meaning and the latter those that are true by how their meaning relates to the world.<sup>83</sup> If we are to accept that a legislative provision is something true by virtue of its meaning then a synthetic approach of many similar subject-matter provisions through practical experience (empiricism) is true by exactly how their meaning, relates to the world or even better to the field they aim to serve.

To put it another way, this synthetic approach's findings are validated by, and grounded in, experience. It is a logical contingency that both the Luxembourg and the Strasbourg Courts are taking into account all the relevant European and international legislation through the microscope of State's practice in order to achieve the highest possible degree of effective protection for those in need. As already been suggested earlier, this process can be considered as indicative of a system of coherence where principles, safeguards and concepts, which do not necessarily collide, are brought together enabling judges collect, test, and improve their legal reasoning expressed through the rulings in question.

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<sup>82</sup> Kant, Immanuel, (1781/1998), *The Critique of Pure Reason*, Cambridge University Press

<sup>83</sup> Rey, Georges, (2003), *The Analytic/Synthetic Distinction*, *The Stanford Encyclopedia of Philosophy*, Edward Zalta (ed.).

### 3.2.3 Contextual interpretation: The role of presumptions

Further highlighting the aforementioned link of a legislative provision to the context it is being applied, I would like to focus on another method used lately by the Courts adjusted to contemporary demands, aiming at a workable international protection and remedial system, that of contextual interpretation. In the *Migrationsverket* case, the CJEU adopted the contextual analysis theory, stating that in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part. Specifically, analyzing the objectives of Dublin Regulation the Advocate General submitted that it focuses firstly on guaranteeing the right of asylum by means of a procedure which is rapid, based on objective criteria and fair for all those involved.<sup>84</sup>

Within the same logic of contextual analysis regard has to be paid to the discussion on presumptions under Dublin Regulation. In *M.S.S.* case the Court maintained that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment and that the diplomatic assurances given by Greece to Belgian authorities did not amount to a sufficient guarantee. This means that mere reference to the applicable legislation in the third state, be it Member State or third state, with no relevant information about the situation in

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<sup>84</sup> CJEU, Case C-620/10, *Migrationsverket v Nuriye Kastrati and Others*, Opinion of Advocate General TRSTENJAK delivered on 12 January 2012, par. 23-24; See also Case C-301/98 *KVS International* [2000] ECR I-3583, par. 21; Case C-300/05 *ZVK* [2006] ECR I-11169, par. 15; and Case C-19/08 *Petrosian and Others* [2009] ECR I-495, par. 34.

practice is not enough for absolving the sending State from its responsibility.<sup>85</sup> The general context and generally the practice followed in the State in question has to be taken into account. The Luxembourg Court, as already stated, followed the same approach in *Joint Cases N.S. and M.E.* It concluded that the logic that national courts must proceed from the conclusive presumption that a Member State is a safe country in which asylum seekers are not exposed to the risk of expulsion to a persecuting State, is contrary to the Geneva Convention and the ECHR, as well as incompatible with Article 47 of the European Charter.<sup>86</sup> Thus, the presumption underlying the relevant legislation that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable and the Member States, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Dublin II where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment.<sup>87</sup>

Equally, one could recognize identical line of reasoning in the recent *M.A. and Others* case which however, should be distinguished by the *Joint Cases N.S. and M.E.*, since the Court didn’t have to assess the relatively certain risk of systematic breaching of fundamental rights as a result of the transfer of the person concerned, but, much more generally, a core question of interpretation of Article 6 of the Dublin Regulation, that is to say, the rule

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<sup>85</sup> ECtHR, *M.S.S.* cited above, par. 353-354.

<sup>86</sup> CJEU, *Joint Cases N.S. and M.E.*, Opinion of the Advocate General, cited above, par. 164.

<sup>87</sup> CJEU, *Joint Cases N.S. and M.E.*, cited above, par. 104, 106.

applicable to determining the Member State which must examine the asylum application lodged by a minor. The Court held that the Regulation is structured between, at the one extreme, a 'sovereignty clause' and, at the other, a 'residual clause' and between the two lies a range of possible solutions, chosen on the basis of several criteria for determining the Member State responsible. In this case the criterion of the best interest of the child was suggested by the Court as providing for the most effective solution given the circumstances of the case (context) and mainly the fact that the applicant was an unaccompanied minor.<sup>88</sup>

Likewise, the H.I.D. case discussed about presumptions in the Asylum Procedures Directive and the possibility of prioritizing the processing of asylum applications by persons belonging to a certain category defined on the basis of nationality or country of origin. According to the Advocate General the Member States enjoy certain discretion in their procedural organization, provided that the national courts are able to ascertain the merits of the grounds on which the competent national authority considered that the application for international protection was unfounded or abusive, without those grounds having the benefit of an irrebuttable presumption of legality.<sup>89</sup> Thus, the examination of the merits of a decision is set as a prerequisite.

Furthermore, a contextual analysis is arguably used, although in an underlying manner in both *Hirsi* and *M.S.S.* cases, where the Strasbourg Court tried to adjust the procedural requirements of the protection

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<sup>88</sup> CJEU, Case C-648/11 *M.A. and Others v Secretary of State for the Home Department*, Opinion of Advocate General CRUZ VILLALÓN delivered on 21 February 2013, par. 54, 64.

<sup>89</sup> See CJEU, *Samba Diouf*, cited above, par. 61.

guaranteed to the specific circumstances of each case. On the one hand, in *Hirsi* case the Court was required to assess the particularities of the interception on the high seas and the objective difficulties of an on board asylum mechanism in order to come up with a workable formula on purpose of guaranteeing effective access to procedures while in *M.S.S.* case the Court had to deal with the systematic deficiencies of a national RSD system and their implications for the applicant at a specific time and place. Therefore the Court interpreted the relevant legislation in such a way to honor the pertaining objectives and simultaneously achieve the best protection possible on a case-by-case basis.

The Court's innovation with regards to *Hirsi* case was in fact the reliance on Article 31 of the Vienna Convention on the Law of Treaties (VCLT)<sup>90</sup> whereby a treaty must be interpreted according to the ordinary meaning to be given to the terms in their context and in the light of its object and purpose. According to that the ECtHR held that a purposive interpretation of Article 4 Protocol 4 of the ECHR reveals how the primary goal of the *non-refoulement* norm is to prevent states from removing aliens without examining their individual circumstances.<sup>91</sup> In particular it submitted that the letter of the provision has no territorial limitation and it refers very broadly to aliens, and not to residents, nor even to migrants while the purpose of the provision is to guarantee the right to lodge a claim for asylum which will be individually evaluated, regardless of how the asylum seeker

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<sup>90</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, entry into force: 27 January 1980. Article 31 par. 1: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

<sup>91</sup> ECtHR, *Hirsi*, cited above, par. 177

reached the country concerned, be it by land, sea or air, be it legally or illegally. Judge Pinto De Albuquerque conquered by arguing that the purpose of the provision would be easily frustrated if a State could place a warship on the high seas or at the limit of national territorial waters and proceed to apply a collective and blanket refusal of any refugee claim or even omit any assessment of refugee status. Following that line of reasoning, the Court found that the applicants had been carried back to Libya in the absence of identification and examination of protection claims, under the control of a crew not trained in conducting interviews, and without legal advisors or translators on board the intercepting military vessels. Taking these into account, the Court concluded that the forced removal of the applicants to Libya amounted to a collective expulsion in breach of Article 4 of Protocol 4. Further, it found the Italian Government in breach of Article 13 in combination with Article 3 of the Convention and Article 4 of Protocol 4 since the applicants were deprived of any remedy which would have enabled them to lodge their complaints with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced and even if such a remedy were accessible in practice, the requirements of Article 13 are clearly not met by criminal proceedings brought against military personnel on board the army's ships, in so far as that does not satisfy the criterion of suspensive effect enshrined in the Court's settled case law.<sup>92</sup> Consequently, what is to be

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<sup>92</sup> ECtHR, *Hirsi*, cited above, par. 205-206. See as well *Čonka v Belgium*, no. 51564/99, Judgment of 5 February 2002, §§ 79 et seq.

examined is whether national authorities afford applicants a realistic possibility of using a remedy.<sup>93</sup>

The aforementioned lead us to the following two remarks: First, there seems to be a general tendency of both the Court of Justice as well as the European Court to rely the interpretation of relevant legislation on the specificities of each and every case and mainly on the context into which these rules are to be applied, with an ultimate aim to achieve in practice the grant of the protection required. Second, strengthening its previous stance in *M.S.S.* case, the ECtHR reiterated in *Hirsi* the importance of providing anyone subjected to a removal decision with adequate information to enable them both to gain access to asylum procedures and to substantiate their complaints under Article 3 of the Convention,<sup>94</sup> a finding which confirms the admission that the principle of *non-refoulement* and the right to an effective remedy are closely linked.

### **3.2.4 Burden of proof as a means of monitoring protection**

A rather technical issue directly connected with the functioning of the right to an effective remedy and the mentioned in previous paragraphs spirit of a comprehensive vision of the context, is the way that the Courts distribute the burden of proof. The ECtHR once again in *M.S.S.* case paved the way and rejected the Belgian Government's argument that the applicant had not sufficiently individualized, before the Belgian authorities, the risk of having no access to the asylum procedure and being sent back by the Greek

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<sup>93</sup> ECtHR, *Hirsi*, cited above, par. 207; *Conka v Belgium*, cited above par. 46.

<sup>94</sup> ECtHR, *Hirsi*, cited above, par. 204; *M.S.S.*, cited above, par. 304.

authorities. The Court submitted that it was in fact up to the Belgian authorities, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first verify how the Greek authorities applied their legislation on asylum in practice. Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Article 3.<sup>95</sup>

Following the same logic in *M. and Others v. Bulgaria* judgment, the Strasbourg Court held that while the national court apparently acknowledged the existence of persecution risks upon removal contrary to Article 3, it placed on the applicant the **burden of proving** that they stemmed from the Afghan authorities and that those authorities would not guarantee his safety, considering this approach deficient on two levels: First, it maintained that unjustifiably the national court placed excessive reliance on the question whether the ill-treatment risked in the receiving State would emanate from State or non-State sources, whereas, in accordance with the Court's established case-law, this issue, albeit relevant, cannot be decisive. Second, it underlined that by dealing with such a serious issue summarily and by placing on the first applicant, without any explanation, the burden of proving negative facts, such as the lack of State guarantees in Afghanistan, the national court practically deprived the applicant of a meaningful examination of his claim under Article 3. In this connection the Court found a violation of Article 13, in view of the importance which it attaches to

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<sup>95</sup> ECtHR M.S.S., cited above, par. 359.

Article 3 of the Convention and the lack of effectiveness of the remedy available.<sup>96</sup>

The significance of analyzing the issue related to the burden of proof in those cases is mainly to understand of the logic behind, which is primarily related to the effective and fair character of the procedure. To put it briefly, the fact that the Courts place the burden of proving safety and protection for the individual in case of removal mainly to the states in question, can be considered as an extra means of monitoring national (intra-State) procedures in terms of fairness and effectiveness.

### **3.2.5 The value of good administration**

Being at the sphere of technical issues and in an effort to gather all the elements analyzed above under one concept, it appears essential here to end the chapter on the content of the right to effective remedies by discussing the role of good administration in the examined case law. It is evident that the Courts are gradually placing specific value on this relatively new concept of good administration in asylum and immigration cases. The good administration arguments come to strengthen the requirement of a fair and effective procedure, taking into account that in most Members States the international protection procedure is under the competence of administrative authorities.

Let's see how this argument is applied in practice. In the indicative case of *M.M.* the Court of Justice focuses on the observance of the rights of the defense as a fundamental principle of EU law in accordance with Article

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<sup>96</sup> ECtHR *M. and Others*, cited above, par. 127.

48(2) of the Charter on the rights of the defense as well as with Article 41 the right to good administration which basically includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, the right to have access to his or her file and the obligation of the administration to give reasons for its decisions.<sup>97</sup> The Court affirmed the importance of the right to be heard and its very broad scope in the EU legal order, considering that that right must apply in all proceedings which are liable to culminate in a measure adversely affecting a person,<sup>98</sup> an example of which is the international protection procedures. What follows is that the right of a protection seeker to be heard must apply fully to the procedure in which the competent national authority examines an application for international protection pursuant to rules adopted in the framework of the CEAS.

This very issue of the rights of the defense has been earlier touched upon by the ECtHR in *M.S.S.* case when discussing the effectiveness of the applicant's request for a stay of execution which according to Belgian law could be lodged before the competent authority "under the extremely urgent procedure". The Court concluded that the procedure did not meet the requirements of the Court's case-law since the extremely urgent procedure reduces the rights of the defense and the examination of the case to a minimum preventing the persons concerned from establishing the arguable

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<sup>97</sup> See Case C-269/90 Technische Universität München [1991] ECR I-5469, par. 14, and Sopropé [2008] ECR I-10369, par. 50); the obligation to state reasons for a decision which are sufficiently specific and concrete to allow the person to understand why his application is being rejected is thus a corollary of the principle of respect for the rights of the defense.

<sup>98</sup> See, inter alia, Case C-287/02 Spain v Commission [2005] ECR I-5093, par. 37; Sopropé, par. 37; Case C-141/08 P Foshan Shunde Yongjian Housewares & Hardware v Council [2009] ECR I-9147, par. 83; and Case C-27/09 P France v People's Mojahedin Organization of Iran [2011] ECR I-0000, par. 64 and 65.

nature of their complaints.<sup>99</sup> In light of these, the important remark to be done here is the Courts' suggestion of the effectiveness of administrative procedures in asylum and migration cases and its link with the fundamental right to good administration under the European Charter.

Having covered the main features of the right to an effective remedy, what one should keep in mind is the elements determining its content and scope, stressed out by the Courts, namely: a) the notion of effectiveness using the availability, accessibility, acceptability and quality criteria extensively analyzed above, as indicators, b) the pragmatic approach of the different judicial and instrumental mechanisms in question, c) the role of contextual analysis and d) the value of good administration. The synthesis of those elements together with the special issue of interception that follows will finally provide us with a codification of the States' obligations towards protection seeker from a procedural standpoint.

### **3.3 Procedural guarantees in cases of interception on the high seas**

I deliberately chose to devote a separate chapter to the procedural guarantees applied in cases of interception considering their *sui generis* nature due to particularities related both to the special circumstances that occur as well as to the controversial issue of State responsibility. A major step forward in terms of border control measures and corresponding state responsibility beyond the territorial waters of an EU Member State, was made by the ECtHR with the judgement in *Hirsi* case. It would be thus

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<sup>99</sup> ECtHR, *M.S.S.*, cited above, par. 389-390.

interesting to examine the relevant procedural concerns raised in this paper along with that specific ruling, being it the first case in which the Court unanimously finds a European State in violation of human rights of migrants and refugees intercepted on the high seas and returned to a third country in the absence of any procedural safeguards. The application concerns the interception and immediate return to Libya of 11 Somali nationals and 13 Eritrean nationals heading by boat for Italy from Libya. By endorsing the credo that ensuring access to protection to people at sea (therefore without any territorial limitation) is a legal and humanitarian imperative, this landmark judgment could serve as a guidance for other states within or outside the Council of Europe in order to re-modulate their interdiction operations along the lines and in consonance with the standards of refugee and human rights law.<sup>100</sup> First of all, the Grand Chamber held that intercepted individuals were under the complete, effective, and exclusive control of Italian organs once put on board ships whose crews were composed of Italian military personnel and characterized the case as one “*of extra-territorial exercise of jurisdiction by Italy capable of engaging that State’s responsibility under the Convention*”.<sup>101</sup>

Further, the Court in *Hirsi* reiterated the doctrine of ‘positive obligations’ adopted in the *Osman v UK* case according to which Article 2(1) of the ECHR embodies both the duty of states to refrain from the intentional and unlawful taking of life, but also the duty to take measures to protect the life of people under their jurisdiction if State authorities knew or ought to have

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<sup>100</sup> Giuffrè, Mariagiulia, *Watered-down Rights on the High Seas: Hirsi Jamaa and Others v Italy*, *International and Comparative Law Quarterly* (2012), p. 729.

<sup>101</sup> ECtHR, *Hirsi*, cited above, par. 81, 78.

known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals.<sup>102</sup> In light of that it affirmed, that Italy is not exempt from complying with its obligations under Article 3 of the Convention because the applicants failed to ask for asylum. Therefore, the absence of an explicit request for asylum does not necessarily absolve the authorities of their *non-refoulement* obligations under international human rights law.<sup>103</sup> In this vein, a teleological interpretation of the Refugee Convention and international human rights treaties, including the ECHR, requires states to act proactively by informing refugees and by taking all necessary measures to ensure *de facto* compliance with the principle of *non-refoulement*—the overarching goal of the asylum regime—thereby avoiding the delivery of refugees back to their persecutors as a consequence of states’ omissions.<sup>104</sup>

In light of these, the ruling in *Hirsi* appears to uphold the principle that obstacles to the right to an effective remedy because of accelerated procedures of expulsion or denial of effective RSD measures are unjustifiable, and all migrants and refugees should be entitled to an in-country right to judicial review with suspensive effect of the return order, and within reasonable time limits (see above Sections 3.2.1. and 3.2.3.). Considering the irreversible nature of the damage if the risk of torture or

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<sup>102</sup> ECtHR, *Osman v UK*, 23452/94, (GC) 28 October 1998, par. 116.

<sup>103</sup> Report to the Italian Government on the Visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009. Council of Europe CPT/Inf (2010) 15, par. 32.

<sup>104</sup> See UNHCR, 2011, ‘*Handbook on Procedures and Criteria for Determining Refugee Status*’ HCR/1P/4/ENG/REV. 3, par. 192; GS Goodwin-Gill, 2011, ‘*The Right to Seek Asylum: Interception at Sea and the Principle of Non refoulement*’, 23 *International Journal of Refugee Law*, p. 449.

inhumane treatments materializes in the receiving country<sup>105</sup> and the ECtHR's insistence on a positive obligation to ensure access to status determination procedures in order to evaluate the consequences of the expulsion of an individual to the country of origin, it can be argued, that although the ECHR does not contain a general obligation to provide a substantive assessment of asylum applications, a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation will expose that individual to treatment prohibited by Article 3.<sup>106</sup> And this could be sufficient justification that points to procedures performed in a place where such a scrutiny can be fully and effectively guaranteed, and this is not the sea, whatsoever. First of all, it is unrealistic that lawyers and translators for all the different nationalities may be placed at the disposal of migrants and refugees on the high seas, thus rendering nugatory any attempt of asylum seekers to claim protection or to receive information. But even if it were the case, with regard to the possibility to apply for asylum either on the vessels or on the mainland, it is submitted that the *Hirsi* decision would greatly lose its significance if boats were considered as an appropriate environment for processing asylum claims. Rather, ships should be unreservedly dismissed as suitable places for examining the individual situations of putative refugees, since they cannot be fairly interviewed in the intimidating atmosphere of a warship after an exhausting journey.<sup>107</sup>

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<sup>105</sup> ECtHR, *Gebremedhin v France* (2007) par. 66; *Abdolkhani and Karimnia v Turkey* (2009) par. 58.

<sup>106</sup> ECtHR, *Hussun and Others v Italy* (2010).

<sup>107</sup> J Schneider, 'Comment to *Hirsi* (part II): Another Side to the Judgment' (Strasbourg Observers, 5 March 2012) <<http://strasbourgobservers.com/2012/03/02/hirsi-part-ii-another-side-to-the-judgment/>> accessed 31 March 2012.

Taking the *Hirsi* findings in conjunction with the analysis of the key issues composing the notion of effective protection into account, it would be safe enough to argue that the Courts and in particular Strasbourg follows a stable reasoning as regard the procedural requirements in all possible stages i.e. asylum, detention, removal, interception, trying to be in line with the EU states autonomy, keeping balance between EU policies and the principle of *non-refoulement*. In that context, the synthesis of findings that follows, despite the specific problems that unavoidably arise, has a clearer task to accomplish.

## 4 Synthesis of findings

The above analysis of the European Courts' recent case law appears to justify the main claim of this paper, namely the fact that the right to effective remedies – given the absence of an enforceable right to seek asylum - provide a solid basis for protection seekers to challenge their *refoulement* to unsafe territory and further claim access to a fair RSD procedure in line with both the European Law as well as International Refugee Law. In other words the right to an effective remedy tends to become the guarantor of protection seekers rights mainly by providing the platform which the procedural guarantees for a fair and effective protection system stem from. Despite the fact that the ECHR does not include refugee rights, the European Court alongside with the Court of Justice through their jurisprudence reveal a new dynamic of a synthetic interpretation of European and international legal instruments (i.e. the CFR and ECHR) with a considerable impact on the institution of asylum as a whole.

Having said this, the promising point of the research in the Courts' rulings appears to be the interaction between international law and EU *acquis* and its effect on migrants' and refugees' fundamental rights issues. The main concern in every case where a return to a third country is being contemplated is what treatment the particular person will receive in the relevant third country if he or she is to be removed now. Many of the third countries to which protection seekers are returned are assumed to be safe because they are not likely to persecute the particular applicants and do not consciously *refoule* people to their persecutors. As earlier suggested though,

*refoulement* can also result when an inadequate RSD procedure prevents an actual refugee from establishing his or her status to the satisfaction of the *refouling* state. This is the case for example with most of the south and eastern European states that lack of sufficiently developed asylum procedures or because of carrying a disproportionate obligation burden due to their geographical front-line position cannot effectively correspond to their duties, a situation in which certain fundamental rights and basic human needs are systematically denied. Consequently, a revisiting of the right to effective remedies and procedural guarantees, as suggested by the European Courts, requires a thorough examination of which human rights must be taken into account by a State when taking removal decisions, what is the content and scope of effective protection, how the right to an effective remedy can constitute a means to achieve such protection and what procedural safeguards the destination countries should provide in order for the relevant substantive criteria to be met. Each of these parameters is being discussed in detail and in light of the above analysis in the following paragraphs.

## **4.1 Procedural Equations**

As argued earlier in section 2.1., the elements of effective protection is freedom from persecution in the third country (Art. 33 of 1951 Convention) and access to remedial mechanisms within a protection status determination procedures.<sup>108</sup> Ensuring that a fair and effective procedure actually occurs

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<sup>108</sup> UNHCR Ex.Com. Conclusion 58 (XL), Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection (1989) par. g; UNHCR Subcommittee of the Whole on International Protection

requires several safeguards. First the destination country should inform the applicant of its right to apply for a protection status as well as of where and how to apply. Although the 1951 Convention nowhere expressly requires a refugee status determination procedure, it is submitted that without a fair determination, the risk is that the person could be erroneously *refouled*.<sup>109</sup> Alice Edwards suggests that, read together Art. 1 and 33 of the Refugee Convention place a duty on State Parties to grant at a minimum, access to asylum procedures for the purpose of RSD.<sup>110</sup> In that context and according to the latest jurisprudential trends examined in Chapter 3 we are pointed to the following pragmatic syllogism: Denial of access to a safe territory means denial of a fair RSD procedure which equates to denial of the right to seek protection, since the identification of those seekers who face risk of persecution becomes impossible. Considering further that a fair and effective determination procedure includes the right to appeal with suspensive effect a negative decision before a national competent authority, denial of the right to effective judicial protection means denial of fair determination procedures, namely denial of the right to seek effective protection in the first place, namely exposure to the risk of persecution.<sup>111</sup>

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of the Executive Committee, Background Note on the Safe Country Concept and Refugee Status, submitted by High Commissioner, 42<sup>nd</sup> Sess., EC/SCP/68 (26 July 1991), par. 13

<sup>109</sup> Legomsky, cited above, 654.

<sup>110</sup> Alice Edwards, 2005, Human Rights, Refugees, and the Right To Enjoy Asylum, 17 Int'l J. Refugee L. 302.

<sup>111</sup> This argument can be put schematically as follows: a) Interceptions on the high seas: No access to safe territory = No access to a fair RSD (info – legal assistance – personal interviews – interpreter) = No access to effective remedies = Denial of the right to seek protection = Exposure to risk of *refoulement*, b) Dublin Returns: Access to a safe European territory → Transfer to the third country responsible with a deficient asylum system → Denial of a fair RSD = No access to effective remedies = Denial of the right to seek protection = Exposure to risk of *refoulement* or chain *refoulement*.

As all logical syllogisms, the malfunction of one component inevitably affects all the others and eventually the syllogism as a whole. Consequently there is a clear connection between the prohibition of *refoulement* and the right to seek protection, the right to seek protection and the granting of access to a fair determination procedure and between a fair determination procedure and the right to effective remedial mechanisms. That is why the Courts' interpretation even in the most controversial cases of transferring protection seekers internally or externally, seriously takes into account procedural guarantees in support of *non-refoulement* principle. What the Courts primarily emphasize on is the principle of effectiveness, which raises the question whether a procedural rule of national or regional (CEAS) legislation renders EU law and ECHR's application impossible or excessively difficult, to the detriment of the protection seekers' rights and the asylum institution viewed as a whole.<sup>112</sup>

## **4.2 Towards common EU procedural standards**

The majority of cases discussed throughout the present thesis suggest that the existence of procedural safeguards is central to the realization of the right to seek protection, given that individual assessment allows for the personal circumstances of the protection seeker to be taken into account as a country safe for some may be unsafe for others.<sup>113</sup> That is why the right to challenge a decision of transfer or removal has been emphasized by the

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<sup>112</sup> See for example C-276/01, Steffensen [2003] ECR I-3735, par. 66.

<sup>113</sup> See European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319, art 12.

Courts in the context of confronting safety presumptions, specifically under Dublin Regulation. While much of Dublin II is simply a question of burden allocation and not in violation of international refugee law, there is one aspect where the State in which the application for refugee status is currently lodged may be seen not to be fulfilling its 1951 Convention obligations in good faith. That is when returning the applicant to another Member State to have her/his application assessed placing him in a worse situation which might end up to persecution. This is well explained under Legomsky's "complicity principle" argument: no country may send any person to another country, knowing that the latter will violate rights which the sending country is itself obligated to respect, regardless whether the third country is a party to the 1951 Convention or to any other human rights conventions.<sup>114</sup> What the aforementioned case law suggests is leaning to what Noll calls the "empirical approach" which contrary to the "formal approach" permitting return as long as the third country is a party to 1951 Convention and thus formally bound to respect its dictates, entails inquiry into not only the relevant legislation in place but also the actual conditions and practices of the third country, mainly as suggested by the Court resting on the interpretation of IL by lawfully established official international entities i.e. UNHCR.<sup>115</sup>

Furthermore the Courts' interpretation demonstrates a tendency to link the right to an effective remedy in asylum cases with an autonomous and justiciable principle of good administration. The Court of Justice, when

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<sup>114</sup> Legomsky, cited above, 620.

<sup>115</sup> Noll, G., 2001, Formalism v. Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law, *Nordic Journal of International Law*, (70) p. 161-182.

interpreting Articles 41 and 47 of the Charter, will probably have recourse to the jurisprudence of the Strasbourg Court concerning administrative justice. According to Lord Millet '*the right to good administration provides an umbrella for a non-exhaustive list of procedural guarantees*'.<sup>116</sup> Indeed, it has to be observed that the right to good administration, as expressed by the Charter and interpreted, mirrors the principles of fair trial (or due process) guaranteed by the ECHR. It is submitted that this right, together with the right to an effective remedy and to a fair trial, create a more general right to administrative justice.<sup>117</sup> This approach seems to be adopted by the Courts when guaranteeing efficient mechanisms for protection seekers to enforce 'just' treatment.

However desirable it may seem, a satisfactory level of harmonized practice, particularly as concerns determination of international protection status may never be reached. Nevertheless increased uniformity of asylum practice seems to remain the goal that is why all latest attempts of implementing and interpreting the states' obligations *vis-à-vis* protection seekers do not lose sight of procedure, as the counterbalance to administrative discretion and unpredictability.

### **4.3 External border control standards**

Case law has significantly evolved as regards the topic of extra-territorial applicability of the ECHR, from which it can be derived that at least in exceptional circumstances, the liability of Contracting States can be incurred

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<sup>116</sup> Lord Millett, 2002, *The Right to Good Administration in European Law*, ISSN 0033-3565, no 2, 318.

<sup>117</sup> Cfr. A. W. Bradley, 1995, *Administrative Justice: A Developing Human Right?*, 1 *European Public Law* 347, at 351.

for acts which take place or produce effects outside their territorial boundaries.<sup>118</sup> This was considered necessary in view of the fact that destination countries have been steadily erecting procedural barriers to their asylum determination systems, including interception of vessels on the high seas, filing deadlines, safe country of origin restrictions, detention, penalties for unfounded claims.<sup>119</sup> Nevertheless, what can be considered as a rather novel concept in the recent case law is the development of positive obligations doctrine under the Convention. While it has been argued by some scholars<sup>120</sup> that the prohibition of *refoulement* is a matter of positive obligations, others have identified the prohibition of *refoulement* as primarily a negative obligation – an obligation to abstain from expulsion.<sup>121</sup>

The ECtHR itself has to a certain degree refrained from linking the concept

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<sup>118</sup> See e.g. ECtHR 23 March 1995, *Loizidou v Turkey*, Appl. No. 15318/89 (preliminary objections), § 59–64; ECtHR 12 December 2001, *Bankovic a.o. v Belgium*, Appl. No. 52207/99, § 67–73; ECtHR 16 November 2004, *Issa a.o v Turkey*, Appl. No. 31821/96, § 65–71. For an overview of case law on extra-territorial applicability of the Convention, see e.g. M. Gondek, ‘Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?’, *Netherlands International Law Review*, Vol. 3, 2005, pp. 349–387; R.A. Lawson, ‘Life After Bankovic – On the Extraterritorial Application of the European Convention on Human Rights’, in F. Coomans and M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Antwerp: Intersentia 2004, pp. 83–123; O. de Schutter, ‘Globalization and Jurisdiction: Lessons from the European Convention on Human Rights’, Center for Human Rights and Global Justice Working Paper No. 9, NYU School of Law, 2005; R. Wilde, ‘Legal “Black Hole”?: Extraterritorial state action and international treaty law on civil and political rights’, *Michigan Journal of International Law*, Vol. 26, No. 3 (2005), pp. 739–806.

<sup>119</sup> See e.g. UNHCR, *Asylum Processes (Fair and Efficient Asylum Procedures)*, Global Consultations on International Protection, 2<sup>nd</sup> Meeting EC/GC/01/12 (31 May 2001)

<sup>120</sup> See Noll, G., 2000, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, The Hague: Kluwer Law International, p. 453–474.

<sup>121</sup> See e.g. De Schutter: ‘*The distinction between positive and negative obligations should be seen not in abstract terms or as dependant upon the description we give of any particular situation, but as relative to the situation existing prior to the adoption of the measure which is challenged. If a foreigner is expelled, this brings about a change in his situation; if a foreigner is denied a visa to have access to the territory, this only denies him an advantage he was requesting; for these reasons, most would see the violation of a negative obligation in the first case, and a violation of a positive obligation in the second case.*’ in: O. de Schutter, expert report in case *Rechtbank Den Haag [District Court The Hague] 31 March 2005, CG Raad c.s. t. Staat der Nederlanden en Transvision BV, LJNAT2882, 04/1015 KG.*

of positive obligations explicitly to *refoulement*-cases.<sup>122</sup> However, from the *M.S.S.* case till *Hirsi* the European Court maintained a firm approach arguing that states' obligations to provide acceptable detention and reception conditions are primarily considered as obligations of *result*, in which limited economic resources cannot justify the provision of conditions below the requirements of Article 3. In that context the Court seems to accept the solution suggested by Shue that *non-refoulement* cases are hybrid cases which impose both positive and negative obligations on an expelling State.<sup>123</sup> They impose first, a *positive obligation*, to make a meaningful assessment of the risk and severity of ill-treatment the claimant fears. Secondly, once established that there is substantial risk that a human right will be breached (based either on the State's own assessment or the existence of facts and circumstances which ought to have been known to the expelling State), the expelling State has the *negative obligation* not to *refoule* – since removal would then have as direct consequence the exposure of the individual to prohibited ill-treatment. In *Hirsi* case, as earlier discussed, the Court further distinguished between types of duties involved in honoring the prohibition of *refoulement* by referring to a positive duty to allow the person concerned to access a fair and effective refugee status determination procedure and enjoy all the necessary guarantees.<sup>124</sup>

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<sup>122</sup> To be more precise, the Court refers to positive obligations in *refoulement*-cases only when the threat emanates from non-state actors in a third country. E.g. ECtHR, *H.L.R. v France*, no. 24573/94, 22 April 1997, par. 30; *D. v UK*, no. 30240/96, 2 May 1997, par. 49.

<sup>123</sup> Shue, H., 1996, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, Princeton University Press, 2nd ed., 155.

<sup>124</sup> Maarten den Heijer, 2008, *Whose Rights and Which Rights? The Continuing Story of Non Refoulement under the European Convention on Human Rights*, *European Journal of Migration and Law* 10, 291.

Consequently, although the nature of human rights protection within the EU is essentially ‘negative’ in the sense that the EU is considered to be under a duty not to violate human rights whenever it takes action, but without any general competence to take positive action on human rights,<sup>125</sup> the Courts’ interpretation demands the provision of identification procedures and remedial mechanisms in the event of a breach, an aspect of human rights duties that goes beyond the EU’s own understanding of its human rights duties. In short what is argued is that, in those areas where the EU have competence, not only are their institutions and agencies under an obligation to refrain from actively violating human rights, but that they are also under the obligation to protect and fulfill human rights in those areas.<sup>126</sup>

## 4.4 Complications

The hypothesis running through the present paper seems to be satisfied, namely the right to an effective remedy appears to be given such a special regard by the European Courts as to acquire an autonomous substance in refugee cases guaranteeing a certain mechanism where a series of procedural safeguards exist. Nevertheless, as to all syllogisms there is a strong antilogus. First of all, the question of whether the European Court and the Court of justice are the appropriate bodies to effectively specify the standards of a fair and effective procedure requires special attention. Further, many questions especially in determining what makes a procedure fair are still not sufficiently answered. However, what is being implied in

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<sup>125</sup> Opinion 2/94 Accession by the Community to the European Convention on Human Rights [1996] ECR I-1759, par. 27.

<sup>126</sup> Tawhida Ahmed and Israel de Jesús Butler, 2006, The European Union and Human Rights: An International Law Perspective, The European Journal of International Law Vol. 17(4), 800.

the present thesis is that Courts simply pave the way that States should follow in the law-making process. The CEAS recast for instance, can be seen as a process influenced by the pertaining jurisprudence. Concerns as regards the harmonization objective are also raised in the sense that harmonization might many times reflect the lowering of the protection standards and inevitably lead to equalizing down at the expense of protection seekers. On the other hand some of the proposed EU standards might even seem to exceed the requirements of international refugee law or some interpretations by the ECtHR might appear overstressing the potential of a complaint under Article 13.<sup>127</sup> One could also argue that the explicit reference to certain procedural safeguards by the Courts and other monitoring bodies might result in rigidity.<sup>128</sup> Having regard to all these reasonable concerns, the obvious argument in favor is legal certainty and reassertion of basic values.<sup>129</sup> According to the spirit of the present thesis, a certain legal degree of procedural uniformity, necessary to get equality of rights among Member States and promote transparency of administrative actions, is at any case the goal.

## 4.5 Concluding Remarks

In a world of nation-states, in which law follows rather than dictates practice<sup>130</sup> asylum and immigration policies are captured between realist

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<sup>127</sup> See ECtHR, M.S.S., cited above, Concurring Opinion of Judge Villiger.

<sup>128</sup> Sabino Cassese, 1993, Legislative Regulation of Adjudicative Procedures: An Introduction, 5 Eur. Rev. Pub. L., 16.

<sup>129</sup> Harlow, C., 1995, Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot', Jean Monnet Chair Papers (Badia Fiesolana), 30.

<sup>130</sup> See Ferguson, 1976, Refugees: A New Dimension in International Human Rights, 70 AM. Soc'y INT'L L. PROC. 58, 74 ("The refugee problem entails facing the ultimate

fears and liberal values most of the times the dominance of realism over liberalism being the case. This credits the conclusion that the role of the judiciary in the asylum field is not only linked to the issue of independence but also to its capacity as the guarantor of principles and values that the rule of law obliges states to uphold, by setting precedent which highlights the establishment of specific procedural standards as a means of guaranteeing substantive rights under European and international law. To achieve that, the Courts appear to emphasize to a certain degree of coherence by weighing up partly incompatible demands and balancing them against each other. In that context and although it is difficult to speak of a liberal European approach to the protection of refugees in international law, the Courts seem to put a great effort to establish common criteria for assessing the principle of effective judicial protection and avoid deviations or misconceptions among states.

It is highlighted through the above analysis that the Courts build upon the extant normative framework surrounding the refugee regime so as to reach a sufficient revitalization level. Their main contribution is placing the states right in front of a vital challenge which is not necessarily to produce new legal instruments, but rather to take advantage of the flexibility that the existing body of law affords to retool the relevant protection policies at an operational level.

What this paper mainly proposes is the adoption by the Member States of this pragmatic and synthetic approach suggested by the Courts' case law aiming to achieve full and inclusive compliance with international standards

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question of the nature of the nation-state, and whether the nation-state is consistent with the types of solutions that must be found for the resolution of the problem.").

through a coherent asylum system, whilst acknowledging the Member States' concerns and difficulties.<sup>131</sup> This approach comes to heal the lack of provisions designed to preserve protection seekers rights and respectfully question those asylum and immigration policies shaped by security objectives resulting to the detriment of the primary obligation of states of guaranteeing the necessary protection to people in need.

In light of these, and given that asylum practice in Europe sets an important example which goes well beyond the European space, policy-making institutions within the national sphere and the EU are urged to provide the forum to a general discussion and undertake the necessary action so as for the states to adjust their law and practice to the requirements of human rights and the demands of the contextual environment these rights are to be applied in.<sup>132</sup>

The need for a more coherent system of law and principles applicable in refugee protection calls for a reasonable consensus reflected in the following approach: when principles collide, e.g., when the rights of protection seekers as individual rights collide with the norm of state sovereignty and the demand to ensure stability and security, the relevant question for decision makers, is not: "what principle is to be eliminated from the system?," but "how to optimalize both principles within the system?"<sup>133</sup> This is a question of creating coherence and for the purposes of the present study, a query for

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<sup>131</sup> Sylvie Da Lomba, 2004, *The right to seek Refugee Status in the European Union*, Intersentia, p. 16.

<sup>132</sup> Moreno-Lax, V., 2012 *Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?* *Human Rights Law Review* 12:3, p. 598.

<sup>133</sup> Alexy, R. and Peczenik, A., 1990, *The Concept of Coherence and Its Significance for Discursive Rationality Ratio Juris*. Vol. 3 No. 1, p. 137.

procedural safeguards guaranteeing legal justification and practical rationality.

Without doubt, the European Union will continue playing an important role in the area of human rights, both in its external and internal policies.<sup>134</sup> Simultaneously, both the European Court as well as the Court of Justice look to decisions and jurisprudence of the other for guidance and while neither will consider itself bound by the other Court's decision, there is clearly deference and one can expect closer cooperation between the two Courts as the jurisdiction of the Luxembourg Court expands.<sup>135</sup> Jean Monnet, one of the EU's founding fathers once said "*People only accept change when they are faced with necessity and only recognize necessity when a crisis is upon them*". This paper argued that in view of the recent case law, European Courts seem to be fully aware of the permanent refugee crisis and its significant ramifications. They gradually and steadily recognize the necessity of change starting by offering clear-cut guidance related to the content and meaning of effective procedural safeguards in international protection issues. In that context and although concurring with Hathaway in that current refugee law imposes only a limited duty on states,<sup>136</sup> far short of meeting the needs of refugees in a comprehensive way, the research into the recent European case law indicates the adherence to some irreducible humanitarian principles that require states to adopt a

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<sup>134</sup> Peter Leuprecht, 1998, Innovations in the European System of Human Rights Protection: Is Enlargement Compatible With Reinforcement? 8 TRANSNAT'L L. & CONTEMP. PROBS. 313.

<sup>135</sup> Elizabeth F. Defeis, 2001, Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights, 19 Dick. J. Int'l L., 301.

<sup>136</sup> Hathaway, J., 1990, cited above, p. 132.

meaningful and needs-based approach to asylum and international protection emphasizing on the minimum (procedure) in order to reach the core (substance). It's this obligation that the Courts remained consistent in: to alarm states by recognizing the significance of being open to pragmatic reforms especially at times of crisis. This statement points us to Nemat Shafic's words in connection to the Eurozone crisis which by analogy could be extended to the issues at hand: "*Managing the refugee regime crisis in Europe requires "more Europe"*".<sup>137</sup> And more Europe from this paper's perspective includes not only states but all the institutional mechanisms established to uphold the core human rights norms and values in the area of granting protection to those in need.

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<sup>137</sup> Dr. Nemat Shafik, Deputy Managing Director of the IMF, Productivity is Europe's ultimate problem, Financial Times, 11 February 2013.

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