



FACULTY OF LAW  
Lund University

Robin Kvist

# Streamlining of Asylum Procedures in the EU

- An Analysis of the Procedures Regulation Proposal and its Compliance with the Principle of *Non-Refoulement*

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program  
30 higher education credits

Supervisor: Amin Parsa

Semester of graduation: period 1 Spring semester 2017

# Contents

<b>SUMMARY</b>	<b>1</b>
<b>SAMMANFATTNING</b>	<b>2</b>
<b>PREFACE</b>	<b>3</b>
<b>ABBREVIATIONS &amp; DEFINITIONS</b>	<b>4</b>
<b>1 INTRODUCTION</b>	<b>7</b>
1.1 Background	7
1.2 Aim and research questions	8
1.3 General approach, method and material	9
1.3.1 <i>Sources of international law</i>	10
1.3.2 <i>Methods of interpretation</i>	11
1.3.2.1 Fundamental rules of interpretation	12
1.3.2.2 Supplementary means of interpretation	13
1.3.2.3 Conclusions on method for interpretation	14
1.3.3 <i>Material</i>	14
1.4 Delimitations	15
1.5 Previous research	17
1.6 Outline	17
<b>2 THE PROCEDURES REGULATION PROPOSAL</b>	<b>19</b>
2.1 Introduction	19
2.2 Background and aim of the proposal	19
2.3 Admissibility procedures	22
2.3.1 <i>First country of asylum</i>	23
2.3.2 <i>Safe third country</i>	25
2.4 Accelerated procedures	27
2.4.1 <i>Safe country of origin</i>	29
2.5 Implicit withdrawals of applications	31
2.6 Conclusions	32
<b>3 OBLIGATIONS IMPOSED ON EU MEMBER STATES BY THE PRINCIPLE OF <i>NON-REFOULEMENT</i></b>	<b>34</b>
3.1 Introduction	34
3.2 General description of the principle of <i>non-refoulement</i>	34
3.3 <i>Non-refoulement</i> under the Refugee Convention	35

<b>3.3.1</b>	<b><i>Who is bound?</i></b>	<b>35</b>
<b>3.3.2</b>	<b><i>Who is protected?</i></b>	<b>35</b>
<b>3.3.3</b>	<b><i>What conduct is prohibited?</i></b>	<b>36</b>
3.3.3.1	The question of risk	37
3.3.3.2	The point in time at which a breach occurs	38
3.3.3.3	The removal of an asylum seeker without assessing his or her claim for refugee status	39
3.3.3.4	Procedural obligations	45
<b>3.3.4</b>	<b><i>Conclusions on states' obligations under the Refugee Convention</i></b>	<b>47</b>
<b>3.4</b>	<b>Non-refoulement under the ECHR</b>	<b>48</b>
<b>3.4.1</b>	<b><i>Who is bound?</i></b>	<b>49</b>
<b>3.4.2</b>	<b><i>Who is protected?</i></b>	<b>49</b>
<b>3.4.3</b>	<b><i>What conduct is prohibited?</i></b>	<b>50</b>
3.4.3.1	The question of risk	50
3.4.3.2	The point in time at which a breach occurs	51
3.4.3.3	Procedural obligations	52
3.4.3.4	The prohibition on indirect refoulement	54
<b>3.4.4</b>	<b><i>Conclusions on states' obligations under the ECHR</i></b>	<b>55</b>
<b>3.5</b>	<b>Combined conclusions in regard to research questions 1 and 2</b>	<b>57</b>
<b>3.5.1</b>	<b><i>Research question 1</i></b>	<b>57</b>
3.5.1.1	Research question 1(a)	58
3.5.1.2	Research question 1(b)	59
<b>3.5.2</b>	<b><i>Research question 2</i></b>	<b>59</b>
3.5.2.1	Research question 2(a)	60
3.5.2.2	Research question 2(b)	61
<b>4</b>	<b>THE ADMISSIBILITY OF CERTAIN PROVISIONS IN THE PROCEDURES REGULATION PROPOSAL</b>	<b>62</b>
<b>4.1</b>	<b>Introduction</b>	<b>62</b>
<b>4.2</b>	<b>Admissibility procedures (article 36)</b>	<b>62</b>
<b>4.2.1</b>	<b><i>The proposal</i></b>	<b>62</b>
<b>4.2.2</b>	<b><i>The criticism</i></b>	<b>64</b>
<b>4.2.3</b>	<b><i>The assessment</i></b>	<b>64</b>
<b>4.3</b>	<b>Accelerated procedures (article 40)</b>	<b>66</b>
<b>4.3.1</b>	<b><i>The proposal</i></b>	<b>66</b>
<b>4.3.2</b>	<b><i>The criticism</i></b>	<b>68</b>
<b>4.3.3</b>	<b><i>The assessment</i></b>	<b>68</b>
<b>4.4</b>	<b>Implicit withdrawals of applications (article 39)</b>	<b>69</b>
<b>4.4.1</b>	<b><i>The proposal</i></b>	<b>69</b>
<b>4.4.2</b>	<b><i>The criticism</i></b>	<b>70</b>

4.4.3	<i>The assessment</i>	70
<b>5</b>	<b>FINAL CONCLUSIONS</b>	<b>72</b>
<b>BIBLIOGRAPHY</b>		<b>73</b>
Litterature		73
<i>Books</i>	73	
<i>Journal articles and working papers</i>		74
<i>Reports</i>		74
Legal sources and official documents		74
<i>Council of Europe</i>		74
Conventions		74
Charts of signatories and ratifications		74
<i>European Union</i>		75
Legislation		75
Reports, publications and press releases		75
<i>Sweden</i>		76
Official reports		76
<i>United Nations</i>		76
Travaux préparatoires		76
Treaties and conventions		77
Treaty series		77
Reports and publications		77
<b>TABLE OF CASES</b>		<b>79</b>
European Court of Human Rights		79
Federal Court of Australia		80
International Court of Justice		80
United Kingdom House of Lords		80

# Summary

The big influx of people seeking asylum in EU Member States in recent years has led to many asylum seekers having to wait a long time for a decision on their asylum applications. For over 25 years, the EU has been encouraging Member States to adopt procedural measures in their national legislations to streamline asylum procedures and in July 2016, the EU Commission presented a proposal for a new Regulation on asylum procedures which proposes further measures to speed up asylum procedures or deflect the responsibility for asylum seekers to other countries.

While it is commonly seen as being in the interest of both asylum seekers and Member States that decisions on asylum applications are taken as soon as possible, measures to streamline asylum procedures are not uncontroversial since they risk compromising the protection of asylum seekers and be at variance with fundamental legal principles of international law.

This thesis studies the compatibility of three specific articles, closely related to the streamlining of asylum procedures, in the EU Commission's Proposal for a new Procedures Regulation with obligations imposed on EU Member States by the principle of *non-refoulement*. The studied articles are the ones on admissibility procedures, accelerated procedures and implicit withdrawals of asylum applications. By conducting this study, this thesis wishes, not only to assess the compatibility of the specific Proposal with the principle of *non-refoulement*, but to contribute to a general discussion on the legal limit of states strives to streamline asylum procedures.

In the second chapter, the three studied articles of the Proposal are thoroughly analysed. In the next chapter, the most commonly accepted sources of international law are interpreted in order to examine what obligations the principle of *non-refoulement* impose on Member States when handling asylum applications. The results of the third chapter are then applied in the fourth chapter to assess whether the articles studied of the Proposal are compatible with the principle of *non-refoulement*.

The conclusions are that articles on admissibility procedures and accelerated procedures, at least in theory, probably are compatible with the principle of *non-refoulement*. The article on implicitly withdrawals of applications, however, will possibly lead to a breach of the prohibition on *refoulement* if adopted in the proposed way.

# Sammanfattning

Det stora inflödet av asylsökande till EU under de senaste åren har lett till att många asylsökande tvingas vänta lång tid på ett beslut i deras asylärende. EU har i över 25 år uppmuntrat medlemsstater att vidta processuella åtgärder i sina respektive nationella lagstiftningar för att effektivisera och rationalisera asylprocessen. I juli 2016 presenterade EU-kommissionen ett förslag till en ny asylprocedurförordning som föreslår ytterligare åtgärder för att snabba upp asylprocessen eller avleda ansvaret för asylsökande till andra länder.

Samtidigt som det är en vanlig åsikt att det ligger i både den asylsökandes och medlemsstatens intresse att beslut i asylärende fattas så snabbt som möjligt är rationaliserings- och effektiviseringsåtgärder av asylprocessen kontroversiella eftersom sådana åtgärder riskerar att äventyra skyddet av asylsökande och kan vara i strid med fundamentala principer i internationell rätt.

Detta arbete studerar huruvida tre specifika artiklar i EU-kommissionens förslag till en ny asylprocedurförordning, nära relaterade till effektivisering och rationalisering av asylprocessen, är förenliga med de skyldigheter som principen om *non-refoulement* ställer på EU:s medlemsstater. De studerade artiklarna är de som rör vilka ansökningar som inte kan tas upp till prövning, vilka ansökningar som ska genomgå ett påskyndat förfarande och förfarandet om implicit återkallade ansökningar. Förhoppningen är att detta arbete inte endast ska utgöra en studie av det specifika lagförslaget utan också bidra till en mer allmän diskussion om i vilken utsträckning principen om *non-refoulement* begränsar EU-staters möjligheter att effektivisera och rationalisera asylprocessen.

I det andra kapitlet görs en noggrann analys av de tre studerade artiklarna. I det efterföljande kapitlet tolkas de mest erkända källorna i internationell rätt för att undersöka vilka skyldigheter principen om *non-refoulement* uppställer på EU:s medlemsstater när dessa hanterar asylansökningar. Resultateten av undersökningen i det tredje kapitlet ligger sedan till grund för bedömningen i det fjärde kapitlet huruvida de studerade artiklarna är förenliga med principen om *non-refoulement*.

Slutsatserna är att artiklarna som rör vilka ansökningar som inte kan tas upp till prövning och vilka ansökningar som ska genomgå ett påskyndat förfarande förmodligen, åtminstone i teorin, är förenliga med principen om *non-refoulement*. Artikelns rörande förfarandet om implicit återkallade ansökningar kommer däremot med största sannolikhet leda till en överträdelse av förbudet mot *refoulement* om den antas i den form förslaget anger.

# Preface

To write this thesis has been like taking a journey on a long and winding road. Between the first idea and the finished result there have been all kinds of obstacles and the process of writing has been a constant movement between hope and despair. For me it has therefore been of utmost importance to have had people around me to give me support and who has, at least occasionally, helped me to think of other things than this thesis. I am especially grateful for all the support I have gotten from my girlfriend, Matilda, during this process. Thank you!

I would also like to thank my supervisor Amin Parsa who has given me valuable feedback and positive energy!

Robin Kvist  
Lund, May 24, 2017

# Abbreviations & definitions

1967 Protocol	1967 Protocol relating to the Status of Refugees
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
Dublin Regulation Proposal	Commission, ‘Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)’ COM(2016) 270 final
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECRE	European Council on Refugees and Exiles
EU	European Union
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
ILC	International Law Commission
Procedures Directive	Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13
Procedures Regulation Proposal	Commission, ‘Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU’ COM(2016) 467 final
Recast Procedures Directive	Directive of the European Parliament and of the Council 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60
Recast Qualification Directive	Directive 2011/95/EU of the European Parliament and of the Council 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 (recast) [2011] OJ L337/9

Refugee Convention	1951 Geneva Convention relating to the Status of Refugees
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969
Qualification Regulation Proposal	Commission, 'Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents' COM(2016) 466 final

The term  
'asylum'

Protection offered to an alien on account of a threat abroad, by a state within its territory

The term  
'asylum seeker'

An individual who has expressed the intention to apply for 'asylum' to the authorities, irrespective of whether an official application has been lodged or not.

The term  
'international protection'

The refugee and subsidiary protection status as defined in the Recast Qualification Directive

The term  
'receiving state' or 'receiving country'

A state to which a 'sending state' has or wishes to remove an asylum seeker

The term  
'refugee'

An individual who has been granted refugee status in accordance with the refugee definition in the Refugee Convention, or an 'asylum seeker' who has not yet been found not to meet the refugee definition after a fair refugee determination procedure.

The term

‘sending state’ or ‘sending country’

A state which has or wants to remove an asylum seeker to another country

# 1 Introduction

## 1.1 Background

In 2016, EU+ countries<sup>1</sup> delivered over 1,1 million asylum decisions in first instance, an increase by 87 % compared to the year before.<sup>2</sup> Despite this dramatic increase of decisions issued, there were, at the end of December 2016, over 870,000 asylum cases awaiting a first-instance decision in the 28 Member States of the EU, Cyprus not included.<sup>3</sup> 56 % of these cases were pending six months or more.<sup>4</sup>

Starting in the 1990's, EU legislation has encouraged Member States to adopt procedural concepts to speed up asylum procedures or deflect the responsibility for asylum seekers to other countries without assessing the merits of the applicants' claims.<sup>5</sup> Under the current EU legislation, Member States are permitted to accelerate certain procedures and use 'safe country' concepts to declare applications inadmissible.<sup>6</sup> While it is a common view that it is in the interest of both asylum seekers and EU Member States, that decisions on asylum applications are taken as soon as possible, the strive to streamline asylum procedures is not uncontroversial as it may compromise the protection of asylum seekers and be at variance with fundamental legal principles of international law, such as the principle of *non-refoulement*.<sup>7</sup>

---

<sup>1</sup> EU+ is composed of the 28 EU Member States plus Norway and Switzerland: European Asylum Support Office, 'Latest asylum trends – 2016 overview' <[www.easo.europa.eu/latest-asylum-trends](http://www.easo.europa.eu/latest-asylum-trends)> accessed 16 February 2017.

<sup>2</sup> Asylum Support Office, 'Latest asylum trends – 2016 overview' <[www.easo.europa.eu/latest-asylum-trends](http://www.easo.europa.eu/latest-asylum-trends)> accessed 16 February 2017.

<sup>3</sup> European Asylum Support Office, 'Latest Asylum Trends – December 2016' <[www.easo.europa.eu/latest-asylum-trends](http://www.easo.europa.eu/latest-asylum-trends)> accessed 13 February 2017.

<sup>4</sup> European Asylum Support Office, 'Latest Asylum Trends – December 2016' <[www.easo.europa.eu/latest-asylum-trends](http://www.easo.europa.eu/latest-asylum-trends)> accessed 13 February 2017.

<sup>5</sup> For instance, in 1992, the Council of the EU urged Member States to implement accelerated procedures for assessing applications regarded as 'manifestly unfounded': Council of the European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ("London Resolution")* (1992)

<[www.refworld.org/docid/3f86bbcc4.html](http://www.refworld.org/docid/3f86bbcc4.html)> accessed 21 February 2017. See also: Sharon Oakley, 'Accelerated Procedures for Asylum in the European Union: Fairness Versus Efficiency' (2007) Sussex Migration Working Paper no. 43 <[www.sussex.ac.uk/webteam/gateway/file.php?name=mwp43.pdf&site=252](http://www.sussex.ac.uk/webteam/gateway/file.php?name=mwp43.pdf&site=252)> accessed 17 February 2017, 3–4.

<sup>6</sup> Directive of the European Parliament and of the Council 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60 (Recast Procedures Directive), arts 31(8), 33(2) b–c.

<sup>7</sup> Recast Procedures Directive, recital 18; United Nations High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice* (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States 2010); Asylum Information Database, *Admissibility, Responsibility and Safety in European Asylum Procedures* (Comparative report, European Council on Refugee and Exiles, 2016) <<http://www.ecre.org/wp-content/uploads/2016/09/ECRE-AIDA-Admissibility-responsibility-and-safety-in-European-asylum-procedures.pdf>> accessed 30 March 2017.

On July 13, 2016, the EU Commission presented a proposal for a Regulation on asylum procedures intended to replace the current Recast Procedures Directive.<sup>8</sup> Beside further harmonising the asylum procedures in Member States, one of the main objectives of the proposal is to further streamline asylum procedures.<sup>9</sup> The proposed way of achieving the objective of more streamlined procedures is, among other things, to implement shorter time limits and make previously optional procedural instruments, such as the ‘safe country’ concepts, mandatory for Member States to use.<sup>10</sup> Since the Proposal proposes stricter implementation of already criticised procedural concepts, it is no surprise that the Proposal has been heavily criticised by non-governmental organisations and others.<sup>11</sup>

This thesis will examine what obligations the principle of *non-refoulement* imposes on EU Member States when handling asylum applications. The results of this examination will then be used to assess whether certain key articles in the Commission’s Proposal, closely related to the strive to streamline asylum procedures, are compatible with the principle of *non-refoulement*.

My personal interest in the subject of this thesis was awakened when I, during the summer of 2015, worked at the Swedish Migration Agency and got the opportunity to see the practical use of accelerated procedures. My general interest of states’ obligations towards asylum seekers was revived when I, during an internship at the Embassy of Sweden in Copenhagen in the autumn of 2016, regularly had to cross the border between Sweden and Denmark, and in doing so, every time, was reminded of the efforts taken by the Swedish government to hinder asylum seekers from reaching Sweden since the carrier sanctions introduced in January the same year required me to show my ID card before boarding the train to Sweden.

## 1.2 Aim and research questions

The aim of this thesis is to assess whether three specific articles in the EU Commission’s Procedures Regulation Proposal are compatible with the principle of *non-refoulement*, and by doing so, contributing to a more general discuss on to what extent the principle of *non-refoulement* restricts EU Member States’ possibilities to streamline asylum procedures. The examination will focus on some of the provisions most closely related to the ambition to streamline asylum procedure, namely, the provisions related to admissibility procedures, accelerated procedures and implicit withdrawals of asylum applications.

---

<sup>8</sup> Commission, ‘Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU’ COM(2016) 467 final (Procedures Regulation Proposal).

<sup>9</sup> Procedures Regulation Proposal, 3–5.

<sup>10</sup> Procedures Regulation Proposal, 4–5.

<sup>11</sup> See chapter 2.

To reach the aim of the thesis, the following research questions will be examined:

- 1) In what way does the principle of *non-refoulement* limit the possibility for EU Member States to remove an asylum seeker to another country *without assessing his or her asylum application on the merits*?
  - a. What is the required level of protection that must be available in the receiving country?
  - b. Are there any procedural obligations that Member States must meet when determining if a receiving country is safe for a particular asylum seeker?
- 2) Does the principle of *non-refoulement* impose any procedural obligations on EU Member States *when assessing asylum applications on the merits*? If so:
  - a. What does this/these obligation imply for the use of time limits stating the maximum duration of certain procedural steps and other procedural requirements imposed on applicants?
  - b. What does it imply for the use of procedures stereotyping applicants from certain countries?
- 3) Considering the answers to the questions 1–2, can it be considered to be compatible with the principle of *non-refoulement*, as proposed in the Procedures Regulation Proposal, to use;
  - a. admissibility procedures, as proposed in article 36;
  - b. accelerated procedures, as proposed in article 40;
  - c. implicit withdrawals of applications, as proposed in article 39.

### 1.3 General approach, method and material

This thesis is a legal study aimed at finding what legal obligations the principle of *non-refoulement* imposes on EU Member States when dealing with asylum applications in order to assess the compatibility of the studied articles in the Procedures Regulation Proposal with these obligations.

The study will be based on a positivistic approach to law where law is understood as an argumentative discipline.<sup>12</sup> Notwithstanding the close relationship between morality, politics and law, the starting point of this thesis will be that law is an autonomous system that can be analysed as such.

To answer the research questions, and reach the aim of this thesis, a argumentativist legal dogmatic method will be used.<sup>13</sup> The most commonly accepted sources of international law, described in section 1.3.1, will be studied and interpreted according to the methods of interpretation that will

---

<sup>12</sup> Neil MacCormick, *Rhetoric and the Rule of Law* (Oxford University Press 2005) 14–15.

<sup>13</sup> Álvaro Núñez Vaquero, 'Five Models of Legal Science' (2013) 19 *Revus* <<http://revus.revues.org/2449>> accessed May 24 2017, paras 45–51.

be discussed in section 1.3.2. In section 1.3.3 some comments will be made on specific sources that will be used in this thesis.

The assessment of whether the studied articles in the Procedures Regulation Proposal are compatible with the obligations imposed by the principle of *non-refoulement* will be based on the criticism that has been expressed towards the Proposal, or towards similar provisions in other legal instruments, from, mainly, non-governmental organisations and scholars.<sup>14</sup>

### 1.3.1 Sources of international law

Article 38(1) of the Statute of the International Court of Justice (the ICJ Statute) is widely recognised as the most authoritative and comprehensive enumeration of the sources of international law.<sup>15</sup> The article states the following:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
  - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
  - b. international custom, as evidence of a general practice accepted as law;
  - c. the general principles of law recognized by civilized nations;
  - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

A special comment shall be made as to the role of judicial decisions and legal doctrine as sources of international law.

In article 38, judicial decisions are explicitly given the role of subsidiary means for the determination of rules of law. Despite their, formally, subsidiary position, judicial decisions can be of immense importance according to Shaw.<sup>16</sup> Taking judicial decisions from the ICJ as an example, Shaw holds that the authoritative position of certain judicial decisions, in combination with judges of the ICJ sometimes going beyond just interpreting the law, gives judicial decisions a position where they are able to not merely interpret, but shape the law.<sup>17</sup>

As regards the status of legal doctrine as a source of international law, it offers a method of finding out what the law is rather than classifying as a source of actual rules.<sup>18</sup> Due to the potential risk of scholars presenting a subjectively coloured view, legal doctrine will be used with due regard to this risk and will be valued based on the strength of the presented reasoning.

---

<sup>14</sup> See chapter 2.

<sup>15</sup> James Crawford, *Brownlie's principles of public international law* (8th edn, Oxford University Press 2012) 20; Malcolm N Shaw, *International Law* (7th edn, Cambridge University Press, 2014) 50; Hugh Thirlway, 'The Sources of International Law' in Malcolm D Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 92–93.

<sup>16</sup> Shaw (2014) 78.

<sup>17</sup> Shaw (2014) 78.

<sup>18</sup> Shaw (2014) 80.

Article 38(1) of the ICJ Statute does not present a strict hierarchy of the stated sources. However, in practice, sub-paragraphs (a) and (b) are regarded more important than (c) and (d).<sup>19</sup> According to Shaw and Thirlway, judicial decisions and writings clearly are the lowest ranking sources, while general principles come in on a third place since they can complement, but never override, customary international law and treaty law.<sup>20</sup>

### 1.3.2 Methods of interpretation

In this section, the methods and rules of interpretation found in international law will be examined in order to determine a methodology of interpretation that will be used in this thesis. Firstly should be noted, however, that, as the International Law Commission (ILC) stated in its 1966 Yearbook, ‘the interpretation of documents is to some extent an art, not an exact science.’<sup>21</sup>

There are in general three basic approaches to treaty interpretation: the subjective approach, the objective approach and the teleological approach.<sup>22</sup> The subjective approach looks to the intention of the parties to the treaty, whereas the objective approach focuses on the wording and actual meaning of the text.<sup>23</sup> The teleological approach has a wider perspective and uses the objective and purpose of the treaty as a whole to interpret particular provisions in the treaty.<sup>24</sup> For the ILC the starting point of interpretation was the text,<sup>25</sup> a method which seems to be preferred also by the ICJ.<sup>26</sup> According to Shaw however, ‘any true interpretation of a treaty in international law will have to take into account all aspects of the agreement’.<sup>27</sup>

The rules of treaty interpretation is covered by articles 31–33 in the Vienna Convention on the law of treaties (VCLT), the content of which is considered by the ICJ to reflect customary international law.<sup>28</sup> These

---

<sup>19</sup> Crawford (2012) 22–23.

<sup>20</sup> Shaw (2014) 87–88; Thirlway (2014) 104–07, 109–10.

<sup>21</sup> International Law Commission, *Yearbook of the International Law Commission*, vol 2 (A/CN.4/SER. A/1966/Add.1, United Nations Publication 1967) 218.

<sup>22</sup> Malgosia Fitzmaurice, ‘The Practical Working of the Law of Treaties’ in Evans (2014) 179; Shaw (2014) 675–76.

<sup>23</sup> Malgosia Fitzmaurice, ‘The Practical Working of the Law of Treaties’ in Evans (2014) 179; Shaw (2014) 675–76.

<sup>24</sup> Malgosia Fitzmaurice, ‘The Practical Working of the Law of Treaties’ in Evans (2014) 179; Shaw (2014) 675–76.

<sup>25</sup> International Law Commission, *Yearbook of the International Law Commission*, vol 2 (A/CN.4/SER. A/1966/Add.1, United Nations Publication 1967) 218.

<sup>26</sup> *Interpretation of Peace Treaties (second phase), Advisory Opinion, ICJ Reports 1950*, p 221, 229; Malgosia Fitzmaurice, ‘The Practical Working of the Law of Treaties’ in Evans (2014) 179.

<sup>27</sup> Shaw (2014) 676.

<sup>28</sup> *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994*, p 6, [41]; *LaCrand (Germany v United States of America), Judgment, ICJ Reports 2001*, p 466,

articles, to some extent, draws on all three of the above mentioned interpretations approaches.<sup>29</sup>

### 1.3.2.1 Fundamental rules of interpretation

The fundamental rules of interpretation are laid down in VCLT article 31 which states the following:

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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - a. Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
  - b. Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - a. Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - c. Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

The first paragraph presents the basic rule of treaty interpretation which consists of three elements: the text, its context and the object and purpose of the treaty.

The principle that a treaty shall be interpreted in good faith is, by some writers, considered to entail a duty to strive for an interpretation which ensures the effectiveness of the treaty.<sup>30</sup> The ILC explained the principle of effectiveness and its relation to interpretation in good faith in the following way:

When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.<sup>31</sup>

In the *Territorial dispute case* the ICJ called this principle ‘one of the fundamental principles of interpretation of treaties’ and, according to Shaw, the principle of effectiveness is evident in the context of human rights

---

[99], [101]; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, ICJ Reports 2002*, p 625, [37].

<sup>29</sup> Malgosia Fitzmaurice, ‘The Practical Working of the Law of Treaties’ in Evans (2014) 179; Shaw (2014) 676.

<sup>30</sup> James c Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) 62; Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 606.

<sup>31</sup> International Law Commission, *Yearbook of the International Law Commission*, vol 2 (A/CN.4/SER. A/1966/Add.1, United Nations Publication 1967) 219.



treaties, giving the ECHR as an example.<sup>32</sup> The principle of effectiveness is, however, not trouble-free. According to Fitzmaurice, ‘The main problem with regard to the principle of effectiveness is to keep it within bounds, to prevent it from leading to judicial legislation ... and to preserve a due proportion between it and the textual principle.’<sup>33</sup> In regard to this problem, the ICJ said in the *Interpretation of Peace Treaties case* that the principle of effectiveness, ‘cannot justify the Court in attributing to the provisions ... a meaning which ... would be contrary to their letter and spirit.’<sup>34</sup>

Subsequent practice, mentioned in sub-paragraph (b) of paragraph 3, is a most important treaty interpretation element as long as the practice is consistent and common to, or expressly or tacitly accepted by, all parties to the treaty.<sup>35</sup> According to Brownlie, also subsequent practise by individual parties has ‘some probative value’.<sup>36</sup>

Finally, paragraph 3 says that attention has to be given to any relevant rules of international law applicable in the relations between the parties. The ICJ has said that ‘an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.’<sup>37</sup> This means that not only norms in force at the time of conclusion of the treaty are relevant for the interpretation, but also norms that have come into existence later.<sup>38</sup>

### 1.3.2.2 Supplementary means of interpretation

Supplementary means of interpretation are covered in VCLT article 32, which states the following:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- a. Leaves the meaning ambiguous or obscure; or
- b. Leads to a result which is manifestly absurd or unreasonable.

---

<sup>32</sup> *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Reports 1994, p 6, [51]; Shaw (2014) 679–80.

<sup>33</sup> Gerald Fitzmaurice, ‘Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points’ (1952) 28 The British Yearbook of International Law 1, 19.

<sup>34</sup> *Interpretation of Peace Treaties (second phase)*, Advisory Opinion, ICJ Reports 1950, p 221, 229.

<sup>35</sup> Anthony Aust, *Modern Treaty Law and Practice* (2ed edn, Cambridge University Press 2007) 241.

<sup>36</sup> Brownlie (2003) 605.

<sup>37</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p 16, [53].

<sup>38</sup> Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff Publishers 2006) 19.

One commonly discussed means of supplementary interpretation is preparatory works<sup>39</sup> (*travaux préparatoires*, or *travaux* for short).<sup>40</sup> In what way *travaux* should be used for interpretation and the weight that should be awarded to them is somewhat disputed. Austin and Battjes hold that reference to *travaux* shall only be done, as stated in article 32, to confirm the meaning of an interpretation according to article 31, or to determine the meaning when the interpretation according to article 31 is ambiguous, obscure, or manifestly absurd or unreasonable, emphasising the risk of *travaux* being incomplete, misleading or outdated due to changed circumstances.<sup>41</sup> Hathaway, however, argues that the *travaux* are to be treated as a means by which to achieve the interpretive goal set by article 31 instead of just being used to confirm an already made interpretation and that this view has substantial backing of other writers and practice.<sup>42</sup> In this thesis *travaux* will take the position proposed by Hathaway but with close attention given to the risks put forward by Austin and Battjes.

Preparatory works can, according to several writers, probably be invoked against states even if they acceded to the treaty and did not take part in its preparation, as long as the *travaux* has been published or is otherwise available.<sup>43</sup>

### 1.3.2.3 Conclusions on method for interpretation

The interpretation method that will be used in this thesis will be based on VCLT articles 31–33, using a combination of the subjective, the objective and the teleological approaches where the wording of the text will be allowed to set a limit to what interpretations are possible.

Preparatory works will be given the role suggested by Hathaway, not strictly as means to confirm an already made interpretation, but as a tool to achieve the interpretive goal set by article 31, keeping in mind the potential risk involved in using preparatory works for interpretation.

### 1.3.3 Material

The 1951 Geneva Convention relating to the Status of Refugees (the Refugee Convention) is, together with the European Convention of Human Rights (the ECHR), the most important legal instruments to this thesis. There are, however, no international legally binding sources available for interpreting the Refugee Convention.<sup>44</sup> Documents from the United Nations High Commissioner for Refugees (UNHCR) will therefore be used to interpret the Refugee Convention in this thesis. The legal value of such

---

<sup>39</sup> For a more thorough discussion on what constitutes a preparatory work, see Aust (2007) 246.

<sup>40</sup> Aust (2007) 244–50; Malgosia Fitzmaurice, ‘The Practical Working of the Law of Treaties’ in Evans (2014) 181–82.

<sup>41</sup> Battjes (2006) 17–18; Aust (2007) 244–45, 247.

<sup>42</sup> Hathaway (2005) 55–59.

<sup>43</sup> Battjes (2006) 17; Aust (2007) 247.

<sup>44</sup> Kees Wouters, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009) 37.

documents is however disputed. Just as regards the position of legal doctrine, Battjes holds that UNHCR documents should be regarded as subsidiary means of interpretation, the relevance of which depends on the quality of its reasoning.<sup>45</sup> Kälin, on the other hand, has the view, referring to case law from national courts, that States Parties' duty to cooperate with the UNHCR and accept its supervisory role of the Convention implies that States Parties have to take into account UNHCR documents, however, emphasising that this does not mean that these documents are legally binding but that they must be regarded as authoritative statements.<sup>46</sup> Since it can be considered controversial to rely on the interpretation of national courts in the way Kälin does to substantiate his view, a more cautious approach will be taken to UNHCR documents in this thesis. UNCHR documents will therefore be treated as important subsidiary means of interpreting the Refugee Convention.

To interpret the ECHR, case law from the European Court of Human Rights (ECtHR) will be used. Although only the respondent state is legally bound by the final judgement of the Court in a specific case, the judgements are of big importance also to other Convention States.<sup>47</sup> In *Ireland v The United Kingdom* the Court stated:

The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties<sup>48</sup>

The case law of the ECtHR is therefore an important source for analysing the obligations imposed on EU Member States by the ECHR.

## 1.4 Delimitations

This thesis will not make a full review of the Procedures Regulation Proposal but will focus on the articles regulating the procedural concepts of admissibility procedures, accelerated procedures and implicit withdrawals of applications, as well as relevant provisions related to these articles. These particular articles have been chosen since they are closely related to the aspiration to streamline asylum procedures and, due to the criticism that has been levelled at these articles,<sup>49</sup> should be suitable for highlighting the outer boundary of what streamlining efforts are compatible with the principle of *non-refoulement*. A further reason for focusing on these particular articles is that the procedural concepts described in these articles, in contrast to other parts of the Proposal, are proposed to become mandatory for EU Member

---

<sup>45</sup> Battjes (2006) 20.

<sup>46</sup> Walter Kälin, 'Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and Beyond' in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law* (Cambridge University Press 2003) 625–27.

<sup>47</sup> Wouters (2009) 195.

<sup>48</sup> *Ireland v. The United Kingdom* App no 5310/71 (ECtHR, 13 December 1977) para 154.

<sup>49</sup> See sections 2.3, 2.4, 2.5.

States to apply, and therefore, inevitably will have an effect on asylum procedures within the EU if the Proposal is adopted.<sup>50</sup>

Due to the limited scope of this thesis, and the strict focus on the chosen articles, the compatibility of the examined articles with the principle of *non-refoulement* will only be assessed in relation to obligations imposed on Member States when examining asylum applications in first instance. This thesis will therefore not examine Member States' obligations towards asylum seekers before an application has been lodged or after a first decision has been taken. The assessment will furthermore focus on the parts of the chosen articles that can be considered most controversial in relation to the principle of *non-refoulement*.<sup>51</sup> The assessment will therefore, in relation to the proposed admissibility procedures, focus on the use of 'safe country' concepts as grounds for declaring an application inadmissible. For the same reason this thesis will not examine the possible need of a certain connection between an asylum seeker and a safe third country.<sup>52</sup> Furthermore, in areas where the Procedures Regulation Proposal refers to other EU legal instruments, proposed or in force, such as the Dublin Regulation Proposal<sup>53</sup> or the Qualification Regulation Proposal<sup>54</sup>, no separate examination will be done as to the compatibility of these instruments with the principle of *non-refoulement*.

The principle of *non-refoulement* can be derived from several different legal sources.<sup>55</sup> The examination of what obligations derive from the principle of *non-refoulement* will, due to the limited scope of this thesis, be restricted to an examination of that principle as derived from the Refugee Convention and article 3 of the ECHR.

---

<sup>50</sup> See sections 2.3, 2.4, 2.5 and compare to, for instance, the proposal on border procedures: Procedures Regulation Proposal, art 41.

<sup>51</sup> See sections 2.3, 2.4, 2.5.

<sup>52</sup> The need for a stronger connection between the asylum seeker and a safe third country than the one required by the Procedures Regulation Proposal has been discussed by, for instance, the ECRE: European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 (2016)* < [http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf) > accessed 8 May 2017, 57. This question can however be considered to lie outside the scope of the prohibition on *refoulement*: Stephen H Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 [4] *International Journal of Refugee Law* 567, 669.

<sup>53</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)' COM(2016) 270 final.

<sup>54</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents' COM(2016) 466 final.

<sup>55</sup> See section 3.2.

## 1.5 Previous research

There has already been substantial research done on the question of what obligations the principle of *non-refoulement* imposes on states.<sup>56</sup> The aim of this thesis is, however, to include the most recent developments and highlight the obligations of specific importance to assess the permissibility of measures proposed in the Procedures Regulation Proposal.

Also the Commission's Proposal has already been scrutinised by non-governmental organisations and others.<sup>57</sup> The criticism levelled at the proposal in these studies is however often imprecise and lacks clear legal reasoning to back it up.<sup>58</sup>

This thesis can therefore contribute to the research already done by updating and specifying what obligations EU Member States have to meet when handling asylum applications and assess, from a stricter legal perspective whether the Commission's Proposal is compatible with these obligations.

## 1.6 Outline

In the second chapter the content of the particular articles that will be analysed in this thesis will be examined. By way of introduction, the background and aim of the Procedures Regulation Proposal will be presented in order to give the reader a better understanding of the proposed articles. After having presented the background and aim, the content of the provisions related to admissibility procedures, accelerated procedures and the implicit withdrawal of asylum applications will be examined one by one. To put these proposed provisions in a context they will, where possible, be compared to the corresponding provisions in the Recast Procedures Directive, which is the instrument currently regulating the asylum procedure on EU level. In order to be able to focus the examination in the third chapter to the relevant questions, the second chapter will also present the criticism that has been levelled at the proposed provisions.

The third chapter will examine what obligations, relevant to the assessment of the provisions described in the second chapter, that emanate from the prohibition on *refoulement* as the prohibition is expressed in the Refugee Convention and the ECHR. These two instruments will be examined individually, starting with the Refugee Convention. The aim of this chapter is to give an answer to research questions 1 and 2 presented in section 1.2.

In the fourth chapter the findings of the third chapter will be applied to the provisions of the Procedures Regulation Proposal presented in the first

---

<sup>56</sup> See for instance: Stephen H Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 [4] *International Journal of Refugee Law* 567; Wouters (2009).

<sup>57</sup> See chapter 2.

<sup>58</sup> See chapter 2.

chapter in order to make an assessment of the compatibility of the proposed provisions with the prohibition on *refoulement*.

In the fifth and final chapter, the conclusions of this thesis will be summarised.

# 2 The Procedures Regulation Proposal

## 2.1 Introduction

This chapter will present the three articles of the Procedures Regulation Proposal that are to be assessed and other relevant provisions of the Proposal that are related to those articles. First, the background and aim of the Proposal will be described briefly to give the reader a better understanding of the Proposal. Thereafter, the provisions relating to the articles concerning admissibility procedures, accelerated procedures and the implicit withdrawal of asylum applications will be examined. Where possible, these provisions will be compared to the corresponding rules in the Recast Procedures Directive in order to give a context to the proposed changes.

The focus of this chapter will be on the most controversial parts of the studied proposals. To make it clear to the reader why certain proposals can be considered controversial, the criticism that has been, or possibly can be, passed on the studied proposals will be presented together with the examination of each proposal respectively.

## 2.2 Background and aim of the proposal

Since 1999, the EU has been striving to create a Common European Asylum System (CEAS).<sup>59</sup> The CEAS is made up of several legal instruments regulating what Member State is responsible for considering an asylum claim (the Dublin Regulation),<sup>60</sup> the reception conditions (the Reception Directive),<sup>61</sup> the asylum procedure (the Recast Procedures Directive) and the type of protection conferred and the rights and benefits granted to those eligible for protection (the Temporary Protection Directive<sup>62</sup> and the Qualification Directive<sup>63</sup>).<sup>64</sup>

---

<sup>59</sup> European Commission, *A Common European Asylum System* (Information folder, Publications Office of the European Union 2014) 3.

<sup>60</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31.

<sup>61</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96.

<sup>62</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12.

<sup>63</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as

The instrument currently in force, regulating the asylum procedures, is the Recast Procedures Directive from 2013 which replaced the 2005 Procedures Directive.

On July 13, 2016, the European Commission presented four proposals for changes to the CEAS: a proposal for a Regulation to replace the excising Recast Procedures Directive,<sup>65</sup> a proposal for a Regulation to replace the Qualification Directive,<sup>66</sup> a proposal revising the Reception Directive<sup>67</sup> and a proposal for a Union resettlement framework<sup>68</sup>.

The aim of the Commission's Procedures Regulation Proposal is, according to the Proposal, to 'establish a truly common procedure for international protection which is efficient, fair and balanced.'<sup>69</sup> This aim can be seen as entailing two separate, but related, parts: the strive to harmonise the procedures within the EU, and the strive to make the procedures efficient and fair.

To achieve a higher degree of harmonisation of the asylum procedures among Member States, with the primary aim of removing initiatives for, what the commission calls, 'asylum shopping' and secondary movements between Member States, the Commission wants to replace the Recast Procedures Directive with a regulation, directly applicable in the Member States,<sup>70</sup> and remove the possibility for states to choose whether to use certain procedural arrangements or not.<sup>71</sup>

---

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 (recast) [2011] OJ L337/9.

<sup>64</sup> Céline Bauloz and others, 'Introducing the Second Phase of the Common European Asylum System' in Céline Bauloz and others (eds), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Brill Nijhoff 2015) 4.

<sup>65</sup> Procedures Regulation Proposal.

<sup>66</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents' COM(2016) 466 final.

<sup>67</sup> Commission, 'Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)' COM(2016) 465 final.

<sup>68</sup> Commission, 'Proposal for a Regulation of the European Parliament and of the Council Establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council' COM(2016) 467 final.

<sup>69</sup> Procedures Regulation Proposal, 3.

<sup>70</sup> According to article 288 of the Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 a Regulation is binding in its entirety and directly applicable in all Member States while a Directive only is binding as to the result to be achieved.

<sup>71</sup> Procedures Regulation Proposal, 3–4.



To achieve the goal of efficiency the Commission wants to see ‘short but reasonable’ time limits, stricter rules to prevent ‘abuse of the system’ and harmonised rules on safe countries.<sup>72</sup> Furthermore, several procedural arrangements relating to efficiency that today are voluntary for Member States to use are proposed to become obligatory.<sup>73</sup> To make sure that asylum claims are adequately assessed the Commission proposes, among other things, to strengthen the right to be heard in a personal interview and the access to free legal assistance and representation.<sup>74</sup> The aim of the Commission is that these measures will promote ‘quick but solid decisions, so that persons who are in need of protection get their status recognised quickly while swiftly returning those not in need of protection.’<sup>75</sup>

There are currently no less than seven possible procedural tracks in EU law for assessing asylum applications: a ‘regular’ procedure,<sup>76</sup> a prioritised procedure,<sup>77</sup> an accelerated procedure,<sup>78</sup> an admissibility procedure,<sup>79</sup> a Dublin procedure<sup>80</sup> and a border procedure<sup>81</sup>. Only the regular procedure and the Dublin procedure are obligatory for Member States to use.<sup>82</sup> The others may, according to the wording of the articles, be used if the Member State wishes to do so.

In the Procedures Regulation Proposal, the Commission proposes to make also the accelerated procedure and the admissibility procedure compulsory for Member States to utilise.<sup>83</sup> In addition to making these procedural concepts obligatory, the Commission proposes certain changes to the content of these provisions. The Procedures Regulation Proposal also introduces changed rules on when an asylum application should be considered implicitly withdrawn and the effect of such a withdrawal. These proposals will be described more closely in the following sections.

---

<sup>72</sup> Procedures Regulation Proposal, 3–5.

<sup>73</sup> E.g. accelerated procedures (compare article 31(8) Recast Procedures directive and article 40 Procedures Regulation Proposal) and inadmissibility proceedings (compare article 33 Recast Procedures Directive and article 36 Procedures Regulation Proposal).

<sup>74</sup> Procedures Regulation Proposal, 4.

<sup>75</sup> Procedures Regulation Proposal, 4.

<sup>76</sup> Recast Procedures Directive, art 31(1).

<sup>77</sup> Recast Procedures Directive, art 31(7).

<sup>78</sup> Recast Procedures Directive, art 31(8).

<sup>79</sup> Recast Procedures Directive, art 33.

<sup>80</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31.

<sup>81</sup> Recast Procedures Directive, art 43.

<sup>82</sup> See the wording of Recast Procedures Directive art 31(1) ‘Member States shall’ and Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31, art 20(1).

<sup>83</sup> Procedures Regulation Proposal, art 41.

## 2.3 Admissibility procedures

According to the current EU law, Member States are not required to examine whether an applicant qualifies for international protection if the application is considered inadmissible.<sup>84</sup> This means that an asylum seeker who's application is considered inadmissible can be removed to another country without getting his or her application for international protection assessed on its merits.

The Recast Procedures Directive presents an exhaustive list of five grounds on which an application may be considered inadmissible.<sup>85</sup> An application may be considered inadmissible if the applicant:

- a) has been granted international protection by another member state;
- b) comes from a 'first country of asylum';
- c) comes from a 'safe third country';
- d) makes a subsequent application with no new elements;
- e) is a dependent of an applicant and makes a separate application without justification.<sup>86</sup>

Under the current legislation, each Member State is not only free to choose whether to use admissibility procedures or not, but the Member States can also choose what inadmissibility grounds to recognise.<sup>87</sup> Due to this freedom, procedures on admissibility vary greatly between national legislations of Member States, ranging from Sweden, not having any admissibility procedure at all, to countries such as Cyprus, Greece and Malta recognizing all admissibility grounds presented in the Directive.<sup>88</sup>

In the Commission's proposal the admissibility procedure, with all its current inadmissibility grounds, are proposed to become an obligatory part of asylum procedures in all Member States.<sup>89</sup> This means that a Member State will be obliged to declare an application as inadmissible if any of the grounds apply.<sup>90</sup> The only exception to this obligation is if the Member State *prima facie* considers that an application may be rejected as manifestly unfounded.<sup>91</sup>

---

<sup>84</sup> Recast Procedures Directive, art 33(1).

<sup>85</sup> Recast Procedures Directive, art 33(2).

<sup>86</sup> Recast Procedures Directive, art 33(2).

<sup>87</sup> Recast Procedures Directive, art 33(2).

<sup>88</sup> Asylum Information Database, *Admissibility, Responsibility and Safety in European Asylum Procedures* (Comparative report, European Council on Refugee and Exiles, 2016) < <http://www.ecre.org/wp-content/uploads/2016/09/ECRE-AIDA-Admissibility-responsibility-and-safety-in-European-asylum-procedures.pdf>> accessed 30 March 2017, 15–16.

<sup>89</sup> Note however that the ground related to the applicant having been granted international protection by another Member State in the proposal is moved to the Dublin Regulation: Procedures Regulation Proposal, art 36(1–2).

<sup>90</sup> Procedures Regulation Proposal, art 36(1–2).

<sup>91</sup> Procedures Regulation Proposal, art 36(5).

The Recast Procedures Directive does not set out any time limits for the duration of an admissibility procedure.<sup>92</sup> In the Commission's proposal the time limit for examining the admissibility of an application is set to one month, or ten working days if the concept of 'first country of asylum' or 'safe third country' is applied.<sup>93</sup>

According to Amnesty International, the proposed time limit for the duration of the admissibility procedure connected to the concepts of 'first country of asylum' and 'safe third country' of only ten days, raises concerns as it 'may not offer applicants an effective opportunity to rebut the presumption of safety in individual circumstances and will deny asylum-seekers access to asylum in Europe.'<sup>94</sup>

The concepts of 'first country of asylum' and 'safe third country' are, in general, the admissibility grounds that has been the primary focus of discussion and criticism by organisations and scholars.<sup>95</sup> The following sections will therefore examine these two admissibility grounds in more detail.

### 2.3.1 First country of asylum

According to article 35 of the Recast Procedures Directive, a country can be considered to be a first country of asylum for a particular applicant if the applicant has been recognised as a refugee in that country and he or she still can avail himself or herself of that protection, or if he or she 'otherwise enjoys sufficient protection in that country, including benefitting from the principle of non-refoulement'. A basic requirement for considering a country as a first country of asylum is also, according to the article, that the applicant will be readmitted to that country.

In some aspects, the Procedures Regulation Proposal proposes a strengthening of the protection of the asylum seeker under the first country of asylum concept. The Commission proposes that an applicant only should be considered to enjoy sufficient protection if:

---

<sup>92</sup> Recast Procedures Directive, art 33.

<sup>93</sup> Procedures Regulation Proposal, art 34(1).

<sup>94</sup> Amnesty International, *The Proposed Asylum Procedures Regulation* (Position paper, 2017) <[http://www.amnesty.eu/content/assets/AI\\_position\\_paper\\_on\\_APR\\_proposal.pdf](http://www.amnesty.eu/content/assets/AI_position_paper_on_APR_proposal.pdf)> accessed 9 May 2017, 6.

<sup>95</sup> See for instance Stephen H Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 [4] *International Journal of Refugee Law* 567; Asylum Information Database, *Admissibility, Responsibility and Safety in European Asylum Procedures* (Comparative report, European Council on Refugee and Exiles, 2016) <<http://www.ecre.org/wp-content/uploads/2016/09/ECRE-AIDA-Admissibility-responsibility-and-safety-in-European-asylum-procedures.pdf>> accessed 30 March 2017, 16–22; Amnesty International, *The Proposed Asylum Procedures Regulation* (Position paper, 2017) <[http://www.amnesty.eu/content/assets/AI\\_position\\_paper\\_on\\_APR\\_proposal.pdf](http://www.amnesty.eu/content/assets/AI_position_paper_on_APR_proposal.pdf)> accessed 9 May 2017.

- a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- b) there is no risk of serious harm as defined in Regulation (EU) No XXX/XXX (Qualification Regulation);
- c) the principle of *non-refoulement* in accordance with the Geneva Convention is respected;
- d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law is respected;<sup>96</sup>

These criteria are currently optional for Member States to apply to the first country of asylum concept.<sup>97</sup> The Procedures Regulation Proposal also introduces criteria for some basic socio-economic rights to the concept of ‘sufficient protection’.<sup>98</sup>

While raising the threshold for when an applicant is to be considered to have access to ‘sufficient protection’, the Procedures Regulation Proposal lowers the threshold of the other ground for considering a country to be a first country of asylum. In the Recast Procedures Directive, an applicant has to be recognised as a refugee in the receiving country in order for that country to be considered a first country of asylum.<sup>99</sup> In the Procedures Regulation Proposal however, it is sufficient that the applicant has enjoyed ‘protection in accordance with the Geneva Convention’.<sup>100</sup>

According to both the Recast Procedures Directive and the Procedures Regulation proposal an applicant should be given the possibility to challenge the application of the ‘first country of asylum’ concept in the light of the applicant’s personal circumstances.<sup>101</sup>

A potential problem with the ‘first country of asylum’ concept is that it may lead to the individual risk of removing an asylum seeker to a particular country being overlooked, if the concept is implemented in a mechanical way.<sup>102</sup> The European Council on Refugees and Exiles (ECRE) expresses concern that the Proposal only requires an asylum seeker to have enjoyed ‘protection in accordance with the Geneva Convention’<sup>103</sup> instead of having been recognised as a refugee in the receiving country.<sup>104</sup> According to the

---

<sup>96</sup> Procedures Regulation Proposal, art 44(2).

<sup>97</sup> Recast Procedures Directive, art 35.

<sup>98</sup> These criteria include appropriate access to the labour market, reception facilities, healthcare and education and a right to family reunification in accordance with international human rights standards: Procedures Regulation Proposal, art 44(2).

<sup>99</sup> Recast Procedures Directive, art 35(a).

<sup>100</sup> Procedures Regulation Proposal, art 44(1)(a).

<sup>101</sup> Recast Procedures Directive, art 35; Procedures Regulation Proposal, art 44(3).

<sup>102</sup> Hathaway recognises this risk in relation to shared responsibility systems, such as the Dublin system: James C Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press 2005) 325. Even if there are differences between the Dublin system and the ‘first country of asylum’ concepts the same problem may possibly arise.

<sup>103</sup> Procedures Regulation Proposal, art 44(1)(a).

<sup>104</sup> European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 (2016)* <

ECRE, the recognition of the asylum seeker as a refugee according to the Refugee Convention should be a prerequisite for considering a country to be a first country of asylum as it otherwise may result in persons eligible for refugee status ‘being effectively barred from accessing their rights’.<sup>105</sup> The ECRE also expresses concerns about the existence of the notion of ‘sufficient protection’ all together.<sup>106</sup> Even though the notion is proposed to be reformulated to offer a stronger protection, the ECRE holds that the protection in the receiving country should be required to be at the same level as under EU law.<sup>107</sup>

### 2.3.2 Safe third country

For a country to be considered a safe third country according to the current EU legislation, the Member State must be satisfied that the applicant will be treated in accordance with the following five principles in that country:

- a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- b) there is no risk of serious harm as defined in Directive 2011/95/EU;
- c) the principle of *non-refoulement* in accordance with the Geneva Convention is respected;
- d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
- e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.<sup>108</sup>

The applicant should also be able to challenge the existence of this connection and the application of the safe country concept on the ground that that the country is not safe for the applicant under his or her particular circumstances.<sup>109</sup>

---

[http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf) > accessed 8 May 2017, 52–53.

<sup>105</sup> European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 (2016)* < [http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf) > accessed 8 May 2017, 52–53.

<sup>106</sup> European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 (2016)* < [http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf) > accessed 8 May 2017, 53.

<sup>107</sup> European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 (2016)* < [http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf) > accessed 8 May 2017, 53.

<sup>108</sup> Recast Procedures Directive, art 38(1). In addition to these five principles a certain connection between the applicant and the third country is required: Recast Procedures Directive, art 38(2)(a). This criterion will however not be assessed in this thesis: see section 1.4.

<sup>109</sup> Recast Procedures Directive, art 38(2)(c).

The Commission has chosen to keep the same five principles of protection, however with a change to the last one.<sup>110</sup> Instead of the requirement that a safe country must provide the possibility for the applicant to request refugee status and receive protection in accordance with the Refugee Convention it is, according to the proposal, sufficient that the possibility exists to receive ‘protection in accordance with the substantive standards of the Geneva Convention’ or the same level of ‘sufficient protection’ as proposed for the first country of asylum concept.<sup>111</sup>

Another change proposed by the Commission is that the decision of whether a country is to be considered a safe third country or not will be taken at Union level.<sup>112</sup> According to the proposal there will be no possibility for Member States to derogate from the common EU-list of safe countries.<sup>113</sup> This means that a Member State must treat a country on the list as a safe country. There is however a possibility for the Member State to deem a safe country unsafe in the individual case of a particular applicant.<sup>114</sup>

According to Hathaway, safe third country concepts in general raise questions of whether it is permissible for a party to the Refugee Convention to consider a non-party state as being a safe third country and what level of protection a country must provide in order to be considered safe.<sup>115</sup> The ECRE has similar concerns in relation to the Commission’s Proposal. ECRE considers the requirement that the third state must provide ‘protection in accordance with the substantive standards of the Geneva Convention’ too weak.<sup>116</sup> ECRE holds that the uncertainty of what the ‘substantive standards of the Refugee Convention’ are, implies that the Refugee Convention can be applied by states on a ‘prick-and-choose’ basis in a way that is incompatible with the Convention.<sup>117</sup> Furthermore, ECRE argues that this, already weak protection, is further weakened by the proposal that ‘sufficient protection’ should be enough for considering a country safe in the lack of ‘protection in accordance with the substantive standards of the Geneva Convention’.<sup>118</sup> In

---

<sup>110</sup> Procedures Regulation Proposal, art 45(1).

<sup>111</sup> Procedures Regulation Proposal, art 45(1)(e).

<sup>112</sup> Procedures Regulation Proposal, arts 45(2)(b), 46. During a period of five years from entry into force of the Regulation Member States are proposed to, with some limitations, be able to decide that also other countries than the ones considered safe at Union level shall be considered safe at national level: Procedures Regulation Proposal, arts 45(2)(a), 50.

<sup>113</sup> Procedures Regulation Proposal, arts 45, 46, 49.

<sup>114</sup> Procedures Regulation Proposal, art 45(3).

<sup>115</sup> Hathaway (2005) 327–28.

<sup>116</sup> European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 (2016)* <[http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf)> accessed 8 May 2017, 55.

<sup>117</sup> European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 (2016)* <[http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf)> accessed 8 May 2017, 55.

<sup>118</sup> European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 (2016)* <[http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf)> accessed 8 May 2017, 56.

the view of the ECRE, the proposed construction of the safe third country concept in the Proposal ‘may entail greater risks of the applicant being ultimately subjected to serious human rights violations, including *refoulement*, as the outcome and quality of such process is by definition unknown.’<sup>119</sup>

## 2.4 Accelerated procedures

If an application is not considered inadmissible, the Member State must generally conduct a substantive examination of the applicant’s claim for asylum to conclude whether the applicant should be granted international protection or not.<sup>120</sup> This examination can be done in different ways.<sup>121</sup> Under the current EU legislation there are ten different situations in which a Member State may choose to accelerate the examination of an application.<sup>122</sup> In contrast to the admissibility procedure, the accelerated procedure allows for a substantive examination of the applicants asylum claims, but in a procedure that allows for shorter time limits on certain procedural steps in comparison to a regular asylum procedure.<sup>123</sup> In the commission’s proposal the grounds for accelerating an examination are reduced to the following eight grounds:

- a) the applicant has only presented facts irrelevant for international protection;
- b) the claim of the applicant is clearly unconvincing;
- c) the applicant has misled the authorities;
- d) the applicant is making an application merely to delay or frustrate the enforcement of a decision to remove the applicant from a Member State;
- e) a third country may be considered a safe country of origin;
- f) the applicant does not comply with certain obligations in the Dublin Regulation;
- g) the application is a subsequent application with no tangible prospect of success.<sup>124</sup>

Just as in the case of the admissibility procedures, the Commission wants to make the accelerated procedures, together with its grounds for application, mandatory for Member States to use.<sup>125</sup>

---

<sup>119</sup> European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 (2016)* <[http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf)> accessed 8 May 2017, 56.

<sup>120</sup> Recast Procedures Directive, art 31; Procedures Regulation Proposal, arts 36, 37. One exception can be if the application is considered implicitly withdrawn: see section 2.5.

<sup>121</sup> The examination procedure can either be ‘regular’ or accelerated: Recast Procedures Directive, art 31.

<sup>122</sup> Recast Procedures Directive, art 31(8).

<sup>123</sup> Recast Procedures Directive, recital 20, art 31(8).

<sup>124</sup> This is a summary of ground presented in article 40, not a quotation of that article: Procedures Regulation Proposal, art 40(1).

<sup>125</sup> Procedures Regulation Proposal, art 40(1).

Under the current EU legislation, it is up to each Member State to lay down its own time limits for the duration of an accelerated procedure. The only requirement imposed by the Recast Procedures Directive is that such time limits must be ‘reasonable’.<sup>126</sup> In the Commission’s Proposal, the time limit for an accelerated procedure is set to two months or eight working days if the examination is accelerated because the application was made ‘merely to delay or frustrate the enforcement of an earlier or imminent decision resulting in his or her removal from the territory of a Member State’.<sup>127</sup> If the determining authority considers that a certain case is too complex to be examined under an accelerated procedure it may continue the examination under a ‘regular’ procedure.<sup>128</sup>

The ECRE holds that the use of accelerated procedures, as they are currently being used in some countries, entails a risk of compromising fundamental rights of applicants by making a fair and qualitative examination of applicants’ need for international protection close to impossible through the use of time limits giving applicants insufficient time to prepare their applications or appeals.<sup>129</sup> The ECRE therefore argues that accelerated procedures only should be used in cases where the application is clearly fraudulent or the applicant only has submitted issues that are unrelated to the grounds for granting international protection.<sup>130</sup> On this basis, the ECRE considers, for instance, the proposal to accelerate the examination of applications that has not been filed by the applicant in the first country where he or she illegally entered the EU, unjustified as the place where the applications has been filed is completely unrelated to the applicants claim for international protection.<sup>131</sup> Also Amnesty International criticise the use of grounds for acceleration based on elements or behaviours that have no connection to the validity or merit of the application.<sup>132</sup>

In the same way as regards the grounds for the admissibility procedure presented above, the, generally, most frequently discussed ground for

---

<sup>126</sup> Recast Procedures Directive, art 31(9).

<sup>127</sup> Procedures Regulation Proposal, art 40(1–2).

<sup>128</sup> Procedures Regulation Proposal, art 40(4).

<sup>129</sup> European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 (2016)* < [http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf) > accessed 8 May 2017, 47.

<sup>130</sup> European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 (2016)* < [http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf) > accessed 8 May 2017, 47.

<sup>131</sup> This acceleration ground is included in the above mentioned point f. European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 (2016)* < [http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf) > accessed 8 May 2017, 47–48.

<sup>132</sup> Amnesty International, *The Proposed Asylum Procedures Regulation* (Position paper, 2017) < [http://www.amnesty.eu/content/assets/AI\\_position\\_paper\\_on\\_APR\\_proposal.pdf](http://www.amnesty.eu/content/assets/AI_position_paper_on_APR_proposal.pdf) > accessed 9 May 2017, 5.



acceleration is the one connected to the concept of ‘safe countries’, the ‘safe country of origin’ concept.<sup>133</sup> The following section will therefore describe this particular ground more thoroughly.

## 2.4.1 Safe country of origin

According to annex I and article 37(1) of the Recast Procedures Directive, a Member State may consider a country to be a safe country of origin if:

... it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

When making the assessment of the safety of a country, the Directive prescribes that account shall be taken to, among other things, the extent to which protection is provided against persecution or mistreatment by observance of the rights and freedoms laid down in the ECHR, as well as respect for the principle of *non-refoulement* in accordance with the Refugee Convention.<sup>134</sup> In order for a safe country of origin, as defined above, to be considered a safe country of origin for a particular applicant, this applicant must have the nationality of that country or, if the applicant is a stateless person, formerly have been habitually resident in that country.<sup>135</sup> Another prerequisite is that the applicant has not submitted any serious ground for considering the country not to be a safe country of origin for the particular applicant.<sup>136</sup>

The overall construction of the ‘safe country of origin’ concept proposed in the Procedures Regulation Proposal reassembles the construction of the concept in the current Directive to a great extent.<sup>137</sup> There are, however, minor, but significant, proposed changes to be found. The formulation in the Directive that there ‘generally and consistently’<sup>138</sup> should be no persecution, torture etc. in a safe country of origin is, in the Proposal, changed to only ‘generally’<sup>139</sup>. The obligation in the Directive to observe whether a country respects the principle of *non-refoulement* in accordance with the Refugee Convention when assessing the safety of a country is rewritten to a general description of the principle of *non-refoulement* which also covers the way

---

<sup>133</sup> See for instance Hathaway (2005) 333–35; European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467* (2016) <[http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf)> accessed 8 May 2017, 58–62; Amnesty International, *The Proposed Asylum Procedures Regulation* (Position paper, 2017) <[http://www.amnesty.eu/content/assets/AI\\_position\\_paper\\_on\\_APR\\_proposal.pdf](http://www.amnesty.eu/content/assets/AI_position_paper_on_APR_proposal.pdf)> accessed 9 May 2017.

<sup>134</sup> This is only a selection of prescribed factors to take into consideration according to the Directive. Recast Procedures Directive, annex I.

<sup>135</sup> Recast Procedures Directive, art 36(1).

<sup>136</sup> Recast Procedures Directive, art 36(1).

<sup>137</sup> Procedures Regulation Proposal, art 47.

<sup>138</sup> Recast Procedures Directive, annex I.

<sup>139</sup> Procedures Regulation Proposal, art 47(1).

the principle is formulated in the ECHR.<sup>140</sup> It does, however, no longer make direct reference to the Refugee Convention.<sup>141</sup>

Similarly to the ‘safe third country’ concept as proposed by the Commission,<sup>142</sup> the countries to which the ‘safe country of origin’ concept is going to be applied are proposed to be decided on Union level.<sup>143</sup> This means that a Member State, according to the proposal, will be required to accelerate the procedure of an application made by an applicant coming from a country on the common EU list of safe countries of origin, unless the applicant has submitted serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances.<sup>144</sup>

According to the ECRE:

The use of safe country lists ... further contributes to a practice of stereotyping certain applications on the basis of their nationality and increases the risk of such applications not being subject to thorough examination of a person’s fear for persecution or risk of serious harm on an individual basis, which is crucial to ensuring full respect for the principle of *non refoulement*.<sup>145</sup>

The ECRE further argues that the application of a presumption of safety puts an almost impenetrable burden of proof on the applicant required to rebut this presumption.<sup>146</sup>

For those reasons the ECRE advocates the complete deletion of the safe country of origin concept all together.<sup>147</sup> An approach also shared by Amnesty International on generally the same grounds.<sup>148</sup>

---

<sup>140</sup> Compare Recast Procedures Directive, annex I and Procedures Regulation Proposal, art 47(3)(c).

<sup>141</sup> Compare Recast Procedures Directive, annex I and Procedures Regulation Proposal, art 47(3)(c).

<sup>142</sup> See section 2.3.2.

<sup>143</sup> Procedures Regulation Proposal, art 48. EU Member States will have the possibility to designate a country as a safe country of origin on a national level for a period of five years from entry into force of the Proposal: Procedures Regulation Proposal, art 50.

<sup>144</sup> Procedures Regulation Proposal, arts 40(1)(e), 47(4)(c).

<sup>145</sup> European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 (2016)* <[http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf)> accessed 8 May 2017, 58.

<sup>146</sup> European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 (2016)* <[http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf)> accessed 8 May 2017, 58.

<sup>147</sup> European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 (2016)* <[http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf)> accessed 8 May 2017, 58.

<sup>148</sup> Amnesty International, *The Proposed Asylum Procedures Regulation* (Position paper, 2017) <[http://www.amnesty.eu/content/assets/AI\\_position\\_paper\\_on\\_APR\\_proposal.pdf](http://www.amnesty.eu/content/assets/AI_position_paper_on_APR_proposal.pdf)> accessed 9 May 2017, 1–2.

## 2.5 Implicit withdrawals of applications

If an asylum seeker for instance, fails to respond to requests to provide certain information or does not appear for a personal interview and he or she can not show that the failure was due to circumstances beyond his or her control, a Member State may, under the current Directive, consider the application implicitly withdrawn or abandoned.<sup>149</sup> In such a case, the Member state shall either discontinue the examination of the application or reject the application if the determining authority, after an adequate examination of its substance, considers the application to be unfounded.<sup>150</sup> If the examination of the application is discontinued and not rejected, the applicant is entitled to request that his or her case should be reopened or to make a new application without having it treated as a subsequent application, if the applicant reports to the authorities within, at least, nine months.<sup>151</sup>

In the Commission's Proposal, the possibility for a Member State to discontinue the examination of an application, instead of rejecting it, is removed.<sup>152</sup> Instead the Proposal presents a list of six circumstances which, if they occur, puts an obligation the Member State to reject the application after having sent a written notice to the applicant, unless the applicant contacts the authorities within one month and shows that the reason for the occurred situation was beyond his or her control.<sup>153</sup> If this is not done the Member State shall consider the application implicitly withdrawn and a decision shall be taken to definitely reject the application as abandoned or as unfounded, where the determining authority has, at the stage that the application is implicitly withdrawn, already found that the applicant does not qualify for international protection.<sup>154</sup> The circumstances on the list are, for example, if the applicant refuses to cooperate by not providing his or her fingerprints, if the applicant does not show up for a personal interview or if the applicant has abandoned his or her place of residence without informing the authorities.<sup>155</sup>

If a new application is made after the first application has been rejected, that application will be considered a subsequent application and will only be examined on its merits if it contains new elements or findings which the applicant was unable, through no fault on his or her own part, to present earlier, unless its considered unreasonable not to take those elements or findings into account.<sup>156</sup>

---

<sup>149</sup> Recast Procedures Directive, art 28(1).

<sup>150</sup> Recast Procedures Directive, art 28(1).

<sup>151</sup> Recast Procedures Directive, art 28(2).

<sup>152</sup> Procedures Regulation Proposal, art 39(1).

<sup>153</sup> Procedures Regulation Proposal, art 39(1-3).

<sup>154</sup> Procedures Regulation Proposal, art 39(4-5).

<sup>155</sup> Procedures Regulation Proposal, art 39(1).

<sup>156</sup> Procedures Regulation Proposal, arts 4(2)(d), 42(1, 4).

The proposed changes would in practice mean, for example, that there no longer is room for the applicant to forget an appointment for a personal interview without severe consequences. If the applicant cannot show that the reason for him or her failing to show up for an interview was beyond his or her control, the application will be rejected and the applicant will have to lodge a new application which will be treated as a subsequent application.

The ECRE holds that the concept of implicit withdrawals may lead to violations of the principle of *non-refoulement*.<sup>157</sup> Also Amnesty International sees a risk of the proposed changes leading to *refoulement* as applicants, after having their applications rejected, will have to make a new application which will be treated as a subsequent application and, ‘Since, in most cases, there will be no new elements for their asylum claim, there is the danger that their application will not be examined at all.’<sup>158</sup> Similar concerns have been expressed by Swedish courts in comments to the Proposal.<sup>159</sup> The ECRE especially criticise that Member States, according to the Proposal, will be obliged to reject an implicitly withdrawn application instead of, as currently, also have the possibility to discontinue the examination, as this flexibility could be necessary for Member States in order to comply with their obligations under international human rights law.<sup>160</sup>

## 2.6 Conclusions

One of the biggest changes in the Procedures Regulation Proposal, compared to the Recast Procedures Directive, is that the admissibility procedures and the accelerated procedures, together with all proposed grounds for inadmissibility and acceleration, such as the ‘safe country concepts’, are made mandatory for Member States to use.<sup>161</sup> As regards the content of the provisions regulating these procedures, there are minor, but potentially important, changes proposed. Some of these proposed changes

---

<sup>157</sup> ECRE does, however, not specify in what way such a violation could occur: European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 (2016)* < [http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf) > accessed 8 May 2017, 45.

<sup>158</sup> Amnesty International, *The Proposed Asylum Procedures Regulation* (Position paper, 2017) < [http://www.amnesty.eu/content/assets/AI\\_position\\_paper\\_on\\_APR\\_proposal.pdf](http://www.amnesty.eu/content/assets/AI_position_paper_on_APR_proposal.pdf) > accessed 9 May 2017, 10.

<sup>159</sup> Kammarrätten i Stockholm, *Remissyttrande: EU-kommissionens förslag till asylprocedurförordning och skyddsgrundsförordning* (Comment of official report by the administrative court of appeal in Stockholm, Dnr KST 2016/379, KST 2016/388, 2016) 6; Förvaltningsrätten i Stockholm, *Remissyttrande: EU-kommissionens förslag till asylprocedurförordning* (Comment of official report by the administrative court in Stockholm, Dnr FST 2016/236-I, 2016) at 3–4.

<sup>160</sup> European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467 (2016)* < [http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf) > accessed 8 May 2017, 45.

<sup>161</sup> See sections 2.3, 2.4.

may increase the protection of the applicants,<sup>162</sup> while others risk lowering the protection<sup>163</sup>.

The Proposal also presents quite radical changes to the concept of ‘implicitly withdrawn applications’ in the way that Member States, according to the proposal, will be obliged to reject applications under certain circumstances and treat a new application from the same applicant as a subsequent application, where, as a ground rule, only new circumstances will be taken into consideration when assessing the applicants claim for protection.<sup>164</sup>

As presented in this chapter, the examined provisions of the Proposal have been criticised on several points for potentially not being compatible with the principle of *non-refoulement*. As regards the proposed admissibility procedure, the criticism has mainly been focused on the ‘first country of asylum’ and ‘safe third country’ concepts.<sup>165</sup> The proposed time limit of ten days for the duration of procedures based on these concepts has been considered to short but also the requirements for declaring a country to be a first country of asylum or a safe third country has been criticised for being too low.<sup>166</sup>

In the case of the accelerated procedures, the main areas of concern have been the short time limits and the risk that stereotyping of certain asylum seekers under the ‘safe country of origin’ concept may lead to the assessment not being sufficiently individualised.<sup>167</sup>

As regards the concept of ‘implicit withdrawals of applications’, the fear has been that this concept may lead to the applicant being deprived of an assessment of his or her asylum claims all together.<sup>168</sup>

---

<sup>162</sup> For example the proposal to introduce specific criteria for the concept of ‘sufficient protection’: See section 2.3.1.

<sup>163</sup> See for example the proposal to change the requirement that a safe country of origin must be ‘generally and consistently’ safe, to only having to be ‘generally’ safe: See section 2.4.1.

<sup>164</sup> See section 2.5.

<sup>165</sup> See section 2.3.

<sup>166</sup> See section 2.3.

<sup>167</sup> See section 2.4.

<sup>168</sup> See section 2.5.

# 3 Obligations imposed on EU Member States by the principle of *non-refoulement*

## 3.1 Introduction

This chapter will examine what obligations, emanating from the principle of *non-refoulement*, EU Member States must meet when handling asylum applications. The chapter will not make a complete examination of obligations under the principle of *non-refoulement* but will focus on the obligations relevant for assessing the permissibility of the specific provisions examined in the previous chapter.<sup>169</sup> The conclusions of this chapter will make out the base for the assessment of these specific provisions in the next chapter.

To assess whether the criticism, presented in chapter 2, of the examined provisions is justified, several parts of the principle of *non-refoulement* have to be examined. In regard to assessing the permissibility of the proposed admissibility procedure, including the use of ‘first country of asylum’ and ‘safe third country’ concepts, the main question is in what way the principle of *non-refoulement* limits the possibility for EU Member States to remove an asylum seeker to another country without assessing his or her asylum application on the merits. As regards the permissibility of the proposed accelerated procedure and the concept of ‘implicit withdrawals of applications’, the main question is whether the principle of *non-refoulement* impose any procedural obligations on EU Member States when assessing asylum applications on the merits.

First, a short, general description of the principle of non-refoulement and its background will be made to introduce the reader to the principle. Thereafter, starting with the Refugee Convention, the obligations emanating from the principle as it is expressed in the Refugee convention and the ECHR will be examined respectively. This examination will not only include a discussion about the specific obligations but also an examination of who is bound and who is protected by the respective legal instrument.

## 3.2 General description of the principle of *non-refoulement*

The principle of *non-refoulement* can broadly be described as a prohibition to expel or return a refugee to a country where he or she is likely to face

---

<sup>169</sup> See section 1.4.

persecution or torture.<sup>170</sup> The principle of *non-refoulement* developed together with the principle of non-extradition of political offenders in the nineteenth century but was first formulated in the 1933 Convention relating to the International Status of Refugees. The principle of *non-refoulement* was later recognised in the Refugee Convention, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and in a multitude of other international instruments.<sup>171</sup>

### **3.3 *Non-refoulement* under the Refugee Convention**

The prohibition on *refoulement* is expressed in article 33 of the Refugee Convention which states the following:

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

#### **3.3.1 Who is bound?**

All EU Member States are bound by article 33 since the Refugee Convention allows no reservation to this article and all Member States are parties to the Convention.<sup>172</sup>

According to article 33, it is the 'Contracting State' that is bound by the obligations of the article. For the purpose of this thesis it is sufficient to observe that the scope of the term 'Contracting State' is defined by the law on state responsibility.<sup>173</sup>

#### **3.3.2 Who is protected?**

The prohibition on *refoulement*, as expressed in article 33, is only applicable to those asylum seekers who meet the conditions in the definition of the refugee as formulated in article 1A of the Refugee Convention. This

---

<sup>170</sup> Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 201.

<sup>171</sup> Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009) 174.

<sup>172</sup> Refugee Convention, art 42(1); United Nations Treaty Series Online, 'Convention relating to the Status of Refugees' (United Nations Treaty Collection) <<https://treaties.un.org/Pages/showDetails.aspx?objid=080000028003002e>> accessed 9 March 2017.

<sup>173</sup> For a more thorough account of the term 'Contracting State' see Elihu Lauterpacht and Daniel Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in Feller, Türk and Nicholson (2003) 108–111.

however, does not mean that states are without obligations towards an asylum seeker before his or her status as a refugee is determined. The declaratory character of the refugee determination implies that a person is a refugee in the meaning of the Convention as soon as he or she fulfils the criteria, even if the refugee status is not formally determined. The UNHCR handbook explains this in the following way, ‘Recognition of his refugee status does not ... make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.’<sup>174</sup> This means that the rights conferred on refugees by the Refugee Convention must be respected by states until and unless a negative decision on the asylum seekers refugee status is taken.<sup>175</sup> Inversely, this means that the Refugee Convention does not confer any rights to an asylum seeker once a negative decision on the asylum seekers refugee status has been taken.

In article 1A(2) of the Convention, defining the term ‘refugee’, there is a dateline, according to which a person can only be determined a refugee as a result of events occurring before January 1, 1951, heavily restricting the practical use of the Convention today. Through the 1967 Protocol relating to the Status of Refugees (the 1967 Protocol), however, this dateline was removed, making the Convention applicable without any time restriction.<sup>176</sup> All EU Member States are parties to the 1967 Protocol.<sup>177</sup>

The second paragraph of article 33 presents an exception to the above presented personal scope of the prohibition on *refoulement*, stating that the benefit of article 33 may not be claimed by an asylum seeker who poses a threat to the country of asylum.

### 3.3.3 What conduct is prohibited?

Article 33 prohibits the Contracting State to ‘expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’ The exact scope of the prohibition is, however, somewhat contested.<sup>178</sup>

---

<sup>174</sup> United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Reissued 2011) para 28.

<sup>175</sup> Hathaway (2005) 278; Hurwitz (2009) 174.

<sup>176</sup> 1967 Protocol, art 1(2).

<sup>177</sup> United Nations Treaty Series Online, ‘Protocol relating to the Status of Refugees’ (United Nations Treaty Collection)

<<https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280048bb8>> accessed 9 March 2017.

<sup>178</sup> Elihu Lauterpacht and Daniel Bethlehem, ‘The scope and content of the principle of non-refoulement: Opinion’ in Feller, Türk and Nicholson (2003) 112; Goodwin-Gill and McAdam (2007) 206.



In the following subsections, specific parts of the prohibition on *refoulement* will be examined in order to extract what obligations states have to meet in order not to breach article 33.

### 3.3.3.1 The question of risk

The question of what risk precludes a state from removing an asylum seeker to another country contains two different elements where the meaning of the word ‘risk’ differs. One element of the question is what type of mistreatment, or nature of the risk, that is required to preclude removal. The other element is how likely the materialisation of that risk must be.

As regards the required nature of the risk, the description of the risk precluding a state from expelling or returning an asylum seeker in article 33 has, even though it is not exactly congruent, big similarities to the definition of the term ‘refugee’ in article 1A(2).<sup>179</sup>

According to Goodwin-Gill and McAdam the study of *travaux* and state practice leads to the conclusion that the differences in wording between article 1A(2) and article 33 are of no practical relevance and that *non-refoulement* therefore, in principle, extends to every individual who has well-founded fear of persecution.<sup>180</sup> The same view is taken by Hathaway.<sup>181</sup>

Also Lauterpacht and Bethlehem agrees that the words ‘where his life or freedom would be threatened’ must be interpreted to comprehend ‘well-founded fear of persecution’, arguing that the internal coherence of the Convention depends on the permissibility of that interpretation.<sup>182</sup> Lauterpacht and Bethlehem, however, further claims that the scope of the prohibition of *refoulement* in the Refuge Convention has come to extend to, not only an asylum seeker who has a well-founded fear of persecution, but also an asylum seeker who faces a real risk of torture or cruel, inhuman or degrading treatment or punishment, or who faces other threats to life, physical integrity, or liberty.<sup>183</sup> It is unclear whether Lauterpacht and Bethlehem mean that the notion of ‘well-founded fear of persecution’ has developed to include the above mentioned threats, or if they mean that the prohibition on *refoulement* has a wider scope than the general refugee definition. Given the above mentioned arguments in favour of interpreting the scope of article 33 as being connected to the scope of article 1A(2), it seems reasonable to believe that any development of the refugee definition in article 1A(2) should be reflected in the scope of the prohibition of *refoulement* in article 33. Some of the arguments leading Lauterpacht and

---

<sup>179</sup> According to article 1A(2) a refugee need to have ‘well-founded fear of persecution’, whereas the expulsion or return of a refugee according to article 33 is precluded to frontiers and territories ‘where his life or freedom would be threatened’.

<sup>180</sup> Goodwin-Gill and McAdam (2007) 233–34.

<sup>181</sup> Hathaway (2005) 304–07.

<sup>182</sup> Elihu Lauterpacht and Daniel Bethlehem, ‘The scope and content of the principle of non-refoulement: Opinion’ in Feller, Türk and Nicholson (2003) 123–124.

<sup>183</sup> Elihu Lauterpacht and Daniel Bethlehem, ‘The scope and content of the principle of non-refoulement: Opinion’ in Feller, Türk and Nicholson (2003) 124–25.

Bethlehem to their conclusion is that the UNHCR has gotten a broader competence as an agency, that the Refugee Convention has an humanitarian objective and that various regional human rights document have a broader understanding of what constitutes *refoulement*.<sup>184</sup> Hathaway holds that the threats mentioned by Lauterpacht and Bethlehem are ‘likely to fall within modern understandings of a risk of “being persecuted,”’ but that their argumentation, if understood as arguing for a scope of article 33 that is wider than that of article 1A(2), is ‘simply unsustainable as a matter of law.’<sup>185</sup>

The above presented arguments lead to the conclusion that it is most reasonable to assume that the nature of the threat required to preclude the removal of an asylum seeker is the same as required to qualify as a refugee.

As regards the question of what degree of likelihood of the threat materialising that is required to prohibit the removal of an asylum seeker, the prevailing position seems to be that that level is the same as is required by the refugee definition.<sup>186</sup> According to the UNHCR handbook that risk needs to be established ‘to a reasonable degree’.<sup>187</sup> Another way of phrasing the level of risk required is, according to Goodwin-Gill and McAdam, that there should be a ‘serious risk’.<sup>188</sup> In addition, Hathaway holds, drawing from the *travaux*<sup>189</sup>, that the risk has to be foreseeable.<sup>190</sup>

To summarise, article 33 precludes the removal of an asylum seeker to another country if there is a serious risk, or a risk that is established to a reasonable degree, that the asylum seeker will be persecuted, as that term is understood in article 1A(2) and this risk is foreseeable.

### 3.3.3.2 The point in time at which a breach occurs

According to the interpretation of article 33 advocated in the previous section, a state commits *refoulement* if it sends a refugee to a country where he or she faces a serious, foreseeable risk of persecution. It is, thus, the act of exposing a refugee to the precluded risk that is prohibited which means that a state is not in breach of article 33 unless the actual removal of the refugee to the place of risk has taken place. The fact that it is the exposure of the refugee to a serious risk of persecution that is prohibited also means

---

<sup>184</sup> Elihu Lauterpacht and Daniel Bethlehem, ‘The scope and content of the principle of non-refoulement: Opinion’ in Feller, Türk and Nicholson (2003) 124–25.

<sup>185</sup> Hathaway (2005) 305–06.

<sup>186</sup> Elihu Lauterpacht and Daniel Bethlehem, ‘The scope and content of the principle of non-refoulement: Opinion’ in Feller, Türk and Nicholson (2003) 124–25; Goodwin-Gill and McAdam (2007) 234; Wouters (2009) 83.

<sup>187</sup> United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Reissued 2011) para 42.

<sup>188</sup> Goodwin-Gill and McAdam (2007) 234.

<sup>189</sup> See statement from Mr. Larsen (the president) UN General Assembly, ‘Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting’ (A/CONF.2/SR.16, 23 November 1951).

<sup>190</sup> Hathaway (2005) 323, 325.

that the risk does not have to materialise in order for a state to be in breach of article 33.

A breach can, possibly, occur also without a serious risk of actual harm if an asylum seeker is removed to another country without a fair assessment of the risk that he or she may face.<sup>191</sup>

### **3.3.3.3 The removal of an asylum seeker without assessing his or her claim for refugee status**

As an asylum seeker is protected by article 33 for as long as no final negative decision on the asylum seekers claim for refugee status has been taken, it is of great importance to the question of the permissibility of removing an asylum seeker to another country whether the asylum seeker has gotten his or her claim for refugee status assessed or not. Under the admissibility procedure proposed by the Commission, no such assessment will be made.<sup>192</sup> It is therefore a vital question to this thesis, in what way the principle of *non-refoulement* limits the possibility for EU Member States to remove an asylum seeker to another country without assessing his or her asylum application on the merits.

The prevailing view is that there is no positive, general obligation for parties to the Refugee Convention to grant asylum to refugees but rather a negative obligation of not exposing refugees to certain types of harm.<sup>193</sup> Because of this notion, States Parties are not prohibited to remove an asylum seeker to another country if the country, to which the asylum seeker is being removed, is safe.<sup>194</sup> That being said, the state in which the asylum seeker presented his or her request for asylum has and retains the immediate and primary refugee protection responsibilities.<sup>195</sup>

Beside the obviously impermissible act of removing an asylum seeker to a place where he or she risks persecution, there is also a prohibition of what is called indirect, or chain *refoulement*, referring to the situation when a refugee is removed to a place that is, in itself, safe but where the asylum seeker, by different reasons, risks being removed to another place where he or she risks facing persecution.<sup>196</sup> It is contested whether this prohibition rests on the wording of article 33 itself, which prohibits *refoulement* ‘in any manner whatsoever’,<sup>197</sup> or exists due to joint state responsibility of wrongful

---

<sup>191</sup> See section 3.3.3.4.

<sup>192</sup> See section 2.3.

<sup>193</sup> Goodwin-Gill and McAdam (2007) 149.

<sup>194</sup> Elihu Lauterpacht and Daniel Bethlehem, ‘The scope and content of the principle of non-refoulement: Opinion’ in Feller, Türk and Nicholson (2003) 122.

<sup>195</sup> United Nations High Commissioner for Refugees, *UNHCR Advisory Opinion on the Interpretation of the Refugee Definition* (2004) para 19.

<sup>196</sup> Elihu Lauterpacht and Daniel Bethlehem, ‘The scope and content of the principle of non-refoulement: Opinion’ in Feller, Türk and Nicholson (2003) 122; Hathaway (2005) 322–23.

<sup>197</sup> Hurwitz (2009) 180.

acts<sup>198</sup>. The mere existence of a prohibition of indirect *refoulement* is, however, fairly uncontroversial.<sup>199</sup>

The general understanding seems to be that there has to be ‘effective protection’ available in the state to which the asylum seeker is going to be removed.<sup>200</sup> The most obvious element of effective protection is freedom from the risk of being persecuted but also the receiving country’s respects for the prohibition on direct and indirect *refoulement* seems uncontroversial.<sup>201</sup> The exact content of the concept of effective protection is, however, not clearly defined.<sup>202</sup> Several of the remaining elements of the concept must be considered disputed.

According to Hathaway, an interpretation of the Refugee Convention where the only requirement on a sending state is to make sure that there is no foreseeable risk of direct or indirect *refoulement*, would be extremely difficult to reconcile to the context, object and purpose of the Convention.<sup>203</sup> Hathaway holds that a fair interpretation of article 33 would entail an obligation for states to make sure that the receiving state is a party to the Refugee Convention or 1967 Protocol, and that the receiving state will in fact assess the asylum seekers status and honour all relevant Convention and other rights.<sup>204</sup> This notion is, however, something that, according to Hathaway, ‘not even a carefully contextualized reading of the Convention can honestly be said to require...’<sup>205</sup> Instead Hathaway advocates an interpretation under which the receiving country can be deemed safe only if:

‘...it will respect in practice whatever Convention rights the refugee has already acquired by virtue of having come under the jurisdiction or entered the territory of a state party to the Refugee Convention, as well as any other international legal rights thereby acquired’<sup>206</sup>

Legomsky expresses a similar view. Based on what he calls ‘the complicity principle’, he holds that:

...no country may return a refugee or asylum seeker to a third country knowing that the third country will do anything to that person that the sending country

---

<sup>198</sup> Goodwin-Gill and McAdam (2007) 252–53.

<sup>199</sup> Elihu Lauterpacht and Daniel Bethlehem, ‘The scope and content of the principle of non-*refoulement*: Opinion’ in Feller, Türk and Nicholson (2003) 122; Hathaway (2005) 322–23; Goodwin-Gill and McAdam (2007) 252–53; Hurwitz (2009) 180.

<sup>200</sup> Stephen H Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 [4] *International Journal of Refugee Law* 567, 573; Hathaway (2005) 329; Goodwin-Gill and McAdam (2007) 393.

<sup>201</sup> Stephen H Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 [4] *International Journal of Refugee Law* 567, 633, 335.

<sup>202</sup> Goodwin-Gill and McAdam (2007) 393–94.

<sup>203</sup> Hathaway (2005) 331–32.

<sup>204</sup> Hathaway (2005) 332–33.

<sup>205</sup> Hathaway (2005) 333.

<sup>206</sup> Hathaway (2005) 333.

would not have been permitted to do itself – regardless whether the third country is a party to the 1951 Convention or to any other human rights conventions.<sup>207</sup>

The responsibility of the country wanting to remove an asylum seeker is, however, according to Legomsky, limited in the way that ‘the degree of certainty required by the word “knowingly” should vary inversely with the importance of the individual right.’<sup>208</sup>

Although highly reasonable from a *de lege ferenda* perspective, the legal validity of Hathaway’s and Legomsky’s views from a *de lege lata* perspective is probably not uncontroversial. Hathaway’s legal reasoning seems to be resting solely on the recognition of object and purpose as means for treaty interpretation in VCTL article 31, while Legomsky’s ‘complicity principle’, as it is applied to the Refugee Convention, seems to rest, partly, just as Hathaway’s view, on treaty interpretation, but also on the responsibility imposed on a state assisting another state in the commission of a wrongful act, as stated in the International Law Commission’s articles on state responsibility<sup>209</sup>, mainly article 16.<sup>210</sup>

Legomsky holds, similar to Hathaway,<sup>211</sup> that the object and purpose of the Refugee Convention would be thwarted if a state ‘...while prohibited from violating the Convention provisions directly, were permitted to assist such violations by returning refugees to other countries knowing the latter would commit the prohibited acts’.<sup>212</sup> The relevant question here is what scope each right in the Refugee Convention has and what conduct they actually prohibit. Taking the right to education in article 22(1) as an example, it says that ‘The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.’ National courts seem to interpret this as a right only awarded refugees while present in a contracting state, irrelevant to the question whether it is permissible to remove a refugee to another state. This conclusion is drawn from the fact that judicial decisions in national courts on the permissibility of removing asylum seekers to third countries seems to focus on the risk of persecution and *refoulement* but not on living conditions.<sup>213</sup>

---

<sup>207</sup> Stephen H Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 [4] *International Journal of Refugee Law* 567, 630.

<sup>208</sup> Stephen H Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 [4] *International Journal of Refugee Law* 567, 645.

<sup>209</sup> International Law Commission, *Responsibility of States for Internationally Wrongful Acts* (2001).

<sup>210</sup> Stephen H Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 [4] *International Journal of Refugee Law* 567, 620–21.

<sup>211</sup> Hathaway (2005) 331–32.

<sup>212</sup> Stephen H Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 [4] *International Journal of Refugee Law* 567, 620.

<sup>213</sup> *Regina v Secretary of State for the Home Department, ex parte Yogathas* [2002] UKHL 36 (UK HL); Hathaway (2005) 329.

To further substantiate his claim, Legomsky refers to the scope of the principle of non-refoulement:

Just as no one denies that a state violates the Convention by knowingly sending someone to a third country that in turn will violate the person's right to non-refoulement, so too there is no evident basis to dispute that a state violates the Convention by knowingly sending someone to a third country that in turn will violate other Convention rights.<sup>214</sup>

A thing to keep in mind, however, when comparing other rights of the Refugee Convention to the prohibition of *refoulement* is that the wide scope of the right to *non-refoulement*, which includes a prohibition of indirect *refoulement*, finds support in the wording of article 33, prohibiting *refoulement* 'in any manner whatsoever,' as well as in the *trauvax*<sup>215</sup>. When comparing the prohibition of *refoulement* to, for instance, the above mentioned right to education, it seems hard to find the same support for giving the right to education the same, wide scope as article 33.

What regards state responsibility, the above mentioned article 16 states that 'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so...'. This means that, to impose an obligation on the sending state in this context, both the sending and receiving states must be under the same obligation, since the failure of the receiving state to comply with its obligations under international law is a prerequisite for the application of article 16. In the case where the receiving state is not a party to the Refugee Convention and does not have the obligation, for instance, to provide education to the asylum seeker, the receiving state does not commit a wrongful act by not providing education and the sending state can therefore not be considered responsible for any wrongful act under article 16. This reasoning leads to the paradox, however therefore not necessarily wrong, conclusion that parties to the Refugee Convention are under stricter obligations when removing a refugee to another country that is also a party to the Convention, compared to the removal of a refugee to a non-party state.

---

<sup>214</sup> Stephen H Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 [4] *International Journal of Refugee Law* 567, 642.

<sup>215</sup> The proposal of the Swedish delegate, to add to article 33 a prohibition to expel or return a refugee to a place '...where he would be exposed to the risk of being sent to a territory where his life or freedom would thereby be endangered' was refused due to the consideration of the Danish government that 'if such expulsion presented a threat of subsequent forcible return to the country of origin, the life and liberty of the refugee in question were endangered': United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Draft Convention Relating to the Status of Refugees*. *Sweden: Amendment to Article 28* (A/CONF.2/70, 1951); United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting* (A/CONF.2/SR.16, 1951); Hathaway (2005) 322–323.

Even though the exact scope of the concept of effective protection is contested, there are parts of the concept that can be claimed with greater certainty.

One question that is especially important to this thesis is whether there is an obligation on the state removing an asylum seeker to make sure that the receiving state will provide the asylum seeker with a fair refugee status determination. As argued in the next subsection, there are grounds for considering a fair determination procedure a prerequisite for not breaching article 33 when a state decides to examine the merits of an asylum claim.

Legomsky does, however, not see a fair refugee determination procedure in the receiving country as an absolute prerequisite for a permissible removal to that country if the country is willing to honour all elements of effective protection without a formal refugee determination procedure, arguing that actual protection is more important than formalities.<sup>216</sup> If the receiving country, however, is not willing to do so, a fair determination procedure should be considered a prerequisite for effective protection.<sup>217</sup>

A related question is whether it is permissible for a party to the Refugee Convention to remove an asylum seeker to a state which is not a party to the convention. It is a common view that a state's formal ratification of the Refugee Convention, in itself, is not sufficient as a ground for considering a country to provide effective protection.<sup>218</sup> Instead attention has to be given to how the convention has been implemented in practice in the specific country.<sup>219</sup> However, while a state's ratification of the convention is not sufficient for considering that state to provide effective protection the prevailing view seem to be that it is not a mandatory condition either. According to a 1996 UNHCR position paper the 'ratification of and compliance with the international refugee instruments...' is one factor to be

---

<sup>216</sup> Stephen H Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 [4] *International Journal of Refugee Law* 567, 656.

<sup>217</sup> Stephen H Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 [4] *International Journal of Refugee Law* 567, 656.

<sup>218</sup> United Nations High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)* (EC/GC/01/12, 2001) paras 14, 39; United Nations High Commissioner for Refugees, *UNHCR's Observations on the European Commission's Proposal for a Council Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status* (2001) para 32; Stephen H Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 [4] *International Journal of Refugee Law* 567, 658; Hathaway (2005) 334.

<sup>219</sup> United Nations High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)* (EC/GC/01/12, 2001) paras 14, 39; United Nations High Commissioner for Refugees, *UNHCR's Observations on the European Commission's Proposal for a Council Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status* (2001) para 32; Stephen H Legomsky, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 [4] *International Journal of Refugee Law* 567, 658.

considered when determining the permissibility of returning an asylum seeker to a particular country.<sup>220</sup> In other words, UNHCR clearly considers the ratification of the Refugee Convention as an important, but not obligatory, factor. The position, that international law does not bar returns to non-party states, can also be found in the rulings of national courts, such as the Australian Full Federal Court which, in a ruling on the permissibility of removing an Iraqi national to a safe country without assessing the applicants claim for refugee status, stated that ‘...it is not necessary to show that ... the third country is party to the Convention’.<sup>221</sup> Also Legomsky comes to the conclusion that:

... international law does not flatly prohibit the return of refugees to third countries that are not parties to the 1951 Convention. As long as the country in actual practise observes the Convention and otherwise meets all the requirements of effective protection...<sup>222</sup>

Having outlined the parts of the concept of effective protection that are most relevant to this thesis, the question remains how to determine whether a third state will offer effective protection, making the removal of an asylum seeker to that country permissible. According to UNHCR the procedure of determining the safety of a third country for a particular asylum seeker must be done on an individualised basis.<sup>223</sup> Legomsky argues that, since the harm of removing an asylum seeker to a third country that lacks effective protection, potentially, is as great as when an asylum claim is incorrectly denied and the asylum seeker is removed directly to his or her country of origin, the same safeguards that are required for the refugee determination procedure should be considered to be required for determining the safety of a third country.<sup>224</sup> Given the validity of the argumentation presented in the next section, according to which a fair refugee determination procedure is a legal obligation, it should, in the same way, be a legal requirement to provide a fair procedure for determining whether a third country should be considered safe for a particular asylum seeker since the same arguments apply in this situation. If it were to be permissible to remove an asylum seeker to a third country without a thorough assessment of the risk of *refoulement* for that particular asylum seeker the effectiveness of article 33 would be jeopardised.

---

<sup>220</sup> United Nations High Commissioner for Refugees, *Considerations on the “Safe Third Country” Concept* (Presented at the EU Seminar on the Associated States as Safe Third Countries in Asylum Legislation, Vienna, 8-11 July, 2001) at 2.

<sup>221</sup> *S115/00A v Minister for Immigration and Multicultural Affairs* [2001] FCA 540; Hathaway (2005) 328.

<sup>222</sup> Stephen H Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 [4] *International Journal of Refugee Law* 567, 661.

<sup>223</sup> United Nations High Commissioner for Refugees, *UNHCR's Observations on the European Commission's Proposal for a Council Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status* (2001) para 33.

<sup>224</sup> Stephen H Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 [4] *International Journal of Refugee Law* 567, 670.



### 3.3.3.4 Procedural obligations

As described in the previous section there is generally nothing that prohibits a state from removing an asylum seeker to another country without assessing his or her claim for refugee status, as long as the country, to which the asylum seeker is being removed, is safe. If a state, however, decides to assess the asylum application on its merits, the question arises if there are any requirements on the procedure, that the state, making the assessment, has to meet.

The Refugee Convention nowhere expressly requires a fair refugee status determination but a fair determination is, according to Legomsky, an essential part of the prohibition on *refoulement* in article 33 since there is a risk that the asylum seeker otherwise will be exposed to *refoulement*.<sup>225</sup> Legomsky even holds that the very establishment of a highly unfair refugee determination procedure, in itself, is a violation of article 33 since the establishment of such a procedure ‘...assures that an unacceptably high number of refugees will be returned erroneously to their persecutors.’<sup>226</sup>

Legomsky’s view implies that a state, which denies an asylum seeker refugee status in an unfair asylum procedure, and returns that person to his or her country of origin, would breach the prohibition of *refoulement* even if that person *de facto* faces no threat. This notion seems incompatible with the wording of article 33 since the article prohibits the return of refugees to places ‘where his life or freedom would be threatened’.

Unfortunately, it is unclear on what ground Legomsky bases his view. However, there seems to be at least two possible arguments to support his opinion: As described above,<sup>227</sup> the removal of an asylum seeker to another country is precluded if there is a serious risk of harm. One possible way of arguing is, thus, that removing an asylum seeker after an unfair procedure, in itself, would constitute such a serious risk of harm that would amount to *refoulement*. This would, however, probably be considered a flawed argumentation. While an unfair procedure raises the risk of the state committing *refoulement* in a larger perspective, it does not create a risk in the case of the particular asylum seeker since an unfair determination can not, in itself, create a risk that does not already exist. The better argument would be, that, given the fundamental character of the prohibition of *refoulement*, an interpretation of article 33 according to the principle of effectiveness entails an obligation to provide a fair determination procedure since the opposite would jeopardise the efficiency of the provision. The

---

<sup>225</sup> Stephen H Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 [4] International Journal of Refugee Law 567, 654.

<sup>226</sup> Stephen H Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 [4] International Journal of Refugee Law 567, 655.

<sup>227</sup> See section 3.3.3.1.

latter argument seems also to be endorsed by Goodwin-Gill and McAdam.<sup>228</sup>

The conclusion that article 33 entails an obligation for states to provide a fair determination procedure naturally leads to the question of what the requirements are for a procedure to be sufficiently fair. The determination procedure is not specifically regulated in the Refugee Convention itself but the question of fair procedure has been thoroughly discussed by UNHCR which has presented a list of elements that they consider should be part of a fair procedure.<sup>229</sup> It is, however, uncertain whether these elements can be said to be required by international law.<sup>230</sup> In the view of Goodwin-Gill and MacAdam, UNHCR documents, especially mentioning the Executive Committee recommendations, provide a practically necessary minimum in order for states not to breach international obligations but emphasise that procedural rights, nevertheless, ‘...remain very much within the area of “choice of means” among States parties to the Convention and Protocol’ and that the question, whether a state fulfils its obligations, essentially depends on the outcome of the procedure rather than the procedure itself.<sup>231</sup>

For the described reasons, it is very hard to, with certainty, set up a list of specific procedural obligations. The conclusion seems to be that as long as the procedure is adequate for an effective implementation of the Refugee Convention, the way in which this goal is met is of lesser importance.<sup>232</sup> A seemingly uncontroversial view is, however, that a fair determination procedure requires a case-by-case examination of the individual circumstances of each asylum seeker, at least in cases where the result of the procedure is a denial of protection.<sup>233</sup> Another specific observation, that is of special importance to this thesis, is that there is nothing that precludes states from adopting formal requirements, such as time limits for lodging an application, but the failure of the applicant to fulfil such a requirement

---

<sup>228</sup> Although not mentioned in direct relation to article 33 Goodwin-Gill and MacAdam hold that the outer limits of a state’s discretion regarding refugee determination is confined by the principle of effectiveness: Goodwin-Gill and MacAdam (2007) 528.

<sup>229</sup> United Nations High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)* (EC/GC/01/12, 2001) para 50; Stephen H Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 [4] *International Journal of Refugee Law* 567, 656; United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Reissued 2011) para 189.

<sup>230</sup> Stephen H Legomsky, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection’ (2003) 15 [4] *International Journal of Refugee Law* 567, 656.

<sup>231</sup> Goodwin-Gill and MacAdam (2007) 533.

<sup>232</sup> Goodwin-Gill and MacAdam (2007) 528.

<sup>233</sup> See Elihu Lauterpacht and Daniel Bethlehem, ‘The scope and content of the principle of non-refoulement: Opinion’ in Feller, Türk and Nicholson (2003) 118; Goodwin-Gill and MacAdam (2007) 529.

should not lead to a request for asylum being excluded from consideration as it may lead to *refoulement*.<sup>234</sup>

### 3.3.4 Conclusions on states' obligations under the Refugee Convention

Every EU Member state is obliged to respect the prohibition on *refoulement* in the Refugee Convention. However, in order for the Refugee Convention to impose any obligation on a state in relation to an asylum seeker, the asylum seeker must meet the definition of the refugee in the Convention. Due to the declaratory character of the refugee status however, a state must presume that an asylum seeker could be a refugee until the opposite has been proven in a refugee determination procedure.

According to the examination in this section, an asylum seeker may not be removed to a country where he or she faces serious risk of being exposed to a threat of persecution.<sup>235</sup> There is, however, generally nothing that precludes a state from removing an asylum seeker to another state without assessing that persons claim for refugee status as long as the country, to which the asylum seeker is being moved, is safe.<sup>236</sup> Thus, if a state wants to remove an asylum seeker to another country without breaching the prohibition on *refoulement* in article 33, that state must first, either make sure that the asylum seeker is not a refugee, or make sure that the country, to which the state wishes to remove the asylum seeker, is safe for that particular asylum seeker.

If a state wants to remove an asylum seeker to a third country without assessing his or her refugee status claim, that third state must be able to provide effective protection.<sup>237</sup> To try to isolate what obligations emanate from the concept of effective protection is no easy task since the exact scope or the concept is contested.<sup>238</sup> Several national courts seem to interpret the principle as restricted to its hard core, in the meaning that it only poses an obligation on states not to send an asylum seeker to a country where he or she will be persecuted or risks being sent to another country where such a risk exists, whereas Hathaway and Legomsky, on the other hand, advocate a much broader interpretation where effective protection entails also several other refugee rights.<sup>239</sup>

---

<sup>234</sup> United Nations High Commissioner for Refugees, *Refugees Without an Asylum Country* (Executive Committee Conclusion 15 (XXX) 1979) para i; United Nations High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)* (EC/GC/01/12, 2001) para 20; United Nations High Commissioner for Refugees, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)* (2005) 11.

<sup>235</sup> See subsection 3.3.3.1.

<sup>236</sup> See subsection 3.3.3.3.

<sup>237</sup> See subsection 3.3.3.3.

<sup>238</sup> See subsection 3.3.3.3.

<sup>239</sup> See subsection 3.3.3.3.

While the exact scope of the concept is contested, it is possible to identify some elements with fairly high certainty. In order to consider a country to provide effective protection for a particular asylum seeker he or she must not face a serious risk of persecution in that country.<sup>240</sup> The country must also respect the prohibition on direct and indirect refoulement.<sup>241</sup> Moreover, the receiving country must either provide the asylum seeker with a fair refugee determination procedure or be willing to honour all elements of effective protection without a formal procedure.<sup>242</sup> Lastly, it is not a prerequisite that the receiving country is a party to the Refugee Convention even though the ratification of the convention, according to UNHCR, is a factor to take into consideration when determining the safety of a country.<sup>243</sup>

The assessment, whether a third country offers effective protection for a certain asylum seeker, must be made individually with the same procedural obligations as a state has to meet when determining an applicants refugee status.<sup>244</sup>

If a state conducts a refugee determination, that procedure must be fair, at least to some extent.<sup>245</sup> Beside the requirement that the assessment must be made on a case-by-case basis, taking into consideration the individual circumstances of each application, the legal requirements of a fair procedure is hard to specify.<sup>246</sup> As long as the determination procedure is effective in realising the object and purpose of the Refugee Convention, each state is fairly free to choose how to conduct the determination.<sup>247</sup>

### 3.4 Non-refoulement under the ECHR

One major difference between the prohibition on *refoulement* in the Refugee Convention and the ECHR is that the implementation and application of the latter is monitored by a judicial body, namely the ECtHR.<sup>248</sup>

The prohibition on *refoulement* in the ECHR is not explicitly stipulated in the Convention.<sup>249</sup> Instead a principle of *non-refoulement* has developed, primarily emanating from article 3, in the case law of the ECtHR.<sup>250</sup>

---

<sup>240</sup> See subsection 3.3.3.3.

<sup>241</sup> See subsection 3.3.3.3.

<sup>242</sup> See subsection 3.3.3.3.

<sup>243</sup> See subsection 3.3.3.3.

<sup>244</sup> See subsection 3.3.3.3.

<sup>245</sup> See subsection 3.3.3.4.

<sup>246</sup> See subsection 3.3.3.4.

<sup>247</sup> See subsection 3.3.3.4.

<sup>248</sup> ECHR, art 19; Hurwitz (2009) 188.

<sup>249</sup> Hurwitz (2009) 188.

<sup>250</sup> *Soering v UK* App no 14038/88 (ECtHR, 07 July 1989) para 91; *Cruz Varas and Others v Sweden* App no 15576/89 (ECtHR, 10 March 1991) para 69–70; *Vilvarajah and Others v UK* App nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR, 30 October 1991) para 103; *Chahal v UK* App no 22414/93 (ECtHR, 15 November 1996) para 73–74.

In the following sections will be examined who is bound by the prohibition on *refoulement*, who is protected and what conduct is prohibited.

### 3.4.1 Who is bound?

All EU Member States are parties to the ECHR.<sup>251</sup> Under article 57 ECHR, Contracting States are allowed to make reservations to the convention when signing the convention or when depositing its instrument of ratification. No such reservation has been made by any EU Member State in regard to article 3.<sup>252</sup>

### 3.4.2 Who is protected?

According to article 1 ECHR ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’ This means that the nationality of a potential rights holder, as well as the question whether he or she has residence inside or outside the territory of the contracting state, is irrelevant.<sup>253</sup> Hence, the mere presence of an individual within the jurisdiction of a contracting state is enough to make the convention applicable to that person.

As mentioned above, in contrast to the principle of *non-refoulement* as expressed in the Refugee Convention, the prohibition of refoulement in the ECHR is absolute. According to article 15 no derogation from article 3 is permissible even ‘In time of war or other public emergency threatening the life of the nation...’. The absolute character of article 3 has also consistently been reaffirmed by the ECtHR.<sup>254</sup>

In contrast to the Refugee Convention’s article 33(2) the ECHR contains no acceptable ground for exclusion.<sup>255</sup> In this regards, the ECtHR has established that:

the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 (art. 3) is thus wider than that provided by Article 33 of the 1951 Convention relating to the Status of Refugees ....<sup>256</sup>

---

<sup>251</sup> Council of Europe, ‘Chart of signatures and ratifications of Treaty 005’ (Treaty Office, 3 May 2017) < [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p\\_auth=TdZnDh8X](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=TdZnDh8X) > accessed 3 May 2017.

<sup>252</sup> Council of Europe, ‘Chart of signatures and ratifications of Treaty 005’ (Treaty Office, 3 May 2017) < [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p\\_auth=TdZnDh8X](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=TdZnDh8X) > accessed 3 May 2017.

<sup>253</sup> Pieter van Dijk and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006) 13–14.

<sup>254</sup> *Soering v UK* App no 14038/88 (ECtHR, 07 July 1989) para 88; *Vilvarajah and Others v UK* App nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR, 30 October 1991) para 108; *Chahal v UK* App no 22414/93 (ECtHR, 15 November 1996) para 79–80; *Saadi v Italy* App no 37201/06 (ECtHR, 28 February 2008) para 127, 137–38.

<sup>255</sup> Hurwitz (2009) 188.

<sup>256</sup> *Ahmed v Austria* App no 25964/94 (ECtHR, 17 December 1996) para 41.

### 3.4.3 What conduct is prohibited?

According to ECtHR, it is a matter of well-established law that parties to the ECHR has a right, subject to their treaty obligations, to control the entry, residence and expulsion of aliens and that neither the ECHR, nor its protocols contains a right to asylum.<sup>257</sup> The removal of an alien can, however, under certain circumstances be in breach of article 3.<sup>258</sup>

Article 3, which is the base of the prohibition on *refoulement* in the ECHR,<sup>259</sup> states that, ‘No one shall be subject to torture or to inhuman or degrading treatment or punishment’. According to ECtHR case law, the nature of the prohibited conduct in relation to article 3 lies in the act of exposing an individual to the risk of ill-treatment.<sup>260</sup> In contrast to article 33 of the Refugee Convention, article 3 of the ECHR does not only prohibit *refoulement* but also prohibits exposure of an individual to the risk of ill-treatment in the contracting state itself. However, in relation to the prohibition on *refoulement*, the main obligation for contracting states is a negative obligation not to forcibly remove an individual to a country where there is a risk of subjection to such ill-treatment prohibited by article 3.<sup>261</sup> The obligation not to remove a person to such a country continues for as long as the risk remains.<sup>262</sup>

#### 3.4.3.1 The question of risk

It is not easy to say, in general, what type of treatment constitutes ‘torture ... inhuman or degrading treatment or punishment’ in article 3 as it depends on the facts and circumstances of the individual case.<sup>263</sup> The ECtHR often does not explicitly examine the nature of the treatment which the applicant risks but instead merely establishes that the conditions in the relevant country needs to be assessment against the standards of article 3.<sup>264</sup> The Court has however, on several occasions, held that the ill-treatment must attain a minimum level of severity.<sup>265</sup>

---

<sup>257</sup> *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 14 March 017) para 112.

<sup>258</sup> *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 14 March 017) para 112.

<sup>259</sup> *Soering v UK* App no 14038/88 (ECtHR, 07 July 1989) para 91; *Cruz Varas and Others v Sweden* App no 15576/89 (ECtHR, 10 March 1991) para 69–70; *Vilvarajah and Others v UK* App nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR, 30 October 1991) para 103; *Chahal v UK* App no 22414/93 (ECtHR, 15 November 1996) para 73–74.

<sup>260</sup> *Vilvarajah and Others v UK* App nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR, 30 October 1991) para 107; *Venkadajalamra v The Netherlands* App no 58510/00 (ECtHR, 17 February 2004) para 63; *Thampibillai v The Netherlands* App no 61350/00 (ECtHR, 17 February 2004) para 61; *Shamayev and 12 Others v Georgia and Russia* App no 36378/02 (ECtHR, 12 April 2005) para 337.

<sup>261</sup> *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 14 March 017) para 112; Wouters (2009) 317.

<sup>262</sup> *Ahmed v Austria* App no 25964/94 (ECtHR, 17 December 1996) para 47.

<sup>263</sup> Wouters (2009) 238.

<sup>264</sup> *Soering v UK* App no 14038/88 (ECtHR, 07 July 1989) para 91; *Cruz Varas and Others v Sweden* App no 15576/89 (ECtHR, 10 March 1991) para 69; Wouters (2009) 238–39.

<sup>265</sup> *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) para 219.

When comparing the treatment precluded by the article 3 ECHR with treatment precluded by article 33 of the Refugee Convention some parallels can be found. In the case *Ahmed v Austria* the Court attached particular weight, when assessing the risk of the applicant in case of an expulsion, to the fact that Austria had granted the applicant refugee status.<sup>266</sup> The ECtHR has, however, on several occasions found the protection in the ECHR to be wider than the protection in the Refugee Convention and that an individual, thus, can have a risk of such ill-treatment precluded by article 3 ECHR without having a well-founded fear of persecution within the meaning of the Refugee Convention.<sup>267</sup>

The risk of the materialisation of the precluded ill-treatment must, according to Wouters be, ‘a real, personal, foreseeable or likely risk which goes beyond a mere possibility but does not need to be certain or highly probable.’<sup>268</sup> According to Wouters, ‘A real, personal and foreseeable risk implies that the risk must be prospective; it must be real, i.e. realistic and not fictional; and it must be personal, i.e. it must relate to the individual concerned.’<sup>269</sup>

### 3.4.3.2 The point in time at which a breach occurs

In the same way as regards *refoulement* under the Refugee Convention, it is the act of exposing an individual to the risk of the prohibited treatment, rather than the materialisation of that risk, that is prohibited. This is clearly stated in the recent ECtHR case of *Ilias and Ahmed v Hungary* where Hungary was found to have breached the prohibition on *refoulement* in article 3 in relation to two Bangladeshi nationals who were removed to Serbia, which by Hungary was considered a safe third country.<sup>270</sup> At the time of the Court’s assessment, the two applicants had already been expelled to Serbia.<sup>271</sup> Since the applicants had not submitted any complaints against how they had been treated in Serbia, the Hungarian government argued that no violation of the applicants’ rights under article 3 had occurred.<sup>272</sup> The Court, however, rejected the argument from the Hungarian government holding that when an applicant has already been expelled, the relevant question is whether there, at the time of removal from the respondent state, existed a real risk that the applicant would be subject to treatment proscribed by article 3 in the state to which he or she was expelled.<sup>273</sup>

---

<sup>266</sup> *Ahmed v Austria* App no 25964/94 (ECtHR, 17 December 1996) para 42.

<sup>267</sup> *Ryabikin v Russia* App no 8320/04 (ECtHR, 19 June 2008) para 118.

<sup>268</sup> Referring to *Soering v UK* App no 14038/88 (ECtHR, 07 July 1989) para 88; *Cruz Varas and Others v Sweden* App no 15576/89 (ECtHR, 10 March 1991) para 69; *Vilvarajah and Others v UK* App nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR, 30 October 1991) paras 108, 111; Wouters (2009) 247.

<sup>269</sup> Wouters (2009) 247.

<sup>270</sup> *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 14 March 017) paras 1, 5, 124–125.

<sup>271</sup> *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 14 March 017) para 103.

<sup>272</sup> *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 14 March 017) para 103.

<sup>273</sup> *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 14 March 017) para 105.

### 3.4.3.3 Procedural obligations

According to the ECtHR, a Contracting State has the responsibility to rigorously scrutinise an individual's claim, that his or her removal to another country would be in breach of article 3, since article 3 'enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment'.<sup>274</sup> This includes the responsibility for a state, assessing such a claim, to assess the conditions in the receiving country against the standards of article 3, as well as, according to Wouters, to actively gather information relevant to the claim.<sup>275</sup> The requirement on a state conducting the assessment to make a thorough examination of the claim is further underlined by the fact that the ECtHR, when assessing if a state has breached article 3, takes into consideration, not only those facts which were known to the state, but also facts that 'ought to have been known to the Contracting State at the time of the expulsion'.<sup>276</sup>

The ECtHR has repeatedly explained that the Court, in cases concerning expulsion of asylum seekers, does not itself examine the actual asylum applications or verify if the Contracting States meet their obligations under the Refugee Convention.<sup>277</sup> Instead the Court's main concern is whether there are effective guarantees protecting the applicant from arbitrary *refoulement* to the country from which he or she has fled.<sup>278</sup>

It is a general view of the ECtHR that rights in the ECHR are supposed to be practical and effective and not theoretical or illusory.<sup>279</sup> This focus on efficiency is apparent in the case of *M.S.S. v Belgium and Greece* where Greece was alleged of having breached the right to an effective remedy in article 13 in conjunction with article 3 because of shortcomings in the Greek asylum procedure.<sup>280</sup> The ECtHR acknowledged that Greece had a number of guarantees, designed to protect asylum seekers from *refoulement* in its national legislation, but that these guarantees were not respected in practice and, hence, did not award sufficient protection against *refoulement*.<sup>281</sup> To come to this conclusion, the Court, among other things, took note of the 'extremely low rate of asylum or subsidiary protection granted by the Greek authorities compared with other European Union member States', although underlining that the importance to be attached to statistics varies according

---

<sup>274</sup> *Jabari v Turkey* App no 40035/96 (ECtHR, 11 July 2000) para 39.

<sup>275</sup> *Soering v UK* App no 14038/88 (ECtHR, 07 July 1989) para 91. Wouters comes to this conclusion referring to *Said v Netherlands* App no 2345/02 (ECtHR, 5 July 2005) para. 54 and *Bader and Others v Sweden* App no 13284/04 (ECtHR, 8 November 2005) para. 45: Wouters (2009) 274.

<sup>276</sup> *Vilvarajah and Others v UK* App nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR, 30 October 1991) para 107.

<sup>277</sup> *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) para 286.

<sup>278</sup> *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) para 286.

<sup>279</sup> *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980) para 33.

<sup>280</sup> The allegation also concerned article 2 of the Convention but the allegation was not examined by the Court: *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) paras 265–322.

<sup>281</sup> *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) paras 298–321.



to the circumstances.<sup>282</sup> Statistics was also used by the ECtHR in *T.I. v The United Kingdom* to assess the applicants argument that a high burden of proof in Germany prevented meritorious claims in practice.<sup>283</sup> In that case the Court said that, ‘The record of Germany in granting large numbers of asylum claims gives an indication that the threshold being applied in practice is not excessively high.’<sup>284</sup> The conclusion is thus, that the ECtHR, when assessing if the asylum procedures of a Contracting State’s offers effective guarantees against arbitrary *refoulement*, takes into consideration, among other things, the historical outcome of the procedures in practise.

Beside the obligations on Contracting States to examine an asylum seekers claim rigorously and provide effective guarantees from arbitrary *refoulement*, there is case law also indicating the existence of a negative obligation not to impose procedural requirements on individuals that hinder them from claiming protection against *refoulement* or substantiating such a claim. One type of procedural requirement discussed by the ECtHR on several occasions is time limits. In the case of *Bahaddar v The Netherlands* the ECtHR said that an applicant, normally, has the obligation to comply with formal requirements and time limits laid down in national law as these are designed to ‘enable the national jurisdiction to discharge their caseload in an orderly manner’, even in cases where there is an alleged risk of ill-treatment contrary to article 3.<sup>285</sup> The Court added, however, that there are situations, depending on the facts of each case, under which an applicant cannot be considered obliged to comply with such rules.<sup>286</sup> In this regard the Court emphasised that:

in applications for recognition of refugee status it may be difficult, if not impossible, for the person concerned to supply evidence within a short time, especially if ... such evidence must be obtained from the country from which he or she claims to have fled.<sup>287</sup>

Bearing this in mind, the Court said that, ‘time-limits should not be so short, or applied so inflexibly, as to deny an applicant for recognition of refugee status a realistic opportunity to prove his or her claim.’<sup>288</sup> In the case of *Jabari v Turkey*, where an Iranian woman who’s application for asylum was rejected since it had not been submitted in compliance with the national legislation, requiring an application for asylum to be submitted within five days of arrival in Turkey, the ECtHR established that:

---

<sup>282</sup> *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) para 313.

<sup>283</sup> See The court’s assessment of the position of the applicant as a failed asylum seeker if returned to Germany: *TI v UK* App no 43844/98 (ECtHR, 7 March 2000).

<sup>284</sup> See The court’s assessment of the position of the applicant as a failed asylum seeker if returned to Germany: *TI v UK* App no 43844/98 (ECtHR, 7 March 2000).

<sup>285</sup> *Bahaddar v The Netherlands* App no 25894/94 (ECtHR, 19 February 1998) para 45.

<sup>286</sup> *Bahaddar v The Netherlands* App no 25894/94 (ECtHR, 19 February 1998) para 45.

<sup>287</sup> *Bahaddar v The Netherlands* App no 25894/94 (ECtHR, 19 February 1998) para 45.

<sup>288</sup> *Bahaddar v The Netherlands* App no 25894/94 (ECtHR, 19 February 1998) para 45.

the automatic and mechanical application of such a short time-limit for submitting an asylum application must be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention.<sup>289</sup>

In *K.R.S. v the United Kingdom*, the ECtHR made clear that this was a principle applicable to all procedural requirements, although adding, that it in principle is ‘acceptable for Contracting States to set procedural requirements for the submission and consideration of asylum claims ...’ as long as article 3 is respected.<sup>290</sup>

#### **3.4.3.4 The prohibition on indirect refoulement**

Just as in the Refugee Convention, the prohibition on *refoulement* in the ECHR does not only prohibit the removal of a person directly to a country where there is a risk of ill-treatment, but also the removal of a person to a third country from which he or she risks being transferred to a country where such a risk exists.<sup>291</sup> As explained above, this is called indirect or chain *refoulement*.<sup>292</sup>

According to Wouters, the risk of chain *refoulement* includes two elements of risk<sup>293</sup>. First, there is the real risk of such ill-treatment proscribed by article 3 in the final country of destination.<sup>294</sup> Secondly, there is the risk that the country, to which the person is going to be removed, will, in its turn, remove the person to the country where the risk of ill-treatment exists.<sup>295</sup> In *T.I v the United Kingdom*, where the question was whether it was permissible to return an asylum seeker, a Sri Lankan national, from United Kingdom to Germany under the Dublin Convention, the ECtHR assessed the risk of Germany returning the applicant to Sri Lanka in two ways after having concluded that the applicant actually could face a risk if returned to Sri Lanka.<sup>296</sup> As a first step, the court examined whether there existed safeguards in Germany that, theoretically, would protect the applicant from being removed to Sri Lanka.<sup>297</sup> The Court then proceeded to assess if these safeguards would be effective in practice, taking into consideration the way in which the procedural safeguards previously had been applied in and the individual circumstances of the applicant.<sup>298</sup> According to Wouters, the ECtHR adopted a relatively low standard of protection on chain refoulement

---

<sup>289</sup> *Jabari v Turkey* App no 40035/96 (ECtHR, 11 July 2000) para 40.

<sup>290</sup> *KRS v the UK* App no 32733/08 (ECtHR, 2 December 2008) 15.

<sup>291</sup> See The court’s assessment of the responsibility of the UK: *TI v UK* App no 43844/98 (ECtHR, 7 March 2000); *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) para 342–43; *Mohammadi v Austria* App no 71932/12 (ECtHR, 3 July 2014) para 60.

<sup>292</sup> See section 3.3.3.3.

<sup>293</sup> Wouters (2009) 320.

<sup>294</sup> Wouters (2009) 320.

<sup>295</sup> Wouters (2009) 320.

<sup>296</sup> See The court’s assessment of the position of the applicant as a failed asylum-seeker if returned to Germany: *TI v UK* App no 43844/98 (ECtHR, 7 March 2000) 16–18.

<sup>297</sup> See The court’s assessment of the position of the applicant as a failed asylum-seeker if returned to Germany: *TI v UK* App no 43844/98 (ECtHR, 7 March 2000) 16–18.

<sup>298</sup> See The court’s assessment of the position of the applicant as a failed asylum-seeker if returned to Germany: *TI v UK* App no 43844/98 (ECtHR, 7 March 2000) 16–18.

as the Court found it sufficient that the applicant could receive protection based on a provision in German law that gave the discretionary powers to German authorities to suspend the removal of aliens that faced substantial dangers to the life, personal integrity or liberty.<sup>299</sup>

The same general method for assessing the risk of indirect *refoulement* presented in *T.I. v The United Kingdom* was used in *M.S.S. v Belgium and Greece* to assess the alleged violation of article 3 by Belgium for exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece.<sup>300</sup> In reply to the argument of the Belgian authorities that they had sought sufficient assurances from the Greek authorities that they would honour their obligations under the ECHR the Court observed 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 where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention ....<sup>301</sup>

In the recent case of *Ilias and Ahmed v Hungary*, where two Bangladeshi nationals were removed from Hungary to Serbia on the notion of Serbia being a safe third country, the Court came to the conclusion that the Hungarian authorities had not sufficiently examined the individual risk of the applicants facing ill-treatment in a chain *refoulement* situation eventually driving the applicants to Greece.<sup>302</sup> The Court stated that even if the burden of proof lies on the applicants for showing that they face a risk of ill-treatment if removed to a country considered safe, the domestic authorities have an obligation to assess that risk of their own motion when information about such a risk is ascertainable from a wide number of sources.<sup>303</sup> This, and other circumstances, led the Court to the conclusion that Hungary had breached article 3 since the Hungarian authorities had:

relied on a schematic reference to the Government's list of safe third countries ..., disregarded the country reports and other evidence submitted by the applicants and imposed an unfair and excessive burden of proof on them<sup>304</sup>

### 3.4.4 Conclusions on states' obligations under

---

<sup>299</sup> See The court's assessment of the position of the applicant as a failed asylum-seeker if returned to Germany: *TI v UK* App no 43844/98 (ECtHR, 7 March 2000) 17–18; Wouters (2009) 320–21.

<sup>300</sup> After having concluded that the applicant could arguably claim that his removal to Afghanistan would violate Article 2 or Article 3 of the Convention the ECtHR proceeded to assess whether the Belgian authorities should have foreseen that the Greek authorities would not respect their international obligations in asylum matters: *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) paras 344–345.

<sup>301</sup> *MSS v Belgium and Greece* App no 30696/09 (ECtHR, 21 January 2011) paras 353.

<sup>302</sup> *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 14 March 017) para 118.

<sup>303</sup> *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 14 March 017) para 118.

<sup>304</sup> *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 14 March 017) paras 124–125.

## the ECHR

Every EU Member State is required to respect the prohibition on *refoulement* in the ECHR.<sup>305</sup> The prohibition on *refoulement* in the ECHR is not explicitly stipulated in the Convention but has developed, primarily emanating from article 3, in the case law of the ECtHR.<sup>306</sup>

In contrast to the refugee Convention, Contracting States do not only have to respect *non-refoulement* in relation to refugees but to every individual within the jurisdiction of the Contracting State.<sup>307</sup> A Contracting State must therefore protect an individual from *refoulement* even if that person cannot be considered to be a refugee.

The ECHR does not place an obligation on Contracting States to grant an asylum seeker asylum but the prohibition on *refoulement* in the Convention does, however, oblige a Contracting State not to forcibly remove an individual to another country where he or she faces a real risk of such ill-treatment prohibited by article 3 of the Convention.<sup>308</sup> Article 3 prohibits torture, inhuman or degrading treatment or punishment. It is, however, hard to define exactly what treatment is precluded by the article.<sup>309</sup> The recognition of an asylum seeker as a refugee can be of importance when assessing the risk of treatment prohibited by article 3. The opposite, that an asylum seeker has been found not to be a refugee, is, however, not decisive for whether he or she risks treatment proscribed by article 3 since an individual can have a risk of such ill-treatment precluded by article 3 ECHR without having a well-founded fear of persecution within the meaning of the Refugee Convention.<sup>310</sup>

The prohibition on *refoulement* in the Convention puts an obligation on Contracting States to provide effective guarantees against arbitrary *refoulement*.<sup>311</sup> This includes an obligation to undertake a rigorous scrutiny of a claim that a removal of an individual would result in *refoulement*, including a responsibility to actively gather relevant information.<sup>312</sup> The state must also provide effective safeguards.<sup>313</sup>

Beside these positive obligations, Contracting States also have the negative obligation of not introducing procedural requirements on individuals that hinder them from claiming protection against *refoulement* or substantiating their claims, such as too short time limits.<sup>314</sup>

---

<sup>305</sup> See section 3.4.1.

<sup>306</sup> See section 3.4.

<sup>307</sup> See section 3.4.2.

<sup>308</sup> See sections 3.4.3, 3.4.3.1.

<sup>309</sup> See section 3.4.3.1.

<sup>310</sup> See section 3.4.3.1.

<sup>311</sup> See section 3.4.3.3.

<sup>312</sup> See section 3.4.3.3.

<sup>313</sup> See section 3.4.3.3.

<sup>314</sup> See section 3.4.3.3.

Just as the prohibition on refoulement in the Refugee Convention, the ECHR prohibits indirect, or chain *refoulement*.<sup>315</sup> If an individual faces a real risk of proscribed ill-treatment in a country, a Contracting State must therefore make sure that the country, to which the Contracting State wishes to remove the individual, has safeguards that can protect the individual from being removed to the place where he or she faces a risk.<sup>316</sup> These safeguards must be effective in practice for the particular individual in order to be considered ensuring sufficient protection.<sup>317</sup>

If a Contracting State uses a list of safe third countries, the State may not rely on a schematic reference to such a list and may not impose an unfair and excessive burden of proof on the individual.

### 3.5 Combined conclusions in regard to research questions 1 and 2

This section will discuss what combined conclusions can be drawn from the examination of the principle of *non-refoulement* as the principle is expressed in article 33 of the Refugee Convention and article 3 of the ECHR in relation to research questions 1 and 2 in this thesis.

The questions to be discussed are:

- 1) In what way does the principle of *non-refoulement* limit the possibility for EU Member States to remove an asylum seeker to another country *without assessing his or her asylum application on the merits*?
  - a. What is the required level of protection that must be available in the receiving country?
  - b. Are there any procedural obligations that Member States must meet when determining if a receiving country is safe for a particular asylum seeker?
- 2) Does the principle of *non-refoulement* impose any procedural obligations on EU Member States *when assessing asylum applications on the merits*? If so:
  - a. What does this/these obligation imply for the use of time limits stating the maximum duration of certain procedural steps and other procedural requirements imposed on applicants?
  - b. What does this/these obligation imply for the use of procedures stereotyping applicants from certain countries?

#### 3.5.1 Research question 1

The differences in scope regarding who is protected by the Refugee Convention and the ECHR respectively, leads to a somewhat different way

---

<sup>315</sup> See section 3.4.3.4.

<sup>316</sup> See section 3.4.3.4.

<sup>317</sup> See section 3.4.3.4.

of approaching the question of what obligations a state must meet when wanting to remove an asylum seeker to another country without assessing his or her asylum application on the merits. While the protection of the Refugee Convention is dependent on the asylum seeker not having received a negative decision on his or her claim for refugee status, the protection of the ECHR shall be given to anyone within the jurisdiction of a Convention State, irrespective of that individual's status as a refugee.<sup>318</sup>

The common view is that States Parties to the Refugee Convention must make sure that the state, receiving an asylum seeker who has not yet been determined not to be a refugee, will offer that asylum seeker effective protection.<sup>319</sup> The content of the notion of 'effective protection' is however contested. Some scholars consider the notion to prohibit parties to the refugee convention from removing an asylum seeker to another country unless that country will give the asylum seeker the same rights as he or she has in the sending state, such as a right to education, while national courts seem to focus on the absence of a risk of persecution or indirect *refoulement*.<sup>320</sup>

As regards the prohibition on *refoulement* in the ECHR on the other hand, the required level of protection is the same, irrespective of whether a refugee determination has been made or not.<sup>321</sup> Judging from the studied ECtHR cases, the prohibition on *refoulement* in the ECHR focuses on not exposing the individual to a real risk of ill-treatment.<sup>322</sup>

### 3.5.1.1 Research question 1(a)

According to the notion of 'effective protection' as derived from the Refugee Convention, an EU Member State must, before it sends an asylum seeker to another state, at least make sure that:

- The asylum seeker will not face a serious risk of persecution in the receiving country.<sup>323</sup>
- The receiving country will respect the prohibition on direct and indirect *refoulement*.<sup>324</sup>
- The receiving country will provide the asylum seeker with a fair refugee determination procedure or be willing to honour all elements of effective protection without a formal refugee determination procedure.<sup>325</sup>

---

<sup>318</sup> See sections 3.3.2, 3.4.2.

<sup>319</sup> See section 3.3.3.3.

<sup>320</sup> See section 3.3.3.3.

<sup>321</sup> See section 3.4.3.1.

<sup>322</sup> See section 3.4.3.1.

<sup>323</sup> See subsection 3.3.3.3.

<sup>324</sup> See subsection 3.3.3.3.

<sup>325</sup> See subsection 3.3.3.3.

Beside these criteria, there are other, more far-reaching, criteria proposed by some scholars, which however must be considered contested.<sup>326</sup>

According to the ECHR, an EU Member State must also make sure that:

- The asylum seeker will not face a real risk of torture, inhuman or degrading treatment or punishment in the receiving country.<sup>327</sup>
- The receiving country has effective safeguards against direct and indirect *refoulement*.<sup>328</sup>

It is important to observe that the personal scope, as well as the scope of the treatment prohibited by the principle of *non-refoulement* differs between the two instruments.<sup>329</sup> It is thus, for instance, not sufficient to make sure that the receiving country will respect the prohibition on *refoulement* as it is expressed in the Refugee Convention to avoid the risk of breaching the prohibition on indirect *refoulement* in the ECHR.

### 3.5.1.2 Research question 1(b)

From the point of view of the Refugee Convention, the same procedural obligations have to be met when examining the safety of a third country as when examining an asylum seekers claim for refugee status.<sup>330</sup> There is also no sign of procedural obligations differing between cases concerning removal of asylum seekers to, for example, a country considered to be a safe third country and removal in other situations according to the case law of the ECtHR.<sup>331</sup> The answer to research question 1(b) is thus the same the answer to research question 2. These questions will therefore be discussed jointly in the next section.

## 3.5.2 Research question 2

The Refugee Convention can be considered to require EU Member States to provide asylum seekers with a fair refugee determination procedure.<sup>332</sup> The question of what specific obligations a fair procedure imply is however hard to tell as the decisive factor of whether the procedure is fair or not is the outcome of the procedure rather than the procedure itself.<sup>333</sup> As long as the procedure is adequate for effectively implementing the Convention, the content of the procedure is of lesser importance.<sup>334</sup>

---

<sup>326</sup> See section 3.3.3.3.

<sup>327</sup> See sections 3.4.3, 3.4.3.1.

<sup>328</sup> See section 3.4.3.4.

<sup>329</sup> See sections 3.4.2, 3.4.3.1.

<sup>330</sup> See section 3.3.3.3.

<sup>331</sup> Compare for instance *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 14 March 2017) paras 112–116 with *Jabari v Turkey* App no 40035/96 (ECtHR, 11 July 2000) paras 38–39.

<sup>332</sup> See section 3.3.3.4.

<sup>333</sup> See section 3.3.3.4.

<sup>334</sup> See section 3.3.3.4.

As regards procedural obligations deriving from the ECHR, EU Member States have an obligation to rigorously scrutinise an individual's claim that his or her removal to another country would be in breach of article 3 and make sure that there are effective guarantees protecting the applicant from arbitrary *refoulement* to the country from which he or she has fled.<sup>335</sup> When assessing whether a specific procedure offers effective guarantees, the ECtHR takes into consideration, among other things, the historical outcome of the procedures in practise.<sup>336</sup>

### 3.5.2.1 Research question 2(a)

According to the UNHCR, the Refugee Convention does not preclude EU Member States from imposing procedural requirements on applicants, such as time limits, as long as the failure of the applicant to fulfil such requirements does not lead to the request for asylum being excluded from consideration.<sup>337</sup> The same view can be seen in the ECtHR case law. The Court has made clear that it in principle is 'acceptable for Contracting States to set procedural requirements for the submission and consideration of asylum claims ...' as long as these requirements does not hinder applicants from claiming protection against *refoulement* or substantiating such a claim.<sup>338</sup>

Short, inflexible time limits, stating the maximum duration of a procedure, can be problematic in, at least, two ways. Firstly, such time limits can make it hard, or impossible, for an applicant to substantiate his or her claim, for example, if the applicant need to gather evidence from abroad. Secondly, short time limits may put an undue pressure on the authorities to conclude a procedure even if the case has not been thoroughly examined which would be in breach of the obligation to rigorously scrutinise the applicant's claim.

Having concluded that time limits, and other procedural requirements on applicants, can be precluded for EU Member States to use, it is hard to further say under exactly what circumstances such requirements are prohibited. ECtHR has said that the situations, in which an applicant is not obliged to comply with such rules, depend on the facts of each case.<sup>339</sup> This will depend on, for example, how much time the applicant needs to collect evidence for his or her claim in the specific case.<sup>340</sup> As regards time limits in relation to the obligation of Member States to rigorously scrutinise each claim, the exact amount of time that can be considered enough for a thorough examination will necessarily depend on the complexity of each specific case and what resources the authorities have to undertake the examination.

---

<sup>335</sup> See section 3.4.3.3.

<sup>336</sup> See section 3.4.3.3.

<sup>337</sup> See section 3.3.3.4.

<sup>338</sup> See section 3.4.3.3.

<sup>339</sup> See section 3.4.3.3.

<sup>340</sup> See section 3.4.3.3.



### 3.5.2.2 Research question 2(b)

It is a pretty uncontroversial view that the Refugee Convention requires the refugee determination procedure to be made on a case-by-case basis assessing the individual circumstances of each applicant.<sup>341</sup> The same view can be found in relation to the ECHR in the case law of the ECtHR.<sup>342</sup> The usage of ‘safe country’ concepts involve stereotyping of certain asylum seekers as the concept is used to presume that applicants granted protection in another country, having had the possibility to apply for protection in certain countries or origination from certain countries are presumed not to have grounds for protection. While the ‘safe country’ concepts are not necessarily incompatible with the principle of *non-refoulement* they may not be used in such a way that they undermine the individual assessment of each asylum seekers claim or put an unfair and excessive burden of proof on the applicant.<sup>343</sup>

As earlier established, it is the result of the procedure rather than the procedure itself that is decisive in whether the procedure is compatible with the prohibition on *refoulement* or not.<sup>344</sup>

---

<sup>341</sup> See section 3.3.3.4.

<sup>342</sup> See sections 3.4.3.3, 3.4.3.4.

<sup>343</sup> See sections 3.3.3.4, 3.4.3.4.

<sup>344</sup> See sections 3.3.3.4, 3.4.3.3, 3.4.3.4.

# 4 The admissibility of certain provisions in the Procedures Regulation Proposal

## 4.1 Introduction

In this chapter, the results of the examination in the previous chapter will be applied to assess whether the articles examined in chapter 2 are compatible with the principle of *non-refoulement*. Firstly, each article, and provisions related to that article, will be described shortly. Secondly, the criticism of each article presented in chapter 2 will be summed up. Lastly, an assessment will be made whether the proposed article is compatible with the principle of *non-refoulement*.

Following the procedure of the ECtHR, an assessment of whether certain rules meet the obligations imposed by the principle of *non-refoulement* should include an assessment of whether the rules meet the obligations in both theory and practise.<sup>345</sup> Since it is very hard, if not impossible, to assess the practical function of rules that have not been implemented, the focus of the assessment will be on the compatibility between the rules and the principle of *non-refoulement* in theory.

## 4.2 Admissibility procedures (article 36)

### 4.2.1 The proposal

According to article 36 of the Commission's Proposal, every Member State is, in principle, obliged to assess the admissibility of every asylum application and reject the application without determining whether the applicant qualifies for refugee status or is eligible for international protection if any of the grounds for inadmissibility applies.<sup>346</sup>

The most discussed grounds for admissibility are the concepts of 'first country of asylum' and 'safe third country'.<sup>347</sup> A country shall be considered a first country of asylum if the applicant has 'enjoyed protection in accordance with the Geneva Convention' in that country, or, if he or she, 'otherwise has enjoyed sufficient protection' there.<sup>348</sup>

An applicant shall be considered to have enjoyed sufficient protection if:

---

<sup>345</sup> See sections 3.4.3.3, 3.4.3.4.

<sup>346</sup> See section 2.3.

<sup>347</sup> See section 2.3.

<sup>348</sup> See section 2.3.1.

- a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- b) there is no risk of serious harm as defined in Regulation (EU) No XXX/XXX (Qualification Regulation);
- c) the principle of *non-refoulement* in accordance with the Geneva Convention is respected;
- d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law is respected;
- e) there is a right of legal residence;
- f) there is appropriate access to the labour market, reception facilities, healthcare and education; and
- g) there is a right to family reunification in accordance with international human rights standards.<sup>349</sup>

Before an application for asylum is rejected as inadmissible, the applicant shall be allowed to challenge the application of the first country of asylum concept in the light of his or her particular circumstances.<sup>350</sup>

As regards the concept of ‘safe third country’, a country shall be designated as safe if:

- a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- b) there is no risk of serious harm as defined in Regulation (EU) No XXX/XXX;
- c) the principle of *non-refoulement* in accordance with the Geneva Convention is respected;
- d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected;
- e) the possibility exists to receive protection in accordance with the substantive standards of the Geneva Convention or sufficient protection as referred to in Article 44(2), as appropriate.<sup>351</sup>

The concept of ‘safe third country’ shall be applied if a country has been designated safe by the individual Member State conducting the admissibility assessment, is designated safe on EU level or in individual cases in relation to a specific applicant.<sup>352</sup> Such a country shall be considered safe *for a particular applicant* where the Member State, after an individual examination: is satisfied that the five criteria above is met for the specific applicant, there is a sufficient connection between the country and the applicant and the applicant has not submitted any serious grounds for considering the country not to be safe in the applicants particular circumstances.<sup>353</sup>

Just as in the case of the ‘first country of asylum’ concept, an applicant shall be given the possibility to challenge the application of the concept of safe

---

<sup>349</sup> Procedures Regulation Proposal, art 44(2).

<sup>350</sup> See section 2.3.1.

<sup>351</sup> Procedures Regulation Proposal, art 45(1).

<sup>352</sup> See section 2.3.2.

<sup>353</sup> See section 2.3.2.

third country in light of his or her particular circumstances before his or her application is rejected as inadmissible.<sup>354</sup>

Where the concepts of ‘first country of asylum’ or ‘safe third country’ apply, the admissibility procedure shall be concluded within ten working days.<sup>355</sup>

#### 4.2.2 The criticism

The concept of ‘first country of asylum’ has been criticised for, if implemented in a mechanical way, leading to the assessment of the risk of *refoulement* not being sufficiently individualised.<sup>356</sup> The concept has also been criticised for setting a too low standard for what should be considered a first country of asylum in relation to a particular asylum seeker since it does not require such a country to have recognised the asylum seeker as a refugee and that ‘sufficient protection’ is considered enough to deem a country to be a first country of asylum.<sup>357</sup>

As regards the concept of ‘safe third country’, it has received similar criticism as the ‘first country of asylum’ concept. It has been argued that ‘protection in accordance with the substantive standards of the Geneva Convention’ would be too weak since the content of this term is uncertain and, according to the criticism, implies that the Refugee Convention can be applied by states on a ‘pick-and-choose’ basis.<sup>358</sup> According to the criticism, this already weak protection is further weakened by the possibility to substitute ‘protection in accordance with the substantive standards of the Geneva Convention’ with ‘sufficient protection’.<sup>359</sup>

Lastly, the time limit of ten working days for the duration of an admissibility procedure where the concept of ‘first country of asylum’ or ‘safe third country’ is applied, has been criticised as it may not give an applicant the possibility to rebut the presumption of safety.<sup>360</sup>

#### 4.2.3 The assessment

The first element to be assessed is whether it is sufficient to have enjoyed ‘protection in accordance with the Geneva Convention’ in order to deem a country to be a first country of asylum. It should firstly be noted that it is not prohibited to remove an asylum seeker to a country that is not a party to the Refugee Convention.<sup>361</sup> It can, thus, not be considered a requirement for removal, that the asylum seeker has obtained refugee status in the receiving

---

<sup>354</sup> See section 2.3.2.

<sup>355</sup> See section 2.3.

<sup>356</sup> See section 2.3.1.

<sup>357</sup> See section 2.3.1.

<sup>358</sup> See section 2.3.2.

<sup>359</sup> See section 2.3.2.

<sup>360</sup> See section 2.3.

<sup>361</sup> See section 3.3.3.3.

state. While ‘protection in accordance with the Geneva Convention’ will naturally include protection against *refoulement* in accordance with article 33 of the Refugee Convention, it is not sufficient for completely protecting against *refoulement* as required by the ECHR since the scope of that protection is wider than the protection in the Refugee Convention. The possibility for the individual to rebut the presumption of safety in his or her particular case is therefore essential for deeming ‘protection in accordance with the Geneva Convention’ as sufficient for considering a certain country safe.

The question of whether the concept of ‘sufficient protection’ offers adequate protection from a *non-refoulement* point of view is very much a question of how the criteria of that concept is interpreted since the wording of the criteria is very similar, but not exactly the same as required by the principle of *non-refoulement*.<sup>362</sup> A possible discrepancy between the criteria and the protection required by the principle of *non-refoulement* can, however, possibly be mended by the possibility of the applicant to rebut the presumption of safety in his or her personal circumstances.

While it is true that the content of the criterion of ‘protection in accordance with the substantive standards of the Geneva Convention’ is uncertain, it is also flexible enough to be able to interpret in accordance with the prohibition on *refoulement* and can thus not be considered directly incompatible with the principle of *non-refoulement*.

The conclusion is thus that the level of protection required to deem a country to be a first country of asylum or safe third country for a particular asylum seeker, in theory, meets the obligations imposed by principle of *non-refoulement*.

As regards the obligation on states to assess asylum applications individually, both the ‘first country of asylum’ concept and the ‘safe third country’ concept require states to make an individual assessment of the applicability of the concept to a specific applicant. According to the Proposal, Member States are also required to give the applicant the possibility to rebut the presumption of safety.

As regards the time limit for the duration of the admissibility procedure it should be noted, on a general level, that the principle of *non-refoulement* in the Refugee Convention and the ECHR require EU Member States to provide the same level of protection to all individuals that fall within the personal scope of each Convention. There is hence, not a certain level of protection that is sufficient for some asylum seekers but not for others.

The only relevant argument for allowing a much shorter time limit for admissibility procedures compared to ‘regular’ procedures, ought to be that it is much easier for applicants to substantiate their claims, and for Member

---

<sup>362</sup> The concept does, for instance, not explicitly prohibit inhuman or degrading punishment as required by article 3 of the ECHR: See section 3.5.1.1.

States to examine and assess these claims, in admissibility procedures. There are, however, no evidence of that this would be the case. Even if the admissibility procedure does not render a decision on the merits of an asylum seeker's claim on protection, the procedure leading to the conclusion that a certain country is safe for a particular asylum seeker can be just as complex as the decision whether he or she is a refugee or not.

It is probably a fair assumption to say that very few would consider ten working days sufficient time for conducting a fair refugee determination procedure. Given the possible high complexity of certain cases on admissibility, it could be considered equally unreasonable to believe that it is possible to conduct a thorough, individual assessment of the safety of a country in relation to a specific asylum seeker, and give him or her a proper chance to rebut the presumption of safety, within ten working days.

It is, however, uncertain what, if any, consequence a Member State will face if it fails to comply with the proposed time limit but there are probably only two different ways of interpreting the meaning of this time limit that can make it compatible with the prohibition on *refoulement*. Either, it must be interpreted as non-binding in order to give Member State the flexibility to prolong the procedure if needed, or it must be regarded as a time limit, after which a Member State must consider an application admissible unless the Member State has been able to prove that the asylum seeker can be removed without breaching the principle of *non-refoulement*.

Even if it is unclear, due to the uncertain role of the time limit, whether the proposed admissibility procedure offers sufficient protection against *refoulement* in theory, it is, however, not possible to clearly say that it is incompatible with the principle of *non-refoulement* either.

## **4.3 Accelerated procedures (article 40)**

### **4.3.1 The proposal**

According to article 40 of the Commission's Proposal, EU Member States will be obliged to accelerate the assessment of an application for asylum if:

- a) the applicant has only presented facts irrelevant for international protection;
- b) the claim of the applicant is clearly unconvincing;
- c) the applicant has misled the authorities;
- d) the applicant is making an application merely to delay or frustrate the enforcement of a decision to remove the applicant from a Member State;
- e) a third country may be considered a safe country of origin;
- f) the applicant does not comply with certain obligations in the Dublin Regulation;

- g) the application is a subsequent application with no tangible prospect of success.<sup>363</sup>

A country may be considered a safe country of origin if it can be shown that there is generally no persecution, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.<sup>364</sup> When making the assessment of the safety of a particular country account shall be taken to, among other things:

- a) the relevant laws and regulations of the country and the manner in which they are applied;
- b) observance of rights and freedoms laid down in the ECHR;
- c) the absence of expulsion, removal or extradition of own citizens to third countries where, inter alia, there is a serious risk that they would be subjected to the death penalty, torture, persecution or other inhuman or degrading treatment or punishment, or where their lives or freedom would be threatened on account of their race, religion, nationality, sexual orientation, membership of a particular social group or political opinion, or from which there is a serious risk of an expulsion, removal or extradition to another third country.<sup>365</sup>

Similarly to the proposed 'safe third country' concept, the countries to which the 'safe country of origin' concept is going to be applied, are proposed to be decided on Union level.<sup>366</sup> A safe country of origin may be considered safe for a particular applicant only where he or she has not submitted any serious ground for considering the country not to be a safe country in his or her particular circumstances.<sup>367</sup>

An accelerated procedure has, according to the Proposal, to be concluded within two months, or eight working days if the examination is accelerated because the application was made 'merely to delay or frustrate the enforcement of an earlier or imminent decision resulting in his or her removal from the territory of a Member State'.<sup>368</sup> However, if the determining authority considers that a certain case is too complex to be examined under an accelerated procedure it may continue the examination under a 'regular' procedure.<sup>369</sup>

---

<sup>363</sup> See section 2.4.

<sup>364</sup> Procedures Regulation Proposal, art 47(1).

<sup>365</sup> This is not a complete quotation of things to take into account but a summary of the things most relevant to this thesis. Procedures Regulation Proposal, art 47(3).

<sup>366</sup> See section 2.4.1.

<sup>367</sup> See section 2.4.1.

<sup>368</sup> Procedures Regulation Proposal, art 40(1–2).

<sup>369</sup> Procedures Regulation Proposal, art 40(4).

### 4.3.2 The criticism

The primary concern with accelerated procedures is that the truncated procedure will undermine a fair and qualitative examination of asylum applications.<sup>370</sup> Because of this risk it has been argued that accelerated procedures only should be used when assessing cases where the application is clearly fraudulent or the applicant only has submitted issues that are unrelated to the grounds for granting asylum.<sup>371</sup>

In special regard to the ‘safe country of origin’ concept as a ground for acceleration, the main criticism is that the concepts stereotypes certain applications and thus risks jeopardising the individuality of the assessment and that the concept puts a too high burden of proof on the applicant.<sup>372</sup> It can also be noted that the required level of safety is proposed to be reduced from ‘generally and consistently’ no persecution etc. to only ‘generally’.<sup>373</sup>

### 4.3.3 The assessment

The question of the accelerated procedures’ compatibility with the principle of *non-refoulement* is, in contrast to the assessment of the admissibility procedures, not a question of what level of protection that needs to be present in a country in order for a Member State to remove an asylum seeker to that country without assessing his or her claim for international protection. This is because accelerated applications, in contrast to applications that are found inadmissible, will be assessed on their merits. The level of protection will therefore be decided by the provisions in the Qualification Regulation instead of the Procedure Regulation Proposal.<sup>374</sup> The question is, therefore, rather if the accelerated procedure is sufficiently fair.

As already concluded, every person falling within the scope of the Refugee Convention or the ECHR, has the same right to protection, including the same right to get the possibility to substantiate his or her claim for protection and get this claim sufficiently examined and assessed. The minimum level of procedural fairness required by the principle of *non-refoulement* must therefore be accessible to all asylum seekers no matter if their applications is assessed in an accelerated or ‘regular’ procedure.

As long as the proposed maximum duration of an accelerated procedure can not be considered to be sufficient also for a ‘regular’ procedure, there must be specific circumstances in the accelerated cases that show that the examination and assessment of these applications do not require the same amount of time as those in the ‘regular’ procedure. Since the accelerated procedures, as proposed by the Commission, contain grounds for

---

<sup>370</sup> See section 2.4.

<sup>371</sup> See section 2.4.

<sup>372</sup> See section 2.4.1.

<sup>373</sup> See section 2.4.1.

<sup>374</sup> Procedures Regulation Proposal, arts 40(1), 37.



acceleration that has nothing to do with the complexity of the case, such as acceleration due to the applicant having misled the authorities or having failed to comply with certain obligations in the Dublin Regulation, is hard to argue that there are reasonable grounds for the shorter duration of the accelerated procedure, at least in relation to these grounds. In this regard, the level of protection required to deem a country to be a safe country of origin is important. The lower the requirements are, the less reasonable it is to use the ‘safe country of origin’ concept as a ground for acceleration.

Despite the problem of justifying some acceleration grounds, the possibility for Member States to change tracks from the accelerated procedure to a ‘regular’ procedure, where they find it necessary for a thorough examination, leads to the conclusion that the time limit of the accelerated procedure, at least in theory, does not pose a problem for the compatibility of the procedure with the principle of *non-refoulement*.

There are no provisions related to accelerated procedures that, in theory, hinders Member States from assessing accelerated applications on a case-by-case basis with due regard to the individual circumstances of each case as required by the principle of *non-refoulement*. It is, nevertheless, possible that the result of the accelerated procedures, in practice, can lead to such a result.

The conclusion is, however, that the concept of accelerated procedures, as proposed by the Commission, in theory is compatible with the obligations imposed on EU Member State by the principle of *non-refoulement*.

## **4.4 Implicit withdrawals of applications (article 39)**

### **4.4.1 The proposal**

According to article 39 of the Proposal an application shall be rejected as abandoned, for example, if the applicant has not lodged his or her application within certain time limits, if the applicant does not cooperate by providing his or her fingerprints and facial image, if the applicant does not appear for a personal interview or if the applicant has abandoned his or her place of residence without informing the authorities.<sup>375</sup> If the applicant does not report back to the authorities within one month and demonstrates that the reason for the applicant not fulfilling his or her obligations was due to circumstances beyond his or her control, the application will be considered implicitly withdrawn.<sup>376</sup> An implicitly withdrawn application shall be rejected as abandoned or as unfounded where the determining authority has, at the stage that the application is implicitly withdrawn, already found that

---

<sup>375</sup> Procedures Regulation Proposal, art 39.

<sup>376</sup> See section 2.5.

the applicant does not qualify for international protection.<sup>377</sup> An application can, thus, be rejected if an applicant forgets the time of a personal interview or forgets to report that he or she has moved.

If a new application is made after the first application has been rejected, that application will be considered a subsequent application and will only be examined on its merits if it contains:

- a) relevant new elements or findings;
- b) the applicant was unable, through no fault on his or her own part, to present those elements or findings during the procedure in the context of the earlier application, unless it is considered unreasonable not to take those elements or findings into account.<sup>378</sup>

#### **4.4.2 The criticism**

The criticism directed towards the proposed changes to the concept of ‘implicitly withdrawn applications’ is centred around the fear that the inflexible nature of the concept may lead to applicants not getting their claims assessed at all.<sup>379</sup> This since Member States will be obliged to reject applications and an applicant, who’s application is rejected as implicitly withdrawn, will have to file a new application which will be treated as a subsequent application.<sup>380</sup>

#### **4.4.3 The assessment**

The main question is whether the concept of ‘implicitly withdrawn applications’ is compatible with the obligation of states not to impose procedural requirements on applicants that hinder them from claiming protection against *refoulement*.

If an asylum seeker’s application is rejected as implicitly withdrawn, *before* the applicant has presented all the facts and arguments that he or she wants to present to substantiate his or her claim, a subsequent application will, in principle, only be assessed on its merits if it contains relevant new elements or findings that the applicant, through no fault of his or her own part, was unable to present in the context of the earlier application. Since it lies in the concept of ‘implicit withdrawn applications’ itself, that the applicant has failed to meet the requirements imposed on him or her due to circumstances within his or her control, the applicant cannot be considered to have been unable to present the elements or findings through no fault of his or her own. The applicant’s claim will, thus, only be assessed on its merits if the authorities consider it unreasonable not to take those elements or findings into account. The risk of being subjected to *refoulement* should reasonably be such a circumstance that would make it unreasonable not to take the new

---

<sup>377</sup> See section 2.5.

<sup>378</sup> Procedures Regulation Proposal, art 42(4).

<sup>379</sup> See section 2.5.

<sup>380</sup> See section 2.5.

elements into consideration. This protection can, however, be considered weak since it relies on the discretion of the authorities in each Member State to decide what subsequent applications to assess and not. In this regard it should be noted that the ECtHR has found protection based on discretionary powers of national authorities sufficient.<sup>381</sup>

The real problem arises, however, in the potential situation where an applicant *already* has presented all facts and element that he or she wants to invoke to substantiate his or her claim when the application, according to article 39, have to be rejected by the authorities as implicitly withdrawn, if the assessment of the circumstances presented at that point in time would lead to the conclusion that the applicant needs protection. In this case the authorities would be obliged to reject the application as abandoned and would be barred from examining a new application since it would contain no new elements. In order to avoid this situation, the strict requirement of new elements must be removed or the flexibility given to Member States to grant protection even if the conditions for an implicit withdrawal are fulfilled.

As previously noted, the ECtHR has said that Contracting States, in principle, are free to set procedural requirements for the submission and consideration of asylum claims, as long as the automatic and mechanical application of such requirements are not at variance with the protection of the fundamental value embodied in article 3.<sup>382</sup> It can, however, not be considered to be in line with article 3 to apply the concept of ‘implicit withdrawn application’ in such a way that asylum seekers who has forgotten the time of a personal interview or forgotten to report that he or she has moved will be barred from protection against *refoulement*. The conclusion is thus, that the proposed article 39 is not compatible with the obligations imposed on EU Member States by the principle of *non-refoulement*.

---

<sup>381</sup> See section 3.4.3.4.

<sup>382</sup> See section 3.4.3.4.

## 5 Final conclusions

The research presented in this thesis shows that the principle of *non-refoulement*, as it is expressed in the Refugee Convention and article 3 of the ECHR, impose obligations on EU Member States that must be respected when shaping asylum procedures. In relation to efforts to streamline asylum procedures, these obligations require Member States not to remove asylum seekers to another country without, either, fairly assessing their asylum applications on the merits, or making sure that the country to which they are to be sent will offer them effective protection.<sup>383</sup>

The assessment of an asylum seeker's claim for international protection or the safety of removing him or her to a particular country must be made rigorously, on a case-by-case basis, taking into consideration the individual circumstances of each applicant.<sup>384</sup> Member States are also obliged not to impose procedural requirements on applicants that will hinder them from claiming protection against *refoulement* and substantiating such claims.<sup>385</sup>

The assessment of whether the studied articles in the Procedures Regulation Proposal are compatible with the obligations imposed by the principle of *non-refoulement* shows that the Proposal, at least in relation to the article on implicit withdrawals of applications, is incompatible with the principle of *non-refoulement*. As regards the studied articles on the proposed admissibility procedures and accelerated procedures, the conclusion is that these articles, in theory, provide sufficient protection against *refoulement*. It should however be underlined that the articles also have to provide sufficient protection in practise, something that is hard to assess before the articles have been implemented. Therefore, even if the articles provide sufficient protection in theory, the criticism directed towards these proposed articles may be legitimate. In the case of the proposed article on the concept of 'implicit withdrawals of applications', the conclusion is that this article is incompatible with the principle of *non-refoulement* since it imposes procedural obligations on applicants that can lead to a claim for protection being excluded from consideration.

---

<sup>383</sup> See sections 3.3.3.3, 3.3.3.4, 3.4.3.1.

<sup>384</sup> See sections 3.3.3.4, 3.4.3.3.

<sup>385</sup> See sections 3.3.3.4, 3.4.3.3.

# Bibliography

## Litterature

### Books

Aust A, *Modern Treaty Law and Practice* (2ed edn, Cambridge University Press 2007)

Battjes H, *European Asylum Law and International Law* (Martinus Nijhoff Publishers 2006)

Bauloz C and others (eds), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Brill Nijhoff 2015)

Brownlie I, *Principles of Public International Law* (6th edn, Oxford University Press 2003)

Crawford J, *Brownlie's principles of public international law* (8th edn, Oxford University Press 2012)

Evans M D (ed), *International Law* (4th edn, Oxford University Press 2014)

Feller E, Türk V and Nicholson F (eds), *Refugee Protection in International Law* (Cambridge University Press 2003)

Goodwin-Gill G S and McAdam J, *The Refugee in International Law* (3rd edn, Oxford University Press 2007)

Hathaway J C, *The Rights of Refugees under International Law* (Cambridge University Press 2005)

Hurwitz A, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009)

Maccormick N, *Rhetoric and the Rule of Law* (Oxford University Press 2005)

Shaw M N, *International Law* (7th edn, Cambridge University Press, 2014)

van Dijk P and others (eds), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006)

Wouters K, *International Legal Standards for the Protection from Refoulement* (Intersentia 2009)

## Journal articles and working papers

Legomsky S H, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 [4] *International Journal of Refugee Law* 567

Fitzmaurice G, 'Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1952) 28 *The British Yearbook of International Law* 1

Oakley S, 'Accelerated Procedures for Asylum in the European Union: Fairness Versus Efficiency' (2007) *Sussex Migration Working Paper* no. 43 <[www.sussex.ac.uk/webteam/gateway/file.php?name=mwp43.pdf&site=25](http://www.sussex.ac.uk/webteam/gateway/file.php?name=mwp43.pdf&site=25)> accessed 17 February 2017

Vaquero Á, 'Five Models of Legal Science' (2013) 19 *Revus* <<http://revus.revues.org/2449>> accessed May 24 2017

## Reports

Amnesty International, *The Proposed Asylum Procedures Regulation* (Position paper, 2017) <[http://www.amnesty.eu/content/assets/AI\\_position\\_paper\\_on\\_APR\\_proposal.pdf](http://www.amnesty.eu/content/assets/AI_position_paper_on_APR_proposal.pdf)> accessed 9 May 2017

Asylum Information Database, *Admissibility, Responsibility and Safety in European Asylum Procedures* (Comparative report, European Council on Refugee and Exiles, 2016) <<http://www.ecre.org/wp-content/uploads/2016/09/ECRE-AIDA-Admissibility-responsibility-and-safety-in-European-asylum-procedures.pdf>> accessed 30 March 2017

European Council on Refugees and Exiles, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation COM(2016) 467* (2016) <[http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR\\_-November-2016-final.pdf](http://www.ecre.org/wp-content/uploads/2016/11/ECRE-Comments-APR_-November-2016-final.pdf)> accessed 8 May 2017

## Legal sources and official documents

### Council of Europe

#### Conventions

European Convention for the Protection of Human Rights and Fundamental Freedoms

#### Charts of signatories and ratifications

Council of Europe, 'Chart of signatures and ratifications of Treaty 005' (Treaty Office, 3 May 2017) <<https://www.coe.int/en/web/conventions/full->

list/-/conventions/treaty/005/signatures?p\_auth=TdZnDh8X> accessed 3 May 2017

## **European Union**

### **Legislation**

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12

Directive 2011/95/EU of the European Parliament and of the Council 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 (recast) [2011] OJ L337/9

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) [2013] OJ L180/96

Directive of the European Parliament and of the Council 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180/60 (Recast Procedures Directive)

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180/31

Treaty on the Functioning of the European Union [2012] OJ C326/47

### **Reports, publications and press releases**

Commission, ‘Proposal for a Regulation of the European Parliament and of the Council Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU’ COM(2016) 467 final (Procedures Regulation Proposal)

Commission, ‘Proposal for a Regulation of the European Parliament and of the Council Establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council’ COM(2016) 467 final

Commission, 'Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast)' COM(2016) 465 final

Commission, 'Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents' COM(2016) 466 final

Council of the European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ("London Resolution")* (1992) <[www.refworld.org/docid/3f86bbcc4.html](http://www.refworld.org/docid/3f86bbcc4.html)> accessed 21 February 2017

European Asylum Support Office, 'Latest asylum trends – 2016 overview' <[www.easo.europa.eu/latest-asylum-trends](http://www.easo.europa.eu/latest-asylum-trends)> accessed 16 February 2017

European Asylum Support Office, 'Latest Asylum Trends – December 2016' <[www.easo.europa.eu/latest-asylum-trends](http://www.easo.europa.eu/latest-asylum-trends)> accessed 13 February 2017

European Commission, *A Common European Asylum System* (Information folder, Publications Office of the European Union 2014)

## **Sweden**

### **Official reports**

Förvaltningsrätten i Stockholm, *Remissyttrande: EU-kommissionens förslag till asylprocedurförordning* (Comment of official report by the administrative court in Stockholm, Dnr FST 2016/236-I, 2016)

Kammarrätten i Stockholm, *Remissyttrande: EU-kommissionens förslag till asylprocedurförordning och skyddsgrundsförordning* (Comment of official report by the administrative court of appeal in Stockholm, Dnr KST 2016/379, KST 2016/388, 2016)

## **United Nations**

### **Travaux préparatoires**

United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Draft Convention Relating to the Status of Refugees. Sweden: Amendment to Article 28 (A/CONF.2/70, 1951)*

United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of*



*Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting* (A/CONF.2/SR.16, 1951)

United Nations General Assembly, 'Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting' (A/CONF.2/SR.16, 23 November 1951)

## **Treaties and conventions**

1951 Geneva Convention relating to the Status of Refugees

1967 Protocol relating to the Status of Refugees

## **Treaty series**

United Nations Treaty Series Online, 'Convention relating to the Status of Refugees' (United Nations Treaty Collection) <<https://treaties.un.org/Pages/showDetails.aspx?objid=080000028003002e>> accessed 9 March 2017

United Nations Treaty Series Online, 'Protocol relating to the Status of Refugees' (United Nations Treaty Collection) <<https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280048bb8>> accessed 9 March 2017

## **Reports and publications**

International Law Commission, *Yearbook of the International Law Commission*, vol 2 (A/CN.4/SER. A/1966/Add.1, United Nations Publication 1967)

International Law Commission, *Responsibility of States for Internationally Wrongful Acts* (2001)

United Nations High Commissioner for Refugees, *Refugees Without an Asylum Country* (Executive Committee Conclusion 15 (XXX) 1979)

United Nations High Commissioner for Refugees, *Considerations on the "Safe Third Country" Concept* (Presented at the EU Seminar on the Associated States as Safe Third Countries in Asylum Legislation, Vienna, 8-11 July, 2001)

United Nations High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)* (EC/GC/01/12, 2001)

United Nations High Commissioner for Refugees, *UNHCR's Observations on the European Commission's Proposal for a Council Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status* (2001)

United Nations High Commissioner for Refugees, *UNHCR Advisory Opinion on the Interpretation of the Refugee Definition* (2004)

United Nations High Commissioner for Refugees, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)* (2005)

United Nations High Commissioner for Refugees, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice* (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States 2010)

United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Reissued 2011)

# Table of Cases

## European Court of Human Rights

Ahmed v Austria App no 25964/94 (ECtHR, 17 December 1996)

Artico v Italy App no 6694/74 (ECtHR, 13 May 1980)

Bader and Others v Sweden App no 13284/04 (ECtHR, 8 November 2005)

Chahal v UK App no 22414/93 (ECtHR, 15 November 1996)

Cruz Varas and Others v Sweden App no 15576/89 (ECtHR, 10 March 1991)

Ilias and Ahmed v Hungary App no 47287/15 (ECtHR, 14 March 2017)

Ireland v. The United Kingdom App no 5310/71 (ECtHR, 13 December 1977)

Jabari v Turkey App no 40035/96 (ECtHR, 11 July 2000)

KRS v the UK App no 32733/08 (ECtHR, 2 December 2008)

Mohammadi v Austria App no 71932/12 (ECtHR, 3 July 2014)

MSS v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011)

Ryabikin v Russia App no 8320/04 (ECtHR, 19 June 2008)

Saadi v Italy App no 37201/06 (ECtHR, 28 February 2008)

Shamayev and 12 Others v Georgia and Russia App no 36378/02 (ECtHR, 12 April 2005)

Soering v UK App no 14038/88 (ECtHR, 07 July 1989)

Thampanillai v The Netherlands App no 61350/00 (ECtHR, 17 February 2004)

TI v UK App no 43844/98 (ECtHR, 7 March 2000)

Venkadajalamra v The Netherlands App no 58510/00 (ECtHR, 17 February 2004)

Vilvarajah and Others v UK App nos 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR, 30 October 1991)

## **Federal Court of Australia**

S115/00A v Minister for Immigration and Multicultural Affairs [2001] FCA 540

## **International Court of Justice**

Interpretation of Peace Treaties (second phase), Advisory Opinion, ICJ Reports 1950, p 221

LaCrand (Germany v United States of America), Judgment, ICJ Reports 2001, p 466

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, p 16

Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, ICJ Reports 2002, p 625

Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, ICJ Reports 1994, p 6

## **United Kingdom House of Lords**

Regina v Secretary of State for the Home Department, ex parte Yogathas [2002] UKHL 36 (UK HL)