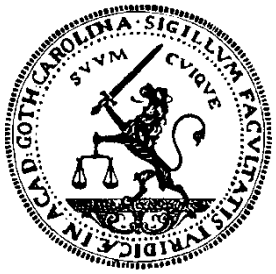

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Safe Countries or Systematic Assessments?

A critical investigation of the safe country of origin concept in the CEAS and the national implementation in Sweden in relation to the right to asylum

LAGM01 Master Thesis

International Human Rights Law
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Contents

Summary

Safety has always been a prominent concept within asylum law for the assessment of international protection. However, as the CEAS has developed immensely the past years, moving towards a paradigm shift of increasingly restrictive migration policies; the use of safety has evolved accordingly. With the 'safe country of origin' (SCO) concept, the focus has shifted further towards the situation in the country rather than the individual merits. The concept allows for an accelerated procedure and is established in the recast Asylum Procedures Directive (recast APD), even if it has been a recognised practice since the 1990's. In Sweden, the concept was implemented in 2021, allowing for the Swedish Migration Agency to subject nationals from a total of eight countries designated as safe in accordance with the recast APD to fast-track procedures. The binding obligation of art. 18 of the EU Charter and international human rights standards articulate obligations upon states to ensure fair and just individual assessments of each applicant's case. Implementing fast-track procedures such as the SCO regulation, may weaken these obligations.

The thesis' purpose was to investigate how the implementation of the SCO regulations in Sweden may affect the right to asylum and international standards on human rights. The research has found issues with coherence between the new rules and fundamental norms incorporated in the right to asylum, with the increased risk of systematic decisions caused by basing the assessment mainly on nationality. Furthermore, the thesis focused on the contradictions within the recast APD and the supposed procedural safeguards. It found that the lessened procedural guarantees in the context of the SCO regulations appear as contradictory to the undertaken obligations considering the vulnerability of asylum seekers. Indicating how the concept is a mean for EU Member States such as Sweden, to decrease migration in a manner that risks the individual's human rights guarantees and limits the access to asylum.

Sammanfattning

Säkerhet har alltid varit ett väletablerat koncept i asylrätten för utvärderingen av rätten till internationellt skydd. Dock har EU:s asylpolitik undergått extensiva förändringar de senaste åren, och genomgått ett paradigmskifte mot mer restriktiva migrationsregleringar: och användningen av säkerhet som ett koncept har förändrats i enlighet med den utvecklingen. Med implementeringen av regleringen om säkra ursprungsländer har fokus förflyttats från individens omständigheter till situationen i den sökandes hemland. Regleringarna tillåter snabbare processer och är numera etablerat i det omarbetade asylprocessdirektivet, även om det har varit en erkänd del av internationell asylrätt sedan 1990-talet. Regleringarna implementerades i Sverige 2021, vilket möjliggör för Sverige att använda sig av så kallade accelererade asylprocesser för medborgare och bosatta från åtta länder som har blivit utnämnda till sådana så kallade säkra ursprungsländer i enlighet med det omarbetade asylprocessdirektivet. Den bindande rätten till asyl i artikel 18 i EU-stadgan, samt grundläggande internationella mänskliga rättigheter sätter särskilda krav på länderna att försäkra en rättvis och rättssäker individuell bedömning av varje enskild asylansökan. Med implementeringen av accelererade processer så som regleringen om säkra ursprungsländer kan detta skydd försvagas.

Uppsatsens syfte var därmed att besvara frågan om hur implementeringen av regleringen om säkra ursprungsländer i Sverige påverkar rätten till asyl och standarder om internationella mänskliga rättigheter. Arbetet har funnit problem i enigheten med normer och rättigheter till följd av den ökade risken för systematiserade beslut då asylbedömningen huvudsakligen kommer att baseras på nationalitet. Vidare har uppsatsen även fokuserat på motstridigheterna inom det omarbetade asylprocessdirektivet och avsedda processuella rättigheter. Det minskade skyddet av dessa i samband med regleringen om säkra ursprungsländer motstrider syftet med höga processuella garantier för asylsökande som en särskilt utsatt grupp. Detta

antyder att regleringen om säkra ursprungsländer har blivit ett medel för EU-stater så som Sverige, att minska invandring på ett sådant sätt att individens mänskliga rättigheter riskeras att påverkas negativt samt att tillgången till asyl minskas.

Preface

First and foremost, I would like to thank Eleni, for being my supervisor and always sharing your thoughts on my thesis. I would also like to express my gratitude towards everyone at the Administrative Court of Appeal in Stockholm for the time I got to spend there during my thesis, and a special thanks to Hanna and Ida.

I would also like to thank my friends and family. Thanks to my dad and brothers, for never completely understanding what I'm doing but always listening. Thank you, Sebastian, for being the best support and partner, for bursting my bubble of law and providing with new perspectives. I also want to direct a special thanks to Astrid for all the great discussions and encouragement, but mainly for being the best friend one could imagine. I'm forever grateful for my time in Lund that brought me to you.

Lastly, I would like to express my gratitude to everyone that has been a part of these 6 years of studies. It's been a ride.

Stockholm, May 2022.

Abbreviations

AIDA	Asylum Information Database
APD	Asylum Procedures Directive
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
Refugee Convention	1951 Convention Relating to the Status of Refugees
SCO	Safe Country of Origin
STC	Safe Third Country
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
QD	Qualification Directive

1 Introduction

1.1 Background

The EU has the past years evolved the Common European Asylum System (CEAS) immensely, and one can observe international trends of a more restrictive nature with the implementation of various migration packages and new procedural directives. Steering the CEAS in a direction that can appear as contradictory with the human rights obligations and the safeguards that supposedly is to be protected under the CEAS and by the international community.[1] A good example of this possible contradictory development is the increasing implementation of the safe country of origin (SCO) concept, as one of the more commonly used grounds for fast-track asylum procedures.[2] The fast-track procedures are accelerated asylum processes where the application for international protection can be processed in a more limited demeanour regarding time and allowing for a more generalised assessment, based on for example the nationality of the person in question, in order to lead to quicker decisions.[3]

The SCO concept has been established as a part of the asylum acquis within the EU in art. 36 and 37 of the recast Asylum Procedures Directive (recast APD), and has allowed for EU Member States to designate countries as 'safe' for the purpose of returning asylum seekers. Creating a presumption that people that originate from those countries are not considered refugees and that such asylum applications most likely are to be considered 'manifestly unfounded'.[4] This has been implemented as a mean to accelerate asylum procedures and is often defended by the interest to decrease unnecessary and

[1] David Scott FitzGerald, *Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers,* Oxford University Press, New York, 2019, p. 163.
[2] Directive 2013/32/EU of The European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) 2013, 29 June 2013, art. 31(8) & 36-37.
[3] Matthew Hunt, 'The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future', *International Journal of Refugee Law*, 26(4), 500–535, 1 December 2014, p. 509.
[4] Ibid, p. 502, this will be explained furhter in section 2.1.2.

inappropriate use of administrative time.[5] However, there has been resistance towards the CEAS reforms as there is a prevalent concern that this can decrease procedural rights and lead to incorrect assumptions of safety which can have fatal results and violate the right to asylum and the essential principle of non-refoulement.[6] Many organisations were critical towards the concept, as well as the international society, and the UNHCR's early criticism did express a worry for the issues this could cause with the obligation of non-discrimination and whether one could ensure the required safeguards in order for an accelerated procedure to still be just and fair for the nationals concerned.[7]

Regardless of the criticism, the practice became more and more commonly used across Europe as well as internationally. However, Sweden was one of the nations that for a long period of time opposed the idea of implementing the SCO concept, due to the concerns for the possible implication that this could have on the right to an individual assessment; a vital aspect of ensuring the right to asylum.[8] These worries have however been addressed within the CEAS as a critique towards the manner of implementation and enforcement when addressing countries as safe rather than criticism directed towards the concept as such, which has been welcomed and is adopted in a total of 22 EU+ countries[9] and it was implemented in Sweden in the year of 2021.[10]

The adoption of the concept in Sweden was partly motivated by a preliminary ruling from the European Court of Justice (CJEU) in 2018, which limited Sweden's possibility to rely on the concept without having fully implemented

[5] Cathryn Costello, 'Safe Country? Says Who?', *International Journal of Refugee Law*, 28(4), December 2016, 601–22, p. 602.
[6] Hunt (n 3), p. 513.
[7] UNHCR, Background Note on the Safe Country Concept and Refugee Status, EC/SCP/68, 26 July 1991, para. 5.
[8] Council of the European Union, 'Reply from the Swedish Delegation', Doc 8772/04: ADD 19, 2004
[9] EU+ countries consist of both EU Member States as well as countries that are integrated in the EU via the EEA (for e.g. Iceland), the Schengen Agreement or the European Single Market (for e.g. Switzerland). Both of these two non-EU Member States have chosen to implement the SCO concept.
[10] Costello (n 5), p. 615, EASO, '"Safe Country of Origin" Concept in EU+ Countries - Situational Update', no. 3, 9 June 2021, p. 2.

the relevant provisions. Stating that Sweden could therefore prior to a national implementation; not regard an application as manifestly unfounded due to the nation in question being considered a 'safe country of origin'.[11] In April 2021, the SCO rules was officially implemented in Sweden, making the regulations Swedish law.[12] An implementation that has faced criticism but also to a certain extent passed without greater discussion as the Swedish system continues to evolve in accordance with the CEAS, leaving these invasive changes to be addressed by future judgements rather than assessing the current risks.

1.2 Concerns with the Safe Country of Origin Concept

Following the implementation of the SCO in Sweden, it is important to assess whether the new rules in Sweden will be able to ensure a correct adaptation of this new procedure. One can question if this can be done without compromising vital rights and procedural safeguards for individuals seeking asylum, or if Sweden will further display the contradictions within the CEAS and with the international community's human rights obligations. For example, the right to asylum is an essential component of human rights law and the CEAS, it is a right that is protected in several important human rights instruments in various manners; to ensure that refugees receive a fair process when applying for international protection.[13] The right to receive international protection as with the principle of non-refoulement is protected under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the Refugee Convention), the European Convention of Human Rights (ECHR) and the Universal Declaration of Human Rights (UDHR) and sets the frame for the asylum system.[14] Furthermore, the specific right to asylum and

[11] *A v. the Swedish Migration Agency,* Court of Justice of the European Union, First Chamber, C-404/17, 25 July 2018.
[12] Prop. 2020/21:71, *Uppenbart ogrundade ansökningar och fastställande av säkra ursprungsländer*, 17 December 2020.
[13] Salvatore Fabio Nicolosi, 'Going Unnoticed? Diagnosing the Right to Asylum in the Charter of Fundamental Rights of the European Union', *European Law Journal*, vol. 23, 94–117, March 2017, p. 96–97.
[14] Hunt, (n 3), p. 522.

essentially seek asylum (this will be discussed further in section 3) is protected in EU law, in art. 18 of the EU Charter as a binding obligation for EU Member States such as Sweden.[15] With the continuous harmonisation efforts of the CEAS, in the form of the recast APD as well as the Qualification Directive (QD)[16], further clarity and guidelines for how Member States should ensure a fair and just asylum system that also is coherent with the vital human rights instruments is required. In the context of the SCO rules as a part of the more restrictive paradigm shift; it can be questioned if the concept's effect on human rights and procedural guarantees causes concerns for the coherence within the CEAS; between nations but also within the system as such.[17]

1.3 Purpose and Research Question

The implementation of the SCO rules has as stated been criticised and as a part of the regulative trend; many non-governmental organisations were critical towards Sweden implementing the concept. The concerns regarded the risk for possible incorrect presumptions that could affect asylum seekers' right to an individual assessment; limiting the access to international protection.[18] However, the general understanding of Swedish courts and authorities appeared to be more accepting of the concept, even if some Swedish courts believed that there was a need for clarification in the original proposition of the law, the assessment rarely addressed the greater implications of the concept on the right to asylum.[19] Due to the concept being

[15] Charter of Fundamental Rights of the European Union, 2012/C 326/02, 26 October 2012, art.18.
[16] 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), 20 December 2011.
[17] Violeta Moreno-Lax, 'Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law', Oxford Scholarship Online, 2017, p. 372–373.
[18] Et al. Amnesty International, 'Yttrande angående uppenbart ogrundade ansökningar och fastställande av säkra ursprungsländer (Ds. 2020:2)', Ju2020/00449, 30 March 2020.
[19] Kammarrätten in Stockholm, 'Remissyttrande - Promemoria uppenbart ogrundade asylansökningar och förteckning över säkra ursprungsländer (Ds 2020:2)', KST 2020/71, 2 February 2020.

new to Sweden and the varying outlooks; there is a need to follow the development and adoption of the SCO rules and creation of SCO lists, but primarily to address the implementation and underline the existing obligations; to evaluate the coherence and conceivable contradictions between these. The SCO list is the designation of such safe countries authorised by the implementation of the concept, meaning that certain countries will be listed by the Swedish Migration Agency as safe and enable the so called fast-track asylum procedure with the assumption that the applications are unfounded.[20] This thesis will therefore intend to analyse the implementation of the SCO rules in Sweden, assessing it in regard to its effect on the right to asylum and the procedural obligations enshrined within the right.

In order to assess this the thesis will attempt to answer the following research question:

To what extent does the implementation of the 'safe country of origin' concept in Sweden affect the right to asylum established in EU law and international standards on human rights?

In order to answer this question, the following sub-questions will be investigated:

1. *What is the 'safe country of origin' concept, how was it developed and how is it regulated in the CEAS*?
2. *How does the 'safe country of origin' concept relate to other human rights norms and principles such as the right to asylum and non-discrimination?*
3. *What was the historical background behind the Swedish implementation of the 'safe country of origin' concept and how is it currently regulated?*

[20] Prop. 2020/21:71 (n 12).

4. *Does the implementation of the 'safe country of origin' concept limit the access to asylum in Sweden?*
5. *What procedural safeguards are to be guaranteed in regard to the implementation of the 'safe country of origin' regulations in Sweden?*

1.4 Delimitations

The thesis will focus on the implementation of the SCO rules in Sweden as a concept of the CEAS, hence the EU directives that regulate the model will be the main sources used rather than addressing the concept beyond the European asylum acquis. The thesis will not examine the Dublin regulations but will focus on the provisions located in the recast APD in combination with the QD, since these encompass the relevant regulations of the SCO concept and is the foundation for the Swedish implementation. Following the manner of the Swedish implementation and the focus on the asylum procedure, this thesis will not engage in a discussion on border procedures. Furthermore, the concept of 'safe third country' (STC) will not be discussed in depth to maintain the focus on the SCO concept. Some case law will be used as a guidance to assess the enforcement of SCO lists, to provide the analysis with a wider basis of knowledge and insight of possible future consequences when implementing and applying the concept based on the existing critique directed towards the various fast-track procedures.

Again, remarking that the thesis focuses on the Swedish adaptation and the harmonisation of a concept stemming from the CEAS; the EU Charter and the ECHR will be the main human rights legislations used in regards to the right to asylum. However, due to the importance of the Refugee Convention and the UDHR for the development of European human rights legislation and its interconnectedness with the EU Charter; this will also be used to emphasise the human rights obligations undertaken by Sweden. However, the thesis will not be able to address all the various legislations relating to the right to asylum in depth but focuses on the binding obligation of art. 18 of the EU Charter.

The text will further not assess the consequences of the concept on a larger scale and the implementation in other EU Member States. It will rather discuss the implementation in Sweden as mirroring the regulatory trend observed in the EU and in that way, be used as a mean to assess its possible implications in the CEAS on a broader level.

Due to the concept being newly introduced in Sweden, the text will not analyse the application and enforcement by the Swedish Migration Agency nor the national courts in the form of on an empirical study. The thesis will rather be based on the existing legal sources and the possible gaps and contradictions that can be found within Sweden's implementation of the concept. The thesis will also be using Swedish law as the SCO provisions have been implemented in national law. When it comes to assessing the asylum procedure; some of the national procedural law will also be used. However, this mainly will be done in combination with the relevant EU law to emphasise the importance of procedural guarantees for ensuring human rights and to discuss the possible contradictions with the limitations justified by the implementation of the concept.

The relevant EU law will also be used to assess whether the Swedish implementation is of a sufficient standard or if even if they are to be considered sufficient; the contradictions are of such a fundamental character that one can question the legitimacy of the concept in regard to relevant international human rights standards. Furthermore, the focus on international sources is also motivated by the intention to provide with a more human rights-based analysis regarding the new Swedish provisions as Sweden is used as an example to highlight the possible issues with the concept.

Moreover, the text will not assess the 'safety' of all the various nations that Sweden has designated as safe. However, it will discuss the use of country of origin information in relation to the notion of the SCO as a part of the positive procedural obligations, and for that purpose some of the countries designated as safe in Sweden will be discussed to exemplify the possible issues at hand.

1.5 Methodology

Firstly, a substantial part of the thesis will contain an evaluation of Sweden's newly implemented legal provisions on the SCO concept in relation to the obligations established in existing directives and the relevant human rights treaties for the CEAS; hence the thesis consist of an analysis mainly based on a legal-dogmatic method.[21] Secondly, as the thesis also will attempt to evaluate the concept based on a human rights analysis, and since this by its nature often goes beyond the legislation and addresses a wider range of issues; the thesis will evaluate the SCO rules with a more critical legal analysis by examining and systematizing the law using doctrine.[22] In order to achieve a more critical approach; the work of renown scholars within the field of asylum rights such as Cathryn Costello, Matthew, Hunt, Maria-Teresa Gil-Bazo and Violeta Moreno-Lax as well, as the statements made by international organisations, will be evaluated.

Since the thesis will address the Swedish implementation of the provisions from the recast APD and the possible consequences following this, the paper will be using both Swedish and EU legislation to understand the SCO concept as constructed within the recast APD.[23] More specifically it will be using the definition sited in art. 31(8) which regulate the accelerated procedures in combination with the definition of a SCO and the manner of designation established in art. 36-37 of that said directive. Since the recast APD uses the definition of persecution from art. 9 of the QD, this will also be evaluated. Further, in order to assess the EU legislation on the right to asylum and the obligations of providing international protection to refugees; the EU Charter, ECHR as well as the Refugee Convention will also be used.

[21] Jan Kleineman, 'Rättsdogmatisk Metod', in Korling, Fredric & Zamboni, Mauro (Eds.) *Juridisk Metodlära* (2nd ed.), Studentlitteratur, 2018.
[22] Alan Hunt, 'The Theory of Critical Legal Studies', *Oxford Journal of Legal Studies*, 6(1), 1989.
[23] Recast APD (n 2), art. 31(8) & 36.

Following that the thesis will examine the Swedish implementation; it will evaluate the relevant provision adaptations in the Swedish Alien Act (Utlänningslagen). More specifically, 6 a § Chapter 1 of the Swedish Alien Act, in combination with 19 § paragraph 3 Chapter 8 of the same law which regulate the possibility to reject an application with immediate execution if a person is from a SCO. The legal preparatory work for these two provisions will therefore be examined to evaluate their meaning and intended interpretation.

Additionally, relevant international human rights treaties such as the UDHR, besides the Refugee Convention will be discussed in relation to the obligations of Sweden and the rights that can be at risk when implementing the SCO concept. The examination will be limited to the fundamental principles and human rights interrelated to the right to asylum with a focus on the procedural obligations most relevant for assessing fast-track asylum procedures.

1.6 Literature Review

For the part of the research that stems from a more legal dogmatic-method, it will be based on the legal framework and existing legislation, analysing the new adoption of the SCO list with existing legal obligations to emphasise a possible gap between these two. However, since the current paradigm and the attitude of the EU Member States tend to be positive towards the more restrictive developments; often finding support for such changes within the CEAS, the thesis will also incorporate a more critical legal analysis. Besides finding a foundation for the existing human rights obligations in treaties and directives; scholars are used to provide with a more critical human right based approach than the one that can be found in the preparatory work for the Swedish legislation. They are also a necessary source of information for the discussion at hand; both to address the gaps that exist legally in a more comprehensive manner as well as having a more interrogative attitude towards the paradigm behind these adaptations.

In order to approach the more legal and purely procedural aspect of the SCO, the research initially was focused on the actual implementations of the concept within the EU law and the directives, and the adaptation of it in the Swedish law as well as the preparatory work. Moreover, various vital legal obligations enshrined within the right to asylum was evaluated; specifically, the right to an individual assessment enshrined within art. 18 of the EU Charter. When I had oriented myself within the more legal aspect of the concept, the research moved towards evaluating the more critical interpretations that had been brought forward when implementing the concept, such as statements made by UNHCR and ECRE, but also the current case law.[24] As the thesis focuses on Sweden's implementation, the research began to be limited to a more national coverage, and in order to find a more critical approach focused on Sweden's implementation; the referrals that had been made by several Swedish authorities and organisations prior to the implementation of the concept were evaluated. These were used to understand how the concept was perceived nationally and if there was a correlation to the worries expressed internationally.

One could note clear similarities in the concerns conveyed both by the national and international community, and the problems that Sweden appeared to face when employing the concept was similar to the general issues of the concept. Hence, this strengthen the value of this thesis as the analysis of the SCO concept in the Swedish context is of relevant for other states that also have implemented the concept. This did not only confirm the problems I had identified with the notion of the SCO; but it also endorsed the value of the more international sources.

Even if the Swedish implementation can be evaluated in relation to studies made of other EU nations; the value of assessing specifically the Swedish adaptation cannot be disregarded. Even if some of the internationally

[24] Et al. European Council on Refugees and Exiles, 'Safe Countries of Origin": A Safe Concept?', *AIDA Legal Briefing No. 3*, September 2015.

accentuated concerns might partly have been assessed when implementing the Swedish provisions, various scholars emphasise that there's a trend to be more tolerant of possible faulting EU legislation in the name of harmonisation, which would also motivate for national case studies when the nation in question is implementing the concept.[25]

Furthermore, what I perceived as a possible gap in the existing analysis is the division that often is made between the legal procedural obligations and these guarantees as essential components for upholding human rights. The examinations that assess the formalistic aspect of the framework is often separated from a more human right based approach and the effects that it can have on human rights tend to be lost.[26] This is a trend that often is enshrined within the work of Swedish authorities regarding migration and there is somewhat of a resistance to address legal issues as human rights issues, and this type of analysis is often left to human rights organisations as observed in the preparatory work for the Swedish legislation on the SCO rules.[27] There one can observe a difference in argumentation, as the various courts tend to assess the wording of the provisions whilst the statements from organisations such as Amnesty International focuses more on the effect of the implementation on human rights.[28]

Sweden takes pride in being a promoter of human rights; however, this should not make the country resilient towards critique and it calls for a more incorporative approach of legal analysis to resist the inclination to separate the formalistic and procedural aspect from the relevant human rights. This tendency of an excessive formalism may in the end underline the essence of human rights, such as the right to asylum. Hence, I believe this work can bridge those two discussions within the Swedish implementation of the SCO concept. Although, this is an observed trend within the EU and the development of the CEAS as the focus is on the harmonization of the

[25] Scott FitzGerald, (n 1), p. 163.
[26] Kammarrätten in Stockholm (n 19).
[27] Prop. 2020/21:71 (n 12), p. 9–10.
[28] Amnesty International (n 18)

procedures between the Member States rather than the human rights aspect and the protection of refugees. Therefore, the analysis of Sweden can have a greater contribution to the debate on SCO; to illustrate the contradictions between the developments of among other the SCO concept and human rights obligations of the international community in the context of asylum law.

1.7 Outline

Chapter 2 will begin with explaining the notion of a 'safe country of origin', by firstly providing with a historical background to the concept and the initial purpose behind its development. It will then address the existing EU legislation on the concept, by assessing the relevant directives, being the recast APD and the QD.

Chapter 3 examines how the concept relates to the right to asylum, as well as principles and norms such as non-refoulement, the prohibition of collective expulsion and non-discrimination. Firstly, the chapter will discuss the scope of the right to asylum as established in art. 18 of the EU Charter and how the SCO concept affect the access asylum due to the limited individual assessment by emphasising the positive obligations of states under the right. Further it addresses the principle of non-refoulement as a part of the negative obligation under the right to asylum in relation to the SCO concept. It will also analyse the prohibition of collective expulsion as a possible norm at risk with spread of the SCO practice. Furthermore, it will discuss the discriminatory nature of the SCO regulation due to the focus on the nationality of applicants and how this can contradict the obligation of non-discrimination as an overarching principle of the asylum system both under international and EU law.

Chapter 4 shifts the focus to the Swedish SCO regulation and first provides with a background to the implementation, and the modifications of migration law in Sweden following the refugee crisis in 2015. It then provides with an

explanation to how the SCO rules currently are regulated in Swedish law in relation to the relevant provisions of the recast APD.

Chapter 5 discusses the Swedish implementation in relation to concerns issues discussed in Chapter 3, and how the Swedish SCO rules relates to the relevant principles and norms interrelated to the right to asylum as established in art. 18 of the EU Charter.

Chapter 6 examines the existing procedural requirements of the asylum procedures, it will emphasise those that are especially relevant to consider when implementing provisions that can be used to accelerate the asylum process. The chapter will begin by discussing the procedural obligation of the migration authorities in Sweden for ensuring a fair and just asylum procedure to mitigate the risk of undermining the right to asylum. Furthermore, it will also discuss the procedural safeguards that should be guaranteed for the individual. It will then problematise the double role of the Swedish Migration Agency, as both a party in migration cases and the expert authority responsible for the creation of the national SCO list.

Chapter 7 consists of the findings and conclusions of the thesis. It will provide with an answer to the research questions as well as the sub-questions, based on the discoveries of this text.

2 The Safe Country of Origin Concept

This chapter aims at providing with a historical background to the development of the SCO concept, and the developments of the CEAS in order to provide the reader with a deeper understanding of how the concept has evolved and the changed attitude towards it in the European system. This chapter will therefore begin by addressing the prevalence of the concept of safety in migration law and the early developments of the SCO concept in the 1990's with the London Resolutions, as the it slowly emerged in the CEAS. Following this, the chapter will then evaluate the changes after the implementation of the first APD and the challenges that were faced on how to regulate the SCO concept on a EU-level.[29] The later sections of this chapter will discuss the challenges that the CEAS faced in 2015 following the increased migratory flow, and how this affected the development of more restrictive asylum regulations. Lastly, it will assess the current regulation of the SCO concept in the recast APD.

2.1 Historical Background

2.1.1 The Concept of Safety in Asylum Law

The concept of safety is not new to the process of evaluating an asylum seeker's need for international protection. However, the SCO rules supplies with an accelerated procedure where the assessment of safety to a certain extent already has been executed.[30] The concept of safety has been fundamental for the assessment of asylum, and in the past with the definition of refugees being persons of a certain origin not enjoying the protection of their country, following the developments of the refugee protection after

[29] Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 13 December 2005.
[30] ECRE (n 24), p. 2.

World War II; the safety of those individuals was key to such an assessment.[31] However, this definition has partially been replaced with the element of fear. The aspect of "well-founded fear of prosecution" is besides the subjective element (being the merits of the individual case) also to be assessed in an objective manner.[32] The objective aspect does make the situation of the nation continuously relevant, in order to assess the need of protection and the safety of the person in question related to the claims; for the fear to be considered well-founded. Even if this according to UNHCR's Handbook does not call for the examining authorities to pass judgement on the conditions of the applicant's country of origin, the situation in the nation is still of a high relevance.[33] However, the assessment is primarily to be based on the individual circumstances.[34]

Furthermore, the element of assessing the possibility of attaining protection in one's country of origin as for the requirement of a causal link between the fear and the claimed Convention ground; establishes the continued significance of the country situation. This may be assessing the inability to attain such protection due to a state of war or other elements that would create obstacles for the state in question to protect the applicant. Moreover, the aspect of willingness of the country to protect their nationals indicates the possibility of attaining protection and the level of safety that then affect the dire needs for international protection as a refugee.[35]

2.1.2 The Early Developments of the SCO Concept

The possibility of basing the assessment of safety on the circumstance that the person can attain protection in their country of origin has been further developed with the SCO concept, as the availability of adequate protection

[31] UNHCR, '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', HCR/1P/4/ENG/REV.3, December 2011, para. 37.
[32] Ibid, para. 40-42.
[33] Ibid, para. 42-43.
[34] Ibid, para. 37.
[35] Ibid, para. 32-33.

from authorities in their country of origin and if the objective circumstances is to be considered safe enough; the applicant is not in need of international protection. The concept of safe countries has been present in Europe since the 1990's, and with the development forums for a more common transnational asylum system, the practices spread.[36] The London Resolutions of 1992 were three non-binding resolutions endorsed by the European Commission, that addressed the concept of certain countries where there was generally no risk of persecution (similar to the current definition of a SCO), manifestly unfounded asylum applications and as well as the practice of 'safe third country' (STC).[37] The aim of the resolution was to address the issue of what was considered to be the increased number of applications by people that were not in genuine need of protection within the terms of the Refugee Convention, so-called unfounded applications. Since this type of applications, arguably overloaded the asylum determination procedures; delaying the recognition of refugees in genuine need of protection and therefore jeopardising the integrity of the asylum system.[38]

An application was to be considered manifestly unfounded if the application did not meet the substantive criteria of the Refugee Convention and the claims made did not relate to the relevant protection grounds. The decision on unfoundedness would consequently be made on a basis of general safety of the country of origin and these asylum applications could therefore be processed in a faster manner.[39] Even if the application was still to be considered on its merits if such relevant grounds where to be mentioned, the possible protection from the nation in question being considered safety could cause this claim to lack substance.[40]

[36] Costello (n 5) p. 605.
[37] Council of the European Union, 'Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ("London Resolution")', 30 November 1992.
[38] Ibid, preamble.
[39] Ibid, art. 1-2 & 7-8.
[40] Ibid, preamble, Claudia Engelmann, 'Convergence against the Odds: The Development of Safe Country of Origin Policies in EU Member States (1990–2013)', *European Journal of Migration and Law*, 2014, p. 284-285.

Following this came the Aznar Protocol to the Treaty of Amsterdam, which incorporated the agreement that all EU Member States were safe countries of origins.[41] The Council's Asylum Working Party, that work with issues relating to the CEAS, met in June 2004 to discuss the SCO concept. This meeting is considered to have had a great influence in the shaping of an agreement for a common system for the designation of safe countries of origins. The council requested for national governments to under three weeks supply with assessment of the safety of countries in regards to the suitability for a common safe country of origin list.[42] In this process, Sweden was partly reluctant towards the designation process for safe countries of origin. Even if Sweden did not disregard the use of the concept; they were concerned about the diversity of meanings reflected in the different apprehension of Member States' designations of safe countries and the practical consequences of this. Hence, Sweden stated how they believed there to be a great importance of unanimity when creating a list and that the presumption of safety must be rebuttable as an individual assessment of asylum applications always must be done.[43] Even if Sweden in their opinion did not oppose the SCO concept, this possible change received criticism from NGOs and international organisation as adopting the provisions would have resulted in lowered national standards, and Sweden refrained from imposing the concept into their national law at the time.[44]

2.1.3 The First Asylum Procedures Directive

The concept of presumed safety for certain nations was incorporated into the community law in 2005 in the first APD; that authorised the creation of SCO lists to be constructed by the Member States.[45] In the first APD it called for the Council to adopt a common SCO list, and that such agreements would

[41] European Union, 'Protocol on Asylum for Nationals of Member States of the European Union', annexed to the consolidated version of the Treaty on the Functioning of the European Union, 9 July 2015.
[42] Hunt (n 3), p. 514.
[43] Council of the European Union (n 8).
[44] Engelmann (n 40), p. 287-290.
[45] First APD (n 29), art. 29-31.

require a qualified majority vote and a consultation with the European Parliament. However, this manner of legislation of a common list by the Council, as well as the lacking possibility for removal of such presumed safe countries of origin from the list, was criticised by the European Parliament and in 2007 the Parliament brought the case to the CJEU.[46]

The case was brought to the CJEU by the European Parliament supported by the Commission of the European Communities against the Council of the European Union supported by the French Republic. The European Parliament primarily sought the annulment of art. 29(1) and (2) ('safe country of origin concept') and 36(3) ('European safe third countries concept') of the first APD or alternatively the annulment of the directive in its entirety. The grounds for this was that the Parliament believed that the subsequent decision of the minimum common list of safe third countries regarded as safe countries of origin and the common list of European safe third countries should have proceeded in accordance with the co-decision procedure and that the council unlawfully made use of legal bases enabling it to adopt that said list by a way of procedure requiring only the consultation of the Parliament.[47] While the Council submitted that the EC Treaty did not preclude an act to be adopted in accordance with the applicable legal basis for creating secondary law for the purposes of the subsequent adoption of a legislative act in the area by the means of simplified decision-making procedure. They further argued that the sensitive political character of the lists and the practical need to react quickly and effectively to changes in the third countries in question called for this manner of adaptation, and that the instruments cannot be used effectively unless they are adopted and amended by the means of the procedure discussed.[48] The CJEU found that by the inclusion of the contested provisions; the Council infringed on art. 68 of the EC Treaty, and exceeded the powers conferred on it by the Treaty.[49] The legislative act adopted by the

[46] *European Parliament v Council of the European Union,* European Court of Justice (Grand Chamber), C-133/06, 6 May 2008.
[47] Ibid, para. 8-10.
[48] Ibid, para. 33-35.
[49] Ibid, para. 61.

Council was therefore considered to be such "common rules and basic principles" within the meaning of the first indent of art. 67(5) of the EC Treaty to which the co-decision procedure is applicable, and that the sensitive political nature did not justified a simplified decision-making procedure. Hence, the CJEU decided that the two provisions, art. 29 and 36 of the APD must be annulled.[50] With this annulment, the designation of safe countries was left to a national level.[51]

2.1.4 The Harmonisation and the Regulatory Movement of the CEAS in the 2010s

In June 2013, there were several actions taken to harmonise the asylum law in the EU Member States, and the adoption of the recast APD was one of the changes that were made. This was motivated by the need to harmonise the asylum procedures in the EU beyond the minimum standards of the QD, to ensure that asylum seekers will receive the same treatment in all the EU nations, as well as to ensure the same level of efficiency. The overall structure was still similar to the one of the first APD, however some of the changes were introduced as regards to the introduction of a list of grounds to accelerate a procedure, and the provision on a minimum common list of third countries regarded as safe countries of origin was removed, rather setting terms for what the Member States must consider when designating a nation as safe.[52] The terms are more closely defined in Annex I to the recast APD which will be discussed further in the section 2.2. The directive contained the provisions on the designation of safe countries of origin, as had been present in the first APD. Since the implementation of the concept continued to be optional, nations such as Sweden had still chosen to not implement it into their national law, making Sweden one of the four EU+ countries together with Italy, Spain

[50] Ibid, para. 64-67.
[51] Recast APD (n 2), art. 30(1), Hunt (n 3), p. 509.
[52] European Council on Refugees and Exiles, 'Information Note on Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast)', December 2014, p. 3-5.

and Greece that had not adopted the concept into their national law as of 2013.[53]

The recast APD did as stated not incorporate a goal of accommodating a common SCO list in the EU, but following the increased migratory flow in 2015, this idea was revived by the European Commission. The 9th of September 2015, the European Commission adopted a second implementation package as part of the European Agenda for Migration that contained what can be seen as several desperate measures to deal with the refugee crisis of 2015.[54] This package did also address the lack of a common SCO list in the EU and the package therefore aimed at adopting such a list based on the criteria set in the recast APD, in order to create a more coherent application of the concept and improve harmonisation.[55] However, this time, in accordance with the procedural requirements for implementing such rules, in order to not conflict with the prior CJEU ruling on the annulment of the provisions on the SCO and STC in the first APD.[56] The suggested list included a total of seven countries that the European Commission deemed safe according to the criteria, being Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey. These specific countries amounted to 17% of the total number of applications lodged in the EU at the time (2014-2015). The countries chosen were considered to be safe in accordance with the criteria of the directive in regard to the recognition of human rights, rejection rates and furthermore that candidates for EU membership also could be considered 'safe' for the purpose of asylum procedures. The reasons stated for the creation of a common list was that the list would separate those who are in need of protection and those who are not, in order to enable fast-track procedures in a more effective

[53] Ibid, p. 42.
[54] Costello (n 5), p. 606.
[55] European Commission, 'European Agenda on Migration: Second implementation package – Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe counties of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU 2013', 9 September 2015, para. 2-3.
[56] Ibid, para. 2-3, *European Parliament v Council of the European Union* (n 46).

manner and reduce the discrepancies between the Member States' asylum procedures as well as to decrease secondary migratory movement.[57]

The European Economic and Social Committee stated in their opinion on the proposal that even if the recast APD reduces differences between the Member States' procedures, there was still a substantial margin that in accordance with the arguments of the Commission could affect the objective of establishing a common procedure and would therefore call for an increased regulation at a EU-level.[58] The Committee further stated that the concept has great practical consequences with the possibility to use accelerated procedures, and that such shortened deadlines can cause difficulties in identifying vulnerable people. Furthermore, they argued that it would create a greater difficulty for asylum seekers to access international protection when operating on the presumption that their application is unfounded.[59] The Committee also stated how the different treatment of international protection according to nationality may contradict the prohibition of discriminatory treatment of refugees according to art. 3 of the Refugee Convention, and that these factors therefore call for a restricted use of the SCO concept.[60] The Committee further believed that the indicators used in the proposal did not comply with the criteria set out in Annex I of the recast APD. They criticised the Commission for not adequately assessing the minimum requirement of the countries' human rights recognition and legislation, as with the suggestion that Kosovo was to be on the list; a nation that has not ratified several key international human rights treaties.[61] Also, the Committee understood there to be a lack of consideration for human rights violations, as the Commission had not distinguished which cases were decided on merits; leading to incorrect conclusions. The

[57] European Parliament, 'Briefing EU Legislation in Progress - Safe countries of origin - Proposed common EU list', 8 October 2015, p. 6-7.
[58] European Economic and Social Committee, 'Opinion of the European Economic and Social Committee on the proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU', REX/457, 10 December 2015, para. 1.1-1.3.
[59] Ibid, para. 4.1.
[60] Ibid, para. 4.2.
[61] Ibid, para. 4.5.1.

Committee also argued against using rejection rates as an indicator due to the statistical ambiguity as the rejection rates vary greatly among the Member States.[62] The Committee also disagreed with the idea that EU candidates had fulfilled the Copenhagen criteria[63], as the candidate status only indicates that the process had begun to validate compliance.[64] Hence, even if the Committee welcomed a common list they directed several points of critique towards the current suggestion. Concluding that the juncture was premature for the creation of a specific list of countries to be considered safe and that the criteria for determining the safety of a country must be established in a more practical and secure way that provides with clearer guarantees for the individual.[65]

The EU Council did end up not agreeing on a common EU list of safe countries of origins as was proposed by the EU Commission. The 12th of April 2017 the negotiations were suspended and the 21st of June 2020 the Commission withdrew the proposal for a common EU list.[66] Again, leaving the designation of safe countries of origin to Member States in accordance with art. 37 of the recast APD, and to continue to construct national SCO lists based on the criteria formulated in Annex I to the directive.[67]

The trend of more restrictive national practices has continued with the national implementations and application of various fast-track procedure such as the STC and SCO lists. It was especially noted after the increased

[62] Ibid, para. 4.5.4.
[63] Copenhagen European Council, 'Presidency Conclusions - Copenhagen European Council', 21–22 June 1993, established the accession criteria, also known as the Copenhagen criteria that sets out the conditions for a country wishing to become a member of the EU. Now regulated in art. 49 and 6(1) of the TEU They are: (1) stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; (2) a functioning market economy and the ability to cope with competitive pressure and market forces within the EU; (3) the ability to take on the obligations of membership, including the capacity to effectively implement the rules, standards and policies that make up the body of EU law (the ' *acquis* '), and adherence to the aims of political, economic and monetary union.
[64] European Economic and Social Committee (n 58), para. 4.5.3.
[65] Ibid, para. 1.2-1.3.
[66] European Commission, 'Amended 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/2020/611 final, 29 September 2020, p. 8.
[67] Recast APD (n 2), art. 37 & Annex I.

migratory flow in 2015, when there was a surge in proposals for reforms CEAS as well as the amplified harmonisation.[68] The increased EU regulated fast-track procedures was argued to be a part of the harmonisation objective, and the increase in migratory flow called for such communal measures to be taken to ensure harmonisation and fairness.[69] However, scholars such as Matthew Hunt argue that the increased harmonisation rather is motivated by the fear of nations being what can be called the 'weakest link' in the EU and therefore conforming to the restrictive trend to avoid an increased migration to their nation.[70] Currently 22 EU+ countries have introduced the SCO lists, meaning that 74% of the EU+ countries are currently applying this system. Sweden together with Cyprus were among the most recent to adopt the concept in 2021.[71]

Even if there is still no common EU list for safe countries of origin, countries such as Albania, Bosnia and Serbia are some of the most reoccurring countries on the national lists. EU candidates and potential candidate countries are generally considered safe, with the exception of Turkey.[72] Some nations also designate regions of countries as safe, or that the country is considered safe for some specific groups such as for men but not for women, or that exceptions are made for LGBTQ+ people, this is for example used in Denmark.[73] The concept of dividing up regions or the safety for different social groups in this manner has been criticised, and among others Sweden has chosen not to be able to do this type of division when evaluating the safety of a country. Sweden believed that there was no room for this interpretation in the recast APD, and that in comparison to the first APD; the new directive did not include the possibility to consider parts of a country as safe or that it is to be considered a SCO for some groups. They further argued that for a country to be considered a SCO, it must be shown that there is *generally* and *consistently* no persecution as defined in art. 9 of the QD, and for a country

[68] Costello (n 5), p. 606.
[69] Hunt (n 3). p. 525.
[70] Ibid p. 504.
[71] EASO (n 10), p. 2
[72] Ibid, p. 4.
[73] Ibid, p. 7.

to be eligible as a SCO one have to consider the situation for vulnerable groups as a part of the overall assessment.[74] This type of divergence in the manner of assessment has also been criticised as hampering the aim of harmonisation, and even if the nations' implementation of the concept stems from the same directive; there are still many differences between the adaptations of the concept.[75]

2.2 The Current SCO Regulation

The essence of the SCO concept are the provisions that exist in the recast APD, that set certain terms for assessment and review. Art. 36 of the directive establishes that if an individual has the nationality or is a stateless person and has formerly been a habitant in a country designated as safe; then that nation can be considered a SCO for that applicant. However, if the person submits any serious grounds for the country to not be a safe for their individual circumstances in unity with the QD, then that country should not be considered a SCO for that specific applicant. Art. 37 of the recast APD states the possibility for Member States to legislate on the SCO when assessing applications for international protection, with the reference to Annex I of the directive which contains the definition of a SCO. The article sets certain terms for review and the designation of countries should be based on several relevant sources such as from other Member States, EASO, UNHCR, the Council of Europe and other relevant international organisations.[76]. When a nation decides to designate countries as safe, they should notify the European Commission.

According to Annex I, for the assessment of safety; the legal situation as well as the application of the law within a democratic system and the general political circumstances should be assessed, in order to evaluate whether there is *generally* and *consistently* no presence of persecution as defined in art. 9 of

[74] Prop. 2020/21:71 (n 12), p.16.
[75] Hunt (n 3), p. 521, Costello (n 5), p. 609.
[76] Recast APD (n 2), art. 37.

the QD. Meaning that there should be no risk of torture, inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.[77] When making the assessment if the sufficient protection against persecution and mistreatment is provided; the relevant laws and regulations in the country in question and how they are applied should be considered. It also requires an observation of the compliance of the rights and freedoms of various human rights conventions such as ECHR, CAT[78] and ICCPR[79], and the respect for the principle of non-refoulement, as well as that there is a system of effective remedies against violations of those rights and freedoms.[80]

Furthermore, in the recast APD's introductory paragraphs, it is stated that when a situation of uncertainty prevails in the country of origin of an applicant, Member States should ensure that they obtain precise and up-to-date information from relevant sources such as European Asylum Support Office (EASO), UNHCR, the Council of Europe and other relevant international organisations.[81]

It is important that this aspect of assessment is executed in a thorough manner and that review is continuous, there is no guideline as for how often such review is to be done or what it should incorporate. The manner of designation has been a shortcoming in other nations, and for example the French Counseil d'Etat annulled the inclusion of Kosovo on the French SCO list in 2014 due to the failure to consider an appropriate range of sources.[82] Similar critique was, as discussed in section 2.1.4, also directed towards the proposal of a common SCO list in the EU.[83] This illustrates that the actual process of designation also is more problematic than expected. Considering the vast

[77] QD (n 16), art. 9.
[78] UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 10 December 1984.
[79] UN General Assembly, International Covenant on Civil and Political Rights 1966, 23 March 1976.
[80] Recast APD (n 2), Annex I.
[81] Ibid, para. 39.
[82] Costello (n 5), p. 607, *Forum réfugiés-Cosi and Others v. OFPRA,* Conseil d'Etat, Decision Nos 375474 and 375920, 10 October 2014.
[83] European Economic and Social Committee (n 58), para. 4.5.1.

effect that the designation of a country as safe holds for the individual and the risks that is posed to asylum seekers; this should reasonably cause for a rather high threshold for such a designation as well as a suitably incorporated manner of review of the national lists.

Additionally, it is stated that Member States must ensure that any delay of conclusion of the procedure fully complies with their obligations under the QD and art. 41 of the EU Charter which states the right to good administration, without prejudice to the efficiency and fairness of the procedures under the directive.[84] It is also stated that the recast APD respects the fundamental rights and observes the principles recognised by the EU Charter. In particular, it should seek to ensure full respect for human dignity and to promote the application of amongst other art. 4 (prohibition of torture and inhuman or degrading treatment or punishment), art. 18 (right to asylum), art. 19 (prohibition of collective expulsions), art. 21 (non-discrimination) and art. 47 (right to effective remedy and to a fair trial) of the EU Charter, and has to be implemented accordingly.[85]

However, the future development of the SCO regulations remains uncertain. In the new Pact on Migration and Asylum, the European Commission stated that the objective is to achieve more streamlined and harmonised rules related to SCO and STC.[86] It is likely to observe further restrictive measures based on the SCO rules in the context of external border procedures, as this is another of the main objectives of the new pact in relation to applicants from a SCO or STC.[87] Perhaps, there will be new attempts to create a common EU list on safe countries of origin, as this was considered by the European Council during the new pact without reaching a conclusion on the matter.[88]

[84] Recast APD (n 2), para. 39.
[85] Ibid, para. 60.
[86] European Commission (n 66), p. 1-2.
[87] Ibid, p. 9–10.
[88] Ibid, p. 8.

Most likely, the SCO practice will become further established in the CEAS as a ground for accelerated procedures and externalising the EU border further.

2.3 Chapter Conclusion

As the chapter has discussed, even if the SCO concept is not new to the CEAS there have been new adaptations made since the first developments in the 1990's with the London resolutions. A common EU list of safe countries of origin has been a reoccurring topic for discussion, displaying the discrepancies in designating nations to be considered safe and the issues in enforcing such regulations on an EU-level. This also reflects the issues of the intended harmonisation of the CEAS with the recast APD. The historical development displays the criticism that the practice has faced, and with Sweden as one of the latest to adopt the concept among the EU+ countries one can evaluate what lead to the implementation in regards to the current paradigm. The many desperate amendments that has been made in the CEAS following the refugee crisis in 2015 causes for concerns of its coherence with existing human rights obligations, and a similar scepticism applies to the SCO concept.

3 The Right to Asylum and Fundamental Principles of the Asylum System

The aim of this chapter is to introduce the issues raised by the SCO concept, with a focus on the right to asylum and some of the fundamental principles and norms that are to be ensured in order to protect this right. The chapter will begin with discussing the scope of the right to asylum in art. 18 of the EU Charter, and the aspect of an individual assessment as an important positive obligation of the right. Following this, it will discuss the issues that the SCO concept can cause in relation to non-refoulement and collective expulsion as negative obligations for ensuring the right to asylum. Furthermore, it will address the possible contradiction with the principle of non-discrimination due to the discriminatory nature of basing the assessment of safety on nationality. It will also discuss the possible justifications for the distinctions made in the asylum procedure based on nationality and the relevance of this in the context of the SCO concept.

3.1 The Right to Asylum

3.1.1 The Scope of the Right to Asylum

Following the humanitarian crisis of Bosnia and Herzegovina and Kosovo, it gave rise to the harmonisation process under the Maastricht Treaty in 1993 and The Tampere Conclusions, adopted by the European Council in 1999. This lead to the creation of a CEAS as a part of the Area of Freedom, Security and Justice. This was set up by the European Union with the goal to gradually harmonise the systems with the creation of certain minimum standard for among other the reception and qualification conditions.[89] In 2005, the first phase was completed, leading to the second phase taking place under the

[89] Moreno-Lax (n 17), p. 368.

Stockholm Programme. The recast instruments were adopted in 2011 and 2013 and the third phase was already in progress. Several of the past CEAS instruments has referred to the right to leave to seek asylum, and to guarantee the observance of the right to asylum, which now is guaranteed by art. 18 of the EU Charter as a binding obligation.[90] The article makes a reference to respect the rules of the Refugee Convention as well the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). The article was originally introduced together with the prohibition against collective expulsion, indicating their close connection, but it was later introduced as a separate provision.[91]

Art. 78 TFEU requires the EU to develop a CEAS offering appropriate status to any requiring international protection and ensuring compliance with the principle of non-refoulement and binding the CEAS to be in accordance with the Refugee Convention and other relevant treaties. Paragraph 2 encompasses several requirements that common standards on reception and procedural conditions must be adopted, however, it does not contain a precise definition of the content of such conditions.[92] In order to find guidance for the characteristics of such procedural conditions, one can attempt to confine in the definition of art. 18 EU Charter. However, the interpretation of art. 18 is debated, as some understand it as the right to be granted asylum while other believe it is merely a reaffirmation of the existing rights in the Refugee Convention in accordance with the preamble.[93]

Firstly, there is a debate regarding if the nature of the article encompassing such an individual right or if it rather is to be considered a state right of sovereignty; as a right and duty that is owned by the state rather than the

[90] Ibid, p. 370
[91] European Union, 'Draft Charter of Fundamental Rights of the European Union', Charte 4137/00, 24 February 2000, p. 6.
[92] European, Union, Consolidated version of the Treaty on the Functioning of the European Union, 2008/C 115/01, 13 December 2007, art. 78.
[93] Moreno-Lax (n 17), p. 372-373.

individual.[94] The latter interpretation is somewhat supported by amongst other art. 1 of the Declaration on Territorial Asylum, that asylum is to be granted by states and respected by states.[95] A similar take on the article is also supported by the Council of Europe Declaration on Territorial Asylum that also states that it is an expression for the sovereignty of states.[96] However, the links between the right to seek asylum in art. 18 of the EU Charter and the absolute prohibition of non-refoulement does arguably impose certain positive obligations on states to avoid violations, which will discussed further in section 3.2.[97] This is also supported by Judge Serghides in his partly dissenting opinion to the ECtHR case of *Khlaifia and Others v. Italy*, where he criticises the discretion given to states in the context the prohibition of collective expulsions, another important aspect of the right to asylum will be discussed more in section 3.3.[98]

However, the most debated aspect of the article is its material scope. Following its reference to the Refugee Convention authors have voiced their concerns for not limiting its scope to the Refugee Convention, but rather that the reference implies an obligation to respect the provisions of the convention. Similar debates have occurred regarding the reference to the TFEU, and that a reference to comply should not have a limiting effect.[99] Rather, the references imply an incorporation of other instruments within the EU law. Furthermore, following the implementation of the Lisbon Treaty these two articles do not have a hierarchical relation. Art. 18 of the EU Charter should not be interpreted as having a subordinate position to art. 78 TFEU but should rather be seen as being complementary since the EU Charter is incorporated into primary EU law. Art. 78 TFEU provides with a legal basis for secondary

[94] Maria-Teresa Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to Be Granted Asylum in the Union's Law', *Refugee Survey Quarterly*. 27(3), 33-52, 2008, p. 38-40.
[95] UN General Assembly, Declaration on Territorial Asylum, A/RES/2312(XXII), 14 December 1967, art. 1.
[96] Council of Europe: Committee of Ministers, Declaration on Territorial Asylum, 18 November 1977, art. 1.
[97] Costello (n 5), p. 391.
[98] *Khlaifia and Others v. Italy*, European Court of Human Rights Application no. 16483/12, 15 December 2016, Partly Dissenting Opinion of Judge Serghides.
[99] Moreno-Lax (n 17), p. 376.

legislation to be created; which authorises the legislative developments of the components necessary in migration law to comply with art. 18 of the EU Charter.[100]

Assessing the preparatory works of the EU Charter, the drafters chose the wording 'right to asylum' rather than the 'right to seek asylum', which suggests that it was to never limit the article to not include such a right to seek asylum.[101] Furthermore, this procedural aspect to seek asylum, is reaffirmed by the connection to the Refugee Convention and UDHR; following that art. 14 UDHR entails such an explicit right to *seek* asylum and the principle of non-refoulement as codified in art. 33 of the Refugee Convention; it is natural to conclude that art. 18 of the EU Charter also contain such a right and the obligation to adhere to the principle of non-refoulement. However, the reference to art. 78 TFEU can also be interpreted as containing a positive obligation to provide the appropriate status besides the negative obligation of non-refoulement. Such a positive obligation would require the possibility and right to therefore seek asylum.[102] If one takes the position of the entailed right to seek asylum, this encompasses such an obligation to appropriately assess the application; which the CEAS has continued to regulate with the development of the recast APD and the QD.[103]

A vital aspect of art. 18 of the EU Charter is that it is established in primary law, deriving from art. 6(1) TEU, making it binding for the Member States; which distinguishes it from other conventions on refugee rights. Hence, it is important for the guidance of EU nations when they regulate asylum law that this is to be considered regardless of its rather uncertain definition.[104] Even if the definition of the article is widely debated, there is somewhat of a consensus that following the reference to the Refugee Convention and the

[100] Ibid, p. 371-376.
[101] European Union, 'Draft Charter of Fundamental Rights of the European Union', Charte 4332/00, 25 May 2000, p. 496–528, Gil-Bazo (n 94), p. 46.
[102] Amanda Musco Eklund, 'An EU Right to (Seek) Asylum: An Analysis of Whether the Right to Asylum in the EU Charter Entails a Right to Seek Asylum', *Europarättslig tidskrift*, no. 1, 135–149, 2020, p. 140.
[103] Moreno-Lax (n 17), p. 371.
[104] Nicolosi (n 13), p. 96-97.

creation of the CEAS, the right to asylum constitutes a principle that requires states and public authorities to promote and transform the right into a judicial cognoscible reality, while at all time respecting the subject-matter and its purpose; being the access to a procedure for determination of refugee status.[105]

The thesis will not evaluate the material scope of art. 18 EU Charter further in regard to the right to be granted asylum, but rather focus on the right to seek asylum and the aspect to have a realistic opportunity to an individual assessment for this to be a de facto right. Following the CJEU and ECtHR's case law, the importance of having the merits of one's individual case evaluated has been well-established.[106] This aspect is also what has been criticised in regard to such accelerated procedures. In the context of the SCO rules, the focus is partially removed from the individual case making more general presumption of safety that should be rebutted rather than the individual merits being examined.[107] If one focuses on the component of the right to a fair and effective asylum determination procedure as a part of the states' positive obligations to ensure the right to asylum in art. 18 of the EU Charter; the right to an individual assessment is a vital aspect.

3.1.2 The Right to an Individual Assessment

Most EU Member States are using fast-track asylum procedures; defined as the procedures that have a shorter time limit and often fewer procedural guarantees than normal asylum procedures, such as observed with the SCO regulations. The use of accelerated procedures has the aim to ensure faster and more efficient assessments; making it possible to enforce the decision quicker, as with the possibility of immediate execution.[108] However,

[105] Ibid, p. 105.
[106] *M.S.S. v. Belgium and Greece*, European Court of Human Rights, Application no. 30696/09, 21 January 2011, *Hirsi Jamaa and Others v. Italy*, European Court of Human Rights, Application no. 27765/09, 23 February 2012.
[107] Marcelle Reneman, 'Speedy Asylum Procedures in the EU: Striking a Fair Balance between the Need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy', *International Journal of Refugee Law*, 25(4), 717-748, January 2014, p. 719.
[108] Ibid, p. 717-718.

according to art. 31(2) of the recast APD Member States should ensure that the examination of the applications is done as soon as possible without prejudice to an adequate and complete examination. In the case of *D.L. v. Austria*, the ECtHR specifically affirmed that the even when using the SCO lists; the nation must still employ such an individual assessment. The case regarded the extradition of the applicant to Kosovo from Austria due to that he was suspected crimes in Kosovo being his country of origin.[109] The state pointed out the fact that Kosovo was considered a SCO in Austria, which supported the claims that extraditing the applicant would not give rise to violations under art. 2 and 3 of the ECtHR.[110] However, the Court concluded that the fact that Kosovo was considered a SCO did not relieve the extraditing country from individually assessing the case at hand. They confirmed that the assessment whether there was a real risk of non-refoulement must be rigorous, as established in prior case law.[111]

However, the possible ambiguity between fast-track procedures and the requirement for individual assessment does give rise to possible questions in regards to the efficiency and mere legality of conducting such procedures in regards to the right to asylum. In *H.I.D. and another v Refugee Applications Commissioner and others*, the CJEU stated that in accelerated procedures where the SCO concept is applied, the national authorities must respect the full set of procedural rights as established in the APD's second chapter. This ruling was based on the first APD, and the relevant procedural rights that was to be considered were those that were established in Chapter II of that said directive, such as the access to procedure in art. 6 and the requirements for examinations of applications in art. 8 (corresponding to art. 6 and 10 of the recast APD). The Court did however conclude that nationality is such an element that can be considered to justify accelerated processing of asylum applications, and as addressing the element of discrimination the important

[109] *D.L. v. Austria*, European Court of Human Rights, Application no. 34999/16, 7 December 2017.
[110] Ibid, para. 45-47.
[111] Ibid, para. 57. Et al. *Chahal v. United Kingdom*, European Court of Human Rights, 70/1995/576/662, 15 November 1996.

rule of determining the situation in a nation was considered as a justifiable ground for a differentiated procedure but without depriving them of a fair and just procedure.[112]

Hence, even if accelerated procedures, as the SCO rules, is an accepted practice within the CEAS; this should not undermine the right to an individual assessment. Furthermore, the regulations on special procedures in the directive also indicate a certain adherence to ensure an individually adopted procedure even for people applying that originate from a country that is considered a SCO.[113] Consequently, in order to ensure that the substantive right of asylum and the encompassed right of an individual assessment is ensured with the implementation of the SCO concept, it is vital to assess the procedural safeguards that are enforced to ensure this.

When implementing the recast APD, the Member States should consider the relevant guidelines developed by the European Asylum Support Office (EASO).[114] In 2019, EASO released a guideline for asylum procedures which contains standards and indicators for a correct and effective implementation of the recast APD.[115] In Chapter II of the recast APD some basic principles and procedural guarantees are set out. Art. 10 establishes requirements for the examination of applications and strengthen the claims of the positive obligation to provide a fair and just procedure. The article's third paragraph ascertains a requirement for an appropriate examination of the application for international protection, and the importance of such examinations being individual, objective and impartial as well as based on updated information obtained from various sources. Moreover, the article's second paragraph requires the decision to be of such a quality that it is soundly motivated both in fact and law.

[112] *H.I.D and another v Refugee Applications Commissioner and others*, Court of Justice of the European Union, C-175/11, 31 January 2013, para. 71-74.
[113] Recast APD (n 2), art. 24(3).
[114] Ibid, para. 10.
[115] EASO, 'Guidance on asylum procedure: operational standards and indicators', *EASO Practical Guide Series*, December 2020, p. 6.

The essential regulation for the SCO, is as discussed earlier, art. 36. It states that a third country designated as a SCO in accordance with the recast APD, may after an *individual examination* be considered as a SCO. This incorporates that a personal interview is conducted in accordance with art. 14 of the recast APD. Art. 15 then sets out the requirement for a personal interview, requiring competent personnel to conduct the interview and the access to an interpreter.

Furthermore, in the third chapter of the recast APD there are provisions regulating the procedures at the first instance. Requiring the Member States to ensure examination as soon as possible, without prejudice to an adequate and complete examination.[116] For cases concerning people from a SCO, there's a possibility to accelerate and/or conduct examinations of applications on the border in accordance with the basic principles and guarantees of Chapter II.[117] Art. 32 regulates the possibility to consider an application to be unfounded if an applicant does not fulfil the criteria of the QD, and the article's second paragraph establishes the opportunity to find an application to be manifestly unfounded, where it is defined in national legislation, if it concerns any of the cases of art. 31(8); such as applicants from safe countries of origin.

However, for so-called special procedures, which include the accelerated procedures based on the SCO rules regulated in art. 31(8) of the recast APD, art. 37 requires Member States to create further regulations on the SCO rules in national law. Hence, Member States should establish a work process and guidelines to enable compliance with the grounds for accelerated procedures. There should also be internal guidelines as how to apply the grounds as described in national law.[118]

[116] Recast APD (n 2), art. 31.
[117] Ibid, art. 31(8).
[118] EASO (n 115), p. 18-26.

The applicability of accelerated procedures is also limited. For vulnerable persons as listed in art. 24 of the recast APD, that have been subjected to physical or psychological trauma that causes the individual to be in need of certain procedural guarantees, the state should refrain from applying art. 31(8) of the recast APD, including the accelerated procedure based on the SCO concept. The Member States should then accordingly cease to apply the accelerated procedures when it cannot provide adequate support to applicants in need of special procedural guarantees.[119] Again, strengthening the claim of a positive obligation to assess the case on its merits and to ensure that the asylum procedure is individually adopted in such a manner that it complies with the right and access to asylum.

Even if there are limitations for applicants that are subjected to accelerated procedures, following among other the requirement to impose time limits for procedures based on the SCO regulation.[120] Yet, this does not mean that all procedural guarantees cease to be applicable, and in the introductory paragraphs of the recast APD; it is confirmed that decisions for international protection must be properly examined and be taken objectively and impartially, hence the authorities must act in accordance with such procedural safeguards provided in the directive, with respect for the applicable deontological principles.[121]

Scholars such as Salvatore Fabio Nicolosi argues that in the light of the EU-Turkey deal, which is a part of the more restrictive paradigm shift, states have reduced their responsibility to assess asylum applications.[122] The EU-Turkey deal was a joint action plan upon the cooperation between the EU and Turkey on the migration management to address the migration crisis in 2015. It included organising joint return operations, and Turkey would take the measures necessary to stop people travelling irregularly from Turkey to the Greek islands, and those who entered the Greek islands from Turkey could be

[119] Ibid, p. 28.
[120] Recast APD (n 2), para. 20, art. 31(9).
[121] Ibid, para. 17.
[122] Nicolosi (n 13), p. 114

returned.[123] The EU-Turkey deal where the responsibility to assess applications is explicitly farmed out to Turkey, can indicate such a lacking compliance with the Member States' obligation to examine applications of asylum and a similar parallel can be done for the fast-track procedures. Even if the nations are the ones receiving the applications, the reference to safe countries and the adequate protection in the SCO, rather than assessing the individual grounds for asylum can in turn lead to a lacking personal assessment that is enshrined within the right to asylum, in an attempt for Member States to reduce their responsibilities.[124] Hence, to mitigate this risk for systematic decisions that would contradict the right to asylum and the incorporated right to an individual assessment, it is essential that the Member States complies with all of the safeguards discussed above and ensures an individually adopted asylum procedure.

3.1.3 Access to Effective Remedy

To ensure the compliance with the access to asylum; the access to effective remedy further compels certain obligations on the Member States. In art. 46 of the recast ADP the regulations for appeals procedures are regulated, including such decisions where an application is considered unfounded in relation to refugee status and/or subsidiary protection status. In order to comply with the first paragraph Member States should provide a full and *ex nunc* examination of both facts and points of law, as an examination of the international protection must be done according to the QD in appeals procedures before a court or tribunal of first instance. However, for the cases of concerning safe countries of origin, the national court will have the power to rule on the matter whether the applicant may remain in the Member State if the applicant's right to remain on the territory is not regulated in national law.[125] Even if the right to remain in the nation during the procedure of appeal is limited, the obligation to a full and *ex nunc* examination is enforced at this step of the asylum procedure as well, further displaying the obligation of

[123] European Commission, 'Fact Sheet - EU-Turkey Joint Action Plan', 15 October 2015.
[124] Nicolosi (n 13), p. 114.
[125] Recast APD (n 2), art. 46(6).

Member States to execute an individual assessment to the extent necessary to ensure the access to effective remedy.

3.2 The Principle of Non-refoulement

Even if the right to asylum entails positive obligations for states such as the component of an individual assessment, it also incorporates the negative obligation of non-refoulement. The principle of non-refoulement is an essential building block of the asylum system, imposing the obligation on states to not return anyone to a country where they could face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. It is protected in several fundamental international human rights instruments, such as the ECHR, UDHR, CAT and the Refugee Convention. For this essay, I will not have the possibility to assess the principle in depth, however, due to the direct reference of the Refugee Convention in the TFEU, this negative obligation is a vital part of the rights and principles that are encompassed within the right to asylum as to be protected in the CEAS.[126]

The principle is codified in art. 33 of the Refugee Convention and is continuously referred to in the preamble as a core obligation. The principle is considered to apply both to refugees and asylum seekers, however, the personal scope of the principle does vary depending on what instrument one is assessing. It is established that two vital aspects are required to be ensured by states in order to protect the principle. Firstly, it includes an obligation for states to implement national mechanisms for assessment related to the principle of non-refoulement, such as the asylum determination procedures.[127] Secondly, it calls for States to have mechanisms for entry and status related to the principle, such as implementing national instruments that grant migrants protection in the form of temporary, long-term or permanent

[126] Gil-Bazo (n 94), p. 350, TFEU (n 92), art. 78.
[127] CAT, 'General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22', 9 February 2018, Para. 13.

status and residency.[128] For this thesis, the first aspect being to implement a fair national assessment procedure is the most relevant aspect of upholding the principle of non-refoulement; as it further demands that sufficient procedural guarantees are provided in order for states to not disregard this principle when adopting the SCO concept.

Furthermore, the principle has been established in the ECtHR case law, as an integral part of the protection against torture under art. 3 ECHR.[129] This right in the ECHR also imposes an obligation for Member States to ensure that the correct manner of assessment is executed. In *M.S.S. v. Belgium and Greece* and *Hirsi Jamaa and Others v. Italy*; the ECtHR further established the importance of an assessment of the case's merits in order for the nation to not violate art. 3 ECHR.[130] In the case of *M.S.S. v. Belgium and Greece*, the ECtHR found that the risk of expulsion to Afghanistan for the applicant due to the deficiencies in Greece's asylum procedure lead to a breach of art. 3. Furthermore, Belgium's return to Greece in accordance with the Dublin system did also violate the principle of non-refoulement; illustrating the risk of this right to be violated due to deficiencies in the preliminary steps of the assessment and emphasising the responsibility of states.[131]

In the case of *Hirsi Jamaa and Others v. Italy*, Italy was considered to have breached the prohibition of non-refoulement due to interception at the seas without examining the individuals' cases and therefore exposing them to a risk of ill-treatment, that also amounted to collective expulsion.[132] An important note to consider here, is the *risk* of ill-treatment and that such ill-treatment must not be established with certainty. Even if the circumstances of these cases vary from the procedure of SCO based assessments, there has been

[128] Special Rapporteur on Torture, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', A/HRC/37/50, 26 February 2018, para. 40, General Comment No. 4 (n. 127), para 22, *Seid Mortesa Aemei v. Switzerland*, UN Committee Against Torture, CAT/C/18/D/34/1995, 29 May 1997.
[129] *Soering v. United Kingdom,* European Court of Human Rights, 1/1989/161/217, 7 July 1989, para. 88.
[130] *M.S.S. v. Belgium and Greece* (n 106), *Hirsi Jamaa and Others v. Italy* (n 106).
[131] *M.S.S. v. Belgium and Greece* (n 106), para. 352–360.
[132] *Hirsi Jamaa and Others v. Italy* (n 106), para. 185–186 & 204–207.

a worry that the principle is at risk with the implementation of the practice. The Commission of Jurists did for example condemn the concept in the light of it being an accelerated procedure with reduced procedural guarantees and therefore putting the principle of non-refoulement at risk.[133]

As discussed, the recast APD does require that several fundamental rights ensured by the EU charter are to be respected. In the definition of a SCO in Annex I of the directive, there is a direct reference to how the principle of non-refoulement in accordance with the Refugee Convention must be considered for the assessment of safety. Hence, when assessing nations as safe there must be a well-founded basis for this to ensure that the principle is upheld and the information used must be updated and based on a variety of sources.[134] The manner of designation of SCO is therefore vital for the protection of the principle of non-refoulement, to ensure that this as well as the access to asylum is not made redundant.

3.3 The Prohibition of Collective Expulsion

Due to the interconnectedness of the right to asylum and the prohibition of collective expulsions; they were originally introduced in the same provision of the EU Charter before they were made into two separate provisions. Therefore, is important to address the issue of collective expulsion when considering the protection of the right to asylum; specifically, in the context of fast-track procedures based on nationality.[135] The prohibition of expulsion is codified in both art. 19 of the EU Charter and art. 4 of Protocol No. 4 ECHR, and prohibits contracting parties from using any measures compelling aliens as a ground to leave the country if such a measure is not taken on the basis of reasonable and objective examination of the particular case of each individual alien.[136] This has been discussed by the ECtHR in the case of

[133] International Commission of Jurists, 'Compromising Rights and Procedures: ICJ Observations on the 2011 Recast Proposal of the Procedure Directive 2011', September 2011, para. 74.
[134] Recast APD (n 2), Annex I.
[135] Moreno-Lax (n 17), p. 371, Charte 4137/00 (n 91).
[136] Art. 4 Protocol No. 4 ECHR, Et al. *Khlaifia and Others v. Italy* (n 98), para. 237.

Khlaifia and Others v. Italy, which concerned three individuals from Tunisia, claiming that they had been subjected to such collective expulsion as prohibited by the article. The Court noted, that they had only found such collective expulsion in four prior cases, among these in *Hirsi Jamaa and Others v. Italy*, however, in that case the applicants had not been subjected to any form of identity check or procedures to assess their right to protection.[137] In the current case the fact that an expulsion of several individuals from the same country had occurred; did not mean that there had been such a collective expulsion. Furthermore, the applicants of the case had the possibility to challenge the expulsion and give their arguments against this. Hence, a violation of the right was not found.[138] In the light of the SCO concept one can consider that such a notion of nationality as a basis for the expulsion of several asylum seekers from the same country, may not give rise to collective expulsion if they have the possibility to challenge this.

However, as the ECtHR has concluded that the prohibition in art. 4 of Protocol No. 4 ECHR is to prevent nations to proceed with collective expulsions without examining their individual case, this prohibition might be at an increased risk of being violated due to the nature of the SCO concept as an accelerated procedure based on nationality rather than assessing individual circumstances.[139] In his partly dissenting opinion; Judge Serghides did not agree with the finding of there not being a violation of art. 4 of Protocol No. 4 ECHR, he referred to the restrictive interpretation of procedural guarantees in favour of state sovereignty as a principle that no longer is relevant and will have a devastating effect on human rights conventions, similar to the discussion of the personal scope of the right to asylum. He concluded by citing the case of *Hirsi Jamaa and Others v. Italy,* and that the procedural obligations as the right to a personal interview under art. 4 Protocol No. 4 is mandatory and does not give any room for discretion to states.[140] Further, one can question the possibility to challenge a decision as a mean to ensure that

[137] *Hirsi Jamaa and Others v. Italy* (n 106), *Khlaifia and Others v. Italy* (n 98)*,* para. 242.
[138] *Khlaifia and Others v. Italy* (n 98), para. 242-255.
[139] Ibid, para. 12.
[140] Ibid, Partly Dissenting Opinion of Judge Serghides, p. 108.

collective expulsion does not occur. In the context of the SCO concept, the presumption of safety and the premise that the individual's application is 'manifestly unfounded', can cause the burden of proof to be higher and less likely to be rebutted in such a manner that it is not a realistic possibility to challenge it.[141]

3.4 Obligations of Non-discrimination

3.4.1 International Human Rights Standards

Furthermore, the discussion of collective expulsion has an important connection with the discriminatory nature of the SCO concept; as it is a ground for accelerated procedures based merely on nationality. The SCO concept inclines that the asylum assessment can be essentially based on the person's nationality. However, this can give rise to contradictions with obligations of non-discrimination, as an overarching principle of the asylum system. [142]

In art. 14 of the ECHR, the prohibition of discrimination is set out; establishing how the rights and freedoms of the convention should be enjoyed without discrimination on any of the given grounds which include national and social origin. Furthermore, even if it is not binding, art. 14 UDHR explicitly enshrines the right to seek asylum and in combination with art. 7 of the UDHR that establishes everyone's equality before the law; one can assume that this is to be applied in the context of asylum law.[143] UNHCR's Handbook also reinforces the importance of consideration for the fundamental rights in the UDHR in the asylum procedure and with the Refugees Convention's own codification of non-discrimination in art. 3; it strengthens this obligation as an essential concept in the asylum system that

[141] Hunt (n 3), p. 512.
[142] EASO (n 115), p. 8, Hunt (n 3), p. 532.
[143] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, art. 7 & 14.

is to be considered for the access to and assessment of international protection.[144]

The concern of discrimination did also prevail the current paradigm, as the UNHCR's early criticism towards the SCO concept was regarding the issue of discrimination and the inconsistency with the nature of the refugee protection.[145] Scholars such as Hunt argue that the SCO concept as such can never be legitimate and human rights-compliant due to the contradiction and violation of the principle of non-discrimination, causing an inconsistency within the CEAS due to the human rights obligations undertaken by EU Member States.[146]

3.4.2 EU Law

Besides the relevant regulation of non-discrimination in European as well as international human rights instruments, the EU law has also established considerations for the protection of asylum seekers and refugees against discrimination. Art. 6(1) TEU establishes that the EU recognises the rights, freedoms and principles established in the EU Charter, and art. 21 of the EU Charter contains an explicit prohibition of discrimination for the EU Member States, and the second paragraph prohibits discrimination within the scope application of the treaties based on nationality.[147] This also corresponds with the prohibition of discrimination in art. 18 TFEU.[148]

As art. 78 TFEU requires the EU to develop a CEAS offering appropriate status to any requiring international protection and ensuring compliance with the principle of non-refoulement and binding the CEAS to be in accordance with the Refugee Convention and other relevant treaties.[149] When creating such secondary migration law in accordance with art. 78 TFEU the principle

[144] Handbook (n 31), Annex II, preamble & para. 5.
[145] UNHCR (n 7).
[146] Hunt (n 3), p. 532.
[147] European Union, Consolidated version of the Treaty on European Union, 13 December 2007, para. 6(1), EU Charter (n 15), art. 21.
[148] TFEU (n 92), art. 18.
[149] Ibid, art. 78, Moreno-Lax (n 17), p. 372–373.

of non-discrimination should therefore be respected, and with the explicit prohibition of discrimination in art. 21 of the EU Charter, this creates a binding obligation for the Member States. [150]

As stated, the recast APD requires that respect is taken to the fundamental rights and principles recognised by the EU Charter, and explicitly states that the directive seeks to protect the application of art. 21 on non-discrimination.[151] The EASO guidelines on the asylum procedure in accordance with the recast APD, states that the obligation to non-discrimination and gender equality is one of the overarching principles for the asylum procedure when nations implement and apply the directive.[152] Hunt criticises the implementation of the SCO as being a concept only with the goal to facilitate discrimination based on nationality, creating an obvious inconsistency with the obligation of non-discrimination. According to Hunt since there is no justification for such discrimination based on nationality; it can constitute a violation of primary EU law, domestic discrimination legislation and international human rights law.[153] Considering this some believe that the Council has exceeded its competence which only permits setting minimum standards on procedures in Member States (Art. 63 (1) (d) EC Treaty) as art. 31(2) APD states that applications from SCOs 'shall' be considered unfounded. Even if the creation of the Lisbon Treaty moved the CEAS into more comprehensive regulations of adopting common rather than minimum standards, this can arguably force Member States to weaken their standards of protection in order to conform with Community law and disregard essential human rights instruments.[154]

The discussion on discrimination was also visible in the argumentation for the second package for the EU Migration Agenda with the suggestion of a common EU list of safe countries of origin. It was argued that having different

[150] TEU (n 147), art. 6(1).
[151] Recast APD (n 2), para. 60.
[152] EASO (n 115), p. 8.
[153] Hunt (n 3), p. 510.
[154] Ibid, p. 511.

countries on the various national lists could lead to discriminatory treatment as nationals would receive different treatment in different Member States, and that this then would enhance secondary migrant movement.[155] Hence, the decision to leave the assessment and designation of safe country of origin lists to the Member States can appear as contradictory to the mission of harmonisation within the CEAS. Affecting the possibility to avoid the phenomena of so-called 'asylum shopping', which has been an outspoken objective of the CEAS.[156] Therefore, one can argue that a common list would lessen the discriminatory treatment of nationals in some Member States were their application would be considered unfounded, whilst in others they could be considered refugees. Even if this could argue for the adaptation of a common list as a measure against differential treatment of nationals within the EU; it does not resolve the issue of discrimination as basing the assessment on nationality. Although, the development within the CEAS has implicated that this is considered a justifiable ground for differential treatment as the safety in a nation is an important factor when assessing an individual's need for protection.[157]

However, one could argue that the SCO concept takes it a step beyond the assessment of safety as a reference point for evaluating the need for international protection in art. 9 QD. The SCO concept leads to a different asylum procedure with possible negative outcomes in regards to the access and right to asylum for some nationalities; that could amount to discriminatory treatment.[158] For example, the presumption of safety can hinder the applicant from being able to prove their need for protection, possibly creating a higher burden of proof for people of a certain nationality. Since the applicants from nations that are considered such safe countries of origin are constricted to a fast-track procedure, their process is more limited

[155] European Commission (n 55), para. 4.2.
[156] Ed. C Bauloz, M Ciger, S Singer & V Stoyanova, 'Introducing the Second Phase of the Common European Asylum System', *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System*, Martinus Nijhoff Publishers, 2015, p. 1-2.
[157] *H.I.D. and another v Refugee Applications Commissioner and others (n 112)*.
[158] Hunt (n 3), p. 511-512.

regarding the time limit and the right to a public counsel[159] which can affect the fairness and equal access to their procedural and inherently their human rights merely based on their country of origin.[160]

3.5 Chapter Conclusion

To conclude, the positive obligations for states to ensure a fair and just assessment cannot be diminished in regards to the protection of the right to asylum. The several procedural obligations as enshrined in both international human rights standards as well as the recast APD emphasises these obligations. In order to not mitigate the right to asylum; it is vital that the state ensures individual assessments of asylum applications. However, the limitations imposed with the SCO concept as a ground for fast-track procedures appear to contradict these vital obligations and hamper their realisation and protection.

The SCO concept may contradict fundamental principles and norms incorporated in the right to asylum. Some of the negative obligations at risk are for example the principle of non-refoulement, the prohibition of collective expulsion and non-discrimination. Since the right to asylum and the encompassed right to an individual assessment might be hampered by the SCO concept, this can consequently lead to breaches of fundamental principles such as non-refoulement and the prohibition of collective expulsion. The possible discriminatory nature of the concept might be defended based on the natural relevance of nationality and country of origin for assessing an asylum application. However, one can question if the differential treatments that these nationals will be subjected in the context of the accelerated procedure is motivated. It is important to consider the rights and procedural guarantees that are to be protected during the asylum procedure and whether the limited access to these based on the SCO regulation is sufficiently justified. The effect on the right to asylum and an

[159] This will be discussed further in Chapter 6 on the procedural safeguards.
[160] Hunt (n 3), p. 512.

individual assessment for some nationals is inherently discriminatory and can arguably not be accepted due to the obligations of non-discrimination under international human rights standards as well as EU-law. Hence, one can argue that the national implementation in Sweden will cause similar contradictions in regard to merely the nature of the concept, however, this will be discussed further in Chapter 5.

4 The Swedish Implementation of the Safe Country of Origin Concept

In order to contextualise the legal development of the SCO concept in Sweden this chapter will firstly address the history behind the implementation and what led to Sweden adopting the SCO rules into national law as of April 2021. The chapter will therefore begin with reviewing the legislative amendments made in Sweden following the increased migratory flow in 2015. Lastly, it will address the current legislation of the SCO rules in the Swedish Alien Act and its coherence with the recast APD and the QD.

4.1 Background and the 2015 "Refugee Crisis"

Following the increased migratory flow in 2015, several changes have been introduced in the Swedish Alien Act such as the implementation of the Temporary Law in 2016. The Temporary Law imposed certain temporary limitations on the right to residence permit, however, the SCO concept was not included among these earlier adaptations. The first change in Sweden since 2015 was the implementation of random border- and identity controls. This was motivated by the need to allow the Swedish authorities and society space to breath following the increased immigration. These controls were then implemented through a law that was accepted in December 2015, that allowed for obligatory identity controls by Sweden's borders and was the beginning of the temporary limitations.[161] The conflict this caused both with Sweden's obligations under EU law and international conventions caused several actors to voice their concerns when the law was proposed.[162] The temporary law was accepted in June 2016 and entered into force the 20th of

[161] Swedish Government, 'Tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige', prop. 2015/16:174, 28 April 2016.
[162] Rebecca Thorburn Stern, 'Innebörden av "svenskt konventionsåtagande": svårare att tolka än man tror', *Svensk Juristtidnin*g, 120–136, 2020 p. 123.

July 2016 with a time limit of three years. The temporary law meant that various application grounds for the right to residence permit was temporarily limited or completely removed, for example the right to family reunification was considerably limited.[163] Certain limitations were later changed based on them possibly causing violations of Sweden's convention obligations.[164]

However, in 2019 the temporary law was prolonged for another two years. No major changes were made in the prolonged temporary law besides the possibility for those that had alternative protection status to enjoy the same rights of family reunification as those with refugee status.[165]

4.2 Sweden's Application of the Concept Prior to the Implementation

Following the 2015 refugee crisis, Sweden continued with their efforts to streamline their migration law and in 2019 the question of SCO rules was deliberated in the CJEU. In the case of *A v. the Swedish Migration Agency,* the CJEU stated that Sweden could not rely on the notion of safety with the reference to SCO concept without implementing the relevant provisions of the recast APD.[166] This naturally implies that the concept had been used as a part of the assessment of the threat of ill-treatment prior to the incorporation of the rules in Swedish law. Before the ruling from the CJEU the Swedish Migration Agency relied on an authority guideline where it was stated that there was a possibility to reject an application due to it being manifestly unfounded if that applicant's claims for protection were considered to not be relevant for the protection grounds in 1 and 2 §§ Chapter 4 of the Swedish Alien Act (equivalent to art. 9 of the QD).[167] This possibility was mainly

[163] Prop. 2015/16:174 (n 161).
[164] Thorburn Stern (n 162), p. 121.
[165] Swedish Government, 'Förlängning av lagen om tillfälliga begränsningar av möjligheten att få uppehållstillstånd i Sverige', prop. 2018/19:128, 9 May 2019.
[166] *A v. the Swedish Migration Agency* (n 11).
[167] 1 § Chapter 4 Swedish Alien Act (Utlänninglag 2005:716)
In this Act 'refugee' means an alien who - is outside the country of the alien's nationality, because he or she feels a well-founded fear of persecution on grounds of race, nationality, religious or political belief, or on grounds of gender, sexual orientation or other

adopted to address such claims that were based on economic or social reasons rather than such a fear of persecution, which then would allow for the decision to be immediately executed in accordance with 19 § Chapter 8 of the Swedish Alien Act.[168] However, within this scope of such 'manifestly unfounded' applications, Sweden had then applied the SCO concept as a consideration for when the claims for international protection were not to be considered relevant, such as in the case that was relevant for the preliminary ruling by the CJEU. This guideline is now revoked following the judgement from CJEU, and after this one could note a decline in such an application of a general assessment of applications being 'manifestly unfounded' due to the situation in the country in question, and decisions of such immediate execution decreased from 1 555 cases to 100 in 2019.[169]

membership of a particular social group and - is unable, or because of his or her fear is unwilling, to avail himself or herself of the protection of that country. This applies irrespective of whether it is the authorities of the country that are responsible for the alien being subjected to persecution or these authorities cannot be assumed to offer protection against persecution by private individuals. A stateless alien shall also be considered a refugee if he or she - is, for the same reasons that are specified in the first paragraph, outside the country in which he or she has previously had his or her usual place of residence and - is unable or, because of fear, unwilling to return there.

2 § Chapter 4 Swedish Alien Act (Utlänningslag 2005:716)
In this Act a 'person otherwise in need of protection' is an alien who in cases other than those referred to in Section 1 is outside the country of the alien's nationality, because he or she 1 feels a well-founded fear of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment, 2 needs protection because of external or internal armed conflict or, because of other severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuses or 3 is unable to return to the country of origin because of an environmental disaster. The corresponding applies to a stateless alien who is outside the country in which he or she has previously had his or her usual place of residence.

[168] The Swedish Migration Agency, 'Rättsligt ställningstagande angående avvisning med omedelbar verkställighet till hemlandet enligt 8 kap. 19 § utlänningslagen', SR 16/2017, 11 May 2017.

[169] Department of Justice, Departementsserie 2020:2 'Uppenbart ogrundade ansökningar och fastställande av säkra ursprungsländer', Ds 2020:2, January 2020, p. 37.

4.3 The Implementation

4.3.1 National Consultation Process Following the CJEU Ruling *A v. the Swedish Migration Agency*

Following the preliminary ruling from the CJEU, *A v. the Swedish Migration Agency*, the prior guideline on manifestly unfounded applications by the Swedish Migration Agency had been revoked and replaced. The new guideline stated how the legal situation had changed following the preliminary ruling from the CJEU. An application could still be considered being manifestly unfounded due to the application mainly being based on economic or social reasons. However, applications where the lacking need of international protection rather was referred to the adequate protection in the country of origin or the safety; was not to be considered manifestly unfounded. For those cases, the protection should still be assessed, and such applications were therefore not to be subjected to immediate execution. The same was to be applied for applications that were considered credible but insufficient.[170]

An investigation was also initiated by the Swedish justice- and migration minsters the 19th of June 2019 to provide with a suggestion on the increased mandate for the Swedish Migration Agency to assess an asylum application as unfounded and execute a decision immediately.[171] In the investigation, it was stated that the Swedish Migration Agency welcomed such an implementation of the SCO rules as a mean of making the asylum procedure more effective. They believed that it could reduce administrative time and cost as it would enable faster decisions for such unfounded applications. The implementation of the regulations from the recast APD was also considered

[170] Ibid, p. 30-31, The Swedish Migration Agency, 'Rättsligt ställningstagande angående avvisning med omedelbar verkställighet till hemlandet enligt 8 kap. 19§ utlänningslagen', SR 43/2018, 6 December 2018.
[171] Department of Justice, Kommittéberättelse 'Uppenbart ogrundade asylansökningar och fastställande av säkra ursprungsländer, Ju 2019:C, 19 June 2019.

to improve the harmonisation as the concept already was being widely used in the EU. However, it was established in the investigation that if such an implementation was to be done; it would require procedural guarantees to ensure a fair and just process, and that in accordance with the already existing procedural guarantees in Swedish law such as the fundamental 'service obligation' (serviceskyldigheten)[172], the applicant should be informed about the process at an early stage.[173]

The investigation led to a suggestion to implement a new provision in 6 a § Chapter 1 of the Swedish Alien Act containing the definition of a SCO. Additionally, it suggested an amendment in 19 § Chapter 8 of the Swedish Alien Act, which regulated the possibility of immediate execution, to incorporate applications concerning people from safe countries of origin that were considered manifestly unfounded as a ground for immediate execution. The new legislative changes were suggested to be implemented the 1st of November 2020.[174]

Following this several authorities and organisations were given the chance to state their attitude towards the suggestion, which contained both positive and negative responses. For example, the Administrative Court of Appeal in Stockholm had more of a formalistic approach and commented on the wording of generally and consistently in order to ensure that it was coherent with the wording of the recast APD's provisions on the SCO.[175] While organisations such as Amnesty International was critical towards the concept as it could lead to arbitrary decisions due to the accelerated procedure and make it more difficult for individuals from safe countries of origin to rebut

[172] 6 § The Administrative Procedure Act (Förvaltningslag (2017:900))
An authority shall ensure that contacts with private persons are smooth and simple. The authority shall give private persons the assistance they need to look after their interests. The assistance shall be given to the extent that is deemed appropriate with regard to the nature of the question, the private person's need of assistance and the activities of the authority. It shall be given without unnecessary delay.
[173] Ds 2020:2 (n 169), p. 37–41.
[174] Ibid, p. 61.
[175] Kammarrätten in Stockholm (n 19).

this in order to make their claims for international protection.[176] After the statements were evaluated, the proposition 2020/21:71 was released the 17 December 2020, which supported the implementation of the SCO concept into Swedish law. This was later accepted the 17th of March 2021 and the amended provisions entered into force the 1st of May 2021.[177]

4.3.2 The New SCO Legislations and Authority Guidelines

The new regulations led to the implementation of a third paragraph in 6 a § Chapter 1 of the Swedish Alien Act where the definition of a SCO is sited. The new paragraph make a reference to the definition of prosecution as regulated in 1-2 §§ Chapter 4 of the Swedish Alien Act, similar to the reference to the QD in art. 36 of the recast APD. Hence, there is to be a general and consistent absence of such treatments that gives rise to the need for international protection according to 1-2 §§ Chapter 4 of the Swedish Alien Act for a country to be considered as a SCO for an applicant. Similarly, to the definition in Annex I to the recast APD, the provision states that the authorities should regard the legal and political situation in the nation when assessing the safety.[178]

The regulation did also lead to an adjustment of 19 § Chapter 8 of the Swedish Alien Act which regulate when the Swedish Migration Agency can execute a decision immediately even if it has not become final yet.[179] This can be done

[176] Amnesty International (n 18).
[177] Lag om ändring i utlänningslagen, SFS 2021:223, 24 March 2021, Swedish Government, 'Riksdagsskrivelse 2020/21:222 Uppenbart ogrundade ansökningar och fastställande av säkra ursprungsländer (2020/21:SfU15), 2020/21:222, 17 March 2021.
[178] 6 a § 1 Chapter Swedish Alien Act (Utlänningslag (2005:716))
Safe country of origin in this Act means a country where there is no general persecution, torture or other inhuman or degrading treatment or punishment or threat due to indiscriminate violence due to an external or internal armed conflict. In assessing whether a country should be considered a safe country of origin, the legal situation and the political conditions in the country's company must.
The government or the authority appointed by the government may issue regulations on a list of countries that meet the definition in the first paragraph. Lag (2021: 223).
[179] 19 § Chapter 8 Swedish Alien Act (Utlänningslag 2005:716)
The Swedish Migration Agency may decide that the Agency's decision on deportation pursuant to section 17, first paragraph 1 or 2 may be enforced even if it has not become final (rejection with immediate enforcement), if it is manifested that there is no basis for asylum and that the residence permit cannot nor shall it be granted on any other basis

if it is obvious that there is no basis for granting asylum, so called manifestly unfounded applications, which after the amendments to the third paragraph of that said provision also includes people from safe countries of origin.[180]

The SCO list is incorporated in the Swedish Migration Agency's code of statues, where a total of 8 countries currently are listed, being: Bosnia and Hercegovina, Georgia, Mongolia, Albania, Chile, Kosovo, Northern Macedonia and Serbia. Meaning, that applicants from those countries where the presumption of safety has not been rebutted; a decision can be immediately executed.[181] The safety of those countries listed as safe countries of origins should according to the Swedish law be presumed and used as an initial premise during the individual assessment whether the country is safe for the individual as well. In order to rebut such a presumption of safety the person in question must be able to display serious reasons that would break the presumption. That would require that the claims consist of such circumstances that would amount to the need of international protection according to 1 and 2 §§ of Chapter 4 of the Swedish Alien Act.[182] Even if manifestly unfounded applications, as for the applicants from safe countries of origin, can be immediately executed; when a decision to reconsider an application has been made, the Swedish Migration Agency should always examine if the execution of the prior decision should be stopped.[183]

(manifestly unfounded application). The Swedish Migration Agency may also decide on rejection with immediate enforcement if an asylum application is rejected on the basis of ch. § 1 b first paragraph 1 or 2.
It may only be considered obvious that there is no basis for asylum if
1. the alien's information is irrelevant to the examination of the application;
2. the alien's information lacks reliability, or
3. the alien comes from a safe country of origin according to such a list as is referred to in ch. § 6 a, and he or she
(a) is a national of that country or is a stateless person who has previously had his or her habitual residence there; and
(b) has not put forward any serious reasons why the country should not be considered a safe country of origin for him or her.
In 12 chap. Section 7 contains more detailed provisions on the enforcement of decisions on rejection with immediate enforcement. Lag (2021: 223)

[180] Ibid, para.3.

[181] Swedish Migration Agency, 'Migrationsverkets föreskrifter om förteckning över säkra ursprungsländer', MIGRFS 2021:4, 25 May 2021.

[182] Prop. 2020/21:71 (n 12), p. 19.

[183] 10 § Chapter 12 Swedish Alien Act (Utlänningslag 2005:716)

With the new adaptations of the Swedish national law, the Swedish Migration Agency has also developed a new authority guideline for how to enforce the concept. The guideline mainly refers to the relevant provisions of the recast APD and reinforces the possibility to assess such cases as manifestly unfounded and immediately execute decisions with the removal of the applicant from Sweden.[184] The immediate execution of a decision and the removal of an applicant must be done within 3 months, and after 3 months the authority must take a decision of deportation. The guideline states that the individual circumstances must be assessed in every case, and in cases of uncertainty the applicant's interest should outweigh the state's interest to control migration, and this should be applied for applicants from safe countries of origin as well.[185]

The guideline then reaffirms the three cases for an application to be considered manifestly unfounded; if the claims are not relevant for the assessment of international protection (such as merely economic and social claims), if the applicant has stated incorrect or untruthful information for the substantial part of their asylum application or if the applicant's claims are to be considered manifestly unfounded due to the possibility of adequate protection from the authorities in the applicant's country of origin and the overall safety of that nation.[186] The latter ground for an application to be considered manifestly unfounded is the one relevant for applicants from countries designated as safe countries of origin. For the Swedish Migration Agency to designate a country as safe; this should be based the same grounds for assessing the safety of a nation as those stated in Annex I of the recast APD. The Swedish Migration Agency should as the responsible authority for the SCO list have assessed the available land information and constructed a

When the Swedish Migration Agency reconsiders a rejection decision, the agency shall examine whether inhibition is to be decided. Lag (2016: 1243).

[184] Swedish Migration Agency, 'Rättsligt ställningstagande - Avvisning med omedelbar verkställighet till hemlandet inklusive säkra ursprungsländer', RS/071/2021, 25 May 2021, p. 3–4.

[185] Ibid, p. 4-5.

[186] Ibid, p. 6-9.

list of countries that can be considered safe. This list is to be published and reviewed continuously to consider if a country is to be removed or added to the list.[187]

Furthermore, the guideline discusses the presumption of safety, and if the grounds claimed by an applicant is based on a threat from a private individual or organisation; there is a presumption for that the national authorities can provide with sufficient and efficient protection. It further states that this presumption is rebuttable, meaning that it can be broken by the applicant if there are such serious reasons for why the country cannot be considered safe for the individual in question. For the presumption to be broken, the individual must prove that such circumstances that are mentioned in 1-2 §§ Chapter 4 of the Swedish Alien Act prevail. It can be reasons connected to the person being a member of a vulnerable group or the situation in the region that the applicant originates from.[188] However, the Swedish Government have chosen to not allow for the possibility to divide regions up as safe or that a country may be safe for some but not as others, and the region must be consistently free from such persecution as mentioned in 1-2 §§ Chapter 4 of the Swedish Alien Act.[189]

The guideline on how to rebut the presumption can appear as contradictory with the decision of the Swedish Government to not allow for the division of safety for regions or vulnerable groups, as this was to be incorporated in the assessment of the overall safety of the countries.[190] Therefore, one can question this as a possible ground to rebut the presumption. Furthermore, the reasons do not have to be more serious than those that normally are required for an applicant to be considered a refugee.[191] Considering what is said about the threat from individuals or organisations to normally not being considered sufficient to rebut the presumption due to assumption that the country's own

[187] Ibid, p. 7-9.
[188] Ibid, p. 9.
[189] Prop. 2020/21:71 (n 12), s. 15–16.
[190] Ibid, Swedish Migration Agency (n 184), p. 9.
[191] Prop. 2020/21:71 (n 12), p. 8-9.

authorities can provide with sufficient protection; one can question whether this may contribute to a higher threshold in the sense that more serious grounds would be required.[192]

4.4 Chapter Conclusion

To conclude, this chapter has illustrated how the refugee crisis in 2015 led to several changes in the Swedish national migration law; following the more restrictive trend of the CEAS. Even if the SCO concept had been relied on in Sweden prior to the implementation, the ruling from the CJEU led to Sweden officially implementing it into national law. The SCO rules from the recast APD was implemented in a new paragraph and led to amendments of the provision regulating the possibility to immediate execute decisions, which enables applicants from safe countries of origin to be subjected to this. The implementation is greatly similar to the provisions of the recast APD. However, the national guidelines do not provide with the needed clarity about how the presumption of safety is to be rebutted and can also appear as contradictory with the Swedish legislative implementation of the SCO rules. This can strengthen the concerns for that the SCO rules can have a negative effect on the access to asylum in Sweden, due to a considerably difficult position of applicants from safe countries of origin to rebut the presumption. The upcoming chapter will therefore address the compliance of the Swedish SCO rules with the right to asylum and international human rights norms; to assess if the concerns discussed in Chapter 3 also prevail in the Swedish context.

[192] Hunt (n 3), 511-512.

5 Compliance of the Swedish Implementation with the Right to Asylum

This chapter will analyse the issues raised in regard to the SCO concept and the right to asylum in the Swedish context. It will evaluate the Swedish rules in relation to the important principles and norms enshrined right to asylum, as discussed in Chapter 3. The chapter aims at assessing how the national implementation affects these obligations and the access to asylum, to concretise possible concerns and contradictions with the implementation of the concept in Sweden, and in turns also the EU.

5.1 The Right to Asylum

5.1.1 The Right to an Individual Assessment

To ensure that an individual assessment is available to avoid systematic rejections is vital for the Swedish asylum system to comply with the binding right to asylum as codified in art. 18 of the EU Charter. The procedural obligations of a fair asylum process as encompassed in the right to asylum can possibly be endangered within the paradigm that Sweden has entered the past years of enforcing more restrictive migration laws.[193] As discussed, one of the objectives for implementing the SCO concept was to decrease the number of applicants that were considered to have no real prospect of success to apply for asylum in Sweden. This was motivated as a manner of providing possible asylum seekers with predictability.[194] However, with the current restrictive paradigm, this appears to rather diminish the access to asylum by in the long-term aiming at preventing asylum seekers from arriving to Sweden's territory. The limited rights of asylum seekers and the decreased prospect of being granted asylum as more of a scare tactic can contradict the right and access to asylum as well as the norm of non-discrimination, this will

[193] Thorburn Stern (n 162), p. 120-122.
[194] Prop. 2020/21:71 (n 12), p. 25.

be discussed further in section 5.3. To hinder such a contradiction, Sweden must ensure that the procedure, even if it is accelerated, does not lead to systematic processing without an individual assessment. Sweden must weigh in the circumstances when such a fast-track procedure should not be used in order to adopt the procedure accordingly to ensure that the guarantees imposed in the recast APD are respected.

Furthermore, the creation of the presumption can cause a difficulty for individuals to realise their right to asylum as enshrined in art. 18 of the EU Charter, by placing the burden of proof on the applicant in a more extensive manner. In the guideline from the Swedish Migration Agency on the assessment of manifestly unfounded applications concerning applicants from designated safe countries of origin, no clarity is provided with on how the presumption may be broken beyond claiming such grounds as established in the Swedish law 1-2 §§ of the Swedish Alien Act, which corresponds to art. 9 of the QD.[195] Naturally one could assume that asylum applications from safe countries of origin would be based on such grounds but that they rather are considered unfounded due to the safety of the nation and adequate protection, causing this presumption to become difficult and dubious to challenge.[196]

The fact that Sweden now has implemented the possibility to accelerated procedures based on the SCO concept, should in accordance with what is stated in the recast APD; not undermine the rights of asylum seekers and Sweden must ensure adherence to regulations on special procedures in the directive.[197] Assessing the Swedish implementation and the guidelines from the Swedish Migration Agency this might appear as coherent with the EU regulations on such special procedures, and the issues may lay in the inherent contradictions of the concept on an EU-level. However, this does not exempt Sweden from their positive obligations in regards to the right to asylum.

[195] Swedish Migration Agency (n 184), p. 8–9.
[196] Costello (n 5), p. 620.
[197] Recast APD (n 2), art. 24(3).

When observing the national implementation in Sweden it reflects this contradiction and the possible negative effect on the access asylum in Sweden, where the individual assessment is diminished by focusing on the country situation. The impact of diminished procedural guarantees in the context of the SCO regulations in Sweden will be discussed further in Chapter 6.

5.1.2 Access to Effective Remedy

According to 6 § Chapter 14 of the Swedish Alien Act, a decision on refugee status can be subject to appeal. The decision on rejection and expulsion can also in accordance with 3 § Chapter 14 of the Swedish Alien Act be appealed. For a rejection combined with immediate execution, the national court should evaluate the question of inhibition, and this should be done urgently.[198] According to the 8 § of the Administrative Court Procedure Act, the national courts have to ensure that the case is investigate to the extent required. If there are any uncertainties or shortcomings in the party's statement; the court should help to repair these to the extent possible.[199] Similar to the obligations imposed in the recast APD; Swedish national law affirms the positive obligations for the national courts to ensure that a sufficient investigation is executed and strengthen the claims of the individual assessment as a vital component of the right and access to asylum.

5.2 The Principle of Non-refoulement

The protection of the right to asylum and the execution of an individual assessment is also vital to hinder violations of the principle of non-refoulement and non-discrimination; however, these norms and principles appear to already suffer negative consequences in the current Swedish migration paradigm. As the focus is on the decreased immigration and uncertainties prevails to the interpretation and enforcement of convention

[198] Prop. 2020/21:71 (n 12), p. 21.
[199] 8 § Administrative Court Procedure Act (Förvaltningsprocesslag (1971:291)).

obligations.[200] Sweden is a contracting party to the UDHR, ECHR, The Refugee Convention and has as an EU Member State undertaken the obligations to consider this fundamental principle in the context of the asylum process. In order to ensure that Sweden does not violate the principle of non-refoulement, it is essential that there is an individual assessment and a real possibility to challenge the presumption of safety for the right and access to asylum to not become redundant. As discussed in section 3.2 it has been established that the principle of non-refoulement as protected under these various international human rights instruments, encompasses an obligation for states to implement national mechanisms for asylum determination procedures.[201] Examining the Swedish implementation of the SCO rules, one can observe similar risks of weakened procedural guarantees in the special procedure based on the SCO concept. The reduced focus on the merits of the individual case has in past case law been considered violating the principle of non-refoulement; reinforcing how this is an important aspect to consider in the context of the new SCO regulations.[202]

5.3 The Prohibition of Collective Expulsion

The SCO rules allow for a fast-track procedure based on nationality. If the practice becomes a ground for systematic rejection to rather fulfil its outspoken objective of decreasing immigration; it increases the risk of Sweden possibly breaching the prohibition of collective expulsion. In the light of the partly dissenting opinion of Judge Serghides in the ECtHR case *Khlaifia and Others v. Italy*, the substantially diminished rights of asylum seekers in favour of state's sovereign right to control migration, can cause a conflict with this prohibition.[203] In the guidelines from the Swedish Migration Agency, in the case of uncertainty it is stated that the individual's interest

[200] Thorburn Stern (n 162), p. 120–121.
[201] General Comment No. 4 (n 127).
[202] *M.S.S. v. Belgium and Greece* (n 106), para. 352–360.
[203] *Khlaifia and Others v. Italy* (n 98), Partly Dissenting Opinion of Judge Serghides, p. 108.

should be prioritised over the state's.[204] However, this is in the context of the assessment; and one can question whether this priority has not already been done as Sweden chose to implement the concept as a ground for an accelerated procedure where the individual's rights are weakened.

5.3 Accepting the Discriminatory Nature of the Concept

Sweden as an EU Member State is a signatory party both to the ECHR and the additional protocols. Sweden did not make any alterations or national implementations of the convention as it was in considered to be in accordance with the national law.[205] By the adoption of the convention, Sweden is obliged to ensure that all their laws are in accordance with the rights and obligations of the convention. This is reaffirmed in 19 § Chapter 2 of the Instrument of Government, which is one of the four constitutional laws in Sweden that makes up the constitution of Sweden.[206] Besides the reference to the obligations of the ECHR, there is also a national obligation of non-discrimination in 12 § Chapter 2 of the Instrument of Government.[207] Furthermore, Sweden is party to the Refugee Convention and the UDHR, and the codified prohibition of non-discrimination in art. 33 of the Refugee Convention respectively art. 7 UDHR is therefore relevant for the assessment of the Sweden's coherence with the norm of non-discrimination when implementing new regulations in their migration law.

Consideration should also be made to the relevant EU law, and art. 21 of the EU Charter as a binding obligation for Sweden as a EU Member State. This

[204] Swedish Migration Agency (n 184), p. 3–4.
[205] Madelaine Seidlitz, *Asylrätt: en praktisk introduktion*, 2nd edn, Norstedts juridik, Stockholm, 2019, p. 48.
[206] 19 § Chapter 2 Instrument of Government (Regeringsformen 1974:152)
No act of law or other provision may be adopted which contravenes Sweden's undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms.
[207] 12 § Chapter 2 Instrument of Government (Regeringsformen 1974:152)
No act of law or other provision may imply the unfavourable treatment of anyone because they belong to a minority group by reason of ethnic origin, colour, or other similar circumstances or on account of their sexual orientation.

calls for them to consider the article in their enforcement of asylum law in accordance with art. 78 TFEU and the relevant guidelines on the recast APD which affirms it as an overarching principle of the asylum procedure.[208] Similar to the critique brought forward by Hunt, one can argue that the changes following the implementation of the SCO rules in Sweden, has led to lower standards and a disregard for essential human rights instruments as observed with the lessened protection for those specific nationals that fall under the scope of the SCO based fast-track procedure. The contradiction between the concept and the norm of non-discrimination; can lessen the SCO rules' legitimacy.[209]

Even if the ECtHR in the case of *H.I.D. and another v Refugee Applications Commissioner and others* would support the implementation of the SCO rules in Sweden and the use of nationality as a ground for accelerated asylum procedures, Costello believe the ruling is disappointing from a non-discrimination perspective. Costello argues that the *H.I.D.* ruling failed to assess how the SCO concept may legally be determined by a general assessment of the country condition rather than individual assessments, being inherently discriminatory.[210] With implementing the concept into Swedish law, Sweden has accepted this view that such differential treatment is motivated without addressing issues of non-discrimination and the essential contradiction of basing the asylum procedure merely on nationality.

Sweden motivated their implementation of the SCO concept with the arguments that it would create a more time and cost effective asylum procedure, as well as a more predictable procedure for the nationals that come from a SCO.[211] Although, with the focus on efficiency and predictability one can identify a possible issue as this can lead to systematic procedures for certain groups of nationals. This could constitute such discriminatory treatment and not be in accordance with the obligations to the right to asylum

[208] EASO (n 115), p. 8.
[209] Hunt (n 3), p. 511.
[210] Costello (n 5), p. 615.
[211] Prop. 2020/21:71 (n 12), p. 25.

both under international human rights standards as well as national law. This displays the discussed contradiction in EU-law with consideration to the relevant procedural obligations established in the recast APD. When the Swedish law was proposed, in the referral by Amnesty International; the organisation addressed the risk of systematic assessments for people from countries designated as safe and that clear guidelines are required for non-discrimination and equal treatment to be ensured as well with a focus on non-refoulement.[212] The ambiguity in how to rebut the presumption of safety can therefore cause the burden of proof to be higher for certain nationals in a discriminatory manner. Since the Swedish regulations and guidelines does not provide much clarity in this regard; this concern might become reality. The discriminatory nature of the SCO concept with the Swedish implementation further illustrates the close connectivity that this has with the principle of non-refoulement and the prohibition of collective expulsion, as basing the assessment mainly on nationality can have a negative effect on these principles enshrined within the right to asylum.

Costello argue that the issue of discrimination has mainly been invoked when the SCO designation is lacking in foundation.[213] Even if the recast APD sets certain guidelines, the manner of implementation is also partially left to the Member States.[214] The Swedish guidelines for assessment does not currently provide the well-needed clarity for how the affected national can rebut the presumption and the guidelines can appear as contradictory with the legislated manner of designation. The Swedish Migration Agency guidelines states that the presumption can be broken if such grounds for asylum as established in 1-2 §§ Chapter 4 of the Swedish Alien Act are claimed, and that it can be grounds related to the situation in the region or for the person as a vulnerable group.[215] However, in the preparatory work Sweden has chosen to not divide certain regions as safe, and that the situation for minorities and the conditions of regions rather should be incorporated in the assessment of the overall

[212] Amnesty International (n 18), p. 1.
[213] Costello (n 5), p. 615.
[214] Recast APD (n 2), art. 37.
[215] Swedish Migration Agency (n 184), p. 9.

safety. The existence of the given treatment in 1-2 §§ Chapter 4 of the Swedish Alien Act, respectively art. 9 QD, would indicate that the country in question is not a suitable SCO due to the lacking aspect of consistency.[216] Therefore, the guidelines by the Swedish Migration Agency might be in violation of the manner of designation as affirmed in the law.

Besides the aspect of efficiency, Sweden believed that the implementation of the SCO regulations in accordance with the recast APD would improve harmonisation within the EU. However, there are currently discrepancies in the manner of implementation and designation of SCO, as observed with Sweden's choice to not divide in regions as safe whilst this is done for example in Denmark.[217] The creation of a common SCO list in the EU could arguably reduce claims of discriminatory treatment as it would decrease the differential treatment of nationals between the Member States. However, observing the current regulation, there are great dissimilarities within the EU. Therefore, the Swedish as well as other nations' implementations do perhaps not lead to the sought-after efficiency and lessened secondary movement to the extent that the procedure could be motivated on the basis of harmonisation. Hunt argues that the movement of harmonisation rather has resulted in a trend of restricted migration rights across the EU, as can be observed in the Swedish context.[218]

5.4 Chapter Conclusion

This chapter has illustrated how the implementation of the SCO concept in Swedish national law give rise to the same concerns as in the EU context. The national guidelines enforce a high burden of proof for the applicant and do not provide with the needed clarity on how the presumption of safety is to be rebutted. A presumption that also can decrease the right to an individual assessment; a vital positive obligation of the state to ensure the right to asylum

[216] Prop. 2020/21:71 (n 12), s. 15–16.
[217] EASO (n 10), p. 4-6.
[218] Hunt (n 3), p. 510.

in art. 18 of the EU Charter. The lessened consideration for the individual case merits may also affect the protection of fundamental norms such as the principle of non-refoulement and the prohibition of collective expulsion. Sweden has accepted the restrictive paradigm of the CEAS, but the discriminatory nature of the SCO concept cannot be ignored with the weakened procedural guarantees that the new implementation entails for the nationals concerned; lessening the access to asylum. The relevant procedural guarantees in the context of the SCO concept will therefore be discussed further in the following chapter.

6 Procedural Safeguards to Mitigate the Risk of Non-compliance

In this chapter, the procedural aspect of the SCO rules will be addressed more in depth in order to assess what safeguards need to be considered for the right to asylum to be ensured. The chapter will begin by discussing the procedural obligation of the migration authorities in Sweden to ensure a fair and just asylum procedure, in order to mitigate the risk of undermining the right to asylum. Furthermore, it will also discuss the procedural guarantees that should be provided to the individual, such as the right to a public counsel and how this right has been limited in Sweden following the implementation of the SCO rules. It will then discuss the double role of the Swedish Migration Agency, as both a party in migration cases and the expert authority to assess the safety of safe countries of origin and the concerns this can cause in relation to a just and fair asylum procedure.

6.1 Procedural Obligations for Migration Authorities

6.1.1 National Positive Obligations in the Asylum Procedure

Besides the relevant procedural safeguards that are to be ensured according to the recast APD in the context of the individual assessment as discussed in section 3.1.2, the Swedish national legislation provides with further obligations for the responsible migration authorities. In Chapter 13 of the Swedish Alien Act there are regulations on the examination of the cases by the Swedish Migration Agency, such as the right to a personal interview and also the obligation for the authority to provide with a motivation for their decisions when it comes to residence permit and the status as a refugee.

In the Administrative Procedure Law, which is the law that further regulates the work of authorities such as the Swedish Migration Agency, some essential principles to be considered are the principle of legality, objectivity, officiality and the rule of law.

The principle of legality is established in 10 § Chapter 2 of the Instrument of Government as well as 5 § 1 para. of the Administrative Procedure Act; meaning that all official power is to be executed under the laws, this includes the asylum procedures that take place at the Swedish Migration Agency.[219]

The principle of objectivity is also established in the Instrument of the Government, moreover in 9 § Chapter 1; stating that the authorities and courts must act on objective grounds as in regards to among other age, religion, ethnicity, gender and political views.

The principle of officiality encompasses an obligation for the authorities and courts to investigate the cases to the extent that the matter at hand demands. The principle is located in 8 § of the Administrative Court Procedure Act for the courts but according to custom it is considered applicable for authorities as well.[220] Furthermore, the authorities also have a service obligation to give guidance and other relevant help to the applicant.[221]

The rule of law includes the principles just mentioned and is essential for the asylum procedure. As stated, the Swedish Migration Agency is the relevant authority to handle asylum cases with the objective to ensure an efficient and sustainable asylum system that protects the right to asylum.[222] The UNHCR's Handbook is an important tool for the assessment of asylum applications in Sweden. In accordance with the national legislation as regards to the importance of considering the rule of law, this is also affirmed in art. 192 of

[219] Seidlitz (n 205), p. 48-49.
[220] Ibid, 8 § the Administrative Court Procedure Act (Förvaltningsprocesslag (1971:291))
[221] See note 172 on 6 § the Administrative Procedure Act (Förvaltningslag (2017:900), Seidlitz (n 205), p. 48-49.
[222] Förordning (2019:502) med instruktion för Migrationsverket 2019, § 1.

the Handbook. In accordance with the general basis for the national law; it is the applicant that holds the burden for proving that they are in a need of international protection.[223] However, Swedish court law has affirmed that even if it is the applicant that holds the burden of proof, due to the nature of migration cases the responsible authorities have an extensive investigate obligation in accordance with the principle of officiality.[224] Benefit of the doubt has also been recognised in Swedish case law, confirming this as a legal principle to be considered regarding the review of evidence and should therefore be used in the context of the SCO rules.[225] Although, it has been debated whether the presumption of safety that needs to be rebutted in the context of the SCO, creates a higher burden of proof for the individual than the one established in the relevant national and international sources; reducing the responsibility of the examining authorities.[226]

There are further guidelines supplementing the manner of enforcement of asylum procedures from the Swedish Migration Agency. Such as the guidelines on unfounded applications in regard to the SCO regulations, but also for example on the assessment of credibility. However, the guideline on credibility is arguably not of such relevance for applications regarding the SCO rules, as it is a matter of unfounded applications rather than a lacking credibility and the Swedish Migration Agency can then make an assessment on the sufficiency.[227] However, one can consider some situations where credibility could be of relevance for the cases where the country of origin or nationality of the applicant is uncertain. However, as the focus for unfounded applications is according to the relevant authority guidelines on sufficiency

[223] Handbook (n 31), para. 196.
[224] 8 § the Administrative Court Procedure Act (Förvaltningsprocesslag (1971:291)), MIG 2006:1, Swedish Migration Court of Appeal, 18 September 2006.
[225] MIG 2006:1 (n 224).
[226] Hunt (n 3), p. 512.
[227] Swedish Migration Agency (n 184), p. 9, "Tillräcklighet" in Swedish, meaning that even if the grounds would be true and credible they are not sufficient to reach the threshold of 1 and 2 §§ Chapter 4 of the Swedish Alien Act corresponding to art. 9 of the QD, similar to the assessment of unfounded applications, MIG 2006:1 (n 224), Seidlitz (n. 205), p. 81.

and unfoundedness; this rather reaffirms the importance to have the individual circumstances adequately investigated.[228]

6.1.2 Ensuring an Indidvidual Assessment of SCO cases in Sweden

The importance of the individual case to be investigated has been established in the Swedish national legislation as regards to the right to a personal interview and the examination of the merits of the case.[229] The UNHCR has in past observations directed critique towards Sweden for the lacking consideration for applicants' individual circumstances and even if the asylum procedure has been considered to be adequate; they believe there to be a need for improvement.[230] One could consider that the implementation of the SCO regulations can give rise to similar issues with lacking assessments due to the presumption of safety based on the applicant's nationality rather than investigating the merits of the individual case.

Art. 14 of the recast APD establishes certain requirements for ensuring a personal interview but leaves much to the Member States on how to implement this. Hence, Sweden has a great responsibility for ensuring that this procedural right is protected and that an individual assessment is conducted. Even if Sweden requires that a personal interview always is conducted in asylum cases (with the exception if the applicant choses to not participate), the interview must also comply with these international standards for ensuring an individual assessment as protected within art. 18 of the EU Charter on the right to asylum. As stated, Sweden has undertaken several international as well as national obligations to ensure fair and just procedures in the context of the asylum applications. For example, the responsibility of the case officer conducting the interview cannot be neglected. Furthermore, when a decision is to be executed, the benefit of the doubt should still be of

[228] Swedish Migration Agency (n 184), p. 9.
[229] 1 and 3 §§ Chapter 13 of the Swedish Alien Act.
[230] Liv Feijen, Frennmark Emelia, *Kvalitet i svensk asylprövning: en studie av Migrationsverkets utredning av och beslut om internationellt skydd*, Swedish Migration Agency, Office of the United Nations High Commissioner for Refugees, 2011, p. 65–71.

relevance for SCO cases even if they fall under fast-track procedures and the case officer still have a responsibility to ensure that the case is investigated to the extent needed.[231] In order to ensure an individual assessment it is important that Sweden emphasises these obligations and does not allow the focus on efficiency to outweigh these fundamental procedural safeguards. As it is stated in the guidelines from the Swedish Migration Agency, in the case of uncertainty; the interest of the individual should be prioritised.[232] Also, the recast APD concludes that people that have experienced physical or psychological trauma, should not be subjected to accelerated procedures.[233] This is also reaffirmed in the guidelines by the Swedish Migration Agency, and that one should assess this for every individual case. For these situations, it might be relevant to provide the applicant with legal representation in the form of a public counsel, this will be discussed further in section 6.2.[234]

Considering the importance of assessing the merits of the case as affirmed both in national and international human rights standards, for Sweden to cohere with their binding obligation under art. 18 of the EU Charter would require that this new possibility of fast-track procedure by the implementation of the SCO regulations, does not lead to systematic decisions merely based on nationality than the individual circumstances. The national law of Sweden and the direct relevance of the international human rights standards, further strengthens the claims of the positive obligations of the relevant authority and courts to ensure that each individual case is assessed on its merits; to ensure that decision is based on objectivity and legality.[235] The diminished procedural safeguards does however indicate that the SCO regulations and the restrictive trend of the Swedish migration law can cause a contradiction with these fundamental principles and procedural safeguards. The risk of systematic decisions does increase with the use of fast-track procedures based

[231] Handbook (n 31), para 192-196.
[232] Swedish Migration Agency (n 184), p. 6–9.
[233] Recast APD (n 2), art. 24(3).
[234] Swedish Migration Agency (n 184), p. 12.
[235] 9 § 1 Chapter Instrument of Government (Regeringsformen), 5 § Administrative Procedure Act (Förvaltningslagen).

on a presumption that is difficult to rebut for applicants that in turn also will have limited procedural guarantees.

6.2 Procedural Guarantees for the Aplicant

In EASO's guidelines for the application and implementation of the recast APD, certain individual procedural guarantees should be ensured for the applicant. The applicant should for example be provided with adequate mechanisms, free of charge containing such relevant legal and procedural information. Furthermore, the right to legal assistance and representation should not be arbitrarily restricted.[236] The level of procedural protection given to the applicant is supposed to be dependent on the interests at stake for the person concerned. Considering the nature of asylum cases, being not economic but human rights issues, as well as the absolute prohibition of refoulement and the right to asylum; this would indicate that the interests at stake are of such a severity that fairly high procedural protection should be guaranteed to the individual.[237] This has also been established the case of *Mansour Ahani v. Canada* where the HRC stated that the closest scrutiny should be applied to the fairness of the procedure.[238] The ECtHR has also expressed the importance of information on the asylum procedure and the effective access to the actual procedure, but also the access to linguistic and legal aid.[239]

However, as an application is considered manifestly unfounded if an applicant is from a SCO, there is according to the directive a possibility to deny the right to a public counsel. The recast APD states that for such cases where there is no *tangible* prospect of success for the appeal; the Member States may decide to not provide free legal assistance and/or representation.[240]

[236] EASO (n 115), p. 15-16.
[237] Reneman (n 107), p. 722-726.
[238] Ibid, p. 726, Et al. *Mansour Ahani v. Canada*, UN Human Rights Committee (HRC), CCPR/C/80/D/1051/2002, 15 June 2004, para. 10.5.
[239] Et al. *Hirsi Jamaa and Others v. Italy* (n 106), para. 204, *M.S.S. v. Belgium and Greece* (n 106), para. 201.
[240] Recast APD (n 2), art. 20(3).

This might appear as contradictory to those rights that are to be ensured for asylum seekers due to the principle of non-refoulement and the access to asylum. The continuously enforced presumption of unfoundedness and safety creates a higher threshold for an applicant, as well as further limiting their realistic possibility of challenging the presumptions.

In 1 § Chapter 18 of the Swedish Alien Act it affirms the right to a public counsel and that there is a presumption for the right to a public counsel for cases of rejection or expulsion. However, there are certain exemptions to this presumption for cases of immediate execution. This is an adjustment that has been made in coherence with the recast APD, art. 20(3).[241] For the cases where an application is considered manifestly unfounded; a public counsel is normally not to be provided.[242] The Swedish law is overall more beneficial than the regulations in the recast APD in respect to the right to be provided with a public counsel. However, applications that are considered manifestly unfounded have in the Swedish law been exempted from such a right which will weaken the procedural safeguards for applicants from safe countries of origin. According to authority guidelines, the assessment of the right to a public counsel is to be based on the strength of the claims made, and the circumstances of the individual as discussed above, rather than the process as such. [243] However, with an explicit exemption in the procedural rights for applicants from safe countries of origin; it is clear that the process of the respective applicant does affect the right to be provided with legal representation.

Following the limited right to a public counsel and the possibility to execute the decision immediately for such unfounded applications, the procedural safeguards for applicants from safe countries of origin are limited. These national implementations are based on the recast APD but assessing the safeguards that are to be ensured within in the asylum procedures and why,

[241] Swedish Migration Agency (n 184), p. 12.
[242] Seidlitz (n 205), p. 61, Swedish Migration Agency (n 184), p. 13.
[243] Swedish Migration Agency (n 184), p. 12.

as to their sensitive nature, to diminish the right to a public counsel and legal representation appear as contradictory and may not uphold the standards required for a fair and just individual assessment.[244]

6.3 The Double Role of the Swedish Migration Agency

An issue at hand for the Swedish legislation in regard to the manner of assessment is that the responsible authority for the creation of the SCO list is the Swedish Migration Agency. The Swedish Migration Agency acting both as an expert authority and as a party in migration cases, can cause concerns for the impartiality and legitimacy of the system.[245]

The double roles of the Swedish Migration Agency can possibly cause issues with biases when it comes to the manner of designation during the creation of the SCO list. Rejection rate is not one of the given grounds for assessing a nation as safe in Annex I of the recast APD, and is allegedly not one of the grounds to be considered according to the Swedish legislation. However, in the Swedish context with one of the main parties as the expert authority for designation; it can create apprehensions for the aspect of rejection rates affecting the designation of safety of countries. An observed trend with the designation of safe countries of origin, is that they commonly reflect the rejection rates and that countries that applicants come from and rarely receive asylum often is designated as safe.[246] In 2016 EASO's statistics showed that 90% of applicants subjected to fast-track procedures were rejected which according to Costello can cause a self-fulfilling prophecy of the presumed safety of the nation.[247]

[244] Et al. *Hirsi Jamaa and Others v. Italy* (n 106).
[245] Swedish Red Cross, 'Svenska Röda Korsets yttrande över promemorian "Uppenabart ogrundade ansökningar och fastställande av säkra ursprungsländer (Ds 2020:2)"', Ju2020/00449, 30 March 2020, p. 7.
[246] Costello (n 5), p. 605-606.
[247] EASO, 'Annual Report on the Situation of Asylum in the European Union 2015', EASO 2016 96, 2017, p. 99, Costello (n 5), p. 606.

By evaluating past statistics from the Swedish Migration Agency, one can observe that already in 2020 the eight countries that currently are designated as safe countries of origin were nations that had a very low approval rate, around 0-3%.[248] Hence, it is important that the Swedish Migration Agency considers what factors are incorporated into the assessment of safety to ensure that the rejection rates are not a primary factor which would be incoherent with the terms set in Annex I of the recast APD. Furthermore, when observing the statistics from 2021 (which has not been finalised yet) there is a slight a higher approval rate for the nations that Sweden currently consider as safe than the prior year.[249] However, consideration must be taken to the yearly shift of the statistics and that this was following the CJEU primary judgement that stated that Sweden could not rely on the SCO concept without implementing it into national law, and the statistics that display the effect of the implementation will be visible the following year of 2022.

Some might argue that rejection rates can be a motivated aspect to consider when designating countries as safe, and it was a part of the suggestion for a common EU list by the European Council as a factor considered for the designation.[250] However, this was criticised by amongst other the European Economic and Social Committee due to the statistical ambiguity between Member States.[251] Furthermore, considering the actual coherence with recast APD and Annex I; rejection rates should regardless not be a criterion for designating a country as a SCO.

In order to ensure that the SCO list is not created in an arbitrary manner or on incorrect criteria, this requires the use of a wide set of information, as stated in art. 37 the recast APD. This is reaffirmed in the guidelines by the Swedish Migration Agency, which also states that this was done when the current

[248] Swedish Migration Agency, 'Avgjorda Asylärenden Beslutade Av Migrationsverket, Förstagångsansökningar, 2020' <https://www.migrationsverket.se/Om-Migrationsverket/Statistik/Asyl.html>, accessed 22 April 2022.
[249] Swedish Migration Agency, 'Avgjorda Asylärenden Beslutade Av Migrationsverket, Förstagångsansökningar, 2021' <https://www.migrationsverket.se/Om-Migrationsverket/Statistik/Asyl.htm>, accessed 22 April 2022.
[250] European Parliament (n 57), p. 6-7.
[251] European Economic and Social Committee (n 58), para. 4.5.1.

national SCO list was created.[252] However, the Swedish Migration Agency rely mostly on their own country information, which does also consist of reports by other organisations and nations. Considering the requirements given in the recast APD it would call for the Swedish authorities to consult a wide range of sources such as guidelines from EASO, UNCHR, other Member States, the Council of Europe and International organisations. Due to the lacking transparency of the motivation for the chosen SCO list, as the guideline merely states how these nations generally have sufficient national protection for their citizens, it is not clear how extensive the investigation prior to the designation of the safe countries of origin has been.[253] This can in accordance with the argumentation of Costello as discussed in section 5.3 give rise to discriminatory treatment, and such faulting assessments also increases the risk of breaching the principle of non-refoulement and the prohibition of collective expulsion.

Considering that the SCO rules creates a strong focus on the nation in question, relevant country information is of essence to ensure that the decision is based on updated material in order to ensure that the evidence used is in fact correct and that the decision is justly motivated. Further insight into the manner of designation of safe countries of origin by the Swedish Migration Agency would therefore be desired, in order to ensure that the recast APD as well as relevant national and international procedural safeguards are observed; to ensure that Sweden in turns do not breach among other the right to asylum by not conducting fair asylum assessments. However, one can as discussed already observe diminished rights for applicants from safe countries of origin that might not comply with these fundamental rights and principles.

[252] Recast APD (n 2), art. 37(3), Swedish Migration Agency (n 184), p. 8.
[253] Swedish Migration Agency (n 184), p. 12.

6.4 Chapter Conclusion

To conclude, there are several limitations on the procedural safeguards with the implementation of the SCO concept in Swedish national law. Even if there are arguably strong requirements on national authorities when assessing asylum applications due to their vulnerable nature, the fast-track procedures have enabled a discrepancy from several procedural obligations as well as individual guarantees within the process. The implementation of the SCO regulations contradicts the EU law requirements for a fair and just asylum procedure in order to protect the individual's rights, such as the right to asylum as discussed in the prior chapters. One can therefore note that the implementation of the SCO rules will lessen individual rights. The limited rights following that the SCO regulation is such a fast-track asylum procedure creates a contradiction within the recast APD with those required procedural safeguards enforced in the directive. The right to an individual assessment as encompassed in the right to asylum and to ensure that the merits of a case is sufficiently investigated can be clearly affected by the implementation of the SCO concept. As noted in the recast APD, several procedural safeguards are restricted for applicants from safe countries of origin; contributing to further difficulties for the concerned applicants to rebut the presumption due to shorter time limits and without a guaranteed right to a public counsel. These reduced procedural rights may not be justified in regard to the binding and fundamental rights that can be affected and can also strengthen possible claims of discriminatory treatment.

One can note that the development of the CEAS and the situation of 2015 has had a great influence on the Swedish asylum system and was a motivator for implementing the SCO regulations into national law in combination with the preliminary ruling from the CJEU. The implementation of the concept has largely been based on the directive and is similar to the regulations in the recast APD. The criticism that was brought forward during the investigation for the new national legal amendments does still call for a caution regarding the possible effects that the new SCO rules can have for the assessment of

individual cases. It requires the full observance of the existing procedural obligations on both a national and international level. As the concept has partially been used prior to the actual implementation, one can note a benefit to the concept now being regulated rather than being rather arbitrarily applied. However, as the implementation of the concept has led to new legislative changes that legitimise further accelerated asylum procedures; one can already observe lessened procedural safeguards. It is vital to consider the relation between these procedural safeguards and the relevant human rights obligations they are aimed at protecting such as the right to asylum; and that the new legislation in Sweden can affect the protection of the right and principles when the SCO concept becomes more widely used.

7 Findings and Conclusion

The thesis sought to answer the question to what extent the new implementation of the SCO concept in Sweden affect the right to asylum as enshrined within various international human rights standards. It did so by addressing several components of this question.

The second chapter answered the sub-question on what the SCO concept is and how it was developed and currently is regulated in the CEAS. It discussed how the concept of safety is an established part of the asylum regulation and how the SCO concept also has been prevalent since the 1990's with the London Resolutions and has become a widely-used practice. However, the historical development also illustrates disagreements as how to regulate the concept, as the continuous discussions on the creation of a common SCO list in the EU. The SCO concept has not been immune to criticism, with the concern for lacking individual assessments as the UNHCR's early criticism on the concept and how the paradigm shift towards a more restrictive migration regulation has allowed for fast-track procedures to develop further. With the new Pact on Migration and Asylum, there's a continuous interest to harmonise the rules related to the SCO concept. This strengthens the need for further observations and analysis of the manner of regulation as the practice becomes more established in the CEAS; to ensure compliance with international human rights standards.

The third chapter answered the question how the SCO concept relates to other human rights norms and principles such as the right to asylum and non-discrimination. It discussed the concept in relation to the right to asylum in art. 18 of the EU Charter and the fundamental principles enshrined within this right. It first addressed the scope of the article, to conclude that it entails certain positive obligations for states to ensure that the right is protected. This claim is supported by the states obligations to ensure a fair and just procedure; demonstrating the importance of procedural safeguards; such as the right to

an individual assessment and the access to effective remedy. The individual assessment is also one of the main aspects at risk with the implementation of the SCO concept as a ground for accelerated procedures. Furthermore, the chapter discussed the fundamental principle of non-refoulement as a negative obligation of states in the context of the right to asylum. The possible lacking individual assessment due to the SCO concept's inherent focus on the country situation; can appear as contradictory with the importance of investigating the individual circumstances of the case to protect asylum seekers from refoulement. Following that one of the discussed effects of the SCO concept is systematic evaluations based on nationality; the spread of this practice may lead to violations of the prohibition of collective expulsion, even if nationality might be a justified basis for accelerated procedures. Furthermore, the right to asylum also interrelates to the obligation of non-discrimination as an overarching principle of the CEAS. Considering the discriminatory nature of the concept as being based merely on nationality, one can question whether this can be acceptable in accordance with existing international human rights standards as well as binding obligations within primary EU law. Perhaps, the concept can never can be legitimate and human rights-compliant due to its contradiction with the principle of non-discrimination, and essentially affecting the access to asylum for some nationals.

The fourth chapter then discussed the regulation in the Swedish context and aimed at answering what the historical background was behind the Swedish implementation and how it currently is regulated. It began with discussing the legal developments within the Swedish migration law following the refugee crisis in 2015. This development displays how Sweden has followed the restrictive development of the CEAS. Even if the SCO concept was used prior to implementation; the new Swedish SCO rules allowed for further restrictions and limitations of the procedure for applicants from safe countries of origin. The regulation is similar to the relevant provisions of the recast APD. However, the Swedish regulations demonstrate how uncertainties remain as in regard to how applicants are to rebut the presumption of safety; contributing to a higher threshold for cases that fall under the SCO rules.

Some of the critique directed towards the new regulations is the possible effect on the principle of non-refoulement and non-discrimination. Yet, authorities and courts continued directing their focus on the formalistic aspect without addressing its interconnectedness with the procedural safeguards' aim of protecting human rights. In similarity with the development of the CEAS, the focus is on efficiency and harmonisation; diminishing the central role of individual rights that are fundamental for ensuring international protection.

The fifth chapter went further in depth regarding the issues with the Swedish implementation, by addressing the sub-question if the SCO regulation limits the access to asylum in Sweden. It contained a discussion on the concerns addressed in Chapter 3. The Swedish implementation demonstrates how Sweden has now also accepted the SCO rules as an established practice, ignoring some of the fundamental principles and negative obligations encompassed in the right to asylum; such as non-refoulement, the prohibition of collective expulsion and non-discrimination. Sweden has undertaken several international human rights obligations as a convention party to the Refugee Convention, UDHR, ECHR but also as binding themselves to protect the fundamental rights, freedoms and principles of the EU Charter, such as art. 18, 19 and 21. As an EU Member State, they follow this contradictory paradigm of restrictive migration law, whereas the protection of these rights becomes secondary to the motive of harmonisation. This tendency of an excessive formalism may in the end underline the essence of human rights, such as the right to asylum. The observed trend within the EU and the development of the CEAS with the focus on the harmonisation of the procedures between the Member States, rather than the human rights aspect and the protection of refugees; further prompts the enforcement of the restrictive paradigm. Hence, the implementation in Sweden illustrate the issue on a broader level, and how even if regulations such as the SCO might be in accordance with the recast APD; it appears to contradict prior human rights commitments as well as binding primary EU law.

In the sixth chapter the procedural aspect of the SCO was analysed, and it sought to answer the question what procedural safeguards are to be guaranteed in regard to the implementation of the SCO regulations in Sweden. The recast APD contains the manner of designation of SCO lists, and how to assess the safety of countries. Yet, much of the manner of implementation is left to the respective Member States. The chapter emphasises some of the issues with the Swedish implementation, and how the SCO rules have led to lessened procedural safeguards for those asylum seekers that fall under the scope of the regulation. The Swedish SCO rules and guidelines does not provide with the needed clarity to ensure that individual assessments will be guaranteed. In the light of the UNHCR's prior critique towards Sweden's faulting asylum assessments, the risk for systematic decisions can possibly increase with the implementation of the SCO rules as a ground for fast-track procedures. The higher burden of proof due to the uncertainty in how the presumption can be rebutted also decreases the de facto access to the right to asylum. The regulation rather opens up for what can be considered fast rejections where an applicant also receives reduced legal support as they are not given the right to a public counsel; otherwise a well-established practice in the Swedish asylum procedure. Furthermore, the double role of the Swedish Migration Agency as both a party to migration cases as well as the expert authority that creates the SCO lists; can cause doubts as for possible biases and affect the trust in the system. Furthermore, the manner of designation and review of the lists remain fairly unknown. In order to ensure that the implementation of the SCO rules does not lead to arbitrary decisions based on incorrect facts; the manner of designation must be executed in a correct manner considering the factors given in the Annex I. Regardless of this, one can still question if the reduced procedural safeguards are justifiable in the light of the rights and principles at risk during an asylum procedure.

As stated, the thesis sought to answer the question to what extent the new implementation of the SCO concept in Sweden affect the right to asylum as enshrined within various international human rights standards. One of essential findings of this thesis has been to highlight the existing contradiction

with the concept as such, in regards to the right to asylum and fundamental norms such as non-discrimination. Even if the concept has become widely accepted within the CEAS as a mean of hindering unfounded asylum applications to create a more effective procedure; the discriminatory nature of the concept with basing the assessment on merely nationality should not be disregarded as nations such as Sweden implement and reproduces this ideal as acceptable. The principle of non-refoulement and the prohibition of collective expulsion as negative obligations for states to ensure the right to asylum; is not to be forgotten. The research demonstrated that these principles are at risk in Sweden, as the SCO rules increases the possibility of systematic decisions. One can be critical towards the actual legality of the rules in regards to national and international obligations related to the right to asylum, partially due to the uncertainties in how the enforcement of the SCO rules will prevail. Therefore, the responsibility of the deciding authority being the Swedish Migration Agency cannot be diminished for ensuring that the the relevant rights and safeguards are protected.

To conclude, the right to asylum does not only incorporate such procedural guarantees, but the procedural guarantees are vital to ensure that the right is protected and accessible. With the implementation of the SCO rules, Sweden has lessened certain procedural rights for individuals. This can appear as contradictory to the ideals to be upheld according to both national and international human rights standards for asylum seekers as a vulnerable group. The procedural guarantees ensured in the Swedish legislation reflect those of the recast APD. However, this does not necessarily strengthen the legality of the SCO rules but rather illustrates a clear contradiction within the CEAS as the limitations perhaps are not justified in the light of the rights at risk. The procedural safeguards in the context of asylum procedures is a very tangible mean of assessing the fulfilment of the EU obligations and international human rights standards. For Sweden to ensure that they will not violate fundamental principles and the right to asylum; the right to an individual assessment must be ensured in such a manner that the presumption can be challenged to avoid systematic rejections only with the objective to

decrease immigration. This thesis therefore concludes that the implementation of the SCO rules in Sweden can have a negative effect on the right to asylum as enshrined within various international human rights standards. The assessment of the national implementation illustrates how these concerns and contradictions also prevail on an EU-level. Sweden therefore exemplifies the restrictive paradigm of the CEAS; where a strong focus on harmonisation and formalism, allows for the disregard of the fundamental rights and principles that constitute the core of the asylum system.

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