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A comparative study on the "Safe Country of Origin" principle between the European Union and Canadian asylum legislations

Par Mina Zarghamifar

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Résumé

Deux décennies après l'adoption de la Convention relative au statut des réfugiés en 1951, l'affluence du nombre de réfugiés réclamant l'asile aux frontières occidentales a mené les États européens à instaurer des règles restrictives pour dissuader les demandeurs d'asile à se réclamer de cette protection internationale au sein de leurs territoires respectifs. Une des mesures préventives récentes est la directive sur « Pays d'origine sûrs » (POS) dont l'objectif est d'identifier les requérants non éligibles à recevoir la protection internationale, car issus de pays considérés sécuritaires. Ce travail de recherche propose une étude comparative entre les directives de l'Union européenne adoptées en 2005, puis réformées en 2013 et la *Loi sur l'immigration et la protection des réfugiés* en vigueur au Canada.

D'une part, nous analysons l'impact néfaste de cette directive dissuasive sur les droits fondamentaux des demandeurs d'asile en provenance de pays d'origine désignés, notamment en ce qui a trait à leur droit à une entrevue individuelle ainsi que leur droit d'en appeler de la décision qui a été prise et leur refusant l'asile. D'autre part, nous démontrerons comment l'étendue des limites substantielles à l'égard des droits fondamentaux des demandeurs d'asile en provenance des POS est contradictoire avec les obligations constitutionnelles de l'UE et du Canada, notamment celles formulées dans la *Charte des droits fondamentaux* de l'Union européenne, la *Convention européenne des droits de l'homme* et la *Charte canadienne des droits et libertés*. Bien que l'élaboration et l'application des règles adoptées par les systèmes juridiques mentionnés souffrent de plusieurs défauts violant les droits fondamentaux des demandeurs d'asile en provenance de pays d'origine désignés, nous démontrerons que l'approche du Canada a des conséquences plus draconiennes sur des demandeurs d'asile en provenance de POS que celles découlant de la loi commune applicable dans l'UE. Finalement, nous conclurons que les États occidentaux ne devraient pas se limiter à une solution à court terme telle celle du POS. Ces États devraient avoir plus de responsabilités et offrir une protection internationale accrue en soutenant les pays près de zones de conflits tout en établissant un programme réaliste permettant d'accueillir un nombre précis de réfugiés tous les ans.

Mots Clés : Pays d'origine sûrs – Pays d'origine désignés – Droits humains – Droits procéduraux – Droit à l'entrevue individuelle – Droit d'appel – l'Union européenne – Canada – Réfugiés requérants – Demandeurs d'asile

Abstract

Two decades following the adoption of the *1951 Convention Relating to the Status of Refugees,* the growing number of asylum seekers arriving at the Western countries' borders convinced European States to put in place new asylum rules to prevent asylum seekers from reaching their borders and dissuade the potential refugee applicants from seeking international protection in their respective territories. One of the most recent preventive measures has been the "Safe Countries of Origin" rule (hereafter SCO) whose main purpose is to identify and reject refugee applicants who are not in real need of international protection since they originate from countries which are deemed generally safe. In this research, we conduct a comparative study between the European Union's Directives adopted in 2005 and recasted in 2013, and the *Immigration and Refugee Protection Act* enacted by the Canada.

At the first step, we intend to verify the adverse impact of this deterrent rule, during the expeditious determination procedure, on the SCO asylum seekers' fundamental human rights including the right to personal interview and the right to appeal. At the second step, our objective is to demonstrate to which extent the fundamental human rights limitations imposed on SCO asylum seekers are in contradiction with the EU's and Canada's constitutional obligations undertaken respectively in *EU Charter of Fundamental Rights*, the *European Convention on Human Rights* and the *Canadian Charter of Rights and Freedoms.* Based on this comparative research we illustrate that, while the elaboration and the application of the SCO rule in both the above-mentioned legal systems suffer from inherent flaws which infringe the basic human rights of SCO refugee applicants, Canada's approach has had more drastic consequences on the SCO refugee applicants than those resulting from the EU's common asylum law. Finally, we conclude that, instead of a short-term solution such as the SCO rule, the Western States must accept more responsibilities in providing international protection by supporting the countries that border the crisis zones, and establishing a workable program to accept a specific number of asylum seekers every year.

Keywords: Safe Countries of Origin - Designated Countries of Origin - Human Rights - Procedural Rights - Right to Personal Interview - Right to Appeal - the European Union - Canada - Refugee Applicants - Asylum Seekers

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List of Abbreviations

APD	Asylum Procedures Directive
BOC	Basis of Claim
CCR	Canadian Council for Refugees
CETA	Comprehensive Economic Trade Agreement
CEAS	Common European Asylum System
DCO	Designated Counties of Origin
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECMRI	EU Council of Ministers Responsible for Immigration
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
IRB	Immigration and Refugee Board of Canada
IRPA	Immigration and Refugee Protection Act
IRPR	Immigration and Refugee Regulation
QMV	Qualified Majority Votes
RAD	Right to Appeal
RAPD	Recast Asylum Procedures Directive
RPD	Refugee Protection Division
SCO	Safe Countries of Origin
STC	Safe Third Country
UNHCR	United Nations High Commissioner for Refugees

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Introduction

Questions involving international asylum seekers have persisted throughout human history. Since the twentieth century, these questions have become an international legal issue that requires specific legislation, regional cooperation, and international agreements. To date, the *1951 Convention Relating to the Status of Refugees*[1] (hereafter the *1951 Geneva Convention)* remains the most notable international attempt to define refugee statuses, along with the major principles that provide adequate protection for refugees.

Two decades after ratifying the convention, however, the humanitarian objectives surrounding refugee protection changed as Western States began to view it as a legal instrument that was ill-equipped to handle problems regarding the arrival, acceptance, and resettlement of refugee applicants at their borders or within their territory.[2] The reasons why this internationally established refugee regime went from a responsive system to one that is widely considered inadequate include, among others, a sudden and unexpected mass influx of refugees from non-European countries in particular, along with those originating in countries not normally associated with refugees, such as Asia, Africa, and Central or South America, the appearance of persons with a stateless status, the globalization and dissemination of information and low-cost transportation, which altered the scale of displacement and facilitated access to Western Europe and North America, along with time-consuming and costly refugee admission processes, which exposed the inherent deficiencies surrounding national asylum legislation in Western countries.[3]

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[1] *The 1951 United Nations Convention Relating to the Status of Refugees,* (28 July 1951) online: <http://www.unhcr.org/3b66c2aa10.html>.

[2] Gretchen BORCHELT, "The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards", (2001) 33 *Colum. Hum. Rts. L. Rev.*473, p. 491.

[3] Daniele JOLY, Clive NETTLETON and Hugh POULTON, *Refugees: asylum in Europe?*, Boulder, Westview Press, 1992, p. 5-6; Tomas HAMMAR, *European immigration policy: a comparative study,* New York, Cambridge University Press, 1985, p.249-250; Ninette KELLEY and Michael J. TREBILCKOK, *The making of the mosaic: a history of Canadian immigration policy*, Toronto, University of Toronto Press, 2010, p.352-353 and p.381; Rebecca HAMLIN, *Let me be a refugee: administrative justice and the politics of asylum in the United States, Canada, and Australia*, Oxford, Oxford University Press, 2014, p.47.

Since the early 1980s, a dramatic rise in asylum applications filed in Western States has created an extensive backlog surrounding the refugee determination process. In Western European countries, for example, the number of refugee claims went from 64,000 applications in 1983 to 192,000 in 1986. Similarly, the number of overseas refugees selected in Canada rose from 7,300 in 1977 to 52,000 in 1991, and the number of inland refugee claimants increased from a few hundred in 1977 to several thousand in 1980.[4] Consequently, Western governments have begun implementing a new asylum system primarily intended to prevent refugee applicants from reaching their territory,[5] discourage potential refugees from approaching their borders,[6] and reduce the likelihood that asylum seekers will gain access to their refugee determination process.[7]

With a growing number of asylum seekers since the late 1980s,[8] the inability of Western States to reduce the refugee application backlog in their national asylum system has exposed the inefficiency and short-lived impact of deterrents and dissuasion measures like visa requirements,[9] carrier sanctions on transportation companies,[10] detention,[11] and the rejection of

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[4] W.R. BOHNING, "Integration and immigration pressures in western Europe", (1991) 130(4) *International Labour Review* 445, p.447; Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p.381.

[5] Agnès HURWITZ, *The collective responsibility of States to protect refugees*, Oxford, Oxford University Press, 2009, p.22(part1) and p.5(prat 3); Matthew J. GIBNEY and Randall HANSEN, "Asylum Policy in the West: past trends, future possibilities", (2003) *WIDER Discussion Papers // World Institute for Development Economics (UNU-WIDER)*, No. 2003/68, p.5, online: <http://www.econstor.eu/handle/10419/52741>.

[6] Matthew J. GIBNEY and Randall HANSEN, prec., note 5, p.7-9; Kay HAILBRONNER, "The concept of 'Safe Country' and expeditious asylum procedures: a Western European perspective", (1993) 5 *International Journal of Refugee Law* 31, p.36.

[7] W.R. BOHNING, prec., note 4, p.449; Maryellen FULLERTON, "Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights", (1988) 29(1) *Virginia Journal of International Law*, 33, p.35-39; Maryellen FULLERTON, "Failing the Test: Germany Leads Europe in Dismantling Refugee Protection", (2001) 36(2), *Texas International Law Journal* 231; James C. HATHAWAY, "Harmonizing for Whom: The Devaluation of Refugee Protection in the Era of European Economic Integration", (1993) 26(3) *Cornell International Law Journal* 719, p.720-721; Kay HAILBRONNER, prec., note 6, p.31-37; D. JOLY, C. NETTLETON and H. POULTON, prec., note 3, p. vii-2 and p. 19-20; Eva KJAERGAARD, "The Concept of 'Safe Third Country' in Contemporary European Refugee Law", (1994) 6 (4) *International Journal of Refugee Law* 649; Andrew SHECKNOVE, "From Asylum to Containment", (1993) 5(4) *International journal of refugee law* 516.

[8] W.R. BOHNING, prec., note 4; Kay HAILBRONNER, prec., note 6, p.36.

[9] Agnès HURWITZ, prec., note 5, p.5(part 3); Ninette KELLEY and Michael J. TREBILCOCK, prec, note 3, p.404.

[10] James C. HATHAWAY, prec., note 7, p.720-721; Agnès HURWITZ, prec., note 5, p.5(part 3) ; Matthew J. GIBNEY and Randall HANSEN, prec., note 5, p.6.

basic socio-economic rights for asylum seekers.[12] As the primary European destination for asylum seekers at the time,[13] Germany, Austria and Switzerland were faced with new backlogs in their asylum systems when 438,191, 20,000 and 41,629 requests were filed in 1991 and 1992, respectively.[14] In Canada, the number of inland refugee applicants reached its peak at 37,000 in 1992.[15] As a result, these countries concluded that the main objective should not be to prevent access to the host country's borders, but to limit the stay of asylum seekers while accelerating the asylum process to hasten their removal. A rationale built on social, political and moral considerations stated that the longer asylum applicants resided in the host country, the harder it became to reject and remove them.[16] Consequently, policymakers implemented new and restrictive rules that would provide a judicial and administrative boost to the integrity and efficiency of their asylum determination process by identifying and separating the legitimate refugee claims from the unfounded ones.[17]

The main focus of our research involves the concept of *safe countries of origin* (hereafter "SCO") or *designated countries of origin* (hereafter "DCO"), introduced as a new measure in Canadian refugee law.[18] The SCO concept refers to a country of origin based on its legal and political situation, the general presumption of safety is conceivable and justifiable in the sense that its nationals do not qualify for international protection.[19] These rules are intended to be applied during the preliminary examination or at the start of the determination process[20] to recognize and remove asylum seekers who do not warrant international protection, along with those who are not eligible for refugee status because they originated from a safe country that

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[11] Matthew J. GIBNEY and Randall HANSEN, prec., note 5, p.8.
[12] *Id*.; Kay HAILBRONNER, prec., note 6.
[13] Kay HAILBRONNER, prec., note 6.
[14] *Id*.
[15] Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p.381.
[16] Matthew J. GIBNEY and Randall HANSEN, prec., note 5, p.9.
[17] *Id*., p.7-9; Gerry Van KESSEL, "Global Migration and Asylum", (2001) 10(10) *Forced Migration Review* 10, p.11.
[18] *Immigration and Refugee Protection Act*, S.C. 2001, c.27, s.109.1; Kay HAILBRONNER, prec., note 6.
[19] Hemme BATTJES, *European Asylum Law and International Law*, Leiden, Boston, M. Nijhoff Publishers, 2006, p.344.
[20] Kay HAILBRONNER, note 6, p.32.

provides adequate protection[21] and poses no serious risk of persecution,[22] inhuman treatment, or degrading punishment.

In effect, this initiative represents a new avenue for the general practice known as *safe country practice*, which includes different rules such as *safe third country*, *first country of asylum*, and *safe country of origin*. The first two rules were implemented in the early 1980s in Europe by the Scandinavian countries,[23] while the third was brought forward at the beginning of the 1990s.[24] In general terms, the safe country practice was implemented to prevent asylum seekers who are not in any real (safe country of origin) or urgent (safe third country or first country of asylum) need of protection from gaining access to a complete examination during the first instance of the determination process.[25] Thus, the safe country concept theoretically refers to two distinct but interconnecting situations. The safe third country or first country of asylum rule applies when asylum seekers come from a third State in which they have already found protection, or when they acquire a reasonable opportunity to seek protection at the border of, or within, the third country's territory before continuing to their destination State.[26] There may be cases, however, where the nationality or formal residence of the asylum seekers' involves a State that is generally considered safe due to its low refugee rate and where the asylum seekers, or the group to which they belong, are not at risk of persecution. This situation led to the creation of new measures regarding safe countries of origin.[27] While questioning the basis of refugee claims, asylum seekers from safe third countries, first countries of asylum, or safe countries of origin are now

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[21] Sabine WEIDLICH, "First Instance Asylum Proceedings in Europe: Do Bona Fide Refugees Find Protection", (2000) 14(3)*Geo. Immigr. LJ* 643, p.650-651.

[22] European Union*, Conclusions on Countries in Which There is Generally No Serious Risk of Persecution ("London Resolution")*, 30 November 1992, online: <http://www.refworld.org/docid/3f86c6ee4.html>.

[23]Agnès HURWITZ, prec., note 5, p.1 (part3).

[24] Cathryn COSTELLO, "Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?", (2005) 7 *European Journal of Migration and Law* 35, p.50.

[25] Matthew J. GIBNEY and Randall HANSEN, prec., note 5, p.9-12.

[26]European Union, *Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries ("London Resolution")*, 30 November 1992, para.2(c), online: <http://www.refworld.org/docid/3f86c3094.html>.

[27]European Union*, Conclusions on Countries in Which There is Generally No Serious Risk of Persecution ("London Resolution")*, prec., note 22, para.1.

denied the standard (case-by-case) asylum procedure by the receiving State, resulting in an expeditious application process with very restricted procedural and appeal rights.

With regard to national legislation in Western States, some authors claim that Switzerland was the first country to adopt this new and restrictive measure in its national asylum laws.[28] The concept, however, was quickly implemented in Western European States, owing to the "policy-sharing interactions characteristic"[29] of asylum legislation. In other words, the sudden appearance of the SCO rule in Western European countries stems from an implicit intention to promote the "procedural race to the bottom"[30] by exercising more restrictive measures in an effort to appear equally, if not less, unfavourable than neighbouring States.[31] By the mid-1990s, the SCO rule had been incorporated into the national asylum policy of many Western European countries, including Switzerland (1990), Austria, Finland, Luxembourg (1991), Germany (1992), Portugal (1993), Denmark (1994), The Netherlands (1995), and the United Kingdom (1996).[32] It is not clear which of these preventive or restrictive measures proved most efficient in reducing the refugee application backlog in the EU, but by the end of the 1990s the number of asylum seekers had seen a significant decline in the EU Member States, dropping from nearly 700,000 requests in 1991 to fewer than 300,000 in 1997.[33]

The safe country practice was implemented by EU Member States through the creation of the Common European Asylum System when it adopted the *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and*

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[28] Cathryn COSTELLO, prec., note 24.
[29] *Id*.
[30] *Id*.; Matthew HUNT, "The Safe Country of Origin Concept in European Asylum Law: Past, Present, Future", (2014) 26(4) *International Journal of Refugee Law* 500, p.504.
[31] Matthew HUNT, prec., note 30, p.503-505.
[32] Cathryn COSTELLO, prec., note 24, p.51; Henry MARTERSON and John MCCARTHY, "'In General, No Serious Risk of Persecution': Safe Country of Origin Practices in Nine European States", (1998) 11(3) *Journal of Refugee Studies* 304, p.306; European Parliament, "Asylum in the European Union: The "Safe Country of Origin Principle"", November 1996, p.4-5, online: <http://aei.pitt.edu/4906/1/4906.pdf>.
[33] Sabine WEIDLICH, prec., note 21, p.646; Intergovernmental Consultations on Migration, Asylum and Refugees, "Asylum Procedures Report on Policies and Practices in IGC Participating States", 2009,p.14 ,online: <http://www.igc-publications.ch/pdf/IGC_AsylumProcedures_2009_Bluebook.pdf>.

withdrawing refugee status,[34] and the *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.*[35] These two supranational instruments have been enacted with the purpose of ensuring a harmonized asylum procedure among the EU Member States while avoiding the unsatisfactory outcomes that result from a lack of asylum policy coordination across the EU. The SCO concept is more controversial in Canada due to its recent, 2012 inclusion in Canadian refugee legislation.[36]

Since the early years of the SCO rule, there have been widespread objections from refugee and human rights experts.[37] Concerns were raised regarding the measure's precarious effects on asylum seekers. The objections pointed to violations of the fundamental principles and requirements surrounding international refugee protection enshrined in the *1951 Geneva Convention*,[38] such as the examination of each specific refugee application,[39] the prohibition of discrimination on the basis of race, religion or nationality when implementing the convention[40] and, more importantly, the infringement of a cornerstone principle known as "non-refoulement" incorporated in major international refugee and human rights laws, including the *1951 Geneva Convention* and the *1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,[41] according to which "[n]o Contracting State shall expel or return

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[34] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32005L0085&from=EN>.

[35] European Union, *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*, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0032&from=EN>.

[36] *Immigration and Refugee Protection Act*, S.C. 2001, c.27, s.109.

[37] James C. HATHAWAY, *The rights of refugees under international law*, New York, Cambridge University Press, 2005, p.333-335; Henry MARTERSON and John MCCARTHY, prec., note 32; Rosemary BYRNE and Andrew SHACKNOVE, "The safe country notion in European asylum law", (1996) 9 *Harvard Human Rights Journal* 185; Nazare ALBUQUERQUE ABELL, "The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees", (1999) 11(1) *International Journal of Refugee Law* 60.

[38] *The 1951 United Nations Convention Relating to the Status of Refugees*, prec., note 1, art.33.

[39] *Id*., art.1(A)(2) and art.32.

[40] *Id*., art.3.

[41] The United Nations General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (10 December 1984), art.3, online:<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened"[42] or "where there are substantial grounds for believing that he would be in danger of being subjected to torture"[43] due to his race, religion, nationality, membership in a particular social group or political opinion.[44]

The crucial effects of this restrictive rule are more understood regarding the current refugee and human rights crisis the global society in general, and the Europe in particular, face these days giving grounds for more rigorous and comprehensive inquiry. In fact, the civil wars exploded in the Northern Africa and the Middle Eastern countries such as Yemen, Lybia, Afganistan, and Iraq have devastated these countries socially, politically and economically which eventually have forced millions of their nationals to be displaced internally or escape to the neighboring countries and the EU Member States seeking international protection. What makes this situation worst is the six years of civil war and consequently the human rights disaster in Syrie which has entailed millions of asylum seekers in other countries. The unprecedented movement of asylum seekers and sudden rise of refugee applications in the EU Member States, in particular the Eastern and the Southern European countries, have paralysed the Western States to put forward effective responses and durable solutions to this catastrophic human rights situation in providing international protection and accepting Syrian refugees, along with other asylum seekers from the Middle East and the Northen African countries. In essence, the Western States's reaction to this refugee crisis has not been acceptable comparing to the neighboring countries to the conflict zones such as Turkey (more than 3 Million Syrian refugees)[45], and Lebanon (1.1 Million Syrian

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[42] *The 1951 United Nations Convention Relating to the Status of Refugees*, prec., note 1, are.33(1).

[43] The United Nations General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, prec., note 41, art.3(1).

[44] *The 1951 United Nations Convention Relating to the Status of Refugees*, prec., note 1, art.33(1); James C. HATHAWAY, prec., note 37, p. 279-370; Elihu LAUTHERPACHT, Daniel BETHLEHEM, "The scope and Content of the Principle of *Non-Refoulement*: Opinion", in Erika FELLER, Volker TURK and Frances NICHOLSON (dir.) *Refugee Protection In International Law, UNHCR's Global Consultations on International Protection*, Cambridge, Cambridge University Press, 2008, p. 87; Walter KALIN, Martina CARONI, and Lukas HEIM, "Article 33, para.1 (Prohibition of Expulsion or Return ('Refoulement')/ Défense d'Expulsion et de Refoulement) ", in Andrea ZIMMERMANN (dir.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol,* Oxford, Oxford University Press, 2011, p. 1327.

[45] The United Nations High Commissioner for Refugees, "UNHCR Turkey: Key Facts and Figures", September 2016, online: <http://data2.unhcr.org/en/documents/download/51498>.

refugees), and Jordan (635,324 Syria Refugees)[46], regarding to fundamental economic, political, social and human rights shortcomings these countries undergo, while reaching their capacity in accepting and settling these asylum seekers.

This situation, bringing about the worst human rights and refugee crisis since the World War II, have placed the questions relating to the Western States asylum policies as one of the most discussed and concerning topics among the press and the Western policy makers. Unfortunately, the refugee crisis is dealt by the Western governments with referring to those already experienced restrictive and preventive refugee policies and legislation inefficiency of which in resolving the mass movement of asylum seekers and reducing the security concerns of Western societies have been proved during the past three decades. One of the irresponsible and instantaneous responses is the closure of external borders of EU or quick and massive expulsion of asylum seekers without considering their human rights conditions in the transit States, safe third country, or their country of origin launched by certain Balkan countries including Hungary, Croatia, and Slovenia blocking the main refugee route to Northern European countries, in particular, Germany. On the other hand, the inability of the neighboring countries and reluctance of EU States in acceptance and receiving the augmenting refugee requests, have left no other way for asylum seekers to turn to people smugglers while risking their lives in passing the sea by unseaworthy boats or other dangerous paths to reach the internal borders of EU. According to UNHCR's monthly data update in October 2016, respectively in 2015 and between January to October 2016, over 1 million and more than 300,000 asylum seekers have fled wars, violence and persecution in their countries in search of safety to Europe by passing Meditteraen Sea, while tragically in this period of time, about 7,000 asylum seekers have been missed or drowned in this dangerous journey especially children.[47]

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[46] Amnesty International, "Syria's refugee crisis in numbers", 6 February 2016, online: <https://www.amnesty.org/en/latest/news/2016/02/syrias-refugee-crisis-in-numbers/>.

[47] The United Nations High Commissioner for Refugees, "Refugee/Migrants Emergency Response- Mediterranean", 8 October 2016, online: <http://data.unhcr.org/mediterranean/regional.php>, The United Nations High Commissioner for Refugees Canada, "Over one million sea arrivals reach EU in 2015", 30 December 2015, online: <http://www.unhcr.ca/news/over-one-million-sea-arrivals-reach-europe-in-2015/>.

In another effort to resolve the refugee crisis in EU, the European Council has made a deal with Turkey on 18 March 2016, known as EU-Turkey Refugee Deal. As the most worrying aspects[48], according to the deal, Turkey, already housing more than three millions asylum seekers, has committed to accept the irregular migrants rejected from EU, in exchange for abolition of visa restriction imposed on Turkish citizens, facilitating the negotiation of Turkey accession to EU, and EU funding of €3bn for resettlement of 72,000 Syrian refugees in Turkey.[49]

Meanwhile, the restrictive measure such as SCO rule has yet kept its dominant role in pushing back unwanted asylum seekers which prove its importance among the other preventive asylum rules. For instance, Germany has proceeded to reform its refugee law by adding new countries to its national list of SCO including Morocco, Algeria, and Tunisia, with the main purpose of reducing the social and political pressure of acceptance and presence of the third country national in its territory.

Hence, while a great deal of academic research has been conducted to reassess the SCO rule in relation to other preventive or restrictive measures, more research is needed due to the rapid expansion of the rule in the Western States and its violation of the fundamental principles surrounding international refugee and human rights laws. In terms of our study, however, the most important reason that would justify a rigorous and comprehensive study of this rule involves its decisive role in fast-tracking unfounded asylum claims and the expulsion of rejected refugee applicants. The main concerns involve the denial of the principle of procedural fairness by imposing very short time frames to prepare SCO applicants for the determination process and to allow decision-making authorities to rule on SCO refugee applications, the rejection of basic procedural rights for SCO asylum seekers, including the omission of the right to a personal

[48] For more critiques about this agreement, refer to: Council of Europe, Parliamentary Assembly, Report of the Committee on Migration, Refugees and Displaced Persons, "The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016", 19 April 2016, D0c.14028.

[49] The European Council, *EU-Turkey Statement*, 18 March 2016, online: <http://www.consilium.europa.eu/press-releases-pdf/2016/3/40802210113_en.pdf>, European Commission, *Implementing the EU-Turkey Statement- Questions and Answers*, 15 June 2016, online: <http://europa.eu/rapid/press-release_MEMO-16-1664_en.htm>.

interview and limited appeal rights, along with the obvious influence of intergovernmental or economic relations between States when establishing the SCO list.

The purpose of this research is to demonstrate the extent to which the procedural consequences and basic human rights limitations imposed on the SCO asylum seekers during the accelerated procedure, which includes the restriction on the right to a personal interview and the right to appeal, comply with the constitutional obligations agreed upon by the European Union and Canada under their fundamental human rights charters. For this purpose:

1. Chapter one will define the notion of the SCO rule by referring to the intergovernmental instruments that initially led to its implementation in the Western European States. This chapter will also take a detailed look at the European Union's shared asylum legislation regarding the SCO rule, including the *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*[50] and the *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*,[51] with particular attention given to the provisions of the *EU Charter of Fundamental Rights*[52] and the *European Convention on Human Rights.*[53]
2. Chapter two will reassess the *Immigration and Refugee Protection Act,*[54] which includes the concept of *designated country of origin* and its obvious violation of the Canadian government's constitutional obligations under the *Canadian Charter of Rights and Freedoms.*[55]

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[50] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34.
[51] European Union, *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*, prec., note 35.
[52] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN>.
[53] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention on Human Rights*), (4 November 1950), online: <https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Convention_ENG.pdf>.
[54] *Immigration and Refugee Protection Act*, S.C. 2001, c.27.
[55] *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act of 1982, [enacted as Schedule B to the Canadian Act 1982, 1982, c. 11 (U.K.)].

3. In Conclusion, as the last part, we will examine the key implications that were drawn from a comparative study of EU and Canadian asylum legislation and provide recommendations for future improvements.

Chapter 1: Development and harmonization of the SCO rule in the EU

The concept of SCOs was established by the Western European countries in the early 1990s,[56] implemented extremely fast in all EU Member States' asylum systems,[57] and after two decades, was incorporated into Canadian asylum legislation.[58] It seems reasonable to begin with both the legally mandatory or non-mandatory documents adopted at the EU level, in order to understand the definition of and modifications imposed on this restrictive rule for nearly two decades, as well as its consequences for the regional and national refugee protection systems of the Western States. This restrictive measure was developed during the process of establishing a common asylum policy and legislation at the EU level and can be divided into three distinct stages.

The first stage involved primary steps toward harmonizing asylum law, which led to the passage of instruments such as the Schengen Agreement of 1985[59] and the Schengen and Dublin Conventions of 1990[60] by the EU Member States at the intergovernmental level, outside the realm of EU competence and free from the supervision of the EU's parliamentary and judicial body. Even after the Maastricht Treaty[61] entered into force and asylum matters were incorporated into the newly created Justice and Home Affairs Pillar (Third Pillar), the EU was not granted the

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[56] Cathryn COSTELLO, prec., note 24.
[57] *Id*., p.51; Henry MARTERSON and John MCCARTHY, prec., note 32; European Parliament, "Asylum in the European Union: The "Safe Country of Origin Principle"", prec., note 32.
[58] *Immigration and Refugee Protection Act*, S.C. 2001, c.27, s.109.
[59] *The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*, (14 June 1985), online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:42000A0922%2801%29&from=EN%3E>.
[60] European Union, *Convention Implementing the Schengen Agreement of 14 June 1985 between the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders ("Schengen Implementation Agreement")*, 19 June 1990, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):en:HTML> ; *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention*, (15 June 1990), online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41997A0819(01)&from=EN>.
[61] *The Treaty of Maastricht*, *the Treaty on European Union*, 7 February 1992, online: <http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf>.

necessary competence to enact legally binding asylum law or create a coordinated asylum policy for all the Member States. This was, for the most part, because the Member States did not want to give up their prerogatives to the European Community in a domain that interfered directly with their sovereignty rights on their territory. The asylum legal documents adopted by the EU in at that time also had an intergovernmental nature and suffered from weakness such as undetermined timelines, ambiguous objectives, the absence of a concrete law-making structure and the unclear legal nature of the adopted instruments.[62]

The essential documents adopted under the Justice and Home Affairs Pillar were the resolutions the EU Council of Ministers Responsible for Immigration (hereafter ECMRI) ratified in 1992 and 1995 as guidelines for the Member States to harmonize their national asylum procedures. Given their non-binding legal effect, the Member States were under no obligation, but merely "agreed to seek to ensure that their national laws are adapted, if need be, and to incorporate the principles of this resolution as soon as possible."[63] Nevertheless, since these resolutions–the 1992 *Conclusion on Countries in Which There is Generally No Serious Risk of Persecution,*[64] the 1992 *Council Resolution on Manifestly Unfounded Applications for Asylum*[65] and the 1995 *Council Resolution on minimum guarantees for asylum procedures*[66] in particular–were the first documents, at the EU level, to provide the primary definition of the SCO rule, the basic conditions constituting a safe country of origin and the procedure under which SCO applications were to be decided, they will be briefly explained in Part 1 to demonstrate the EU's first perceptions of the SCO concept, as a starting point for more detailed discussions of the SCO rule implemented in EU common asylum legislation in 2005 and 2013.

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[62] Sylvie Da LOMBA, *The Right to seek Refugee Status in the European Union*, Antwerp; New York, Intersentia, 2004, p.13.

[63] European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum*, para.4, online: < http://www.refworld.org/docid/3f86bbcc4.html>.

[64] European Union, *Conclusions on Countries in Which There is Generally No Serious Risk of Persecution ("London Resolution")*, prec., note 22.

[65] European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum*, prec., note 63.

[66] European Union, *Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures*, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31996Y0919(05)&from=EN>.

While the first stage was characterized by disparate legislative cooperation with undetermined objectives and ineffective results, the next stage was the first phase toward establishing the Common European Asylum System (hereafter CEAS), which commenced when the Treaty of Amsterdam entered into force in 1997[67] and provided the necessary legal basis for adoption of the first instrument under the new competence granted to the European Union, the *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status,*[68] which will be reassessed in Part 2.

In its last attempt to repair the flaws inherent in the first phase of establishing the CEAS, including the legislation framework, the major inconsistencies between the legislated provisions and the EU's human rights obligations and the Member States' failure to transpose and implement the common EU asylum measures,[69] the European Community began revising the instruments passed in the first phase and enlarging the European asylum system.[70] This ambitious objective was inspired while reconsidering the Asylum Procedures Directive of 2005 in order to ensure increased harmonization in the implementation of procedures among the Member States,[71] decrease the difficulties caused by the lack of coordinated application of the EU's common asylum rules on secondary movements of asylum seekers within the Union and

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[67] *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, and certain related acts (Consolidated Version)*, (97/C 340/01), 10 November 1997, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1997:340:FULL&from=EN>.

[68] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34.

[69] Doede ACKERS, "The Negotiations on the Asylum Procedures Directive", (2005) 7(1) *European Journal of Migration and Law* 1, p.33.

[70] Matthew HUNT, prec, note 30, p.522-524; Francesca IPPOLITO and Samantha VELLUTI, "The Recast Process of the EU Asylum System: A Balancing Act Between Efficiency and Fairness", (2011) 30(3) *Refugee Survey Quarterly* 24, p.28-32; Steve PEERS, "The second phase of the Common European Asylum System: A brave new world- or lipstick on a pig?", 8 April 2013, *Statewatch*, p.1-2, online: < http://www.statewatch.org/analyses/no-220-ceas-second-phase.pdf>; Commission of the European Communities, "Policy Plan on Asylum: An Integrated Approach to Protection across the EU", 17 Jun 2008, Com (2008) 360 final, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF>; Council of the European Union, *The Stockholm Programme- An Open and Secure Europe Serving and Protecting Citizens*, 4 May 2010, (2010/C 115/01), online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52010XG0504(01)&from=EN>.

[71] Francesca IPPOLITO and Samantha VELLUTI, prec., note 70, p. 32.

"increase mutual trust between Member States."[72] The 2013 Recast Asylum Procedures Directive's provisions, compared to those of the Asylum Procedures Directive of 2005, will be discussed in Part 3.

Part 1: Preliminary instance of common European asylum legislation

The European Economic Community was created in 1957[73] with the primary objective of economic integration. Real cooperation regarding asylum and immigration policy within the European Community began in the early 1980s with a sudden increase in the number of refugee claims, leading to the adoption of intergovernmental provisions outside the framework of the EU.[74] What convinced the EU Member States to legislate shared asylum provisions was the fact that the unilateral mainstreaming of immigration and asylum policies could at some points temporarily reduce the pressure of refugee claim backlogs. However, this system ended up generating more difficulties, such as the phenomena of asylum in orbit,[75] asylum in limbo[76] and

[72] Council of the European Union, *The Stockholm Programme- An Open and Secure Europe Serving and Protecting Citizens*, (2010/C 115/01), prec., note 70.

[73] European Union, *Treaty Establishing the European Community (Consolidated Version), Rome Treaty*, 25 March 1957, online: <http://www.refworld.org/docid/3ae6b39c0.html>.

[74] European Union, *Convention Implementing the Schengen Agreement of 14 June 1985 between the of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders ("Schengen Implementation Agreement")*, prec., note 60; *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention*, prec., note 60; A.G. HURWITZ, prec., note 5, p.14 (Part1).

[75] This is a situation where the asylum seeker is not granted refugee status in any country where he/she applied for international protection. As a result, the countries in which the asylum application is lodged send constantly the asylum seeker to another country without considering themselves responsible to examine merit of the asylum claim.

[76] The problematic living condition of 'asylum in limbo' is an unknown status where asylum seekers are awaiting the result of their initial refugee claim or their appeals of the refugee status determination decision for an undetermined time. The situation of asylum in limbo can also be reproduced where the receiving country leave asylum seekers in detention centers or in refugee camp without any durable solution.

asylum shopping,[77] and in practice failed to provide the expected result of permanently pushing the constant influx of asylum seekers back from EU borders.

When the Maastricht Treaty entered into force in 1992[78] and cooperation in the field of asylum and immigration was incorporated into the triple shared framework of the EU under the Third Pillar of Justice and Home Affairs, another objective was defined regarding cooperation in the field of asylum legislation, although still with an intergovernmental character:[79] reducing the security concerns of EU Member States. In fact, EU Member States' major concern involved deterring asylum seekers from accessing EU borders because of security and terrorist threats. In other words, it was assumed that the economic integration, gradual abolition of internal frontiers and freedom of movement within the EU would endanger EU Member States' territorial integrity and public safety.[80] European policymakers tried to tackle the security gap caused by the abolition of internal frontiers between the Member States by adopting compensatory rules in the fields of terrorism, criminal actions and asylum seekers. Along with the intergovernmental activities of the Member States outside the Community's framework, the ECMRI decided to issue recommendations for harmonizing policy on regular and expeditious asylum procedures, the application of safe third country and safe country of origin principles and manifestly unfounded asylum requests among the EU Member States. These recommendations resulted in the adoption of four non-binding instruments during meetings in 1992 and 1995:

- *Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries with the objective of resolving the problems caused by the complex and ambiguous application of the safe country concept among the Member States*[81]

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[77] This expression refers to the context within which, because of different asylum systems among certain countries in a region like European Union, the asylum seekers try to find a refugee country with more favorable asylum legislation or better social conditions by requesting refuge in several countries or they pass some countries, while being able to apply for asylum in transit countries, and head to an specific State to lodge their refugee application.

[78] *The Treaty of Maastricht*, *the Treaty on European Union*, prec., note 61.

[79] *Id*., Title VI.

[80] A.G. HURWITZ, prec., note 5, p.15-.16 (part 1); J.C. HATHAWAY, prec., note 7,p.719.

[81] European Union, *Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries ("London Resolution")*, 30 November 1992, point 2(c), online: <http://www.refworld.org/docid/3f86c3094.html>.

- *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum*[82]
- *Conclusion on Countries in Which There is Generally No Serious Risk of Persecution*[83]
- *Council Resolution on Minimum guarantees for asylum procedures*[84]

Of these documents, the last three directly refer to the SCO concept, propose the criteria for identifying safe countries of origin, introduce the expeditious procedure for decisions on SCO refugee applications and determine the procedural principles to be observed by the Member States. These documents will be explained briefly in the next two sections.

1.1: Conclusion on Countries in Which There is Generally No Serious Risk of Persecution[85]

This instrument, containing only six paragraphs, mainly concerned the questions surrounding safe countries of origin, with the purpose of reducing the heavy burden of refugee application backlogs on the Member States' determination process, providing international protection for asylum seekers who merit it and deterring bogus refugee applicants from abusing the Member States' asylum procedures.[86]

For the first time, apart from the Member States' national legislation, a definition of SCO for the entire EU was given in paragraph 1 of the Conclusion as:

> [A] country which can be clearly shown, in an objective and verifiable way, normally not to generate refugees or where it can be clearly shown, in an objective and verifiable way,

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[82] European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum*, prec., note 63.
[83] European Union, *Conclusions on Countries in Which There is Generally No Serious Risk of Persecution ("London Resolution")*, prec., note 22.
[84] European Union, *Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures*, prec., note 66.
[85] European Union, *Conclusions on Countries in Which There is Generally No Serious Risk of Persecution ("London Resolution")*, prec., note 22.
[86] *Id*., para.2.

that circumstances that might in the past have justified recourse to the 1951 Geneva Convention have ceased to exist.[87]

As a positive interpretation, according to this definition, it is only permissible to designate a whole country as an SCO, without any geographical or population exceptions. It is therefore not acceptable to designate part of a country as safe or identify it as safe for a particular group.

However, the negative point that can be drawn from this definition is that the safety of a State is conceivable only if the life or freedom of its nationals is not threatened under the provisions of the *1951 Geneva Convention*. Infringement of the provisions of other major international human rights legal instruments, such as the *1984 Convention against Torture* and the *European Convention on Human Rights*, in the country in question are not relevant to the rejection of its general safety.

The Conclusion set out four criteria for evaluating the security of a country for its nationals. It is not clear which of these four criteria had a more decisive role in determining the general safety of the third country. It seems that the Member States were to consider all these factors. The requirements consisted of:

1. Previous numbers of refugees and recognition rates. Under paragraph 4(a) of the Conclusion, the Member States were required to "look at the recognition rates for asylum applicants from the country in question who have come to Member States in recent years."[88]

   Although the ECMRI admitted that the stable conditions of a safe country of origin could change in subsequent years, it did not specify the circumstances under which the Member States should ignore previous low rates of refugee acceptance of the SCO's nationals and remove the designated country from the SCO list. It simply mentioned that "in the absence of any significant change in the country it is reasonable to assume that low

[87] *Id.*, para.1.
[88] *Id.*, para.4(a).

recognition rates will continue and that the country tends not to produce refugees."[89] However, it is illogical to consider a low rate of acceptance one of the main indications of a country's safety over the number of refugee applications. In addition to the difficulties in gathering accurate information from a third country, a growing number of refugee applications is the most significant indication of a changing human rights situation and calls into question the general and objective assumption of the safety of a country under inquiry.

The precarious effect of this provision on future SCO refugee applicants is that in addition to the presumption of safety, which makes it harder for them to prove their persecution claims and denies them a fair determination procedure, it is irrational to expect the Western States to be able to react properly to a sudden human rights crisis in a third country where most of the human rights violations remain undocumented and unknown to the international community, especially persecution caused by State actors against minority ethnic, sexual or religious groups. In this context, refugee applications would be recognized as unfounded because their national country had been previously designated as an SCO, and the low acceptance rate would reaffirm the presumption of safety, preventing the Western States from monitoring the actual human rights conditions in the third country and encouraging them to reject more refugee applications from countries assumed to be safe. This ambiguous provision was in line with the prevalent belief among the Western States' policymakers, who concluded that the reduced admission of a third country's nationals resulted from the implementation of safe country rules, demonstrating that most refugee applicants from safe countries are economic migrants and do not deserve international protection from the Western States.[90]

2. Observance of human rights. According to paragraph 4(b) of the Conclusion, the third country's respect for human rights may be demonstrated by two factors, including "the formal obligations undertook by a country in adhering to international human rights instruments and under its domestic law" and "how in practice it meets those

[89] *Id*.

[90] For a detailed discussion in this regard, see: Kay HAILBRONNER, "The concept of 'Safe Country' and expeditious asylum procedures: a Western European perspective", prec., note 6.

obligations."[91] This paragraph is the most notable provision of the Conclusion because of its stress on the real practices of the third country rather than complete reliance on the international obligations agreed to by the third country. It reiterates that

> [A]dherence or non-adherence to a particular instrument cannot in itself result in a country being considered as one in which there is generally no serious risk of persecution. It should be recognized that a pattern of breaches of human rights may be exclusively linked to a particular group within a country's population or to a particular area of the country.[92]

Also, the Conclusion correctly stipulated the third country's openness to monitoring by human rights NGOs as one of the most reliable indications of its commitment to observe its international human rights obligations. Thus the Member States, during the process of determining safe countries of origin, are warned about paying attention solely to international refugee and human rights legal instruments the third country has ratified. The central focus must be not only on the formal and general reports issued by officials of the third country in question, but also on the actual human rights situation for minority groups, especially those living far from large cities. In order to gather up-to-date and reliable information about these groups, the Member States are strongly urged to take the reports of expert human rights NGOs into consideration.

3. Democratic institutions. Paragraph 4(c) can be interpreted as complementary to the second criterium, which stated that "consideration should be given to democratic processes, elections, political pluralism and freedom of expression and thought,"[93] along with the availability and effectiveness of judicial redress provided by the executive and judicial body of the third country, as one of the most important manifestations of the presence and accessibility of adequate protection in the third country.[94]
4. Stability. While the ECMRI recognized the possibility that a stable, safe situation could change in the country of origin as previously mentioned, no guidelines were given to the

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[91] European Union, *Conclusions on Countries in Which There is Generally No Serious Risk of Persecution*, prec., note 22, para. 4(b).
[92] *Id*.
[93] *Id*., para.4(c).
[94] *Id*.

> Member States on how they should verify changing human rights situations in third countries or when a third country should be excluded from the SCO list. The ECMRI left this worrisome matter to the Member States' discretion, which proved to be influenced by other factors than human rights considerations, such as economic, political or military intergovernmental relations.

In short, the ECMRI ignored the fact that the SCO rule contradicts the rationale behind the establishment of a refugee protection regime. Asylum seekers appear and international protection is required when minority groups of different ethnicities, religious beliefs or political opinions are threatened in their country. It is challenging and complicated for the Western States to understand the real human rights practices in third countries, as well as the degree of suppression and the persecution that the people endure under conservative or radical governments with entirely different cultures, administrative law and judicial systems. Is any evidence more convincing than an increasing number of asylum seekers from a particular country arriving in a Western country to justify a potential lack of safety and human rights violations in that third country?[95] Although there will always be a certain number of fraudulent refugee applications, without adequate guarantees in the first instance decision and appeal procedures, it is totally unacceptable to determine safe countries of origin under such ambiguous and general requirements.

All these factors are theorically relevant and crucial in assessing the safety of a third country, but it is unrealistic to believe that the Member States will properly take into account these criteria as well as the real practices of the third country, especially since under the provisions of the Conclusion, they are completely entitled to designate a safe country of origin according to their national legislation only. When the Conclusion was being drafted, the EU faced strong resistance from the Member States regarding interference in their national legislation on the movement of asylum seekers and acceptance of refugees. In the end, the Conclusion did not improve on the SCO concept, and the only outcome was an official affirmation of the Member States' neglectful

[95] Rosemary BYRNE and Andrew SHACKNOVE, prec., note 37, p.186.

practices in reducing the number of asylum seekers and ignoring human rights violations currently occurring around the world.

1.2: The Resolution on Manifestly Unfounded Applications for Asylum[96] and the Resolution on minimum guarantees for asylum procedures[97]

In general terms, a refugee status determination process to identify asylum seekers eligible for international protection normally consists of a full and detailed examination of the merits of every refugee application and provides rejected refugee applicants with the right to appeal. The general principles and the fundamental rights provided for asylum seekers during regular determination procedures were set out in the *Resolution on minimum guarantees for asylum procedures*. However, with the growing influx of asylum seekers and the emergence of restrictive and preventive measures in the Western States' asylum systems, a specific determination process with the central objective of recognizing manifestly unfounded or clearly fraudulent refugee claims at the first stages of the determination process has been created in the form of an "accelerated procedure" or "expeditious examination." During this process, the decision-making authorities are permitted to focus on objective factors rather than the claim's detailed and substantive considerations during their examination.[98] The especial procedural rules and the possibility of ruling on SCO applications using accelerated procedures were legislated under the *Council Resolution on Manifestly Unfounded Applications for Asylum*.

While the expeditious procedure developed in all Member States' asylum systems,[99] it was not defined comprehensively in any document ratified under the Third Pillar. The *Resolution on Manifestly Unfounded Application for Asylum* simply referred to the accelerated procedure as a process that does not encompass comprehensive assessment of the application at every level of the determination and introduced the most common applications that may be ruled on during an accelerated procedure, including clearly unsubstantiated claims, fraudulent asylum requests and

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[96] European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ("London Resolution")*, prec., note 63.
[97] European Union, *Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures*, prec., note 66.
[98] Sabine WEIDLICH, prec., note 21, p.659.
[99] *Id*.; Kay HAILBRONNER, prec., note 6.

SCO refugee applications[100] that "shall be regarded as manifestly unfounded."[101] The *Resolution on minimum guarantees for asylum procedure* enumerated certain principles that the Member States should respect or may disregard during accelerated procedures. In this part, these two resolutions will be explained together to give a more comprehensive perspective on the SCO rule and its consequences during accelerated procedures. It is important to note that according to the *Resolution on Manifestly Unfounded Applications for Asylum*, the *Resolution on minimum guarantees on asylum procedure* and the *Conclusion on Countries in Which There is Generally No Serious Risk of Persecution*, it is completely up to the EU Member States to designate safe countries of origin and decide whether to examine refugee requests from these countries in an accelerated procedure.[102]

The ECMRI requirements that the Member States must observe during an expeditious procedure can be summarized as follows:

1. Under paragraph 3 of the *Resolution on Manifestly Unfounded Applications for Asylum*, the ECMRI suggested a time frame of one month for deciding on SCO applications using an accelerated procedure,[103] but the details were left to the national legislation of the Member States. The Resolution did not clarify how the Member States should identify asylum seekers in urgent and real need of protection or how to give refugee applicants enough time to present their well-founded fear of persecution under the fast track procedure. How can asylum seekers, who have been traumatized in their own country and during the journey to the destination country, be expected to trust the determining authority in a short period of time and express their story without forgetting the key points that are essential to the interviewer's decision? Is it realistic to expect decision-making officials who process many asylum applications at the borders or in airports on a

[100] European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ("London Resolution")*, prec., note 63, para.1 and 2.
[101] *Id*., para.1(a).
[102] *Id*., para.8; European Union, *Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures*, prec., note 66, para.3; European Union, *Conclusions on Countries in Which There is Generally No Serious Risk of Persecution*, prec., note 22, para.3.
[103] European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ("London Resolution")*, prec., note 63, para.3.

daily basis to be able to recognize real asylum seekers through a limited admissibility procedure, especially applicants from safe countries of origin, knowing that many genuine refugees correspond to examples of manifestly unfounded applications at the first stages of the asylum process?[104]

2. The ECMRI required guarantees that the personal interview be conducted by fully qualified officials to make decisions on applications within an accelerated procedure.[105] It is a positive sign that the Resolution considered that the crucial role of the personal interview is to make the first instance determination process fairer, in particular for SCO refugee applicants. The requirement that refugee applications be examined by "an authority fully qualified in the field of asylum and refugee matter" and the right to a personal interview were unconditionally affirmed later in the *Resolution on minimum guarantees for asylum procedures*.[106]
3. Although according to the above paragraph, the appeal procedure for decisions rendered in an accelerated process would be more simplified compared to regular rejected refugee requests, the ECMRI urged the Member States to provide appeal or judicial review rights for refugee applicants whose requests were refused during an expeditious determination process.[107]

   In this regard, there are some contradictions between the resolution adopted in 1992 and the resolution passed in 1995. Under the provisions of the 1995 *Resolution on minimum guarantees for asylum procedures*, the ECMRI expressly permitted the Member States to deny unfounded refugee applicants (including SCO applicants) the right to appeal if "an independent body which is distinct from the examining authority has already confirmed the decision."[108]

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[104] Sabine WEIDLICH, prec., note 21, p.668-671.
[105] European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ("London Resolution")*, prec., note 63, para.4.
[106] European Union, *Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures*, prec., note 66, para.4, 6, and 14.
[107] European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ("London Resolution")*, prec., note 63, para.3.
[108] European Union, *Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures*, prec., note 66, para.19.

Though rejected asylum applicants were permitted to stay in the Member State's territory while appealing a negative decision, except for refugee applicants recognized as unfounded based on "deliberate deception or an abuse of asylum procedures,"[109] in cases where an asylum application was determined to be manifestly unfounded during a special procedure at the border prior to the admission procedure and the application was consequently refused, the Member States were permitted to disregard the principle of suspensive effect of appeal.[110]

These provisions cannot be justified in any way whatsoever in relation to the principles of fairness and efficiency of asylum procedures reiterated in the *Resolution on minimum guarantees for asylum procedures*,[111] in particular with regard to the vital role of the right to appeal and the suspensive effect of appeal in preventing refoulement of SCO refugee applicants, who experience a higher burden of proof and shortened time frame for the first instance decision process.

4. Fortunately, under paragraph 8 of the *Resolution on Manifestly Unfounded Applications*, the Member States were encouraged not to channel SCO applications to an accelerated procedure automatically before individually considering every SCO application and assessing any specific claim presented by the asylum seeker that may contradict the general presumption of safety in the country of origin.[112] In other words, the ECMRI intended to require the Member States to implement the SCO rule as an absolute bar, denying SCO asylum seekers a fair chance to substantiate their claims and removing them without fully considering the merit of their applications during a detailed and fair determination procedure.

This short review reveals a missing element in the Western States' asylum system. Categorizing asylum claims and transferring them to a simplified and accelerated examination procedure is the

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[109] *Id*., para.21; European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ("London Resolution")*, prec., note 63, para.9-10.
[110] European Union, *Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures*, prec., note 66, para.24.
[111] *Id*., part II.
[112] European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum ("London Resolution")*, prec., note 63, para.8.

first step toward further violations of refugee rights and rejection of fundamental procedural principles. That is why without the necessary safeguards, such as the right to a personal interview, the right to appeal and the right to stay in the receiving country's territory while awaiting the appeal decision, these accelerated procedures are suspect.[113] Although it was contended that the objective of the ECMRI resolutions was to resolve the problems of genuine refugees facing restrictive asylum rules and persuade the Member States to establish a fair and efficient asylum procedure, these non-binding instruments were not able to make a significant difference or motivate serious reforms in the EU Member States' safe country practices because of the lack of necessary legislative competence, executive body and judicial institutions to force the Member States to obey the adopted provisions and modify their diverse asylum practices.[114]

On the other hand, the development of asylum law from unilateral national initiatives to a multilateral process demonstrates the considerable change that refugee protection theory and practices experienced at the EU level. The main reason for establishing international refugee law was to create a global consensus on protecting the fundamental human rights of asylum seekers deprived of their own government's protection. However, this objective has been replaced by increasingly restrictive measures and preventive practices among the EU Member States, with the objective of reducing their security concerns and meeting their economic goals. The key problem with the European Community's asylum regulations, as Hathaway has underlined, is ignorance of the fact that the international refugee protection rules incorporated in the *1951 Geneva Convention* do not contradict the interests or sovereignty of the Member States; on the contrary, they are "an attempt to reconcile the dominant intention of States to control entry into their territories with the human rights reality of forced migration."[115]

[113] Sabine WEIDLICH, prec., note 21, p.668.
[114] G. BORCHELT, prec., note 2, p.476 and 522; Doede ACKERS, prec., note 69, p.2.
[115] J.C. HATHAWAY, prec., note 7, p.728.

Part 2: The first phase of establishing a Common European Asylum System

The most meaningful step toward the creation of the Common European Asylum System (CEAS) commenced with the adoption of the Amsterdam Treaty.[116] As explained in the previous section, primary collaborations in the field of asylum law in the EU started and expanded in the 1980s at intergovernmental fora to satisfy the Member States' concerns about losing their discretion in asylum matters.[117] Although the major provisions adopted at this time represented an essential contribution to the creation of shared asylum policy and rules among EU Member States, the efforts of Western European governments, given the abolition of internal borders, were intended to develop and implement more sophisticated measures to prevent asylum seekers from reaching the EU's external borders and increase the discretionary power of EU States in asylum law.[118] Nevertheless, the Member States' reluctance to create shared legislation of asylum provisions with the EU and the lack of an explicit intention to harmonize regulations in accordance with the fundamental principles of international refugee and human rights law created a complicated situation with an even more severe refugee application backlog.[119]

In the mid-1990s EU Member States, conscious of the shortcomings of intergovernmental cooperation at the Third Pillar level, came to the conclusion that issues involving asylum seekers, as an integral part of the internal market and free movement of persons, had to be part of a joint system with a harmonized and sustainable approach.[120] This was the major role of the Treaty of Amsterdam, which introduced a new area in the shared EU legislation structure, clarified the goals to be achieved in the development of common EU asylum and immigration law and

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[116] *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, and certain related acts (Consolidated Version)*, prec., note 67.

[117] Kay HAILBRONNER, *EU Immigration and Asylum Law: commentary on EU regulations and directives*, Oxford, Beck/Hart, 2010, p.1.

[118] E. KJAERGAARD, prec., note 7, p. 650.

[119] S. Da LOMBA, prec., note 62, p.13-14, and p.26-35.

[120] *Id*., p.12-13; Pieter BOELES, Maarten den HEIJER, Gerrie LODDER, and Kees WOUTERS, *European Migration Law*, 2nd edition, Cambridge, Intersentia, 2014, p.248.

policy[121] and broadened the European Union's objectives from intergovernmental cooperation in the Justice and Home Affairs Pillar to maintaining and enlarging the Union as "an area of freedom, security and justice"[122] that allowed the free movement of people while ensuring external border controls, managing the movement of immigrants and asylum seekers, and preventing criminal activities.[123]

As a result of this communalization process,[124] issues involving asylum law and policy were placed explicitly under the discretion of the Community Pillar.[125] Upon addition of a new title, "Title IV on Visa, Immigration, Asylum and other Policies to the Free Movement of Persons," to Articles 63(1) and 63(2) of the Amsterdam Treaty, the European Community gained the competence to adopt common minimum asylum law standards, including the criteria for determining the Member State responsible for considering an asylum application, the minimum standards for receiving an asylum seeker, the minimum standards for qualifying a third country national as a refugee and the minimum procedural standards for granting or withdrawing refugee status (Article 73k of the consolidated version of the Treaty of Amsterdam).[126]

Despite this major achievement in communalizing asylum legislation at the supranational level, the EU legislative body was not granted full discretion to enact shared provisions, but was confined to adopting only "minimum standards" within the Community as set out in Article 63 of the Treaty of Amsterdam. In fact, the Member States maintained their prerogatives on the sensitive matter of asylum law. They were obliged to agree only on the lowest common rules while using their discretionary power to continue implementing restrictive asylum rules in their

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[121] S. Da LOMBA, prec., note 62, p.21-35.

[122] *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, and certain related acts (Consolidated Version)*, prec., note 67, art.1(3); Kay HAILBRONNER, prec., note 117, p.3.

[123] *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, and certain related acts (Consolidated Version)*, prec., note 67, art.B.

[124] Pieter BOELES, Maarten den HEIJER, Gerrie LODDER, and Kees WOUTERS, prec., note 120.

[125] Olga FERGUSON SIDORENKO, *The Common European Asylum System*, The Hague, The Netherlands, T.M.C Asser Press, 2007, p.20.

[126] *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, and certain related acts (Consolidated Version)*, prec., note 67, art.73k (ex art.63(1) and (2)).

domestic legislations. Moreover, the vast discretionary powers accorded to the Member States to implement the asylum rules of their national legislations resulted in various asylum procedures among them, eventually reducing the effectiveness of the legislated common measures and leading to the same problems as before, such as the inability to manage the irregular movement of asylum seekers effectively within the EU. In the end, the minimum asylum policy demonstrated that the Western European States' objectives were the same as before: to restrict access to their asylum determination procedures, perceive asylum seekers as economic immigrants, prevent unfounded refugee applicants from abusing their asylum systems by implementing safe country rules and implement stricter external border controls.[127]

The Council Directive of 2005 defined the SCO concept and set out the requirements for identifying safe countries of origin at the EU and national levels (section 2.1), the process for ruling on SCO applications (section 2.2) and the legal and procedural limitations imposed on SCO refugee claimants, including the right to a personal interview and the right to appeal (section 2.3). All these issues will be defined in this section in order to clarify compliance with the fundamental human rights principles of EU law enshrined in the *Charter of Fundamental Rights of the European Union*[128] and the *European Convention on Human Rights*[129] by referring to the rulings of the European Court of Justice (hereafter ECJ), which, in accordance with the provisions of the Amsterdam Treaty, was tasked with interpreting the EU common asylum measures adopted under Title IV of the Treaty of Amsterdam.[130]

2.1: The Asylum Procedures Directive of 2005 and its Recast in 2013

The CEAS, created in the first five years after the Treaty of Amsterdam entered into force and reaffirmed at the European Council summit in Tampere,[131] resulted in one regulation and four directives, the last of which, the *Council Directive 2005/85/EC of 1 December 2005 on minimum*

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[127] Agnès HURWITZ, prec., note 5, p.20-22 (part 1).
[128] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, prec., note 52.
[129] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention on Human Rights*), prec., note 53.
[130] *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, and certain related acts (Consolidated Version)*, prec., note 67, art.73p.
[131] *Tampere European Council, Presidency Conclusions*, 15 and 16 October 1999, part A, online: <http://www.europarl.europa.eu/summits/tam_en.htm>.

standard on procedures in Member States for granting and withdrawing refugee status (Asylum Procedures Directive of 2005, hereafter the APD), directly considered major issues surrounding the SCO rule. The Commission presented the first version of the APD to the Council in September 2000, but due to the debates and the modifications the Council imposed on it, the Commission had to prepare another proposal in accordance with the Council's amendments in June 2002. Eventually, after protracted negotiations among the Member States in the Council, the Directive was adopted by the Council of the European Union at the meeting of the Justice and Home Affairs on December 1, 2005,[132] with a one-year delay from the time limit appointed by the Amsterdam Treaty and the Tampere Presidency Conclusions.[133]

It is worth noting that the APD had an even more destructive effect on the development of common asylum rules at the EU level and protection of refugee rights at the international level than previous provisions adopted by the EU, such as the London Resolutions, which had briefly explained the current restrictive practices of the Member States without officially enforcing a deterrent or a limiting measure on them. In fact, it was only after the APD was adopted that the safe country practices were introduced and officially passed at a supranational level in a legally binding instrument. This legislative practice gave rise to deep concerns and severe criticism from the vast majority of refugee and human rights organizations and experts. The most significant criticism was based on the fact that incorporating these rules into a legally binding instrument adopted by the Council with a direct effect on the Member States' asylum systems transformed them from exceptional to normal principles in refugee determination procedures, further decreasing the protection standards provided by the international refugee rights regime.[134] In other words, the passage of the APD spread the initiatives and restrictive practices of Western

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[132] European Council on Refugees and Exiles, "ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", IN1/10/2006/EXT/JJ, October 2006, p.1-3, online: < http://www.refworld.org/docid/464317ab2.html>.

[133] *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, and certain related acts (Consolidated Version)*, prec., note 67, art.73k; *Tampere European Council, Presidency Conclusions*, prec., note 131, para.14.

[134] Cathryn COSTELLO, "The Asylum Procedures Directive in Legal Context: Equivocal Standards Meet General Principles" in Anneliese BALDACCINI, Elspeth GUILD and Helen TONER (dir), *Whose freedom, security and justice*, Oxford, Hart, 2007, p.151, in p.159.

European countries around the world and consequently weakened the global consensus regarding the fragile situation and urgent protection needs of asylum seekers.

The more troubling feature of the Directive was the incorporation of various practices for applying the SCO rule and the enactment of inconsistent provisions in the final version compared to the Commission's 2002 proposal.[135] It seems that the radical alterations imposed on the initial proposal were mostly due to pressure from influential Member States in the Council to incorporate all their various rules and procedures in determining safe countries of origin and keep their national lists in force, against the general principles of the Directive.[136] These two negative aspects of the APD related, for the most part, to the essential flaws in regional and international asylum legislation.

At the EU level, according to Article 67(1) of the Treaty of Amsterdam,

> [D]uring a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.[137]

In other words, during this five-year time frame, no co-decision procedure or a simultaneous active role was recognized for either the Council or Parliament. The unanimous voting requirement resulted in many amendments to the Commission's proposal because the Member States delegated to the Council were afraid of losing their authority in their territory and of sharing the Community's asylum legislation. This legislation took so long to pass that the deadline established by the Treaty of Amsterdam was extended. Given this troublesome law-making procedure and the expressed necessity that the Council's legislation be restricted to minimum standards, the Commission's proposals were mostly modified to recognize the lowest standard of protection for asylum seekers and refugees and provide less harmonization than was originally proclaimed.[138] These are exactly the difficulties the Commission faced in introducing

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[135] Steve PEERS, "Key Legislative Developments on Migration in the European Union", (2006) 8(1) *European Journal of Migration and Law* 97, p.105.

[136] *Id*.; Cathryn COSTELLO, prec., note 134, p.158 and 192.

[137] *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, and certain related acts (Consolidated Version)*, prec., note 67, art.73o.

[138] Pieter BOELES, Maarten den HEIJER, Gerrie LODDER, and Kees WOUTERS, prec., note 120, p. 248-249.

and amending the APD proposal. The more alarming result was the European Parliament's strictly consultation role, which prevented it from exercising its supervisory capacity to effectively oppose the Council's legislative actions and force the Council to abide by the fundamental principles of EU law while adopting common asylum provisions. Ultimately, the final version of the Directive resulted in contradictory provisions and a wide range of discretionary powers for the EU Member States. The APD was arguably a clear portrait of the Council's flawed decision-making process and the Member States' unwillingness to create a real Common European Asylum System.[139]

The difficulty of agreeing on a harmonized asylum procedure is rooted in the absence of a formally accepted legal framework and fundamental principles at the international level for decisions on refugee requests. Although some essential procedural principles, such as non-refoulement or the prohibition of discrimination based on race, nationality or religion can be drawn from the *1951 Geneva Convention* (the leading international source on refugee rights) and other major international human rights legal instruments, including the 1984 *Convention against Torture*, the *European Convention on Human Rights* or the 1989 *Convention on the Rights of the Child*[140] (referred to in the Preamble of the APD as international refugee and human rights instruments by which the Member States, who are signatories, must abide[141]), none of them determines a specific procedure under which applications for international protection should be managed or refugee status should be granted or withdrawn.

This fundamental gap comes from substantial discrepancies between the administrative laws of every country, even at EU level, with a close legal system. Every Member State has its own administrative rules for decisions on refugee applications that have developed out of their different constitutional laws and legal traditions.[142] Creating a common asylum system and

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[139] Cathryn COSTELLO, prec., note 134.
[140] The United Nations General Assembly, *the Convention on the Right of the Child*, 20 November 1989, online: <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.
[141] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, Preamble, para. 8 and 9.
[142] Doede ACKERS, prec., note 69, p.2.

constraining accepted procedural rules for examining asylum requests has a direct impact on administrative arrangements and constitutional law in the Member States.[143]

There were and still are many complexities regarding the number of asylum applications lodged in each Member State and the financial difficulties Member States experience, which bring about differences in asylum legislation and the political or social reactions of each country in dealing with them. For instance, Germany has a long history of accepting asylum seekers and as a result, was one of the first countries to enact preventive measures in its asylum system, such as provisions relating to SCOs or STCs, compared to other Member States such as Italy, which in the 1990s had one of the lowest rates of approved asylum applications.[144]
Despite all these shortcomings, it should not be forgotten that adopting the APD was undoubtedly the most vital and difficult step the Council has taken to create an area of freedom, security and justice in which all asylum seekers are guaranteed the same rights and valid status throughout the EU. This brief explanation of the obstacles in reaching generally accepted procedural rules on the problematic subjects of asylum law and the refugee determination process can facilitate an understanding of the APD's inconsistent provisions, and SCO rules in particular, which will be discussed in the following sections.

If we take the 2005 version of the APD as a starting point, and more importantly as the EU legislative body's first attempt to harmonize asylum procedures among EU Member States, the next and most recent legislation in this regard, the Recast Asylum Procedures Directive (hereafter RAPD), adopted in 2013 during the second phase of CEAS establishment, is the best portrait of the EU Community's improved point of view and policy toward asylum seekers and their fundamental rights throughout the EU. The inherent flaws of the primary phase of CEAS establishment, which were recognized and reaffirmed in the Commission's reports[145] (some of which will be described in the next section), convinced the Community to revise the instruments enacted during this period and develop CEAS in accordance with the principles of EU law and

[143] Pieter BOELES, Maarten den HEIJER, Gerrie LODDER, and Kees WOUTERS, prec., note 120, p.276.
[144] Doede ACKERS, prec., note 69, p.2.
[145] *Id*., p.33.

international refugee and human rights law,[146] while also taking into account ECJ and European Court of Human Rights (hereafter ECtHR) jurisprudence.

The first and the most significant difference between the first and second phases of EU common asylum legislation is the law-making procedure under which the Commission's proposal was adopted by the Council and European Parliament. According to Articles 63(1), 67(1), and 251 of the Amsterdam Treaty, reaffirmed in the Treaty of Nice (new Article 67(5)), after the five-year transitional period following the entry into force of the Treaty of Amsterdam, common measures in asylum law would be legislated in a co-decision procedure shared between the Council and European Parliament.[147] In other words, contrary to the legislative procedure set out in the first phase based on unanimous votes from the Council and mere consultation from European Parliament, during the recast process, the Community's contributions were compelled in accordance with Article 251 of the Amsterdam Treaty, the qualified majority votes in the Council (QMV) and the co-decision procedure between the Council and Parliament.

This method for enacting shared asylum law measures is more advantageous than the former, since it recognizes and affords European Parliament a more active role, ensuring that common EU asylum provisions comply with the objectives of the Community and the principles of Community law and international human rights standards. Given that the members of European Parliament are directly elected by the voters in all Member States as representativess of the people's interests, contrary to the Council, which is composed of ministers who defend the Member States' policy, a more effective Parliamentary presence in the law-making process ensures the democratic quality of EU common legislation and increases the fairness and efficiency of adopted measures by limiting the Council's power to give Member States more discretion. Consequently, as will be demonstrated in the following section, the RAPD has directly addressed most of the criticism and concerns of the first Directive and contains more favourable provisions, in particular for more disadvantaged groups of asylum seekers such as SCO applicants.

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[146] Matthew HUNT, prec., note 30, p.523.

[147] *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, and certain related acts (Consolidated Version)*, prec., note 67, art.73k,73o (1), and 251.

The second stage was introduced by the Lisbon Treaty on December 1, 2009, requiring the Commission to prepare proposals for reviewing and reforming EU legislations from the first phase. This goal was reaffirmed in Hague (2004) and Stockholm (2010) programs.[148] During the recast process, the Commission focused on modifying the inherent weakness in the instruments in force, eliminating ambiguous and complicated provisions and limiting the discretion granted to the Member States.[149] The Council and European Parliament were mandated to adopt the legislative proposals with the aim of establishing a single asylum procedure and a uniform international protection status by no later than 2012.[150] This objective has been more influential while revising the APD, as stipulated in the Stockholm Programme, to ensure "greater harmonization and streamlining of the implementation of the procedures,"[151] "prevent or reduce secondary movements within the Union" and "increase mutual trust between Member States."[152]

On October 21, 2009, the Commission put forward a proposal for recasting the APD, which was adopted on June 26, 2013, after the failure of two proposals and four years of negotiation by the Council and European Parliament.[153] It was decided that the RAPD would be implemented and transposed into the Member States' national legislations two years after its adoption, which according to Article 51 of the RAPD was on July 20, 2015.[154] The Member States have an additional three years to implement the new rules on deadlines for decisions on asylum

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[148] Francesca IPPOLITO and Samantha VELLUTI, prec., note 70, p.28-30.

[149] *Id*., p. 32; Steve PEERS, prec., note 70; European Commission, *Policy Plan on Asylum: An Integrated Approach to Protection across the EU*, 17 Jun 2008, Com (2008) 360 final, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF>; European Council, *The Stockholm Programme- An Open and Secure Europe Serving and Protecting Citizens*, (2010/C 115/01), online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2010:115:FULL&from=EN>.

[150] European Commission, *Communication from the Commission to the European Parliament and the Council- An area of freedom, security and justice serving the citizens*, Com (2009) 0262 final, 6 October 2009, p.27, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009DC0262&from=en>; Francesca IPPOLITO and Samantha VELLUTI, prec., note 70, p.30.

[151] Francesca IPPOLITO and Samantha VELLUTI, prec., note 70, p.32.

[152] European Council, *The Stockholm Programme- An Open and Secure Europe Serving and Protecting Citizens*, prec., note 149.

[153] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0032&from=en>.

[154] *Id*., art.51.

applications.[155] Concerning the SCO provisions, which will be discussed in the next section, a comparison between the former and the recast APD revealed that notable improvements have been made.

Before discussing the definition of the SCO concept, it is necessary to circumscribe our research and clarify the provisions that will be discussed in this section. Under the provisions of the APD, the safe countries of origin were to be designated at two distinct levels, the supranational (EU) level and the national level. The first provision is the common SCO list that was to be prepared by the Council of the European Union. According to Article 29(1) of the APD,

> [t]he Council shall, acting by a qualified majority on a proposal from the Commission and after consultation of the European Parliament, adopt a minimum common list of third countries which shall be regarded by Member States as safe countries of origin in accordance with Annex II.

Thus the Council identified and adopted a list of safe countries of origin that all Member States would be forced to abide by and utilize for decisions on refugee applications from these countries.

On March 8, 2006, one year after the APD entered into force, European Parliament opposed the legislative procedure established by the Council in Articles 29(1), (2) and 36(3) of the APD, which necessitated a qualified majority in the Council and Parliamentary consultation. Parliament submitted a plea to the European Court of Justice (ECJ) seeking annulment of these articles and ultimately, annulment of the entire Directive because of its infringement on EU law in relation to the process (co-decision procedure) for adopting common measures on asylum provided for by Article 67(1) of the Treaty of Amsterdam as amended by the Treaty of Nice (Article 67(5)) in accordance with Article 251 of the Treaty of Amsterdam. According to these provisions, the Council, "[d]uring the transitional period of five years following the entry into

[155] *Id.*, art.51.2.

force of the Treaty of Amsterdam,"[156] was mandated to adopt common asylum law provisions as determined in Article 63(1) of the Treaty of Amsterdam, in accordance with the procedure considered in Article 67(1) of the Treaty authorizing the Council to act unanimously on the proposals from the Commission or the Member States after consulting European Parliament.[157]

Parliament reasoned that according to the first indent of Article 67(5), as introduced by the Treaty of Nice, the Council should enact the secondary legislation (the Community legislation that "the Council has previously adopted, in accordance with paragraph 1 of this Article [...] defining the common rules and basic principles governing these issues") in the field of asylum law, pursuant to the legislative procedure established by Article 251 of the Treaty of Amsterdam. Article 251 required qualified majority votes in the Council (QMV) and the co-decision procedure between the Council and Parliament.[158] Parliament took the view that since the APD was the last document adopted according to Article 63(1) of the Treaty of Amsterdam, which terminated the transitional period of five years, enacting the common list of safe countries of origin and European safe third countries after this time frame was an act of secondary asylum legislation and that the Council should legislate the measures in question according to the legislative process under Article 67(5) and 251 of the Treaty of Amsterdam.[159] Consequently, Parliament concluded that due to the Council's disregard of the common legislation process and its consequent lack of competence in providing or amending the safe countries of origin list or the common list of European safe third countries, the contested articles in the APD had to be declared invalid.[160]

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[156] *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, and certain related acts (Consolidated Version)*, prec., note 67, art.73k and 73o (1).
[157] *Id*., art.73o (1).
[158] European Court of Justice, *Parliament* v. *Council*, (2008) C-133/06, para.19-42, online: <http://curia.europa.eu/juris/celex.jsf?celex=62006CJ0133&lang1=en&type=TXT&ancre=>.
[159] *Id*., para.21.
[160] *Id*., para.19.

Taking into consideration the parties' arguments, the ECJ found that under Article 7(1) of the Treaty of Amsterdam,[161] EU institutions are mandated to act in accordance with the competence conferred and within the limits determined by the Treaty of Amsterdam.[162] Secondly, despite "the political importance of the designation of safe countries of origin"[163] and "the potential consequences for asylum applicants of the safe third country concept"[164] expressed in Recital 19 and Recital 24 of the APD respectively, the Council failed to provide detailed grounds to justify its decision to consider itself an exceptional power to amend the decision-making procedure as prescribed in indent 2 of Article 67(2) of the Treaty of Amsterdam,[165] which enabled the Council, "acting unanimously after consulting the European Parliament, [to] take a decision with a view to providing for all or parts of the areas covered by this Title to be governed by the procedure referred to in Article 189b."[166] Thirdly, given the fact that the Council, by adopting the APD, provided "detailed criteria enabling the lists of safe countries to be established subsequently,"[167] the enactment of the common list of safe countries of origin, the common list of European safe third countries and amendment of these two lists should be considered a common secondary legislative act intended to be accomplished in accordance with qualified majority votes in the Council and the co-decision legislative procedure between European Parliament and the Council of the European Union, provided for in Articles 67(5) and 251 of the Treaty of Amsterdam.[168]

The ECJ therefore upheld the European Parliament's plea on the invalidity of Articles 29(1), (2) and 36(3) of the APD and subsequently annulled these provisions.[169] Since the Council and Parliament have not yet prepared any common list, the focus in the next section will be on the

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[161] *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, and certain related acts (Consolidated Version)*, prec., note 67, art.7(1).
[162] European Court of Justice, *Parliament* v. *Council*, prec., note 158, para.44.
[163] *Id*., para.48.
[164] *Id*., para.48.
[165] *Id*., para.47 and 58.
[166] *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, and certain related acts (Consolidated Version)*, prec., note 67, art.73o(2).
[167] European Court of Justice, *Parliament* v. *Council*, prec., note 158, para.10-17, and para.65.
[168] *Id*., para.65-66.
[169] *Id*., para.67-69; Cathryn COSTELLO, prec., note 134, p.159.

SCO concept and the procedure for designating SCO countries at the national level, referring to the Commission proposals and the enacted provisions of the APD.

The SCO concept discussed in this study refers to the third countries (non-EU Member States) that have been identified as safe countries of origin. Accordingly, we will not examine the concept of EU safe countries of origin as described in the *Protocol on Asylum for Nationals of Member States of the European Union (Aznar Protocol)*,[170] which is annexed to the Treaty of Amsterdam. Under its sole article, asylum requests lodged by citizens of EU Member States will be considered unfounded or inadmissible "given the level of protection of fundamental rights and freedoms by the Member States of the European Union" and regards all EU Member States "as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters."[171] Each Member State is prevented from accepting and processing asylum applications from another Member State's citizens unless certain conditions are met according to the Aznar Protocol.[172]

Among the EU Member States, only Belgium has made a reservation to the Aznar Protocol[173] by adding a declaration to the Treaty of Amsterdam. All the asylum legislations adopted under the Community's discretion in the first pillar will exclusively govern issues involving asylum applications lodged by third country nationals, namely individuals who come from non-EU Member States.

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[170] *Protocol on asylum for nationals of Member States of the EU (Aznar Protocol)*, Protocol annexed to the Treaty establishing the European Community, OJ C 115, 9.5.2008, p. 305-306, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E/PRO/24&from=EN>.

[171] *Id*., art.1.

[172] *Id*.

[173] Belgium has proclaimed that "in accordance with its obligations under the 1951 Geneva Convention and the 1967 New York Protocol, it shall, in accordance with the provision set out in point (d) of the sole Article of that Protocol (Aznar Protocol), carry out an individual examination of any asylum request made by a national of another Member State." (*Declaration no 56 by Belgium on the Protocol on asylum for nationals of Member States of the European Union*, Declaration annexed to the treaty of Amsterdam).

2.1.1: The definition of the SCO concept

A safe country of origin is described in Annex II of the APD as follows:

> A Country...where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.[174]

This definition, repeated exactly in Annex I of the RAPD,[175] is in line with Article 4(3) of the Qualification Directive (Article 4(3) of the Recast Qualification Directive) requiring the Member States to take the general situation of the country of origin into consideration while assessing an application for international protection.[176] According to this definition, which is the same as in the previous document adopted in this regard, the *Conclusion on Countries in Which There is Generally No Serious Risk of Persecution*,[177] the general safety of a third country is conceivable "on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances,"[178] provided that the criteria set out in the APD are satisfied.

The APD and the RAPD have provided one of the EU's most comprehensive definitions to date, and generally, in a series of provisions other than national SCO definitions. By referring to the provisions of the Qualification Directive (and the Recast Qualification Directive), the APD and

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[174] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, Annex II.

[175] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, Annex I.

[176] European Union, *Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, 29 April 2004, art. 4(3), online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML> ; European Union, *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 guaranteed*, art.4(3), online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0095&from=EN>; Hemme BATTJES, prec., note 19, p.346.

[177] European Union, *Conclusions on Countries in Which There is Generally No Serious Risk of Persecution*, prec., note 22, para.1.

[178] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, Annex II.

the RAPD have addressed almost all reasons for which international protection requests may be well founded.[179]

First of all, Article 9 of the Qualification Directive, in accordance with Article 1A of the *1951 Geneva Convention*, defined acts of persecution as "sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms" or "an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a),"[180] which can take different forms as described in paragraph 2 of Article 9.

Second of all, the various types of serious harm, including mistreatment and threats, are clarified in Article 15 of the Qualification Directive as "death penalty or execution," "torture or inhuman or degrading treatment or punishment of an applicant in the country of origin" or "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."[181]

The definition of the SCO concept, combined with the Qualification Directive's definitions, is more complete and detailed than in the Commission's 2002 proposal, which briefly defined a safe country of origin as a country that "consistently observes the basic standards laid down in international human rights law from which there may be no derogation in time of war or other public emergency threatening the life of the nation."[182] The SCO definition provided in Annex II of the APD (Annex I of the RAPD) includes almost all forms of persecuting, harmful and

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[179] Hemme BATTJES, prec., note 19, p.347.

[180] European Union, *Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, prec., note 176, art.9(1) and (2).

[181] *Id*., art.15.

[182] European Commission, *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, 2002, Annex II, para I, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:JOC_2002_291_E_0143_01&qid=1436380015190&from=EN>.

threatening acts that refugee applicants may provide to substantiate their international protection claims. The wider scope of the SCO concept in the final version of the APD, compared to the Commission's 2002 proposal, is more helpful for SCO asylum seekers in proving the danger and discrimination they experience in their country of origin. Consequently, minority groups who face well-organized and multifaceted discrimination based on their gender, religion or ethnic origin, even in apparently democratic countries, may establish the real threat they experience in allegedly safe countries of origin.

However, the difficulty arises when applying the criteria for assessing the general safety of a particular third country provided by the APD and replicated word for word in Annex I of the RAPD. There are significant differences between the criteria set out in the Commission's 2002 proposal[183] and the versions adopted by the Council in 2005 and 2013 that may ultimately undermine the refugee protection standards guaranteed by the EU. Under paragraphs (a) to (d) of Annex II of the APD (paragraphs (a) to (d) of Annex I of the RAPD), the Member States are required, when evaluating the safety of a third country, to take into account the protection provided by the country of origin for its people against persecution or mistreatment according to certain standards, including:

a) "[T]he relevant laws and regulations of the country and the manner in which they are applied"[184]: This criterium was previously expressed in Article 4(3)(a) of the Qualification Directive in 2004 (Article 4[3][a] of the Recast Qualification Directive), which required the Member States to consider inter alia, when examining an individual's application, "all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and

[183] The Commission has made no changes on the criteria for designation of SCO in its proposal aimed at recasting the Asylum Procedures Directive of 2005. In this regard refer to: European Commission, *Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast)*, COM (2011) 319 final, 1 Jun 2011, p.78, online: <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0319_/com_com(2011)0319_en.pdf>.

[184] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, Annex II, para. (a); European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, Annex I, para. (a).

the manner in which they are applied."[185] The APD and RAPD have therefore recognized the legislative acts of the third country as the primary and official sources for evaluating the extent to which protection against persecution and mistreatment is provided for nationals of the third country.

b) "[O]bservance of the rights and freedoms laid down in the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and/or the *International Covenant on Civil and Political Rights* and/or the *Convention against Torture*, in particular the rights from which derogation cannot be made under Article 15(2) of the said European Convention,"[186] and "respect of the non-refoulement principle according to the Geneva Convention"[187]: again, in this paragraph the APD and RAPD have the same formal approach as in paragraph (a), since they consider whether a third country accedes to the aforementioned international conventions and respects the rights and freedoms enacted under the provisions of these conventions as the second requirement for determining the country's general safety. In contrast, there is no reference to international refugee and human rights legal instruments in the Commission's 2002 proposal, but human rights, which the Commission considered fundamental, were specifically mentioned in Annex II of the proposal to serve as an indication of the safety of the country in question, including "the right to freedom of thought, conscience and religion, the right to freedom of expression, the right to freedom of peaceful assembly, the right to freedom of associations with others, including the right to form and join trade unions and

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[185] European Union, *Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, prec., note 176, art.4(3)(a); European Union, *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 guaranteed*, prec., note 176, art.4(3)(a).

[186] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, Annex II, para.(b); European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, Annex I, para.(b).

[187] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, *Id*., Annex II, para.(c); European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, *Id*., Annex I, para.(c).

the right to take part in government directly or through freely chosen representatives" and "the right to liberty and security of person, the right to recognition as a person before the law and equality before the law."

In fact, there was no priority or hierarchy between the human rights enumerated in Annex II of the Commission's 2002 proposal, but expression of these fundamental human rights would demonstrate their importance in the EU Community's view and could serve as an important guideline to assist the Member States in understanding the human rights that are key to the protection of a person and examining the real safety of a third country. However, the vague reference to rights and freedoms in the final versions of the APD and RAPD leaves the door open for the Member States to underestimate the importance of human rights violations by a third country. This may be the case when a Member State overlooks human rights infringements in a third country, stating they are not significant enough to declare the country unsafe, for reasons of diplomatic relations or the economic or politic interests of both countries as indicated in paragraph 19 of the APD Preamble.[188] In other words, with regard to designation of an SCO, deep concerns remain that irrelevant considerations such as intergovernmental relations taint the central objective of assessing the safety of a third country.[189] UNCHR, in its comment on the APD Directive proposal, stipulated that "clear benchmarks" are vital in order to demonstrate the exact circumstances under which a country can be identified as an SCO and be included in the common or national list.[190]

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[188] *Id*., Preamble, para.19.

[189] Cathryn COSTELLO, prec., note 24, p.66.

[190] The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005, p.40, online: <http://www.unhcr.org/43661ea42.pdf>.

c) "[P]rovision for a system of effective remedies against violations of these rights and freedoms"[191]: in comparison to the Commission's 2002 proposal, this provision does not comprehensively and carefully consider the real practices of the third country. According to paragraph I of Annex II of the Commission's 2002 proposal, the Member States were required to take into account not only the third country's practices to provide "generally effective remedies against violations of these civil and political rights and, where necessary, for extraordinary remedies,"[192] but also its openness to monitoring of its human rights observance by international organizations.[193] This provision, which briefly referred to "the relevant laws and regulations of the country and the manner in which they are applied,"[194] was omitted in the final version of the APD and the RAPD. According to both documents, the Member States are required to take into account different sources of information, including "the legal situation, the application of the law and the general political circumstances in the third country concerned"[195] and "information from other Member States, EASO, the UNHCR, the Council of Europe and other relevant international organisations."[196] However, there is always a potential risk that the real practices of the country in question will remain uncovered. Even in cases where the effective remedy is accessible for all nationals of the third country, it is likely that its judicial body is not capable enough to supervise or ensure that the courts' decisions are exercised. It is conceivable that in many cases, international organizations,

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[191] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, Annex II, para.(d); European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, Annex I, para.(d).

[192] European Commission, *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, 2002, prec., note 182, Annex II, para. I D.

[193] *Id*., Annex II, para. I B.

[194] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, Annex II, para.(a); European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, Annex I, para.(a).

[195] *Id*., art.30(4).

[196] *Id*., art.30(5); European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.37(3).

> NGOs or the embassies of foreign countries that regularly review the situation[197] or periodically monitor the practices of the third countries have limited access to real information. At the very least, the third country's receptivity to and cooperation with monitoring by these organizations demonstrates the transparency of its government. More importantly, efficient and regular review of the safe countries of origin, required by the RAPD and reiterated by UNHCR in its comments on the Commission's 2002 proposal, provides the EU and its Member States with an opportunity to react efficiently and discover both gradual and sudden changes to the human rights situation in a third country previously identified as safe.[198]

It can be concluded that designation of a third country as an SCO under these criteria does not constitute any meaningful or strong presumption of safety.[199] The necessary conditions are vague, and the third country's actual practices are ignored. Admittedly, the Council and European Parliament have provided the Member States with a wide margin of discretion to designate an SCO list and have facilitated application of this restrictive rule in the Member States' respective national asylum legislations.

Regarding the procedure for adding a country to the SCO list in a Member State's national asylum legislation, contrary to the obligatory nature of the common SCO list, each Member State asylum is left to determine their national SCO list. The difference between the APD and the RAPD is as follows.

According to the APD, two kinds of processes were planned. The first process concerned the identification of safe countries of origin using the same definition and criteria established by Annex II, as explained above. Under Article 30(1):

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[197] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.2.
[198] The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), prec., note 190, p.40.
[199] Hemme BATTJES, prec., note 19, p.348-349.

> Without prejudice to Article 29, Member States may retain or introduce legislation that allows, in accordance with Annex II, for the national designation of third countries other than those appearing on the minimum common list, as safe countries of origin for the purposes of examining applications for asylum. This may include designation of part of a country as safe where the conditions in Annex II are fulfilled in relation to that part.[200]

While the Member States were obliged to observe the requirements stipulated in Annex II for introducing new rules or maintaining their current legislation on the identification of SCOs, they were also permitted to designate either a whole country or part of a country as safe,[201] contrary to Article 30 of the Commission's 2002 proposal, which permitted the Member States to designate only an entire country as safe according to the same criteria in Annex II considered for creation of a common list.[202] The discretion granted to the Member States in the final version passed by the Council directly contradicted the definition provided in Annex II, which describes a safe country of origin as "a country" without considering, in any way whatsoever, any geographical exceptions. The question that should be asked is that if a third country is presumed to be safe based on its "general political circumstances," as expressed in paragraph 1 of Annex II, how is it acceptable to designate only part of the county as safe and not the whole country? While denying the idea of partial designation of a safe country of origin in its comments on the Commission's proposal, UNHCR answered that:

> [T]he designation of a safe part of a country does not necessarily represent a relevant or reasonable internal relocation or flight alternative. The existence of a "safe" part of a country may be but one element in an examination of whether a particular asylum-seeker has such an alternative. The complex questions which arise in the application of the

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[200] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, art.30(1).
[201] *Id*., art.30(1) and Annex II.
[202] European Commission, *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, prec., note 182, are. 30(1) and (2).

internal flight alternative require, however, a careful examination of the individual case in the regular procedure and should not be dealt with in an accelerated procedure.[203]

The second group of provisions on the designation of an SCO at the national level are Articles 30(2) and (3) of the APD, according to which the Member States, by derogation from Article 30(1) and Annex II, could "retain legislation in force on 1 December 2005 that allows for the national designation of third countries, other than those appearing on the minimum common list, as safe countries of origin for the purposes of examining applications for asylum"[204] and/or "retain legislation in force on 1 December 2005 that allows for the national designation of part of a country as safe, or a country or part of a country as safe for a specified group of persons in that country."[205] In this regard, the criteria that had been used to identify SCOs were much less restrictive than the Annex II criteria, since it would be sufficient for the nationals of the third country to be generally subjected to neither "persecution as defined in Article 9 of Directive 2004/83/EC" nor "torture or inhuman or degrading treatment or punishment."[206]

Under these two provisions, the Member States were allowed to maintain their current restrictive asylum policy or legislate new rules enabling them to designate a third country as safe with not only geographical but also with population exceptions. As the most worrisome feature, the criteria for identifying SCOs were so ambiguous and "unsatisfactory"[207] that they would call into question the Member States' ability to verify the safety of third countries and render the whole process suspect to political or economic intergovernmental considerations rather than the humanitarian and refugee protection objectives of asylum legislation. The Member States, under Articles 30(2) and (3), were not obliged to consider the international refugee and human rights

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[203] The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), prec., note 190, p.40-41.
[204] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, art.30(2).
[205] *Id*., art.30(3).
[206] *Id*., art.30(2)(a) and (b).
[207] The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), prec., note 190, p.41.

obligations of the third country, its real human rights practices or its respect for the rule of law.[208]

More dangerously, based on these ineffective requirements, the Member States could assure the safety of a particular group of people in a third country without extensive knowledge of the cultural or judicial system in question or the religious or ethical beliefs of its society. How is it possible and acceptable to consider specific parts of a country safe while its government does not have sufficient authority to maintain security across its entire territory? As explained by UNHCR, in adopting the APD, the Council confused the distinct concepts of internal relocation and flight alternative with the SCO concept, which involves entirely different considerations and requires stringent scrutiny.

These provisions proved that the main purpose of adopting the APD was not to establish a real and workable harmonization of the Member States' asylum policies. In practice, the Member States' objective, which was delegated to the Council, was to force the EU to acknowledge their neglectful and restrictive asylum measures.[209] The harmful effect of the APD's provisions for designating SCOs, in practice a collection of the Member States' varied and contradictory practices with many substantial derogation clauses and exceptions, was to encourage the Member States to participate more than before in the competitive race to the bottom. As a result, the goal of creating a common asylum procedure to protect the rights of persons in need of international protection in a uniform way was completely missed. Subsequently, several Member States, including Germany, France, Austria, the Netherlands and the United Kingdom, seemingly legally amended their national asylum legislation and added some new countries to their national list of safe countries of origin before the APD was passed. In fact, they intended to take advantage of the chance to indirectly violate and circumvent the provisions of the Directive in such a way that they would not be obliged to change their national list at a later date by observing more rigid requirements under the Directive.[210] As Costello has reiterated, "The temptation for Member States to use the Directive as an excuse to lower domestic standards may

[208] Steve PEERS, prec., note 135, p. 105-106.
[209] Matthew HUNT, prec., note 30, p.508; Doede ACKERS, prec., note 69, p.27.
[210] Cathryn COSTELLO, prec., note 24, p. 53.

prove irresistible, as the Directive contains no standstill clause."[211] Moreover, national legislations amendments before the adoption of the Directive made its process of decision-making more complicated and time-consuming.[212]

Some Member States like the Czech Republic, Finland, France, the Netherlands, the UK and Germany have retained their national legislation in force according to these requirements,[213] while Belgium, Bulgaria, Italy, Poland, Greece, Slovenia, Sweden and Spain did not implement these derogating provisions in their national legislation and remain bound by criteria in Annex II related to the common list.[214] Greece legislated for designation of part of a country as safe under certain conditions, and the UK has permitted designation of part of a country as safe or of a country as safe for a specified group of persons.[215]

Fortunately, under Article 37(1) of the RAPD, as in the Commission's 2002 proposal, no different criteria and no exceptions based on territorial or population considerations have been determined for national legislation, either relating to the current legislation or the introduction of new asylum rules.[216] This provision is one of the best amendments incorporated into the RAPD to address the criticism from refugee and human rights specialists and expert organizations, since it ensures effective coordination among the Member States' asylum laws and provides more integrity for a Common European Asylum System. According to the new Directive, "Member States may retain or introduce legislation that allows, in accordance with Annex I, for the

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[211] *Id*., p.68; The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", March 2010, p.332, online: <http://www.unhcr.org/4c7b71039.pdf>; The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), prec., note 190, p.40.

[212] Doede ACKERS, prec., note 69, p.2.

[213] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.337.

[214] *Id*., p.340.

[215] *Id*., p.337.

[216] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.37(1); European Commission, *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, 2002, prec., note 182, art.30(2) and (3).

national designation of safe countries of origin for the purposes of examining applications for international protection."[217]

The RAPD, like its precedent, permits a generalized presumption of safety based on criteria in Annex I with the same deficiencies as the requirements of Annex II of the APD, but contrary to the provisions of the former Directive, Member States are not authorized to designate SCOs according to less restrictive criteria or with geographical or group-specific exceptions. There is no mention of the EU common list, and the possibility of determining a binding SCO list for all Member States has been completely eliminated. Yet the missing provision in the RAPD is that while the Member States are required to "regularly review the situation in third countries designated as safe countries of origin"[218] and "notify to the Commission the countries that are designated as safe countries of origin,"[219] there are no reliable arrangements to respond rapidly to sudden changes in a country of origin's security situation.[220]

Admittedly, the limited approach for national designation of SCOs followed from the Commission's 2002 proposal, and the RAPD is the best way to establish harmonized procedures in application of SCO measures among Member States. It preserves the CEAS throughout the EU,[221] provides efficient international protection to persons who truly need it, increases the integrity of the Member States' asylum systems by preventing mistreatment of their national legislation and ensures a uniform and fair asylum determination procedure throughout the EU.[222]

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[217] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.37(1).
[218] *Id*., art.37(2).
[219] *Id*., art.37(4).
[220] Matthew HUNT, prec., note 30, p.526.
[221] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.340-345; European Commission, "Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", (Com (2010) 465 final), 8 August 2010, p.12, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0465&from=EN>.
[222] *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, and certain related acts (Consolidated Version)*, prec., note 67, art.73k; *Tampere European Council, Presidency Conclusions*, prec., note 131; European Commission, *Communication from the Commission to the*

A comparison of the APD and RAPD clearly demonstrates that the Council and European Parliament intended to restrict the Member States' discretion to exercise the SCO rule through the RAPD, while the APD was a strong indication of the Member States' reluctance to relinquish their restrictive asylum policies and of their focus on reducing the numbers of refugee applications as much as possible.[223] The difficulties that the Commission and the Council faced during the debates for amendment of the original 2002 proposal resulted in "deadlock in negotiations," in particular on subject matter relating to SCOs, STCs and appeal rights. As observed above, the only remaining way for the Council to satisfy all Member States in passing the APD was to adopt the relevant provisions with many restrictions and exclusions rooted in the Member States' national practices.[224] In the end, the APD reflected what the Member States had already been doing for decades.[225] In this regard, UNCHR stated that

> [T]aking a very good European Commission draft as its starting point, the long process of inter-state negotiations has resulted in an Asylum Procedures Directive which contains no binding commitment to satisfactory procedural standards, allowing scope for states to adopt or continue worst practices in determining asylum claims.[226]

The Council's and European Parliament's endeavour to improve and coordinate the application of the SCO rule among the Member States by adopting the RAPD must be appreciated. The wide range of disparities caused by the provisions of the former Directive had diminished the possibility of reaching the goal of creating the CEAS. The RAPD's single set of criteria to determine SCOs, without any exception clauses, reduces the complexity of the EU asylum system and ensures more harmonization among the Member States in implementing the RAPD

European Parliament and the Council- An area of freedom, security and justice serving the citizens, prec., note 150, p.30; European Commission, *Policy Plan on Asylum: An Integrated Approach to Protection across the EU*, prec., note 149; *The Stockholm Programme- An Open and Secure Europe Serving and Protecting Citizens*, prec., note 149; Matthew HUNT, prec., note 30, p.515-516.

[223] The United Nations High Commissioner for Refugees, "Lubber calls for EU asylum laws not to contravene international law", 29 March 2004, online: <http://www.unhcr.org/40645bd77.html>.

[224] Doede ACKERS, prec., note 69, p.28.

[225] *Id*., p.32; Matthew HUNT, prec., note 30, p.509.

[226] The United Nations High Commissioner for Refugees, "UNHCR regrets missed opportunity to adopt high asylum standards", 30 April 2004, online: <http://www.unhcr.org/40921f4e4.html>.

provisions in their national legislation.[227] Enacting SCO national designations brings about a proliferation of inconsistent and divergent standards among the Member States, but it should not be forgotten that during negotiations for adoption of the RAPD, there was strong resistance against European Parliament's proposed amendments to get rid of national lists.[228] The only way left to protect the general principle of Community law and respect international refugee and human rights law was to remove the derogation clauses incorporated in the former Directive and restrict the Member States' discretion in denying SCO applicants their basic procedural rights.

The last matter that should be taken into account is the fundamental notion of the SCO rule, recognized differently by the APD and the RAPD. Article 31(2) of the APD, which allowed the Member States to consider any application from a safe country of origin to be unfounded, has been removed in the RAPD. Transforming the SCO concept from a mandatory rule to a guideline for applying the accelerated procedure is a significant success for the Community's asylum legislation.[229] It seems that the Council and European Parliament have addressed the concerns of critics regarding the dangerous effect of Article 31(20) of the APD, which obliged Member States, even those without national SCO rules, to lower their national protection standards. One may argue that the RAPD has contradicted this improvement by passing Article 36(2), which stipulates that "the Member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept." However, upon closer examination of the RAPD, we will see that this argument is inconsistent with other provisions. According to Article 36(1) of the RAPD a third country, in accordance with criteria in Annex I, "may"[230] be determined to be an SCO, while Article 37(1) explicitly states that "the Member States 'may' retain or introduce legislation that allows, in accordance with Annex I, for the national designation of safe countries of origin for the purposes of examining applications for

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[227] Matthew HUNT, prec., note 30, p.529.
[228] *Id*., p.523-525.
[229] Cathryn COSTELLO, Emily HANCOX, "The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum Seeker and the Vulnerable Refugees", 5 February 2015, Oxford Legal Studies Research Paper No. 33/2015, Forthcoming in Vincent CHETAIL, Philippe De BRUYCKER, and Francesco MAIANI (dir.), *Reforming the Common European Asylum System: The New European Refugee* Law, Brill, Nijhoff, 2016, p.28, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2609897>.
[230] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.36(1).

international protection."[231] Thus, the Member States are free to decide whether or not to maintain a national SCO list, and the RAPD does not require the Member States to apply the SCO provisions in their national legislation.[232]

The most worrying subject matter in terms of applying the preventive measure of the SCO rule is the Member States' authority to impose widespread deprivation or limitation of the procedural and fundamental human rights of SCO asylum seekers during the determination process. Under paragraph 21 of the APD Preamble and paragraph 42 of the RAPD Preamble, it is established that "by its very nature" SCO designation "cannot establish an absolute guarantee of safety for nationals of that country," but that "the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country." Consequently, it can be concluded that "where an applicant shows that there are serious reasons to consider the country not to be safe in his/her particular circumstances, the designation of the country as safe can no longer be considered relevant for him/her."[233] Regrettably, according to European Council on Refugees and Exiles' 2013/2014 annual report (Asylum Information Database: AIDA), even with the amendments implemented by the RAPD, there is an inherent risk of "undermining the quality of examination of international protection needs," in particular because of the considerably varied approach of the Member States in transposing and implementing preventive measures such as the SCO and STC rules, and also owing to "the procedural disadvantage and the increased burden of proof they tend to create for the applicants concerned from the start of the procedure."[234]

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[231] *Id*., art.37(1).
[232] Matthew HUNT, prec., note 30, p.526; Cathryn COSTELLO, Emily HANCOX, prec., note 229, p.28.
[233] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, Preamble, para.21; European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, Preamble, para.42.
[234] European Council on Refugees and Exiles, "Mind the Gap. An NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System", Annual Report 2013/2014, p.48, online:
< http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annual_report_2013-2014_0.pdf>.

In the three next sections, we will reassess whether effective avenues are provided for SCO refugee applicants at the first instance of decision-making (the right to a personal interview) and at the appeal level (the right to appeal) to substantiate their persecution claims and reject the general presumption of safety regarding their country of origin. To limit the scope of the inquiry, we have decided to explain the legal and procedural deprivations that have the most crucial effects on the procedural fairness of decision-making procedures as reiterated by certain specialists.[235] Those are the right to a personal interview, the right to appeal and reasonable time limits to make a decision. There are other procedural safeguards such as the right to legal aid or the right to a reasoned decision,[236] but the three requirements mentioned above, commonly restricted in the asylum legislation of both the EU and Canada, have a vital role in ensuring the fairness of any determination procedure, especially in the field of asylum rights.[237]

At the EU level, the right to a personal interview and the right to effective remedy are two of the core components of Community law that ensure the fairness of asylum decision-making procedures. However, before considering these two fundamental rights, it would be useful to briefly explain the procedure under which SCO applications may be assessed according to the APD. The harmful effects of the accelerated procedure, exaggerated in relation to the restrictions inflicted on the two rights mentioned above, will be illustrated in further detail in the following sections.

2.1.2: Accelerated procedure

Under Article 23(1) and (2) of the APD, the Member States were expressly required to conduct a determination procedure for refugee applications at first instance, in accordance with the fundamental principles and safeguards stipulated in Chapter II of the Directive,[238] and to make a decision "as soon as possible"[239] but "without prejudice to an adequate and complete

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[235] Cathryn COSTELLO, prec., note 134, p.154; Matthew HUNT, prec., note 30, p.512-513.
[236] Cathryn COSTELLO, prec., note 134, p.152.
[237] Matthew HUNT, prec., note 30, p.513.
[238] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, art.23(1).
[239] *Id*., art.23(2).

examination."[240] This provision was explained in Recital 11 of the APD: it would remain within the scope of each Member State's discretion to organize a workable system for processing refugee applications, but the Member States, bound by the standards set out in the APD, would make the final decision on refugee applications as soon as possible with the goal of putting in place a fair and efficient determination procedure that served the interests of both the Member State concerned and the refugee applicants.[241]

It should be noted that while the duration of the examination procedure had not been determined explicitly, even in the Commission's proposal, the APD acknowledged a time limit of six months as an acceptable duration for examining and making a decision on a refugee application, since the Council stipulated that "where a decision cannot be taken within six months," the Member States should either notify applicants of the delay, or give them updates on the time frame within which the final decision is expected to be rendered, upon request.[242]

The disturbing point of Article 23 was that apart from the undetermined time frame, even in cases where the examination had not been finalized after six months and the applicant had been informed of the time frame within which the competent authority expected to issue the decision, the host Member State had no obligation to respect this time schedule, since according to the last paragraph of Article 23(2) (b), such an anticipated time frame was not considered "an obligation for the Member State towards the applicant concerned to take a decision within that time-frame."[243]

The harmful effects of the unspecified time limit were more evident in 14 cases, determined under Article 23(4) of the APD, according to which the Member States could apply the accelerated procedure while respecting the basic principles and guarantees of Chapter II. The Directive therefore did not set out any time limits for the accelerated procedure and permitted the Member States to accelerate the determination procedure, which amounted to a wide range of

[240] *Id*.
[241] *Id*., Preamble, para.11.
[242] *Id*., art.23(2) (a) and (b).
[243] *Id*., art.23 (2) (b); The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.223.

time frames among the Member States, varying from a one-month time limit in the Czech Republic to 15 days for the in-territory accelerated procedure for applicants who were not detained in France, to the extremely shortened duration of two days for the airport accelerated procedure in certain Member States like Germany.[244] There were many discrepancies among the Member States in applying the accelerated procedure, including the grounds for application, the authority making decisions on the acceleration and the procedural rights omitted from the expedited procedure.[245] The discretion provided to the Member States to speed up the determination procedure was counter to the EU's central objectives in creating a common asylum system among EU Member States in accordance with the principles of EU law and, as reiterated in the Treaty of Amsterdam, to eliminate secondary movement of asylum seekers through the EU.[246]

In order to reduce these negative outcomes, the Council and European Parliament, through Article 31(3) of the RAPD, have obligated the Member States to make a decision within six months of lodging the application, in accordance with the basic principles and guarantees set out in the Directive.[247] However, it seems that they have not been successful in constraining the Member States' authority and appointing a single mandatory time limit for the first instance refugee procedure. Three other time limits are mentioned in the RAPD. The first concerns the cases in which the Member States are allowed to exceed the six-month time frame by postponing

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[244] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.246; European Commission, "Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", (Com (2010) 465 final), prec., note 221, p.9-10.

[245] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.225-275; European Commission, "Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", (Com (2010) 465 final), prec., note 221, p.9.

[246] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, Preamble, recital 1 and 6.

[247] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.31(3).

the final decision to a maximum of nine months following the lodging of the application.[248] Under Article 31(3), this delay is subject to three conditions, including complex factual or legal issues related to the application, simultaneous refugee applications or the applicant's failure to cooperate with the competent authority. In the second condition, according to the last paragraph of Article 31(3), the Member States are entitled to reschedule and add another exceptional time limit, not to exceed three months at maximum, to issue the final decision if they seek to "ensure an adequate and complete examination of the application for international protection."[249] According to Article 31(5), the third and final time frame relates to the duration of the processing time, and shall not exceed "21 months from the lodging of the application."[250] These conditions are extremely vague and general, preventing applicants from objecting to the recurring deferment imposed on the determination procedure or from proving that the delay in the determination procedure is unjustified and contrary to Article 31(3) of the RAPD.

The RAPD's provisions on the first instance's reasonable time limits therefore suffer from the same shortcomings as the previous Directive. The discretion granted to the Member States to extend the time limit for concluding each refugee application may cause "asylum in limbo," when the refugee claimants must wait for a long time for the determining authority's decision on their application, with no indication of a possible final decision in the near future. This uncertainty eventually leads to asylum seekers' irregular or secondary movement to another Member State with the hope of being accepted by more favourable asylum legislation. The reason behind this ambiguous legislation is the high diversity of the determination procedure timescale among the Member States based on their respective administrative and constitutional law, which makes it impossible to set a single time limit with no exceptions.

The next essential issue that should be taken into consideration is the provisions regulating expeditious procedures. In the RAPD, the cases in which the Member States may apply the accelerated procedure have been reduced to nine, compared to fourteen cases in the APD; however, both instruments allow the Member States to apply the accelerated procedure to

[248] *Id*., art.31(3) and (4) and (5).
[249] *Id*.
[250] *Id*., art.31(5).

process SCO applications. Fortunately, the APD's inconsistent provisions on the procedural rights of SCO applicants have been removed in the RAPD. In fact, in the APD, the Council required the Member States to respect the basic principles and guarantees of Chapter II when accelerating the determination process, but they were also given the authorization to derogate from certain procedural rights ensured in Chapter II of the Directive, including the right to a personal interview and the right to stay pending appeal, with the purpose of guaranteeing the speed of this type of procedure. Consequently, applicants had no opportunity to prepare themselves for the determination procedure, gather the necessary documents, provide convincing evidence of their persecution claim and explain or correct inconsistent and contradictory statements or insufficient information they may have given during the preliminary interview.[251] Moreover, the competent officials were not afforded adequate time to rigorously process all the legal and factual aspects of refugee applications, which made them incapable of rendering a sound and reasoned decision and undermined the accuracy and fairness of the whole determination procedure. In effect, the fast-track procedure for assessing SCO asylum seekers, which did not fully observe the fundamental principles of EU law, the procedural safeguards incorporated in the APD and the international human rights obligations of the Member State concerned, had detrimental effects on both the host country's asylum systems and refugee applicants, as reiterated in Recital 11 of the APD.[252] Certain Member States such as the Czech Republic, Spain, Finland, France, Germany and Slovenia had transposed Article 23(4)(c)(i) in their national legislation.[253]

Some may put forward the argument that the accelerated or prioritized determination procedure is one of the most helpful solutions for both the receiving country and asylum seekers, because speeding up the determination procedure aids in identifying applicants with a real and urgent need of protection and granting international protection sooner, prevents misuse of the Member

[251] European Council on Refugees and Exiles, "ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", prec., note 132, p.13-14 and p.20.
[252] Henry MARTERSON and John MCCARTHY, prec., note 32, p.321; Matthew HUNT, prec., note 30, p.512.
[253] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.258.

States' generous asylum legislation and reduces the burden on competent officials in examining asylum applications. This reasoning could be accepted if applicants who were channelled through accelerated procedures enjoyed the same procedural rights and safeguards as regular applicants. But when the Member States are allowed to deprive SCO applicants of the most crucial procedural rights, such as the right to a personal interview[254] or the right to remain in the host country while awaiting an appeal decision,[255] or when they are able to impose severe time restrictions on their decision-making procedures, the only explanation is that their primary purpose is not to provide quality decisions or increase the fairness of first instance decisions, as reiterated in Recital 3 of the APD,[256] but rather to reject asylum applicants at any cost as soon as possible.[257] In this context, Article 23(4) represented one of the gravest threats to the procedural rights of SCO nationals, hindering their rights as ensured in the APD.[258]

Omission of these conflicting measures in the RAPD will hopefully reduce the likelihood of erroneous decisions and the risk of violating fundamental human rights, the gravest of which is the refoulement of SCO asylum seekers, which could be exacerbated during the accelerated procedure. It seems that the Council and Parliament have taken these concerns into account, especially the case law of the ECJ, in passing the RAPD provisions on the procedural and fundamental human rights of SCO applicants during the determination process. For instance, in the case of *H.I.D. and B.A. v. Refugee Applications Commissioner and Others*,[259] one of the issues, which was referred to the ECJ, was whether adopting administrative measures entitles the Member States to designate a particular class of refugee applications for examination through the

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[254] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., not 34, art.12(2) (c).
[255] *Id*., art.39(3) (a).
[256] *Id*., Preamble, recital 3: "[...] a Common European Asylum System should include, in the short term, common standards for fair and efficient asylum procedures in the Member States [...]."
[257] Matthew HUNT, prec., note 30, p.513-514.
[258] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.224 and 239; Matthew HUNT, prec., note 30, p.520.
[259] *H. I. D. and B. A.* v *Refugee Applications Commissioner and Others*, Case C-175/11, 31 January 2013, online: <http://curia.europa.eu/juris/celex.jsf?celex=62011CJ0175&lang1=en&type=TXT&ancre=>.

accelerated procedure based on the nationality or country of origin.[260] The Court explained that the applicant's country of origin or nationality may be considered justifying grounds and has a decisive role in accelerating an asylum application,[261] based on the established case law of the Court,[262] and under Recital 11 of the Preamble and Articles 23(3) and (4) of the APD, the Member States are permitted to organize, accelerate or prioritize the processing of refugee applications based on their national needs.[263] However, this margin of discretion is subject to two conditions, according to the Court.

First of all, the Member States should avoid any discrimination based on the nationality of asylum seekers whose application is decided on in an accelerated procedure by respecting all the procedural rights stipulated in Chapter II of the APD.[264] According to the ECJ, "[T]he establishment of a prioritized procedure such as that in the main proceedings must allow in full the exercise of the rights that that directive confers upon applicants for asylum."[265]

Secondly, the time frame for the expeditious procedure must be fair and efficient, in the sense that the refugee applicant can

> [E]njoy a sufficient period of time within which to gather and present the necessary material in support of their application, thus allowing the determination authority to carry out a fair and comprehensive examination of those applications and to ensure that the applicants are not exposed to any dangers in their country of origin.[266]

It should be emphasized that although certain refugee rights expert organizations such as UNCHR or European Council on Refugees and Exiles (hereafter ECRE) recognize the EU Member States' discretion to accelerate the determination procedure, it is expressly limited to

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[260] *Id*., para.48(1).
[261] *Id*., para.73.
[262] *Brahim Samba Diouf* v. *Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, 28 July 2011, para. 29, 49, and 61, online : <http://curia.europa.eu/juris/celex.jsf?celex=62010CJ0069&lang1=en&type=TXT&ancre=>; *H. I. D. and B. A.* v *Refugee Applications Commissioner and Others*, prec., note 259, para.63.
[263] *Id*., para.63-70.
[264] *Id*., para.74.
[265] *Id*., para.75.
[266] *Id.*; Cathryn COSTELLO, Emily HANCOX, prec., note 229, p.28.

cases of manifestly unfounded or clearly abusive applications.[267] However, even in those cases, Member States must take into account certain factors in order to establish a fair and lawful accelerated procedure, including an adequate time limit for asylum seekers to submit their application to the determining authority; be prepared for the interview; consult a legal advisor or expert refugee organizations; provide additional supporting evidence, which in some cases can take a great deal of time to be sent from the country of origin; provide more flexible time limits for applicants who have experienced trauma and need more time than normal applicants to open up and substantiate their application during an interview; and provide sufficient time for the determining authority to gather information, examine the evidence provided and finally to render an adequately reasoned and just decision.[268] In cases where acceleration of the asylum procedure is allowed, Member States should observe the principle of full and individual assessment of the merit of the applications by implementing all procedural safeguards in the EU directives or regulations and international refugee and human rights legal instruments.

The accelerated determination procedure may be implemented in the most effecient way possible for abusive or manifestly unfounded applications, by means of a full and individual first instance determination based on the substance of the claims and a simplified appeal procedure with more limited time for lodging the appeal.[269] In this context, the risk of violating the applicants' fundamental rights, especially the right of non-refoulement, will be considerably minimized. When applying the accelerated procedure, the Member States must recall that the primary objective is to ensure a fair and efficient asylum procedure. Sacrificing procedural safeguards and the quality of the process for more speedy determinations, or imposing unreasonable time limits on either applicants participating in the determination procedure or on the decision-making authority to reach the final decision not only violates the right to asylum guaranteed by the

[267] European Council on Refugees and Exiles, "ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", prec., note 132, p.21.

[268] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.247-249.

[269] *Id*., p.224-225; European Council on Refugees and Exiles, "ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", prec., note 132, p.21.

Charter of Fundamental Rights of the European Union,[270] but also undermines the efficiency of the asylum system and prolongs the proceedings through appeal instances.[271] According to ECJ case law, "[T]he detailed procedural rules governing actions for safeguarding an individual's rights under Community law" must not render its exercise "impossible or extremely difficult."[272]

EU legislative bodies must consider that accelerating asylum procedures is not a sustainable solution to problems relating to the influx of asylum applicants, nor it is an acceptable way to lighten the heavy burden of accepting and processing an increasing number of refugee applications. Even if the Member States reject applications considered unmeritorious of international protection using the expeditious procedure, the rejected applicants, deprived of their basic procedural rights, can request a judicial review or submit an appeal that ends up prolonging the final decision, which in turn necessitates more resources. That is why ECRE stated that

> [T]he most effective way to increase the efficiency and the speed of decision-making is that receiving States adopt a policy of frontloading by investing sufficient recourses in order to enhance the quality and efficiency of first instance decision-making, thus avoiding unnecessary appeals.[273]

The next two subsections will explain the APD and RAPD provisions on the right to a personal interview and the right to effective remedy, and their exercise during the accelerated procedure for examining SCO applications.

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[270] European Union, *Charter of Fundamental Rights of the European Union*, prec., note 52, art.18.

[271] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.224.

[272] *Unibet (London) Ltd and Unibet (International) Ltd* v. *Justitiekanslern*, Case C-432/05, 13 March 2007, para.38-54, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62005CJ0432&from=EN>; The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.440.

[273] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.223; European Council on Refugees and Exiles, "ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", IN1/10/2006/EXT/JJ, prec., note 132, p.21.

2.1.3: The right to a personal interview

The reason the right to a personal interview is essential during the first instance of the decision-making process is the fact that the information gathered at this stage has a decisive impact on the whole determination process and its final result, since the interview serves as one of the primary ways for the determining authority to evaluate the asylum seeker's specific situation in the country of origin and the major elements of the refugee claim, in addition to providing the first and/or last chance for the asylum seeker to explain his or her request in person, clarify any ambiguity in the application and make a positive impression on the decision-maker.[274] Providing adequate opportunity for asylum seekers to comprehensively substantiate, in person, their reasons for escaping their home country and why they merit international protection is one of the most crucial rights for refugees, and must be guaranteed by the receiving State during the procedure for determining refugee status (or for any other status related to international protection).[275] The personal interview process should be regarded as a core component of any procedure requiring significant information relating to the substance of the application.[276] In the next two sections, we will ascertain the general provisions set out in the APD and RAPD regarding the right to a personal interview and the detrimental effects of its denial on SCO refugee applicants.

General remarks

Prior to adoption of the APD, this procedural right's central role in the assessment of refugee applications was highlighted in the *Council Resolution on Minimum guarantees for asylum procedures*[277] and UNHCR's 1983 Executive Committee Conclusion No. 30 (XXXIV).[278]

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[274] *Id*., p.14-15.

[275] The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), prec., note 190, p.16; The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.65.

[276] *Id*.

[277] European Union, *Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures*, prec., note 66, para.14: "Before a final decision is taken on the asylum application, the asylum-seeker must be given the opportunity of a personal interview with an official qualified under national law."

However, no indications can be found in either of these two documents concerning procedural details for conducting a personal interview or justificaitons for removing this meeting from the decision-making process. At the EU level, this fundamental right has been recognized as one of the basic guarantees and principles of the determination procedure in Chapter II of the APD and the RAPD.

According to Article 12 of the APD, "Before a decision is taken by the determining authority, the applicant for asylum shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview."[279] Article 14(1) of the RAPD repeats this provision, requiring a personal interview on the substance of an application for international protection to be held "by the personnel of the determining authority."[280] This additional requirement would increase harmonization among the Member States' determination procedures.

Certain requirements were set out in the APD to provide a real opportunity for asylum seekers to present their claims in person. Some aspects of these requirements were completed by the RAPD. Article 12 of the APD imposed a general responsibility on the Member States to give each asylum seeker, but not dependent adults, a chance for a personal interview before a final decision is made. In order to help the determining authority obtain a comprehensive understanding of the factual and legal conditions of the application, the RAPD correctly obliged the Member States to conduct a personal interview with both the applicant and the dependent adult on behalf of whom the applicant has submitted an international protection request.[281]

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[278] The United Nations High Commissioner for Refugees, "The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum", EXCOM Conclusions No. 30 (XXXIV), 20 October 1983, para.(e)(i), online: <http://www.unhcr.org/3ae68c6118.html>: "as in the case of all requests for the determination of refugee status or the grant of asylum, the applicant should be given a complete personal interview by a fully qualified official and, whenever possible, by an official of the authority competent to determine refugee status."

[279] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, art.12.

[280] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.14(1).

[281] *Id*., art.14(1): "Where a person has lodged an application for international protection on behalf of his or her dependants, each dependent adult shall be given the opportunity of a personal interview."

Given the special situation of asylum seekers in the receiving country, including psychological conditions and the financial, cultural or linguistic problems they may experience, the APD necessitated that the personal interview be conducted by a qualified person who, as provided for in Article 13(3)(a), "is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability, in so far as it is possible to do so."[282] However, it would have been more helpful if the Directive had laid down specific procedural provisions for sensitive interviews with applicants in more vulnerable situations or with special needs, such as applicants of a particular sexual orientation, to avoid violation of their fundamental rights, including the right to the integrity of the person, the right to human dignity and the right to respect for private and family life.[283] In this regard, in the case of *A, B, C v. Staatssecretaris van Veiligheid en Justitie* on the issue of proper and acceptable practices for examining refugee applications on the grounds of sexual orientation, the European Court of Justice has reiterated that it is the determining authority's responsibility to adjust the process of collecting and assessing statements and information concerning the refugee application according to the individual situation of each refugee applicant and general circumstances surrounding the application.[284] Fortunately, some Member States such as Belgium, Bulgaria, the Czech Republic, Germany, Spain, the Netherlands, Lithuania, Italy, Hungary, Slovakia and Slovenia have special arrangements in place to appoint an interpreter or interviewer of the same sex as the applicant.[285]

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[282] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, art.13(3)(a), 8.2(a), and(c).

[283] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, prec., note 52, art.1, 3, and 7; *A, B, C* v. *Staatssecretaris van Veiligheid en Justitie*, Joined Cases C-148/13 to C-150/13, 2 December 2014, online: <http://curia.europa.eu/juris/celex.jsf?celex=62013CJ0148&lang1=en&type=TXT&ancre=>; European Commission, "Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", (Com (2010) 465 final), prec., note 221, p.7.

[284] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, prec., note 52, art.1,3, and 7; *A, B, C* v. *Staatssecretaris van Veiligheid en Justitie*, Joined Cases C-148/13 to C-150/13, 2 December 2014, prec., note 283, para.54-56, and para.61-62.

[285] European Commission, "Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", (Com (2010) 465 final), prec., note 221, p.7.

In this regard, Article 15 of the RAPD can be considered a complementary provision to the former Directive containing the requirement to conduct a fair and efficient personal interview, in the sense that it has addressed all the deficiencies of the former article and has required the Member States to take necessary steps to ensure that "the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability"[286] and to "wherever possible, provide for the interview with the applicant to be conducted by a person of the same sex if the applicant so requests."[287]

Article 13(3)(b) of the APD and Article 15(3) (c) of the RAPD require the Member States to appoint an interpreter during the personal interview "to ensure appropriate communication between the applicant and the person who conducts the interview."[288] The RAPD, contrary to the APD, has adopted more favourable conditions for refugee applicants in which communication between the applicant and the interpretor must be in the applicant's preferred language "unless there is another language which he or she understands and in which he or she is able to communicate clearly."[289]

More importantly, to create the most appropriate psychological environment for the applicant, the Member States are required, whenever possible, to assign a same-sex interpreter for the applicant[290] and ensure that the competent authority who conducts the interview does not wear a "military or law enforcement uniform."[291] UNHCR has welcomed these provisions for the

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[286] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.15(a).
[287] *Id*., art.15(3)(b).
[288] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, art.13(3)(b); European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.15(3)(c).
[289] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.15(3)(c).
[290] *Id*.
[291] *Id*., art.15(3) (d).

personal interview, reaffirming that when granting refugee applicants a personal interview, the Member States should undertake "all the reasonable measures."[292]

Despite these significant provisions, the personal interview is not explicitly defined in either the Commission's proposal or in the adopted versions of the Directive of 2005 or 2013. This lack of definition creates a confusing situation. Since applicants are interviewed by different authorities at various stages of the determination procedure under each Member State's national legislation, it is not clear which of these meetings should be considered a personal interview and must be held in accordance with RAPD requirements and fundamental human rights principles.[293] It seems that the first paragraph of Article 13(3) of the APD and Article 15(3) of the RAPD have acceptably defined the personal interview as a meeting subject to certain requirements stipulated in the Directive that "allow applicants to present the grounds for their applications in a comprehensive manner."[294]

Based on this definition, one may conclude that the preliminary interview as held in several Member States, including Belgium, the Czech Republic, Finland, Italy, the Netherlands and the UK, even though it is conducted in the presence of the determining authority, may not be established as the personal interview under the provisions of Articles 12 and 13, since the main purpose of this preliminary interview is to gather and register the applicant's personal information, such as age, sex, identity, family relationships, nationality, travel routes and travel documents.[295] However, this argument is not convincing, since the information collected from

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[292] The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), prec., note 190, p. 16.

[293] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.61.

[294] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, art.13(3); European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.15(3); The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.61-62.

[295] *Id*., p.61.

this type of interview has a conclusive role in determining the responsible Member State or the procedure under which the application should be examined.[296] Also, the determining authority reassesses the gathered personal data in the next stages of the application to uncover any inconsistencies or contradictions. The preliminary interview and the information collected therein is as important as the first instance decision-making procedure, and may be supported by Article 4 of the Qualification Directive and the Recast Qualification Directive, which provide the necessary conditions for "assessment of applications for international protection."[297] According to Article 4(2), evaluation of the factual and legal elements of each application consists of

> [T]he applicant's statements and all documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.[298]

To complete and increase the quality of the entire determination procedure, the Council and European Parliament require the personal interview on the substance of an asylum application to be conducted "by the personnel of the determining authority."[299] It can be correctly concluded that according to the RAPD, any meeting on the substance of an international protection application must be recognized as a form of personal interview and therefore should be carried out by the competent authority qualified to assess the merits of the application in accordance with the requirements specified in the RAPD. Thus, the requirements and guarantees incorporated in Articles 14 and 15 of the RAPD should be recognized and implemented during

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[296] *Id.*, p.62.
[297] European Union, *Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, prec., note 176, art.4; European Union, *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 guaranteed*, prec., note 176, art.4.
[298] *Id*., art.4(2).
[299] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.14(1).

any meetings held before the personal interview.[300] In some Member States such as Germany and Greece, a single personal interview is conducted to gather information for the purposes of registering and completing the applicant's profile, and to collect information on the reasons for seeking international protection. Accordingly, the preliminary interview or any other meeting between the host country's competent authority and refugee applicants with the purpose of gathering information on the factual or legal conditions of a refugee claim, at the border or in the territory, should be recognized as a personal interview under the terms of Articles 14 and 15 of the RAPD and must be conducted in accordance with EU law, fundamental international refugee and human rights law and the principles of procedural fairness.

Rejection of the right to a personal interview

The most problematic provision of the APD regarding the right to a personal interview was Article 12(2), according to which there were three possible cases when the Member States were entitled to disregard this right.[301] One of these cases was when asylum seekers had come from an SCO or an STC and "the determining authority, on the basis of a complete examination of information provided by the applicant, considers the application as unfounded."[302]

This provision clearly indicates the precarious effect of the SCO measure on asylum seekers and the effect the general presumption of safety has on the principles of procedural fairness.[303] The designation of a third country as an SCO justified the elimination of the refugee applicant's participation in the fact-finding process, requiring only the determining authority's consideration in order to grant or refuse international protection. Given the multifaceted and complicated issues arising from every refugee application, especially SCO applications examined in an accelerated procedure, the personal interview sessions are a non-negligible way of helping officials reach the correct decision. In other words, omitting the personal interview calls into question the accuracy

[300] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.62, 82, and 96.
[301] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, art.12(2).
[302] *Id*., art.12(2) (c).
[303] Matthew HUNT, prec., note 30, p.520.

and validity of decisions rendered at the first instance, in particular in an expeditious process, and puts the onus of examining refugee applications on the appeal body. UNHCR has expressed its serious concerns about the Member States' abilities to deprive certain applicant groups of the right to a personal interview and testimony, arguing that "all claimants should in principle be granted personal interviews, unless the applicant is unfit or unable to attend an interview owing to enduring circumstances beyond his or her control."[304]

This idea was reaffirmed by the Commission in its 2002 proposal and by the Council and European Parliament in the RAPD, which has allowed the Member States to exclude personal interviews solely on the basis that "the determining authority is able to take a positive decision with regard to refugee status on the basis of evidence available"[305] or that "the determining authority is of the opinion that the applicant is unfit or unable to be interviewed owing to enduring circumstances beyond his or her control."[306]

Careful consideration of exceptional cases referred to by UNHCR, the Commission proposal, and the RAPD supports the interpretation that they have not intended to preclude asylum seekers from the right to a personal interview, but have simply aimed to express examples of situations in which refugee applicants are, unintentionally and by no fault of their own, unable to appear at the personal interview meeting, requiring the receiving countries to take into account the individual (either psychological or medical) conditions of the asylum seeker in holding or overlooking the personal interview. That is why, according to the last sentence of Article 14(2)

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[304] The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), prec., note 190, p.16 ; The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.81.

[305] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.14(2)(a); European Commission, *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, 2002, prec., note 182, art.10(2) (a).

[306] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, *Id*., art.14(2) (b) ; European Commission, *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, 2002, prec., note 182, art.10(2) (b).

and Article 10(3) of the Commission's 2002 proposal, "[w]here a personal interview is not conducted pursuant to point (b) or, where applicable, with the dependent, reasonable efforts shall be made to allow the applicant or the dependant to submit further information."[307] In this case, it would be more helpful if the RAPD mandated the presence of a legal advisor or other procedural requirements as indicated in the Commission's 2002 proposal.

Regarding the grave consequences of erroneous decisions on the life and freedom of asylum seekers, the obligation the RAPD imposes on the Member States to conduct a personal interview during the first instance decision-making procedure is in full compliance with fundamental human rights law, and is why Article 12(2) of the APD was eliminated in the new Directive. This amendment is significant for two reasons.

First of all, the cases provided for under Article 14(2) of the RAPD are related to issues beyond the control or intention of asylum seekers, and, more importantly, are not based on discriminatory criteria such as the origin of refugee applicants. The SCO rule, provided as acceptable grounds in Article 12(c) of the APD for depriving asylum seekers of their fundamental right to a personal interview, is totally unrelated to the merit of the application. More dangerously, the SCO rule is in opposition to Article 3 of the *1951 Geneva Convention*[308] and Article 14 of the *European Convention on Human Rights*[309] prohibiting discrimination on the grounds of race, religion or country of origin when applying the Convention's provisions as reiterated in paragraph 9 of the Preamble of the APD, which states that "[w]ith respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination."[310] In addition, depriving asylum seekers of a personal interview based on their nationality contradicts Article 21 of the legally binding *Charter of Fundamental Rights of the European Union,* which prohibits any discrimination on the grounds of nationality "[w]ithin the

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[307] *Id*., art.10(3).
[308] *The 1951 United Nations Convention Relating to the Status of Refugees,* (28 July 1951), prec., note 1, art.3.
[309] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention on Human Rights*), prec., note 53, art.14.
[310] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, Preamble, para.9.

scope of application of the Treaty establishing the European Community and of the Treaty on European Union [...]."

Secondly, designating a third country as an SCO creates an assumption of safety for the determining authority, thereby increasing the applicant's burden of proof to reject that assumption by introducing additional evidence.[311] In practice, it seems that this general predetermination of safety exempts the determining authority from the obligation to completely and comprehensively assess each application on a case-by-case basis,[312] since SCO applications seem unfounded before they are even made unless the applicants are afforded adequate time and are able to present evidence to deny this initial determination.[313] Furthermore, according to Article 31(8) (b) of the RAPD and Article 23(4) (c) (i) of the APD, when an asylum seeker is coming from a safe country of origin, the Member States are allowed to accelerate the determination procedure,[314] which means the applicant has to gather supporting evidence or consult a legal advisor quickly and the determining authority is forced to reach the final decision in a short period of time. All these factors may result in a decision made without carefully considering the applicant's particular situation, and the general aspects of the application place SCO asylum seekers at a greater risk of being refouled to a country where their life or freedom is in danger than any other group of asylum seekers. Empowering the Member States to derogate from the general principle of a personal interview during the determination procedure could amount to incorrect decisions based on inadequate information and ambiguous statements, which could result in violations of the fundamental principles of international refugee and human rights law, such as the principle of non-refoulement enshrined in the *1951 Geneva Convention*[315] and

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[311] The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), prec., note 190, p.42.
[312] Matthew HUNT, prec., note 30, p.504.
[313] *Id*.
[314] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.31(8)(b);European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, art.23(4) (c) (i).
[315] *The 1951 United Nations Convention Relating to the Status of Refugees,* (28 July 1951), prec., note 1, art.33(1).

the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*[316]

Ultimately, any limitation or obstacle to the exercise of the right to a personal interview during the determination procedure that reduces the asylum seeker's chance to explain the grounds for requesting international protection may violate the right to life, the right to liberty and security, the right to be protected from torture and the right to a fair trial incorporated in the *European Convention on Human Rights*[317] and the *Charter of Fundamental Rights of the European Union*,[318] in particular when applications are examined in an expedited procedure because of the asylum seeker's national origin. Although not related directly to the issue of personal interviews, in the case of *Transocean Marine Paint Association v. Commission of the European Communities*, the ECJ, while highlighting the nature and objective of the process concerned, indicated that "a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view."[319]

As one of the avenues left for SCO asylum seekers to defend their claim and clarify their application, ensuring that a personal interview takes place is in accordance with the fundamental principles of refugee and human rights law. The provisions that guarantee the right to a personal interview for all asylum applicants is in line with Recital 42 of the RAPD's Preamble and Recital 21 of the APD's Preamble, which affirm that the "designating of a third country of origin [...] cannot establish an absolute guarantee of safety for nationals of that country," and more importantly adds that

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[316] The United Nations General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, prec., note 41, art.3.

[317] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention on Human Rights*), prec., note 53, art.2, 3, 5, and 6.

[318] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, prec., note 52, art.2, 4, 6, and 47.

[319] *Transocean Marine Paints Association* v. *Commission of the European Communities*, Case 17/74, 23 October 1974, para.15 online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61974CJ0017&from=EN#CO>; Matthew HUNT, prec., note 30, p.520.

> [B]y its very nature, the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in the country concerned.[320]

It can therefore be concluded that SCO applications must be examined by means of an individual and comprehensive procedure in which the applicant is afforded a real opportunity to rebut the presumption of safety in his or her case.[321]

UNHCR went a step further, requiring Member States to inform applicants at the beginning of the examination procedure if their national country has been designated as an SCO and notify them of the legal and procedural effects of this preventive measure during the determining procedure.[322] Consequently, UNHCR criticized Member States such as Finland or Spain that do not have a national designation of safe countries of origin and instead use this notion on a case-by-case basis "without a transparent, formal, published" national list, since they indirectly deprive SCO refugee applicants of the opportunity to prepare adequate evidence in advance or to consult a legal advisor for assistance in disapproving the presumed safety of their national country.[323]

Pursuant to the last paragraph of Article 36(1) of the RAPD (Article 31(1) of the APD), a third country can be designated as an SCO after individual examination of an application only if the applicant for asylum

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[320] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, Preamble, para.21.
[321] *Id*.; The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.333.
[322] *Id*.
[323] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.332, 354, and 356; Matthew HUNT, prec., note 30, p.520; European Commission, "Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", (Com (2010) 465 final), prec., note 221, p.12.

has not submitted any serious grounds for considering the country not to be a safe country of origin in his or her particular circumstances and in terms of his or her qualification as a beneficiary of international protection in accordance with Directive 2011/95/EU.[324]

If the Member States, under the provisions of the RAPD, are entitled to apply the accelerated procedure when examining SCO applications, the only efficient and reliable opportunity left to SCO asylum seekers in order to counterindicate the presumption of safety in their country of origin is a personal interview conducted with an interviewer who has adequate and up-to-date knowledge of the allegedly safe country. Granting a personal interview to applicants whose asylum requests are examined by means of an accelerated procedure, without increasing the burden of proof,[325] is a significant step toward establishing the principle of full individual examination of every asylum application on its merits, as emphasized by the *1951 Geneva Convention*[326] and the Recast Qualification Directive,[327] and ensuring procedural fairness of determination procedures in Member States' asylum systems, as indicated in Article 6 of the *European Convention on Human Rights* and Article 47 of the *Charter of Fundamental Rights of the European Union*. As stressed by UNHCR, respecting the right to a personal interview in any judicial or quasi-judicial decision-making procedure, in particular the refugee status

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[324] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.36(1); European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, art.31(1).

[325] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.331 and 334.

[326] *The 1951 United Nations Convention Relating to the Status of Refugees,* (28 July 1951), prec., note 1, art.1.

[327] European Union, *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 guaranteed*, prec., note 176, art.4(3) ; European Union, *Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, prec., note 176, art.4(3).

determination procedure will increase the "fairness of procedure and the accuracy of decisions."[328]

Ultimately, in line with the aforementioned reasons, granting the right to a personal interview is in accordance with "the right to good administration" as guaranteed by the *Charter of Fundamental Rights of the European Union*. According to Article 41(1) of the EU Charter, this right implies that "[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union," which includes the right to be heard, the right to have access to his or her file and the right to a reasoned decision.[329] As established by the case law of the European Court of Justice, Article 41(1) constitutes an integral part of the European Union's legal order.[330]

In the recent case of *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*,[331] the ECJ has attempted to give a comprehensive definition of the right to be heard, its centrality and vital position in judicial or administrative proceedings and the major requirements for providing this right. Although this case concerns the return order of a third country national staying illegally in France based on the Return Directive of 2008,[332] the Court's method and reasoning for interpreting the inherent nature of the right to be heard in all proceedings demonstrates that the right to a personal interview in the refugee determination procedure is an essential derivative of the right to be heard and is therefore guaranteed by the *Charter of Fundamental Rights of the European Union*. As reaffirmed by the Court, the right to be heard is recognized as an inherent part of the fundamental right to a defence, which is confirmed by Article 47 (right to a fair trial),

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[328] The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), prec., note 190, p. 16.

[329] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, prec., note 52, art.41(1) and (2).

[330] *M.G and N.R* v. *Staatssecretaris van Veiligheid en Justitie*, Case C-383/13 PPU, 10 September 2013, para.32, online: <http://curia.europa.eu/juris/celex.jsf?celex=62013CJ0383&lang1=en&type=TXT&ancre=>.

[331] *Khaled Boudjlida* v. *Préfet des Pyrénées-Atlantiques*, Case C-249/13, 11 December 2014, para.30, online: <http://curia.europa.eu/juris/celex.jsf?celex=62013CJ0249&lang1=en&type=TXT&ancre=>.

[332] European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0115&from=EN>.

Article 48 (right to be assumed innocent and right to a defence), and Article 41(2) of the *Charter of Fundamental Rights of the European Union.*[333] The right to be heard is defined by the Court as the opportunity for every person "to make known his views effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely."[334] According to the Court, this right must be observed for two reasons. It enables the person to correct any errors or clarify ambiguities in the submitted evidence by providing additional information about his or her personal circumstances and the general situation of the case, and it helps the decision-making authority to take into consideration all relevant information and essential aspects of the case in order to render a justifiable decision.[335] Thus, as a general rule, the Member States are obliged to observe the right to be heard when they act within the scope of EU law.[336]

However, as established by ECJ case law, the right to be heard is not, in essence, an "unfettered prerogative," meaning that it can be subject to some restrictions under certain conditions. First of all, any limitations on a fundamental right guaranteed in a legal measure such as a regulation or directive must be in accordance with the general objectives pursued by that legal measure and its scheme.[337] Second of all, these restrictions should not bring about "a disproportionate and intolerable interference" with the *raison d'être* of the infringed right.[338] Thirdly, in the case of *M.G, N.R v. Staatssecretaris van Veiligheid en Justitie*, the Court accepted that the infringement or any irregularity in the exercise of the fundamental right to be heard during administrative procedures does not automatically render the final decision invalid, but that it is necessary to assess whether in light of the factual and legal conditions of the case concerned, the outcome could have been different if the applicant had been given an effective chance to present his or her point of view or provide more supporting evidence.[339]

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[333] *Khaled Boudjlida* v. *Préfet des Pyrénées-Atlantiques*, Case C-249/13, prec., note 331, para.31.
[334] *Id*., para.36.
[335] *Id*., para.37-38.
[336] *Id*., para.40.
[337] *M.G and N.R* v. *Staatssecretaris van Veiligheid en Justitie*, Case C-383/13 PPU, prec., note 330, para.37.
[338] *Id*., para.43.
[339] *Id*., para.43-44.

In accordance with these requirements and the interpretation put forward by the Court, if we take the RAPD as our starting point, we will find the Commission, the Council and European Parliament's central goals in passing the RAPD. As reiterated in the Preamble and in Article 1 of the RAPD, the first and most important purpose of the Directive is to provide minimum standards for implementing a fair and efficient common asylum procedure among the Member States and a uniform status recognized throughout the EU[340] in full compliance with the *1951 Geneva Convention*,[341] fundamental rights recognized by the EU Charter and observance of the Member States's obligations according to international legal instruments to which they are signatories.[342] Accordingly, restrictions on the rights provided for in the Directive must be applied with this intended goal in mind and within the scope of the Member States' constitutional and international refugee and human rights responsibilities. Given all these considerations, Articles 12 and 13 of the APD have been removed in the RAPD, and the Member States are required to recognize the right to a personal interview during the determination procedure, in order to provide an effective opportunity for asylum seekers "to present the grounds for their applications in a comprehensive manner"[343] before the competent authority makes a decision about the refugee application.

These changes are in accordance with ECJ case law, which has reiterated that implementing the provisions of the EU legislation and applying the restrictions permitted by these measures is subject to the conditions and limitations set out by the Directive in question.[344] For instance, in the case of *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, it was recognized as the Member States' responsibility to adopt a return decision against a third country national residing illegally in their territory while taking into account the exceptions provided in the 2008 Return Directive, including the principle of non-refoulement. Accordingly, the competent authority must hear the person's point of view before making any decision about returning the person to his or

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[340] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, Preamble, para.3-8.
[341] *Id*., Preamble, para.3.
[342] *Id*., Preamble, para.15.
[343] *Id*., art.12(1) and 13(3).
[344] *Khaled Boudjlida* v. *Préfet des Pyrénées-Atlantiques*, Case C-249/13, note 331, para.48-49.

her country of origin to avoid refouling third country nationals to a territory where their life or freedom is threatened.[345]

Given the fragile situation of asylum seekers and that an incorrect decision has a greater impact on an asylum seeker's life or freedom regarding returning to their country of origin than on other third country nationals residing in the EU, the Member States are obliged to provide all favourable measures, with due respect to their international obligations and the fundamental rights guaranteed by the EU Charter, to ensure a correct and reasonable final decision on refugee applications.

Due to the similar definitions of the right to a personal interview and the right to be heard outlined by the RAPD and the ECJ respectively, as well as the equal importance accorded to these two rights during any administrative proceedings in order to protect fundamental human rights, in particular during the refugee determination procedure, it may be concluded that the right to a personal interview during the determination process has been recognized as an inherent part of the right to be heard and that the Member States must respect it as an inherent component of the right to good administration guaranteed by the *Charter of Fundamental Rights of the European Union*.

In sum, the complex reasons for and composite nature of asylum applications require the determining authority to gather "precise and up-to-date information from various sources"[346] and to implement an assessment method that corresponds to the particular situation of each asylum seeker in observance of their fundamental rights.[347] Conducting a personal interview is the best way to meet all these requirements.[348] Furthermore, guaranteeing the personal interview,

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[345] *Id*., para.47-49.

[346] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, art.8.2(b).

[347] *A, B, C* v. *Staatssecretaris van Veiligheid en Justitie*, Joined Cases C-148/13 to C-150/13, prec., note 283, para.54.

[348] European Union, *Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, prec., note 176, art.4.3; Cathryn COSTELLO, prec., note 134, p.514; European Council on Refugees and Exiles, "ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", prec., note 274, p.15; The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the

especially in an accelerated procedure, reduces the risk of incorrect decisions and prevents appeals against determination decisions that prolong asylum proceedings before reaching the final decision. Prolongation of the determination procedure is in contrast with the primary objective of any efficient asylum system, which is to shorten the time asylum seekers spend in the receiving country, quickly identify legitimate refugees and accept or reject refugee applications within a reasonable period of time. In this regard, UNHCR has underlined that establishing a fair and efficient asylum procedure can guarantee the interests of all parties involved.[349]

In light of the previous explanations, it is impossible to expect the Member States to make correct and fair decisions on asylum applications in due respect of their human rights obligations without granting a personal interview.[350]

2.1.3 Right to appeal (right to an effective remedy)

Under Article 39(1) of the APD and Article 46(1) of the RAPD, the Member States are required, with no exceptions, to ensure that applicants for international protection "have the right to an effective remedy before a court or tribunal, against [among others] a decision taken on their application for asylum."[351] Fortunately, it follows from these articles that contrary to the APD's provisions on the right to a personal interview, the Member States are obliged to provide all applicants seeking international protection with the right to appeal decisions before a court or

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Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), prec., note 190, p.16; The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.95.

[349] The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), prec., note 190, p.27 ; The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.83.

[350] Matthew HUNT, prec., note 30, p.520.

[351] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, art.39(1); European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.46(1).

tribunal, irrespective of their nationality, the former country they have come from or any other factors.[352] The prominent position of this right has been reaffirmed in the Preambles of the aforementioned Directives as "a basic principle of Community law."[353]

In this regard, there is a remarkable difference between the RAPD and the APD. While in the last paragraph of Recital 27 of the APD, the effectiveness of the appeal or judicial review process depended on the administrative and judicial system of each Member State, in Recital 50 of the RAPD, there is no reference to this condition. This amendment is based on the APD's and RAPD's distinct approaches. Contrary to the APD, which recognized a wide range of discretion for the Member States in administrating and providing international protection applicants with the right to effective remedy, the RAPD has constrained the Member States' authority in order to ensure that the right to effective remedy is administered in the most efficient way possible, and to further harmonize the Member States' asylum systems with ECJ and ECtHR case law. It will be described, in further detail, in the following section.

The fundamentals of this procedural requirement originate from the fact that because of the growing number of asylum requests, determining refugee status in Western societies is one of the most difficult administrative or quasi-judicial procedures even when carried out by competent officials, which heightens the risk of making a wrong decision at the first instance.[354] This is, in most part, due to the unique questions and unprecedented issues arising during the decision-making process.[355] Accordingly, the likelihood of an erroneous decision urges almost all rejected applicants to request a judicial review or lodge an appeal opposing a negative decision before a tribunal or court of appeal. This general concern about potential wrong decisions is reinforced by

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[352] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note211, p.431-432.

[353] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, Preamble, para.27; European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, para.50.

[354] Cécile ROUSSEAU, François CRÉPEAU, Patricia FOXEN, and France HOULE, "*The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board*" (2002) 15(1) *Journal of Refugee Studies* 43.

[355] Cathryn COSTELLO, prec., note 134, p.153.

the reality that according to UNHCR, approximately 60% of rejected asylum seekers are recognized as refugees during an appeal.[356] In 2007, 29,500 negative refugee applicant determinations made in a first tier examination worldwide were overturned and were granted international protection at the appeal level, according to statistics provided by UNHCR on the quality of decisions made in the first instance procedure.[357]

Effective remedy before an independent and impartial judicial body is the last chance granted to rejected refugee applicants to seek protection from the violation of their human rights and refoulement to a country where their life or freedom is threatened.[358] Therefore, the right to an appeal, guaranteed by the *Charter of Fundamental Rights of the European Union*[359] and the *EU Convention on Human Rights*,[360] entails safeguarding the right to life, the right to be protected from torture or inhuman or degrading treatment and the right to liberty and security.[361]

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[356] The United Nations High Commissioner for Refugees, "UNHCR regrets missed opportunity to adopt high EU asylum standards", prec., note 226; The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), prec., note 190, p.51.

[357] European Commission, "Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", (Com (2010) 465 final), prec., note 221, p.15;The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.453; Matthew HUNT, prec., note 30, p.520.

[358] The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), prec., note 190, p.50.

[359] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, prec., note 52, art.47: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."

[360] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention on Human Rights*), prec., note 53, art.13: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

[361] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, prec., note 52, art.2, 4, and 6; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention on Human Rights*), prec., note 53, art.2, 3, and 5; *Salah Sheekh* v. *the Netherlands*, Application no. 1948/04, 11 January 2007, para.136, online: <http://hudoc.echr.coe.int/eng?i=001-78986>.

This right is even more crucial in the case of SCO refugee claimants whose applications have been examined during an expeditious procedure with a higher burden of proof to reject the presumed safety of their national country.[362] It is correct to recognize this right as a fundamental principle of human rights law[363] whose significance has been reaffirmed by the jurisprudence of both the ECJ and the ECtHR. According to ECJ case law, the right to an effective remedy has been established as "a general principle of EU law to which expression is now given by Article 47 of the Charter of Fundamental Rights of the European Union."[364]

In the case of *Labsi v. Slovakia*,[365] the ECtHR, concerning the conditions under which the right to effective remedy should be conferred on rejected asylum seekers as warranted in Article 13 of the *European Convention on Human Rights*, upheld that before executing any final removal decision, the asylum applicant must have access to judicial redress "by means of a complaint" before a competent court.[366] The Court expressed that depriving asylum applicants of the right to adequate redress contravenes the right to an effective remedy as ensured by Article 13 of the *European Convention on Human Rights.*[367]

Ironically, the APD and the RAPD necessitated that the judicial remedy be "effective," but they did not give any clear definition of the quality required. The fundamental principles of human rights and the ECtHR and ECJ's interpretations can compensate for this major deficiency. In this regard, two issues should be clarified: the general procedural rules for the comprehensive establishment and efficient implementation of this right, and its suspensive effect in preventing the execution of a deportation order.

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[362] Matthew HUNT, prec., note 30, p.513.
[363] European Council on Refugees and Exiles, "ECRE Comments on the European Commission Proposal to recast the Asylum Procedures Directive", May 2010, p.15, online: < http://www.ecre.org/topics/areas-of-work/protection-in-europe/162.html>.
[364] *Brahim Samba Diouf* v. *Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, 28 July 2011, prec., note 262, para.49 and 61.
[365] *Labsi* v. *Slovakia*, Application no. 33809/08, 15 May 2012, para.133-140, online: <http://hudoc.echr.coe.int/eng?i=001-110924>.
[366] *Id*., para.138.
[367] *Id*., para.139-140; Matthew HUNT, prec., note 30, p.513.

General procedural rules

Determining the basic principles to be applied during refugee determination procedures, from the first step of lodging an application to the final decision issued by a competent appeal court, has been a recurring controversial issue, due to the fact that the most important legal resource on international refugee rights, the *1951 Geneva Convention*, does not contain any explicit procedural rules.[368] At the EU level, the APD was almost silent on the procedural criteria for guaranteeing and increasing the efficiency of the appeal process. It merely required the Member States to establish time frames and other necessary rules for ensuring the right to appeal in accordance with their national legislations.[369]

ECtHR case law grants the contracting States some discretion in carrying out their obligations to ensure the right to appeal; however, according to the Court, they must prevent the execution of measures that are inconsistent with the provisions of the *European Convention on Human Rights.*[370] In the case of *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration* on the issue of whether the rejected refugee applicant had the right to challenge the determining authority's decision to examine the application in an accelerated procedure, the ECJ explained the centrality of the right to judicial remedy and the requirement for its effective exercise. In this context, the Court upheld that although according to the provisions of the APD, the Member States were permitted to choose the procedure (either ordinary or accelerated) for examining refugee applications, national law must be applied in full conformity with EU law and, consequently, the courts must interpret national provisions while ensuring the "full effectiveness of EU law"[371] and the achievement of the objectives pursued by the directive

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[368] François JULIEN-LAFERRIÈRE, Henri LABAYE, and Örjan EDSTRÖM, *La politique européenne d'immigration et d'asile : bilan critique cinq ans après le traité d'Amsterdam = The European immigration and asylum policy : critical assessment five years after the Amsterdam Treaty*, Bruxelles, Bruylant, 2005, p.286.

[369] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, art.39(2), (4), (5), and (6).

[370] *Conka* v. *Belgium*, Application no.51546/99, 5 February 2002, para.79, online: <http://hudoc.echr.coe.int/eng?i=001-60026>.

[371] *Brahim Samba Diouf* v. *Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, 28 July 2011, prec., note 262, para.60.

concerned.[372] The Court concluded that in order to ensure the principle of effectiveness, the right to remedy should be applied as required by Article 39(1) of the APD, in such a way that

> [T]he national court must be able to review the merits of the reasons which led the competent administrative authority to hold the application for international protection to be unfounded or made in bad faith, there being no irrebuttable presumption as to the legality of those reasons.[373]

Furthemore, since the Directive imposed on the Member States the responsibility to observe their international obligations while legislating on issues such as the suspensive effect of the appeal,[374] they are not free to establish an appeal procedure irrespective of their international obligations. Accordingly, although certain principles and necessary provisions were left undetermined in the APD, they have been clarified by RAPD provisions, the fundamental principles of international refugee and human rights law, and Community law.

First of all, the basic requirement that the Member States must observe, in order to comply with their international refugee and human rights obligations, is to establish a fair procedure, from the first instance through to the appeal body's final decision, that impedes the refoulement of asylum seekers to a country where their life or freedom is in danger or where they are subject to inhuman punishment or degrading treatment.[375] Thus, given the irreversible consequences if asylum seekers are returned to a territory where their life or freedom is in danger or where they are at risk of ill-treatment or torture,[376] the Member States are obliged to respect the principle of non-refoulement as the cornerstone of refugee rights protection in every phase of the determination procedure, even during a judicial review or appeal proceedings on the first instance decision. As expressed in the previous section, it is not rational to expect a State to be able to meet all its

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[372] *Id*.
[373] *Id*., para.61.
[374] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, art.39(3).
[375] *Salah Sheekh* v. *the Netherlands*, Application no. 1948/04, prec., note 361, para.136; *Labsi* v. *Slovakia*, Application no. 33809/08, prec., note 365, para.137; François JULIEN-LAFERRIÈRE, Henri LABAYE, and Örjan EDSTRÖM, prec., note 368, p.287.
[376] *Labsi* v. *Slovakia*, Application no. 33809/08, prec., note 365, para.137.

constitutional and international refugee and human rights obligations without providing a fair and effective determination procedure.[377]

The necessity of stipulating a reasonable timescale also applies to appeal instances. Although under Article 39(2) of the APD the Member States were required to "provide for time limits and other necessary rules for the applicant to exercise his/her right to an effective remedy pursuant to paragraph 1," regrettably, the Directive did not specifically determine the length of the time limit or the basic conditions that constitute effective remedy in the following articles, instead leaving these decisions to the discretion of the Member States. Under Article 46(4) of the RAPD, the Member States do not enjoy unconditional discretion in this regard and must comply with the same requirements as those governing first instance procedures, since according to its last paragraph, the time limit set out by the Member States should not make exercising the right to effective remedy "impossible or excessively difficult."[378] This measure is one of the best indications of the harmonization established by the Council and European Parliament between the measures adopted in the RAPD and the interpretation put forward by the ECtHR, inter alia, in the case of *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern.*[379] In order to ensure the effectivity and accessibility of judicial remedy, the Member States are obliged to respect the general procedural principles of Community law when establishing any time limits for appeal procedures. As stipulated by UNHCR, given the complexity of the judicial proceedings, the Member States should allow refugee applicants the necessary time "to undertake all the required procedural steps," such as consulting a legal assistant, understanding the procedure and submitting the appeal.[380]

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[377] *Id*., p.287-288.
[378] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.46(4).
[379] *Unibet (London) Ltd and Unibet (International) Ltd* v. *Justitiekanslern*, prec., note 272.
[380] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p. 440-444.

The time limits of 48 hours for applicants at French borders or for the fast-track procedure for detained applicants in the UK[381], or the time limit of 72 hours to appeal rejected applications in accelerated procedures in Slovenia, adopted under the APD's provisions, violate Community law procedural principles and make appeal proceedings useless.[382]

Though Article 38(2) of the Commission's 2002 proposal[383] extended the scope of judicial remedy to both factual and legal issues, the APD does not specifically determine the extent to which the appeal body is entitled to review the determining authority's decision. The uncertainty regarding the appeal court's review competence undermines asylum seekers' ability to completely exercise their right to judicial remedy. Given the complex and distinctive nature of each refugee application, the appeal body needs a wide scope of jurisdiction to be able to reassess all the factual and legal issues surrounding the refugee application in question and to fully understand the applicant's particular position and the general situation of the case, in order to provide the most effective remedy for asylum seekers.[384] Imposing restrictions on the appeal body's jurisdiction in examining the evidence, reassessing the relevant issues of the application or the grounds for challenging the first instance decision undermines the fairness and efficiency of the appeal process and subsequently of the entire determination procedure. This interpretation is in accordance with the European Court of Justice's case law.[385] As well, ECtHR jurisprudence is specific on that point that judicial review has to be a "close and rigorous scrutiny" in order to

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[381] *Id*., p.444.
[382] *Id*., p.444-445.
[383] European Commission, *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, prec., note 182, art.38(2).
[384] The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), prec., note 190, p.50.
[385] *Georg Dörr* v. *Sicherheitsdirektion für das Bundesland Kärnten, and Ibrahim Ünal* v. *Sicherheitsdirektion für das Bundesland Vorarlberg*, *Case* C-136/03, 2 June 2005, para.57, online: <http://curia.europa.eu/juris/celex.jsf?celex=62003CJ0136&lang1=en&type=TXT&ancre=>; The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.461.

be considered a genuine, effective remedy.[386] Consequently, the ECtHR has always provided itself with the jurisdiction to examine the facts and law in each case before it.[387]

Under the national legislation of several Member States, including Bulgaria, the Czech Republic, Finland, France, Germany, Italy and Spain, the appellant body is entitled to review both factual and legal issues in cases with negative decisions on claims for international protection.[388] UNHCR emphasized that effective remedy as defined in Article 39 of the APD and Article 13 of the *European Convention on Human Rights* requires the appellant body to gather evidence rigorously during an independent investigation, which enables the court to reassess negative asylum application decisions by taking into account factual and legal issues.[389]

The Council and European Parliament have taken these consideration into account by recasting Article 39 of the APD in such a way that under Article 46(3) of the RAPD, the Member States are expressly required to "ensure that an effective remedy provides for a full and ex nunc examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance."[390]

Although not expressed by either the APD or the RAPD, it would be the most helpful if the judicial body responsible for accepting the appeal were a separate court with the specific task of

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[386] *Labsi* v. *Slovakia*, Application no. 33809/08, prec., note 365, para.137; *Salah Sheekh* v. *the Netherlands*, Application no. 1948/04, 11 January 2007, prec., note 361, para.136; The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.461.

[387] *Id*.

[388] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211,p.461-463; European Commission, "Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", (Com (2010) 465 final), prec., note 221, p.15.

[389] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.463-464.

[390] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.46(3).

reviewing refugee status determination decisions. The complex and composite nature of refugee applications makes it difficult and confusing for the ordinary judicial body to reassess refugee applicants. Specialized courts have been established in Belgium, Cyprus, Ireland, Malta, Poland and the UK.[391] Asylum seekers are one of the most vulnerable groups in society, with many challenges such as financial or psychological problems, cultural and linguistic issues and so on. Allocating a distinct appeal body to consider the especial situation of rejected asylum seekers with simplified procedural rules, more generous time limits and automatic suspensive effects that allow asylum seekers to stay in the receiving country pending their appeal is the best way to protect the appeal right of asylum seekers and to guarantee compliance with fundamental human rights principles.[392] This requirement is drawn from the last paragraph of Article 46(3) of the RAPD, in accordance with the jurisprudence of the ECtHR.[393] UNHCR has pointed out that "the practicalities which are inherent in exercising a judicial right of appeal are notoriously technical and complex. It is crucial, therefore, that Member States minimize requirements and facilitate access to the right in practice."[394]

None of these three requirements was expressly stipulated in the APD, while the provisions relating to the procedural rules of appeal were legislated vaguely without any specific details. Fortunately, as explained above, these deficiencies have been amended by ECJ and ECtHR case law and have ultimately been incorporated into the RAPD.

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[391] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.434; European Commission, "Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", (Com (2010) 465 final), prec., note 221, p.14.

[392] The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), prec., note 190 ,p.51.

[393] *Unibet (London) Ltd and Unibet (International) Ltd* v. *Justitiekanslern*, Case C-432/05, prec., note 272;
The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.440.

[394] *Id*., p.436.

In the next section, the most vital feature of the right to appeal, its suspensive effect, will be explained in detail.

Suspensive effect of appeal

Regarding best practices for ensuring the right to an effective remedy, the only specified rules incorporated into the APD required Member States to provide this right generally for all applicants;[395] determination of time limits and other necessary rules for applicants to exercise their right to an effective remedy were left up to the Member States' national legislation.[396] Regrettably, with regard to the sensitive subject matter of the suspensive effect of the appeal proceedings, the Member States, with the purpose of retaining their restrictive asylum legislations and manipulating the APD's procedural rules, forced the Council to grant them discretion, the most disconcerting and controversial of which was stipulated in Article 39(3)(a). According to this article, Member States could, in accordance with their international obligations and where appropriate, lay down in their national legislation provisions for whether or not applicants were allowed to remain in their territory while awaiting the outcome of the appeal.[397]

To rationalize this provision, Western countries have put forward the argument that generally, any procedural right or proceeding that prolongs an asylum seeker's stay in the host State must be limited, since the longer refugee applicants remain in the country of asylum, the harder it will be to return them in the case of a negative final decision. The Western States, in most cases, see the appeal process as a pretext asylum seekers use to abuse the determination procedure, extend their stay and make deporting them legally or morally harder or more complicated. In addition, from the host country's point of view, the appeal process is not part of the whole refugee status determination procedure, so it is legitimate and not at variance with the principle of non-refoulement to return rejected asylum seekers to their previous country, even though the appeal body's decision has not yet been rendered.

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[395] European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, art.39(1).
[396] *Id*., art.39(2).
[397] *Id*., art.39(3) (a).

Consequently, the Member States, by virtue of the discretion afforded in Article 39(3)(a) of the APD, were empowered to keep their current asylum legislation or introduce new provisions on returning refugee applicants to their country of origin or the previous country they had come from while the appeal court was reassessing their application and a final decision had not yet been rendered.

The initial version of this article, included in the Commission's 2002 proposal, affected two distinct groups. The first was asylum seekers whose refugee applications had been examined during a regular procedure and whom the Member States were obliged to allow to remain in their territory while awaiting the results of appeal proceedings.[398] Although the Commission had permitted the Member States to derogate from this general provision in accordance with national legislation in force on the date the Directive was adopted,[399] they were obliged to mandate a court of law to decide, on a case-by-case basis, if applicants could stay or were required to leave.[400] The second group involved refugee claimants whose applications had been decided in an accelerated procedure. According to the proposal, in this context the Member States were entitled to determine cases in their national legislation in which the suspensory effect of appeal would be denied for decisions made using such a procedure.[401] Nevertheless, the Commission correctly and wisely required the Member States to

> [E]nsure that a court of law has the competence to rule whether or not this applicant for asylum may [...] remain on the territory of the Member State concerned, either upon request of the concerned applicant or acting on its own motion.[402]

As a result, the Member States would not be free of their international human rights obligations if they denied rejected applicants, such as SCO asylum seekers whose refugee claims had been determined in an expeditious procedure, the right to remain while appeal proceedings were pending. In this context, a separate court should have been given the competence to decide

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[398] European Commission, *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, prec., note 182, art.39(1).
[399] *Id*., art.39(2).
[400] *Id*., art.39(3).
[401] *Id*., art.40(1).
[402] *Id*., art.40(2).

whether to let the rejected refugee claimant remain in the Member State's territory during the appeal, taking into account the applicant's special conditions and the general situation of the case, in accordance with the asylum seeker's fundamental human rights. According to the proposal's expression, no expulsion would be carried out before a court of law had issued a decision about the suspensive effect of appeal.[403]

Unfortunately, this procedural requirement was not incorporated into the final version of Article 39(3)(a) of the APD which, in practice, created a paradoxical situation. Member States were merely required to take into account their international obligations while also maintaining the discretion to grant or deny suspensive effect to rejected asylum seekers' appeal requests and, more neglectfully, they were free from any responsibility to provide an opportunity for rejected asylum seekers to challenge this harmful deprivation in a specialized court of law. How can the Member States be expected to meet their international human rights obligations, the most important of which is the fundamental principle of non-refoulement, when they are free to send applicants back to their countries of origin without taking all the steps necessary to examine, process and make a decision on a refugee application? Is it acceptable that the first instance decision is sufficient to deport asylum seekers to their country without taking a specialized, independent judicial body's opinion into account, in particular when it is mandated to reassess new information and evidence provided by the refused asylum seeker? Is it reasonable to afford Member States the authority (given their preventive asylum policy and intolerance regarding the presence of asylum seekers in their territory) to decide whether or not an applicant may stay in its territory during the appeal procedure? UNHCR has called this article the "most worrisome" rule of the Directive.[404]

It is regrettable that under the provisions of the APD, the right to appeal was enacted in such an ineffective way. As established by the ECJ's case law, the principle of effectiveness requires that the provisions enacted by the EU be exercised and interpreted in conformity with the principles

[403] *Id*., art.40(3).
[404] UNCHR, "UNHCR regrets missed opportunity to adopt high EU asylum standards", prec., note 226.

of EU law and the objectives pursued by the regulation or directive in question.[405] To respond to all these concerns, the final version of the RAPD obliges the Member States to

> [A]llow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy.[406]

Although this provision is the same as was adopted in APD, the suspensive effect of the right to appeal has not been guaranteed unconditionally in the RAPD. However, under Article 46(6) of the RAPD and contrary to Article 39(3)(a) of the APD, the Member States' discretion to reject the suspensive effect has been restricted to four cases, one of which is when the application is rejected based on the SCO rule.[407]

Article 46(6) suffers from the same deficiencies as its precedent, but there is a requirement in this provision that demonstrates notable progress compared to Article 39(3)(a). If suspensive effect of judicial review is denied, under Article 46(6)

> [A] court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon the applicant's request or acting ex officio, if such a decision results in ending the applicant's right to remain in the Member State and where in such cases the right to remain in the Member State pending the outcome of the remedy is not provided for in national law.[408]

In practice, this requirement increases the possibility of effective redress against the harmful consequences of SCO designation.[409]

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[405] *Brahim Samba Diouf* v. *Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, 28 July 2011, prec., note 262, para.60.
[406] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, art.46(5).
[407] *Id*., art.46(6).
[408] *Id*., art.46(6).
[409] Matthew HUNT, prec., note 30, p.527-528.

Although the ambitious goal of unconditionally providing the automatic suspensive effect of the right to appeal has not yet been stipulated in the European asylum system, the Council and European Parliament have taken significant steps to establish common standards for granting and withdrawing refugee status in full accordance with the *1951 Geneva Convention*, in particular the cornerstone principle of non-refoulement, international human rights instruments to which the Member States are party and the fundamental rights recognized by the *European Convention on Human Rights* and the *Charter of Fundamental Rights of the European Union.*[410] The direct consequences of providing the right to stay in the host country during the appeal process, as stipulated under Article 46(5) of the RAPD and in full compliance with the principles of EU law and fundamental human rights, can be demonstrated as follows.

First of all, if appealing the first instance's decision does not automatically result in a stay of the deportation order, or if no separate judicial body is recognized to reassess the applicant's urgent need to remain in the host country's territory pending the appeal, in practice, asylum seekers cannot exercise their right to appeal, since the purpose of protecting the right to an effective remedy is to ensure asylum seekers a fair determination procedure and to protect them from being refouled to their country of origin by virtue of a full and comprehensive case-by-case assessment of each refugee application. Refusal of the suspensive effect of the appeal does not constitute a fair trial in the Member States as guaranteed by the *Charter of Fundamental Rights of the European Union*[411] and the *European Convention on Human Rights.*[412] Moreover, according to the *International Convention on Civil and Political Rights* to which all EU Member

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[410] European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, prec., note 153, Preamble, para.2-4 and 15; European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, prec., note 34, Preamble, para.1, 2, 8, and 9.

[411] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, prec., note 52, art.47.

[412] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention on Human Rights*), prec., note 53, art.13.

States are party, the right to appeal and the suspensive effect of appeal should be guaranteed for every person in the territory of the contracting States.[413]

Secondly, given the irreparable harm that may occur based on erroneous deportation of rejected asylum seekers to their country of origin, the authorization provided in Article 39(3)(a) likely violates fundamental human rights enshrined in the *European Convention on Human Rights*[414] and the *Charter of Fundamental Rights of the European Union*,[415] including the right to life, the right to be protected from torture, the right to liberty and security and the right to effective remedy and a fair trial.[416] Therefore, denying the suspensive effect of the right to effective remedy contradicts the fundamental principles of procedural fairness and the effectiveness of EU legislation, rendering protection of the right to effective remedy meaningless.[417] ECtHR jurisprudence has developed the centrality of the suspensive effect in refugee determination procedures as the precise and conclusive implication of the right to an effective remedy.

For instance, in the case of *Jabari v. Turkey*,[418] an asylum seeker lodged a complaint with the ECtHR regarding the deportation order she had been issued by the Turkish authority. She claimed that she had been denied the right to an effective remedy as guaranteed in Article 13 of the ECHR, since the Ankara Administrative Court did not consider her claim of being at risk of

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[413] The United Nations General Assembly, *International Convention on Civil and Political Rights*, 16 December 1966, art. 13 and 14, online: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>; The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.429 -430.

[414] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention on Human Rights*), prec., note 53, art.2, 3, 5, 6, and 13.

[415] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, prec., note 52, art.2, 4, 6, and 47.

[416] Matthew HUNT, prec., note 30, p.521.

[417] *Marguerite Johnston* v *Chief Constable of the Royal Ulster Constabulary*, Case 222/84, 15 May 1986, para.18 online: <http://curia.europa.eu/juris/celex.jsf?celex=61984CJ0222&lang1=en&type=TXT&ancre=>; Cathryn COSTELLO, prec., note 134, p.186; European Council on Refugees and Exiles, "ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", prec., note 132, p.34; The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), prec., note 190, p.52.

[418] *Jabari* v. *Turkey*, Application no. 40035/98, 11 July 2000, online: <http://hudoc.echr.coe.int/fre?i=001-58900>.

inhuman punishment if returned to her country of origin, and the court was not entitled by the host country's national legislation to suspend execution of the deportation order.[419] In the Court's view, regarding the absolute nature of the prohibition guaranteed in Article 3 (the right to be protected from torture or inhuman punishment) and its fundamental value in a democratic society, Article 13 required the contracting party's authority to not only reassess the substance of the asylum seeker's claim by virtue of "independent and rigorous scrutiny,"[420] but also to reconsider the possibility of granting "appropriate relief"[421] by suspending execution of the deportation order,[422] due to the potentially irreversible harmful results that could occur if the asylum seeker were removed to her country of origin. In this case, the ECtHR built its reasoning on the decisive role of the right to an effective remedy in protecting the fundamental rights enshrined in Article 3 of the ECHR, and the competent authority's responsibility to review both the factual and legal aspects of each refugee application. However, it is noteworthy that the Court did not interpret Article 13 to impose a definite responsibility on the contracting States to automatically grant the suspensive effect to the effective remedy. Instead, according to the Court's ruling, depending on the nature of the right claimed to be violated, the Member States are obliged to allow the judicial or administrative review authority to reassess the possibility of issuing a stay of execution of the contested measures.[423]

More precisely, in the case of *Čonka v. Belgium*,[424] the applicants, Slovakian Roma asylum seekers deported from Belgium, submitted a complaint to the ECtHR against the Belgian authority, asserting that the appeal procedure against the decision on their refugee application did not meet the requirements for effective remedy established by Article 13 of the ECHR, since this remedy did not have any automatic suspensive effect to stay the State's deportation order and the competent authority was able to execute the deportation order without waiting for the

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[419] *Id*., para.43-44.
[420] *Id*., para.50.
[421] *Id*., para.48.
[422] *Id*., para.50; Cathryn COSTELLO, prec., note 134, p.185; The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.454.
[423] *Čonka* v. *Belgium*, Application no.51564/99, 5 February 2002, prec., note 370, para.71.
[424] *Id*.

judgment in the appeal proceedings.[425] The ECtHR reaffirmed its interpretation in the case of *Jabari v. Turkey*, as Article 13 merely requires the contracting States to provide a domestic remedy to examine the substance of the complaint on the likely violation of the rights and freedoms guaranteed by the ECHR and also to afford appropriate relief. In fact, according to the ECtHR, the scope of the obligation imposed on the contracting States varies depending on the nature and essentiality of the infringement of rights claimed.[426] As expressed by the Court, effective remedy, as ensured under Article 13, does not require the contracting States to consider automatic suspensive effect for any action against a decision made by the competent authority, but rather "requires that the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible."[427]

Nevertheless, the Court stipulated that under the provisions of Article 6 and 13 of the ECHR, the remedy must be effective in practice and in law, and the review authority, either judicial or administrative, must be granted adequate competence to guarantee the effectivity of the afforded remedy.[428] In fact, in this case, the Court took a step forward to increase protection of the right to effective remedy, since although in *Jabari v. Turkey*, the Court had made it sufficient for the contracting State to consider whether there was any possibility of granting suspensive effect to the remedy provided by the review body concerned, in *Čonka v. Belgium*, the ECtHR recognized effective remedy as not a mere "statement of intent or a practical arrangement,"[429] but rather as the contracting States' duty to organize their judicial or administrative body in such a way as to guarantee the suspensive effect of the proceedings against the decisions contested whenever appropriate and necessary.[430] This interpretation has been consistently reiterated and upheld in

[425] *Id*., para.64-66.
[426] *Id*., para.75.
[427] *Id*., para.79.
[428] *Id*., para.75, 83, and 84.
[429] *Id*., para.84.
[430] *Id*.; Cathryn COSTELLO, prec., note 134, p.185; The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.457.

subsequent cases and decisions of the ECtHR.[431] Ultimately, in the case of *Labsi v. Slovakia*, the Court ruled that

> [G]iven the irreversible nature of the harm which might occur if the alleged risk of torture or ill-treatment materialised, and the importance which the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires (i) close and rigorous scrutiny of a claim that there exist substantial grounds for believing that there was a real risk of treatment contrary to Article 3 in the event of the applicant's expulsion to the country of destination, and (ii) a remedy with automatic suspensive effect.[432]

In this judgment, the Court has completed its case law by necessitating that depending on the gravity of the consequences of violation of the right in question, the review authority has a responsibility to recognize and observe the suspensive effect of the effective remedy.[433] Although the ECtHR's ruling did not entail the automatic suspensive effect of any right or freedom alleged to be violated by the contracting State concerned, the Court's interpretation based on the gravity of the infringed right has acted as the best recourse for asylum seekers who were denied full recognition of the right to an effective remedy. In fact, contrary to the provisions of the APD, which considered the suspensive effect of the appeal a subsidiary right in terms of the right to effective remedy and left its application to the discretion of the Member States, ECtHR jurisprudence has granted a distinct position to the suspensive effect of appeal as an inherent component of effective remedy, the observance of which is guaranteed by Article 13 of the ECHR. As expressed by the Court in the case of *Čonka v. Belgium*, the rights and freedoms ensured by the ECHR, in particular the right to effective remedy, require that the Member States take real steps to guarantee compliance. This requirement constitutes "one of the

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[431] *Gebremedhin* v. *France*, Application no. 25389/09, 26 Avril 2007, para.66, online: <http://hudoc.echr.coe.int/eng?i=001-80333>; Matthew HUNT, prec., note 30, p.520.
[432] *Labsi* v. *Slovakia*, Application no. 33809/08, prec., note 365, para.137; Matthew HUNT, prec., note 30, p.520.
[433] Cathryn COSTELLO, prec., note 134, p.186; Rosemary BYRNE, "Remedies of Limited Effect: Appeals under the forthcoming Directive on EU Minimum Standards on Procedures", (2005) 7(1) *European Journal of Migration and Law* 71, p.80; Matthew HUNT, prec., note 30, p. 520-521.

consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention."[434]

In terms of the main subject of our research, providing an automatic suspensive effect for appeal proceedings is vital in cases where the asylum seeker's country of origin is an SCO and is given as the reason for processing the refugee application in an accelerated procedure with more limited time frames. In effect, affording the right to appeal and permitting rejected SCO refugee claimants to stay in the host country and explain to the appeal court in person their fear of persecution or torture in their country of origin is the best way to compensate for the deficiencies and procedural flaws of first instance expeditious procedures, which helps the Member States to meet their international refugee and human rights obligations. Denying the suspensive effect of the appeal process in both the APD and the RAPD demonstrates the prevalence of the presumption of safety throughout the whole determination procedure, from the first step of lodging the refugee application to the last instance of appeal. Furthermore, this deprivation indicates rejection of the principles of procedural fairness and deprives SCO asylum seekers of their fundamental refugee and human rights. In this context, acknowledging rejected SCO asylum seekers' right to remain in the host country during the appeal process complies with the principle of non-discrimination based on nationality affirmed in Article 21 of the *Charter of Fundamental Rights of the European Union*[435] and Article 14 of the *European Convention on Human Rights.*[436]

Based on all the justifications and considerations mentioned above, it can be concluded that the right to effective redress is now recognized as a "general principle of [the] European Union."[437] Its automatic suspensive nature has not been recognized unconditionally by ECJ and ECtHR case law and is subject to the grave consequences resulting from violation of the right in question.

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[434] *Čonka* v. *Belgium*, Application no.51564/99, prec., note 370, para.83; Rosemary BYRNE, prec., note 433, p.80.
[435] European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, prec., note 52, art.21.
[436] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention on Human Rights*), prec., note 53, art.14.
[437] The United Nations High Commissioner for Refugees, "Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)", prec., note 211, p.429.

Although contrary to relevant measures in the APD, the RAPD has limited the Member States' discretion in rejecting the suspensive effect of the appeal process, to correspond much more adequately to the general principles of Community law and the Member States' international human rights obligations,[438] EU Member States regrettably maintain some authority in granting or rejecting the suspensive effect of appeal proceedings for SCO applications.

Concluding remarks

The first phase of the creation of the CEAS, brought forward in the Treaty of Amsterdam and reaffirmed by the Council in Tampere in 1999, was terminated by the adoption of the APD, which came into force on December 1, 2005. As previously outlined, the new and sensitive subject matter of the APD regarding harmonization of asylum procedures among EU Member States resulted in the longest adoption negotiations to date and also provoked widespread objections from refugee and human rights experts and NGOs. On two occasions, UNHCR explicitly took a stance against the most controversial provisions of the Directive concerning STCs, SCOs and restrictions imposed on the right to an effective remedy.[439] UNHCR regretted that the Community missed the opportunity to amend Member States' preventive practices and blamed the Directive for setting the Community back in terms of its human rights obligations, since it incorporated many exceptions into EU asylum legislation and established Member States' dubious practices as the accepted norm.[440] The refugee and human rights violations caused by the implementation of the Directive were so serious that UNHCR requested that the Council drop adoption of the APD entirely.[441]

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[438] Matthew HUNT, prec., note 30, p.528; Cathryn COSTELLO, prec., note 134, p.186-188.
[439] The United Nations High Commissioner for Refugees, "Lubbers calls for EU asylum laws not to contravene international law", prec., note 223; The United Nations High Commissioner for Refugees, "UNHCR regrets missed opportunity to adopt high EU asylum standards", prec., note 226.
[440] The United Nations High Commissioner for Refugees, "Lubbers calls for EU asylum laws not to contravene international law", prec., note 223; Matthew HUNT, prec., note 30, p.517.
[441] UNHCR, "Lubbers calls for EU asylum laws not to contravene international law", prec., note 223.

In addition, an unprecedented coalition of 10 expert refugee and human rights organizations, including ECRE, Amnesty International and Human Rights Watch, called upon the Commission to withdraw the proposed APD in 2004, stating that the current instrument was "unacceptable as a legal basis for minimum standards in the European Union"[442] because of its ambiguous language, incoherent provisions, discriminatory approach to asylum seekers in establishing different and complicated procedures based on nationality or travel routes, and the large amount of discretion granted to the Member States to derogate from the minimum standards established by the Directive.[443]

Regarding the SCO rule, as the main objective of this inquiry, the primary source of the controversy of the provisions was the enormous difference between the goal expressed at the Community level (harmonization of asylum law and policy) and the Member States' true goal in mobilizing their resources. For the EU Member States, establishing CEAS was "a secondary objective" as they focused on the mechanisms to protect themselves from economic, social and security difficulties caused by the presence of asylum seekers.[444] During the first phase of asylum policy harmonization, Member States were not ready to abandon their most powerful weapons for deflecting asylum seekers, such as the STC and SCO rules that had been legislated in their national asylum systems for decades.[445] Transforming quasi-exceptional rules such as the SCO rule into accepted measures of EU asylum legislation, as well as the proliferation of divergent practices among Member States through implementation of the APD, made it apparent that harmonizing asylum law and policy was more an optimistic fantasy than a true goal.[446]

The negative reactions to and comments on the ADP provisions focused on the fact that its harmful effects, especially preventive measures such as the SCO rule and the procedural and legal deprivations imposed on SCO asylum seekers, were not limited to the borders of the EU,

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[442] Statewatch, "NGOs call for withdrawal of EU draft asylum procedures Directive", 22 March 2004, online: <http://www.statewatch.org/news/2004/mar/ngo-asylum-letter.pdf>.
[443] European Council on Refugees and Exiles, "ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", prec., note 132, p.4-5.
[444] Matthew HUNT, prec., note 30, p.529.
[445] *Id*.; Cathryn COSTELLO, prec., note 134, p.192.
[446] Matthew HUNT, *Id*., p.534.

but that its measures would be expanded to other parts of the world and eventually undermine the global refugee protection system.[447]

At the regional level, the EU lost its ability to reasonably manage the movement of asylum seekers throughout the Community, and instead concentrated its asylum policy solely on deterrent measures as tools to push refugee claimants out of the EU and reduce the cost of accepting and settling asylum seekers. However, the best solution for overcoming the difficulties caused by an increasing number of asylum seekers is to put in place a comprehensive and well-studied program that pursues two parallel objectives. The Member States should establish an effective, burden-sharing system for receiving and accepting refugee claims among themselves, and the Community should invest more resources and efforts into protection and settlement in the regions from which the asylum seekers are coming.[448]

In terms of a global asylum policy, the EU's preventive approach not only contravenes the fundamental principles recognized by regional and international refugee and human rights legal instruments, but also sets a negative precedent and paves the way for more refugee rights violations in other parts of the world. The European Union, as world's leading regional organization, has been attempting to establish a modern and systematic means of managing the movement of asylum seekers within its territory; the EU's initiatives and minimalist approach toward asylum legislation therefore have a direct effect on asylum policies in other parts of the world, which weakens the protection that can be offered to refugees all over the world.[449]

Despite all these flaws, the historical importance of the APD should be kept in mind since as previously mentioned, it was the first legally binding instrument at the regional level in the field of refugee rights to set minimum standards for a determining authority to grant refugee status and establish basic procedural rights for asylum seekers in lodging their applications. These minimum standards have been improved upon by the interpretations of the ECJ or ECtHR, as

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[447] The United Nations High Commissioner for Refugees , "Lubbers calls for EU asylum laws not to contravene international law, prec., note 223.
[448] *Id*.
[449] The United Nations High Commissioner for Refugees , "Lubbers calls for EU asylum laws not to contravene international law, prec., note 223; Cathryn COSTELLO, prec., note 24, p.68.

well as the provisions of the RAPD. Moreover, though the Directive has set lower standards, its role as a guideline for passing more favourable rules in Member States with less developed asylum systems, especially new EU Member States, should not be underestimated.[450]

The recasting process has allowed the EU legislative bodies to address certain concerns and criticism from commentators and human rights NGOs. Since the Amsterdam Treaty entered into force, the main goal at the EU level has been to harmonize asylum policy and law among the Member States, with the ultimate objective of establishing a common asylum system that guarantees "efficiency and fairness."[451] Not surprisingly, the original APD failed to achieve this goal. This was in part because of the decision-making mechanism put in place to legislate asylum law requiring unanimous votes of the Member States in the Council, and which conferred a mere consulting role on European Parliament. As was briefly noted, during the second phase of the creation of CEAS, European Parliament gained a significant role with the passing of the RAPD and its conformity with the fundamental principles of Community law.

The first phase of legislation served the main purpose of maintaining the Member States' low protection standards, allowing their deterrent asylum policies to continue, incorporating their complex practices into Community asylum law and imposing unlimited clauses for derogation from the general procedural principles guaranteed by the APD.[452] The final version of the APD became a regionally accepted instrument that legalized and spread the application of deterrent measures, in particular safe country practices.[453]

Nevertheless, the second phase of legislation in asylum law and policy was based on qualified majority votes (QMV) in the Council and the co-decision of European Parliament. During this period, European Parliament maintained a co-legislator role, which was a decisive factor in recasting and improving the instruments enacted during the first phase. European Parliament's endeavour to remove a variety of the Member States' preventive practices, such as the SCO

[450] European Council on Refugees and Exiles, "ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", prec., note 132, p.4.
[451] Cathryn COSTELLO, Emily HANCOX, prec., note 229, p.1.
[452] *Id*., p.5.
[453] *Id*., p.2.

national list, and to include the general principles of Community and international human rights law into the RAPD was remarkable.[454] Although European Parliament has not been able to eliminate the SCO rule, it has managed to restrict the Member States' discretion to derogate from general guarantees and has ameliorated the protection of fundamental procedural rights for asylum seekers, in particular the right to a personal interview and the right to an effective remedy.[455] In fact, the positive reforms implemented during the second phase of development of a common EU asylum system, as Costello and Hancox have pointed out, are the product of the new idea that "efficiency must serve fairness, not vice versa."[456]

Under the RAPD measures, though the Member States are authorized to determine the time limit for decisions on asylum applications, they are also obliged to conduct a full and comprehensive personal interview for all asylum applicants, regardless of their national origin or travel route. Furthermore, while it is left to the discretion of the Member States to accelerate the determination procedure for SCO applications, they are required to recognize all applicants' right to effective remedy before an independent court or tribunal mandated to review both the factual and legal issues of the application, even those coming from safe countries of origin. The RAPD should generally be welcomed, but there is still a long way to go before a fair and efficient CEAS is created that fully respects the general principles of Community law and international refugee and human rights law.[457]

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[454] Matthew HUNT, prec., note 30, p.523-525.
[455] *Id*., p.534-535.
[456] Cathryn COSTELLO, Emily HANCOX, prec., note 229, p.1 and 5.
[457] Matthew HUNT, prec., note 30, p.529.

Chapter 2: Canada's immigration law

In this chapter, the main focus of the study will be on Canadian immigration law relating to the concept of *designated countries of origin* (hereafter DCOs), the Canadian version of the SCO rule, and the procedural and/or legal consequences for asylum seekers originating from such countries.

The most important issue that should be clarified is that while the primary objective of this inquiry is to conduct a comparative study between the European Union and Canada regarding the SCO and DCO rules, in some cases, it is extremely difficult or confusing to find and cite the exact provision from one of these legal systems corresponding directly to a provision of the other system or containing the same content as the relevant measure legislated by the other system. Therefore, in order to follow the plan set out in the Introduction, we will reassess the measures Canada has passed based on the following: the procedure for designating a DCO, the accelerated procedure for holding a personal hearing and making decisions on refugee claims, and appeal proceedings. In order to carry out the primary purpose of comparing the two systems, in each section, we will mention the relevant provision adopted by the EU, explained in the previous chapter.

The second point to be clarified is that although the reasons for preventive and restrictive policy and rules in Western industrialized countries have already been explained in the Introduction section, the evolution of Canadian immigration law differs from that of Western European countries, since the emergence and development of restrictive asylum policies are the product of both global and domestic elements.[458] For a better understanding of the rationale behind the adoption of restrictive rules in refugee law, we will commence this chapter by reconsidering the historical development of Canadian immigration law, which has led to today's refugee law theories and practices. The differences between the EU's and Canada's asylum legislation can be categorized as follows:

[458] Rebecca HAMLIN, prec., note 3, p.33.

1. Canada's geographical location and distance from traditional refugee-producing regions and incidents in the world, including the World Wars in Europe and civil wars in the Middle East, Africa and Asia
2. The difficulties that asylum seekers faced in reaching Canada before globalization and the expansion of transport facilities across the continents
3. Specific racial and economic ideologies of Canadian society and governments
4. The decisive role of the *Canadian Charter of Rights and Freedoms*,[459] which has improved the protection of the fundamental rights of non-citizens through the Supreme Court's interpretation of the measures adopted by the government.[460]

Historically, Canada's geographic location has been the major obstacle for migrants in reaching its border and entering the country. However, liberal ideologies of the 1970s and 1980s, globalization and pressure from Western European allies to accept more refugees changed Canada's traditional position on the arrival and resettlement of asylum seekers in its society. The rise of military and Marxist dictator regimes in Central and South America in the 1960s and 1970s, as well as insecurities caused by drug cartel wars, especially in Mexico, since the late 1990s caused an influx of refugee claimants arriving at Canada's borders. As a result, Canada experienced the same difficulties as the Western European States. Although the outcome has been the same in both territories, namely the struggle of Western host countries to reduce the number of asylum seekers in their territory and hasten the removal of failed asylum seekers, the two have used diverse approaches to accomplish this ultimate goal. Before discussing DCO measures, it is therefore essential to explore the history of Canada's immigration law in order to understand the prevailing vision of Canadian society on immigration and more specifically on refugee claimants.

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[459] *Canadian Charter of Rights and Freedoms*, prec., note 55.

[460] FRANÇOIS CRÉPEAU ET DELPHINE NAKACHE, "Controlling Irregular Migration in Canada-Reconciling Security Concerns with Human Rights Protection", (2006) 12(1) *IRPP Choices* 1, p.9-18.

Part 1: Historical developments

Before the 1970s, although the Canadian border was open to some refugees with certain racial considerations, Canada had neither a specific asylum policy nor a codified refugee status determination procedure. Most of the time, asylum seekers had been considered equal to immigrants, and the conditions for accepting refugee claimants had been the same as for immigrants, that is, based on the government's economic goals. In other words, in most cases the government's financial and economic goals were the leading factors in accepting or rejecting asylum seekers, rather than humanitarian reasons.[461] It is evident that apart from the view each nation has of its identity and fundamental values,[462] some experts in immigration law history have noted that since Confederation, Canadian immigration policy has been regarded as the cornerstone of population growth and economic expansion, and subsequently creates a more independent country and a more powerful actor on the international stage and in intergovernmental relations.[463]

Moreover, accepting immigrants and refugees into Canadian society in the 19th and early 20th centuries was not the result of the contemporary governments' liberal attitude toward immigration policy.[464] In spite of increased and generous admission of immigrants, in particular from central and southern Europe, Canada has had many examples of codified discriminatory rules in order to exclude and deport third country nationals based on their racial or ethnic origin since the late 19th century.[465] For instance, in the 1880s, the Chinese population in Canada was growing rapidly, as many Chinese immigrants came to work on construction projects like the Canadian Pacific Railway. The federal government adopted preventive laws with the aim of reducing the number of Chinese immigrants, such as the *Federal Franchise Act* of 1885 impeding these immigrants from voting in federal elections, or the *Federal Chinese Immigration*

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[461] Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p.12-14.
[462] EMILY F. CARASCO, *Immigration and Refugee Law: Cases, Materials and Commentary*, Emond Montgomery Publications, 2007, p.1.
[463] *Id*., p.12-13.
[464] *Id*.
[465] *Id*.

Act in the same year, which imposed an extra $50 tax on Chinese immigrants that reached $500 in 1903.[466]

Another example is the incorporation of new rules into immigration law, such as the *Continuous Passage Act of 1908*,[467] which necessitated that foreign nationals arrive in Canada by way of a "continuous journey" without any interruption in their trip in order to be accepted in Canada as immigrants. Consequently, immigrants had to travel to Canada directly from their country of origin. Considering the difficulty of travelling between continents and Canada's particular geographical location, it is obvious that this legislation was intended to deter immigrants from southeast Asia, especially Japan and India, countries from which the population of immigrants in Canada had been growing during that period.

Another significant example of Canada's stance against certain ethnic, racial, religious or national groups is the Canadian government's reaction and response to human rights violations and refugee crises that have occurred in other parts of the world. For example, during the Second World War, many countries around the world, including Western European countries, implemented restrictive immigration laws, but the Canadian government's attitude toward certain ethnic refugees was even more severe and preventive. During this period, Canada adopted discriminatory immigration measures against Japanese immigrants and Jewish refugees, which led to the deportation of many Japanese immigrants from Canada to Japan and prevented 907 Jewish refugees who had escaped from the Nazi regime in Europe from reaching the territory of Canada.[468] Canada pursued this exclusionary policy in the first years after the end of World War II and accepted only 5,000 Jewish refugees, which, compared to Western European acceptance rates, was one of the lowest numbers among Western democratic countries at that time.[469]

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[466] Martin JONES and Sasha BAGLAY, *Refugee Law*, Toronto, Irwin Law, 2007, p.4-5; Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3.
[467] Martin JONES and Sasha BAGLAY, prec., note 466, p.4-5; Valerie KNOWLES, *Strangers at Our Gates: Canadian Immigration and Immigration Policy, 1540-1997*, Toronto, Dundurn Press, 1997, p.93.
[468] EMILY F. CARASCO, prec., note 462, p.22-25; Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p.17.
[469] EMILY F. CARASCO, prec., note 462, p.468; Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p.17.

However, a new attitude gradually emerged regarding refugee claimants and immigrants based on two considerations. Because of economic expansion and job creation in Canada, as in the Western European countries, demand increased for foreign workers as a labour force contributing to economic prosperity. The influence of churches and human rights organizations also encouraged the government to enact more open and less discriminatory provisions. Eventually, due to pressure from its European allies, Canada admitted nearly 250,000 displaced persons from Europe between 1947 and 1962.[470]

In contrast with this generous trend, a new element arose in the mid-20th century that served as the main pretext for rejecting refugee claimants: the Canadian government's profound fear of the influence and spread of Communist ideology in the country. This fear caused delays and justifications for rejecting asylum seekers from central and eastern European countries. For example, between 1946 and 1958, more than 29,000 applicants were rejected for national security reasons.[471] Canada's resistance to signing the *1951 Geneva Convention* was based on the government's belief that adopting the Convention would limit the country's right to exclude and reject refugee claimants on security grounds,[472] since the government suspected human right organizations, such as the UN's International Refugee Organization, of being influenced by the Communist States.[473]

In the 1960s before Canada adopted the *1951 Geneva Convention*, despite improvements to Western Europe's asylum legislation, Canada accepted asylum seekers from Europe who were resettled in Canada, in most cases due to pressure from the Western European States. The government's response to the refugee crisis was delayed, and there was no specific asylum policy governing acceptance of asylum seekers. Most of the time, they were accepted according

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[470] EMILY F. CARASCO, prec., note 462, p.23; Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p.318.
[471] EMILY F. CARASCO, prec., note 462, p.23; Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p.314, 342, 348, 351.
[472] Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p.345.
[473] *Id*., p.17, and 343-345; Rebecca HAMLIN, prec., note 3, p.34.

to the requirements established for selecting economic immigrants and were treated in accordance with immigration policy.[474]

Fortunately, after Canada signed the *1951 Geneva Convention* in 1969, due to its active participation in the international community, human rights cooperation with the UN, commitment to multiculturalism[475] and expansion of values defending immigration and anti-discrimination trends in Canadian society, new generous but still selective rules arose regarding immigration, refugee claims and family reunification in the late 1960s and the 1970s.[476] As a result, in the early 1970s Canada began to accept more refugee claimants from overseas (especially European asylum seekers),[477] leading to the adoption of the first series of rules that specifically addressed accepting refugee claimants and administering refugee status determination procedures, the *Immigration Act of 1976.*[478]

In this new series of immigration laws, immigration and refugee policy objectives were clearly determined for the first time, and Canada acknowledged its obligations to achieve the democratic goals of reuniting families, observing Canada's international obligations toward refugees and reaffirming its humanitarian traditions regarding displaced and persecuted persons.[479] All these positive changes raised Canada to one of the main resettlement countries providing refuge for asylum seekers by the mid-1970s.[480]

The remarkable upheaval of the late 1960s brought about a growing political and public consensus that procedural fairness and due process protections should exist in terms of the entry, acceptance and expulsion of asylum seekers based on explicit and transparent provisions, reasoned decisions and the possibility of challenging the result of the determination before an

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[474] Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p.365; Martin JONES and Sasha BAGLAY, prec., note 466, p.2 and 8.
[475] Rebecca HAMLIN, prec., note 3, p.45.
[476] *Id.*; Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p.17; EMILY F. CARASCO, prec., note 462, p.23.
[477] Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p.18 and p.316-317.
[478] *Immigration Act, 1976*-1977, c.52, s. 1.
[479] Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p.382 and p.395.
[480] Rebecca HAMLIN, prec., note 3, p.46.

independent tribunal.[481] In 1967, a series of measures were adopted to this end called *The 1967 Regulations.*[482] One of the provisions required the establishment of the Immigration Appeal Board and implementation of basic due process protections in the immigrant admission process. It was an unprecedented step forward for Canadian immigration legislation, encouraging legislators to adopt more favourable and protective immigration and refugee protection rules in the following years.[483] This democratized and quasi-liberal refugee policy was followed by three events that unfortunately reversed the government's direction regarding asylum seekers and their presence in Canadian society.

First of all, the energy crisis and the deep economic recession that occurred in the 1970s in all industrialized countries, including Canada, caused a shortage of resources for resettling refugee claimants as well as a lack of job creation. This situation led to the unwillingness of refugee-receiving countries to accept and sponsor more refugees from overseas. During the recession, skilled and educated immigrants were needed to increase investment and find new sources of income in order to revitalize economic activity.[484]

Second of all, increased globalization resulted in the spread of information and access to transportation, which helped asylum seekers reach distant lands like Canada. Since the end of World War II, most asylum seekers were selected from overseas, especially from refugee camps in Western Europe, and were sponsored by relatives in Canada, refugee and human rights organizations, or churches and the federal government, with particular attention to refugees' abilities to contribute to economic activities in Canada. Before the 1960s, 90 per cent of refugee claimants were of European origin, but since the 1980s and 1990s, significant changes in the origin of asylum seekers meant that less than 25 per cent of refugees were from Europe while refugee claims from the Middle East and Africa reached 50 per cent.[485]

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[481] Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p.18.
[482] *Immigration Regulations, Order in Council PC 1967-1616,1967.*
[483] Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p.356-358.
[484] *Id*., p.352-353.
[485] *Id*., p.381.

Thirdly, a sudden increase in refugee claimants at the border and in the territory of Canada occurred partly due to the vast numbers of rejected Central and South American asylum seekers coming from the shared border between Canada and the United States.[486] In Canada, the number of refugees selected from overseas jumped from 7,300 in 1977 to 52,000 in 1991. As well, the number of inland refugee claimants rose from a few hundred in 1977 to several thousand in the 1980s, peaking at 37,000 in 1992.[487]

Consequently, in the 1980s Canada was confronted with a serious backlog of refugee claims that raised concerns about the inefficiency of the refugee admission administration and the destruction of refugee status determination procedures. This refugee crisis obliged the government to control refugee movement at the border by enacting more deterrent refugee rules.[488] However, since the 1990s, the Canadian immigration system's efficiency in admitting suitable immigrants based on the country's economic requirements and in protecting asylum seekers has experienced an increased number of public and political controversies. Critics became louder in 1999 when four boats containing hundreds of undocumented Chinese immigrants reached British Colombia, on the west coast of Canada. All of these Chinese nationals requested refugee protection in Canada.[489] Since the mid-1990s, tensions between the public safety of refugee-receiving countries and their international refugee and human rights obligations have increased.[490]

While Canada was confronted with another increase in the number of inland refugee claimants in the late 1990s and at the beginning of the 21st century,[491] the terrorist attacks on September 11, 2001, in the United States exacerbated the situation inside Canada and outside, drawing particular criticism from its southern neighbour, the United States, which accused Canada's

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[486] Rebecca HAMLIN, prec., note 3, p.47.
[487] Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p.381.
[488] *Id*., p.19.
[489] *Id*., p.20, 382, and p.421-422.
[490] *Id*., p.415.
[491] Martin JONES and Sasha BAGLAY, prec., note 466, p.15.

immigration and refugee border security of being inefficient[492] and spread xenophobic sentiment and racialized reactions against immigrants and refugees in the Western countries.[493]

All these considerations led to the adoption of new immigration and refugee laws in 2002 and additional amendments in 2010 and 2012, which were in stark contrast with the liberal trend of the 1976 *Immigration Act*. They clearly reflect an exclusionary asylum policy and expose the government's main concerns as reducing the number of inland refugee claimants, strengthening border controls and making it more difficult to access the determination procedure and achieve refugee status, with the primary purpose of protecting national security and public safety. The major differences between the 1976 *Immigration Act* and the government's more conservative asylum legislation in force since the early 2000s are:

1. Lack of specificity. This shortcoming is a major detour from the previous legislation of 1976. Since 2002, the framework of immigration and refugee policy has been determined broadly; the relevant rules have been codified in general terms, while the details have been left to the executive body to designate and implement by regulation or order, with minimal parliamentary and judicial supervision. The ambiguity and indefiniteness concerned many immigration and refugee advocates and human rights activists because of the dangerous departure from the legislative accountability established by the 1976 Act.[494]
2. Broadened inadmissibility criteria. Contrary to the previous series of laws, the grounds for rejecting refugee claims and restricting asylum seekers' eligibility to have their refugee requests heard during the determination procedure were extensively codified in the new legislation of 2002. Security concerns play a significant role in this change.[495]
3. Extension of grounds for rejection. Although in new legislation, the international protection granted by Canada extends to Convention refugees (refugee applicants whose claims are considered according to the definition and requirements of the *1951 Geneva*

[492] Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p.423.
[493] Martin JONES and Sasha BAGLAY, prec., note 466, p.6.
[494] Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p. 425, and 457-458.
[495] *Id*., p.425.

Convention) and to a new group called "protected persons" (persons at risk of torture or inhuman and degrading punishment or treatment if they are returned to the country from which they escaped), many preventive or limiting provisions can be found depriving certain groups of having their refugee claims fully and fairly heard through the refugee determination system, such as refugee claimants from DCOs or STCs.[496]

4. Unprecedented government empowerment. The broad authority accorded to immigration officers and the Minister of Citizenship and Immigration to detain or deport certain refugee claimants has provoked human rights criticism, since these detentions and deportations are mostly executed without observing the principles of due process and procedural fairness.[497] This deficiency has reappeared in the process for designating SCOs.

The history of Canadian immigration law is the best illustration of the fact that apart from the country's economic interests, the primary concern and focus of policymakers and legislators in the field of immigration has historically been to accept third country nationals from similar cultures, in particular, immigrants of British origin.[498] Every time the number of immigrants or refugees of a certain ethnicity or from a certain nation rises, the Canadian government tries to restrict their admission and presence by enacting deterrent or limiting immigration and refugee laws.[499] The sudden increase in refugee claims from Hungary, in particular Roma refugees, and Mexico, since late 2009 was one of the main reasons for introducing and incorporating the preventive measure of "designated countries of origin" in Canadian refugee legislation in 2010.

Furthermore, the comparison between previous and contemporary immigration and refugee legislation demonstrates that contrary to the liberal and human rights considerations of the 1970s and the 1980s, since the mid-1990s, the major priority in this field has been security concerns, in particular public safety and border control. It is the rationale behind the government's restrictive

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[496] *Id*.
[497] *Id*., p.426.
[498] Valerie KNOWLES, prec., note 467, p.13; EMILY F. CARASCO, prec., note 462, p.3.
[499] Martin JONES and Sasha BAGLAY, prec., note 466, p.3.

policy on immigrant admissions, refugee claimant acceptance and the enforcement of new rules like the STC or DCO rule.[500]

As outlined previously, the SCO principle (DCO in Canadian refugee law) is a more recent initiative in the refugee legislation of Western countries. Canada incorporated the DCO rule into the *Balanced Refugee Reform Act* of 2010 and in more detail in the *Protecting Canada's Immigration System Act* of 2012. Since the provisions of the *Balanced Refugee Reform Act* of 2010 on DCOs never came into force, the next section will be dedicated to the DCO concept and the process by which it has been codified into the *Protecting Canada Immigration System Act* of 2012.[501]

Part 2: Bill C-31: Protecting Canada's Immigration System Act

Beginning in the late 1990s and early 2000s and exacerbated by the 9/11 terrorist attacks, security concerns were the leading motive for the substantial shift in the Western countries' approach regarding immigration and refugee policy and law, in particular in the United States and Canada.[502] Although it was later revealed that these terrorist attacks had been mobilized and committed by third country nationals who had entered the United States legally, and no link was found between these inhuman actions and individuals entering Canada to apply for international protection,[503] the horrified feelings caused by these incidents allowed the Conservative government to bring forward and impose previously prepared restrictive provisions on the *Immigration and Refugee Protection Act*, which completely contradicted the liberal trends of the 1970s and 1980s.[504] The changes were made in response to widespread criticism of Canada's current immigration and refugee policy,[505] with the main goal of resolving the recurrent backlog

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[500] Ninette KELLEY and Michael J. TREBILCKOK, prec., note 3, p.461; Martin JONES and Sasha BAGLAY, prec., note 466, p.6.
[501] *Bill C-31: Protecting Canada Immigration System Act*, SC 2012, c 17.
[502] Rebecca HAMLIN, prec., note 3, p.32.
[503] FRANÇOIS CRÉPEAU ET DELPHINE NAKACHE, prec., note 460, p.19.
[504] Martin JONES and Sasha BAGLAY, prec., note 466, p. 20.
[505] FRANÇOIS CRÉPEAU ET DELPHINE NAKACHE, prec., note 460, p.21.

of inland refugee claims, reducing the number of refugee claimants entering Canada and securing external borders. Ramraj has interpreted this trend as a shift from liberty to security.[506]

The government put in place a new inland refugee system that included a rapid decision-making procedure based on limited procedural requirements, restricted access to the Immigration and Refugee Board of Canada's Refugee Appeal Division for some rejected claimants, restricted some asylum seekers' access to certain fundamental rights such as the right to free basic healthcare or the right to work, a new fast-track process in the early stages of the decision-making procedure targeting asylum seekers from designated safe countries, and the rapid removal of individuals with unfounded asylum claims. All these measures were implemented to dissuade potential asylum seekers from coming to Canada's border, reduce the time refugee claimants spend in Canada's territory and speed up the process of rejecting and deporting failed asylum seekers. The new system was established by amending the 2001 *Immigration and Refugee Protection Act* in 2010 and 2012[507] and has generated widespread criticism, bringing Canada's inland refugee procedure into the spotlight.

The concept of DCOs was added to Canadian refugee legislation through the introduction of Bill C-11 in 2010, which was eventually adopted as the *Balanced Refugee Reform Act*. As mentioned above, the provisions of Bill C-11 on DCOs were never implemented and were replaced by Bill C-31 provisions. In the next section, the DCO rules incorporated into Bill C-31 will be assessed. Bill C-31, *An Act to Amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act*, titled *Protecting Canada's Immigration System Act*,[508] was introduced in the House of Commons on February 16, 2012. It was later sent to the House of Commons Standing

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[506] *Id*., p.21-24; VICTOR V. RAMRAJ, "The Emerging Security Paradigm in the West: A Perspective from Southeast Asia", (2003) 4(1) *Asia Pacific Journal on Human Rights and the Law* 1, p.1-3.

[507] *Immigration and Refugee Protection Act*, S.C. 2001, c.27.

[508] *Bill C-11: An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act (Balanced Refugee Reform Act)*, introduced on 30 March 2010, received Royal Assent on 29 June 2010. For more information, refer: Parliament of Canada, *Legislative Summary of Bill C-11: An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act (Balanced Refugee Reform Act)*, Publication No. 40-3-C11-E, 12 May 2010, Revised 12 January 2011, online: <http://www.lop.parl.gc.ca/Content/LOP/LegislativeSummaries/40/3/c11-e.pdf>.

Committee on Citizenship and Immigration for more rigorous scrutiny on April 23, 2013, and was returned to the House of Commons with 15 amendments on May 14, 2012. Bill C-31 received royal assent on June 28, 2012, and came into force on December 5, 2012.[509]

The new Bill C-31 made further changes to Canada's inland refugee determination system. Although according to the government proclamation these reforms were put in place for legitimate objectives including the protection of the integrity of Canada's immigration system, the prevention of misuse of Canada's generous asylum legislation, the establishment of a faster and fairer asylum system for legitimate refugees, addressing problems relating to human trafficking and ensuring Canada's security and public safety,[510] as the Canadian Bar Association stated, the short time limit for discussing and passing Bill C-31 prevented Parliament and refugee rights organizations and experts from debating and considering in adequate detail the real negative impact, human rights violations and constitutional infringements caused by this new legislation.[511]

The main reforms to the inland refugee status determination system concerned the creation of five different groups of refugee claimants: refugee claimants originating from designated countries of origin, refugee claimants with manifestly unfounded claims, refugee claimants whose request has no credible basis, designated foreign nationals and refugee claimants coming from a safe third country. Every group is subject to different procedural rules for lodging a refugee application with the Refugee Protection Division, depriving claimants of various fundamental or procedural rights, including the right to appeal to the Refugee Appeal Division, different timelines for pre-removal risk assessment and restrictions on the automatic stay of removal or eligibility for a work permit, health insurance coverage or permanent residence. It is

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[509] *Bill C-31: Protecting Canada's Immigration System Act*, S.C. 2012, c. 17, Assented to 28 June 2012; For more information, refer to: Parliament of Canada, *Bill C-31: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act*, Publication No. 41-1-C31-E, 29 February 2012, Revised 4 June 2012, online: <http://www.lop.parl.gc.ca/content/lop/LegislativeSummaries/41/1/c31-e.pdf>.

[510] Government of Canada, Citizenship and Immigration Canada, *Harper Government Introduced the Protecting Canada's Immigration System*, 16 February 2012, online: <http://news.gc.ca/web/article-en.do?nid=657129>.

[511] The Canadian Bar Association (National Immigration Law Section), "Bill C-31: Protecting Canada's Immigration System", April 2012, p.8, online: <https://www.cba.org/CMSPages/GetFile.aspx?guid=b4f81c7d-f3a0-43d4-a7f4-3d97544035e1>.

evident that all these differences between refugee claimants and restrictions of their fundamental rights are in opposition to the goals claimed by the government, as they prevent refugee claimants from accessing a complete and fair refugee determination procedure in law and practice. In fact, as Wanda Yamamoto, former President of the Canadian Council for Refugees (hereafter CCR) has commented, the government's new legislation "emphasizes speed and categorizations over fairness and individual protection."[512]

It is not an exaggeration to conclude that incorporating the DCO concept into Canada's inland determination procedure was one of the Canadian government's most significant amendments to Canada's asylum system. During the first meeting on the introduction of Bill C-31, Citizenship and Immigration Minister Jason Kenney explained the DCO concept as the first and the most notable modification put forward by Bill C-31. According to Kenney, the DCO provisions were intended to identify "non-refugee producing countries,"[513] deter abuse of "Canada's generous asylum system"[514] and quickly reject asylum seekers arriving from safe countries, who Kenney defined as "bogus refugees."[515]

Given the significant effect of the DCO provisions on the coherence and accuracy of Canada's asylum system, the reforms implemented by Bill C-31 have had the most harmful effects on DCO refugee claimants. The short time limits for lodging refugee requests and the vast deprivation of fundamental procedural and human rights during the determination procedure create precarious circumstances that, in most cases, force claimants to withdraw or abandon their refugee claims or prevent them from presenting a well-prepared and strong international protection request, which consequently leads to higher rejection rates. Regrettably, as one of the criteria for determining the general safety of a country, the high rate of rejected or abandoned refugee applications results in a vicious circle that reinforces and reiterates the idea of the designated country's general safety, preventing reconsideration of the real practices in the

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[512] Canadian Council for Refugees, "Canada Rolls Back Refugee Protection: Bill C-31 receives Royal Assent", Media release, 29 June 2012, online: <http://ccrweb.ca/en/bulletin/12/06/29>.
[513] Government of Canada, Citizenship and Immigration Canada, *Harper Government Introduced the Protecting Canada's Immigration System*, prec., note 510.
[514] *Id*.
[515] *Id*.

country in question or of any sudden changes in its human rights situation. That is why according to the CCR's 2014 report, two years after implemention of the *Protecting Canada's Immigration System Act*, DCO refugee claimants "are the leading group of concern for NGOs"[516] among groups who are subjected to deprivation and limitations under the new refugee system. As Showler reiterated, the deficiencies in the new refugee determination process "encourage frivolous claims and serve neither the interest of Canada nor genuine refugees."[517]

In the following subsections, Bill C-31's provisions on the criteria and procedure for designating a DCO, as well as DCO refugee applicants' fundamental right to a personal hearing and appeal will be discussed in detail.

2.1: DCO designation: sophisticated process and ambiguous criteria

It should be specified at the outset that contrary to EU asylum legislation on the SCO rule, the DCO concept is not precisely and comprehensively defined in Canada's asylum legislation under the provisions of either Bill C-11 or Bill C-31. The only way to understand the Canadian government's view on the DCO rule is through the definitions occasionally provided by government authorities. During a press conference for introducing Bill C-31, Jason Kenney, then Immigration and Citizenship Minister, illustrated the DCO concept as including countries that generally do not produce refugees, in that their nationals are not in real need of international protection.[518] However, the Minister did not clarify based on which grounds these countries would be deemed generally safe for their nationals. On another occasion, in a backgrounder note put forward by the government, DCOs were described vaguely as third countries that "do not normally produce refugees, respect human rights and offer State protection,"[519] while granting

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[516] Canadian Council for Refugees, «Keeping the door open: NGOs and new refugee claim process», October 2014, p.9, online: <http://ccrweb.ca/sites/ccrweb.ca/files/ngo-claim-process-report.pdf>.
[517] PETER SHOWLER, "Fast, Fair and Final: Reforming Canada's Refuge System", 2009, *The Maytree Foundation*, p.2, online: <http://www.maytree.com/wp-content/uploads/2009/07/FastFairAndFinal.pdf>.

[518] Government of Canada, Citizenship and Immigration Canada, *Harper Government Introduced the Protecting Canada's Immigration System*, prec., note 510.
[519] Government of Canada, Citizenship and Immigration Canada, *Backgrounder-Designated Countries of Origin*, 2012, online:

full discretion to the government (the Immigration and Citizenship Minister) to designate DCOs and organize the procedures under which DCO applications should be processed and decided.

On a third occasion in a more detailed backgrounder note, the government specified the major elements that constitute a DCO while requiring the Minister to review his decision on the third countries on the DCO list by consulting with other Canadian federal government departments, even in the case of designation based on quantitative criteria.[520] The government stipulated that the review should be based on a select set of conditions, including

> [D]emocratic governance, protection of right to liberty and security of the person, freedom of opinion and expression, freedom of religion and association, freedom from discrimination and protection of rights for groups at risk, protection from non-state actors (which could include measures such as state protection from human trafficking), access to impartial investigations, access to an independent judiciary system, and access to redress (which could include constitutional and legal provisions).[521]

The government's attempt to add transparency to the procedure for designating DCOs while taking into account the fundamental human rights guaranteed by the *Canadian Charter of Rights and Freedoms* is appreciated as a significant start point. However, these additional criteria have not been endorsed or imposed by any legal provision passed by Parliament. There is therefore no way to monitor whether or not the Minister will apply them when adding a new country to the DCO list since, even if other Canadian federal government departments have been consulted, the final DCO list is at the Minister's sole discretion.

None of these three statements provides any applicable standards for identifying and designating DCOs. The fundamental deficiencies in the DCO provisions, namely the lack of a specific

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<http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-02-16i.asp?_ga=1.4410874.85214719.1442608782>.

[520] Government of Canada, Citizenship and Immigration Canada, *Backgrounder – Designated Countries of Origin*, 2012, online: <http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-11-30.asp>.

[521] *Id*.

definition, conditions that are too general and unreliable to ensure the accuracy of DCO identification, the sole authority of the Minister to determine DCOs and Parliament's inability to oversee the government's proceedings, serve the best interests of the government by allowing DCO refugee applications to be rejected quickly. These circumstances increase the risk of determining DCOs based on the government's political, economic or intergovernmental interests, while the ambiguity makes the process more confusing for DCO refugee claimants, since they do not know if their national country is considered safe and what supporting documents they must prepare and submit to disprove the general presumption of the safety of their country of origin.

While Parliament did not impose any reform on measures concerning the procedure for designating DCOs[522] between the first and final versions of Bill C-31, certain differences exist among the provisions proposed under Bill C-11 and the amendments added to Bill C-31 in clauses 58 and 84 which demonstarate, on the one hand, the improvement of the government's standpoint regarding the concept of safety in the third country while one the other hand in some cases reduces the transparency and accucary of the process for designation of the DCO list.

The most significant differecnce between Bill C-11 and Bill C-31 is that according to the later, the Immigration and Citizenship Minister is only granted the authority to designate an entire third country as a DCO, instead of part of it or for a particular group of its nationals (s.109.1

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[522] Parliament of Canada, *First Reading of Bill C-31: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act*, First Session, Forty-first Parliament, 60-61 Elizabeth II, 16 February 2012, s.109.1, online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5391960&File=48#8>; Parliament of Canada, *Bill C-31 as amended by the Standing Committee on Citizenship and Immigration as a working copy for the use of the House of Commons at report stage and as reported to the House*, First Session, Forty-first Parliament, 60-61 Elizabeth II, 14 May 2012, s.109.1, online: http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5581460>; Parliament of Canada, *Bill C-31: as passed by the House of Commons*, First Session, Forty-first Parliament, 60-61 Elizabeth II, 11 June 2012, s.109.1, online: http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5667849>; Parliament of Canada, *An Act to amend the Immigration and Refugee Protection Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act*, First Session, Forty-first Parliament, 60-61 Elizabeth II, 28 June 2012, s.109.1, online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5697417>.

(1)).[523] This improvement is the government's effective response to criticism expressed by human rights NGOs and experts. For example, the Ontario Council of Agencies Serving Immigrants has reiterated that even in countries that are seemingly safe and democratic, certain groups such as women or LGBTQ individuals face systematic persecution that remains undocumented and beyond the reach of human rights organizations or the general society.[524] In some cases, individuals' lives or freedom are threatened or they endure violence or persecution, not only from the authorities but also from people in their personal life or community.[525] Moreover, as UNHCR affirmed, it is irrational to consider part of a country to be safe if the authority governing that country is not able to establish and maintain public safety in the entire territory for all inhabitants.[526]

In sum, although the provisions proposed by Bill C-11 made it possible to designate a third country as a DCO with a regional or population exception, as the EU had legislated in the 2005 version of the APD, the government, fortunately, took into account serious concerns expressed by experts in refugee and human rights law and removed the exception established under the previous s.109.1 (1), as did the Council and European Parliament when they recast the APD provisions and passed the RAPD.

Regarding the designation of DCOs a "two-step process"[527] has been put in place. In effect, under the new section 109, there are two different scenarios in which the Immigration and Citizenship Minister (hereafter the Minister) can designate a country as a DCO based on

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[523] *Immigration and Refugee Protection Act*, prec., note 54, s.109.1 (1), Government of Canada, Citizenship and Immigration Canada, *Summary of Changes to Canada's Refugee System in the Protecting Canada's immigration System Act*, 2012, online: <http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-02-16f.asp>.

[524] Ontario Council of Agencies Serving Immigration, "Brief to Standing Committee on Citizenship and Immigration, Re: Bill C-31, "Protecting Canada's Immigration System Act", 22 April 2012, p.3, online: <http://www.ocasi.org/downloads/Bill_C-31_OCASI_Brief_to_CIMM.pdf>.

[525] *Id*.; Amnesty International Canada, "Unbalanced Reforms: Recommendations with respect to Bill C-31", 7 May 2012, p.16, online: <https://www.amnesty.ca/sites/amnesty/files/2012-05-31unbalancedreforms.pdf>.

[526] The United Nations High Commissioner for Refugees, "UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status", (Council Document 14203/04, Asile 64, of 9 November 2004), prec., note190, p.40-41.

[527] Government of Canada, Citizenship and Immigration Canada, *Backgrounder-Designated Countries of Origin*, prec., note 519.

quantitative or qualitative criteria.[528] These two groups of conditions are enacted hierarchically so that to identify the country as a DCO, the Minister should implement the quantitative measure. If it is not applicable, the Minister may then consider the qualitative standards. This process will be clarified below.

Quantitative criteria: according to s.109.1 (2) (a), the examination of a third country is primarily triggered if the number of refugee protection claims by the nationals of the country in question, with a final determination issued by the Refugee Protection Division (hereafter RPD), is equal to or higher than the threshold criteria determined by the order of the Minister. If the application numbers are met, the next decisive criteria that should be taken into account is the withdrawal, abandonment or rejection rate of refugee claims of the nationals of the country under inquiry.[529] At this point, two cases should be separated:

i. In the first instance, the Minister considers the total number of refugee applications submitted by the nationals of the third country in question which, during the time limit established by the Minister's order, have been finally rejected or determined by the RPD to be withdrawn or abandoned. If the result of the difference, indicated as a percentage, between this number and the total number of refugee claims made by the nationals of the third country in question that, during the same period, have been decided by the RPD, is equal to or greater than the percentage provided for by the Minister's order, the third country in question may be designated by the Minister as a DCO.[530]
ii. In the second phase, the Minister should reconsider only the total number of abandoned or withdrawn refugee claims from the nationals of the third country in question, as determined by the RPD. In this situation, if the number obtained by dividing the number mentioned above by the total number of refugee applications made by the nationals of the country in question, on which the RPD has made the final determination, is equal to or

[528] *Id*.; Parliament of Canada, *Bill C-31: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act*, prec., note 509, p.7.
[529] *Immigration and Refugee Protection Act*, prec., note 54, s.109.1 (2) (a).
[530] *Id*., s. 109.1(2) (a) (i).

greater than the percentage laid down by the order of the Minister, the third country may be determined as a DCO[531].

According to the *Order Establishing Quantitative Thresholds for the Designation of Countries of Origin* issued by the Minister on December 15, 2012, the thresholds for designating a country have been determined as follows:

1. The rate of refugee claims by the nationals of a country in question for which final decisions have been issued by the Refugee Protection Division that triggered the review of the country must be equal to or higher than 30 refugee requests "during any period of 12 consecutive months in the three years preceding the date of the designation."**[532]**
2. The rejection and/or withdrawal and abandonment rate resulting in designation of a country as a safe country of origin is 75 per cent or above.**[533]**
3. The rate of withdrawal and abandonment has been determined by the Ministerial order as 60 per cent or higher.**[534]**

As the first negative point, paragraph (i) and paragraph (ii) of section 109.1(2) (a) are phrased in such a way as to make them difficult and confusing to understand and interpret accurately. Also, as is apparent, these measures are legislated generally, while the details are to be determined by the order based on the authority granted expressly to the Minister to establish all conditions required for the procedure of designating SCOs. It is not clear based on which considerations these rates have been obtained and indicated in the Regulation. The most disturbing point is that the order of the Minister is free from Parliamentary survey.

Given the sensitive subject matter of DCO rules, the irreversible effects of an inaccurate designation on DCO asylum seekers' lives and freedoms (the protection of which is guaranteed

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[531] *Id*., s. 109.1 (2) (a) (ii).
[532] Government of Canada, Citizenship and Immigration Canada, *Order Establishing Quantitative Thresholds for the Designation of Countries of Origin*, Canada Gazette, 15 December 2012, online: <http://www.gazette.gc.ca/rp-pr/p1/2012/2012-12-15/html/notice-avis-eng.html>.
[533] *Id*.
[534] *Id*.

under section 7 of the *Canadian Charter of Rights and Freedoms*[535]) and the potential violation of the fundamental principle of non-refoulement, the best approach for identifying DCOs is the process by which the government's suggested DCO list is discussed and endorsed by the people's elected representatives in Parliament. We could be optimistic that Canada's international and constitutional refugee and human rights obligations will be taken into account and observed. However, under the unprecedented asylum policy established by the new legislation, the Minister is the only person empowered to determine the details and provide the DCO list, with no judicial accountability and without Parliamentary oversight.[536] The only means left to challenge and change the government's current position is public opinion and court rulings.

Upon review of the Federal Court of Canada's case law, many interpretations have requested that the government ensure that Canada's asylum legislation conforms with international refugee and human rights law. For instance, though the case of *Freitas v. Canada*[537] did not directly involve the issue of DCOs, Justice Gibson and others attempted to clarify the objectives of the *1951 Geneva Convention* in order to demonstrate the central purpose that the government should pursue when legislating Canadian immigration provisions. Referring to the interpretation provided by Justice Bastarache, who described the *1951 Geneva Convention* as "a manifestation of the international community's commitment to the assurance of basic human rights without discrimination" in *Pushpanathan v. Canada*,[538] Justice Gibson concluded, as reiterated in section 3(2) of the *Immigration and Refugee Protection Act*, that the government's most important objectives when establishing policy and enacting measures in immigration and refugee law should be "to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of

[535] *Canadian Charter of Rights and Freedoms*, prec., note 55, s.7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."; *Singh* v. *Canada (Minister of Employment and Immigration)* [1985] 1 S.C.R. 177.

[536] The Justice for Refugees and Immigrants Coalition (comprised of Amnesty International, the Canadian Association of Refugee Lawyers, the Canadian Civil Liberties Association, and the Canadian Council for Refugees), "Protecting Refugees from Bill C-31", March 2012, p.1, online: <http://ccrweb.ca/sites/ccrweb.ca/files/coalitionstatementc31.pdf>.

[537] *Freitas* c. *Canada (Minister of Citizenship and Immigration)* [1999] 2 F.C. 432, para.28.

[538] *Pushpanathan* c. *Canada (Minister of Citizenship and Immigration)* [1998] 1 S.C.R. 982, para.56.

resettlement" and to "grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution."[539] The Canadian government and Parliament are therefore not authorized to pass any measures in Canada's immigration and refugee law irrespective of Canada's international refugee and human rights obligations and its humanitarian tradition as reaffirmed and guaranteed under the *Canadian Charter of Rights and Freedoms*.

Qualitative standards: according to section 109.1(2) (b), "[I]n the case where the number of claims for refugee protection made in Canada by nationals of the country in question in respect of which the Refugee Protection Division has made a final determination is less than the number provided for by order of the Minister," the qualitative criteria can be considered in order to help the Minister decide whether to designate the country under review as a DCO or not. The quantitative standards are absolute and have the major role in determining the safety of a third country in the absence of quantitative criteria.

In this regard, the safety of the third country in question may be determined if the Minister is of the opinion that three conditions are met: "[T]here is an independent judicial system, basic democratic rights and freedoms are recognized and mechanisms for redress are available if those rights or freedoms are infringed, and civil society organizations exist."[540] All three criteria are necessary in order to assess a country as safe, but they alone are not enough and suffer from certain fundamental shortcomings that undermine the accuracy, neutrality and equity of the whole process of DCO designation.

Though demonstrating the government's intention to discover the real human rights practice of the third country, these requirements are written in general and vague terms that in practice prevent the Minister from reaching a correct, reliable and convincing conclusion about the general safety of third countries. More precise and detailed criteria would be helpful for both DCO asylum seekers and the RPD, enabling DCO asylum seekers to know the specific grounds

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[539] *Id*., para.57; *Freitas* c. *Canada (Minister of Citizenship and Immigration)* [1999] 2 F.C. 432, prec., note 537; *Immigration and Refugee Protection Act*, prec., note 54, s.3(2) (b) (c).
[540] *Immigration and Refugee Protection Act*, prec., note 54 , s.190.1 (2) (b).

upon which the general safety of their native country was determined, and consequently to provide more convincing evidence to substantiate their refugee claim. More specific standards also lead to more correct and reasonable final decisions, which ultimately prevent prolonging the determination procedure due to a judicial review by the Federal Court. However, these ambiguous criteria may not meet the expectations or respond to the concerns of refugee and human rights experts, since as Showler has indicated, "The devil will indeed be in details."[541]

Secondly, contrary to what was predicted in Bill C-11, in the new section 109.1 (2) (b), the Minister is not obliged to engage and consult with refugee and human rights experts or NGOs during the designation procedure. This shortcoming reduces the accuracy and transparency of the Minister's decision[542] while increasing the risk of politicizing the designation procedure.[543]

The third negative point is the lack of objective standards in the qualitative criteria against which the third country's human rights record can be weighed and evaluated.[544] It is not clear how the Minister should put in place reasonable measures to assess different degrees of human rights violations in a third country. In fact, it is irrational to consider that all types of human rights violations have the same level of negative effect on a human being or on his or her ability to enjoy life. How can the Minister compare the right to non-discriminatory access to education with the right to life, liberty and security? Alternatively, how does the Minister compare the right to be protected from torture with freedom of conscience and religion?[545] These unanswered questions about the DCO rule reject the possibility of designating a third country as a DCO. As

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[541] Peter SHOWLER, "Proposed Refugee Reforms may be a step towards a Faster, Fairer System", 30 March 2010, *The Maytree Foundation*, p.1, online:
<http://www.maytree.com/wp-content/uploads/2010/03/REFUGEE-FORUM-__Press-Release.pdf>.
[542] The United Nations High Commissioner for Refugees, "UNHCR Submission on Bill C-31 Protecting Canada's Immigration System Act", May 2012, p.11, online:
<http://www.unhcr.ca/wp-content/uploads/2014/10/RPT-2012-05-08-billc31-submission-e.pdf>.
[543] The Canadian Bar Association (National Immigration Law Section), "Bill C-31: Protecting Canada's Immigration System", prec., note 511, p.29.
[544] Amnesty International Canada, "Unbalanced Reforms: Recommendations with respect to Bill C-31", prec., note 525, p.17.
[545] *Id*.

Amnesty International Canada maintains, "[I]t is impossible to assign a quantifiable measurement to human rights violations."[546]

Section 109.1 (2) (b) does not require the Minister to take into consideration the country under review's openness to monitoring by national and international human rights organizations, as envisaged by EU asylum legislation,[547] which although not a definite measure, is a useful means of uncovering the third country's real practices.

The element with the most damaging effect on the accuracy and fairness of the RPD's final decisions on DCO applications is the absence of measures requiring the Minister to take into consideration the real practices of the third country in adhering to international refugee and human rights legal instruments; providing judicial redress when the fundamental human rights of its people have been violated; and the willingness and ability of law enforcement services, like the police force, to monitor the execution of judicial redress. In many cases involving judicial review of the RPD's negative decision on a DCO refugee application, the Federal Court has based its interpretation on this fundamental deficiency as the major factor in recognizing the RPD's final decision as erroneous and invalid. We will return to this matter later.

Ultimately, no mechanism, based on either quantitative or qualitative criteria, has been put in place for cases of sudden changes in human rights patterns in a DCO or the procedure for periodical review of third countries presumed safe.[548]

All these deficiencies point to the disturbing fact that the Canadian government, just like the EU, has been using a formal and inoperative approach for identifying DCOs,[549] since the criteria that is not mentioned and that is the most vital factor is the way the third country provides State protection for its citizens in practice. This legislation method is not in accordance with the

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[546] *Id*.

[547] The United Nations High Commissioner for Refugees, "UNHCR Submission on Bill C-31 Protecting Canada's Immigration System Act", prec., note 542, p.11; The United Nations High Commissioner for Refugees, "Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)", 31 May 2001, para.39, online: < http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3b36f2fca>.

[548] Amnesty International Canada, "Unbalanced Reforms: Recommendations with respect to Bill C-31", prec., note 525, The Canadian Bar Association (National Immigration Law Section), "Bill C-31: Protecting Canada's Immigration System", prec., note 511, p.5.

[549] *Id*., p.15.

factual questions relating to the human rights abuses in many countries,[550] which increases the likelihood of incorrect decisions on refugee applications. It also paves the way for countries to be able to reject asylum seekers at any cost, even in violation of the fundamental principles of procedural fairness and international refugee and human rights law, including the principle of non-refoulement, the right to life and freedom and the right to be protected from torture, inhuman or degrading treatment.

Nevertheless, the first DCO list, based on the quantitative criteria, was unveiled by a ministerial order on December 15, 2012, and included Croatia, the Czech Republic, France, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Slovakia, Spain, the United Kingdom and the United States of America.**[551]** On the same day, the Minister issued the second DCO list based on the qualitative criteria, comprising Austria, Belgium, Cyprus, Denmark, Estonia, Finland, Greece, Ireland, Luxembourg, Malta, Netherlands, Slovenia and Sweden.**[552]**

As expected, the designation of certain Central and Eastern European countries, in particular, Hungary, the Czech Republic and Slovenia, has provoked widespread criticism. The first question regarding this dubious designation was according to which considerations has Hungary been identified as a DCO alongside Germany and the United States? In other words, is it logical to designate a country like Hungary as a DCO, given its poor track record in protecting the fundamental human rights of ethnic or religious minorities as reported by international human rights organizations in several cases, and which had the highest rate of refugee application in Canada in 2011?[553] It is absurd that the federal government has identified certain countries such as Croatia or Estonia as DCOs, while other States that are apparently more democratic and have

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[550] *Id*.
[551] Government of Canada, Citizenship and Immigration Canada, *Order Establishing Quantitative Thresholds for the Designation of Countries of Origin*, prec., note 532.
[552] *Id*.
[553] Government of Canada, Citizenship and Immigration Canada, *Speaking notes for The Honourable Jason Kenney, P.C., M.P., Minister of Citizenship, Immigration and Multiculturalism*, 14 December 2012, Ottawa, online: <http://www.cic.gc.ca/english/department/media/speeches/2012/2012-12-14.asp>.

much better human rights records are not incorporated in the list, such as Switzerland, New Zealand, Australia and Norway.[554]

To justify this questionable designation, the Minister of Immigration and Citizenship argued that in 2011, more asylum applications were submitted in Canada by EU nationals, mostly from Hungarian citizens, than were received from Asia and Africa.[555] The Minister explained more specifically that since 2008, when Hungarians were granted a visa exemption for entering Canada, some 6,000 refugee applications from Hungarian citizens were finalized in Canada, 62% of which were abandoned or withdrawn by the applicants while about 33% were rejected by the RPD;[556] therefore, during this period, 98% of asylum applications received by the Canada were from Hungary. Referring to Hungarian citizens' unrestricted mobility within the 27 EU Member States and their free access to many countries around the world, Kenney arrived at the conclusion that almost all the refugee applications lodged by Hungarian citizens were unfounded,[557] that Hungarian citizens do not need international protection and that they instead come to Canada to "benefit from the generosity of Canada's social welfare system."[558]

This reasoning is not acceptable in light of the harsh living conditions ethnic minority groups, in particular the Roma, experience in the EU. First of all, though Hungarian citizens, like other EU citizens, have free access to other EU Member States' territory, they cannot request international protection as provided for in major international refugee and human rights instruments such as the *1951 Geneva Convention*, since given the general safety of all EU Member States recognized by the single provision of the *Protocol on asylum for nationals of Member States of the EU (Aznar Protocol)*, refugee requests from any EU Member State citizen will be rejected in another

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[554] Stephanie LEVITZ, "EU countries dominate new list is affecting refugee claims in Canada", The Canadian Press, 14 December 2012, online: <http://globalnews.ca/news/319531/eu-countries-dominate-new-list-affecting-refugee-claims-in-canada-3/>.
[555] Government of Canada, Citizenship and Immigration Canada, *Speaking notes for The Honourable Jason Kenney, P.C., M.P., Minister of Citizenship, Immigration and Multiculturalism*, prec., note 553.
[556] *Id*.
[557] *Id*.
[558] *Id*.

Member State's territory except under specific conditions.[559] In the second place, the Minister's argument that Hungarian citizens have free access to the territory of 27 EU Member States is unfounded, since while all EU citizens have unlimited mobility rights within the borderless EU, they can only stay in another EU Member State if they find a job within three months of their entry. Otherwise, they will be deported to their national country. Although according to the Minister's statistic, Hungary satisfied the quantitative criteria of a 75 per cent rate of rejection, abandonment or withdrawal required to be a candidate for the DCO list, basic questions remain unanswered or ignored by the federal government, which make the presumption of safety in that country dubious.

At first glance, it is confusing that most of the refugee applications lodged in Canada are from the EU, despite its remarkable development in asylum legislation and protection of refugee and human rights. Although the Minister clarified that most of these refugee claimants were coming from Central and Eastern European countries, he failed to mention that most of these countries are suffering from social, economic and political deficiencies even decades after their transformation from Communist regimes to democratic governments.

Given the systematic ethnic and religious discrimination and persecution that has been carried out against Roma or Jewish communities (in some cases with the participation of the police force or quasi-military racist or extremist groups, especially in Hungary and the Czech Republic) and that has been documented and reported on several occasions by international human rights organizations, widespread anti-Roma sentiment, hateful feelings and discrimination throughout the EU against the Roma,[560] is it rational to contend that almost all Roma asylum seekers are

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[559] *Protocol on asylum for nationals of Member States of the EU (Aznar Protocol)*, Protocol annexed to the Treaty establishing the European Community, OJ C 115, 9.5.2008, prec., note 170, art.1.

[560] For more information in this regard, refer to: Lyndall SACHS, "(Europe: The debate over asylum) – Roma: Five centuries of discrimination...and still counting", *Refugees Magazine*, Issue 113, 1 January 1999, online: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3b811c144&query=Roma,%20Europe>;
Amnesty International, European Institutions Office, "Discrimination against Roma", online: <http://www.amnesty.eu/en/news/press-releases/eu/discrimination/roma/#.VqefDvkrLIU>;
European Commission, "EU and Roma", online: < http://ec.europa.eu/justice/discrimination/roma/index_en.htm>;
European Commission, *Communication from the Commission to the European Parliament, the Council, the*

unfounded refugee claimants who could have been safely and successfully resettled in the EU? It can be assumed that some of the refugee applications made by Roma in Canada are unfounded, but the high rate of requests, the discrimination against them in their national country and hateful sentiment against them across Europe create a situation of unsafety and a real need for protection, rather than one of safety and unfounded refugee claims. Even Jason Kenney, during his trip to Hungary in 2012 before presenting the DCO list, expressed deep concerns about the rise of xenophobic extremism and neo-Nazi political parties, who he described as "crazy" and "hateful xenophobic nutbars" in terms of their actions against Roma and Jewish communities.[561]

The fact is that although European countries have to provide a certain level of human rights protection as one of the main requirements for acceptance as an EU Member State, it is evident that the administrative and judicial systems, human rights observation levels and accessibility to and effectivity of fundamental justice offered by new EU Member States such as Hungary or the Czech Republic are quite different from the Western EU Member States. These recently joined EU Member States have a long way to go before reaching the same level as Western EU countries in respecting the main international and regional human rights and refugee legal standards.

Nevertheless, the life and death of genuine refugees are in the hands of the Minister of Immigration and Citizenship, who can designate countries like Hungary or the Czech Republic as DCOs without any obligation to consult an independent panel of experts, contrary to what was required in Bill C-11, and in spite of alarming indications of the miserable living conditions and the human rights violations their citizens, in particular the Roma, endure and which have been affirmed by the Federal Court in several cases. It is hoped that the Federal Court's case law can compensate for the procedural fairness and fundamental rights that have been denied DCO

European Economic and Social Committee and the Committee of the Regions an EU framework for National Roma Integration Strategies up to 2020, COM (2011) 173 final, 5 Avril 2011, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011DC0173&from=en>;
Rick WESTHEAD, "Why the Roma are fleeing Hungary and why Canada is shunning them?", 13 October 2012, *thestar*, online: <http://www.thestar.com/news/world/2012/10/13/why_the_roma_are_fleeing_hungary_and_why_canada_is_shunning_them.html>.

[561] Stephanie LEVITZ, prec., note 554.

refugee claimants by finding the errors in the RPD's final decisions, providing more effective tools for RPD Board Members to affirm or reject the general safety presumed for DCOs and calling for the government to reconsider the idea of general safety by removing certain countries, especially Hungary, from the DCO list.

The Federal Court's focus, in most cases, has been on considering the inherent deficiencies of the provisions on DCO designation reflected in the RPD's final decisions, in particular the lack of a fact-finding mechanism regarding the real practices of DCOs in providing adequate, effective and accessible State protection for its citizens, which the Federal Court has considered the most decisive requirement.

For instance, in *Hercegi v. Canada (Minister of Citizenship and Immigration)*,[562] one of the first judicial reviews submitted to the Federal Court after Hungary was designated as a DCO, the applicants, two Hungarian Roma families seeking refugee protection in Canada, requested that the Federal Court set aside the negative decision made by an RPD board member and rule for a re-determination to be carried out by the RPD.[563] Based on the transcript of the hearing to examine the refugee applicants' evidence, the Court found the board member's insistence on further documentation to back up the Hungarians' claims of not being provided State protection unreasonable. In effect, the Federal Court was of the view that although Hungary had been recognized as a DCO, in the particular case of these applicants, it was up to the board member to answer the major question of whether the applicants had been receiving State protection in their national country or not.[564]

Referring to the reasons the board member offered to support the existence and accessibility of State protection in Hungary, Justice Hughes correctly concluded that the board member had not properly addressed the State protection issue, since "[i]t is not enough to say that steps are being taken that someday may result in adequate State protection. It is what State protection is *actually provided* at the *present time* that is relevant."[565] As Justice Hughes stipulated in another case,

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[562] *Hercegi* c. *Canada (Minister of Citizenship and Immigration)* [2012] F.C.J. No.273.
[563] *Id*., para.1.
[564] *Id*., para.3 and 7.
[565] *Id*., para.5.

Lopez v. Canada (Minister of Citizenship and Immigration), it is an error of law if the determining authority focuses solely on serious efforts made, measures passed or statements expressed by the country of origin when investigating the State protection provided by the third country's government. Rather, the board member must determine "the actual effectiveness of the protection."[566]

In order to establish the efficiency and accessibility of State protection, and therefore the safety of the home country, the determining authority must base its findings on what the third country's government is actually doing and the results gained in practice, not the government's endeavours or intentions.[567] The Court concluded that the board member had been confused when examining the documents presented by the applicants, that the determining authority's approach to dealing with the question of State protection was "unsatisfactory"[568] and that the evidence provided by the applicants overwhelmingly proved that Hungary was unable to offer adequate State protection to its Roma citizens. Thus, the Court returned the two families' applications to be determined by a new board member separately.

Although the Federal Court's interpretations may serve as guidelines for RPD board members when implementing the Minister's DCO list and establishing the general safety of a third country in a specific refugee claim case, the Court failed to reiterate the harmful effect the presumed safety of DCOs has on the fairness and accuracy of the overall determination procedure. In fact, this case clearly reflects the predominance of third countries designated as DCOs, which imposes a higher burden of proof on DCO refugee claimants to rebut the presumed safety of their national country and prevents the determining authority from correctly considering the legal and factual issues of DCO refugee applications. The vague criteria for identifying DCOs, as was apparent in this case, do not require the RPD to take into account the real practices of DCO governments in protecting their citizens' fundamental human rights and providing adequate State protection.

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[566] *Lopez* c. *Canada (Minister of Citizenship and Immigration)* [2010] F.C.J. No. 1589, para.8; *Hercegi* c. *Canada (Minister of Citizenship and Immigration)*, prec., note 562, para.5.
[567] *A.T.V.* v. *Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 1540, para.14; *Lopez* c. *Canada (Minister of Citizenship and Immigration)*, prec., note 566, para.8; *Hercegi* c. *Canada (Minister of Citizenship and Immigration)*, prec., note 562, para.5.
[568] *Hercegi* c. *Canada (Minister of Citizenship and Immigration)*, *Id*., para.4.

In one of its recent cases, *Varga v. Canada (Minister of Citizenship and Immigration)*,[569] the Federal Court explained in great detail the fundamental elements that constitute "adequate State protection." In this case the applicants, a Hungarian family, submitted a judicial review to the Federal Court challenging the RPD's decision to deny them the refugee protection they had requested in Canada. The RPD board member had rejected the applicants' refugee claim for two reasons: "[T]he Applicants did not provide "clear and convincing evidence that, on a balance of probabilities, state protection in Hungary is inadequate," and because the applicants "did not take all the reasonable steps, under the circumstances, to seek state protection in Hungary prior to seeking international protection in Canada."[570]

At the outset, the Court stated that although it is up to the applicants to rebut the existence of State protection in Hungary as defined by the Canadian government, the board member should take an active role in fact-finding regarding the presumption of safety and whether the State protection provided by the DCO's government for its citizens is adequate.[571] According to the Court, in order to establish the presumption of safety with regard to the particular refugee applicants, the determining authority should investigate the adequacy and accessibility of State protection in the DCO by considering and assessing the evidence submitted by the applicant and other reliable and relevant sources.

Regarding the RPD's role in ascertaining the level of State protection in the third country, two issues should be taken into consideration, according to the Court. The first consideration involves the official form of the country in question, including the "nature of the state" and its organizations. The Court admitted that in this case, proving the first issue does not provoke considerable disagreement based on the fact that Hungary is a democratic country that controls its territory effectively and has functioning security and police institutions that ensure the

[569] *Varga* c. *Canada (Minister of Citizenship and Immigration)* [2014] F.C.J. No. 1092.
[570] *Id*., para.1.
[571] *Id*.

observance and supremacy of its laws and constitution.[572] In this regard, the presumption of safety for Hungary is proven and established.

The second consideration should be made based on the content and quality of the protection provided by the government of the country in question. The Court expressed that, as established by the Federal Court's case law, the most important condition required for State protection is that it be "adequate."[573] Contrary to the first element, proving the second element leads to many difficulties. In order to reach a convincing and reasonable conclusion, the Court clarified that the RPD must perform a "two-step analysis."[574] This analysis includes the "factual standards" for measuring and comparing the State protection offered by the DCO's government and the DCO's real practices in guaranteeing State protection, which are gained by comparing the factual standards and the evidence the applicant has provided or that the RPD discovered. If the result of the comparison demonstrates that the factual standards have been met, then the RPD may firmly conclude that the DCO grants adequate State protection to its citizens.[575]

Concerning the factual standards of adequate State protection based on the Federal Court's case law, certain conditions should be implemented in order to demonstrate the required quality of adequate protection offered by the government. For example, "actual police surveillance, visible presence, and immediate response to investigate and take action against the commission of crime and when crime occurs [which] can be considered to be adequate State protection at the operational level."[576] The Court added that although it is generally accepted that under certain circumstances, even a well-trained, professional police force cannot react in time to prevent the commission or recurrence of a crime, it must be established that they have made their "best efforts" in the sense that "the force's ability and expertise is developed well enough to make a

[572] *Id*., para.3.
[573] *Id*., para.4.
[574] *Id*., para.5.
[575] *Id*.
[576] *Id*., para.6.

credible, earnest attempt to do so, from both the perspective of the victim, and the concerned community."[577]

In this case, the Federal Court issued one of the most brilliant interpretations of adequate State protection by taking into account both sides of the issue. Not only should the country's police force and judicial body be well trained, educated and motivated enough to ensure the prevalence of State protection in society, but the victims of crime and society as a whole should also be satisfied with the efficiency and effectivity of the police force's or law enforcement department's operations and the judicial body's proceedings.

The Court correctly refused the evidence the RPD used to prove adequate State protection by considering it to be a "reviewable error of fact," since all the reports the RPD referred to in order to demonstrate the existence of adequate State protection in Hungary were in fact indications of efforts made or measures taken by the Hungarian government to provide State protection, the results of which did not lead to the quality required for State protection to be adequate and effective as established in the Court's jurisprudence in the previous case.[578]

The Court considered the evidence provided by the applicants' counsel, which rejected reports claiming that the Hungarian government had made serious efforts to combat and prevent the commitment and recurrence of racist crimes against the Roma minority group. The Court affirmed these documents, stipulating that the evidence upon which the RPD had relied to prove the existence of adequate State protection in Hungary was not convincing, since all the Hungarian government's efforts and reforms to improve the functionality of its law enforcement agencies and eliminate corruption among police officers had not had a meaningful effect in protecting the Roma against the racial abuses or discriminatory treatment they experienced at the hands of the police force or extremist groups. According to the Court, the Hungarian government had failed to offer adequate and effective state protection to the Roma, reiterating that "unsuccessful 'best efforts' to reach a standard of operational state protection is not state

[577] *Id*.
[578] *Id*.

protection, let alone 'adequate' state protection."[579] Thus, the Court concluded that since the RPD had relied on inaccurate and irrelevant documents, its conclusion that the Hungarian government had provided adequate state protection for the Roma was "erroneous."[580]

Ultimately, given the systematic, racially motivated crimes committed by extremist groups and the discriminatory persecution carried out by the police force against Roma individuals in Hungary, as well as the Hungarian government's inability and unwillingness to protect Roma effectively from the deep and widespread violation of their fundamental rights, the Federal Court was of the opinion that the RPD had failed in fact-finding about the existence and accessibility of adequate State protection for Roma people in Hungary, rendering the RPD's decision unreasonable. Accordingly, the Court ruled that the refugee application should be reassessed by a new RPD board member.

This decision is one of the best indications of the positive role the Federal Court has played in the refugee determination process after the implementation of DCO legislation and regulations. In many cases, the Federal Court serves as the last resort for DCO asylum seekers who have been denied refugee protection based on the general presumed safety of their national country, irrespective of their particular situation and the factual or legal conditions of their refugee claim. Fortunately, Justice Campbell reaffirmed his new method in *Hornak v. Canada (Minister of Citizenship and Immigration)*[581]concerning Roma refugee applicants fleeing the Czech Republic whose refugee protection claim was rejected by the RPD. In this recent case, Justice Campbell repeated his reasoning that although extraordinary serious efforts have been made by the Czech government to grant systematic protection to Roma people, these efforts may not be recognized as adequate State protection, given their ineffective and inconclusive results. According to the Court, the RPD made a fundamental fact-finding error regarding the existence of adequate State protection in the Czech Republic for Roma people, since "no attempt is made to define the content of State protection against which the evidence of in-country conditions, including the

[579] *Id*., para.8.
[580] *Id*.
[581] *Hornak* c. *Canada (Minister of Citizenship and Immigration)* [2015] F.C.J. No.521.

evidence of the Applicants' experiences, can be applied and compared to conclude whether State Protection, in fact, exists."[582]

With regard to the decisive role of the Federal Court's interpretation in assessing the RPD's incorrect decisions on DCO refugee applications, Raoul Boulakia, a member of the Refugee Lawyers Association of Ontario, has stated that the Federal Court's rulings reveal the "basic flaw" in the recent asylum legislation, in particular, the Minister's designation of DCOs. In effect, the Federal Court's findings on the absence of adequate and effective State protection in DCOs demonstrate the unreasonableness of the current circumstances under which the Minister is granted the full authority to designate certain countries as DCOs even though there is objective and convincing evidence proving that these designations are not based on the real situation in some countries presumed safe.[583]

2.2: The right to a personal hearing: a flawed guarantee

Under the provisions of the *Immigration and Refugee Protection Act* (hereafter IRPA), refugee claims have been divided into two different categories: refugee protection claims made inside Canada and refugee protection claims submitted outside Canada.[584] Since the concept of DCO applies to inland refugee applications in the IRPA, this section will concentrate on the first group.

According to section 99(3) of the IRPA, refugee applications made inside Canada are further divided into two groups: refugee claims presented inside Canada at the port of entry and claims made inside Canada other than at the port of entry. One of the most notable differences between these two groups is the varied time limits for refugee claimants to provide their Basis of Claim form (hereafter BOC form), a document in which the asylum seeker gives necessary detailed

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[582] *Id*., para.15.
[583] Cristin SCHMITZ, "Federal Court reopens door to Roma refugees", (2014) 34(27) *The Lawyers Weekly 1*, p.2.
[584] *Immigration and Refugee Protection Act*, prec., note 54, s.99(1).

information about himself or herself, including identity, family, travel history and all other documents based on which he or she seeks refugee protection in Canada.[585]

Under section 99(3) and 99 (3) (1) of the IRPA, subject to section 159.8 (1) of the *Immigration and Refugee Protection Regulation* (hereafter IRPR),[586] if the refugee application is submitted inside Canada but not at the port of entry, the refugee applicant is required to provide the BOC form to the Canada Border Services Agency officer or to Citizenship and Immigration Canada "not later than the day on which the officer determines the eligibility of their claim," or as indicated by the government, "during the eligibility interview."[587] In other words, refugee claimants are obliged to present the BOC form the same day they submit the refugee application. However, refugee claimants who make their application inside Canada at the port of entry can present their BOC form to the RPD within 15 days of the referral of their application to that division.[588]

Irrespective of whether the refugee claim is made inside Canada, either at the port of entry or not, before the RPD proceeds to a decision on the refugee application, an Immigration and Refugee Board of Canada (IRB) officer assesses the application to determine if it is eligible to be referred to the RPD. During this phase, while it is incumbent upon applicants to prove their merit by presenting reliable documents, completely filling out the BOC form and truthfully answering the officer's questions during the eligibility interview,[589] the officer determines, within three working days, if the refugee claim can be sent to the RPD or if it has to be rejected.[590]

The problem under section 100(1) on the procedure for determining the eligibility of the refugee claim is its tightened time scale. Given the multifaceted considerations officers must take into

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[585] Immigration and Refugee Board of Canada, *Claimant's Guide*, modified on 21 January 2016, online: <http://www.irb-cisr.gc.ca/Eng/RefClaDem/Pages/ClaDemGuide.aspx#_Toc340245791>.
[586] *Immigration and Refugee Protection Regulations*, (SOR/2002- 227).
[587] Government of Canada, Citizenship and Immigration Canada, *Changes at the Immigration and Refugee Board of Canada (IRB)*, 15 December 2012, online: <http://www.cic.gc.ca/english/refugees/reform-irb.asp>.
[588] *Immigration and Refugee Protection Act*, prec., note 54, s.99(3) and (3) (1); *Immigration and Refugee Protection Regulations*, prec., note 586, s.159.8 (1) and (2).
[589] *Immigration and Refugee Protection Act*, prec., note 54, s.100 (1.1).
[590] *Id*., s.100(1) and (3).

account while evaluating the eligibility of refugee claims, including inadmissibility, security or serious criminality grounds and convictions for human rights violations,[591] as well as the burden on refugee applicants to gather all the necessary documents and fill out the BOC form in a language other than their native language on the same day they make the refugee protection claim, it is irrational to expect officers to be able to reach a sound and reasonable decision on the eligibility of the refugee claim within just three days.

The one-day time limit for providing the BOC form and other supporting evidence and the three-day processing time for determining the admissibility of refugee claims point to the fact that the government and Parliament have underestimated the significance of eligibility examinations in the whole determination procedure, or that they have not accepted the eligibility test as a major part of the decision-making process. As explained in Chapter 1 on EU asylum legislation, given the vital role of the preliminary interview or eligibility examination in the procedure to make decisions on refugee applications and to reject or refer refugee applicants to the RPD in Canada's asylum system, all these primary examinations must be carried out according to the same fundamental principles of procedural and human rights as are recognized for the ordinary determination procedure.

As a positive point, because of the vulnerable situation of refugee claimants at the port of entry, "for reasons of fairness and natural justice,"[592] the RPD is empowered to extend the 15-day time limit, permitting refugee claimants to gather the information required and submit the BOC form.[593] This provision is helpful for DCO refugee applicants, who are confronted with a heavier burden of proof from the first step of lodging their application because of the presumed safety of their national country, and who consequently need more time to provide convincing documents rejecting their national country's presumed general safety in their case.

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[591] *Id*., s.101(1) and (2).
[592] *Immigration and Refugee Protection Regulations*, prec., note 586, s.159.8(3).
[593] *Id*.

In the next step, if the officer considers the refugee application eligible to be referred to the RPD for the determination process, he or she shall assign a date for a hearing before the RPD.[594] The essential place of the hearing in the determination procedure and its vital role in respecting the fundamental principle of procedural fairness has been recognized and affirmed in Canadian asylum legislation, such that the right to a hearing has been guaranteed for all refugee applicants indiscriminately and equally, regardless of their country of origin or their travel route. However, as expressed in section 100 (4.1) of the IRPA, subject to section 159.9 of the IRPR, which is even more constrained than what was proposed in Bill C-11,[595] there is no single time frame for conducting the hearing under the reforms incorporated by Bill C-31, and different time frames for participation in the hearing process have been established based on the country of origin.[596] If refugee claimants have come from a DCO, they have to attend the hearing session either 30 days after their refegee application is referred to the RPD, if the claim is made inside Canada at the port of entry,[597] or 45 days if the refugee claim is made inside Canada other than at the port of entry.[598] All other refugee claimants are required to be present before the RPD 60 days after their application has been sent to the RPD, regardless of whether they have submitted their claim at the port of entry or other than at the port of entry.[599] DCO refugee applicants are subject to a shorter time frame to prepare for the hearing session compared to ordinary refugee applicants.

This provision is a clear indication of the government's desire to increase the efficiency of the determination procedure by accelerating the processing time for refugee applications that are assumed to be unfounded, before the RPD has made a thorough and rigorous determination. Consequently, preventing abuse of Canada's generosity in granting international protection by imposing more limits on asylum seekers' procedural rights, especially on DCO refugee applicants, was one of the government's main concerns in amending the former asylum legislation.

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[594] *Immigration and Refugee Protection Act*, prec., note 54, s.100(4.1).
[595] It should be noted that under Bill C-11, the time-frame of 90 days was proposed for regular refugee claimants while the DCO refugee applicants were granted 60 days to attend the hearing session.
[596] *Immigration and Refugee Protection Act*, prec., note 54, s.111.1 (2).
[597] *Immigration and Refugee Protection Regulations*, prec., note 586, s.159.9 (1) (a) (i).
[598] *Id*., s. 159.9 (1) (a) (ii).
[599] *Id*., s.159.9 (1) (b).

Although many human rights organizations have stated on several occasions that Canada's refugee determination system is too lengthy and time-consuming, undermining the efficiency of the system and impairing Canada's ability to meet its constitutional and international obligations,[600] the processing time for refugee claims should be established based on the time it takes to offer adequate protection to those who need it, not as a tool to deter refugee applications.[601] It is regrettable that the government and Parliament, in proposing and passing these changes, have forgotten that one of the main objectives of Canada's refugee determination system is to establish provisions that are "in the first instance about saving lives and offering protection to the displaced and persecuted."[602] However, it seems that the government's main purpose is to reject asylum seekers and return them to their countries of origin. The time restrictions adopted under Bill C-31 have compromised and sacrificed fairness for speed and spurious efficiency.[603]

Though in theory the right to a hearing has been recognized and ensured for all refugee applicants under the new provisions, in practice, the hearing is too constrictive for DCO refugee applicants, as it denies them an adequate opportunity to counsel legal sources, prepare necessary documents and present a complete file to the RPD. It is not an exaggeration to conclude that DCO refugee claimants are being deprived of the full and complete exercise of their fundamental procedural right to a hearing during the determination procedure.

It is difficult, or in some cases impossible, for asylum seekers to access all necessary resources, whether medical, psychological or legal and gather, in 30 or 45 days, all documents required to support their claim. In many instances, asylum seekers have left their home country in such a short time that they do not have the necessary evidence. Moreover, because of the social, financial and linguistic difficulties asylum seekers experience as they struggle in the new society,

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[600] Amnesty International Canada, "Unbalanced Reforms: Recommendations with respect to Bill C-31", prec., note 525, p.19.
[601] The United Nations High Commissioner for Refugees, "UNHCR Submission on Bill C-31 Protecting Canada's Immigration System Act", prec., note 542, p.2.
[602] *Immigration and Refugee Protection Act*, prec., note 54, s.3 (2) (a).
[603] The United Nations High Commissioner for Refugees, "UNHCR Submission on Bill C-31 Protecting Canada's Immigration System Act", prec., note 542, p.2.

they are often too disoriented to understand the administrative and legal complexities of lodging a refugee application. This situation is exacerbated in the case of asylum seekers fleeing their country because of their sexual orientation, since they have to provide all the medical or psychological reports required to prove their refugee claim. It is a time-consuming process to receive current, official and reliable documents from the country of origin and have them translated into English or French.[604]

Second of all, a report by the CCR one year after implementation of Bill C-31 found that the unreasonable and unworkable time limits had caused so much stress and in some cases severe panic in refugee applicants that they were unable to participate positively and actively in the hearing procedure, which eventually leds the RPD to the conclusion that their refugee applications were unfounded.[605] This was the case for refugee applicants who have experienced serious trauma, such as sexual assault or torture.[606] Moreover, it is impossible for refugee claimants suffering from PTSD, such as women who have been the victims of sexual assault or violence or LGBT individuals, with different cultural, social or religious values, to be prepared to attend a hearing and trust the determining authority enough to explain their terrible experiences in such a restricted period, considering the long years of shame and fear they have experienced in their national country and during their journey to the receiving country.[607]

This tightened schedule for preparing DCO refugee claimants' cases increases the risk of presenting a weak claim and subsequently that the case will fail during the determination procedure, which in turn could result in a poor reputation for legal professionals in this field over time. As the CCR has reiterated, NGOs are concerned about lawyers' high rejection rates of

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[604] Canadian Council for Refugees, "Keeping the door open: NGOs and new refugee claim process", prec., note 516, p.3; Amnesty International Canada, "Unbalanced Reforms: Recommendations with respect to Bill C-31", prec., note 525, p.22.
[605] Canadian Council for Refugees, "New refugee system – one year on", 9 December 2013, p.2, online: <http://ccrweb.ca/sites/ccrweb.ca/files/refugee-system-one-year-on.pdf>.
[606] *Id*.
[607] Amnesty International Canada, "Unbalanced Reforms: Recommendations with respect to Bill C-31", prec., note 525, p.21-22; Canadian Council for Refugees, "Keeping the door open: NGOs and new refugee claim process", prec., note 516, p.6.

DCO refugee cases.[608] These unreasonable time limits therefore indirectly violate the refugee claimants' right to counsel as affirmed in the *Immigration and Refugee Protection Act* and in practice make it void.[609]

More reasonable and flexible time scales in the IRPA regarding certain exceptional circumstances under which refugee claimants would be offered more chances, in particular regarding their medical or psychological conditions, to appear at the hearing session would comply with the principle of procedural fairness. Furthermore, flexibility in scheduling the hearing date would give the determining authority adequate time to provide supplementary evidence, research the actual human rights practices of the third country in question and assess the liability for the events the asylum seeker claims.[610] Accelerating the determination procedure without taking into consideration the financial, psychological, cultural, legal and administrative constraints that refugee applicants face leads to a hearing with an unprepared refugee applicant based on insufficient documents. Consequently, a hearing held without proper evidence undermines the accuracy, fairness and efficiency of the hearing. Recurring delays in finalizing the determination process and incorrect decisions based on poor documentation are the inevitable results. This unfair procedure and weak decisions will cause more requests for judicial review before the Federal Court and counter the government's goal of rushing the refugee procedure and reducing the difficulties of removing rejected refugee claimants. The irrational time limits imposed on DCO refugee applicants prevent Canada from fulfilling its constitutional and international human rights obligations.

Taking into account the unreliable and unworkable criteria for identifying DCOs explained in the previous section, incorrect decisions on DCO refugee applications and consequent refouling of refused DCO asylum seekers to a country where their life, freedom or physical integrity is threatened is contrary to the explicit signification of Article 33(1) of the *1951 Geneva*

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[608] Canadian Council for Refugees, "Keeping the door open: NGOs and new refugee claim process", prec., note 516, p.7-9.

[609] *Immigration and Refugee Protection Act*, prec., note 54, s.167(1).

[610] Canadian Council for Refugees, "Bill C-31- Diminishing Refugee Protection, A Submission to The House of Commons' Standing Committee on Citizenship and Immigration", April 2012, p.9, online: <http://ccrweb.ca/files/ccrbriefc31.pdf>.

Convention[611] and Article 3 of the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,[612] though it occurs unfortunately all too often. In this situation, imposing additional restrictions on fundamental procedural rights such as the right to a personal hearing is not only in stark contrast with the principle of non-refoulement, but also contradicts the fundamental right to life, liberty and security stipulated by the revolutionary decision in *Singh v. Canada (Minister of Employment and Immigration)* guaranteed for "every person physically present in Canada"[613] by section 7 of the *Canadian Charter of Rights and Freedoms*.[614]

In *Singh v. Canada*, the Supreme Court of Canada answered the question of whether the procedure for determining and reviewing the decision on the appellants' refugee claims, as set out under the current *Immigration Act* of 1976, denied the rights they are afforded under the principles of fundamental justice guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*. As Dickson, Lamer and Wilson explained in this case, though Canada has explicitly acknowledged its commitment to observing the principle of non-refoulement for protected persons and refugees under the Convention,[615] and taking into consideration the potential life-threatening consequences of denying refugee status to asylum seekers with a well-founded fear of persecution, the principles of fundamental justice dictate that refugee claimants are entitled to assert their right to life, freedom and personal security as ensured in section 7 of the *Canadian Charter of Rights and Freedoms* during the procedure established for determining their refugee claims.[616] Thus, Dickson, Lamer and Wilson concluded that the principles of fundamental justice require that the refugee claimant concerned be granted "adequate opportunity to state his case."[617] The time frames of 30 or 45 days for DCO refugee applicants to be present in a hearing session lack the basic quality of adequacy and accordingly,

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[611] *The 1951 United Nations Convention Relating to the Status of Refugees*, prec., note 1, art.33(1).
[612] The United Nations General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, prec., note 41, art.3.
[613] *Singh* v. *Canada (Minister of Employment and Immigration)*, prec., note 535, p.3 and para.35.
[614] *Canadian Charter of Rights and Freedoms*, prec., note 55, s.7.
[615] *Immigration and Refugee Protection Act*, prec., note 54, s.115(1).
[616] *Singh* v. *Canada (Minister of Employment and Immigration)*, prec., note 535, p.3.
[617] *Id*.

the Supreme Court should proclaim the provisions, including these time limits, unconstitutional and in violation of section 7 of the *Canadian Charter of Rights and Freedoms*.

Differentiating among refugee applicants based on their national county directly violates the principle of non-discriminatory treatment of asylum seekers as established under Article 3 of the *1951 Geneva Convention*[618] and enshrined in section 15(1) of the *Canadian Charter of Rights and Freedoms* as "the right to the equal protection and equal benefit of the law without discrimination."[619]

On several occasions, the government has put forward convincing reasons for these rules, such as preventing misuse of Canada's liberal asylum system by bogus asylum seekers and responding quickly to people who truly need international protection, in order to rationalize and legalize the recent reforms introduced by Bill C-11 and Bill C-31. However, ameliorating the current asylum legislation should not deprive a certain group of asylum seekers of their fundamental human and refugee rights as ensured in the major international legal instruments and the Constitutional Act of Canada. Accordingly, as reiterated in section 15(2) of the *Canadian Charter of Rights and Freedoms*,[620] the government and Parliament are entitled to reform the provisions in force with the goal of providing more favourable conditions for disadvantaged individuals or groups, but based on the principles of fundamental justice, this permission should not be construed as a pretext for unreasonably limiting the basic human rights of certain individuals or denying them altogether, especially asylum seekers, one of the most vulnerable and deprived groups in society. Such deprivation cannot be "justified in a free

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[618] *The 1951 United Nations Convention Relating to the Status of Refugees*, prec., note 1, art.3.

[619] *Canadian Charter of Rights and Freedoms*, prec., note 55, s.15.(1): "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[620] *Id.*, s.15.(2): "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

and democratic society," as specified in section 1 of the *Canadian Charter of Rights and Freedoms*.[621]

That is why according to CCR, of the changes incorporated into the new asylum system, the DCO rule and the tightened time frames have had the most severe impact on the fairness of Canada's asylum system, particularly for DCO refugee applicants.[622]

In the next section, which is the last section of our discussion, we will assess if the fundamental right to an effective remedy has been unconditionally ensured for all refugee applicants in Canada's asylum legislation, with particular attention to the intervention of the Supreme Court of Canada in increasing the compliance of the provisions in force with the fundamental principles of international refugee and human rights law and the *Canadian Charter of Rights and Freedoms*.

2.3: Right to appeal (right to an effective remedy)

The Refugee Appeal Division (hereafter RAD) is one the most advantageous measures of Canada's asylum legislation. It was enacted in the *Immigration and Refugee Protection Act* of 2001 but did not come into force until 10 years later, in December 2012. The RAD is a new section of the Immigration and Refugee Board, where rejected refugee claimants or the Minister of Citizenship and Immigration are able to appeal final decisions rendered by the RPD. According to section 110 (1) of the IRPA and the amendments imposed by Bill C-31,

> [A] person or the Minister may appeal, in accordance with the rules of the Board, on a question of law, of fact or of mixed law and fact, to the Refugee Appeal Division against a decision of the Refugee Protection Division to allow or reject the person's claim for refugee protection.[623]

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[621] *Id*., s.1: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."
[622] Canadian Council for Refugees, "Keeping the door open: NGOs and new refugee claim process", prec., note 516, p.5; The Canadian Bar Association (National Immigration Law Section), "Bill C-31: Protecting Canada's Immigration System", prec., note 511, p.3.
[623] *Immigration and Refugee Protection Act*, prec., note 54, s. 110 (1).

The most considerable argument that justifies the necessity of providing all refugee applicants with the real right to appeal before the RAD is the massive discrepancy between the acceptance rates of first instance decision-making officials. Due to the changes implemented by Bill C-11 to the Immigration and Refuge Board, first-level decision-makers are civil servants rather than political appointees, but according to analysis of the results of first level decisions on refugee cases, most of the time the results can be predicted based on which adjudicator reviews the refugee application in question, as certain decision-makers are known to have lower or higher acceptance rates than others.[624]

Although the Immigration and Refugee Board insists on the quality and consistency of first instance decisions, the wide variation in the results of first instance adjudicators leads us to two logical conclusions. First of all, that there is "a level of arbitrariness"[625] among first level decision-makers in determining refugee status and that, depending on factors such as gender, geographical location and ideology (either liberal or conservative), the final results of the determination procedure will inevitably differ. Secondly, there is an urgent need for an independent, accessible and effective appeal process for all refugee applicants.[626]

UNHCR described the importance of an appeal body to perfect the refugee claim determination procedure as "a fundamental feature of a credible refugee status determination system."[627] In practice, an appeal body is one of the most decisive ways to increase the accuracy and fairness of a host country's asylum system and provide more consistency among decision-making authorities.[628] Before the creation and implementation of the RAD, Canada' asylum system had

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[624] Adrian HUMPHREYS, "Refugee claim acceptance in Canada appears to be 'luck of the draw' despite reforms, analysis shows", *National Post*, April 15, 2014, online: <http://news.nationalpost.com/news/canada/refugee-claim-acceptance-in-canada-appears-to-be-luck-of-the-draw-despite-reforms-analysis-shows>.

[625] *Id*.

[626] *Id*.

[627] The United Nations High Commissioner for Refugees, Branch Office for Canada, "UNHCR Appeal – Canadian Council for Refugees", 7 January 2000, online: < http://ccrweb.ca/sites/ccrweb.ca/files/static-files/hcrappeal.htm>.

[628] *Id*.

been criticized for its inability to correct the errors that inevitably occurred during the determination procedure as its most considerable flaw.[629]

Taking into account the importance of the right to effective remedy as a last resort afforded to rejected asylum seekers, establishing an appeal body can be considered one of the most revolutionary developments and liberal trends in Canada's asylum legislation, with the goal of constructing an asylum system that is in accordance with the international refugee, human rights and constitutional legal obligations undertaken by the Canadian government and enshrined in the *Canadian Charter of Rights and Freedoms*, especially observance of the principles of fundamental justice.[630]

By instituting an independent, expert appeal body for reviewing the merit of refugee requests, Canada has joined the ranks of Western countries with the most humanitarian refugee systems, harmonized with the global expansion of human rights law, while still acknowledging the risk of incorrect decisions on refugee requests, as they are one of the most difficult and complicated quasi-judicial decisions.

While this fundamental right was affirmed for all failed refugee claimants in the *Balanced Refugee Reform Act* of 2010 and welcomed by human rights organizations like Amnesty International Canada as a "necessary element in any fair refugee determination system,"[631] these progressive measures have been omitted in the current legislation brought forward by Bill C-31. According to section 110(2) of the IRPA, seven cases have been provided for under which the RPD's decisions may not be opposed before the RAD, including "a decision of the Refugee Protection Division allowing or rejecting a claim for refugee protection made by a foreign

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[629] For more information in this regard: Canadian Council for Refugees, Refugee Appeal Division, online: <http://ccrweb.ca/sites/ccrweb.ca/files/static-files/RADpage/PAGE0004.HTM>; Canadian Council for Refugees, "Protecting Refugees: Where Canada's refugee system falls down", May 2007, online: <http://ccrweb.ca/files/flaws_0.pdf>; Sean REHAAG, "Judicial Review of Refugee Determinations: The Luck of the Draw", (2012) 38(1) *Queen's Law Journal* 1, p.4-5.

[630] *Canadian Charter of Rights and Freedoms*, prec., note 55, s.1.

[631] Amnesty International Canada, "Unbalanced Reforms: Recommendations with respect to Bill C-31", prec., note 525, p.3.

national who is a national of a country that was, on the day on which the decision was made, a country designated under subsection 109.1(1)."[632] Rejected DCO refugee claimants or the Minister are not entitled to appeal the RPD's final determination.

It is evident the Canadian legislator's approach regarding DCO refugee applicants has been more radical than what has been enacted by the European Council and European Parliament, despite the fact that while the SCO rule was implemented and adopted by EU Member States, the right to effective remedy is recognized for all asylum seekers, even the nationals of SCOs, in the Asylum Procedures Directive of 2005 and the Recast Asylum Procedures Directive of 2013.

Canada's negligent asylum policy has been condemned by refugee and human rights organizations. UNHCR warned that implementing the DCO principle should not "[serve] to block any access to a status determination procedure," or "[result] in serious inroads into procedural safeguards."[633] With regard to the inevitable erroneous decisions that occur during the determination procedure, which may be exacerbated in the case of DCO refugee claims because of unreasonable criteria and additional procedural restrictions during the accelerated hearing and decision-making process, guaranteeing full access to an independent appeal body is the minimum redress that the receiving country can provide to decrease the harmful effects of expeditious procedures, prevent refouling of asylum seekers to countries where their life, freedom or physical integrity is threatened, prohibit discriminatory treatment of refugee claimants based on their nationality and respect the principles of fundamental justice for all persons, including refugee claimants, physically present in Canada.

In essence, this preventive measure can be seen as the government's strong intention to discourage and reduce the number of refugee claimants at any cost, even violation of the fundamental human rights principles enshrined in the *Canadian Charter of Rights and Freedoms* and the principles of non-refoulement and prevention of torture and degrading or

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[632] *Immigration and Refugee Protection Act*, prec., note 54, s. 110 (2) and 110 (2) (d.1).

[633] The United Nations High Commissioner for Refugees, "Background Notes on the Safe Country Concept and Refugee Status", 26 July 1991, para.10, online: <http://www.unhcr.org/3ae68ccec.html>; Amnesty International Canada, "Unbalanced Reforms: Recommendations with respect to Bill C-31", prec., note 525, p.6.

inhuman treatment ensured by major international refugee and human rights legal instruments such as the *1951 Geneva Convention* and the 1984 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*[634]

Even if the general safety of a third country could be supposed, the individual nature of refugee status determination, as set out in the *1951 Geneva Convention*,[635] requires that asylum seekers be granted adequate opportunity to disprove the presumption of the safety of their country of origin in their particular case. This principle implies that rejected refugee claimants also have the absolute right to effective redress to a distinct appeal body other than the determining authority, which is authorized to consider both the factual and legal questions that have risen from their case. Unfortunately, imposing an absolute bar on the right of appeal to the RAD leaves room for judicial review only, carried out by the Federal Court. Although judicial review of final decisions on refugee applications constitutes a significant portion of the Federal Court's work (3,655 out of 8,403 applications submitted in 2014),[636] the Court is not as efficient and effective as the RAD in ensuring the fundamental rights of rejected asylum seekers and curing the basic deficiencies and inevitable injustices that occur during the first instance decision-making procedure.

In the case of *Y.Z v. Canada (Minister of Citizenship and Immigration)*,[637] decided on July 23, 2015, the Federal Court of Canada found inconsistencies in the denial of the right to appeal to the RAD to DCO refugee applicants, in this case a single gay man and a gay couple respectively from the designated countries of Croatia and Hungary. This right is enacted under section 110(2)(d.1) of the IRPA and section 15(1) of *Canadian Charter of Rights and Freedoms*, and is not justifiable under section 1 of the Charter. Accordingly, the Court declared

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[634] *The 1951 United Nations Convention Relating to the Status of Refugees*, prec., note 1, art.33(1); The United Nations General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, prec., note 41, art.3.
[635] *The 1951 United Nations Convention Relating to the Status of Refugees*, prec., note 1, art.1.A (2).
[636] Justice Anne L. MACTAVISH, "The Role of the Federal Court in the Canadian Refugee Determination Process", CARFMS/ACERMF Working Paper No: 2015/1, October 2015, p.2-3, online: <http://carfms.org/wp-content/uploads/2015/10/CARFMS-WPS-No1-Anne-Mactavish.pdf>.
[637] *Y.Z.* v. *Canada (Minister of Citizenship and Immigration)* [2015] F.C.J. No.880.

that the provision be impugned and that section 110(2)(d.1) of the IRPA has neither effect nor force, granting the DCO refugee claimants the right to appeal to the RAD.

Where relevant, the Federal Court's interpretations in the case mentioned above will be referred to and explained in more detail to shed some light on and support our reasoning regarding the unconstitutionality of section 110.2(d.1) of the IRPA.

According to section 72(1) of the IRPA, the Federal Court may conduct a judicial review of "any matter — a decision, determination or order made, a measure taken or a question raised — under this Act." Thus, the RPD's rulings on DCO refugee applications, subject to section 110 (2) (d.1), may undergo judicial review by the Federal Court.

The primary negative outcome of this provision is that contrary to the basic requirement of a more simplified procedure because of the disorientation and confusion asylum seekers experience in the host country as they struggle with many administrative, legal, psychological and financial difficulties, DCO refugee applicants are obliged to follow more complicated procedures to receive an effective remedy against the RPD's final decision before the Federal Court, in comparison to the procedure set out for appealing ordinary refugee determinations before the RAD.[638]

Limited time frame: according to section 72(1) of the IRPA, before the judicial review is initiated by the Federal Court, the applicant must file an application for leave to the Federal Court. Rejected asylum seekers do not have an automatic right to judicial review; rather, they must obtain the leave of the Federal Court. Until the leave is granted, the Federal Court will not commence a judicial review of the RPD's final decision.[639]

The troubling aspect of this provision is the extremely short time limit for presenting the application for leave to the Federal Court. Rejected refugee claimants have only 15 days (in the

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[638] *Immigration and Refugee Protection Act*, prec., note 54, s.110 -111.1 (2); *Immigration and Refugee Protection Regulations*, prec., note 586, s.159.91(1) - 159.92(2).

[639] *Immigration and Refugee Protection Act*, prec., note 54, s.72(1): "Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is, subject to section 86.1, commenced by making an application for leave to the Court."; Justice Anne L. MACTAVISH, prec., note 636, p.4.

case of inland refugee claimants like DCOs) after the RPD sends its written reasons for the final decision to submit their application for leave.[640] In this case, the 15-day time frame is not enough time to consult a legal professional, provide the documents required and correctly submit the application for leave, which should include information such as the name of the parties, the details of the case, the final decision made, the measures taken, the question put forward, the requested redress, the grounds on which the relief is sought and so on.[641] The time limit for responding to the application for leave is even shorter. Under section 8(1) of the *Federal Court Citizenship, Immigration and Refugee Protection Rules*, the respondent has only 10 days after the application for leave is received to file a notice of appearance. The application for leave must be perfected within 30 days by filing an application record that should contain the application for leave, the RPD's decision under review, the RPD's written reasons, the memorandum of argument and the supporting affidavits.[642] It is clear that in order to request judicial review of the determination before the Federal Court, denied refugee claimants have to complete a complicated administrative process, intensified by the excessively short time schedule.[643]

Lack of hearing: the Federal Court judge decides whether to grant or reject the leave based on the court file and the evidence provided by the parties without a hearing, except in exceptional cases.[644] When the applicant is the rejected refugee claimant, he or she has no chance to explain to the court in person the reasons for seeking leave and the grounds on which he or she is seeking a judicial review of the final determination.

Unreasoned decisions: the Federal Court has no obligation to give the reasons for approval or rejection of an application for leave, and applicants are not entitled to appeal the court's decision in the case of rejection.[645] There are no guidelines or reliable tests outlining the

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[640] *Immigration and Refugee Protection Act*, prec., note 54, s. 72 (2)(b) and 169(f).
[641] *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, (SOR93/22), s.5(1) ; Sean REHAAG, prec., note 629, p.6.
[642] *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, prec., note 641, s.8(1).
[643] Sean REHAAG, prec., note 629, p.6-7.
[644] *Immigration and Refugee Protection Act*, prec., note 54, s.72(2) (d).
[645] *Id*., s.72(2) (e); Sean REHAAG, prec., note 629, p.7.

circumstances under which the Court will grant the leave.[646] This situation makes it difficult for the applicant and his or her legal counsel to determine how they should provide the evidence and creates stressful circumstances for them regarding the outcome of the proceedings. Even when the reasons are given, detailed information is not provided, since all of the Federal Court's justifications are general and vague except in very infrequent cases.[647] For example, in one case where the reason for denial of leave was given, *Mina v. Canada (Minister of Citizenship and Immigration)*, Justice Shore indicated that "[i]n an application for leave and for judicial review, a serious, arguable case with serious issues must be submitted."[648]

Inconsistent leave decisions: one of the most discouraging issues regarding the accuracy of judicial review proceedings is the wide variation in approval of applications for leave from one judge to another[649] and the high rate of rejection of leave by the Federal Court. Based on a recent inquiry by Rehaag, between 2005 to 2010, leave was granted in only 14.44% per cent of cases.[650] The result is even lower according to statistics provided by Amnesty International Canada, indicating that the rate of granting leave is as low as 7.5%. Given the reforms and the restrictive measures imposed on the IRPA, such as DCO or STC rules, it is not surprising that the low rate of leave granting has not ameliorated in recent years. Based on more recent statistics from Justice Mactavish, the acceptance rate of application leave in 2014 was only 24.9%, including requests for judicial review of both refugee determinations and of the Pre-removal Risk Assessment.[651]

Restricted judicial view: even if leave is granted, the judicial review is more constrained than RAD appeal proceedings. In fact, while the RAD is mandated to review both the factual and legal aspects of each application, the Federal Court has jurisdiction only to reassess legal

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[646] Justice Anne L. MACTAVISH, prec., note 636, p.4.
[647] Sean REHAAG, prec., note 629, p.7-9.
[648] *Mina* v. *Canada (Minister of Citizenship and Immigration)* [2010] F.C.J. No.1482, para.6; Sean REHAAG, prec., note 629, p.9; Amnesty International Canada, "Unbalanced Reforms: Recommendations with respect to Bill C-31", prec., note 525, p.10.
[649] Sean REHAAG, prec., note 629, p.13-20; Justice Anne L. MACTAVISH, prec., note 636, p.4.
[650] Sean REHAAG, prec., note 629, p.23.
[651] Justice Anne L. MACTAVISH, prec., note 636, p.4.

issues, so it does not consider the merit of refugee claims comprehensively.[652] Consequently, the Federal Court neither reconsiders the credibility of the claim nor examines new evidence, but reviews only the RPD's decision and the documents, evidence or reports available and referred by the RPD at the time of the hearing during the determination procedure.[653]

Under these circumstances, the effectiveness, fairness and validity of the Federal Court's judicial review is dubious. The Federal Court's limited jurisdiction is most damaging in the case of rejected LGBT refugee claimants for two main reasons. These applicants have experienced many years of oppression in order to deny or hide their sexual identity, which brings about deep-rooted mental and psychological health problems and social isolation. Consequently, it takes them more time than other refugee claimants to disclose all the factual issues of their case or their self-identity and recount their whole experience. As explained before, LGBT refugee protection cases are more challenging in terms of gathering and providing all the necessary and valid documents to substantiate the refugee protection request comprehensively, since as LaViolette noted in the case of *Y.Z. v. Canada (Minister of Citizenship and Immigration)*, "[A]vailable country documentation is often deficient or non-existent when it comes to persecution of sexual minorities."[654] One of the most fundamental flaws of the judicial review conducted by the Federal Court is that judges are prevented from receiving new evidence not available during the first instance determination procedure, especially in the case of rejected asylum seekers requiring judicial review of their claim on the grounds of sensitive subject matter such as sexual orientation, gender identity or gender-based violence and discrimination.[655]

Denial of automatic stay of removal: the last and the most worrisome issue, which demonstrates the unworkable and inefficient judicial review system implemented by Bill C-31 for the Federal Court, as well as the importance of providing DCO refugee applicants with the

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[652] *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, prec., note 641, s.5, 14, and 17.
[653] Canadian Council for Refugees, "Protecting Refugees: Where Canada's refugee system falls down", prec., note 629; Amnesty International Canada, "Unbalanced Reforms: Recommendations with respect to Bill C-31", prec., note 525, p.10.
[654] *Y.Z.* v. *Canada (Minister of Citizenship and Immigration)*, prec., note 637, para.59.
[655] *Id*., para.59-68.

effective right to appeal to the RAD, is the issue of denying the suspensive effect of appeal for DCO refugee applicants who request judicial review of their refugee protection determination before the Federal Court.

Generally, under the current asylum system established by the IRPA and the IRPR, every foreign national whose claim is eligible to be referred to the RPD is issued a conditional Specified Removal Order based on the circumstances described in sections 228(3) and 229(2) of the IRPR. However, when the refugee claim is rejected by the RPD, the date the removal order comes into force depends on whether refugee protection was requested by a DCO refugee claimant or an ordinary one.

According to section 49(2) (c) of the IRPA, the removal order becomes enforceable "on the expiry of the time limit referred to in subsection 110(2.1) or, if an appeal is made, 15 days after notification by the Refugee Appeal Division that the claim is rejected."[656] With regard to the fact that DCO refugee claimants are deprived of the right to appeal before the RAD, the removal order is applicable 15 days after the day on which the rejected refugee claimant receives the reasons in writing from the RPD.[657] When the removal order is enforceable, the subject of the order, the foreign national, has to leave Canada immediately.[658]

When submitting an application for leave before the Federal Court to contest the RAD's decision, the removal order is automatically stayed until the final result is issued,[659] except when "the subject of the removal order is a designated foreign national or a national of a country that is designated under subsection 109.1(1) of the Act."[660] Based on these provisions, DCO refugee claimants, contrary to ordinary asylum seekers, are denied the suspensive effect of judicial review, and rejected DCO asylum seekers can be deported to their country of origin before the judicial review has been finalized, unless they obtain a judicial stay of removal from the Federal Court.

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[656] *Immigration and Refugee Protection Act*, prec., note 54, s.(2) (a) – (e).
[657] *Immigration and Refugee Protection Regulations*, prec., note 586, s.159.91(1); *Y.Z.* v. *Canada (Minister of Citizenship and Immigration)*, prec, note 637, para.8(5).
[658] *Id*., s.48(1) and (2).
[659] *Immigration and Refugee Protection Regulations*, prec., note 586, s.231(1).
[660] *Id*., s.231(2).

Depriving DCO refugee claimants of the right to remain in Canada pending the decision of the leave judge or the final result of the Federal Court's judicial review constitutes discriminatory treatment against a particular group of asylum seekers based on their country of origin, contrary to the explicit implication of Article 3 of the *1951 Geneva Convention* and section 15(1) of the *Canadian Charter of Rights and Freedoms*, which requires the Canadian government to provide equal protection and enjoyment of the law irrespective of a person's "national or ethnic origin."[661] In the case of *Y.Z v. Canada (Minister of Citizenship and Immigration)*, the Federal Court provided a detailed reasoning responding to the question of the discriminatory and unconstitutional character of section 110(2) (d.1) of the IRPA.

According to the Court, the best way to uncover the inconsistency of the provision that disputes section 15(1) of the *Canadian Charter of Rights and Freedoms* is the test established by the Supreme Court of Canada in the case of *Withler v. Canada (Attorney General).*[662] When conducting the "substantive equality inquiry," two issues should be clarified: "(1) Does the law create a distinction based on an enumerated or analogous ground? and (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"[663]

With regard to the first question, the Supreme Court illustrated that a comparative analysis should establish that a "distinction" has occurred, leading us to the conclusion that in this particular case, DCO refugee applicants, deprived of the right to appeal to the RAD, are treated differently than non-DCO asylum seekers based on the same or analogous grounds of discrimination enumerated in section 15(1) of *Canadian Charter of Rights and Freedoms.*[664] As one of the conflicting points between the applicants and respondents, it should be determined whether or not the distinction set out in section 110(2) (d.1) is based on "national origin," prohibited in section 15(1) of the Charter. Based on the interpretation provided by Justice

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[661] *The 1951 United Nations Convention Relating to the Status of Refugees,* prec., note 1, art.3; *Canadian Charter of Rights and Freedoms*., prec., note 55, s.15(1).
[662] *Withler* v. *Canada (Attorney General)* [2011] S.C.J No.12, para.61; *Y.Z.* v. *Canada (Minister of Citizenship and Immigration)*, prec, note 637, para.115.
[663] *Withler* v. *Canada (Attorney General)*, prec., note 662, para.61; *Y.Z.* v. *Canada (Minister of Citizenship and Immigration)*, prec., note 637, para.115.
[664] *Withler* v. *Canada (Attorney General)*, prec., note 662, para.62; *Y.Z.* v. *Canada (Minister of Citizenship),* prec., note 637, para.118.

Mactavish in the case of *Canadian Doctors for Refugees v. Canada (Attorney General)*,[665] a distinction based on national origin as indicated in section 15(1) of the Charter signifies "a prohibition on discrimination between classes of non-citizens based upon their country of origin [...] consistent with the provisions of the *Refugee Convention*, article 3 of which prohibits discrimination against refugees based upon their country of origin."[666] Basing its reasoning on this definition in the case of *Y.Z. v. Canada (Minister of Citizenship and Immigration)*, the Federal Court correctly reached the conclusion that the differentiation established in section 110(2)(d.1) between DCO and non-DCO refugee claimants is a clear distinction on the basis of national origin since, as specified by the Court, "[i]f the claimant comes from one of the countries designated under subsection 109.1(1) of the *IRPA*, his or her claim will be assessed without the potential benefit of or access to an appeal to the RAD, unlike claimants from non-DCO countries."[667] In other words, whatever the considerations might be to designate a country as a DCO or remove it from the DCO list, the only reason for treating DCO asylum seekers differently that non-DCO refugee applicants is that they originate from and are nationals of DCOs, a distinction exercised regardless of the personal characteristics of DCO asylum seekers.

Ultimately, the Court specified that the distinction in section 110(2) (d.1) is based on one of the grounds prohibited by section 15(1) of the Charter, since "it creates two classes of refugee claimants based on national origin: those foreign nationals from a DCO and those who are not from a DCO."[668] This argument is reinforced by the foregoing explanations about the complicated administrative steps DCO refugee claimants must take to submit a judicial review request before the Federal Court and the inefficient jurisdiction granted to the Court for conducting the judicial assessment of the RPD's final determination, compared to the simplified appeal procedure for non-DCO refugee applicants before the RAD.

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[665] *Canadian Doctors for Refugees* v. *Canada (Attorney General)* [2015] F.C.J. 147.
[666] *Id*., para.768; *Y.Z.* v. *Canada (Minister of Citizenship and Immigration)*, prec., note 637, para.119.
[667] *Y.Z.* v. *Canada (Minister of Citizenship and Immigration)*, prec., note 637, para.120.
[668] *Id*., para.121-122.

Considering the second question, the Supreme Court clarified that the inquiry should answer the question of whether the impugned provision or decision brings about "substantive inequality" in the sense that it causes a detriment by invoking and maintaining prejudice or stereotype against a particular group of refugee claimants irrelevant to their actual characteristics or situation.[669] In the second phase of the test, depending on the nature of the case, a comparative study should be carried out between the two groups, in this case DCO and non-DCO refugee claimants, with the goal of reaching a "contextual understanding" of the DCO refugee applicants' situation not only within the legal, but also the social and political contexts, which will help to uncover the disadvantages against them caused by the impugned law or decision perpetuating the misjudgment or stereotype.[670]

With regard to DCO refugee claimants deprived of the right to appeal to the RAD, in the case of *Y.Z. v. Canada (Minister of Citizenship and Immigration)*, the respondents asserted that the DCO regime is not founded on stereotypes but on reliable information, profound inquiry and rigorous review establishing the general safety of the country of origin in question.[671]

However, the Court disagreed with this claim, recalling the government's repeated statements during the first steps of IRPA reforms in order to prevent abuse of Canada's asylum system by bogus asylum seekers from safe and non-refugee producing countries and to ensure full access to a fair and efficient refugee status determination procedure for eligible and well-founded refugee claimants. During the conference introducing the DCO rule and its procedural and legal consequences for DCO refugee claimants, the Minister of Citizenship and Immigration, relying on the aforementioned explanations, proclaimed that most of the changes to the IRPA were aimed at unfounded and bogus refugee claims from safe countries such as Hungary. As indicated by the Court, all the justifications provided by the government and the legal or procedural distinctions between DCO and non-DCO asylum seekers marginalize DCO

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[669] *Withler* v. *Canada (Attorney General)*, prec., note 662, para.65; *Y.Z.* v. *Canada (Minister of Citizenship and Immigration)*, prec., note 637, para.115.
[670] *Withler* v. *Canada (Attorney General)*, prec., note 662, para.65-66; *Y.Z.* v. *Canada (Minister of Citizenship and Immigration)*, *prec.*, note 637, para.115.
[671] *Y.Z.* v. *Canada (Minister of Citizenship and Immigration)*, prec., note 637, para.123.

nationals, reinforcing the stereotype that they are all "queue jumpers" and bogus applicants seeking only to abuse Canada's asylum legislation.[672]

To defend their argument, the respondents referenced statistics demonstrating a decline in the rate of abandonment or withdrawal of refugee claims and a slight increase in the rate of accepted refugee requests since certain countries such as Hungary had been designated as safe, as evidence that the DCO regime was working well. The people who wanted to abuse the Canadian asylum system were deterred, while genuine refugee claimants were accepted.

The Court rejected this argument, stating that although all these statistics seem convincing and true, they point to the fact that there are well-founded refugee applicants seeking genuine refugee protection among the DCO asylum seekers being denied the right to appeal. More importantly, there is no need to deprive all DCO refugee applicants of the right to appeal to the RAD in order to deter by fraudulent DCO refugee claimants from misusing Canada's determination procedure, since under sections 107(2), 107.1, 110(2) (c), and 110(2) (b), fraudulent or abusive claims that the RDP determines to have no credible basis, as well as manifestly unfounded, abandoned or withdrawn refugee claims, are denied the right to appeal to the RAD.[673] Accordingly, the Court specified that

> [D]enying an appeal to all DCO claimants, regardless of the RPD's determination, effectively means that the stereotypical "bogus" DCO claimant is being preferred to the RPD's individual assessment of a claimant's story. There is no reason to expect that the RPD is any less likely to make a mistake when it rejects genuinely-advanced claims from DCOs than it is when it rejects claims from non-DCOs with similar rates of acceptance [...]. Denying an appeal to claimants from DCOs thus does not correspond to whether those claimants are actually abusing the refugee system, nor does it correspond to whether they actually need an appeal less than claimants from non-DCOs.[674]

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[672] *Id*., para.124.
[673] *Id*., para.125-126.
[674] *Id*., para.126.

Based on the Supreme Court's stipulations in the case of *Withler v. Canada*, the equality required by section 15(1) of the Charter is not limited to the formal and legal aspects of the disputed provision, but rather directly concerns the substantive equality[675] that has been denied DCO refugee claimants vis-à-vis non-DCO asylum seekers on the discriminatory basis of national origin and denies their right to appeal to the RAD. This unfavourable provision also reinforces the historical prejudice of "undesirable refugee claimants" with unfounded or fraudulent refugee applications who do not deserve the refugee protection that Canada provides.[676]

The Federal Court finally declared that section 110(2) (d.1) infringes on section 15(1) of the *Canadian Charter of Rights and Freedoms*, since "this is a denial of substantive equality to claimants from DCO countries based upon the national origin of such claimants."[677]

Even though the government's objective in enacting these provisions, as indicated on several occasions, was to prevent bogus asylum seekers from misusing the Canadian asylum system and increasing the efficiency of the inland determination procedure, because of the grave consequences of returning refugee applicants whose claims have not been determined to their home country, limits on rejected refugee claimants' ability to stay in Canada while awaiting the leave decision or final judicial review of the Federal Court is one of the most obvious instances of infringement of the non-refoulement principle, clearly prohibited in the major international refugee and human rights instruments of law.[678]

Even though it could be acceptable to accelerate the judicial review process for fraudulent or clearly abusive refugee applications, preventing refugee claimants from remaining in Canada until the Federal Court has made a final decision on their claim solely because of the general safety presumed for their country of origin eliminates their right to judicial redress and leads to the denial of the fundamental human rights to life, liberty and security of person ensured in the

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[675] *Withler* v. *Canada (Attorney General)*, prec., note 662, para.2; *Y.Z.* v. *Canada (Minister of Citizenship and Immigration)*, *Id*., para.127.
[676] *Y.Z.* v. *Canada (Minister of Citizenship and Immigration)*, *Id*., para.127.
[677] *Id*., para.130.
[678] Amnesty International Canada, "Unbalanced Reforms: Recommendations with respect to Bill C-31", prec., note 525, p.8-9.

Canadian Charter of Rights and Freedoms, the violation of which is not "justified in a free and democratic society."[679]

Unfortunately, in the case of *Y.Z v. Canada (Minister of Citizenship and Immigration)*, the Federal Court, while acknowledging the respondents' assertion, ruled that depriving DCO refugee applicants of the right to appeal to the RAD does not violate the principles of fundamental justice ensured under section 7 of the Charter, since the Supreme Court stipulated in the case of *Charkaoui v. Canada (Minister of Citizenship and Immigration* that "there is no constitutional right to an appeal."[680]

However, the Federal Court then addressed the most fundamental issue arising from section 110(2) (d.1), which was the Court's ruling establishing that depriving DCO refugee claimants of the right to appeal to the RAD violates section 15(1) of the *Canadian Charter of Rights and Freedoms*, and whether this inconsistency "can be demonstrably justified in a free and democratic society,"[681] which is the fundamental consideration required in section 1 of the Charter. The Supreme Court of Canada, in the case of *R. v. Oakes*,[682] for the first time set out a two-step test for the Court to examine whether or not the limits imposed on certain persons' Charter rights and freedoms are reasonable and legitimate in any free and democratic society.[683]

It must be determined whether the measures limiting the rights or freedoms guaranteed in the Charter are "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 *supra*, at p. 352), in the sense that the objectives must consider "pressing and substantial" issues in a free and democratic society as the minimum standard.

The party resorting to section 1 must demonstrate that the measures enacted are definitely justifiable and reasonable, calling for "a form of proportionality test" as established in the case

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[679] *Canadian Charter of Rights and Freedoms*., prec., note 55, s.1.
[680] *Charkoui* v. *Canada (Minister of Citizenship and Immigration)* [2007] S.C.J. No.9; *Y.Z.* v. *Canada (Minister of Citizenship and Immigration)*, prec., note 637, para.143.
[681] *Canadian Charter of Rights and Freedoms*., prec., note 55, s.1.
[682] *R.* v. *Oakes* [1986] 1 S.C.R. 103.
[683] *Id*., para.138-139; *Y.Z.* v. *Canada (Minister of Citizenship and Immigration)*, prec., note 637, para.156.

of *R. v. Big M Drug Mart Ltd.* In the view of the Supreme Court, while the features of the test may vary depending on the case before the court, any proportionality test must constitute three fundamental elements: firstly, the impugned provision must be adopted carefully as to guarantee the objectives contended, in the sense that there must be a rational connection between the measures enacted and the objectives sought. Secondly, even in a case with the required logical relation, these measures must restrict as much as possible the right or freedom concerned. Lastly, there must be a proportionality between the impact of measures restricting the right or freedom ensured by the Charter and the objectives recognized as sufficiently important.

To clarify this test, in the case of *Canada (Attorney General) v. Bedford*,[684] the Supreme Court explained that section 1 imposes the burden on the government to demonstrate that with regard to its pressing and substantial goal, the violation of an individual's or a group's rights or freedoms is rationally justified by the greater public interest. The court must then analyze whether the legislator could have passed provisions infringing on the individual's rights or freedoms within a more limited scope. Finally, the court is required to assess whether there is a reasonable balance between the negative effects of the measures in question on the rights or freedoms of the persons subjected to them and those measures' favourable impact in serving the broader interests of society as a whole.[685]

Accordingly, the Federal Court expressed that in the case of *Y.Z. v. Canada (Minister of Citizenship and Immigration)*, "the central question is whether the negative impact of paragraph 110(2) (d.1) on the rights of DCO claimants vis-à-vis other refugee claimants is proportionate to the pressing and substantial goal of paragraph 110(2)(d.1) in furthering the public interest."[686]

To answer this question, the Court first affirmed the reforms carried out on the IRPA, since before the introduction of Bill C-11 and Bill C-31, Canada's asylum system was sophisticated, time-consuming and inapplicable, with many unnecessary procedural steps in order to reach a

[684] *Canada (Attorney General)* v. *Bedford* [2013] 3 S.C.R. 11.1.
[685] *Id*., para.125-126; *Y.Z.* v. *Canada (Minister of Citizenship and Immigration)*, prec., note 637, para.157.
[686] *Y.Z.* v. *Canada (Minister of Citizenship and Immigration)*, prec., note 637, para.158.

final decision on refugee claims or deport failed refugee claimants. The government therefore focused on eliminating unnecessary administrative rules, expediting the determination procedure and accelerating the removal of rejected refugee claimants as the substantial and pressing objective, reducing the average number of days refugee claimants stay in Canada from the time they submit a refugee claim to their removal from Canada, in the case of a failed refugee request.[687]

Based on this primary indication, the Federal Court reasonably concluded that the objective of section 110(2) (d.1) of the IRPA is to reduce or limit recourse available to DCO refugee claimants, which in ordinary cases is granted to all refugee claimants, and consequently to accelerate the removal of DCO refugee claimants from Canada compared to other failed asylum seekers. According to the Court, the government also expected that these reforms might discourage fraudulent asylum seekers from coming to Canada and trying their chances of receiving refugee protection.[688]

After determining the government's objective in introducing and passing section 110(2) (d.1), even though it was recognized as a pressing and substantial objective, the proportionality test established by the Supreme Court will now be applied to the case of *R. v. Big M Drug Mart Ltd*.

The Federal Court explained that if we accept that there is a reasonable and rational relation between the government's objective and denying DCO refugee claimants the right to appeal to the RAD as the first constitutive element of the inquiry, in the second step the Court is required to establish that section 110(2) (d.1) is minimally impairing the right to appeal and there is no other solution possible for the government to reach its broader objective of increasing the efficiency and fairness of Canada's asylum system and preventing manifestly unfounded or fraudulent refugee applicants from safe countries from abusing Canada's inland determination procedure. In other words, the Court must consider if other alternatives exist for the legislator to reach the ultimate goal of serving the larger public interest. The Federal Court stated that the

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[687] *Id*., para.160.
[688] *Id*., para.161.

respondents failed to prove that depriving DCO refugee claimants of the right to appeal to the RAD was the last resort available to the government to satisfy its objective. Even if we accepted the respondents' claim that one of the government's purposes in reforming the IRPA was to deter abuse of Canada's asylum legislation, this goal has been achieved and enacted in other sections of the IRPA, by means of the RPD's determination recognizing refugee claims as manifestly unfounded or having no credible basis. In both cases, failed refugee claimants have no right to appeal before the RAD. Refugee claimants who have abandoned or withdrawn their claims are not entitled to appeal before the RAD.

According to the Court, an additional deterrent provision against DCO refugee applicants is not justifiable, since "the stated goal of deterring abusive or unfounded claims could be achieved by the combined effect of section 107.1, subsection 107(2) and paragraphs 110(2)(b) and (c) of the *IRPA*."[689]

On the subject of depriving DCO refugee claimants of an automatic stay of removal while requesting a judicial review of the RPD's negative decision before the Federal Court, the Court has declared that "[a]n appeal to the RAD is a significant benefit for claimants, and denying this appeal to some claimants based on their country of origin is a serious impairment of their right to equality,"[690] and as a result, that "[d]enying an appeal to all claimants from DCOs is not proportional to the government's objectives; it is an inequality that is disproportionate and overbroad and cannot be saved by section 1 of the *Charter*."[691]

It is obvious that the right to effective remedy established in the asylum system prior to the Federal Court's decision in the case of *Y.Z. v. Canada (Minister of Citizenship and Immigration)* was meaningless, since rejected DCO refugee claimants were provided no real chance to effectively seek the judicial redress and fundamental justice they were unlawfully denied during the first instance determination procedure.[692] UNHCR has stipulated that the

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[689] *Id*., para.165.
[690] *Id*., para.166.
[691] *Id*., para.170.
[692] Amnesty International Canada, "Unbalanced Reforms: Recommendations with respect to Bill C-31", prec., note 525, p.10.

right to appeal "is a fundamental requirement of a fair and efficient asylum procedure, to which no exception should be made," since the appeal procedure is the last opportunity to observe the principles of fundamental justice and protect rejected asylum seekers from being unfairly refouled to a country where their life, freedom or integrity of person is threatened,[693] in accordance with sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*. In the end, the failure to guarantee the right to effective remedy is a clear violation of the right to request refugee protection enshrined and recognized for all persons, irrespective of their country of origin, in the *Universal Declaration of Human Rights.*[694]

Concluding remarks

The Harper government's legacy to Canada's asylum system, followed by consecutive IRPA reforms and ambiguous, discriminatory and, in some cases, contradictory provisions, resulted in puzzling and stressful situations for refugee claimants in Canada. Although the government has had legitimate objectives in amending Canada's asylum legislation by introducing Bill C-11 and Bill C-31, including calming security concerns; curing the inherent flaws in Canada's asylum system, such as an unreasonably long and sophisticated inland determination procedure; limiting procedural recourse and accelerating the deportation of fraudulent and unfounded refugee applicants who intend to abuse Canada's asylum legislation, hoewever, according to the government's standpoint, the only solution has been to dissuade and deport these undeserving asylum seekers by applying preventive measures such as the STC or DCO rules, and depriving these fraudulent refugee claimants of the fundamental procedural and human rights enjoyed by ordinary asylum seekers, the most important of which are the right to

[693] The United Nations High Commissioner for Refugees, "UNHCR Submission on Bill C-31 Protecting Canada's Immigration System Act", prec., note 542, p.17.

[694] The United Nations General Assembly, *Universal Declaration of Human Rights*, (10 December 1948), art.14 (1), online: <http://www.un.org/en/universal-declaration-human-rights/>; The United Nations High Commissioner for Refugees, "UNHCR Submission on Bill C-31 Protecting Canada's Immigration System Act", prec., note 542, p.16; Amnesty International Canada, "Unbalanced Reforms: Recommendations with respect to Bill C-31", prec., note 525, p.7; The United Nations High Commissioner for Refugees, "General Conclusion on International Protection No. 74 (XLV)", EXCOM Conclusions, 7 October 1994, para.(i), online:
< http://www.unhcr.org/3ae68c6a4.html>; Canadian Association of Refugee Lawyers, "Designated Countries of Origin", 14 December 2012, p. 1, online: <http://www.carl-acaadr.ca/our-work/issues/DCO#Press Release DCO>.

a full and unconstrained personal hearing and the right to an effective remedy, as ensured by the establishment of the RAD.

Regarding recently passed initiatives, the government has been furthering its preventive asylum policy by spreading the stereotype that most asylum seekers from safe countries, and DCO refugee claimants in particular, are bogus or are queue jumpers with the sole purpose of misusing the asylum rules enacted under previous liberal trends. As explained above, in spite of certain improvements in Bill C-31 comparing to Bill C-11, in practice, the government has created a new multilayered asylum system that classifies refugee claimants as worthy or unworthy and differentiates among them on the basis of factors unrelated to the merit of their refugee protection claims, such as their national country (DCO rule) or the travel routes they have taken to reach Canada (STC rule). This discriminatory approach calls into question the fairness and independence of Canada's asylum system, while also leaving it vulnerable to political, economic or intergovernmental considerations.[695]

The introduction of the DCO rule in Bill C-31, in spite of the government's legitimate objective as to target certain shortcomings in Canada's inland refugee system such as time-consuming determination procedures or identification of unfounded refugee applications, and, one the other hand, reforming some defects in Bill C-11 such as designation of DCO without population or regional exceptions, one the other hand, resulted in increased antirefugee sentiment in Canada, as well as incorrect messages, and exaggerated reports about floods of refugees and the harmful effects of their presence in Canada have contributed to the indifference of Canadian society toward the increasingly restrictive practices of the government while inciting intolerance of refugees in the country.[696] This unfriendly atmosphere diminishes opportunities to improve the flaws of the current asylum system while paving the way for more

[695] Ontario Council of Agencies Serving Immigration, "Brief to Standing Committee on Citizenship and Immigration, Re: Bill C-31, "Protecting Canada's Immigration System Act", prec., note 524, p.1.
[696] *Id*., p.2.

infringements of the international and constitutional human rights obligations to which the government is committed.[697]

Although the Federal Court and the Supreme Court have acknowledged the unsafety of the DCO rule and its inability to prove effective State protection for refugee claimants in several cases, and have also uncovered the unconstitutional character and discriminatory distinctions of the legislated preventive measures relating to DCO refugee claimants explained in the previous sections, many parts of the story have been left untold.

The government has never satisfied basic concerns relating to the transparency and reliability of the process by which the Minister identifies DCOs. More delicate and sensitive questions remained unanswered in the IRPA and the Ministerial order for determining the general safety of a third country. In fact, the inadequate and unreliable criteria (either quantitative or qualitative) used to create the DCO list and deprive DCO asylum seekers of their fundamental procedural rights support the conclusion that the government regards democracy as a label to be attached to a third country definitely guaranteeing effective State protection.[698]

However, as the Federal Court specified in the case of *Sow v. Canada (Minister of Citizenship and Immigration)*, State protection should be granted based on a rigorous inquiry, taking into consideration significant issues such as "the quality of the institutions providing that protection," "the adequacy of state protection at an operational level" and "persons similarly situated to the applicant and their treatment by the state." Accordingly, the Court stipulated that

> [D]emocracy [...] requires institutions and principles to give effect to the values that the term encompasses. These may include, amongst others, an independent judiciary and defense bar, access to justice and a police force that is independent in the exercise of its investigatory function.[699]

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[697] *Id*.; *Immigration and Refugee Protection Act*, prec., note 54, s. 3 (2) (b); Amnesty International Canada, "Unbalanced Reforms: Recommendations with respect to Bill C-31", prec., note 525, p.1.
[698] *Sow* v. *Canada (Minister of Citizenship and Immigration)* [2011] F.C.J. No.824,, para.11.
[699] *Id*., para.12.

These considerations are missing from the criteria established by the IRPA and the Ministerial orders.

The massive and unlimited discretion granted to the Minister of Citizenship and Immigration to designate DCOs, along with widespread deprivation of any effective opportunity for DCO applicants to comprehensively substantiate their applications, as specified by the Federal Court in the case of *Y.Z. v. Canada (Minister of Citizenship and Immigration)*, does not guarantee that refugee protection will be provided to those who really need it, as contended by the government in reforming the current asylum system. When the government's main focus is to reject, as quickly as possible, people who do not deserve protection, it does not give individuals who are in need of refugee protection enough time and resources to explain their merit.[700] The new asylum system is helpful in rare cases only for an extremely limited group of refugee applicants with strong documentation, competent legal representation and a supportive community.[701]

The second unanswered question, with regard to the dubious designation of Central and Eastern European countries such as Hungary and Croatia as DCOs, is how much of the designation process is influenced by geopolitical and economic factors rather than human rights concerns? One of the main reasons for suspicion is that while preparing the DCO list, the Canadian government was negotiating a free trade agreement with the EU. It is suspicious that the Federal government had identified all EU Member States except Romania and Bulgaria as DCOs, with the goal of convincing them to ratify the trade deal.[702]

For example, since 2008 citizens of the Czech Republic have been required to have a visa to travel to Canada because of the growing number of refugee applicants from that country,

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[700] Tobi COHEN, "Number of asylum claim drops dramatically after Ottawa releases list of 'safe' countries", August 13, 2013, National Post, online: <http://news.nationalpost.com/news/canada/number-of-asylum-claims-drops-dramatically-after-ottawa-releases-list-of-safe-countries>.

[701] Canadian Council for Refugees, ""New refugee system – one year on", prec., note 605, p.1.

[702] Stephanie Levitz, prec., note 554, p.3; Karl NERENBERG, "Canada is poised to give comfort to 'hateful, xenophobic nutbars'", 1 December 20102, *rabble.ca Blogs*, online: <http://rabble.ca/blogs/bloggers/karl-nerenberg/2012/12/canada-poised-give-comfort-%E2%80%98hateful-xenophobic-nutbars%E2%80%99>.

especially the Roma. However, in the midst of the negotiations to ratify the Comprehensive Economic Trade Agreement (CETA) between Canada and the European Union, the Czech Republic threatened not to ratify the agreement if Canada did not remove the barriers for its citizens to travel to Canada.[703] Although the federal government did not immediately remove the visa requirement, it put the Czech Republic on the DCO list. The same policy has been applied against Hungarian citizens, especially Roma asylum seekers. In 2009, the federal government exempted Hungarian citizens from visa requirements, but following a sudden increase in the number of refugee application made by Roma individuals, Hungary became the primary source of refugee applications in Canada. In order to resolve the complicated situation caused by the unprecedented number of refugee applicants from Hungary and ensure the ratification of the trade deal by all EU Member States, the federal government included Hungary as a DCO on the first DCO list issued in 2012 to facilitate the rejection of refugee applications by Roma and Jewish individuals from Hungary.[704]

The Harper government's restrictive asylum policy resulted in a growing number of undocumented foreign nationals who found lodging refugee applications useless because of the unfair refugee determination system in Canada, which consequently makes it more difficult for the federal government to manage its resources effectively in order to process refugee applications and settle asylum seekers in its territory.

The harmful effects of the deterrent asylum legislation on overseas resettlement programs have resulted in a dramatic decrease in the number of refugees resettled from outside of Canada since 2012, though the federal government has given the increase in the resettlement number as justification for a more restrictive inland refugee claim process.[705] Despite increasingly horrific human rights violations occurring every day all around the world, the Canadian government

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[703] Tobi COHEN, "Critics slam Canada's new 'safe' country list for refugees", 14 December 2012, Canada.com, online: < http://o.canada.com/news/national/federal-government-unveils-list-of-countries-it-deems-safe-for-refugees>.
[704] Nicholas HUNE-BROWN, "The Family that Won't Leave", 23 September 2014, *TORONTO LIFE*, online: <http://torontolife.com/city/the-family-that-wont-leave/>.
[705] Canadian Council for Refugees, "CCR decries dramatic drop in refugees resettled to Canada", 7 March 2013, online: <http://ccrweb.ca/en/bulletin/13/03/07>; Canadian Council for Refugees, ""New refugee system – one year on", prec., note 605, p.7.

remained reluctant to accept refugees compared to Western European countries, especially prior to the 2015 Canadian federal election and subsequent Liberal majority in Parliament. It is obvious that Canada would rather turn its back on refugees rather than act as a responsible member of global society by providing effective and proper protection for genuine asylum seekers. Although the new Liberal government has committed to bringing 25,000 Syrian refugees to Canada by February 29, 2016[706] in response to the civil war in Syria, one of the worst humanitarian crises in the world since World War II, it has not been making a significant effort to accept asylum seekers and provide international protection for real refugees since the start of the civil war in Syria compared to Western European countries.

[706] Government of Canada, Citizenship and Immigration Canada, *Welcome Refugees: Milestones and key figures*, online: <http://www.cic.gc.ca/english/refugees/welcome/milestones.asp>.

General Conclusion

Since the *1951 Geneva Convention* established the international refugee protection system and the expansion of its provisions in the contracting States' domestic asylum legislation, providing refugee protection has led to two conflicting outcomes. Especially among Western countries, a country's ability to control the movement of asylum seekers, accept and resettle recognized refugees has been considered clear evidence of the State's sovereignty over its territory and its political and economic power, which represents that country as an active actor in intergovernmental relations and global society. However, a negative result is that the unprecedented flow of asylum seekers to the borders of Western countries since the mid-20th century has caused deep concerns about the presence of asylum seekers in Western societies, in particular in the case of refugee claimants from countries that traditionally do not produce refugees.

In order to respect their international obligation to provide refugee protection while satisfying fundamental suspicions about the efficiency of the international refugee system, exacerbated by security concerns about the presence of refugees, and the growing economic burden of accepting and examining refugee applications, the Western States began rearranging their domestic refugee legislation based on their previous asylum policy.

Although the change in Western asylum policies from supportive to deterrent began in the mid-20th century, the 9/11 terrorist attacks in 2001, and the civil wars in the Middle Est and the North Africa hastened the establishment of preventive asylum policy and legislation among the Western countries, such that all these States have been competing to put in place more restrictive asylum rules than their neighbours or allies.

This competition is more evident in the passing of restrictive rules such as the SCO and STC rules. Though the main purpose of our inquiry, the SCO rule, was initiated by the Western European States and eventually, since 2012, Canada incoporated this preventive rule in its national legislation, however, there can be found some similarities and differences between these two legal system in applying the SCO rule. Based on what has been explained in this research, at first glance, the criteria established by both EU and Canada legislation to determine a third

country's safety are too general and do not comply with reality and the complicated patterns of human rights violations happening every day on the domestic scale. The criteria for determining the general safety of a third country are legislated ambiguously so that many decisive issues, such as the third country's real practices, the accessibility of State protection to all its nationals and the applicability of judicial redress, remained unknown to the internal law-making bodies of Western governments.

On the other hand, with regard to the differences, Canada's approach to developing the SCO rule in its asylum legislation has been more radical, with more intense results than those achieved by the common asylum policy and laws implemented in the EU. As demonstarated in this comparative study, first of all, the quantitative measures laid down in the IRPA suffer from additional shortcomings compared to the standards passed by EU legislators in the APD and the RAPD. According to Costello, the quantitative criteria are so dubious that "they include abandoned and withdrawn claims within their calculations; and it is problematic that they are based on **past** refugee determinations and not on **present** or anticipated country conditions."[707]

Second of all, although, as Costello indicated, both the qualitative criteria laid down in the IRPA and the standards established in the APD and the RAPD "are general and do not focus enough on whether a country is likely to produce refugees"[708], however, all these problems, in addition to a DCO designation procedure left entirely to the Minister's discretion, have made the impact of the DCO rules on refugee claimants in Canada definitely more severe, since DCO refugee applicants were deprived of the right to appeal to the RAD,[709] compared to SCO provisions enacted in the APD and later in the RAPD, which did not deprive SCO applicants of the right to appeal. Fortunately, in its brilliant decision in the case of *Y.Z. v. Canada (Minister of Citizenship and Immigration)*, the Federal Court has granted the fundamental right to appeal to DCO refugee claimants.

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[707] *Y.Z.* v. *Canada (Minister of Citizenship and Immigration)*, prec., note 637, para.54.
[708] *Id*.
[709] *Id*.

However, one of the most concerning aspect of determination of SCO or DCO, common between the two legal systems of the EU and Canada, is that the constitutionality and accuracy of criteria for designating SCOs and DCOs has not been decided or established by any case law, either in the EU or Canada. Hence, while the EJC and ECtHR, as the judicial bodies protecting human rights at the EU level, and the Federal Court in Canada, have established the inherent flaws of the SCO and DCO rules in some cases, including the potential violation of the fundamental principle of non-refoulement and infringement of international refugee and human rights law or constitution law, in particular when the determination procedure is expedited and the basic human rights of SCO and DCO asylum seekers are ceded or denied, Western countries have not stopped applying this restrictive rule, especially at the EU level.

With regard to the asylum crisis the EU is struggling with today and the massive flow of asylum seekers escaping from Syria, Afghanistan, Iraq and northern African countries to the eastern and the southern borders of the EU, the most affected Member States have resorted to more restrictive asylum measures such as closing their borders, making the resettlement process harder for recognized refugees, preventing family reunification and accelerating the deportation of unfounded or undeserving asylum seekers to their countries by adding new countries to their national SCO list. For instance, as a quick response to the security concerns and increasing criticism caused by the massive arrival and acceptance of Syrian and African asylum seekers in Germany since last year, the German government has suggested recognizing Morocco, Algeria and Tunisia as SCOs.

Ultimately, the most disturbing aspect of the SCO rule is that it reflects and meets, more than any other restrictive measure, the political, economic and social interests of the Western countries instead of ensuring effective international protection for persons who truly need it. Exempting a third country's nationals from the prerequisite of having a visa is a decisive factor in the intergovernmental relationship between the destination State and the country of origin. Though recognizing a country of origin as an SCO may best serve the receiving State's purposes by deterring and discouraging potential SCO refugee claimants from seeking international protection in the host country, the forgotten element is the life, freedom, and physical integrity of citizens that are violated in the country of origin deemed safe.

The life-threatening and dangerous ways asylum seekers manage to reach EU territory and the growing number of refugee claimants arriving at the EU's external borders reveal that the immediate, irresponsible and discriminatory responses of certain EU Member States to all these disasters may not resolve the asylum crisis in the long term and do not diminish the security, economic and social concerns raised by the presence of refugee applicants. Even restrictive measures such as the SCO and STC rules are not effective enough to reduce the heavy burden of refugee requests on such a large scale.

It is time for Western countries to wake up and accept their responsibility in strengthening the refugee protection system, as it is more vulnerable now than it has been at any other time. Countries that are far from refugee-producing zones, such as Canada and the United States, should support countries that border the crisis zones by accepting displaced persons and establishing a collaborative, workable program for allocating a specified number of asylum seekers to each receiving country in accordance with political, financial and population conditions, the cultural proximity between the asylum seekers and the refugee country in question and the ability of the third country nationals' community to support and integrate the new asylum seekers, while also attempting to identify and cure the issues that produce refugees in the country of origin.

Fortunately, the Canadian government, since 2015, has pursued a more liberal and hospitable refugee policy regarding the current refugee crisis, in particular, the refugee applications of Syrian asylum seekers. With the main purposes of giving effective response to the refugee crisis and continuing its commitment to resettle more Syrian refugees, the Canadian government has put in place certain programs such as " the Private Sponsorship of Syrian Refugees Program"[710], "the Government-Assisted Refugees Program"[711], and "the Blended Visa Office-Referred

[710] For more information, refer to: Government of Canada, Citizenship and Immigration of Canada, *Sponsor a Refugee*, 19 July 2016, online: <http://www.cic.gc.ca/englisH/refugees/sponsor/index.asp>, Canadian Council for Refugees, "Private Sponsorship of Refugees", online: < http://ccrweb.ca/en/private-sponsorship-refugees>.
[711] For more information, refer to: Government of Canada, Citizenship and Immigration of Canada, *Government-Assisted Refugees Program*, 16 Jun 2016, online: <http://www.cic.gc.ca/english/refugees/outside/gar/index.asp>.

Program"[712] which ultimately has resulted the arrival of 32,437 Syrian refugees since November 4, 2015.[713]

One the other hand, it is expected from the EU Member States to put forward the emergency responses and accept their responsibilities to manage the rising number of asylum seekers movement, in particular, the Syrian asylum seekers, and to resolve the refugee crisis burdened, in particular, on the Eastern and the Southern EU Member States. In this regard, certain steps can be very helpful to reduce the financial and social costs of the overcrowded refugee sites in some EU Member States such as Greece or Italy. As suggested by UN High Commissioner for Refugees, Filippo Grandi, it is time for all EU Member States to step up, observe their regional and international human rights commitments, and accelerate the execution of legal options such as family reunification and relocation through the EU's official relocation programme[714]. This program is proposed by the European Commission and the Council with the main purposes of transfering, through safer pathways, the persons in need of international protection from the Eastern and the Southern EU frontiers to the Northern and the Western EU Member States, protecting them from being exploited by the human smugglers, and reinforcing the solidarity between the EU Member States in controlling the mass movement of asylum seekers in EU.[715]

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[712] Government of Canada, Citizenship and Immigration Canada, *Blended Visa Office-Referred Program*, 30 August 2016, online: <http://www.cic.gc.ca/english/refugees/sponsor/vor.asp>, Canadian Council for Refugees, "Statement on Blended Visa Office-Referred Program", 21 July 2016, online: <http://ccrweb.ca/en/BVOR-statement>.

[713] Government of Canada, Citizenship and Immigration of Canada, *Welcome Refugees, Key Figures*, 14 October 2016, online: < http://www.cic.gc.ca/english/refugees/welcome/milestones.asp>.

[714] The United Nations High Commissioner for Refugees, "UNHCR chief says Greece needs EU help to manage its refugee crisis", 24 August 2016, online: <http://www.unhcr.org/news/latest/2016/8/57bdcb144/unhcr-chief-says-greece-needs-eu-help-manage-its-refugee-crisis.html?query=refugee crisis, solution, EU>, For more information about the EU Relocation and Resettlement Program, refer to: European Union, European Commission, *Relocation and Resettlement: Increased efforts on resettlement and relocation must be sustained*, 15 June 2016, online: <http://europa.eu/rapid/press-release_IP-16-2178_en.htm>.

[715] European Union, European Commission, *Enhancing legal channels: Commission proposes to create common EU Resettlement Framework*, p.1, 13 July 2016, online: <http://europa.eu/rapid/press-release_IP-16-2434_en.htm>, European Union, *Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council*, COM(2016) 468 final, 13 July 2016, online: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-468-EN-F1-1.PDF>.

The Western countries can no longer ignore the disturbing fact that human rights disasters are a permanent feature of a global society. Remaining passive before all these human rights crises, closing borders or applying deterrent asylum rules are not acceptable responses either to a specific situation or as a long-term solution. Many rejected or deported asylum seekers continue trying to reach a country they consider safe for themselves by risking their lives on a more dangerous journey, if they are not killed or imprisoned upon being returned to their “safe” country of origin.

TABLE OF BIBLIOGRAPHY

1. LEGISLATION

a) Constitutional text

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act of 1982, [enacted as Schedule B to the Canadian Act 1982, 1982, c. 11 (U.K.)]

b) Federal text

Bill C-11: An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act (Balanced Refugee Reform Act), introduced on 30 March 2010, received Royal Assent on 29 June 2010.

Bill C-31: Protecting Canada Immigration System Act, SC 2012, c 17

Federal Courts Citizenship, Immigration and Refugee Protection Rules, (SOR93/22)

Immigration Act, 1976-1977, c.52, s. 1

Immigration Regulations, Order in Council PC 1967-1616, 1967

Immigration and Refugee Protection Act, S.C. 2001, c.27

Immigration and Refugee Protection Regulations, (SOR/2002- 227)

c) European Union text

European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN>

European Union, *Convention Implementing the Schengen Agreement of 14 June 1985 between the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders ("Schengen Implementation Agreement")*, 19 June 1990, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):en:HTML>

European Union, *Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, 29 April 2004, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML>

European Union, *Council Directive 2005/85/EC of 1 December 2005 on minimum standard on procedures in the Member States for granting and withdrawing refugee status*, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32005L0085&from=EN>

European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0115&from=EN>

European Union, *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 guaranteed*, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0095&from=EN>

European Union, *Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection (recast)*, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013L0032&from=en>

Protocol on asylum for nationals of Member States of the EU (Aznar Protocol), Protocol annexed to the Treaty establishing the European Community, OJ C 115, 9.5.2008, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E/PRO/24&from=EN>

Treaty Establishing the European Community (Consolidated Version), Rome Treaty, 25 March 1957, online: <http://www.refworld.org/docid/3ae6b39c0.html>

Treaty of Maastricht, *the Treaty on European Union*, 7 February 1992, online: <http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_on_european_union/treaty_on_european_union_en.pdf>

Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, and certain related acts (Consolidated version), (97/C 340/01), 10 November 1997, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1997:340:FULL&from=EN>

d) International text

Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities - Dublin Convention, (15 June 1990), online:
<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41997A0819(01)&from=EN>

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention on Human Rights*), (4 November 1950), online:
<https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/Convention_ENG.pdf>

The Schengen acquis - Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, (14 June 1985), online:
<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:42000A0922%2801%29&from=EN%3E>

The United Nations General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, (10 December 1984), online:
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>

The United Nations General Assembly, *Convention on the Right of the Child*, (20 November 1989), online: <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

The United Nations General Assembly, *International Convention on Civil and Political Rights*, (16 December 1966), online: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

The United Nations General Assembly, *Universal Declaration of Human Rights*, (10 December 1948), online: <http://www.un.org/en/universal-declaration-human-rights/>

The 1951 United Nations Convention Relating to the Status of Refugees, (28 July 1951) online:
<http://www.unhcr.org/3b66c2aa10.html>

2. JURISPRUDENCE

a) Canadian Judgement

A.T.V. v. *Canada (Minister of Citizenship and Immigration)* [2008] F.C.J. No. 1540

Canada (Attorney General) v. *Bedford* [2013] 3 S.C.R. 11.1

Canadian Doctors for Refugees v. *Canada (Attorney General)* [2015] F.C.J. 147

Charkoui v. *Canada (Minister of Citizenship and Immigration)* [2007] S.C.J. No.9

Freitas c. *Canada (Minister of Citizenship and Immigration)* [1999] 2 F.C. 432

Hercegi c. *Canada (Minister of Citizenship and Immigration)* [2012] F.C.J. No.273

Hornak c. *Canada (Minister of Citizenship and Immigration)* [2015] F.C.J. No.521

Lopez c. *Canada (Minister of Citizenship and Immigration)* [2010] F.C.J. No. 1589

Mina v. *Canada (Minister of Citizenship and Immigration)* [2010] F.C.J. No.1482

Pushpanathan c. *Canada (Minister of Citizenship and Immigration)* [1998] 1 S.C.R. 982

R. v. *Oakes* [1986] 1 S.C.R. 103

Singh v. *Canada (Minister of Employment and Immigration)* [1985] 1 S.C.R. 177

Sow v. *Canada (Minister of Citizenship and Immigration)* [2011] F.C.J. No.824

Varga c. *Canada (Minister of Citizenship and Immigration)* [2014] F.C.J. No. 1092

Withler v. *Canada (Attorney General)* [2011] S.C.J No.12

Y.Z. v. *Canada (Minister of Citizenship and Immigration)* [2015] F.C.J. No.880

b) European Court of Justice Judgement

A, B, C v. *Staatssecretaris van Veiligheid en Justitie*, Joined Cases C-148/13 to C-150/13, 2 December 2014, online: <http://curia.europa.eu/juris/celex.jsf?celex=62013CJ0148&lang1=en&type=TXT&ancre=>

Brahim Samba Diouf v. *Ministre du Travail, de l'Emploi et de l'Immigration*, Case C-69/10, 28 July 2011, online :
<http://curia.europa.eu/juris/celex.jsf?celex=62010CJ0069&lang1=en&type=TXT&ancre=>

Georg Dörr v. *Sicherheitsdirektion für das Bundesland Kärnten, and Ibrahim Ünal* v. *Sicherheitsdirektion für das Bundesland Vorarlberg*, *Case* C-136/03, 2 June 2005, online:
<http://curia.europa.eu/juris/celex.jsf?celex=62003CJ0136&lang1=en&type=TXT&ancre=>

H. I. D. and B. A. v *Refugee Applications Commissioner and Others*, Case C-175/11, 31 January 2013, online:
<http://curia.europa.eu/juris/celex.jsf?celex=62011CJ0175&lang1=en&type=TXT&ancre=>

Khaled Boudjlida v. *Préfet des Pyrénées-Atlantiques*, Case C-249/13, 11 December 2014, online:
<http://curia.europa.eu/juris/celex.jsf?celex=62013CJ0249&lang1=en&type=TXT&ancre=>

Marguerite Johnston v *Chief Constable of the Royal Ulster Constabulary*, Case 222/84, 15 May 1986, online:
<http://curia.europa.eu/juris/celex.jsf?celex=61984CJ0222&lang1=en&type=TXT&ancre=>

M.G and N.R v. *Staatssecretaris van Veiligheid en Justitie*, Case C-383/13 PPU, 10 September 2013, online:
<http://curia.europa.eu/juris/celex.jsf?celex=62013CJ0383&lang1=en&type=TXT&ancre=>

Parliament v. *Council*, (2008) C-133/06, online:
<http://curia.europa.eu/juris/celex.jsf?celex=62006CJ0133&lang1=en&type=TXT&ancre=>

Transocean Marine Paints Association v. *Commission of the European Communities*, Case 17/74, 23 October 1974, online:
<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61974CJ0017&from=EN#CO>

Unibet (London) Ltd and Unibet (International) Ltd v. *Justitiekanslern*, Case C-432/05, 13 March 2007, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62005CJ0432&from=EN>

c) European Court of Human Rights judgement

Conka v. *Belgium*, Application no.51546/99, 5 February 2002, online:
<http://hudoc.echr.coe.int/eng?i=001-60026>

Gebremedhin v. *France*, Application no. 25389/09, 26 Avril 2007, online:
<http://hudoc.echr.coe.int/eng?i=001-80333>

Jabari v. *Turkey*, Application no. 40035/98, 11 July 2000, online: <http://hudoc.echr.coe.int/fre?i=001-58900>

Labsi v. *Slovakia*, Application no. 33809/08, 15 May 2012, online: <http://hudoc.echr.coe.int/eng?i=001-110924>

Salah Sheekh v. *the Netherlands*, Application no. 1948/04, 11 January 2007, online: <http://hudoc.echr.coe.int/eng?i=001-78986>

3. BIBLIOGRAPHY

a) Books, Monographs, and Collective Works

BATTJES, H., *European Asylum Law and International Law*, Leiden, Boston, M. Nijhoff Publishers, 2006

BOELES, P., M. den HEIJER, G. LODDER, and K. WOUTERS, *European Migration Law*, 2nd edition, Cambridge, Intersentia, 2014

CARASCO, E.F., *Immigration and Refugee Law: Cases, Materials and Commentary*, Emond Montgomery Publications, 2007

Da LOMBA, S., *The Right to seek Refugee Status in the European Union*, Antwerp; New York, Intersentia, 2004

FERGUSON SIDORENKO, O., *The Common European Asylum System*, The Hague, The Netherlands, T.M.C Asser Press, 2007

HAILBRONNER, K., *EU Immigration and Asylum Law: commentary on EU regulations and directives*, Oxford, Beck/Hart, 2010

HAMLIN, R., *Let me be a refugee: administrative justice and the politics of asylum in the United States, Canada, and Australia*, Oxford, Oxford University Press, 2014

HAMMAR, T., *European immigration policy: a comparative study,* New York, Cambridge University Press, 1985

HATHAWAY, J.C., *The rights of refugees under international law*, New York, Cambridge University Press, 2005

HURWITZ, A., *The collective responsibility of States to protect refugees*, Oxford, Oxford University Press, 2009

JOLY, D., C. NETTLETON and H. POULTON, *Refugees: asylum in Europe?*, Boulder, Westview Press, 1992

JONES, M., and S. BAGLAY, *Refugee Law*, Toronto, Irwin Law, 2007

JULIEN-LAFERRIÈRE, F., H. LABAYE, and Ö. EDSTRÖM, *La politique européenne d'immigration et d'asile : bilan critique cinq ans après le traité d'Amsterdam = The European immigration and asylum policy : critical assessment five years after the Amsterdam Treaty*, Bruxelles, Bruylant, 2005

KELLEY, N., and M. J. TREBILCKOK, *The making of the mosaic: a history of Canadian immigration policy*, Toronto, University of Toronto Press, 2010

KNOWLES, V., *Strangers at Our Gates: Canadian Immigration and Immigration Policy, 1540-1997*, Toronto, Dundurn Press, 1997

b) Scientific Journals and Collective Works Articles

ACKERS, D., "The Negotiations on the Asylum Procedures Directive", (2005) 7(1) *European Journal of Migration and Law* 1

ALBUQUERQUE ABELL, N., "The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees", (1999) 11(1) *International Journal of Refugee Law* 60

BOHNING, W.R., "Integration and immigration pressures in western Europe", (1991) 130(4) *International Labour Review* 445

BORCHELT, G., "The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards", (2001) 33 *Colum. Hum. Rts. L. Rev.*473

BYRNE, R., "Remedies of Limited Effect: Appeals under the forthcoming Directive on EU Minimum Standards on Procedures", (2005) 7(1) *European Journal of Migration and Law* 71

BYRNE, R., and A. SHACKNOVE, "The safe country notion in European asylum law", (1996) 9 *Harvard Human Rights Journal* 185

COSTELLO, C., "Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?", (2005) 7 *European Journal of Migration and Law* 35

COSTELLO, C., "The Asylum Procedures Directive in Legal Context: Equivocal Standards Meet General Principles" in Anneliese BALDACCINI, Elspeth GUILD and Helen TONER (dir), *Whose freedom, security and justice*, Oxford, Hart, 2007

COSTELLO, C., E. HANCOX, "The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum Seeker and the Vulnerable Refugees", 5 February 2015, Oxford Legal Studies Research Paper No. 33/2015, Forthcoming in Vincent CHETAIL, Philippe De BRUYCKER, and Francesco MAIANI (dir.), *Reforming the Common European Asylum System: The New European Refugee Law*, Martinus Nijhoff, 2015, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2609897>

CRÉPEAU, F., ET D. NAKACHE, "Controlling Irregular Migration in Canada-Reconciling Security Concerns with Human Rights Protection", (2006) 12(1) *IRPP Choices* 1

FULLERTON, M., "Failing the Test: Germany Leads Europe in Dismantling Refugee Protection", (2001) 36(2), *Texas International Law Journal* 231

FULLERTON, M., "Restricting the Flow of Asylum-Seekers in Belgium, Denmark, the Federal Republic of Germany, and the Netherlands: New Challenges to the Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights", (1988) 29(1) *Virginia Journal of International Law*, 33

GIBNEY, M.J., and R. HANSEN, "Asylum Policy in the West: past trends, future possibilities", (2003) *WIDER Discussion Papers // World Institute for Development Economics (UNU-WIDER)*, No. 2003/68, online: <http://www.econstor.eu/handle/10419/52741>

HAILBRONNER, K., "The concept of 'Safe Country' and expeditious asylum procedures: a Western European perspective", (1993) 5 *International Journal of Refugee Law* 31

HATHAWAY, J.C., "Harmonizing for Whom: The Devaluation of Refugee Protection in the Era of European Economic Integration", (1993) 26(3) *Cornell International Law Journal* 719

HUNT, M., "The Safe Country of Origin Concept in European Asylum Law: Past, Present, Future", (2014) 26(4) *International Journal of Refugee Law* 500

IPPOLITO, F., and S. VELLUTI, "The Recast Process of the EU Asylum System: A Balancing Act Between Efficiency and Fairness", (2011) 30(3) *Refugee Survey Quarterly* 24

KALIN, W., M. CARONI, and L. HEIM, "Article 33, para.1 (Prohibition of Expulsion or Return ('Refoulement')/ Défense d'Expulsion et de Refoulement) ", in Andrea ZIMMERMANN (dir.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol,* Oxford, Oxford University Press, 2011

KESSEL, G.V., "Global Migration and Asylum", (2001) 10(10) *Forced Migration Review* 10

KJAERGAARD, E., "The Concept of 'Safe Third Country' in Contemporary European Refugee Law", (1994) 6 (4) *International Journal of Refugee Law* 649

LAUTHERPACHT, E., D. BETHLEHEM, "The scope and Content of the Principle of *Non-Refoulement*: Opinion", in Erika FELLER, Volker TURK and Frances NICHOLSON (dir.) *Refugee Protection In International Law, UNHCR's Global Consultations on International Protection*, Cambridge, Cambridge University Press, 2008

MARTERSON, H., and J. MCCARTHY, "'In General, No Serious Risk of Persecution': Safe Country of Origin Practices in Nine European States", (1998) 11(3) *Journal of Refugee Studies* 304

PEERS, S., "Key Legislative Developments on Migration in the European Union", (2006) 8(1) *European Journal of Migration and Law* 97

PEERS, S., "The second phase of the Common European Asylum System: A brave new world- or lipstick on a pig?", 8 April 2013, *Statewatch*, online:
< http://www.statewatch.org/analyses/no-220-ceas-second-phase.pdf>

RAMRAJ, V.V., "The Emerging Security Paradigm in the West: A Perspective from Southeast Asia", (2003) 4(1) *Asia Pacific Journal on Human Rights and the Law* 1

REHAAG, S., "Judicial Review of Refugee Determinations: The Luck of the Draw", (2012) 38(1) *Queen's Law Journal* 1

ROUSSEAU, C., F. CRÉPEAU, P. FOXEN, and F. HOULE, "*The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee Board*" (2002) 15(1) *Journal of Refugee Studies* 43

SCHMITZ, C., "Federal Court reopens door to Roma refugees", (2014) 34(27) *The Lawyers Weekly 1*

SHECKNOVE, A., "From Asylum to Containment", (1993) 5(4) *International journal of refugee law* 516

SHOWLER, P., «Fast, Fair and Final: Reforming Canada's Refuge System», 2009, *The Maytree Foundation*, online:
<http://www.maytree.com/wp-content/uploads/2009/07/FastFairAndFinal.pdf>

SHOWLER, P., "Proposed Refugee Reforms may be a step towards a Faster, Fairer System", 30 March 2010, *The Maytree Foundation*, online: <http://www.maytree.com/wp-content/uploads/2010/03/REFUGEE-FORUM-__Press-Release.pdf>

WEIDLICH, S., "First Instance Asylum Proceedings in Europe: Do Bona Fide Refugees Find Protection", (2000) 14(3) *Geo. Immigr. LJ* 643

c) Governmental Documents

i. Canada

Government of Canada, Citizenship and Immigration Canada, *Backgrounder-Designated Countries of Origin*, 2012, online: <http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-02-16i.asp?_ga=1.4410874.85214719.1442608782>

Government of Canada, Citizenship and Immigration Canada, *Backgrounder – Designated Countries of Origin*, 2012, online: <http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-11-30.asp>

Government of Canada, Citizenship and Immigration Canada, *Blended Visa Office-Referred Program*, 30 August 2016, online: <http://www.cic.gc.ca/english/refugees/sponsor/vor.asp>

Government of Canada, Citizenship and Immigration Canada, *Changes at the Immigration and Refugee Board of Canada (IRB)*, 15 December 2012, online: <http://www.cic.gc.ca/english/refugees/reform-irb.asp>

Government of Canada, Citizenship and Immigration of Canada, *Government-Assisted Refugees Program*, 16 Jun 2016, online: <http://www.cic.gc.ca/english/refugees/outside/gar/index.asp>

Government of Canada, Citizenship and Immigration Canada, *Harper Government Introduced the Protecting Canada's Immigration System*, 16 February 2012, online: <http://news.gc.ca/web/article-en.do?nid=657129>

Government of Canada, Citizenship and Immigration Canada, *Order Establishing Quantitative Thresholds for the Designation of Countries of Origin*, Canada Gazette, 15 December 2012, online: <http://www.gazette.gc.ca/rp-pr/p1/2012/2012-12-15/html/notice-avis-eng.html>

Government of Canada, Citizenship and Immigration Canada, *Speaking notes for The Honourable Jason Kenney, P.C., M.P., Minister of Citizenship, Immigration and Multiculturalism*, 14 December 2012, Ottawa, online: <http://www.cic.gc.ca/english/department/media/speeches/2012/2012-12-14.asp>

Government of Canada, Citizenship and Immigration of Canada, *Sponsor a Refugee*, 19 July 2016, online: <http://www.cic.gc.ca/englisH/refugees/sponsor/index.asp>

Government of Canada, Citizenship and Immigration Canada, *Summary of Changes to Canada's Refugee System in the Protecting Canada's immigration System Act*, 2012, online: <http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-02-16f.asp>

Government of Canada, Citizenship and Immigration of Canada, *Welcome Refugees, Key Figures*, 14 October 2016, online: <http://www.cic.gc.ca/english/refugees/welcome/milestones.asp>

Government of Canada, Citizenship and Immigration Canada, *Welcome Refugees: Milestones and key figures*, online: <http://www.cic.gc.ca/english/refugees/welcome/milestones.asp>

Immigration and Refugee Board of Canada, *Claimant's Guide*, modified on 21 January 2016, online: <http://www.irb-cisr.gc.ca/Eng/RefClaDem/Pages/ClaDemGuide.aspx#_Toc340245791>

Parliament of Canada, *Bill C-31: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act*, Publication No. 41-1-C31-E, 29 February 2012, Revised 4 June 2012, online: <http://www.lop.parl.gc.ca/content/lop/LegislativeSummaries/41/1/c31-e.pdf>

Parliament of Canada, *Legislative Summary of Bill C-11: An Act to amend the Immigration and Refugee Protection Act and the Federal Courts Act (Balanced Refugee Reform Act)*, Publication No. 40-3-C11-E, 12 May 2010, Revised 12 January 2011, online: <http://www.lop.parl.gc.ca/Content/LOP/LegislativeSummaries/40/3/c11-e.pdf>

Parliament of Canada, *First Reading of Bill C-31: An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act*, First Session, Forty-first Parliament, 60-61 Elizabeth II, 16 February 2012, online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5391960&File=48#8>

Parliament of Canada, *Bill C-31 as amended by the Standing Committee on Citizenship and Immigration as a working copy for the use of the House of Commons at report stage and as reported to the House*, First Session, Forty-first Parliament, 60-61 Elizabeth II, 14 May 2012, online: http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5581460>

Parliament of Canada, *Bill C-31: as passed by the House of Commons*, First Session, Forty-first Parliament, 60-61 Elizabeth II, 11 June 2012, online: http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5667849>

Parliament of Canada, *An Act to amend the Immigration and Refugee Protection Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act*, First Session, Forty-first Parliament, 60-61 Elizabeth II, 28 June 2012, online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5697417>

ii. European Union

European Commission, *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, 2002, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:JOC_2002_291_E_0143_01&qid=1436380015190&from=E>

European Commission, *Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast)*, COM (2011) 319 final, 1 Jun 2011, online: <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0319_/com_com(2011)0319_en.pdf>

European Commission, *Communication from the Commission to the European Parliament and the Council- An area of freedom, security and justice serving the citizens*, Com (2009) 0262 final, 6 October 2009, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52009DC0262&from=en>

European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions an EU framework for National Roma Integration Strategies up to 2020*, COM (2011) 173 final, 5 Avril 2011, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011DC0173&from=en>

European Commission, *Enhancing legal channels: Commission proposes to create common EU Resettlement Framework*, p.1, 13 July 2016, online: <http://europa.eu/rapid/press-release_IP-16-2434_en.htm>

European Commission, "EU and Roma", online: <http://ec.europa.eu/justice/discrimination/roma/index_en.htm>

European Commission, *Implementing the EU-Turkey Statement- Questions and Answers*, 15 June 2016, online: <http://europa.eu/rapid/press-release_MEMO-16-1664_en.htm>

European Commission, *Policy Plan on Asylum: An Integrated Approach to Protection across the EU*, 17 Jun 2008, Com (2008) 360 final, online: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF>

European Commission, *Relocation and Resettlement: Increased efforts on resettlement and relocation must be sustained*, 15 June 2016, online: <http://europa.eu/rapid/press-release_IP-16-2178_en.htm>

European Commission, "Report from the Commission to the European Parliament and the Council on the Application of Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status", (Com (2010) 465 final), 8 August 2010, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010DC0465&from=EN>

European Council, *The Stockholm Programme- An Open and Secure Europe Serving and Protecting Citizens*, (2010/C 115/01), online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2010:115:FULL&from=EN>

The European Council, *EU-Turkey Statement*, 18 March 2016, online: <http://www.consilium.europa.eu/press-releases-pdf/2016/3/40802210113_en.pdf>

European Parliament, "Asylum in the European Union: The "Safe Country of Origin Principle"", November 1996, online: <http://aei.pitt.edu/4906/1/4906.pdf>

European Union*, Conclusions on Countries in Which There is Generally No Serious Risk of Persecution ("London Resolution")*, 30 November 1992, online: <http://www.refworld.org/docid/3f86c6ee4.html>

European Union, *Council Resolution of 30 November 1992 on a Harmonized Approach to Questions Concerning Host Third Countries ("London Resolution")*, 30 November 1992, online: <http://www.refworld.org/docid/3f86c3094.html>

European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum*, online: < http://www.refworld.org/docid/3f86bbcc4.html>

European Union, *Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures*, online: <http://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:31996Y0919(05)&from=EN>

European Union, *Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council*, COM(2016) 468 final, 13 July 2016, online: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-468-EN-F1-1.PDF>

Tampere European Council, Presidency Conclusions, 15 and 16 October 1999, part A, online: <http://www.europarl.europa.eu/summits/tam_en.htm>

d) International Documents

i. Canada

Amnesty International Canada, "Unbalanced Reforms: Recommendations with respect to Bill C-31", 7 May 2012, online: <https://www.amnesty.ca/sites/amnesty/files/2012-05-31unbalancedreforms.pdf>

Canadian Association of Refugee Lawyers, "Designated Countries of Origin", 14 December 2012, online: <http://www.carl-acaadr.ca/our-work/issues/DCO#Press Release DCO>

Canadian Association of Refugee Lawyers, the Canadian Civil Liberties Association, and the Canadian Council for Refugees), "Protecting Refugees from Bill C-31", March 2012, online: <http://ccrweb.ca/sites/ccrweb.ca/files/coalitionstatementc31.pdf>

Canadian Council for Refugees, "CCR decries dramatic drop in refugees resettled to Canada", 7 March 2013, online: <http://ccrweb.ca/en/bulletin/13/03/07>

Canadian Council for Refugees, "Private Sponsorship of Refugees", online: <http://ccrweb.ca/en/private-sponsorship-refugees>

Canadian Council for Refugees, "Bill C-31- Diminishing Refugee Protection, A Submission to The House of Commons' Standing Committee on Citizenship and Immigration", April 2012, online: <http://ccrweb.ca/files/ccrbriefc31.pdf>

Canadian Council for Refugees, “Canada Rolls Back Refugee Protection: Bill C-31 receives Royal Assent”, Media release, 29 June 2012, online: <http://ccrweb.ca/en/bulletin/12/06/29>

Canadian Council for Refugees, «Keeping the door open: NGOs and new refugee claim process», October 2014, online:
<http://ccrweb.ca/sites/ccrweb.ca/files/ngo-claim-process-report.pdf>

Canadian Council for Refugees, “New refugee system – one year on”, 9 December 2013, online: <http://ccrweb.ca/sites/ccrweb.ca/files/refugee-system-one-year-on.pdf>

Canadian Council for Refugees, “Protecting Refugees: Where Canada’s refugee system falls down”, May 2007, online: <http://ccrweb.ca/files/flaws_0.pdf>

Canadian Council for Refugees, Refugee Appeal Division, online: <http://ccrweb.ca/sites/ccrweb.ca/files/static-files/RADpage/PAGE0004.HTM>

Canadian Council for Refugees, “Statement on Blended Visa Office-Referred Program”, 21 July 2016, online: <http://ccrweb.ca/en/BVOR-statement>

Ontario Council of Agencies Serving Immigration, “Brief to Standing Committee on Citizenship and Immigration, Re: Bill C-31, “Protecting Canada’s Immigration System Act”, 22 April 2012, online: <http://www.ocasi.org/downloads/Bill_C-31_OCASI_Brief_to_CIMM.pdf>

The Canadian Bar Association (National Immigration Law Section), “Bill C-31: Protecting Canada’s Immigration System”, April 2012, online:
<https://www.cba.org/CMSPages/GetFile.aspx?guid=b4f81c7d-f3a0-43d4-a7f4-3d97544035e1>

The Justice for Refugees and Immigrants Coalition (comprised of Amnesty International, the United Nations High Commissioner for Refugees, Branch Office for Canada, “UNHCR Appeal – Canadian Council for Refugees”, 7 January 2000, online:
<http://ccrweb.ca/sites/ccrweb.ca/files/static-files/hcrappeal.htm>

ii. Council of Europe

Council of Europe, Parliamentary Assembly, Report of the Committee on Migration, Refugees and Displaced Persons, “The situation of refugees and migrants under the EU-Turkey Agreement of 18 March 2016”, 19 April 2016, D0c.14028.

iii. European Union

Amnesty International, European Institutions Office, “Discrimination against Roma”, online: <http://www.amnesty.eu/en/news/press-releases/eu/discrimination/roma/#.VqefDvkrLIU>

European Council on Refugees and Exiles, “ECRE Comments on the European Commission Proposal to recast the Asylum Procedures Directive”, May 2010, online: <http://www.ecre.org/topics/areas-of-work/protection-in-europe/162.html>

European Council on Refugees and Exiles, “ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status”, IN1/10/2006/EXT/JJ, October 2006, online: < http://www.refworld.org/docid/464317ab2.html>

European Council on Refugees and Exiles, “Mind the Gap. An NGO Perspective on Challenges to Accessing Protection in the Common European Asylum System”, Annual Report 2013/2014, online: <http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_annual_report_2013-2014_0.pdf>

iv. United Nations

The United Nations High Commissioner for Refugees, “Background Notes on the Safe Country Concept and Refugee Status”, 26 July 1991, para.10, online: <http://www.unhcr.org/3ae68ccec.html>

The United Nations High Commissioner for Refugees, “General Conclusion on International Protection No. 74 (XLV)”, EXCOM Conclusions, 7 October 1994, online: <http://www.unhcr.org/3ae68c6a4.html>

The United Nations High Commissioner for Refugees, “Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)”, 31 May 2001, online: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3b36f2fca>

The United Nations High Commissioner for Refugees, “Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice (A UNHCR research project on the application of key provisions of the Asylum Procedures Directive in selected Member States)”, March 2010, online: <http://www.unhcr.org/4c7b71039.pdf>

The United Nations High Commissioner for Refugees, “Lubber calls for EU asylum laws not to contravene international law”, 29 March 2004, online: <http://www.unhcr.org/40645bd77.html>

The United Nations High Commissioner for Refugees Canada, “Over one million sea arrivals reach EU in 2015”, 30 December 2015, online: <http://www.unhcr.ca/news/over-one-million-sea-arrivals-reach-europe-in-2015/>

The United Nations High Commissioner for Refugees, “Refugee/Migrants Emergency Response-Mediterranean”, 8 October 2016, online: <http://data.unhcr.org/mediterranean/regional.php>

The United Nations High Commissioner for Refugees, “The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum”, EXCOM Conclusions No. 30 (XXXIV), 20 October 1983, online: <http://www.unhcr.org/3ae68c6118.html>

The United Nations High Commissioner for Refugees, “UNHCR chief says Greece needs EU help to manage its refugee crisis”, 24 August 2016, online: <http://www.unhcr.org/news/latest/2016/8/57bdcb144/unhcr-chief-says-greece-needs-eu-help-manage-its-refugee-crisis.html?query=refugee crisis, solution, EU>

The United Nations High Commissioner for Refugees, “UNCHR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting or Withdrawing Refugee Status”, (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005, online: <http://www.unhcr.org/43661ea42.pdf>

The United Nations High Commissioner for Refugees, “UNHCR regrets missed opportunity to adopt high asylum standards”, 30 April 2004, online: <http://www.unhcr.org/40921f4e4.html>

The United Nations High Commissioner for Refugees, “UNHCR Submission on Bill C-31 Protecting Canada’s Immigration System Act”, May 2012, online: <http://www.unhcr.ca/wp-content/uploads/2014/10/RPT-2012-05-08-billc31-submission-e.pdf>

The United Nations High Commissioner for Refugees, “UNHCR Turkey: Key Facts and Figures”, September 2016, online: <http://data2.unhcr.org/en/documents/download/51498>

v. Other International Organisations

Amnesty International, "Syria's refugee crisis in numbers", 6 February 2016, online: <https://www.amnesty.org/en/latest/news/2016/02/syrias-refugee-crisis-in-numbers/>

Intergovernmental Consultations on Migration, Asylum and Refugees, "Asylum Procedures Report on Policies and Practices in IGC Participating States", 2009, online: <http://www.igc-publications.ch/pdf/IGC_AsylumProcedures_2009_Bluebook.pdf>

Statewatch, "NGOs call for withdrawal of EU draft asylum procedures Directive", 22 March 2004, online: <http://www.statewatch.org/news/2004/mar/ngo-asylum-letter.pdf>

e) Newspaper Articles and Working Papers

COHEN, T., "Critics slam Canada's new 'safe' country list for refugees", 14 December 2012, Canada.com, online: <http://o.canada.com/news/national/federal-government-unveils-list-of-countries-it-deems-safe-for-refugees>

COHEN, T., "Number of asylum claim drops dramatically after Ottawa releases list of 'safe' countries", August 13, 2013, National Post, online: <http://news.nationalpost.com/news/canada/number-of-asylum-claims-drops-dramatically-after-ottawa-releases-list-of-safe-countries>

HUMPHREYS, A., "Refugee claim acceptance in Canada appears to be 'luck of the draw' despite reforms, analysis shows", *National Post*, April 15, 2014, online: <http://news.nationalpost.com/news/canada/refugee-claim-acceptance-in-canada-appears-to-be-luck-of-the-draw-despite-reforms-analysis-shows>

HUNE-BROWN, N., "The Family that Won't Leave", 23 September 2014, *TORONTO LIFE*, online: <http://torontolife.com/city/the-family-that-wont-leave/>

Justice MACTAVISH, A.L., "The Role of the Federal Court in the Canadian Refugee Determination Process", CARFMS/ACERMF Working Paper No: 2015/1, October 2015, online: <http://carfms.org/wp-content/uploads/2015/10/CARFMS-WPS-No1-Anne-Mactavish.pdf>

LEVITZ, S., "EU countries dominate new list is affecting refugee claims in Canada", The Canadian Press, 14 December 2012, online: <http://globalnews.ca/news/319531/eu-countries-dominate-new-list-affecting-refugee-claims-in-canada-3/>

NERENBERG, K., “Canada is poised to give comfort to ‘hateful, xenophobic nutbars’”, 1 December 20102, *rabble.ca Blogs*, online: <http://rabble.ca/blogs/bloggers/karl-nerenberg/2012/12/canada-poised-give-comfort-%E2%80%98hateful-xenophobic-nutbars%E2%80%99>

SACHS, L., “(Europe: The debate over asylum) – Roma: Five centuries of discrimination...and still counting”, *Refugees Magazine*, Issue 113, 1 January 1999, online: <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3b811c144&query=Roma,%20Europe>

WESTHEAD, R., “Why the Roma are fleeing Hungary and why Canada is shunning them?”, 13 October 2012, *thestar*, online: <http://www.thestar.com/news/world/2012/10/13/why_the_roma_are_fleeing_hungary_and_why_canada_is_shunning_them.html>