

Université de Montréal

**Right to Asylum and Border Control: Implications of European Union
Policies on Access to EU Territory of People in Need of International
Protection**

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Access to EU Territory of People in Need of International Protection

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Résumé

Depuis plusieurs années, les États membres de l'Union européenne (UE) se soumettent à des politiques restrictives, en matière d'asile, qui les contraignent à respecter leur engagement de protéger les personnes qui fuient la persécution.

Plusieurs politiques de dissuasion de l'UE sont controversées. Certaines ont d'abord été élaborées dans différents États, avant que l'UE ne mette en place une politique commune en matière d'asile. Certaines de ces politiques migratoires ont été copiées, et ont un effet négatif sur la transformation des procédures d'asile et du droit des réfugiés dans d'autres pays, tel le Canada.

En raison des normes minimales imposées par la législation de l'UE, les États membres adoptent des politiques et instaurent des pratiques, qui sont mises en doute et sont critiquées par l'UNHCR et les ONG, quant au respect des obligations internationales à l'égard des droits de la personne.

Parmi les politiques et les pratiques les plus critiquées certaines touchent le secteur du contrôle frontalier. En tentant de remédier à l'abolition des frontières internes, les États membres imposent aux demandeurs d'asile des barrières migratoires quasi impossibles à surmonter. Les forçant ainsi à s'entasser dans des centres de migration, au nord de l'Afrique, à rebrousser chemin ou encore à mourir en haute mer.

Mots-clés : Asile – Union européenne – Contrôle frontalier – Protection internationale – Base de données – Mécanismes de conformité de l'UE

Abstract

For many years, EU member states have imposed strict controls on asylum and have often failed to respect their commitment to provide protection to persons fleeing persecution. Many of the controversial EU policies of deterrence have been developed by different member states and implemented on an EU level. Some of those policies have been copied and brought negative changes to the refugee law system in other countries, such as Canada. Under the minimal standards imposed by the EU legislation, the states are adopting and putting in place policies and practices whose compliance with the international human rights obligations is questionable and criticized by the UNHCR and NGOs.

Some of the most controversial policies and practices put in place are in the area of border control. Aiming to compensate for the abolishment of internal borders, EU member states are imposing nearly insurmountable barriers to asylum seekers who find themselves suffocating in migration centres in North Africa, turned back or left to die at high sea.

Keywords: Asylum – European Union – Border control – International protection – Databases – EU compliance mechanisms

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Abbreviations

AFSJ	Area of Freedom, Security and Justice
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
CEAS	Common European Asylum System
DARIO	Draft Articles on Responsibility of International Organizations
EASO	European Asylum Support Office
EBF	External Borders Fund
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	Court of Justice of the European Union
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
ETA	Electronic Travel Authorisation
EU	European Union
IBM	Integrated Border Management
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
IRL	International Refugee Law
RPP	Regional Protection Programmes
SBC	Schengen Borders Code
SIS	Schengen Information System
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of European Union
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
VIS	Visa Information System

*It was in Europe that the institution of refugee protection was born,
it is in Europe today that the adequacy of the system is being tested.*

(Sadako Ogata, UN High Commissioner for Refugees)

INTRODUCTION

Global Regression in the Commitment to Protect Asylum-seekers and Refugees

The international refugee regime is based on the idea of providing coherent protection and assistance to people fleeing persecution through cooperation and the sharing of responsibilities among states. However, core principles of the refugee regime are jeopardised by the growing inclination of governments worldwide to circumvent their international obligations towards asylum-seekers and refugees. Unilaterally, the industrialized states of Europe, North America and Australia are introducing particularly restrictive measures that are changing the nature of the refugee regime. The restrictions put in place by the states successfully deter asylum-seekers from leaving their countries and prevent those already on the move from reaching state shores and accessing refugee determination procedure. Encouraged by the reluctant behaviour of the North,¹ the Southern states,² traditionally tolerant to asylum-seekers and refugees³ are gradually

¹ North refers to the industrialized countries of Europe, North America and Australia.

² Southern states refer to the developing countries.

³ According to United Nations High Commissioner for Refugees, there were 43.7 million forcibly displaced people worldwide at the end of 2009, the highest number in 15 years. This number includes 15,4 million refugees, 27,5million IDPs, more than 837,500 asylum-seekers whose application for asylum have not been adjudicated by the end of the reporting period. UNHCR. *Global trends 2010*, Division of Programme Support and Management, 2011 [Online] <http://www.unhcr.org/4dfa11499.html> [Accessed 2 June 2011]; In terms of refugee distribution around the world, according to UNHCR developing countries hosted four-fifths of the world's refugees. More than 4.4 million refugees, representing 42 per cent of the world's refugees, resided in countries which GDP per capita was below USD 3,000. This number includes Pakistan which hosted the largest number of refugees worldwide (1.9 million), followed by the Islamic Republic of Iran (1.1 million) and the Syrian Arab Republic (1 million; Government estimate). In the context of asylum-seekers, South Africa was the world's largest recipient of individual applications for asylum. Therefore, the least developed countries are sheltering the most displaced persons worldwide. This responsibility-sharing inequality is criticised by the UNHCR Commissioner, António Guterres, as follows: "What we're seeing is worrying unfairness in the international protection paradigm. Fears about supposed floods of refugees in industrialized countries are being vastly overblown or mistakenly conflated with issues of migration. Meanwhile it's poorer countries that are left having to pick up the burden". *Id.*

adopting the same hard-line policies. Thus, asylum-seekers and refugees worldwide are routinely subjected to interception at the borders, arbitrary arrests, detention and denial of social and economic rights, contrasting the international refugee and human rights regime. What is more, fearing political and social instability, industrialized states are increasingly focusing on “avoiding refugee flows” by keeping them close to the source countries⁴. As a result, numerous people are confined to refugee camps for decades and compelled to marginalized existence.

The regression in states’ commitment to protect asylum-seekers and refugees can be attributed to important geo- and socio-political developments⁵, which have significantly increased global migration. African decolonization, which resulted in prolonged armed conflicts, the fall of the Soviet bloc, and globalization, among other factors, has resulted in mass voluntary and involuntary displacements worldwide. Particularly, globalization has played a significant role in the change of global migration patterns⁶. Generally associated with the liberalization of international trade, globalization has brought prosperity to many societies around the world. The development of informational technologies and transportation networks has significantly facilitated the movements of people across the globe. However, the positive effects of globalization have been

⁴ Bill FRELICK, “Paradigm Shifts in the International Responses to Refugees” in James D. WHITE & Marsella J. ANTHONY (eds.) *Fear of Persecution : Global Human Rights, International Law, and Human Well-being*. Lanham, Lexington Books, 2007.

⁵ In recent years, environmental changes are also a significant factor in forced displacement.

⁶ Erika FELLER, “Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come”, (2006) 18 *International Journal of Refugee Law* 509, 510.

overshadowed by acute inequalities within and between the countries⁷. The unequal distribution of income and wealth among nations⁸ has pushed many people to cross international borders and seek better opportunities significantly increasing international migration towards developed countries.

Potential fears of floods of migrants have prompted industrialized states to engage in extensive regularization and control over their borders. With fewer possibilities for regular entrance and settlement, many people have turned to irregular entry channels⁹ and/or used an asylum channel in order to secure a better means of existence. This has oversaturated current asylum systems and blurred the distinction between people in need of protection and irregular migration for economic reasons. Entry control measures introduced by states to fight irregular migration are lacking safeguard mechanisms to make the important distinction between the different migrant groups. As rightly pointed out by Hathaway¹⁰, migrants, especially those coming from less developed part of the

⁷ According to the UN Report, 'much of the world is trapped in an inequality predicament' manifested in the 'chasm between the formal and informal economies, the widening gap between skilled and unskilled workers, the growing disparities in health, education and opportunities for social, economic and political participation.' The report concluded that the world is more unequal than it was 10 years ago. UNITED NATIONS, "*United Nations 2005 Report on World Social Situation Finds Much of World Trapped in Inequality Predicament*" " cited in E.FELLER, Op. Cit., note 6, p.510.

⁸ Eighty per cent of the world's gross domestic product belongs to the 1 billion people living in the developed world. The remaining twenty per cent is shared by the five billion people living in developing countries. UNITED NATIONS, *The inequality predicament. Report on the world social situation 2005*, New York United Nations: Department of Economic and Social Affairs, [Online] <http://www.un.org/esa/socdev/rwss/docs/2005/rwss05.pdf> [Accessed 3 December 2011].

⁹ It is estimated that fifty million people reside irregularly somewhere at present. This number may be higher because it is difficult to make an accurate estimation. Catherine DAUVERGNE, *Making People Illegal : What Globalization Means for Migration and Law*, New York, Cambridge University Press, 2008, p.14.

¹⁰ James C. HATHAWAY, "Harmonizing for Whom- the Devaluation of Refugee Protection in the Era of European Economic Integration", (1993) 26 *Cornell International Law Journal* 719, 723.

world, are treated as “an undifferentiated evil: refugees, economic migrants, drug traffickers, and terrorists are officially categorized as presenting a unified threat and will all confront a common policy of deterrence”. Thus, asylum-seekers and refugees are treated as a sub-group of irregular migrants¹¹, which undermines the protection owed to them by the state and leads to dangerous consequences such as refoulement to countries where there is a risk of torture, inhuman or degrading treatment or punishment.

The terrorist attacks on September 11, 2001 (9/11 attacks) on the USA, followed by other significant terrorist activities in Europe¹² placed the issue of national security high on the political agenda and accelerated the erosion of the refugee protection. Fears that terrorists may resort to asylum channels¹³ to enter state territory have resulted in even more restrictions, extensive border and background checks and wide state discretion in granting international protection. Some of those restrictive practices have been underway long before the 9/11 attacks happened. However, these tragic events were used by governments to justify the restrictive measures where emphasis was placed on security with little care for the rights of asylum-seekers and refugees.

The ‘War on terror’ and the radical discourse used for political gain completely changed the common perception of asylum-seekers and refugees. Increasingly, asylum-seekers and refugees are perceived as potential security threats. Moreover, due to restriction on asylum processes many people in need of protection have resorted to use the ‘services’

¹¹ E. FELLER, *Op. Cit.*, note 6, p.516.

¹² Madrid bombing in 2004 and the attack of the London subway in 2005.

¹³ There is lack of evidence suggesting that terrorists may abuse asylum channels. Asylum procedures are rigid with extensive background checks, fingerprinting, etc., which make them very unattractive to terrorists.

of smugglers and traffickers. This has additionally intensified their association with criminals¹⁴ who abuse western generosity. The media has also played part in such association by additionally blurring the distinction between different categories of migrants. This has further intensified the anti-refugee discourse and xenophobia towards third country nationals. All of this has fertilized the ground for the rise of nationalistic movements, which have negatively influenced states', policies on asylum.

Asylum-seekers and refugees who manage to reach the shores of industrialize states find themselves with less rights and possibilities to have a fair and unbiased determination of their claim for protection. Treated as an irregular migration sub-group, they are penalized for the act of seeking asylum. For the sake of security, states are inclined to compromise their international obligations, thus endangering the existence of the international refugee regime. Undoubtedly, it is a great challenge for the states to uphold asylum in the context of mix migratory flows. However, border security for the well-being of the country's own population should not be done at the expense of refugee rights.

EU: More Restrictions to Access to Asylum

For many years, the EU member states have imposed strict controls on asylum and often fail to respect their commitment to provide protection to persons fleeing persecution. Controlling migration flows is one of the main priorities for EU and its member states.

¹⁴ Joan FITZPATRICK, "Flight from Asylum: Trends toward Temporary "Refuge" and Local Responses to Forced Migrations", (1995) 35 *Virginia Journal of International Law* 13, 29.

Thus, it can be stated that the common EU asylum policy is primarily focussed on keeping asylum-seekers and refugees away from European territory. Many of the controversial EU policies of deterrence such as ‘*safe country of origin*’ or ‘*safe third country*’¹⁵ have been developed by different member states and implemented on an EU level. Some of those policies have been copied and brought negative changes to the refugee law system in other countries such as Canada¹⁶. Under the minimal standards imposed by EU legislation, the states are adopting and putting policies and practices in place whose compliance with the international human rights obligations is questionable and criticized by the UNHCR and NGOs¹⁷. Moreover, as the Common European Asylum System (CEAS)¹⁸ is still a work in progress, asylum-seekers and refugees are subjected to different treatment depending on the member state in which they happen to

¹⁵ “The ‘safe country of origin’ principle allows states to deny refugees access to the asylum system on the grounds that human rights are so well protected in their country of origin that persecution severe enough to cause people to flee never occurs. The principle is different (though not unrelated) to the ‘safe third country’ rule, under which refugees can be turned away at the EU’s external borders or sent back to ‘safe’ countries through which they have passed to make their asylum applications.” STATEWATCH, *EU Divided Over List of “Safe Countries of Origin”. Statewatch Calls for the List to be Scrapped*, 2004 [Online] <http://www.statewatch.org/news/2004/sep/safe-countries.pdf> [Accessed 2 July 2011].

¹⁶ 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> [Accessed 3 April 2012].

¹⁷ UNHCR & ECRE, *Asylum in Europe: now is up to you. An information package of six factsheets and one leaflet on key European Union asylum issues, developments and legislation*, 2009 [Online] <http://www.unhcr.org/cgi-bin/texis/vtx/search%5C?page=&comid=4a9d19d86&cid=49aea9390&keywords=Asylum%20Europe%20Factsheets&sort=title> [Accessed 3 December 2011]; AMNESTY INTERNATIONAL, *Refugee and Human Rights Organisations Across Europe Call on EU to Scrap Key Asylum Proposal*, 2004 [Online] <http://www.amnesty.eu/en/documents/asylum-and-migration/%28%2819%29%29/> [Accessed 3 December 2011].

¹⁸ The Common European Asylum System consists of measures encompassing several issues in regards to asylum such as reception of asylum seekers, criteria for granting refugee status or subsidiary protection status, asylum procedures, responsibility-sharing among EU states for an asylum case, granting a temporary protection, family reunification. The aim of those legislative measures is to harmonize the common minimum standards for asylum among EU member states. CEAS finds its legal base in art.63 of the Treaty of Amsterdam.

land (as there are still huge differences between national asylum systems of the EU member states¹⁹).

Some of the most controversial policies and practices put in place by EU member states are in the area of border control. Aiming to compensate for the abolishment of internal borders, EU member states are imposing nearly insurmountable barriers to asylum-seekers who find themselves suffocating in migration centres in North Africa, turned back, or left to die at sea. New policies and systems for border control are being debated and developed without sufficient knowledge and thorough research on their efficiency and impact on persons subjected to them. Databases to regulate the movement of migrants have been developed at a fast pace with few safeguards for the respect of fundamental rights, such as privacy and non-discrimination among others.

Frontex, the European Agency for the Management of Operational Cooperation at the External Borders, is operating without a clear mandate, lacking any fundamental rights framework. Member states, on the other hand, are using some lacunas within the international law to intercept people at high sea and turn them back to the port of departure. What is worse is that attempts have been made to externalize border control and transfer the responsibility for protection of asylum-seekers to third countries. Thus, instead of championing the rights of asylum-seekers and upholding the international

¹⁹ EUROPEAN PARLIAMENT, *Improving the Quality and Consistency of Asylum Decisions in the Council of Europe Member States*, 2009 [Online]
<http://assembly.coe.int/Documents/WorkingDocs/Doc09/EDOC11990.pdf> [Accessed 2 April 2011].

obligations, the EU has become a “Fortress” hostile to people in need of international protection.

Aim of the Research

The main objective of the research is to explore how the access of asylum-seekers to EU territory is impeded by some of the EU policies on asylum. We will concentrate mainly on the border control policies because this is the area in which our observations can most easily be demonstrated. Since EU laws and policies tackling asylum issues is impossible to be subjected to an in-depth analysis, due to volume constrains, we have selected only few aspects of the latter to shed light on the hostile treatment of asylum-seekers even before they have entered the territory of the member states.

The present research does not carry the ambition to invent new approaches in treating asylum-seekers at EU shores according to international human rights standards. Our aim is to explore current EU practices in the area of cross-border movements and their compliance with international and EU law for protection of asylum-seekers. We are particularly interested in exploring the effectiveness of mechanisms within EU asylum policies to assure access of asylum-seekers to refugee determination procedures, on one hand, and to hold member states and EU institution responsible for violations of protection obligations, on the other hand. The availability of efficient mechanisms for protection is of utmost importance given the leading role of the EU on the international scene and its influence in advancing protection of asylum-seekers. Based on the results of our analysis we will attempt to suggest improvements of already existing policies to

assure higher standards of treatment of asylum-seekers. Finally, our hope is to advance the argument of prominent scholars and other human rights activists that the states' interests such as border security can be completely protected only if the basic human rights of the citizens and third country nationals are respected. Therefore, there is no need border security to be achieved at the expense of the rights of asylum-seekers and refugees.

To that end, our attention will be focused on the international obligations arising from the various international legislative acts and their (miss)interpretation by states, including those of the EU, that want to avoid their responsibilities of protecting asylum-seekers. Thus, the analysis will be situated within the context of the compatibility of the selected EU asylum policies with the international law, including international refugee law and human rights law. In addition, the research will explore the scope of the access to asylum in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)²⁰ and the Charter of Fundamental Rights of the European Union (EU Charter)²¹ and the ability of the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (ECJ) to establish enforceable standards allowing the unimpeded access of asylum-seekers to EU territory.

The first part of the paper will introduce the scope of the right to asylum in international law. The EU as a legal entity and its member states as sovereign countries have

²⁰ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, [Online] <http://www.unhcr.org/refworld/docid/3ae6b3b04.html> [Accessed 30 November 2011]

²¹ *Charter of Fundamental Rights of the European Union*, 18 December 2000, O.J (2000/C 364/01), [Online] <http://www.unhcr.org/refworld/docid/3ae6b3b70.html> [accessed 29 June 2012]

obligations under international law to secure access to their territory for asylum-seekers. Moreover, regional instruments such as the ECHR have emerged as a complementary and effective tool for the protection of asylum seekers and refugees in Europe. The EU Charter, that now has binding force, has introduced the right to asylum into the EU law, thus obliging not only the EU institutions but also the member states, at least when implementing EU legislation. In the second part, we will explore the main trends in the development of the EU asylum acquis over the years to understand better the current restrictive policies towards asylum-seekers. The third part aims to discuss the various databases put in place for border control and the role they play in imposing barriers to asylum in EU. Here, we will demonstrate the impact of the Schengen Information System (SIS), Visa Information System (VIS) and Eurodac and their operation as tools for controlling migration and for imposing additional barriers to asylum. The fourth part of the paper will examine how member states and Frontex conduct the border control in the Mediterranean region. The joint operations in high sea are particularly demonstrative for the reluctance of member states to live up to their obligations towards asylum-seekers. The fifth part will discuss the extra-territorialisation of EU asylum policy and the way member states are subcontracting their international protection responsibilities to third states. Lastly, the paper will examine the existing mechanism to initiate enforcement procedures against member states that do not comply with EU law and discuss the efficacy of these provisions.

Throughout the paper, we will attempt to answer the following questions: 1) is the EU asylum policy designed in a way to deprive asylum seekers from accessing the EU territory and exercise their right to asylum. 2) If yes, what is the logic behind that and

does it require denial of the right to asylum? In other words, can a better balance be achieved between complying with human rights obligations and various state interests, such as keeping EU territory secure? Our intention is to demonstrate that the main objective of the common EU policy on asylum is not to comply with international human rights law and standards but to control who is entering the EU territory and prevent potential asylum-seekers from exercising their right to asylum.

Theoretical framework

The perception of borders is constantly changing depending on the politico-social climate of given time. This reflects upon the way states are controlling their borders. However, it was not until the nineteenth century when the doctrine of national sovereignty became widely accepted, implying the right and the legitimate authority of the state to have exclusive control within its territory and across its borders²². Controlling movement across frontiers became a priority of the western liberal states. New approaches and methods for border control to counter some of the current challenges, such as international terrorism and increased migration, resulted in shifting the borders away from the physical geographical demarcations. Sophisticated technologies and databases for border control are being constantly developed and put to use. Such rapid shift in border control has negatively affected the migration of people. However, persons in need of international protection were affected the most.

²² Malcolm ANDERSON, "The Transformation of Border Controls: a European Precedent", in ANDREAS, P. & SNYDER, T. (eds.), *The Wall Around the West : State Borders and Immigration Controls in North America and Europe*, Lanham, Rowman & Littlefield, 2000, p.18.

For the purposes of our research, the right of free movement across borders of each individual will be defended as the only alternative to the prevalent control over state borders. The right will be analyzed within some concepts developed by libertarian doctrine, reflected through the natural law, which is defending the universality of the individual rights. Such framework will assist us to have better understanding of EU border control and other asylum policies and the way they interact with the free movement of people, most specifically with the access of asylum-seekers to the EU territory. The understanding that the right of free movement is a basic human right will set the goal for higher standard of treatment of these populations by EU and its member states.

The mainstream view in terms of migration adopted by the liberal democratic states is that state, owing to its sovereignty, is at liberty to decide who can enter its territory and to whom such privilege should be denied. And while states have the liberty to be generous in granting entry to foreigners, they are under no obligation to do so²³. One of the most prominent defenders of such an approach among the theorists is Michael Walzer. Defending the communitarian view, Walzer argues that individuals living in one community have the exclusive right to the distribution of membership to that community, according to that community's common understanding of self-determination²⁴. Thus states, one of the widely accepted forms of human community, can be compared with clubs, according to Walzer. As clubs have pre-selection criteria

²³Joseph H. CARENS, "Aliens and Citizens: the Case for Open Borders", (1987) 49 *The Review of Politics* 251, 251.

²⁴Michael WALZER, *Spheres of Justice : a Defense of Pluralism and Equality*, New York, Basic Books, 1983, p.31-32.

for admission of applicants to whom they choose to distribute membership, in the same way states are entitled to establish criteria for exclusion and inclusion of foreigners.

On the other end of the free movement debate, Joseph Carens defends the liberal egalitarian view of the right of each individual to move freely. Reflecting on the contemporary meaning of citizenship, Carens compares it to a feudal status from the medieval world: assigned by birth, it determines one's life opportunities for individual development. He argues that when affluent countries like Canada are limiting entry to their territory this equals to protection of birthright privilege. Therefore, modern exclusionary practices employed by the affluent countries are feudal restrictions to free movement of people²⁵. For Carens, such practices challenge the equal moral worth of each individual and their right to equal opportunities and treatment.

Can free movement of people be considered as a basic human right? The natural law tradition recognizes certain rights as inherent or universal to each human by virtue of human nature. However, as rightly observed by Ann Dummett²⁶, modern political philosophy too often constrains the entitlement of rights and obligations of each individual within the relationship with a given state. Thus, in states where the theory of universal rights is accepted, those rights are translated into "citizens' rights" in order to reflect that bond²⁷. Consequently, fewer rights are accorded to the residents who are not

²⁵ Joseph H. CARENS, "Migration and Morality: a Liberal Egalitarian Perspective" in B. M. BARRY & R. E. GOODIN (eds.) *Free Movement : Ethical Issues in the Transnational Migration of People and of Money*, Pennsylvania, State University Press, 1992, p. 26-27.

²⁶ Ann DUMMETT, "The Transnational Migration of People Seen from within a Natural Law Tradition" in B. M. BARRY & R. E. GOODIN (eds.) *Free Movement : Ethical Issues in the Transnational Migration of People and of Money*, University Park, Pa., Pennsylvania State University Press, 1992, p.170.

²⁷ *Id.*

citizens of the state²⁸, which makes non-citizens second-class individuals. Such two-tiered approaches conflict fundamentally with the understanding of the universality of human rights. Thus, in order to be pragmatic, we have to defend our argument of universality of the free movement within the constraints of the contemporary framework of state dominance over individual liberties.

However, before embarking on such analysis it will be useful to develop the free movement argument within an ideal theory to serve as a standard to which states and individuals should adhere. We shall begin with Kant²⁹ and his idea for a cosmopolitan society where every stranger has the right not to be treated as an enemy by the citizens of the given state. Such behaviour is dictated by universal hospitality. The stranger has the right of visitation and as long as they comport in a peaceful manner they should not be treated with hostility. Such right of visitation or also called by Kant ‘right of resort’ is inherent to every stranger by virtue of the right of the common possession of the surface of the earth, “to no part of which anyone had originally more right than another”³⁰.

The universal ownership of the earth is a valid argument to defend the free movement of people. The Earth as well as its natural resources are no one’s achievement and belong to every human being. Thus, people living in an area where resources are scarce have the right to move to resource rich parts of the Earth. Sharing the same thinking as Carens on citizenship, Risse³¹ concludes that “all human beings, no matter when and where they

²⁸ *Id.*, p.171.

²⁹ Immanuel KANT & W. HASTIE, *Kant's Principles of Politics, Including his Essay on Perpetual Peace. A Contribution to Political Science*, Edinburgh, T. & T. Clark, 1891.

³⁰ *Id.*, p.101.

³¹ Mathias RISSE, “On the Morality of Immigration”, (2008) 22 *Ethics & International Affairs* 25, 28.

were born, are in some sense symmetrically located with regard to the earth's resources and cannot be arbitrarily excluded from them by accidents of space and time". It is morally unacceptable for vast territories with sufficient resources to be populated and utilized by few³².

In the ideal theory, the principles of justice, which govern any given society, are decided by the people regardless of their personal status (sex, race, class, etc.) or as suggested by Rawls³³ behind "a veil of ignorance." Rawls states that behind this veil most certainly people will choose the principle of equal liberties to govern their society, coupled with the principle of equal opportunities where any inequalities should be transformed to benefit those less advantaged. Such an approach will remove artificially created barriers such as citizenship and free movement will be regarded as an equal opportunity for individual growth to be enjoyed by all members of all societies.

Access to equal opportunities is the reason for constant aspiration of individuals to create new and maintain existing basic rights. Each individual has a moral equal worth, therefore is entitled to equal chances in life. As pointed by Nett³⁴ it is in a sense that justice should be defined. In his essay "The Civil Right We are not Ready for: the Right of Free Movement of People on the Face of the Earth" he remarks that today's set of basic human rights is not complete which renders those rights not functional³⁵.

³² In such case the only justifiable restriction to free movement will be the population-to-state ratio. M. Risse, Op. Cit., note 31, p.29.

³³ John RAWLS, *A theory of Justice*, Cambridge, Belknap Press of Harvard University Press, 1971 cited in J. H. CARENS, Op. Cit., note 23, p. 255.

³⁴ Roger NETT, "The Civil Right We Are Not Ready for: the Right of Free Movement of People on the Face of the Earth", (1971) 81 *Ethics* 212, 216.

³⁵ According to Nett "a functioning set of rights provides a climate of dignity for individuals and frees them from dissipating their energies in coping with arbitrary authority. People accustomed to basic

Accordingly, the right of free movement is the missing piece of this set in order for the rights to be complete and to serve their purpose. The right of free movement has two dimensions. Material, covering the right to move freely to places where there are sufficient resources and political, justifying the right to move from oppression and persecution among others³⁶. Therefore, it is only logical to assume that the right of free movement will be the best fit to fill the functional gap in the set of contemporary basic rights. Even in places where basic human rights are upheld, without free movement such rights-based systems will always be at best halfway efficient.

The right of free movement implies the right to exit one's country and the right to enter another. However, it is broadly accepted that while individuals may freely leave their state, they do not hold the exclusive right to enter another. Walzer defends this position. According to him "[i]mmigration and emigration are morally asymmetrical"³⁷. However, denying someone the right to enter the territory will be equal to denying her/him basic rights as dignity and liberty among others providing that such person comes from place of oppression and/or poverty. As rightly pointed by Carens "a right to exit that does not carry with it some reasonable guarantee of entry will not seem adequate"³⁸. The freedom of movement from one city or province to another is recognized as a basic human right. The same should be valid and for the cross-border

freedoms are more likely to be critical of what transpires in a social order than those accustomed to forms of loyalty without rights". *Id.*, p.222.

³⁶ *Id.*, p.218.

³⁷ Michael WALZER, *Op. Cit.*, note 24, p.140.

³⁸ J. CARENS, *Op. Cit.*, note 25, p.27.

movement. Even more so as people, everywhere moves for the same reasons: employment, religion, relationship, and so on³⁹.

While concluding on the construction of the free movement of people in ideal theory, we have to emphasize the most important advantage of that right which is the reduction of all inequalities⁴⁰. By moving freely, people will pursue more opportunities to better suit their life choices. Thus, the success of each individual will not be determined by the chance of their place of birth, class, sex, etc. but by personal talents and strengths and the determination to develop those talents. In the context of oppressive government, by leaving their country people will tacitly express disagreement with the regime. Consequently, this may lead to positive changes in the system and reduce the power of the oppressor.

Having said all of that, we need to accept today's reality that free movement is subject to more closed borders and restrictions than ever before. For the near future, the restrictions imposed on free movement are here to stay. Then in order to implement at least some of the concepts of free movement within the existing political structure, we need to elaborate on the question of the extent to which state borders should be closed and what kinds of restrictions to free movement can be justified. Even within the libertarian theory, the open borders debate is controversial, ranging from complete openness to closure on different levels⁴¹. From a personal view, it is hard to justify any restrictions

³⁹ *Id.*, pp.27-28.

⁴⁰ *Id.*, p.26.

⁴¹ Berry THOLEN, "The Changing Border: Developments and Risks in Border Control Management of Western Countries", (2010) 76 *International Review of Administrative Sciences* 259, 261.

on the will of each individual to move freely assuming their good intentions towards the new place⁴². However, as already stated, we need to be aware of the common perception over the border controls, which states claim to be inherent part of their sovereignty.

There are two arguments brought by Carens, which we also support, that could justify state's claim to close its borders⁴³. Those arguments, however, would be morally and legally justifiable only if such restrictions are applied, not for mere convenience, but if there is a reasonable belief in the possible outcome⁴⁴. Thus, national security and public order seem valid grounds to justify some degree of border closure. People who pose a real threat to national security, for example those aiming at destroying the existing order, should be denied entry. Public order⁴⁵ grounds may exist when there is a real danger posed by the sudden mass and extraordinary influx of immigrants, which will bring chaos and threat to existing liberties and liberal institutions. Thus, restrictions on free movement will be necessary to safeguard the liberty and equality in the long term. Carens's position is also justified from a natural law point of view. The freedom of movement can be restricted only if it threatens the fundamental rights of other

⁴² In this sense Risse suggests very progressive view on the legitimacy of border. He states: "why it would be acceptable in the first place (especially to those thus excluded) that we draw an imaginary line in the dust or adopt the course of a river and think of that as a border". M. RISSE, Op. Cit., note 31, p.26.

⁴³ More libertarian egalitarian arguments developed by different authors on close border justifications see Arash ABIZADEH, "Liberal Egalitarian Arguments for Closed Borders: Some Preliminary Critical Reflections", (2006) 4 *Revue éthique et économique / Ethics and Economic.s*

⁴⁴ Often states are establishing measures for cross-border movement control based on national security, for example. However, in many instances those measures are harsh and may contradict the principle of proportionality. One can conclude that the real aim of such measures was to steam the movement across border.

⁴⁵ In this context public order implies only the maintenance of the law and order in the state and does not refer to the welfare states with the social practices and policies in place. J. H. CARENS, Op. Cit, note 25, p.30.

individuals. Then states, as guardians of those rights, can restrict freedom of movement in order to preserve the rights⁴⁶.

Notwithstanding, due to the controversy that the right of free movement generates, the question of refugees' access to state territory seems less contentious. It is generally understood that refugees are entitled to enter any state in order to escape persecution. In addition, states hold a moral obligation to give them access⁴⁷ in order to determine the legitimacy of their claim. Even Walzer⁴⁸, to whom the membership distribution is a cherished privilege of the host society, agrees that the needy outsiders (refugees) should be given a refuge⁴⁹. The debate of the state's obligation to apply an open border policy towards refugees is mostly situated within the moral aspect of the issue implying that states have moral obligations to admit refugees. However, states also hold legal obligations towards people in need of protection. Those obligations are stemming from the orderly constructed international human rights system to which states have chosen to adhere.

It is not politically feasible in the near future for states to embrace the right of free movement as a basic human right. Restrictions to this right will continue to be applied. However, there are only a few situations where such restrictions will be justified. While it is unrealistic to expect that, the right to free movement will be included in the set of

⁴⁶ A. DUMMET, Op. Cit., note 26, p.177.

⁴⁷ J. H. CARENS, "Who Should Get in? The Ethics of Immigration Admissions", (2003) 17 *Ethics & International Affairs* 95, 101-102; B. TOHLEN, Op. Cit., note 41, p.262.

⁴⁸ M. WALZER, Op. Cit., note 24, pp.51-51.

⁴⁹ Although he reserves the right of the host community to restrain the flow when the number of refugees pose a threat to the character of the communal self-determination. *Id.*

basic human rights that does not mean we should not continue to strive for this result. As rightly pointed by Nett:

“[A]t some future point in world civilization, it may well be discovered that the right to free and open movement of people on the surface of the earth is fundamental to the structure of human opportunity and is therefore basic in the same sense as is free religion, speech, and the franchise”⁵⁰.

Until such moment comes, at least refugees are entitled to a safe haven and states have moral and legal obligation to grant one.

CHAPTER I: INTERNATIONAL LEGAL STANDARDS RELATED TO THE RIGHT TO ASYLUM

SECTION 1: Content of the Refugee Convention

The framework of international refugee protection was established at the end of World War II when Europe was confronted with the precarious situation of millions of people being displaced by acute violence. The Convention Relating to the Status of Refugees⁵¹ and the following Protocol Relating to the Status of Refugees (1967 Protocol) were put in place to address the needs of people in need of international protection⁵². The recognition of refugee status imposes a number of obligations on the State. The 1951 Refugee Convention establishes a variety of rights, including the right to

⁵⁰ R. NETT, Op. Cit., note 34, p.218.

⁵¹ *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS, vol. 189 [Online] <http://www.unhcr.org/refworld/docid/3be01b964.html> [Accessed 20 March 2011] [1951 Refugee Convention].

⁵² According to the 1951 Refugee Convention refugee is a person who:

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.” (art.1A(2))

property (art.13), right of association (art.15), right to employment (art.17), right to housing (art. 21), right to education (art.22) which are enforceable against the State and are to be applied without discrimination (art.3). Moreover, the protection of refugees is placed within the wider framework of human rights protection⁵³. States are obliged to protect the human rights of individuals under their jurisdiction, including asylum-seekers and refugees. However, such wider protection is somehow often neglected or denied⁵⁴. In light of the contemporary shift in the international refugee regime, states tend to apply restrictively and in isolation the 1951 Refugee Convention provisions undermining international human rights regime⁵⁵.

SECTION 2: The Scope of the Right to Asylum within the International Law

While the decline in protection for refugees is disturbing, the situation of asylum-seekers⁵⁶ is even more precarious. As previously mentioned, the rights of refugees and the corresponding legal obligations of the states towards them are codified in the 1951 Refugee Convention. Asylum-seekers, on the other hand, are placed in legal uncertainty in regards to their rights and the corresponding state obligations, as the 1951 Refugee

⁵³ Alice EDWARDS, "Human rights, Refugees, and the Right 'to enjoy' Asylum", (2005) 17 *International Journal of Refugee Law* 293, 297. According to the author "the drafting of a separate treaty on refugees was a pragmatic response to the reality surrounding Europe after World War II. It in no way removes the issue of refugees outside the realm of human rights". *Id.*, 298.

⁵⁴ Guy S. GOODWIN-GILL, "Who to Protect, How ..., and the Future?" (1997) 9 *International Journal of Refugee Law* 1, 3.

⁵⁵ Many states draw distinction between refugee and human rights regime in order to limit their international obligations. This is done in part because the definition of 'refugee', provided by the Refugee Convention, is very narrow and ignores situation of many people who otherwise would be recognized as refugees, thus enjoying the safeguards offered by the 1951 Refugee Convention.

⁵⁶ 'Asylum-seeker' means a third country national that has made an application for asylum in respect of which a final decision has not yet been taken. COUNCIL REGULATION (EC) No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National, art.2(d).

Convention lacks provisions concerning them. What is more, there is no legally binding international instrument upholding the right to asylum which places asylum-seekers in a legal grey zone within the international refugee regime. The only international instrument where the right to asylum is articulated is the Universal Declaration of Human Rights (UDHR)⁵⁷ which although respected by the states is a declaratory instrument lacking legally binding power. Even within the UDHR, the right to asylum is vague and ill-defined. Closely linked with state sovereignty and lacking clear legal framework, the right to asylum is susceptible to abuse by states unwilling to accept people in need of protection⁵⁸.

As enshrined in the UDHR, the right to asylum affords every individual with the right to obtain asylum but does not impose correlative obligation on the state to grant one⁵⁹. Thus, the right to asylum is the exclusive right of the state stemming from its sovereignty. Therefore, states are not legally bound to grant asylum. The lack of international obligation on the state to provide asylum is perceived as the ‘Achilles heel of the international refugee regime’, depriving individuals in need of protection to make an

⁵⁷ Art.14(1) states:

“Everyone has the right to seek and to enjoy in other countries asylum from persecution”.

⁵⁸ H el ene LAMBERT, *International Refugee Law*, Farnham, Surrey England; Burlington, VT, Ashgate, 2010.

⁵⁹ Thomas GAMMELTOFT-HANSEN & Hans GAMMELTOFT-HANSEN, “The Right to Seek - Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU”, (2008) 10 *European Journal of Migration and Law* 439. According to the authors the original text of art.14 (UDHR) “everyone shall have the right to seek and be granted asylum from persecution” has been received with vigorous opposition during the drafting of the UDHR by most state representatives and after numerous consultations and long debates was rejected. More on the process of drafting the UDHR and the debates corresponding to the right to asylum see Morten KJAERUM, “Analyses of Article 14” in Gudmundur ALFREDSSON & Eide ASBJ ORN (eds.) *The Universal Declaration of Human Rights: a Common Standard of Achievement*, The Hague, Martinus Nijhoff Pub., 1999. After abolishment of the initial proposition, the French representative had noted that: “[i]t had been a mistake...to recognize the individual’s right to seek asylum while neither imposing upon the States the obligation to grant it nor invoking the support of the United Nations”. G. S. GOODWIN-GILL & Jane MCADAM, *The Refugee in International Law*, New York, Oxford University Press, 2007, p.360.

effective use of the provisions in 1951 Refugee Convention or other international human right instruments⁶⁰. The 1967 UN Declaration on Territorial Asylum further reaffirms the position that granting asylum is an exercise of state sovereignty⁶¹. Consequently, the absence of the right to asylum in any international binding treaty points to the reluctance of the states to embrace asylum as an international obligation owed to individuals who are deprived from the protection of their own states⁶².

SECTION 3: Non-refoulement: Inherent Part of the Right to Asylum

Nevertheless, that right to asylum as articulated in art.14 UDHR is not without legal force and “must be held in greater regard”⁶³. The right to asylum is to be considered in conjunction with a *non-refoulement principle*⁶⁴, which forbids the return of any individual to place where they might be subjected to torture or ill-treatment. Moreover, the right to asylum and *non-refoulement* are deemed as cardinal principles of refugee

⁶⁰ Eduard NEWMAN & Joanne van SELM, *Refugees and Forced Displacement International Security, Human Vulnerability, and the State*, New York, United Nations University Press, 2003, p.277.

⁶¹ Art.1 states:

“(1) *Asylum granted by a State*, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States.[emphasis added]
(3) It shall rest with the *State granting asylum* to evaluate the grounds for the grant of asylum.”[emphasis added]

Declaration on Territorial Asylum, GA Res, UNGAOR, 22nd sess., Suppl. no. 1614 UN Doc A/6716, (1967), p.81, [Online] <http://www.unhcr.org/refworld/docid/3b00f05a2c.html> [Accessed 29 February 2011]

⁶²G. S. GOODWIN-GILL and J. MCADAM, Op. Cit., note 59, p.369. The authors also remark that there is a humanitarian vision for asylum but no sense of obligation.

⁶³ Helen O’NIONS, “The Erosion of the Right to Seek Asylum”, (2006) *Web journal of Current Legal Issues* [Online] <http://webjcli.ncl.ac.uk/2006/contents2.html> [Accessed 21 January 2012]

⁶⁴ 1951 Refugee Convention defines the prohibition of refoulement as follows:

“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. (art.33(1))”

protection⁶⁵. State parties to the 1951 Refugee Convention are bound by *the principle of non-refoulement* and are prohibited to apply any reservations to it⁶⁶. Moreover, state authorities, including provincial authorities and government agents, who are exercising state power within a state's geographical territory as well as outside, are responsible for violating the principle when an individual is placed under their effective control⁶⁷. This is a significant remark given the wide discretion vested to the state authorities when deciding on the fate of asylum-seekers within the territory of the state and abroad.

The principle of non-refoulement is to be respected not only in relation to individuals fitting the refugee definition under art.1A of the 1951 Refugee Convention, but everyone at risk of ill-treatment in case of return⁶⁸. In addition, it is widely considered that *non-refoulement* is a principle of international customary law, implying obligation to all

⁶⁵ *Executive Committee, General Conclusion on International Protection. 42nd session. No. 65 (XLII) – 1991, para (c)*. In this context the Committee urged states "...to avoid unnecessary and severe curtailment of their [refugees and asylum-seekers] freedom of movement, to ensure conditions of asylum compatible with recognized international standards, and to facilitate their stay in countries of asylum..." *Id.* See also E. FELLER, "Opening Statement by Ms Erika Feller", in COUNCIL OF EUROPE & UNHCR (eds.), *Proceedings of the 2nd Colloquy on the European Convention on Human Rights and the Protection of Refugees, Asylum-Seekers and Displaced Persons : Consolidation and Development of the Asylum-related Jurisprudence of the European Court of Human Rights*, Strasbourg, Council of Europe Pub., 2000, p.15.

⁶⁶ The rule applies to the State Parties to the Convention and to the Protocol (art.12) and has an absolute character as reservations to it are not permitted (1951 Refugee Convention, art.42).

⁶⁷ Sir Elihu LAUTERPACHT & Daniel BETHLEHEM, « Avis sur la portée et le contenu du principe du non-refoulement » in Erika FELLER, Volker TÜRK, Frances NICHOLSON & NATIONS UNIES HAUT COMMISSARIAT POUR LES REFUGIES (eds.) *La protection des réfugiés en droit international*. Bruxelles, UNHCR, 2008, pp.141-143. Lauterpacht and Bethlehem ground their analysis of such responsibility on the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) adopted by the International Law Commission (ILC) of UN on 31 May 2001 (art.4, 5, 6, 8, 9, 11). The bounding nature of non-refoulement is particularly relevant to agents or bodies exercising state responsibilities at the embarkation points, transit or international zones, etc., including carriers, airport officials checking documents at transit zones. The acts performed by the above listed authorities will engage state responsibility when non-refoulement principle is violated; also see G. GOODWIN-GILL & J. MCADAM, *Op. Cit.*, note 59, p.248.

⁶⁸ S. E. LAUTERPACHT & D. BETHLEHEM, *Op. Cit.*, note 67, p.157; EXECUTIVE COMMITTEE, *General conclusion on international protection. 55th session. No. 99(LV)- 2004*.

states to conform to it⁶⁹. Thus, asylum-seekers under the jurisdiction of the state benefit from the protection of *the principle of non-refoulement*.

Furthermore, refoulement when there is a risk of torture or other ill-treatment is prohibited ‘*in any manner whatsoever*’, including rejection at the frontier⁷⁰. Although it does not afford the right of entry, the principle binds states “at least to temporary admission to determine an individual status. Only in this way can State ensure that it does not send back an individual to persecution or torture”⁷¹. However, the often repeated practices endangering the lives of asylum-seekers⁷² and the lack of strong condemning reaction on part of the international community⁷³ points to the conclusion that states are still resilient to assume any obligation related to asylum-seekers not formally admitted into a state’s territory. Nevertheless, international bodies such as

⁶⁹S. E. LAUTERPACHT & D. BETHLEHEM, Op. Cit., note 67, p.180; G. GOODWIN-GILL & J. MCADAM, Op. Cit., note 59, p.248; Also according to Subrata Roy Chodhury the right draws its customary law status from the position of the customary status of UDHR within the international law. There are three reasons to support such assertion. First, the commitment of 171 states to create the UN Charter and the UDHR expressed in the 1993 Vienna Declaration. Second, the status of the non-binding instruments given by International Court of Justice (ICJ). In Nicaragua case, for example, the court “accords limited significance to State practice, especially to inconsistent or contrary practice, and attributes central normative significance to resolutions both of the United Nations General Assembly and of other international organisations.” Third, states are continuing to grant asylum despite the large number of asylum-seekers. Furthermore, the author points to the fact that prohibition of torture and non-refoulement are complementary. If the former is part of the customary law, therefore the latter should be considered in the same context. Subrata Roy CHOWDHURY, “A Response to the Refugee Problems in Post Cold War Era: Some Existing and Emerging Norms of International Law”, (1995) 7 *International Journal of Refugee Law* 100, 105-106.

⁷⁰ S. E. LAUTERPACHT & D. BETHLEHEM, Op. Cit., note 67, p.145; G. GOODWIN-GILL & J. MCADAM, Op. Cit., note 59, p.246; According to all, although the right to asylum does not imply obligation on the state to grant entry, they cannot reject at free will people who have well founded fear of persecution. If they do not want to admit such individuals, states are obliged to take any measures to avoid refoulement, including third country removal.

⁷¹ G. GOODWIN-GILL & J. MCADAM, Op. Cit., note 59, p. 215; Other documents confirming that conclusion see EXECUTIVE COMMITTEE, *Conclusion on international protection. 49th session. No. 85 (XLIX) – 1998*; T. GAMMELTOFT-HANSEN & H. GAMMELTOFT-HANSEN, Op. Cit., note 67, p.446 conclude that the drafting history of art.14 shows clearly that although the substantial right of asylum has been rejected, the procedural right (*the right to an asylum process*) remained untouched.

⁷² The recent push-backs of asylum-seekers in high sea by the Italian authorities towards Libya (see below).

⁷³ H. O’NIONS, Op. Cit., note 63.

UNHCR⁷⁴ and its Executive Committee, and scholars⁷⁵ argue strongly in support of the wider interpretation of *non-refoulement*, thus questioning scrupulous deterrence practices applied by the states towards asylum-seekers.

SECTION 4: International Human Rights Law and the Right to Asylum

Asylum-seekers are entitled to benefit from the protection afforded by various international and regional human rights instruments⁷⁶, which set out the basic standards and norms of treatment. Whereas each State has a right to control those entering into their territory, this right must be exercised in accordance with a prescribed international law. Thus, the legal power of right to asylum is reinforced by the international human rights law. Moreover, as already clarified, the Refugee law is not a separate branch within the international law. Refugees and asylum-seekers benefit not only from human rights provisions themselves but also from the international mechanisms for protection of those rights. Important consequence giving the fact that 1951 Refugee Convention lacks international body to exercise monitoring on the implementation of its provisions. Two core human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), offer ‘consistently overlapping’ protection with 1951 Refugee Convention⁷⁷ to asylum-seekers. In addition, the Executive Committee urges states to “reiterate ... the

⁷⁴ UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, 2007 [Online] <http://www.unhcr.org/refworld/docid/45f17a1a4.html> [Accessed 3 May 2011].

⁷⁵ James HATHAWAY, *The Rights of Refugees Under International Law*, Cambridge, Cambridge University Press, 2005, p.54; S. E. LAUTERPACHT & D. BETHLEHEM, *Op. Cit.*, note 67; E. FELLER, *Op. Cit.*, note 65, p.15.

⁷⁶A. EDWARDS, *Op. Cit.*, note 53, p.299.

⁷⁷ J.HATHAWAY, *Op. Cit.*, note 75, p.9.

obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments”⁷⁸. The right to asylum is a human right. Thus, it has to be considered in correlation with all other human rights enshrined in the human rights treaties.

Fundamental rights proclaimed by the ICCPR are inherent to all human beings. In that sense the Human Rights Committee has clarified that

“the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons who may find themselves in the territory or subject to the jurisdiction of the State Party”⁷⁹.

In regards to asylum the connection with the art.12 ICCPR⁸⁰, the right to leave one’s country, is especially strong. As it was demonstrated above, in the theoretical phramework, it is only logically to conclude that every person has the right to leave their country and to enter another country for purpose of seeking asylum. Otherwise, the right to asylum can be considered ‘at best a half right’⁸¹.

Asylum-seekers, within state territory and subject to its jurisdiction, benefit from the general requirement of non-discrimination in respect to the rights provided in the Covenant as well as judicial protection for procedures related with claiming asylum.

⁷⁸ EXECUTIVE COMMITTEE, *Conclusion on safeguarding asylum. 48th session. No. 82 (XLVIII)-1997, para d(vi)*.

⁷⁹ HRC, *General Comment No. 31: Article 2: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 21 April 2004, CCPR/C/21/Rev.1/Add.13, Para. 10.

⁸⁰ Art.12(2) reads:

“Everyone shall be free to leave any country, including his own”.

⁸¹ Louis HENKIN, “An Agenda for the Next Century: the Myth and Mantra of State Sovereignty”, (1994) 35 *Virginia Journal of International Law* 115, 117.

Thus, the right to an effective remedy is of particular importance to asylum-seekers among the rights upheld by the ICCPR. The right is articulated in art. 2(3) ICCPR and requires States to ensure that individuals have accessible, effective and enforceable remedies in order to uphold the rights guaranteed by the Covenant. States must ensure appropriate judicial and administrative mechanisms to address the violations of rights⁸². In addition, the remedies should be appropriately adapted to take into consideration the special vulnerability of certain categories⁸³ such as asylum-seekers.

The right to an effective remedy is also protected under art.13 ECHR. The ECtHR has held that whenever there is “arguable complaint” alleging violation of a Convention rights States should put in place in their national legislation provision of a domestic remedy and grant appropriate relief. Moreover, the remedy must be “effective” in practice as well as in law⁸⁴. Such effectiveness is secured when the remedy is rendered available in practice as well as in law and not unjustifiably hindered by the authorities⁸⁵. Some of the effective remedies are secured by art.6 ECHR that guarantees to everyone the entitlement to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. According to art.1 ECHR States are obliged to secure the rights and freedoms guaranteed by the Convention to everyone within their

⁸²HUMAN RIGHTS COMMITTEE, *Communication No. 1328/2004*, CCPR/C/90/D/1328/2004, 16 August 2007, Para 7.10 [Online]

http://www.univie.ac.at/bimtor/dateien/hrc_2007_kimouche_vs_algeria.pdf

⁸³ HUMAN RIGHTS COMMITTEE, *General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 may 2004, Para 15 [Online] <http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument>

⁸⁴ *Case of M.S.S. v. Belgium and Greece*, App. No(s).30696/09, ECHR (Grand Chamber) 21 January 2011, Reports of Judgments and Decisions 2011, Para 288 [Online]

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050> [Accessed 30 August 2011]

⁸⁵ *Id.*, Para 290.

jurisdiction, this includes not only the citizens of the State but also third country nationals such as asylum-seekers.

The right to an effective remedy has been proclaimed as “a key provision in terms of guaranteeing certain procedural safeguards to refugees”⁸⁶. In regards to *non-refoulement* (art.3 ECHR), for example, art.13 offers important safeguards for asylum-seekers not to be removed to countries where they would face danger to their lives. In this respect, the ECHR has stated that

“given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised the notion of an effective remedy requires independent and rigorous scrutiny of a claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 and the possibility of suspending the implementation of the measure impugned.”⁸⁷

Moreover, it also requires that the person concerned should have access to a remedy with automatic suspensive effect⁸⁸.

In terms of EU law, the right to an effective remedy is enshrined in art.47 EU Charter. The first paragraph of the provision reads as follow: “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective

⁸⁶ Helene LAMBERT, “The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities”, (2005) 24 *Refugee Survey Quarterly* 39, 47.

⁸⁷ *Case of Jabari v. Turkey*, Appl. No. 40035/98 ECHR (Forth Section) 11 July 2000, Para 50 [Online] <http://www.unhcr.org/refworld/docid/3ae6b6dac.html> [Accessed 15 December 2011]

⁸⁸ *Conka v. Belgium*, Appl. No. 51564/99 ECHR (Third Section) 5 February 2002, Para 81-83 cited in *M.S.S. v. Belgium and Greece*, Op. Cit., note 84. However, this is not a right to stay in the country until decision is reached on appeal against negative asylum decision but until a judge has passed a decision on the lawfulness of the authorities’ decision in a preliminary protection procedure. EUROPEAN PARLIAMENT, *Minimum Standards for the Procedures For Granting and Withdrawing Refugee Status in the Member States – Assessment (Summary) of the Implementation of the 2005 Procedures Directive and Proposals for a Common European Regime of Asylum*, September 2008, PE 393.291, p.8 [Online] <http://www.ulb.ac.be/assoc/odysseus/CEAS/PE393.291.pdf>

remedy before a *tribunal* in compliance with the conditions laid down in this Article”⁸⁹. [Emphasis added] As it becomes clear from the legal explanations to the Charter, the provision is more extensive than the one enshrined in ECHR because it guarantees the right to an effective remedy before the court. Further to that, art.47 applies to member states and Union when implementing Union law and to all rights guaranteed by the law⁹⁰.

The prohibition of collective expulsion is another right within international human rights law very closely related to asylum. This prohibition is absolute in nature⁹¹ and has acquired status of customary international law⁹². The Human Rights Committee has stated that art.13 of the Covenant entitles each individual to a decision of its own case and to submit reasons against expulsion thus, placing the collective expulsion in variance with art.13⁹³. This is a measure, which cannot be derogated from even in state of emergency, as there are no justifiable circumstances to entail such measure⁹⁴.

⁸⁹ Paragraph 2 and 3 states :

“Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.”

⁹⁰ JUSTICE, Legal Explanations to the EU Charter, art.47 [Online]

http://www.eucharter.org/home.php?page_id=56 [Accessed 20 November 2012]

⁹¹ UNITED NATIONS, *International Law Commission, Report on the work of its fifty-ninth session*, 7 May to 5 June and 9 July to 10 August 2007), Supplement No. 10 (A/62/10) para 200 [Online]

<http://untreaty.un.org/ilc/reports/2007/2007report.htm>

⁹² UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *Intervener Brief in the case of Hirsi et al v. Italy*, Application No 27765/09, para 7 [Online]

<http://www.unhcr.org/refworld/pdfid/4f5f11a52.pdf> [Accessed 20 November 2012]

⁹³ HUMAN RIGHTS COMMITTEE, *General Comment 15/27 of 22 July 1986*, CCPR/C/21/Rev.1, para 10 [Online] [Accessed 20 October 2012]

⁹⁴ HUMAN RIGHTS COMMITTEE, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001 CCPR/C/21/Rev.1/Add.11, para 13(d) [Online] <http://www.unhcr.org/refworld/pdfid/453883fd1f.pdf> [Accessed 25 October 2012]

The prohibition of mass expulsions is articulated expressly in art.4 of Protocol 4 ECHR⁹⁵. According to the Court, it “is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group”⁹⁶. In order for a State to be in line with art.4 when considering expulsion of a group, it should consider “with due diligence and in good faith, all individual circumstances that may militate against the expulsion of each particular individual in the group”⁹⁷. Moreover, the procedure put in place should afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account.⁹⁸ Thus, art.4 of Protocol 4 ECHR imposes a duty for each case to be examined individually. Push back operations of asylum-seekers in high sea done by many states without individual assessment of each case amount to a breach of the above article and should be regarded illegal⁹⁹.

The right to liberty is a fundamental right inherent to all human beings, including asylum-seekers and refugees. Asylum is not a crime and those seeking refuge should not be penalized, including held in detention when accessing State territory. Art.31 Refugee Convention recognizes the particular situation of asylum-seekers and obliges States not to impose penalties on a count of an illegal entry. However, the reality is that States

⁹⁵ The prohibition from collective expulsion in EU Charter (art.19 (1)) has the same meaning and scope as the one in ECHR.

⁹⁶ *Case of Vedran Andric v. Sweden*, Appl.No 45917/99 ECHR (First Section) 23 February 1999, Para 1 [Online] <http://www.unhcr.org/refworld/docid/3ae6b7048.html> [accessed 15 November 2012]

⁹⁷ UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, Op. Cit., note 92, para 8.

⁹⁸ *Čonka v. Belgium*, Op. Cit., note 88, Para 63

⁹⁹ Jan Arno HESSBRUEGGE, “European Court of Human Rights Protects Migrants against “Push Back” Operations on the High Sea”, (2012) 16 *Insights* [Online] <http://www.asil.org/pdfs/insights/insight120417.pdf> [Accessed 12 October 2012]

routinely subject asylum-seekers to detention on arbitrary basis and for prolonged periods without an opportunity to challenge the reasons of their detention¹⁰⁰.

Many international and regional human rights instruments tackle the right to liberty, including protection from arbitrary detention. Art.9 ICCPR accords important safeguards to ensure that detention for any purpose including immigration control¹⁰¹ is in line with the international human rights standards and national law. Art.9 (1) ICCPR requires that deprivation of liberty is not arbitrary and against the law. To avoid arbitrariness every detention, including detention of asylum-seekers, should be assessed against criteria such as reasonableness, necessity, proportionality and non-discrimination¹⁰². Moreover, it requires States to set their national legislation in line with the standards prescribed by the international law, otherwise, the deprivation of liberty will be unlawful¹⁰³. Further to that, paragraph four lays down important procedural guarantees requiring the lawfulness of the detention to be decided by court without any delay.

Art.5 of the ECHR also aims at preventing arbitrary deprivation of liberty¹⁰⁴. The ECtHR has extensive case law in regards to this provision and in particular detention of

¹⁰⁰ EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER'S PROGRAMME, *Detention of Asylum-Seekers and Refugees: The Framework, the Problem and Recommended Practice*, EC/49/SC/CRP.13, 4 June 1999, Para 5 [Online] <http://www.unhcr.org/refworld/pdfid/47fdfaf33b5.pdf> [Accessed 21 October 2012]

¹⁰¹ HUMAN RIGHTS COMMITTEE, *CCPR General Comment No. 8: Article 9 (Right to Liberty and Security of Persons)*, Sixteenth Session, 30 June 1982, Para 1 [Online] <http://www.unhcr.org/refworld/pdfid/4538840110.pdf> [Accessed 30 October 2012]

¹⁰² UNHCR, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, PPLA/2011/01.Rev.1, April 2011, p.20 [Online] <http://www.unhcr.org/refworld/pdfid/4dc935fd2.pdf> [Accessed 20 November 2012]

¹⁰³ *Id.*

¹⁰⁴ Art.6, the right to liberty and security in the EU Charter, has the same meaning and scope as the one guaranteed by art.5 ECHR.

asylum-seekers. In regards to the increased use of detention of asylum-seekers and refugees by the States, the Court has held that: “States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by [Refugee Convention and ECHR]”¹⁰⁵.

Article 5(1) ECHR requires, in a first place, that every arrest or detention is lawful. To be lawful the deprivation of liberty should conform to the substantive and procedural rules of national law¹⁰⁶, which should be sufficiently accessible, precise¹⁰⁷ and compatible with the rule of law, a concept inherent in all the Articles of the Convention¹⁰⁸. The reasons for detention are defined in exhaustive manner in art. 5(1) a-f and should be interpreted narrowly in order to be consistent with the aim of that provision, i.e. to ensure that no one is arbitrarily deprived of his liberty¹⁰⁹. Thus, in regards to asylum-seekers art.5 (1) (f) permits detention only for two reasons: 1) to prevent unauthorised entry and 2) for the purposes of deportation or extradition.

Despite the panoply of international human rights provisions protecting asylum-seekers many states remain reluctant to assume the obligation to accept the individual right to be granted an asylum and to accord to asylum-seekers fundamental human rights benefiting their own citizens. The proliferation of interdiction measures, aiming to prevent potential

¹⁰⁵ *Case of Amuur v. France*, Appl.No 17/1995/523/609, ECHR, 25 June 1996, Para 43 [Online] <http://www.unhcr.org/refworld/docid/3ae6b76710.html> [accessed 15 November 2012]

¹⁰⁶ *Id.*, para 50.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Case of Vasileva v. Denmark*, Appl.No 52792/99 ECHR (First Section) 25 September 2003, Para 33 [Online] <http://www.unhcr.org/refworld/pdfid/502d4ae62.pdf> [Accessed 23 November 2012]

protection seekers to enter state's territory¹¹⁰, is justified with the exclusive power of the state to control the movement across its borders, which is a key element of state sovereignty. The notion of sovereignty is reinvigorated in the current security discourse¹¹¹ where, so it is argued, the states have to balance between international human rights commitment and successfully ensure the safety of their citizens. However, such statement is not convincing. The concept of sovereignty has lost much of its power since the conception in Westphalia. The globalization has resulted in open state borders for purpose of conducting business. As pointed by Henkin the EU is another example where state sovereignty was reduced for the benefit of a common goal. International Criminal Court (ICC), UN Security Council, ECtHR, etc. which decisions are binding upon the states, are challenging even further the notion of sovereignty¹¹². Therefore, state sovereignty is not particularly convincing justification to avoid international obligations.

SECTION 5: EU Human Rights Framework and its Relevance to the Access to Asylum

The debate that touches upon the relevance of 1951 Refugee Convention to the protection of refugees and the need for the Convention to be reformed is still ongoing. Regardless of the outcome, the current lack of comprehensive protection available to

¹¹⁰ Those who had the “fortunate” luck to claim asylum are facing harsh living conditions having to survive on insignificant government allowances without right to employment, basic healthcare, which is leading many of them into destitution. BRITISH RED CROSS, *Not Gone but Forgotten: The Urgent Need for More Humane Asylum System*, London, British Red Cross, 2010 [Online] <http://stillhumanstillhere.files.wordpress.com/2009/01/not-gone-but-forgotten-june-2010.pdf> [Accessed 24 January 2011].

¹¹¹ A. EDWARDS, Op. Cit., note 53, 300.

¹¹² L. HENKIN, Op. Cit., note 81, 118.

asylum-seekers, and the practice of exclusion deployed by the states, point to major gaps within the refugee protection regime. The narrow definition provided in art.1A of the Refugee Convention is “removed from the reality of modern forced migration”¹¹³, thus, excluding from the protection regime the majority of people in need of a ‘safe haven’. The lack of an international body to oversee the implementation of the 1951 Refugee Convention renders the proper implementation of refugee regime even more obscure. The UNHCR is awarded only a supervising role¹¹⁴ - without powers to enforce compliance by the states. Consequently, the interpretation of the Convention and state practices vary considerably as they depend upon the willingness of the individual state to provide protection. In such a climate of uncertainty, the judiciary proves to be useful for setting standards for protection.

A. Protection Standards Set by the ECHR and the ECtHR

The aim of this section is not to provide an exhaustive analysis of the jurisprudence of the European Court on Human Rights or provisions of ECHR relevant to the protection of asylum-seekers. Instead, it seeks to outline some standards related to asylum set by the court and to determine how effective they are when it comes to imposing obligations on Contracting States as to the implementation of those standards. To this end, the jurisprudence on art.3 ECHR¹¹⁵ will be analyzed in detail because art.3 is related to *non-refoulement*, the most important pillar of refugee protection regime.

¹¹³ Colin J. HARVEY, “Dissident Voices: Refugees, Human Rights and Asylum in Europe”, (2000) 9 *Social & Legal Studies* 367, 369.

¹¹⁴ 1951 Refugee Convention, Op. Cit., note 51, Preamble and art.35.

¹¹⁵ Art.3:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

1) Applicability of ECHR to Asylum Cases

The absence of the right to asylum within the ECHR may lead one to conclude, wrongly so, that the Convention is of no relevance to the protection of asylum-seekers and refugees¹¹⁶. Interestingly, the ECtHR itself has repeatedly stated that there is no right to asylum contained in the Convention¹¹⁷. However, in recent years, the ECtHR has developed significant jurisprudence related to asylum-seekers, thus setting protection standards that in some cases are wider in scope¹¹⁸ than those provided by the 1951 Refugee Convention. While the Refugee Convention is set to provide protection only to refugees, such protection can be lost relatively easily¹¹⁹. On the other hand, the ECHR (art.1) applies to anyone within the jurisdiction of the State Parties, including refused asylum-seekers and refugees facing removal. The Court's judgments are legally binding as the states and Committee of Ministers oversees the implementation of its decisions¹²⁰. Furthermore, in cases of removal the Court can apply interim measures by requesting the respondent state not to proceed with any actions that would be detrimental to the applicant until the final judgment on the case is delivered¹²¹. Finally, in regards to accountability, ECtHR through its jurisprudence "has pushed states to provide a more

¹¹⁶ According to Nuala Mole the reason why asylum was not included in ECHR is because the drafters anticipated Refugee Convention to be a *lex specialis* and cover in full the needs of refugees. Nuala MOLE, *Asylum and the European Convention on Human Rights*, Strasbourg, Council of Europe Pub., 2000, p.5.

¹¹⁷ *Case of Vilvarajah and others v. the United Kingdom*, App. No(s).13163/87; 13164/87; 13165/87; 13447/87; 13448/87, ECHR (Chamber) 30 October 1991, Series A215, para 102 cited in N. MOLE, *Id.*, p.9.

¹¹⁸ UNHCR, *Manual on Refugee Protection and the European Convention on Human Rights* (updated 2006), p.1.

¹¹⁹ N. MOLE, *Op. Cit.*, note 116, p.15. The author refers to art.1F 1951 Refugee Convention.

¹²⁰ ECHR, *Op. Cit.*, note20, art.46.

¹²¹ More E. FELLER, *Op. Cit.*, note 59, p.12.

convincing and evidence-based justification in curtailing rights pertaining to individuals belonging to various kinds of minorities”¹²², including asylum-seekers.

2) *Scope of art.3 ECHR*

One of the most important and commonly invoked provisions of ECHR in regards to asylum-seekers is art.3. According to the Court, the great importance of art.3 stems from the fact that it “enshrines one of the fundamental values of the democratic societies making up the Council of Europe”¹²³. Although the article invokes obligation similar to *the principle of non-refoulement* enshrined in the 1951 Refugee Convention, it has wider scope than art.33 of 1951 Refugee Convention¹²⁴. Art.3 is non-derogable and provides for no limitations even in the event of a public emergency threatening the life of the nation. While the personal scope of *non-refoulement* is considerably limited under art.33 of the Refugee Convention¹²⁵, art.3 of the ECHR protects everyone irrespective of their status in the country¹²⁶. The Court has also broadened the application of art.3 by

¹²² Dia ANAGNOSTOU, “Does European Human Rights Law Matter? Implementation and Domestic Impact of Strasbourg Court Judgments on Minority-Related Policies”, (2010) 14 *International Journal of Human Rights* 721, 723.

¹²³ *Case of Soering v. the United Kingdom*, App. No(s).14038/88 ECHR (Plenary) 7 July 1989, A161, para 88 [Online] Available: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57619> [Accessed 3 July 2011].

¹²⁴ In *Chahal v. UK* the Court acknowledges the limits of the 1951 Refugee Convention in relation to non-refoulement. *Case of Chahal v. the United Kingdom*, App. No(s). 22414/93, ECHR (Grand Chamber) 15 November 1996, Reports 1996-V, para 80 [Online] <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100631> [Accessed 12 June 2011]

¹²⁵ Only refugees and asylum-seekers waiting for decision on their cases benefit from art.33 Refugee Convention.

¹²⁶ *Non-refoulement* applies to all persons who have a well-founded fear of persecution, whether or not a person has been recognised as a refugee. Helene LAMBERT, “Protection against Refoulement from Europe: Human Rights Law Comes to the Rescue”, (1999) 48 *The International and Comparative Law Quarterly* 515, 522.

including cases where harsh medical conditions in the country of origin can lead to ill-treatment¹²⁷.

The prohibition of ill-treatment under art.3 is absolute and provides protection to individuals irrespective the illicitness of their conduct. According to the Court “there can never be, under the Convention or under international law, a justification for acts in breach of that provision”¹²⁸. In the case of *Chahal v. UK*¹²⁹ the Court, while acknowledging the difficulties faced by the State when protecting its citizens from terrorist violence, concluded that prohibition against treatment contrary to art.3 is absolute and “the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.” Since the “War on terror” became a mainstream argument for greater security measures, governments are actively seeking, although unsuccessfully, to rebut the absolute nature of art.3 insisting on the need for balance between the interests of the applicant and those of the community¹³⁰.

¹²⁷ According to the Court the receiving government cannot be blamed or held responsible for the absence of socio-medical support. In its reasoning the Court stated that whether the medical facilities and treatment is not adequate the act of removal would be in breach of art.3 as it would expose the applicant “to a real risk of dying under the most distressing circumstances and would thus amount to inhumane treatment.” However, this applies only in extraordinary circumstances. *Case of D. v. the United Kingdom*, App. No(s).30240/96 ECHR (Chamber) 2 May 1997 Reports 1997-III, Para 53 cited in UNHCR, Op. Cit., note 118.

¹²⁸ *Case of Ireland v. the United Kingdom*, App. No(s). 5310/71, 18 January 1978, Para 162 [Online] Available: <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/regionalcases/europeancourtofhumanrights/nr/2607> [Accessed 13 June 2011]; The absolute character of non-refoulement was recently reaffirmed in *Case of Saadi v. Italy*, App. No(s).37201/06, ECHR (Grand Chamber), 28 February 2008, Para 138-141 [Online] <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85276> [Accessed 21 June 2011]

¹²⁹ *Chahal v. UK*, Op. Cit., note 124, Para 79-80.

¹³⁰ CENTRE FOR CRIMINAL JUSTICE AND HUMAN RIGHTS, *Saadi v Italy, the ECtHR Reaffirms Article 3's Absolute Protection*, 4 March 2008 [Online] <http://www.ucc.ie/law/blogs/ccjhr/2008/03/saadi-v-italy-ecthr-reaffirms-article.html> [Accessed 3 April 2011]. In *Saady v. Italy*, Op. Cit., note 128, para 140 the UK, which was intervening in the case, further argued that because the right to asylum does not exist under the ECHR, this right is governed by the 1951 Refugee Convention which provides exception to non-refoulement in cases where there is a risk to national security and the asylum seeker acted contrary to UN Charter.

3) *State Responsibility under art.3*

Art.3 of the ECHR has an extraterritorial jurisdiction invoking the responsibility of the contracting state for any possible ill-treatment committed by the receiving state, not party to the Convention¹³¹. When substantial grounds have shown that if removed, the person would face a real risk of being subjected to ill-treatment, the state will be responsible under art.3¹³². The existence of other international instruments does not preclude the contracting party's responsibility "for all and any foreseeable consequences of the act of removal suffered outside their jurisdiction"¹³³. The source of ill-treatment can come from state authorities as well as non-state agents, as long as the state cannot provide protection¹³⁴.

In cases of removal under the 'safe third country' concept, the Court has stated that the state, which automatically relies on safe third country arrangements made under the Dublin Regulations and removals to an intermediate country party to the Convention, do not affect the responsibility of the sending state under art.3¹³⁵. Furthermore, the Court has observed, "the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient

¹³¹ In *Soering v. UK*, Op. Cit., note 123 the Court has stated that the sending state would be in violation of art.3 if extradite the applicant to a country not party to the Convention, such as USA, where she/he will face a death penalty.

¹³² *Id.*, Para 91; *Chahal v. UK*, Op. Cit., note 124, Para 74.

¹³³ *Soering v. UK*, Op. Cit., note 123, Para 86.

¹³⁴ *Case of Salah v. the Netherlands*, App. No(s).8196/02, ECHR (Third Section) 6 July 2006, Para 147 [Online] <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76256> [Accessed 24 July 2011]

¹³⁵ *Case of T.I. v. the United Kingdom*, No. 43844/98, ECHR (Third Section) 7 mars 2000, Reports 2000-III, p. 15 [Online] http://www.gisti.org/IMG/pdf/jur_cedh_ti-royaume-uni_2000-3-7.pdf [Accessed 23 September 2011].

to ensure adequate protection against the risk of ill-treatment”¹³⁶. Subsequently, each state should give a thorough consideration of each applicant’s submission before exercising any removal under the Dublin Regulations.

It can be firmly concluded that the ECHR, with its extensive jurisprudence, “set the standards for the rights of asylum-seekers across Europe”¹³⁷. In fact, cases brought before the ECtHR by asylum-seekers and refugees are the fastest growing area of case law¹³⁸. The Convention offers important safeguards to asylum-seekers against states trying to avoid their protection responsibilities.

4) ECtHR: Limitations of the Procedure

However, the protection under the ECHR has limitations and, according to some authors, the protection provided rests within the theoretical framework without practical importance¹³⁹. There are several reasons to reach the later conclusion.

Although the ECtHR has undertaken a progressive approach towards safeguarding the rights of asylum-seekers under the ECHR, especially art.3, some procedural hurdles overshadow the effective protection offered by the Convention. In the first place, the rigid admissibility criteria under Court rules pose huge barriers to applicants¹⁴⁰. The

¹³⁶ *M.S.S. v Belgium and Greece*, Op. Cit., note 84, Para 353.

¹³⁷ N. MOLE, Op. Cit., note 116, p.9

¹³⁸ A. ANAGNOSTOU, Op. Cit., note 122.

¹³⁹ Nuala MOLE, “Keynote presentation by Ms Nuala Mole” in COUNCIL OF EUROPE & UNHCR (eds.) *Proceedings of the 2nd Colloquy on the European Convention on Human Rights and the Protection of Refugees, Asylum Seekers and Displaced Persons : Consolidation and Development of the Asylum-Related Jurisprudence of the European Court of Human Rights*, Strasbourg, Council of Europe Pub., 2000, p.39.

¹⁴⁰ ECHR, Op. Cit., note 20, art.35.

standard of proof¹⁴¹, among others, is set so high making it very difficult to be reached¹⁴². Secondly, the ECtHR procedure may take 5-6 years until the final judgement is reached, which is a great challenge for asylum-seekers facing deportation or expulsion, as it is usually executed in short periods¹⁴³. The interim measures under Rule 39 are very useful in urgent situations¹⁴⁴. However, according to the Court, the interim procedures are not binding in nature. The fact that Rule 39 ECHR has been obeyed by contracting parties before does not make it binding¹⁴⁵. Moreover, very rarely cases of asylum-seekers considered by the Court result in decisions in favour of the applicant¹⁴⁶. It is true that the ECtHR cannot assume the role of European Court of appealing for unsatisfactory asylum decisions¹⁴⁷, but at the same time the Court has to take into consideration the vulnerable situation of asylum-seekers in the receiving state, and the huge differences in the treatment of asylum-seekers in different EU states. Moreover, the court has to acknowledge the lack of an international monitoring mechanism for the accurate application of Refugee law by the state.

Further to the above, the implementation of ECtHR decisions into domestic policies varies across European states. In some instances, even after direct involvement by the Committee of Ministers, some states remain reluctant to take the necessary steps to

¹⁴¹ The applicants have to be able to show that they would be personally at risk if returned and to be relatively more at risk of prohibited treatment than others in similar vulnerable situations.

¹⁴² N. MOLE, Op. Cit., note 139, p.39-40; A. ANAGNOSTOU, Op. Cit., note 122, 725.

¹⁴³ H. LAMBERT, 1999, Op. Cit., note 126, 529-530.

¹⁴⁴ *Id.*, p.531, they can be granted only in cases where asylum-seeker can show that “irreparable” and “irreversible” damages would occur if the removal is carried on before decision.

¹⁴⁵ *Case of Cruz Varas and others v. Sweden*, App. No(s).15576/89 ECHR (Plenary) 20 March 1991, A201, Para 92 [Online] <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57674> [Accessed 20 September 2011]

¹⁴⁶ N. MOLE, Op. Cit., note 139, p.39.

¹⁴⁷ N. MOLE, Op. Cit., note 116.

comply with the court's decision¹⁴⁸. Moreover, the Court lacks guidance and gives a broad margin of appreciation to states to decide on relevant changes of domestic law, and policies¹⁴⁹.

Finally, the Court is silent on the status of the applicant once a stay of removal is issued. It is up to the individual state to decide what social and other benefits are to be assigned to asylum-seekers. Such uncertainty can be detrimental to the applicant's well being. Particularly the lack of any adequate status, which can guarantee basic social and economic rights, can amount in many instances to ill-treatment under art.3¹⁵⁰.

B. EU Charter of Fundamental Rights and Court of Justice of the European Union: Impact on Rights of Asylum-Seekers

Initially established as a community with economic aims, the EU has long evaded the need for the implementation of a human rights framework within its legal treaty structure to assure compliance by EU and member states alike. It was not until the Treaty of Maastricht when human rights were officially codified into the EU legal structure¹⁵¹. Since then, the EU has gradually advanced the human rights agenda with

¹⁴⁸ Kerstin BUCHINGER & Astrid STEINKELLNER, "Litigation Before the European Court of Human Rights and Domestic Implementation: Does the European Convention Promote the Rights of Immigrants and Asylum Seekers?", (2010) 16 *European Public Law* 419, 432-433.

¹⁴⁹ A. ANAGNOSTOU, Op. Cit., note 122, 724.

¹⁵⁰ UNHCR, Op. Cit., note 118, p.12. In case of *Ahmed v. Austria*, the Somali applicant committed suicide a year and a half after the Court's stay of removal, unable to coop with the situation of limbo in the country of asylum. *Case of Ahmed v. Austria*, App. No(s).25964/94, ECHR (Chamber) 17 December 1996, Reports 1996-VI [Online] <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58001> [Accessed 3 September 2011]

¹⁵¹ Art. F of the Treaty affirmed the respect for fundamental rights, as guaranteed by the ECHR and the constitutional traditions common to the Member States. It needs to be point out that human rights were first mentioned in the Single European Act; however the provision was included in the preamble which awards it with a declaratory character.

point of culmination the adoption of EU Charter¹⁵². The aim of the Charter is to provide more coherent protection of human rights within the EU by making those rights more visible¹⁵³. The Charter has acquired a rank of primary legislation with the same legal value as EU treaties with entry into force of the Lisbon Treaty in December 2009. Thus, directives and other secondary laws have to be drafted and implemented in compliance with the Charter. Furthermore, the Charter is directly enforceable in national courts in cases concerning the application of EU law¹⁵⁴.

1) Scope of the Charter

The scope of the Charter is limited to areas of application of the Union law, and binds EU institutions, bodies, and member states when implementing Union law¹⁵⁵. The Charter catalogues the existing rights under the EU legal order, but does not extend the competence of the Union outside Community law, in areas where member states have competence¹⁵⁶. Many of the Charter's provisions correspond to those listed in the ECHR and have the same meaning and the same scope as the ECHR provisions¹⁵⁷. In regards to its personal scope, the Charter applies to everyone, including third country nationals, except for provisions expressly limiting the application to EU citizens, such as the right

¹⁵² For general overview see COUR DE CASSATION DE FRANCE, *Dossier : la Charte des droits fondamentaux - historique et enjeux juridiques*, 2010 [Online] http://www.courdecassation.fr/publications_cour_26/publications_observatoire_droit_europeen_2185/veilles_bimestrielles_droit_europeen_3556/octobre_2010_3810/droits_fondamentaux_18630.html [Accessed 3 June 2011]; Contra see Joseph H. H. WEILER, "Editorial: Does the European Union Truly Need a Charter of Rights?", (2000) 6 *European Law Journal* 95.

¹⁵³ EU Charter, Op. Cit., note 21, Preamble.

¹⁵⁴ EU Charter, Op. Cit., note 21, art.51(1).

¹⁵⁵ Poland, UK and Czech Republic have opted for a limited national effect of the Charter. Also the Charter does not apply in areas of EU law where UK, Ireland and Denmark have opted out.

¹⁵⁶ *Consolidated Version of the Treaty on the European Union* [TEU] 2010 OJ, C 83/13, art.6 [Treaty of Lisbon].

¹⁵⁷ EU Charter, Op. Cit., note 21, art.52 (3).

to vote, for example¹⁵⁸. Accordingly, Guild¹⁵⁹ has concluded that the Charter has equalized the rights for everyone in the EU, thus diminishing the divide between citizens and non-citizens.

The EU Charter itself does not expressly list the situations when its provisions can be subjected to limitation. Art. 52(1) EU Charter¹⁶⁰ only requires that the law provide limitations to any of the Charter provisions and meet the principles of proportionality and necessity. However, as concluded by Peers, the lack of any express statement of situations when the legislator can derogate from Charter provisions does not allow the Union or the member states to apply derogating measures under the Charter as they please¹⁶¹. For example, following Peers' logic, in case of derogation from provisions corresponding to the rights of the ECHR, EU institutions (when EU becomes party to the ECHR) or member states will be in breach of the ECHR, which lists limited situations where derogation is permitted¹⁶². Moreover, the derogating state risks being in breach of art.53 of the Charter¹⁶³. Therefore, in cases where the ECHR itself envisages the

¹⁵⁸ Steve PEERS, "Immigration, Asylum and the European Union Charter of Fundamental Rights", (2001) 3 *European Journal of Migration and Law* 141, 146; See also art.39 as well as arts. 12(2), 15(2) and (3), 21(2) and 34(2), for example.

¹⁵⁹Elsbeth GUILD, "The European Union after the Treaty of Lisbon Fundamental Rights and EU Citizenship", *Global Jean Monnet/European Community Studies Association World Conference*. Brussels 25-26 May 2010, p.5.

¹⁶⁰ The article states:

"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

¹⁶¹ S. PEERS, Op. Cit., note 158, 152-155.

¹⁶² ECHR, Op. Cit., note 20, art.15.

¹⁶³ Art. 53 states:

"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the

possibility of derogation, the Charter is offering additional limitations¹⁶⁴. Thus, art.52 (1) is only “a ‘residual’ derogation clause” related to the provisions that are unique to the Charter¹⁶⁵.

2) Scope of the Right to Asylum in EU Charter

The right to asylum¹⁶⁶ is included within the EU Charter, therefore acquiring the status of a fundamental right within the EU legal order. As such, it is directly enforceable in national courts and national courts have to ensure effective protection of the right¹⁶⁷. However, it is difficult to determine the exact content of the right to asylum within the EU legal order given the vague language used in the provision itself. The unclear wording of the right to asylum within the international law further complicates the task. Prof. Steve Peers and Maria Gill- Bazo accord the right to asylum, as provided by the EU Charter, a wider scope than under art.14 of the UDHR¹⁶⁸. Considering art.52 (4) of the EU Charter and the *travaux préparatoires*, Gill-Bazo concludes that art.18 “[is] to be construed as the right of individuals to be granted asylum when they meet the criteria.

Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.”

¹⁶⁴ S. PEERS, Op. Cit., note 158, 152-155.

¹⁶⁵ *Id.*, p.155.

¹⁶⁶ According to art.18:

“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.”

¹⁶⁷ Marcelle RENEMAN, An EU right to interim protection during appeal proceedings in asylum cases? *European journal of migration and law*, 12(4), 411.

¹⁶⁸ S. PEERS, Op. Cit., note 158, p.161; Maria-Teresa GIL-BAZO, “The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law”, (2008) 27 *Refugee Survey Quarterly* 33, 48.

These criteria are necessarily those established by the Union's law, rather than by the member states themselves"¹⁶⁹.

Further to the right to asylum, art.19(2) EU Charter¹⁷⁰ articulates the prohibition of removal, extradition or expulsion to a state where there is a serious risk of an individual being subjected to a death penalty, torture or other inhuman or degrading treatment or punishment. According to the Commentary accompanying the EU Charter, art.19 (2) incorporates art.3 case law of the ECtHR pertinent to *non-refoulement*. Moreover, the *non-refoulement principle* is repeated twice in the Charter. Once it is stated in art.4 and then reprinted in art.19 (2). The second repetition is not accidental. It emphasizes the extreme vulnerability of the third country nationals facing refoulement thus, providing further safeguarding of their rights. At the same time, such repetition strengthens the position of *non-refoulement* as a cornerstone of the asylum institution. Although art.19 (2) does not correspond to a specific provision of ECHR, it cannot be derogated from. The core element of the provision is *the non-refoulement principle*, which does not allow for derogations under ECHR¹⁷¹. Therefore, any derogation will lead to breach of art.53 of the Charter, as it will limit and adversely affect the obligations of member state under ECHR¹⁷². Furthermore, in cases where there is a violation of Charter rights by a

¹⁶⁹ M-T. GIL-BAZO, Op.Cit., note 168; Also according to the Protocol on Asylum attached to the Treaty of Amsterdam (1997), the EU nationals are excluded from the application of art.18. Thus, Member States have discretion to apply art.18 in regards to such claimants.

¹⁷⁰ Article 19(2) states:

“No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.”

¹⁷¹ S. PEERS, Op. Cit., note 158, 159.

¹⁷² *Id.*

Union's institutions and member states, art.47 confers to individuals, including asylum-seekers, the right to an effective remedy before a court or tribunal.

3) ECJ and the Relevant Jurisprudence

Over the years, the ECJ's jurisprudence in relation to the place of human rights within the community order has significantly progressed: from complete reluctance to recognize human rights as a standard for the interpretation of community legislation and to express recognition of human rights as general principles protected under the Union law¹⁷³. Since the Treaty of Amsterdam, the ECJ has acquired jurisdiction to legislate in regards to asylum. The preliminary rulings procedure¹⁷⁴ is one of the main instruments of the ECJ for harmonizing the EU legislation in areas of asylum, as the Court's rulings on particular case are legally binding for all member states (for extensive discussion see below).

Despite the scarce jurisprudence on asylum, it can be affirmed that court adjudications have been in line with the international human rights standards. In regards to *non-refoulement principle* ECJ has taken the same line of reasoning as ECtHR. It has recognized the prohibition of torture laid down in art.3 of the ECHR as absolute and not

¹⁷³ *Erich Stauder v City of Ulm – Sozialamt*, Case 29-69, 12 November 1969, Para 7 [Online] http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61969J0029&lg=en [Accessed 12 July 2011]; Following threat from some member states to disregard the supremacy of the community law which jeopardizes human rights guaranteed within their constitutional order, ECJ expressly recognized human rights as a general principle of the law protected by the Union. Yaşar DOĞAN, "The Fundamental Rights Jurisprudence of the European Court of Justice: Protection for Human Rights within the European Union Legal Order", (2009) 6 *Ankara Law Review* 53, 54. More on human rights and ECJ see S. PEERS, "Human Rights, Asylum and European Community Law", (2005) 24 *Refugee Survey Quarterly*.

¹⁷⁴ *Consolidated Version of the Treaty on the Functioning of the European Union* [TFEU], 2010 OJ, C 83/49, aer.267 [Treaty of Lisbon]

susceptible to any restrictions¹⁷⁵. The court is already developing its own jurisprudence in regards to asylum. One recent decision will be commented on here in order to demonstrate the court's willingness to align its jurisprudence with human rights standards.

In the *Elgafaji v Staatssecretaris van Justitie* case¹⁷⁶, the court was asked to interpret art.15(c) of the Qualification Directive. This provision is of particular importance to asylum-seekers who fall outside of the scope of art.1A of the Refugee Convention as it affords them with a subsidiary protection which is a relatively new instrument of international protection pertaining to asylum¹⁷⁷. Member States intervening in the case supported the position that art. 15(c) requires the person in need of protection to prove individual risk to their life in the case of a return. In contrast, the court held that art.15(c) covers situation where there is also a general risk of harm faced by the individuals¹⁷⁸. According to the Court, in situations of indiscriminate violence, due to armed conflict, the person will face individual risk solely on account of their presence in the territory

¹⁷⁵ *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich*, Case C-112/00, 12 June 2003. *Free movement of goods - Restriction resulting from actions of individuals - Obligations of the Member States - Decision not to prohibit a demonstration by environmental protesters which resulted in the complete closure of the Brenner motorway for almost 30 hours - Justification - Fundamental rights - Freedom of expression and freedom of assembly - Principle of proportionality*, Para 80 [Online] Available: <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C.T.F&num=C-112/00&td=ALL&parties=Schmidberger> [Accessed 23 December 2011]

¹⁷⁶ *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*. Case C-465/07, Court (Grand Chamber), 17 February 2009. *Directive 2004/83/EC - Minimum standards for determining who qualifies for refugee status or for subsidiary protection status - Person eligible for subsidiary protection - Article 2(e) - Real risk of suffering serious harm - Article 15(c) - Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of armed conflict - Proof*. [Online] <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C.T.F&num=C-465/07&td=ALL&parties=Elgafaji> [Accessed 21 June 2011].

¹⁷⁷ Roger ERRERA, "The ECJ and Subsidiary Protection: Reflections on *Elgafaji* - And After", European Asylum Law Judges Association - European Academy Workshop, Berlin, October 19 - 20, 2009, p.17

¹⁷⁸ *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie*, Op. Cit., note 176, Para 33.

where such violence takes place¹⁷⁹. At the same time, however, the court assigned the national authorities the task of assessing the exceptionality of indiscriminate violence in each case¹⁸⁰. This is an important decision as it creates an enforceable right to asylum for individuals fleeing indiscriminate violence¹⁸¹, establishing that the protection of refugees fleeing generalized violence is not a matter of executive discretion but is governed by law. It can be concluded that with the new powers assigned to the ECJ by the Lisbon treaty, its role for developing asylum standards aligned with human rights will be indispensable. This will enable for speedy harmonization of the practices of member states to provide more consistent treatment of asylum-seekers.

CHAPTER II: ACCESS TO ASYLUM IN EU: QUESTION OF HUMAN RIGHTS OBSERVANCE OR POLITICAL PRIORITIES

SECTION 1: Where is EU Heading? Main Trends in the EU Asylum Acquis¹⁸²

In this chapter, our aim is to take a glance at the EU policy on asylum and outline the legal and socio-political context in which such policies have developed. In the brief overview of the EU asylum acquis we shall demonstrate the gradual establishment of exclusionist policies as well as the debatable reasons and fears which prompted the establishment of such policies. This will allow a better understanding of the current state

¹⁷⁹ *Id.*, Para 43.

¹⁸⁰ *Id.*

¹⁸¹ Maryellen FULLERTON, “A Tale of Two Decades: War Refugees and Asylum Policy in the European Union”, (2010) 10 *Global Studies Law Review* 1, 4.

¹⁸² The EU Asylum acquis (body of law) comprises of legislative measures and harmonised standards on asylum (there are five legal instruments that make up the EU acquis on asylum. Discussed below.)

of the EU asylum shaped by narrow political interests of member states with little account for the rights and well-being of those seeking protection.

A. Historical Background

The fall of the Berlin wall and the following developments have produced numbers of asylum-seekers and provoked gradual tightening of the EU borders to the point where EU was labelled “Fortress Europe”. Obsessed with scare-mongery about refugees flooding their territories and menacing national values, member states took on a race to introduce controversial restrictive asylum policies that are completely at odds with the international human rights instruments. Such development was facilitated by the initial lack of human rights framework within the EU legal order. The EU was originally conceived as a common market. This goal was achieved by the abolition of the internal borders so as to facilitate the free movement of capital, goods, services and labor¹⁸³. In other words, until recently, EU affairs have been driven mainly by internal market logic, with no or little attention to the human rights principles¹⁸⁴. It is true that gradually, human rights have emerged onto the EU political agenda according to EU citizens’ various freedoms. However, the internal market logic is still persistent when it comes to according rights for asylum-seekers and refugees¹⁸⁵.

¹⁸³ Elspeth GUILD, “EU Dimension of Refugee Law: the Europeanisation of Europe's Asylum Policy”, (2006) 18 *International Journal of Refugee Law* 630, 631-633.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* In the context of internal market logic, Guild has compared asylum-seekers with tins of beans whose access to the EU territory is pending upon approval of state authorities.

“Determination of asylum claims by state authorities was assimilated to the certification of extra EU imported goods, a prerequisite for the goods gaining access to the internal market and free movement within the EU... In the internal market logic, asylum seekers should be certified on arrival like beans, or warehoused (like tins of beans) until this is administratively convenient.”

Moreover, due to the initial policy making process within the EU¹⁸⁶, narrow state interests to stem asylum-seekers' flow¹⁸⁷ have found their way into EU asylum acquis through multilateral agreements and intergovernmental cooperation directed to harmonize the response to asylum¹⁸⁸. Controversial measures such as '*safe country of origin*', '*safe third country*' and the notion of the manifestly unfounded claim, among others are products of national legislations attempting to regulate the movement of asylum-seekers across national borders¹⁸⁹. Such policies have quickly become popular as they corresponded completely to the '*race to the bottom*' pursued by the states in order to make them less attractive for asylum-seekers. Thus, at the beginning, the EU asylum was dominated by '*bottom up approach*'¹⁹⁰ contrary to the popular misconception about the 'Brussels dictate'¹⁹¹ over national policies. The '*informal governmentalism*'¹⁹² which characterizes the initial approach toward asylum as amenable to criticism because of the lack of transparency during the negotiations and the adoption process with little or no participation of the Community institutions and the civil society.

¹⁸⁶ Until the Treaty of Amsterdam the asylum was not part of the common EU goals and was regulated by intergovernmental cooperation.

¹⁸⁷ Rosemary BYRNE, Gregor NOLL & Jens VEDSTED-HANSEN, "Understanding Refugee Law in an Enlarged European Union", (2004) 15 *European Journal of International Law* 355, 359.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* For example, 'safe third country' notion was originally invented and introduced in the Danish asylum law. It is known as a Danish clause.

¹⁹⁰ *Id.*, 357.

¹⁹¹ The term refers to EU institutions.

¹⁹² Andrew GEDDES, "Asylum in Europe: States, the European Union and the International System", (2001) 20 *Refugee Survey Quarterly* 59, 60.

Thus, geo-political changes, market driven logic of asylum measures and narrow states interests determined the initial stage of policy development in the field of asylum in the EU. This set the tone for further inhospitable legislation towards asylum-seekers and refugees.

B. Overview of the EU Asylum Acquis

Bill Frelick has identified three major paradigms in the international refugee protection regime: exilic, source country and security paradigm¹⁹³. It can be suggested that the EU asylum policy follows similar patterns in its responses toward asylum-seekers and refugees. Furthermore, the EU due to its political influence was one of the main players in shaping the international refugee regime ever since its conception¹⁹⁴.

1) Exilic Paradigm

The exilic paradigm, until 1991, was marked by deep ideological tensions between the Western Countries and the Soviet Bloc. Due to the impossibility of resolving the root causes in the countries of origin, refugees could not be returned home¹⁹⁵. During that period, refugees clearly had an ideological value, and granting a safe haven to them was

¹⁹³ Bill FRELICK, "Paradigm Shifts in the International Responses to Refugees" in WHITE J. D. & ANTHONY J. M. (eds.) *Fear of Persecution : Global Human Rights, International Law, and Human Well-being*. Lanham, Lexington Books, 2007.

¹⁹⁴ According to Hathaway "[d]ominated by EU western states the Refugee Convention was conceived to serve their political and ideological views." The author concludes that the Convention is "[e]urocentric, offering not universal but rather two-tiered protection where non-European refugees were offered only indirect and discretionary financial assistance". J. HATHAWAY, "A Reconsideration of the Underlying Premise of Refugee Law", (1990) 31 *Harvard International Law Journal* 129, 157.

¹⁹⁵ B. FRELICK, Op. Cit., note 193, p.34.

used, so to say, as a tool by the Western states for promoting liberal values¹⁹⁶. Most of the Western European countries lacked a comprehensive refugee determination regime, and refugee status was granted almost automatically¹⁹⁷. The EU for its part had no competences in the field of migration and asylum, which were considered internal matters.

2) Source Country Paradigm

The source country paradigm described the 1990s and was characterized by shift in the approach toward granting asylum. Refugees were kept as close as possible to their areas of origin and afforded temporary status at most¹⁹⁸. An increased use of temporary protection, safety zones within the country of origin and similar policies were put in place to facilitate the task. Refugees were subjected to policies aiming to prevent them from reaching the Western shores. From the 1980s, asylum applications in EU countries

¹⁹⁶ *Id.* Also Sara COLLINSON, *Beyond borders : west European migration policy towards the 21st century*, London, Royal Institute of International Affairs, 1993 cited in Joan FITZPATRICK, "Flight from Asylum: Trends toward Temporary "Refuge" and Local Responses to Forced Migrations", (1995) 35 *Virginia Journal of International Law* 13, 27.

¹⁹⁷ *Id.*, Collinson describes the situation at that time:

"During the 1950s and 1960s, the 1951 Convention proved both adequate for responding to the refugee problems faced by the Western states, and suited to their political interests. The majority of those seeking asylum in the West were people attempting to escape political repression and economic hardship in the Eastern bloc. Despite a reluctance to enter into any obligations over the granting of asylum, the Western states offered refuge to these groups in an almost automatic fashion ("presumptive refugee status"), even though the majority would not have been able to make a case for refugee status according to a strict interpretation of the 1951 Convention. By accepting exiles from the Eastern bloc as refugees, the Western countries could deal an ideological blow to the communist countries by stigmatizing them as persecutors, while simultaneously promoting Western liberal values. Furthermore, owing to the imposition of exit restrictions by the Eastern bloc countries, the numbers were generally low."

¹⁹⁸ *Id.*, p.16. Widespread state practice is to afford asylum-seekers with a temporary protection. Such approach prevents such individuals from all rights to which refugees are entitled under the 1951 Refugee Convention. *Id.*

rose rapidly to reach 672,385 in 1992¹⁹⁹ a number, which was perceived as ‘asylum out of control’²⁰⁰. The Treaty of Maastricht²⁰¹ has now enshrined the ‘three pillar system’²⁰² in the legal structure of the EU. Asylum and immigration are placed in the security framework of the third pillar on “Police and Judicial Cooperation in Criminal Matters”, characterised by intergovernmental cooperation. This leads one to the conclusion that the security trend of EU asylum policies had begun earlier, outside the EU framework²⁰³. Asylum policy was now placed in one policy framework together with illegal immigration, organized crime, the fight against terrorism, drug trafficking and police cooperation.

¹⁹⁹ EUROSTAT, *Asylum applications in the European Union*, 2007 [Online] http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-07-110/EN/KS-SF-07-110-EN.PDF [Accessed 3 January 2011].

²⁰⁰ Joan Fitzpatrick points out three reasons for the sharp increase of the asylum applications: 1. The end of the cold war where 1.2 million people left the Warsaw Pact states in search of new lives in the West; 2. Improved means of transportation and the increase of smugglers facilitating the arrival of asylum seekers from developing countries; 3. The oil crisis in 1970’s limited the legal venues for immigration in Europe and asylum channel used as an easy venue for entering the country. J. FITZPATRICK, *Op. Cit.*, note 196, 27. The third point is also highlighted by Peter Stalker. Peter STALKER, “Migration Trends and Migration Policy in Europe”, (2002) 40 *International Migration* 151, 153.

²⁰¹ For a first time EU Treaty made reference to the 1951 Refugee Convention. Article K.1 which regulates matters, including asylum policy, states that it “shall be dealt with in compliance with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Convention relating to the Status of Refugees of 28 July 1951 and having regard to the protection afforded by Member States to persons persecuted on political grounds”. *Treaty on European Union*, Feb. 7, 1992, OJ, C191 [Treaty of Maastricht].

²⁰² The term refers to the EU legal structure before entry into force of the Treaty of Lisbon. The first pillar was the European Communities consisting of the European Community (EC), the former European Coal and Steel Community (ECSC) and the European Atomic Energy Community (EURATOM). This pillar was the supranational (community) pillar handling common European policies such as economic, environment, agriculture, social, etc. The Common Foreign and Security Policy (CFSP) was the second pillar and the Police and Judicial Co-operation in Criminal Matters, the third pillar comprising police and criminal cooperation. The last two pillars were characterized by intergovernmental cooperation.

²⁰³ The first intergovernmental body to tackle asylum and immigration among issues as drugs, international crime, etc. was the TREVI Group (Terrorisme, Radicalisme, Extremisme et Violence Internationale); The ad hoc Working Group on Asylum and Immigration was formed after separation from TREVI Group to tackle matters on abuse of the asylum systems of the participating Member States and the volume of applications. Dace SCHLENTZ, *Did 9/11 Matter? Securitization of Asylum and Immigration in the European Union in the Period from 1992 to 2008*, Refugee Studies Centre Working Paper Series 56, 2010, p.17 [Online] http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:5570 [Accessed 5 May 2011].

The 1990s were critical in paving the way to a decidedly restriction oriented EU asylum policy, completely ignoring the protection needs of asylum-seekers recognized in international law. While abolishing borders between member states, the Convention Implementing the Schengen Agreement²⁰⁴ introduced the beginning of the ‘Fortress Europe’ by strengthening the control of the common external border. The Convention put in place short-term visa entry²⁰⁵ together with a list of countries whose citizens should possess visas to enter the EU territory²⁰⁶. Although not directly aiming at tightening access for asylum-seekers, one of the intentions of such a list was clearly to stem refugee flows. Most of the countries on the list like Afghanistan, and Somalia are refugee-producing countries. In addition, the Convention put in place carrier sanctions for air transporters carrying third country nationals who are not in possession of valid travel documents²⁰⁷. It is a well-known fact that many asylum-seekers are traveling without documentation due to legitimate reasons such as the urgency of their flight, the lack of nearby visa posts, among others²⁰⁸. Thus, visa requirements on countries that generate refugees along with carrier sanctions constitute “the most explicit blocking mechanism for asylum flows and it denies most refugees the opportunity for legal

²⁰⁴ *Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany And the French Republic, on the Gradual Abolition of Checks at their Common Borders*, 19 June 1990, [Schengen Convention] <http://www.unhcr.org/refworld/docid/3ae6b38a20.html> [Accessed 29 June 2012]

²⁰⁵ *Id.*, art10.

²⁰⁶ Council Regulation (EC) No 539/2001 of 15 March 2001 Listing the Third Countries whose Nationals Must be in Possession of Visas when Crossing the External Borders and those Whose Nationals are Exempt from that Requirement.

²⁰⁷ Schengen Convention, Op. Cit., note 204, art.26.

²⁰⁸ Art. 26 require the return of undocumented passengers and imposition of penalties to be undertaken in compliance with the 1951 Refugee Convention and the corresponding 1967 Protocol. However, such reference appears useless as the carrier personal is not trained and qualified to identify potential asylum-seekers. Clearly, the preference will be given to deterrence of all passengers without necessary documents rather than risking stiff penalties for the carrier company.

migration”²⁰⁹. Consequently, many asylum-seekers have resorted to irregular channels for entering the EU territory²¹⁰.

The so-called Dublin Convention²¹¹ was another instrument, which fell short of implementing international standards for the protection of asylum-seekers. In broad terms, it obliged the asylum-seekers to submit their application in the first country of entry²¹², thus significantly limiting asylum-seekers to choose which country to apply for protection²¹³. In suspicious cases where an individual passed through a member state without applying for asylum there, they are requested to return to that first country of entry. According to the EU Parliament, such allocation of responsibility deprives asylum-seekers of their access to a fair and efficient determination procedure²¹⁴. Preventing asylum-seekers to choose freely in which country to claim asylum, and given the varying acceptance rate in different member states, they are subjected to an ‘*asylum lottery*’²¹⁵. The heaviest responsibility was placed on the member states situated on the

²⁰⁹John MORRISON & Beth CROSLAND, *Trafficking and Smuggling of Refugees: the End Game in European Asylum Policy*, UNHCR Working paper No. 39, 2001 [Online] <http://www.unhcr.org/3af66c9b4.html> [Accessed 20 May 2011].

²¹⁰Estimations suggest that 90% of refugees rely on irregular means to gain access to the EU. ECRE, *Broken Promises - Forgotten Principles. An ECRE Evaluation of the Development of EU Minimum Standards for Refugee Protection. Tampere 1999, 2004*, p.17 [Online] <http://www.unhcr.org/refworld/docid/4124b3cc4.html> [Accessed 3 May 2011].

²¹¹In 2003, Dublin Convention was replaced by the Dublin Regulation. Council Regulation (EC) No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National. The Dublin Regulation is one of the five legal instruments comprising CEAS.

²¹²Some exceptions apply, e.g. in case of unaccompanied minors.

²¹³It is well known that, if the circumstances allow it, asylum-seekers would prefer to lodge an asylum claim in country where they have relatives or people from the same community in order to receive establishment and other support.

²¹⁴EUROPEAN PARLIAMENT, Op. Cit., note 88, p.7.

²¹⁵*Id.* According to the same report, in 2007 acceptance rates within member states varied considerably between 1% and 39%. The acceptance rates for Iraqis seeking protection, for example, varied between 0 and 81% in different EU member states.

periphery of the EU such as Italy and Greece²¹⁶. Thus, the Convention has failed to apply a responsibility-sharing²¹⁷ concept between member states, which was one of the initial aims.

In line with the restrictive, hard-lined policies, the 1992 London Resolutions²¹⁸ and Conclusions put in place the concepts of ‘*manifestly unfounded applications*’, ‘*safe third country*’ and ‘*safe country of origin*’²¹⁹. Those concepts have allowed states to introduce accelerated or simplified determination procedures with few safeguards for the rights of the claimants. In summation, the post-Maastricht period is characterized by intergovernmental cooperation and non-binding instruments, emphasising the lowest common denominator and restriction-oriented policies²²⁰.

In 1997, the Treaty of Amsterdam transferred asylum and immigration policies to the first (Community) pillar²²¹, giving the EU Commission the power to introduce measures on asylum and the EU Parliament the right to be consulted on the matter. Furthermore, it was affirmed that measures adopted under the new title IV, have to be in accordance with the Geneva Convention and related Protocol²²². For the first time the Treaty of Amsterdam introduced the concept of “Area of Freedom, Security and Justice”

²¹⁶ ECRE, *Summary Report on the Application of the Dublin II Regulation in Europe*, 2006, p.8 [Online] <http://www.ecre.org/topics/areas-of-work/protection-in-europe/135.html> [Accessed 2 June 2011].

²¹⁷ Many authors apply the term “burden” and “burden-sharing”. However, it is advisable such terms to be replaced with other more suitable, such as “responsibility-sharing” which will avoid the perception of asylum-seekers and refugees as a burden.

²¹⁸ *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum* [London Resolutions].

²¹⁹ For detailed review of the concepts see E. GUILD, Op. Cit., note 183.

²²⁰ A. Geddes, Op. Cit., note 192, 60.

²²¹ *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, Oct. 2, 1997, O.J. (C340) [Treaty of Amsterdam]. The new part IV was introduced as Visas, Asylum, Immigration and other Policies related to Free Movement of Persons

²²² *Id.*, art.63 (1).

(AFSJ)²²³ establishing, among other things, that EU is an area where people can seek international protection²²⁴. However, given the restricted jurisdiction of the ECJ and the considerable power of the individual states to influence the legislation due to the unanimity voting procedure in the Council, there was not a significant change in regards to the hard-lined asylum policies.

In 1999, the European Council met in Tampere where the first 5-year strategy (1999-2004) in the asylum and immigration field was laid down²²⁵. The EU Council agreed to work towards an establishment of a Common European Asylum System to be based on the full and inclusive implementation of the 1951 Refugee Convention, absolute respect for the principle of non-refoulement and the right to seek asylum²²⁶. The Conclusions acknowledged the distinction between immigration and asylum²²⁷, important distinction given the different needs of both categories of migrants. The Council also proposed measures for common European border management, suggesting a balanced approach in upholding refugee rights and managing external borders. Along with the positive development in the field of asylum, Tampere Conclusions laid down a framework leading to more securitisation of asylum. As priorities for the next five years, the Council envisaged, among others, to finalize its work on Eurodac, the electronic system

²²³ Analysis of the concept see Pieter BOELES, "Introduction: Freedom, Security and Justice for All", in E. GUILD & C. HARLOW (eds.), *Implementing Amsterdam*, Portland, Hart Pub, 2001, p.2-8; and Olga F. SIDORENKO, *The Common European Asylum System : Background, Current State of Affairs, Future Direction*, the Hague, Asser Press, 2007, p.21-24

²²⁴ *Id.*, O. F. SIDORENKO, p.21.

²²⁵ EUROPEAN COUNCIL, *Presidency Conclusions, Tampere, 15 and 16 October 1999*.

²²⁶ *Id.*, Para 13.

²²⁷ *Id.*, Para 10. Asylum-seekers are forced to leave their country due to persecution and need international protection; immigrants on the other hand move voluntary aspiring better economic opportunities, therefore both categories have different needs.

for the identification of asylum-seekers²²⁸, to pursue further the common active policy on visas including establishment of common EU visa offices²²⁹, etc. Thus, although giving the impression to project a direction axed on safeguarding the rights of asylum-seekers, refugees and other migrants, the post-Tampere legislative period placed the focus on border protection making the access to EU territory even harder and the post Tampere legislative developments are mostly disappointing.

3) Security Paradigm

The third period in refugee protection, according to Frelick, is marked by the security paradigm and began around the year 2000²³⁰. The period is characterized with an extensive ‘War on terror’ and further erosion in the application of the Refugee Convention across countries. Asylum-seekers and refugees are regarded as a security threat and asylum as a channel for terrorism²³¹. Anti-refugee discourse was reinforced by the mainstream media, which intentionally or through misinformation has supported misleading myths about asylum-seekers and refugees created by far right nationalistic movements. The link between asylum-seekers and refugees with terrorism was reinforced by the ‘problematic language’²³² used by the UN Security Council in several anti-terrorism resolutions where states are urged to deny safe haven to terrorists and to ensure that refugee status is not abused by such people²³³. Thus, the terrorism agenda

²²⁸*Id.*, Para 17.

²²⁹*Id.*, Para 22.

²³⁰B. FRELICK, *Op. Cit.*, note 193.

²³¹*Id.*, p.45.

²³²Guy S. GOODWIN-GILL, “Forced Migration: Refugees, Rights and Security” in J. MCADAM (ed.) *Forced Migration, Human Rights and Security*, Oxford, Hart Pub., 2008

²³³ UN Security Council, *Resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts]*, SCOR, Available at: <http://www.unhcr.org/refworld/docid/3c4e94552a.html> [Accessed 3 February 2011]. The Resolution is urging states to:

“(f) Take appropriate measures in conformity with the relevant provisions of

provided many states with ‘spurious justification’ to adopt hostile asylum measures²³⁴. Goodwin-Gill has suggested that the UN Security Council bears the responsibility for the fact that asylum legislation in many countries is in breach with International Human Rights Law (IHRL), International Refugee Law (IRL) and International Humanitarian Law (IHL)²³⁵. The 9/11 terrorist attacks accelerated the anti-refugee discourse and the securitization of the EU asylum acquis²³⁶.

Right after the 9/11 attacks, the EU Council held an extraordinary meeting in Brussels which called for strengthening the controls over the external borders²³⁷ inviting the Commission “to examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments”²³⁸ thus, reaffirming the tendency of the implied relation between asylum and terrorism. Although the Commission’s working document in response of the call did not suggest a dramatic change in the EU asylum polices, it called for revising *the non-refoulement*

national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;
(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists”;

In addition, the language of the resolutions has been problematic in view of the fact that there is no internationally agreed definition on terrorism. It remains within the prerogatives of each state to decide who is a terrorist and therefore excluded from refugee status. Thus, the matter is open for abuses from states. Rene BRUIN & Kees WOUTERS, “Terrorism and the Non-derogability of Non-refoulement”, (2003) 15 *International Journal of Refugee Law* 5,7.

²³⁴As noted by GOODWIN –GILL: “For some States, (or rather, for some governments), that has been the opportunity to introduce yet more stringent laws and policies, often in the aftermath of a terrorist incident, but also generally under a carefully constructed cloud of fear”. G. S. GOODWIN-GILL, Op. Cit., note 232, p.7.

²³⁵ *Id.*, p.13.

²³⁶ D. SCHLENTZ, Op. Cit., note 203.

²³⁷ EUROPEAN COUNCIL, *Extraordinary Council Meeting in Brussels on Justice, Home Affairs and Civil Protection. 20 September 2001*, para 24.

²³⁸ *Id.*, Para 29.

principle enshrined in art.3 ECHR, which, according to the ECtHR case law, is absolute and non-derogable²³⁹.

The following two EU Council meetings in Laeken²⁴⁰ and Seville²⁴¹ marked a new trend in EU asylum policy: externalization. The EU Council²⁴² called for an integration of the policy on migratory flows into the EU's foreign policy. The Union did not hesitate to use its trade agreements, diplomacy and other tools to “persuade” third countries for “joint management of migration flows and on compulsory readmission in event of illegal migration”²⁴³. Furthermore, asylum was treated within the irregular migration discourse placing the emphasis on the abuse of the asylum system coupled with the quick return of the rejected claimants²⁴⁴. The important distinction made in Tampere between asylum and immigration was once again blurred. One commentator has pointed that “EU is heading for a situation where people fleeing poverty and persecution are to be expelled, repatriated, deported, and back to where they have come from regardless of the circumstances”²⁴⁵. Combating irregular migration and prioritizing border control was supplemented by the creation of a common EU agency for border control: Frontex.

²³⁹ EUROPEAN COMMISSION, *the Relationship between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments. Working Document. 5 December 2001. Brussels. COM(2001) 743 Final*, p.6 and 14.

²⁴⁰ EUROPEAN COUNCIL, *Presidency Conclusions European Council Meeting in Laeken. 14 and 15 December 2001*.

²⁴¹ EUROPEAN COUNCIL, *European Council meeting in Seville, Presidency Conclusions. 21 and 22 June, 2002*.

²⁴² EUROPEAN COUNCIL, *Op. Cit.*, note 240, para 40.

²⁴³ EUROPEAN COUNCIL, *Op. Cit.*, note 241, para 33.

²⁴⁴ *Id.*, Para 29.

²⁴⁵ Tony BUNYAN, *EU Presidency Conclusions at the Seville European Council 21/22 June*, Statewatch, 2002 [Online] <http://www.statewatch.org/news/2002/jun/14seville.htm> [Accessed 4 June 2011].

Between 1999 and 2005, following the Tampere Conclusions, five Directives have been adopted comprising the backbone of the CEAS. In a first place, Directive on Reception Condition for Asylum-Seekers²⁴⁶ aiming at “harmonis[ing] the laws of the Member States concerning the reception conditions applicable to asylum seekers, thus contributing to the establishment of an EU-wide level playing field in the area of asylum and to reduce secondary movements”²⁴⁷. Without entering into details regarding the content of the Directive, it can be affirmed that the vague provisions of the document accord to the member states large margin of discretion in regards to treatment of asylum-seekers. Such vague language has created conditions for different treatment of asylum-seekers in each member state rendering impossible the harmonization of the legislation of member states on the matter²⁴⁸.

One of the most prominent examples to support such a conclusion is the provision, which tackles the administrative detention. Art.7 (3) of the Directive lets member states to confine an asylum-seeker when it is necessary in accordance with state national law. However, the grounds for detention vary considerably from exceptional grounds to general practice of detaining asylum-seekers irregularly entering the country. Moreover,

²⁴⁶ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

²⁴⁷ EUROPEAN COMMISSION, *Report from the Commission to the Council and to the European Parliament on the Application of Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers*, Brussels, 26.11.2007, COM(2007) 745 final, p.2.

²⁴⁸ EUROPEAN COMMISSION, *Green Paper on the future Common European Asylum System*, Brussels, 6.6.2007, COM(2007) 301 final, p.5. The Commission has also reached the same conclusion:

“ However, according to the information already available on the implementation in practice of Council Directive 2003/9/EC (the "Reception Conditions Directive"), the wide margin of discretion left to Member States by several key provisions of this Directive results in negating the desired harmonisation effect.”

the length of detention varies considerably from 7 days to 12 months or even indefinitely²⁴⁹.

Another instrument part of the CEAS is the Directive on qualifications for becoming a refugee or a beneficiary of subsidiary protection status²⁵⁰. The Directive aims at ensuring that persons who need protection are identified and granted the same level of protection regardless the member state they are logging their asylum application²⁵¹. The Directive has imported many positive developments in regards to the conditions of obtaining a protected status. For example, the applicant is awarded with the benefit of the doubt when the facts and circumstances in application are assessed²⁵². Further, non-state actors are considered as agent of persecution²⁵³. The gender-based violence is considered as act of persecution²⁵⁴; sexual orientation²⁵⁵ as well has been included in the reasons for persecution to be taken into consideration when state is assessing a claim for asylum. Least but not last, the Directive has promoted the notion of subsidiary protection (explained in details above) which permits protection to be granted to individuals subjected to general violence but does not qualify as refugees.

Despite the positive developments, the Directive is criticized for falling short to reach the stated objective. According to ECRE and UNHCR the Directive

²⁴⁹EUROPEAN COMMISSION, Op. Cit., note 247, p.7.

²⁵⁰COUNCIL DIRECTIVE 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

²⁵¹ UNHCR & ECRE, Op. Cit., note 17.

²⁵² COUNCIL DIRECTIVE 2004/83/EC, Op. Cit., note 250, art.4 (5).

²⁵³ *Id.*, art.6.

²⁵⁴ *Id.*, art.9 (2) (f).

²⁵⁵ *Id.*, art.10(1)(d).

“clearly demonstrated that the possibility of finding protection varies dramatically from one Member State to another. At present, the Directive allows for extensive divergence in practice among Member States, undermining not only the EU’s harmonization objective, but also the rights of people needing protection. It is imperative to guarantee that people fleeing persecution can find protection and enjoy the same level of rights across Europe.”²⁵⁶

Directive on Asylum Procedures²⁵⁷ is another legislative instrument part of the CEAS. Its main objective is to establish common rules in Member States on the procedure of granting and withdrawing refugee status. This Directive is among the most controversial within the EU asylum acquis. While the Directive introduces many basic procedural guarantees to assure effective and fair refugee determination procedure such as right to receive information on their own language²⁵⁸; right to an interpreter²⁵⁹; right to a personal interview²⁶⁰; right to a legal assistance and representation²⁶¹; right to communicate with UNHCR²⁶²; the right to an appeal²⁶³ etc., it has introduced some controversial concepts and legal measures which generated vast critique.

In a first place, art.18 of the Directive provides for detention of asylum-seekers. While the detention of asylum-seekers is not prohibited under the international law, the language of the provision is vague giving States wide margin of discretion. For example,

²⁵⁶ UNHCR & ECRE, Op. Cit., note 17.

²⁵⁷ COUNCIL DIRECTIVE 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

²⁵⁸ *Id.*, art.10(a).

²⁵⁹ *Id.*, art.10(b).

²⁶⁰ *Id.*, art.12.

²⁶¹ *Id.*, art.15.

²⁶² *Id.*, art.10(c).

²⁶³ *Id.*, art.39.

there are no exact criteria providing reasons to detain as well as time limit for which asylum-seeker can be deprived from their liberty.

Another controversy generated by the Directive is the introduction in the EU law of 'safe third country' concept²⁶⁴. The idea carried by the concept is that EU member state can consider country outside EU for a safe and refuse to examine a claim for protection if the claimant first passed through this country. The concept is controversial simply because it allows the protection responsibility to be transferred to another country²⁶⁵ denying asylum-seeker the choice where to lodge the application for protection. Thus, asylum-seekers seeking to enter the territory may be denied access and subject to return without thorough consideration of their claim and verification of the safety of the country²⁶⁶.

Real risk exists that the state, which adopted the concept, would automatically return asylum-seekers without individual examination of the circumstances of the application for asylum. Given the different refugee determination systems in each country such return may amount to violation of non-refoulement. Moreover, the returns will be directed to the neighbouring EU countries that have weak asylum determination

²⁶⁴ *Id.*, art.27.

²⁶⁵ The UNHCR has stated that "[t]he 'safe third country' concept and the border procedures as outlined in the draft directive will serve to shift the burden from EU Member States to countries further afield... [t]his will do little to convince states in regions of origin and transit that Europe is serious about establishing global burden- and responsibility sharing arrangements". UNHCR, *Lubbers Warns EU Asylum Law May Erode International Standards*, 24 November 2003 [Online] <http://www.unhcr.org/3fc1e5a94.html>

²⁶⁶ *Id.*

procedures and where serious human rights violations persists²⁶⁷. Thus, art.27 of the Directive “fails to comply with international standards and potentially fundamentally undermines asylum in the EU”²⁶⁸. Thus, given the minimum standards applied in the Directive and the wide discretion accorded to the member states the Directive failed to harmonize the asylum procedures between member states²⁶⁹ assuring uniform treatment of asylum-seekers throughout the EU. The member state managed to maintain their existing procedures, while applying only relatively minor changes²⁷⁰.

The Temporary Protection Directive²⁷¹ is another legislative instrument part of the CEAS. The main goal of the Directive is to provide temporary (generalised) protection in situations of mass influx of displaced persons from third countries to EU member states when the individual refugee determination status is not a viable solution, such as in cases when many persons’ refugee status must be determined. Temporary protection is given for a limited period of one year that can be extended by six monthly periods for a maximum of two years²⁷². The Directive establishes numerous benefits for the individuals under temporary protection including a residence permit²⁷³, possibility for a

²⁶⁷ 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, p.23 [Online] <http://www.ulb.ac.be/assoc/odysseus/CEAS/ECRE.OCT.2006.pdf>

²⁶⁸ *Id.*, p.23.

²⁶⁹ EUROPEAN PARLIAMENT, *Minimum Standards for the Procedures For Granting and Withdrawing Refugee Status in the Member States – Assessment (Summary) of the Implementation of the 2005 Procedures Directive and Proposals for a Common European Regime of Asylum*, September 2008, PE 393.291, p.1 [Online] <http://www.ulb.ac.be/assoc/odysseus/CEAS/PE393.291.pdf>

²⁷⁰ *Id.*

²⁷¹ *Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof*

²⁷² *Id.*, art.4.

²⁷³ *Id.*, art.8.

family reunification²⁷⁴, access to employment²⁷⁵, and suitable accommodation²⁷⁶. One of the positive outcomes of the Directive is that it does not preclude access to an individual asylum determination procedure²⁷⁷. Moreover, in cases when refugee status or other protection is not granted, the individual is still eligible and can benefit from temporary protection²⁷⁸.

Notwithstanding the positive developments it contains, the Directive is criticised as being an obstacle to obtaining refugee status²⁷⁹. As pointed out by Gilbert, the Directive does not accord the same rights as those enjoyed by refugees, and temporary protection can be terminated at state's will²⁸⁰. Moreover, the Directive lacks a right to appeal in cases when temporary protection is denied²⁸¹.

In summation, following the post 9/11 pattern, first phase instruments, such as the Asylum Procedure Directive²⁸², has been placed within the security paradigm, with fewer rights for asylum seekers²⁸³. Despite some positive developments, the overall outcome of the legislative instruments was the upholding of the lowest common denominator. Thus, the legislation was placed at odds with the 1951 Refugee Convention and *the principle of non-refoulement*, and allowed member states to

²⁷⁴ *Id.*, art. 15.

²⁷⁵ *Id.*, art. 12.

²⁷⁶ *Id.*, art. 13.

²⁷⁷ *Id.*, art. 19(1).

²⁷⁸ *Id.*, art. 19(2).

²⁷⁹ Geoff GILBERT, "Is Europe Living Up to Its Obligations to Refugees?", (2004) 15 *European Journal of International Law* 963, 982.

²⁸⁰ *Id.*

²⁸¹ ECRE, *Temporary Protection* [Online] <http://www.ecre.org/topics/areas-of-work/protection-in-europe/81-temporary-protection.html> [Accessed 5 January 2012]

²⁸² EUROPEAN COUNCIL 2005/85/EC, Op. Cit., note 257.

²⁸³ ECRE has called the first phase of the establishment of CEAS 'a missed opportunity' which will negatively impact the building of the common asylum infrastructure. ECRE, Op. Cit., note 210, p.29.

continue to apply narrow national practices. The EU Commission²⁸⁴ has concluded that member states were reluctant to cooperate, prioritizing national agendas over EU, and making it difficult to reach an agreement. Member states were criticized for the lack of transparency during the final negotiations of the instruments and the absence of dialog with civil society²⁸⁵. Currently, the EU Commission has proposed amendments to most of the instruments to address that criticism.

The Hague Programme²⁸⁶, which launched the second phase of the CEAS, clearly puts the emphasis on the external dimension of the Union's asylum policy. The Programme gave priority to the refugee protection programs in cooperation with countries of origin and transit. Data collection and the information exchange were referred to as being of key importance for the Union's asylum policy, thus reaffirming the continuum with the asylum-security nexus. The same tendency is observed in the latest 5-year asylum and immigration programme, agreed upon in the Stockholm²⁸⁷. Therefore, the program is promoting more state cooperation than common EU initiatives on asylum²⁸⁸.

Another recent major development concerning the EU asylum law is the establishment of the European Asylum Support Office (EASO). The idea for such entity was first

²⁸⁴ EUROPEAN COMMISSION, *Communication from the Commission to the Council and the European Parliament, Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations. COM(2004) 401 final*, p.4.

²⁸⁵ ECRE, *Op. Cit.*, note 283, p.26.

²⁸⁶ EUROPEAN COUNCIL, *The Hague programme: strengthening freedom, security and justice in the European Union*.

²⁸⁷ EUROPEAN COUNCIL, *The Stockholm Programme - an open and secure Europe serving and protecting citizens*.

²⁸⁸ Elizabeth COLLETT, *The European Union's Stockholm Program: Less Ambition on Immigration and Asylum, but More Detailed Plans*, Migration Policy Institute, 2010 [Online] <http://www.migrationinformation.org/Feature/display.cfm?ID=768> [Accessed 5 February].

established by the Hague Program to facilitate “all forms of cooperation between Member States relating to the Common European Asylum System”²⁸⁹. Thus, in 2008 the Commission put forward a legislative proposal for a regulation for the creation of EASO which main task will be “to provide practical assistance to member states in taking decisions on asylum claims”²⁹⁰. This regulation is based on two legal provisions. First, art.74 TFEU that tackles the cooperation between member states and between them and the EU Commission and the EU Parliament. Second, art.78 (1) and (2) TFEU tackling the common policy on asylum and the co-decision powers divided between EU Parliament and the Council.

The mandate of the Agency is as follows: a) to improve the implementation of the Common European Asylum System; b) to strengthen practical cooperation among Member States on asylum and c) to provide support to Member States subject to particular pressure on their asylum and reception systems²⁹¹. Thus, EASO, steaming from its mandate, may play significant role in harmonizing the asylum legislation of EU member states.

Another positive aspect brought by the EASO’s Regulation is the cooperation of the agency with the UNHCR. UNHCR also will take part of the agency’s management board with non-voting rights²⁹². Given the vast expertise of the UNHCR, its participation in various activities undertaken by the Agency will assure the observance

²⁸⁹ Hague Programme, Op. Cit., note 286, Para 1.3.

²⁹⁰ EUROPEAN COMMISSION, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions Policy Plan on Asylum an Integrated Approach to Protection Across the EU*, Brussels, 17.6.2008, COM(2008) 360 final, p.6.

²⁹¹ *Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office*, art.1.

²⁹² *Id.*, art25(1).

of the 1951 Refugee Convention. Moreover, civil society organizations and other agencies on national, regional and international level competent in the field of asylum can take part of the Consultative forum set up by the EASO. The forum will be a platform for information and knowledge exchange²⁹³. This may lead to more transparency in the work of the Office making sure the voices of civil society are heard.

The Treaty of Lisbon (TFEU and TEU) which came into force in December 2009 brought some radical changes into the EU legal structure, abolishing the Union's pillar structure and giving a legal personality to the EU. Furthermore, the co-decision²⁹⁴ procedure became the ordinary decision making process, with the full participation of the European Parliament. The qualified majority voting in the European Council²⁹⁵ substituted the unanimity voting, making it more difficult for single member states to block legislation and therefore, to influence its content. Finally, the EU Charter was incorporated in the Treaty, giving it legal binding force and jurisdiction was granted to the ECJ to interpret its provisions. Title V of the TFEU called for the establishment of CEAS, making it a priority for the Union in the field of asylum. The positive influence of the new changes brought by the Treaty of Lisbon over asylum policies remains to be seen.

CHAPTER III: BORDER CONTROL AND DATABASES: BARRIERS FOR ACCESS TO PROTECTION

²⁹³ *Id.*, art. 51.

²⁹⁴ Before the Treaty of Lisbon the co-decision procedure was an exceptional procedure articulated in art. 251 (Treaty of Amsterdam)

²⁹⁵ art.248 TFEU.

As established above, people escaping persecution have the right to asylum proclaimed by the UDHR and various other international and supranational legislative acts. States carry the obligation to give at least temporary access to their territory for purpose of claiming asylum. The right to asylum is rendered meaningless if there is no place for someone to go”²⁹⁶. However, over the recent years the entry into EU for the purpose of seeking refuge has been proven difficult.

The tragic events of 9/11 gave an additional impetus to the EU and member states to develop further the general framework of deterrence. Increasingly, national security and the fight against terrorism are justifications used for the implementation of advanced surveillance technologies and other technological tools such as databases to secure state borders. However, implementation of these surveillance technologies is done at a fast pace, completely overlooking fundamental rights, such as right to privacy of third country nationals. The emphasis is placed on massive data processing and on exchange of information between governments and agencies on third country nationals, thus changing the perception of the cross-border movement to security issues and criminal activity²⁹⁷. Currently, there are several databases that process and store very sensitive personal information on individuals for immigration control. The information stored in

²⁹⁶ Ann CASTAGNOS-SEN, *After Amsterdam: How to Safeguard Refugee Protection in the Process of European Harmonization?*, 1999 [Online] <http://www.cicerofoundation.org/lectures/p4castagnos-sen.html> [Accessed 21 June 2011].

²⁹⁷ Florian GEYER., *Taking Stock: Databases and Systems of Information Exchange in the Area of Freedom, Security and Justice*, CEPS Research Paper No 9, 2008, p.10 [Online] <http://www.ceps.eu/book/taking-stock-databases-and-systems-information-exchange-area-freedom-security-and-justice> [Accessed May 3 2011].

these databases is increasingly used for crime related purposes²⁹⁸. Furthermore, the quest for massive data exchange has been supported by the extensive use of biometric identifiers without thorough consideration of their reliability and the impact of this new technology on individual's rights, including those of asylum-seekers.

In the following sections the development of the EU border management will be discussed and the influence of the member states and their narrow political interests over border policies. The focus will be placed on some of the current databases developed and used as tools to control migration. In particular, we will discuss three of the EU databases, SIS, VIS and Eurodac, and how the mass exchange of information on individuals negatively affects vulnerable non-EU nationals such as asylum-seekers and refugees. Although not specifically created to store information on asylum-seekers (except for one database: Eurodac), the databases are creating additional barriers to access to asylum.

Our choice to discuss in length the use of databases as a barrier to access asylum in EU, among other intercepting measures, was determined by the recent proliferation of such policy tools and the extensive reliance of the EU and member states on them to control asylum movements which significantly exacerbates the vulnerability of asylum-seekers to treatment contrary to basic human rights in the country of asylum. The problem lies in the fact that such new technological instruments are developed with a fast pace without

²⁹⁸ Anneliese BALDACCINI, "Counter-Terrorism and the EU Strategy for Border Security: Framing Suspects with Biometric Documents and Databases", (2008) 10 *European Journal of Migration and Law* 31,32.

sufficient knowledge about their efficiency and impact on fundamental rights of people subjected to them. Moreover, for individuals escaping persecution and for regular travelers it is not immediately evident of the significant impact on their privacy rights, among others, once their data is taken, stored and exchanged between numbers of law enforcement and other agencies within EU and outside. While the databases offer the possibilities for improving EU border control, this should not be done at the expense of the rights of asylum-seekers who already suffered grave human rights violations.

SECTION 1: EU Border Management in a Snapshot

Needless to say, the administration of EU external borders is a complex task. The border which encompasses an area of 3.6 Million Km²²⁹⁹ is changing its geographical dimensions with the accession of every new member state. Moreover, the borders of the Schengen area do not coincide with the EU external frontiers. A Protocol attached to the Amsterdam Treaty enabled UK, Ireland and Denmark to opt-out and not to participate in any common measures adopted in relation to Schengen acquis, and to continue to impose border checks on persons entering their territory. While the two most recently accepted members, Bulgaria and Romania, are not yet members of the Schengen area³⁰⁰, the non-EU states of Switzerland, Norway, Island and Lichtenstein are Schengen members³⁰¹. Therefore, different legal instruments govern the responsibility of different

²⁹⁹ Stefano BERTOZZI, *Schengen: Achievements and Challenges in Managing an Area Encompassing 3.6 Million km²*, CEPS Working Document No. 284, 7 February 2008 [Online] <http://www.ceps.eu/book/schengenachievements-and-challenges-managing-area-encompassing-36-million-km%C2%B2> [Accessed 29 May 2011].

³⁰⁰ Cyprus is also excluded from the Schengen area because of ongoing land disputes between Turkey and Greece.

³⁰¹ The non-EU members do not have the right to vote on EU legislation related with the Schengen area.

countries for complying with human rights legislation, such as the right to privacy and data protection.

In historical terms, as discussed earlier, it was the Schengen Agreement followed by the implementation Convention that completely changed Europe's geography, by rendering invisible the internal EU frontiers. The control over the EU borders was shifted to those EU Members on the periphery of the EU. Negotiated in secrecy, without consultation with civil society³⁰², the Agreement was presented as a 'laboratory for Europe' furthering the European unification³⁰³. In order to compensate for the abolishment of the internal frontiers, the Agreement introduced rigid entry measures transforming EU into a society, where only selected categories of third country nationals, such as skilled workers, were welcome. Thus, some Schengen candidate countries, which were historically friendly to immigration as they benefited from cheap labour, had to tighten the control on immigrants in order to be accepted as members to the borderless territory³⁰⁴. Furthermore, the Agreement pioneered measures, which although not directly challenging the states' international protection obligations towards asylum seekers, severely hampered their access to the Union's territory.

³⁰²Jacqueline COSTA-LASCoux, « L'espace Schengen » (1992) 8 *Revue européenne de migrations internationales* 207.

³⁰³ Ruben ZAIOTTI, "Revisiting Schengen: Europe and the Emergence of a New Culture of Border Control", (2007) 8 *Perspectives on European Politics and Society*, 31, 39; However, the benefit of the Agreement for facilitating the EU integration is doubtful. The Agreement is an intergovernmental instrument and as such is promoting the cooperation between countries not the EU integration. In addition, at the time document was adopted, border matters were controlled in accordance with the national priorities of each individual state not subjected to common EU policies.

³⁰⁴ E.g., Italy has been encouraging immigration from North Africa before the Schengen membership. Elizabeth WHITAKER, "The Schengen Agreement and Its Portent for the Freedom of Personal Movement in Europe", (1992) 6 *Georgetown Immigration Law Journal*, 198.

Besides the abolishment of the internal borders and other measures already discussed, the Convention pioneered the establishment of a joint information system, referred to as SIS. The system allows the personnel responsible for border control checks, police and other custom checks, as well as visa issuing authorities, to access information on persons wanted for arrest, missing persons, refused entry third country nationals, stolen vehicles and other objects³⁰⁵.

The Schengen project was deemed successful³⁰⁶ as regulations governing the matters had been implemented in the Amsterdam Treaty, thus becoming part of EU law. Art. 62(2) of title IV granted the Council with ability to adopt external border crossing measures³⁰⁷.

Currently, the Schengen external border acquis is a complex “multi-layered compilation of provisions” to be found in the founding Treaties, Council Regulations and Decisions, bilateral and multilateral agreements with individual states, and with third countries³⁰⁸.

Rijpma divides the acquis into five categories: 1) Measures governing the border

³⁰⁵ Schengen Convention, Op. Cit., note 204, art. 95-100.

³⁰⁶ The success of Schengen endeavour is doubtful as it has two outcomes. In one hand it facilitated the free movement of goods, services and EU citizens within the Union. On the other, the goal was accomplished at the expense of the third country nationals, in particular those seeking protection, as it introduced additional deterrence measures.

³⁰⁷ Treaty of Amsterdam, Op. Cit., note 221, art. art.62(2),

(a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders;

(b) rules on visas for intended stays of no more than three months, including:

(c) the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement;

(d) the procedures and conditions for issuing visas by Member States;

(e) a uniform format for visas;

(f) rules on a uniform visa;

³⁰⁸ Peter D. HOBGING, *Integrated Border Management at the EU Level*, CEPS Working Document No. 227, 2005, p.10 [Online] <http://www.ceps.eu/book/integrated-border-management-eu-level> [Accessed 29 May 2011].

crossing regime at the external borders (most important legislative act being the Schengen Borders Code (SBC)); 2) Measures establishing the burden-sharing responsibilities between Member States in management of the common borders (most important instrument is the External Borders Fund (EBF)); 3) Measures establishing centralized databases for border management and migration: the Schengen Information System, the Visa Information System and Eurodac; 4) Measures penalising illegal entry, smuggling and trafficking; 5) Measures linked with the establishment of operational coordination necessary for managing the borders³⁰⁹.

Notwithstanding the multitude of measures to facilitate the free movement of people, numerous difficulties continued to impede access to and the movement within the EU territory of third country nationals³¹⁰. The difficulties were further exacerbated by the diverse implementation of border policies on a national level. Urged by the Council, the Commission came forward with a proposal for an integrated management of the external borders. Such integrated approach comprises “mechanisms for working and cooperation at European Union level which will permit practitioners of the checks at the external borders to come together around the same table to co-ordinate their operational actions in the framework of an integrated strategy which takes progressively into account the

³⁰⁹ Jorrit J. RIJPMAN, “EU Border Management after the Lisbon Treaty”, (2009) 5 *Croatian Yearbook of European Law and Policy*.

³¹⁰ E.g. the process of granting Schengen visa has been impeded by the lack of transparency and information as well as establishment of unofficial quotas for certain countries of origin by some Member States. Joanna APAP, Jakub BORATYNSKI, Michael EMERSON, Grzegorz GROMADZKI, Marius VAHL & Nicholas WHYTE, *Friendly Schengen Borderland Policy on the New Borders of an Enlarged EU and its Neighbours*, CEPS, 1 September 2001, p.4 [Online] <http://www.ceps.be/book/friendly-schengen-borderland-policy-new-borders-enlarged-eu-and-its-neighbours> [Accessed 3 March 2011].

multiplicity of aspects to the management of the external borders”³¹¹. Five areas are identified as essential elements of the new Integrated Border Management (IBM):

- a common *corpus* of legislation;
- a common coordination and operational cooperation mechanism;
- common integrated risk analysis;
- staff and inter-operational equipment;
- burden-sharing between Member States.

The integrated border management concept was furthered by the Treaty of Lisbon, which called for introduction of an integrated management system for external borders, a common objective to be achieved within the framework of freedom security and justice³¹².

With the sensitivity of border controls, which States claim as an inherent part of their sovereignty, such a communitarian approach towards the Schengen borders seems irrational but its development was determined by very pragmatic reasons. The awkward intergovernmental framework within which Schengen was conceived was based on cooperation among member states, and was simply not fit to meet the new security threats in the context of the fight against terrorism. Moreover, some member states voiced the concern that a non-functional external border would undermine the collective

³¹¹ EUROPEAN COMMISSION, *Commission Communication to the Council and the European Parliament, Towards integrated management of the external borders of the Member States of the European Union. Brussels. COM(2002) 233 final.*

³¹² TFEU, Op. Cit., note 174, art.77(1)(c).

trust, threatening the entire functioning of the single market³¹³. However, the communitarization of the border control was not able to address adequately some of the critiques of the old policies: lack of transparency, of accountability, and of respect for human rights.

SECTION 2: The Cyber-fortress Europe

After 9/11, the governments of industrialized countries embarked on a race to develop complex systems for data processing, sophisticated biometric reading machines, and other state-of-the-art security tools for the benefit of *bona fide* travellers and the security of their own populations. However, the 2001 terrorist attacks in the USA only provided “an additional window of opportunity for supranational executives”³¹⁴ to push the technological development in the border security field. Controversial body scanners at the airports, biometric data collected at border checks and included in travel documents, invasive strip searches, for example, embittered the travel experiences of many passengers. The situation becomes even more perplexing in context of the mass personal data of the travellers being processed and stored in a multitude of databases, accessible to law enforcement and other government agencies³¹⁵, and exchanged between agencies and countries. Many travellers are unaware of the manner in which their personal data is

³¹³ Peter HOBGING, “The Management of the EU’s External Borders from the Customs Union to Frontex and E-Borders” in Elspeth GUILD, Sergio CARRERA & Alejandro EGGENSCHWILER (eds.) *The Area of Freedom, Security and Justice Ten Years on Successes and Future Challenges under the Stockholm Programme*, Brussels, CEPS, 2010, p.64 [Online] <http://www.ceps.eu/book/area-freedom-security-and-justice-ten-years-successes-and-future-challenges-under-stockholm-pro> [Accessed 23 February 2011]

³¹⁴ Jonathan P. AUS, *Supranational Governance in an “Area of Freedom, Security and Justice”*: Eurodac and the Politics of Biometric Control, SEI Working Paper No 72, 2003, p.6 [Online] www.sussex.ac.uk/sei/documents/wp72.pdf [Accessed 3 June 2011]

³¹⁵ In order to confirm if the visitor is a criminal or terrorist the US IDENT database, for example, cross-checks data with more than 20 government databases, including FBI. Rebekah THOMAS, “Biometrics, international migrants and human rights”, (2005) 7 *European Journal of Migration and Law* 377, 393.

used, accessed, stored, and protected, and the implications of such a data process. Moreover, many data subjects are not aware that personal data is held against them up until the point when a person's name wrongly ends up in a database and this person "finds [him or herself] increasingly the object of state suspicion, with no concrete reason or grounds"³¹⁶.

The abolition of EU external borders has spurred the development of numerous highly technological tools to facilitate the cross-border movement while strengthening, so was stated, the cooperation to fight terrorism and organized crime. Retention of personal data and information exchange has become central elements of the EU border strategy. Numerous data systems have been conceived with different purposes and legal mechanisms regulating the access, process and data protection. Moreover, there are numerous initiatives in place enabling the free flow of information between EU agencies, EU governments and third countries. For example, the Swedish initiative, streamlining the process of exchange of information between member states for criminal investigations; the Prüm Decision enabling the exchange of DNA, fingerprints, and other biometric data among member states for combating terrorism; the Passenger Name Record Agreements with third countries allowing for passenger data to be sent in advance and screened by law enforcement for potential terrorist activities of the subject.

³¹⁶ Sara K. GOO, "Sen. Kennedy Flagged by no-fly List", *The Washington Post*, 20 August 2004 cited in Florian GEYER, Sergio CARRERA & Elspeth GUILD, *The Commission's New Border Package: Does It Take Us One Step Closer to a 'Cyber-Fortress Europe'?*, CEPS Policy Briefs N 154, 2008 [Online] <http://www.ceps.be/book/commissions-new-border-package-does-it-take-us-one-step-closer-cyber-fortress-europe> [Accessed 5 March 2011].

Those are only few of the activities deployed in cross-border information exchange for security purposes³¹⁷.

Additionally, in 2008 the Commission proposed a new border package that complicated the EU dependence on new technologies to secure its borders. The proposed legislative package sparked criticism³¹⁸ because it suggested more IT data systems for border security without a proper impact assessment of already existing ones and of those under implementation. The strategic objective of the new proposal was to facilitate the entry of *bona fide* visitors into the EU while enhancing security³¹⁹. In order to achieve the above objective, the Commission proposed the introduction of the following:

- An entry/exit system to register the border crossing of TCN, which will be supported by a new EU wide database interoperable with the existing and planned databases, and biometric systems. In the Commission's opinion, such a system will allow for the detection of individuals who have overstayed their visas and alter the responsible national authorities³²⁰.
- An Automated Border Control system to allow EU citizens and "low risk" third country travellers for a quick border crossing through an automated border check without the intervention of border guards³²¹.
- Electronic Travel Authorisation (ETA), which requires travellers to electronically submit their personal and travel information in advance. Once the

³¹⁷ For more see EUROPEAN COMMISSION, *Communication From The Commission To The European Parliament And The Council Overview of Information Management In The Area of Freedom, Security And Justice. COM(2010)385 final.*

³¹⁸ F. GEYER, S. CARRERA & E. GUILD, *Op. Cit.*, note 316.

³¹⁹ EUROPEAN COMMISSION, *Communication from the Commission to the European Parliament and to the Council on an entry/exit system at the external borders of the European Union, facilitation of border crossings for bona fide travellers, and an electronic travel authorisation system, Brussels. COM(2008) final, p.2.*

³²⁰ *Id.*, p.5.

³²¹ *Id.*, p.5-6.

information is submitted it will be checked against the existing databases in order to prevent third country nationals deemed unwanted to “offloading national border guard resources” by arriving at the EU external borders³²².

The Stockholm Programme continued the e-border control tendency within the Area of Freedom, Security and Justice by remaining “overtly oriented towards the reinforcement of the reliance on technology within the context of EU security policies, particularly computerised systems of information exchange and data processing”³²³. The Programme was criticised for falling short of recognizing the fundamental data protection rights of third country nationals, including asylum seekers “despite the fact that they are chiefly concerned with EU-wide information exchange schemes (e.g. Eurodac, the Schengen Information System, and the future Visa Information System)”³²⁴.

A. Network of Databases Controlling Migrants’ Movement

As previously stated, in the context of EU border security, multiple extant operational information systems store a variety of data and accessible to a myriad of national and supranational authorities for different purposes. Of these, SIS, Eurodac, and VIS “constitute the backbone of the EU’s internal information exchange dimension”³²⁵. While the main purpose of the latter two databases is to control the movement of migrants at the EU external frontiers and within the territory, the SIS has many

³²² *Id.*, p.7.

³²³ Didier BIGO & Julien JEANDESBOZ, *Border Security, Technology and the Stockholm Programme*, CEPS Policy Briefs No3, 2009, p.2 [Online] <http://www.ceps.eu/book/border-security-technology-and-stockholm-programme> [Accessed 3 March 2011].

³²⁴ *Id.*, p.1.

³²⁵ Thierry BALZACQ, “The Policy Tools of Securitization : Information Exchange, EU Foreign and Interior Policies”, (2008) 46 *Journal of Common Market Studies* 75, 83.

functions. It contains information on a wide range of issues such as stolen vehicles, missing persons, and so on. However, the majority of data on individuals held in the database concerns third country nationals who have been refused entry to the EU³²⁶ emphasising the role of the SIS as a tool for controlling immigration flows. Therefore, it will be true to state that the most ambitious of the EU data processing projects represents tools for supporting the EU policy of controlling migration movements to and within the Union.

1) Schengen Information System

The fight against terrorism and organized crime has significantly influenced the current trend of replacing the supporting purpose of the above mentioned information systems with functions that allow for criminal investigation of third country nationals³²⁷.

Thus, the SIS was introduced with the Convention Implementing Schengen Agreement³²⁸ as part of the measures compensating for the abolishment of the internal borders. SIS is a joint information system, which enables the states party to the Convention “[...] by means of an automated search procedure, to have access to alerts on persons and property for the purposes of border checks and other police and customs

³²⁶ As of May 2011, the SIS contained more than 38 million entries. Over 1 million persons were entered into the database; 77% of those were on persons not allowed to enter and stay in the Schengen area. EUROPEAN COMMISSION, *Report on the global schedule and budget for the entry into operation of the second generation Schengen Information System (SIS II)*, SEC(2010) 1138 final;

³²⁷ In 2005, the Commission called for an increased operability between EU data systems, including new functions and wider law enforcement access. In the context of the fight against terrorism, the Commission identified the absence of access by internal security authorities to VIS, SIS II and Eurodac as a shortcoming and serious gap in identification persons suspected of perpetrating a serious crime. EUROPEAN COMMISSION, *Communication from the Commission to the Council and the European Parliament on improved effectiveness, enhanced interoperability and synergies among european databases in the area of justice and home affairs*. COM(2005) 597 final, para 4.6.

³²⁸ Schengen Convention, Op. Cit., note 204.

checks”³²⁹. The objects entered into SIS can be stolen motor vehicles, boats, firearms, passports, identity cards, travel documents, etc.³³⁰ Categories of persons entered into SIS include: a) persons wanted for arrest or extradition³³¹; b) third country nationals whose entry into Schengen area have been refused³³²; c) missing persons or persons placed under police protection³³³; d) witnesses in judicial trials and convicted persons³³⁴; e) persons or vehicles for the purpose of discreet surveillance or specific checks³³⁵.

Each Schengen member enters the information in the database, which is only basic. Each member state disposes of a national SIRENE Bureau where more detailed information is entered and is provided upon request to member states. Since its introduction, SIS has been deemed one of the most important databases used for immigration and border controls in the EU. As mentioned, the majority of the data contained in SIS is on third-country nationals to be refused entry based on Article 96 CISA³³⁶.

Art.96 of the Convention is of particular importance for our argument as it concerns alerts on third country nationals refused entry to EU. Art.96 (1) reads as follows:

“1. Data on aliens for whom an alert has been issued for the purposes of refusing entry shall be entered on the basis of a national alert resulting from decisions taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law”.

³²⁹ *Id.*, art.92.

³³⁰ *Id.*, art.100(3).

³³¹ *Id.*, art.95.

³³² *Id.*, art.96.

³³³ *Id.*, art.97.

³³⁴ *Id.*, art.98.

³³⁵ *Id.*, art.99.

³³⁶ See also Eveline BROUWER, *The Other Side of Moon: the Schengen Information System and Human Rights aTask for National Courts*, CEPS Working Document No. 288, 2008 [Online] <http://www.ceps.eu/book/other-side-moons-schengen-information-system-and-human-rights-task-national-courts> [Accessed 3 December 2011]

Therefore, data is stored, among others, on asylum-seekers refused entry to the Union. Although the Convention lists the rules to be followed to issue an alert, state parties have found way to establish their own practices at variance with the Convention³³⁷. The decision to issue alerts is guided by national policies, giving a significant margin of discretion to each state in the refusal of entry of third country nationals³³⁸. Thus, some countries are routinely labelling asylum-seekers as “illegal aliens” and flagging them in the system³³⁹. Still other countries issue alerts based on minor offences or even on suspicion of a criminal act³⁴⁰. The problem is twofold. On the one hand, the refusal of entry is valid for the whole Schengen area. Thus, asylum-seekers who are refused entry in one country cannot look for protection in other Schengen member nations. On the other hand, even if a Schengen member wants to authorise entry of a person, it cannot do so if an alert has been issued for this person by another state³⁴¹.

³³⁷ Helen OOSTEROM-STAPLES, “*Has Europeanization Silenced Criticism on Intergovernmental External Border Cooperation?*” in Elspeth GUILD & Paul MINDERHOUD (ed.) *The First Decade of EU Migration and Asylum Law*, Netherlands, Martinus Nijhoff, 2011, p.112.

³³⁸ HOUSE OF LORDS, Op. Cit., note 346, Para 67.

³³⁹ Peter HOBGING, *An Assessment of the Proposals of Regulation and Decision which Define the Purpose, Functionality and Responsibilities of the Future SIS II*, CHALLENGE Program, 2006, para 3.2 [Online] <http://www.libertysecurity.org/article1179.html> [Accessed 3 March 2011].

³⁴⁰ E. R. BROUWER, Op. Cit., note 336, p.3. Recognizing the implications of decisions which refuse entry, the ECJ has required from member states to verify case-by-case if the individual upon which an alert is issued constitutes a threat in the sense of art.96 each. *Commission of the European Communities v Kingdom of Spain*. Case C-503/03, Court (Grand Chamber) 31 January 2006. *Freedom of movement for persons - Directive 64/221/EEC - National of a third country who is the spouse of a national of a Member State - Right of entry and residence - Restriction imposed on grounds of public policy - Schengen Information System - Alert issued for the purposes of refusing entry*. [Online] <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-503/03&td=ALL&parties=Spain> [Accessed 1 May 2011] cited in P. HOBGING, Op. Cit., note **Error! Bookmark not defined.**

³⁴¹ *Id.*

Recently, the SIS underwent major changes and was upgraded to the SIS II³⁴² with new functionalities³⁴³ including new categories of data stored in the database³⁴⁴. Once operational the new SIS II will store a wide range of data including biometric data (fingerprints and photographs)³⁴⁵ possibly DNA and retina scans³⁴⁶. The new data will allow for two types of searches: a “one-to-one” search to confirm the identity of the concerned individual by comparing the biometric data only against other individuals carrying the same name³⁴⁷. The second and most problematic search, the “one-to-many” will allow the data stored in the system to be used to identify the person comparing his/her biometrics against all subjects in the system³⁴⁸. The latter search will allow for the “so-called ‘fishing expeditions’ in which people registered in the database will form a suspect population”³⁴⁹.

³⁴² Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II); Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II).

³⁴³ The SIS II is currently under construction and according to the global schedule presented by the Commission it will become operational by the first quarter of 2013. EUROPEAN COMMISSION, *Report on the global schedule and budget for the entry into operation of the second generation Schengen Information System (SIS II)*, SEC(2010) 1138 final; There are five critical new functions in the SIS II: 1) new categories of alert; 2) new categories of data, including ‘biometric’ data; 3) the interlinking of alerts; 4) widened access to the SIS; 5) a shared technical platform with the VIS. See generally STATEWATCH, *Analysis, SIS II: fait accompli?, Construction of EU’s Big Brother Database Underway* [Online] <http://www.statewatch.org/news/2005/may/sisII-analysis-may05.pdf> [Accessed 4 December 2011].

³⁴⁴ Two reasons were brought forward to justify the SIS upgrade: to accommodate the needs of the constantly enlarging members of the Schengen area and to respond more efficiently to the perceived new threats such as terrorism.

³⁴⁵ Regulation (EC) No 1987/2006, Op. Cit., note 342, art.20.

³⁴⁶ HOUSE OF LORDS, *Schengen Information System II (SIS II)*, 9th Report of Session 2006-07; SELECT COMMITTEE ON EUROPEAN UNION, *Police Access to Eurodac and VIS*, (Fortieth Report) London, para 57.

³⁴⁷ Currently the SIS operates on hit/no hit principle. If the data subject information is already in the system, when a search is performed, the database will produce a “hit” and the person will be apprehended. Since the SIS does not store detailed information on the individual, in case of a “hit” the competent authorities request additional information from national SIRENE bureaus.

³⁴⁸ HOUSE OF LORDS, Op. Cit., note 346, para 57.

³⁴⁹ STATEWATCH, Op. Cit., note 343.

Along with the new categories of data, the Council has decided to widen the access authorities have to the SIS by including law enforcement agencies such as Europol and Eurojust³⁵⁰ in order to facilitate their tasks in fighting terrorism and organized crime. Due to opposition by the EU Parliament,³⁵¹ the authorisation of law enforcement to access information stored in relation to immigration issues (art.96)³⁵² was put on hold. Nevertheless, the legislation has given unrestricted access to such information to national judicial authorities³⁵³ allowing the data on third country nationals to be used in criminal proceedings. Thus, according to Hayes³⁵⁴ the relationship between judicial authorities on the EU level (e.g. European Judicial Network or joint investigation teams) will inevitably grant access to the data by EU agencies³⁵⁵.

2) Visa Information System

Similarly, to the SIS, VIS is designed to process and store biometric identifiers including photographs and fingerprints along with alphanumeric data. The VIS role is to support the common EU visa policy by improving communication exchange between visa issuing authorities. The purpose of the VIS is to facilitate the identification of visa holder by relevant authorities at border crossings; to contribute to the prevention of visa

³⁵⁰ COUNCIL DECISION 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, in particular in the fight against terrorism; The Decision granted access to data information of Europol for the purposes of art. 95, 97, 99 and to Eurojust to art. 95 and 98; See more T. BALZACQ, Op. Cit., note 325, p.84.

³⁵¹ S. PEERS, “Key Legislative Developments on Migration in the European Union: SIS II”, (2008) 10 *European Journal of Migration and Law* 77, 92.

³⁵² Currently, authorities who have access to the SIS for the purposes of art.96 include authorities performing border control, police and custom checks, visa issuing authorities and those issuing residence permit and since 2005 to the national judicial authorities. Regulation (EC) No 1987/2006, Op. Cit., note 342, art.27.

³⁵³ T. BALZACQ, Op. Cit., note 325, p.86.

³⁵⁴ Ben HAYES, *From the Schengen Information System to SIS II and the Visa Information (VIS): the Proposals Explained*, Statewatch, 2004 [Online] <http://www.statewatch.org/news/2005/may/analysis-sisII.pdf> [Accessed 25 July 2011]

³⁵⁵ *Id.*

shopping, where one individual may lodge a visa application in numerous EU Consulates; to facilitate the application of the Dublin II Regulation; to assist with the identification of undocumented irregular migrants and facilitate a subsequent return; to contribute towards improving the administration of the common visa policy and towards internal security and to combat terrorism³⁵⁶.

The system has wide capacities³⁵⁷ and will allow for processing and storing of information on all requested, issued, refused, annulled, revoked, or extended visas and the visa claimant³⁵⁸. A refusal of visa by one member state will possibly have therefore a visa ban for the same individual by other member states.

Although the VIS was not developed as part of the EU counter terrorism strategy³⁵⁹, it was given enforcement functions to straighten the fight against terrorism and organized criminality. Border check authorities as well as other law enforcement, immigration, and internal security authorities may consult the system for performance of their tasks³⁶⁰.

³⁵⁶ Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between member states on short-stay visas (VIS Regulation). Since October 2011, the VIS operates in North African states of Algeria, Egypt, Libya, Mauritania, Morocco and Tunisia. The start dates for other parts of the world are yet to be announced. Carlos COELHO, MEP, *Visa Information System up and Running Today*, [press release] 11 October 2011 [Online] <http://www.eppgroup.eu/press/showpr.asp?prcontroldoctypeid=1&prcontrolid=10671&prcontentid=17979&prcontentlg=en> [Accessed 4 December 2011].

³⁵⁷ The system is set to connect at least 12,000 users in 27 Member States and at 3,500 consular posts. EUROPEAN COMMISSION, *Communication from the Commission to the Council and the European Parliament, Development of the Schengen Information System II and possible synergies with a future Visa Information System (VIS)*, COM(2003) 771 final.p.26.

³⁵⁸ Regulation (EC), 767/2008, Op. Cit., note 356.

³⁵⁹ Maria TZANOU, "The EU as an Emerging Surveillance Society: the Function Creep Case Study and Challenges to Privacy and Data Protection", (2010) *Vienna Online Journal on International Constitutional Law*, 416.

³⁶⁰ Only visa issuing authorities are granted access for entering and updating information in the system. Regulation (EC), 767/2008, Op. Cit., note 356, art.6.

In 2008, the Council has authorised Europol and national authorities responsible for investigating terrorist offences to access the database for investigation purposes³⁶¹. Additionally, the future VIS was set to share a common technical platform with SIS II. Therefore, before issuing a visa the VIS users will be able to consult the SIS II in order to determine if the person is subject to an alert in the SIS II. In the same manner, the SIS users will be able to check for visa authenticity or identity of the visa holder by consulting the VIS database³⁶². However, the Council maintains that the VIS and the SIS II will be “two different systems with strictly separated data and access”³⁶³.

3) Eurodac

Eurodac³⁶⁴ is the first EU fingerprint-collecting database and is set up as an asylum tool to facilitate the implementation of the Dublin II Regulation. Eurodac stores biometric data of three categories of aliens over 14 years of old apprehended while crossing EU border: 1) applicants for asylum; 2) aliens apprehended with connection of irregular border crossing and 3) aliens found illegally present in a member state. By comparing the fingerprints through Eurodac, the authorities can determine if an asylum-seeker or another foreign national has previously claimed asylum in another member state and if such claim was rejected in order to prevent multiple applications also known as “*asylum shopping*”. As already explained, asylum seekers are expected to apply for asylum in the

³⁶¹ Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of member states and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences.

³⁶² EUROPEAN COMMISSION, Op. Cit., note 357.

³⁶³ EUROPEAN COUNCIL, *Council Conclusions on the development of the Visa Information System (VIS)*. Brussels. 20 February 2004, para 6.

³⁶⁴ Council Regulation (EC) No. 407/2002 of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention.

first safe country in which they arrive, and subsequently returned to the first safe country if it can be proven that the applicant has been in that country before arrival in the country in which the claim for asylum is made.

Eurodac is the only database among the three discussed here in which law enforcement authorities were not granted access to investigate terrorism related crimes³⁶⁵. The lack of access by the law enforcement to Eurodac in cases where person in suspicion is registered in Eurodac but not in other database has been considered by the Commission as “a serious gap in the identification of suspected perpetrators of a serious crime”³⁶⁶. That is why the Commission has recently suggested a legislation to amend Eurodac in order to allow access of member states’ police and law enforcement authorities for detecting and investigating criminal and terrorist offences³⁶⁷. Followed by a criticism of EU Parliament and European Data Protection Supervisor³⁶⁸ the latter suggestion was withdrawn, at least for the moment.

The law enforcement access to the Eurodac for investigative purposes will pose numerous dangers to the individuals whose information is stored in the system. Considering the vulnerability of asylum-seekers who are escaping persecution, it cannot

³⁶⁵ M. TZANOU, *Op. Cit.*, note 359, 424.

³⁶⁶ EUROPEAN COMMISSION, *Communication from the Commission to the Council and the European Parliament on improved effectiveness, enhanced interoperability and synergies among european databases in the area of justice and home affairs. COM(2005) 597 final*, para 4.6, 5.2.3.

³⁶⁷ EUROPEAN COMMISSION, *Proposal for a Council Decision on requesting comparisons with EURODAC data by Member States' law enforcement authorities and Europol for law enforcement purposes was adopted at the same time COM(2009) 344 final*.

³⁶⁸ OCMC EUROPEAN CONSULTANCY, *Access to Eurodac Database for Law Enforcement Purposes Not Allowed*, 2011 [Online] <http://www.ocmc.eu/news/access-to-eurodac-database-for-law-enforcement-purposes-not-allowed-%E2%80%93-but-for-how-long/> [Accessed 3 December 2011].

be assured³⁶⁹ that the information exchange between agencies like Europol and third countries will not reach the persecutors of the asylum-seeker. This therefore jeopardizes the applicant's security³⁷⁰. Additionally, in the context of criminalization of migrants, the law enforcement access for investigation purposes will lead to further stigmatization of asylum-seekers.

B. Interoperability by Design

The increased access to law enforcement authorities and exchange of information between the existing and future planned EU databases is based on the principle of availability launched with the Hague Programme³⁷¹, implying that data held in one

³⁶⁹ According to UNHCR “[c]onfidentiality of data is particularly important for refugees and other people in need of international protection, as there is a danger that agents of persecution or rights violations may ultimately gain access to such information, potentially exposing a refugee to danger even in her/his asylum country”. UNHCR, *UNHCR comments on the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or a stateless person ("Dublin II") (COM(2008) 820, 3 December 2008) and the European Commission's Proposal for a recast of the Regulation of the European Parliament and of the Council concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [the Dublin II Regulation] (COM(2008) 825, p 19 [Online] <http://www.unhcr.org/refworld/docid/49c0ca922.html> [Accessed 3 December 2011].*

³⁷⁰ For example, Europol has signed an agreement for exchange of private information with US in 2002. STATEWATCH, *Proposed Exchange of Personal Data between Europol and USA Evades EU Data Protection Rights and Protections*, 2002 [Online] <http://www.statewatch.org/news/2002/nov/12eurousa.htm> [Accessed 3 December 2011]; USA was recognized to have the weakest laws of data protection meaning that USA lacks adequate assurance that the obtained data will not be exchanged with the country persecuting the asylum-seeker. R. THOMAS, Op. Cit., note 315, 391; Farraj points out for example that the Department of Homeland Security which maintains IDENT (the Automatic Biometric Identification System that is used for various DHS functions, including the enforcement of immigration laws) shares data with foreign government and agencies charged with law enforcement and immigration functions. Although it is established that the information sharing complies with the law, there are no real guarantees that such sensitive data will become available to persecutors. Achraf FARRAJ, “Refugees and the Biometric Future : The Impact of Biometrics on Refugees and Asylum Seekers”, (2011) 42 *Columbia Human Rights Law Review* 891, 931.

³⁷¹The Hague Programme, Op. Cit., note 286., recital 2, p. 2.1. The principle of availability is defined by the EU Council as follows: “[w]ith effect from 1 January 2008 the exchange of ... information should be governed by conditions set out below with regard to the principle of availability, which means that, throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State...The method of exchange of information should make full use of new technology and must be adapted to each type of information, where

member state should be shared between the law enforcement agencies on international and national level. One of the key safeguards for data subjects' rights is that the available data can only be exchanged to permit "legal tasks" to be performed. However, the vagueness of the term "legal task" allows use of the information for a variety of purposes including surveillance and investigations³⁷². Based on the principle of availability, "interoperability by design"³⁷³ between EU databases has been consistently pursued on an EU level. The last five-year program in the Area of Freedom, Security and Justice carried even further the idea of information availability based on complete interoperability of the data systems, full access to the databases for the needs of law enforcement agencies and information exchange with third countries authorities³⁷⁴.

C. Consequences to Access to Territory for Asylum seekers

The gradual shift towards "cyber-fortress Europe"³⁷⁵, presumably advancing measures to fight terrorism and organized crime³⁷⁶, is affecting disproportionately asylum-seekers and refugees among other categories of third country nationals. Moreover, asylum-

appropriate, through reciprocal access to or interoperability of national databases, or direct (on-line) access, including for Europol, to existing central EU databases such as the SIS."

³⁷² STATEWATCH, *The "Principle of Availability" Takes Over from the "Notion of Privacy": What Price Data Protection?* [Online] <http://www.statewatch.org/news/2005/feb/07eu-data-prot.htm> [Accessed 3 December 2011]. More on the complications of the principle of availability and the need of EU comprehensive framework for data protection in context of the principle see EUROPEAN DATA PROTECTION AUTHORITIES, *Common Position of the European Data Protection Authorities on the Use of the Concept of Availability in Law Enforcement*, Spring Conference of the European Data Protection Authorities, Cyprus 10-11 May 2007.

³⁷³D. BIGO and J. JEANDESBOZ, Op. Cit., note 323, p.2. The term "Interoperability" is defined by the Commission as the "ability of IT systems and of the business processes they support to exchange data and to enable the sharing of information and knowledge". EUROPEAN COMMISSION, Op. Cit., note 366, Para 2.2.

³⁷⁴ The Stockholm Programme, Op. Cit., note 287, Para 4.3.1.

³⁷⁵ F. GEYER, S. CARRERA & E. GUILD, Op. Cit., note 316.

³⁷⁶ Most likely, such intense measures have double purpose: fighting terrorism and limiting access to the EU of less desirable third country nationals, including asylum seekers.

seekers are more susceptible to violations of their rights in the host country as they lack protection of their own country.

1) Non-discrimination

The current and planned information systems on border security are focused on gathering and processing information on non-EU nationals. The VIS goes even further by considering particular geographic regions as high risk³⁷⁷, thus subjecting their nationals to more intrusive measures for border control purposes³⁷⁸. Intensive screening of migrants only based on their status of non-EU nationals is at odds with the principle of non-discrimination. The principle is deeply rooted in the international human rights instruments as well as in regional ones such as the ECHR and in EU law.

Article 14 of the ECHR entails that Convention rights “be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Thus, being third country national, including asylum-seeker is not

³⁷⁷EUROPEAN COUNCIL, *Draft Council Conclusions on the consular roll out for the Visa Information System (VIS)*. 24 November 2005. Although the document does not clarify what a high risk implies, given the context within which the document was drafted it can be concluded that high risk countries are those where there is a high possibility of irregular movement of migrants towards EU.

³⁷⁸ The North Africa and Near East have been targeted as priority for piloting the VIS. The system is already operational in North African countries. The change in the political landscape in North Africa since the beginning of the so called “Arab spring” will increase significantly the role of the VIS in stemming the migrant flux towards EU. STATEWATCH, *Small Steps to Big Brother: the Development of the Visa Information System and the Schengen Information System II is Back on Track*, 2011 [Online] <http://www.statewatch.org/news/2011/aug/01eu-vis-sis.htm> [Accessed 4 December 2011].

a reason *per se* to be subjected to a differential treatment in respect to the rights accorded by the ECHR³⁷⁹.

While non-discrimination is not absolute³⁸⁰ and “Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law”³⁸¹, the Strasbourg Court has established a criteria to measure a discriminatory treatment. Accordingly, a treatment is deemed discriminatory “if it has no objective and reasonable justification”, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realised”³⁸².

Thus, when asylum- seekers are treated differently than country nationals such measures have to pursue a legitimate aim and to have balance between means and the aim sought. In the context of databases, the intensive screening of asylum-seekers and storage of their data for law enforcement purposes would inevitably lead to stigmatization of these persons as criminals³⁸³. Therefore, it will harm their social well-being and possibly increase their persecution “on the mere basis that its members have made use of their

³⁷⁹ Helene LAMBERT, *The Position of Aliens in Relation to the European Convention on Human Rights*, Strasbourg, Council of Europe Pub., 2007, p.19 [Online]

http://www.hurights.eu/docs/9789287162793/9789287162793_txt.pdf [Accessed 23 October 2012]

³⁸⁰ *Id.* Except in very limited cases based on explicit provision in the ECHR allowing such differential treatment (e.g. art.5, 6, 15).

³⁸¹ *Case of Abdulaziz, Cabales and Balkandali v. The United Kingdom*, Appl. No 15/1983/71/107-109 ECHR 24 April 1985, Para 72 [Online] <http://www.unhcr.org/refworld/docid/3ae6b6fc18.html> [Accessed 15 October 2012]

³⁸² *Id.*

³⁸³ MEIJERS COMMITTEE, *Note Meijers Committee on the EURODAC proposal (COM(2012) 254)*, Letter communication to the European Parliament, 10 October 2012 [Online] <http://www.statewatch.org/news/2012/oct/eu-meijers-committee-eurodac-proposal.pdf> [Accessed 1 December 2012]

fundamental right to seek asylum”³⁸⁴. Such differential treatment based on nationality is not reasonably justified by claims based on national security, for example.

In the same manner, the EU principle of non-discrimination requires the equal treatment of any individual or group irrespective of their particular characteristics, including nationality³⁸⁵. In the *case of Heinz Huber v. Germany*, the Advocate General has pointed that the existence of a database for German citizens and another for foreign nationals, when the latter consists of more extensive in scope information and allows for stricter and systematic monitoring of foreign nationals, is a discriminatory treatment based on nationality. Such difference in treatment of citizens and non-German nationals cannot be justified by crime prevention or security threat reasons³⁸⁶.

2) Purpose Limitation Principle

The intelligence-led access to the stored data and increased interoperability between the systems provide the possibility of information to be used for purposes other than the ones originally anticipated and not consented to by the data subject at the time of enrolment³⁸⁷. Considering the fact that data protection legislation is advancing at a

³⁸⁴ *Id.*

³⁸⁵ EU principle of non-discrimination on grounds of nationality in particular is articulated in art. 21 of EU Charter and art. 18(1) of the Treaty on the Functioning of the European Union (TFEU)

³⁸⁶ Poiaras MADURO, *Heinz Huber v Bundesrepublik Deutschland, Case C-524/06. Opinion of Mr Advocate General delivered on 3 April 2008*, European Court reports 2008 Page I-09705 [Online]

<http://eur-lex.europa.eu/Notice.do?val=467835:cs&lang=en&list=649103:cs,517112:cs,467835:cs,467617:cs,464595:cs,455301:cs,425652:cs,424637:cs,412373:cs,412755:cs.&pos=3&page=1&nbl=33&pgs=10&hwords=&checktexte=checkbox&visu=#texte> [Accessed 4 december 2011]. The ECJ has reached similar conclusion. See more on the subject González FUSTER Gloria DE HERT, Erika ELLYNE & Serge GUTWIRTH, *Huber, Marper and others: Throwing New Light on the Shadows of Suspicion*, CEPS INEX Policy Brief No. 8, 2010 [Online] <http://aei.pitt.edu/14985/> [Accessed 6 November 2010].

³⁸⁷ Also known as a “function creep”. R. THOMAS, *Op. Cit.*, note 370, p.392.

slower pace than privacy invasive counter-terrorism and organized crime policies³⁸⁸, such a trend can be considered as a breach of the purpose limitation principle³⁸⁹. The principle of purpose limitation³⁹⁰ is considered a fundamental principle of EU data protection regime because the individual's consent to the collection of personal data depends upon information on the purpose and use of the data collected³⁹¹. Although the existing legislation states that use of information will be applied on case-by-case basis, no further guarantees exist in order to preclude permanent access to the data for investigation of criminal offences³⁹², which threatens the privacy of individuals concerned³⁹³.

According to the European Data Protection Supervisor, the ultimate goal of internal security cannot justify the consequences to the travellers, including those seeking asylum, in regards to their data privacy³⁹⁴. Moreover,

³⁸⁸ SELECT COMMITTEE ON EUROPEAN UNION, Op. Cit., note 346.

³⁸⁹ M. TZANOU, Op. Cit., note 359, p.421.

³⁹⁰ According to art.6 (1) of the Data protection directive the purpose limitation principle establishes that the personal data must be "collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that member states present appropriate safeguards". *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.*

³⁹¹ M. TZANOU, Op. Cit., note 359, p.421.

³⁹² A. BALDACCINI, Op. Cit., note 298, p.41.

³⁹³ In context of VIS, for example, the European Data Protection Supervisor stated that VIS is an information system that supports the common EU visa policy not an investigation tool and routine access "would entail a disproportionate intrusion in the privacy of travellers who agreed to their data being processed in order to obtain a visa, and expect their data to be collected, consulted and transmitted, only for that purpose". EUROPEAN DATA PROTECTION SUPERVISOR, *Opinion of the European Data Protection Supervisor on the proposal for a council decision concerning access for consultation of the Visa Information System (VIS) by the authorities of member states responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences. COM (2005) 600 final*, point 1.2(b).

³⁹⁴ The Commission holds the opposite opinion. According to the Commission the "[a]ccess to 'Eurodac' cannot be considered disproportionate to the aims to be achieved". EUROPEAN COMMISSION, Op. Cit., note 367, p.6.

“[s]ince information systems are built for a specific purpose, with safeguards, security, conditions for access determined by this purpose, granting systematic access for a purpose different from the original one would not only infringe the principle of purpose limitation, but could also make the above mentioned elements inadequate or insufficient.”³⁹⁵

The interoperability between the SIS, VIS and Eurodac will further contravene the purpose limitation principle³⁹⁶. It will allow for *de facto* exchanging of data between systems conceived for different purposes threatening the privacy of the data subjects. In summation, it can be concluded that the use and exchange of information is not justified for reasons other than originally stated and for the sake of convenience of state authorities.

3) Implied Risk of Biometrics

National security concerns and the fight against terrorism gave an impetus for the states to further increase the use of biometrics, which are perceived to determine more accurately one's identity. The use of biometrics in EU information systems is consistently growing but without proper risk consideration and safeguards against adverse effects of such technology on the individuals whose fingerprints or photographs are taken for processing³⁹⁷. The biometrics are highly criticised by experts due to their

³⁹⁵ EUROPEAN DATA PROTECTION SUPERVISOR, Op. Cit., note 393, point 1.2.

³⁹⁶ The Commission has stated that the interoperability of the EU systems is more technical than a legal or political concept. In this regard, the EDPS has emphasised that the exchange of information between the systems is clearly a legal issue, as it has consequences towards the data protection of the subjects. EUROPEAN DATA PROTECTION SUPERVISOR, *Opinion on the Communication from the Commission to the European Parliament and the Council on an area of freedom, security and justice serving the citizen. COM(2009)0262 final*, Para 61.

³⁹⁷ EUROPEAN DATA PROTECTION SUPERVISOR, *Opinion of the European Data Protection Supervisor — on the proposal for a council decision on the establishment, operation and use of the second generation Schengen Information System (SIS II) (COM(2005)230 final); — the Proposal for a regulation of the European Parliament and of the Council on the establishment, operation and use of the second generation Schengen Information System (SIS II) (COM(2005)236 final), and — the Proposal for a*

fallibility and vulnerability to fraud³⁹⁸. When biometrics are built in databases with huge storing capacity such as SIS, VIS and Eurodac even a small error rate will lead to disproportionate number of false rejections³⁹⁹. Therefore, it will be “overstated to consider that these technologies will offer an ‘exact identification’ of the data subject”⁴⁰⁰.

The error rate coupled with the use of the data for investigation purposes entails serious risk for all data subjects⁴⁰¹. In the case of asylum-seekers and refugees, the misidentification can lead to a ban on the EU territory and refoulement to the place of persecution, where they risk possible torture and even death⁴⁰². In view of the serious consequences in case of misidentification, there is a pressing need for a thorough assessment of the necessity and the impact of the biometrics on individuals. Otherwise, the use of biometric identifiers is disproportionate, as the identity of the data subjects

regulation of the European Parliament and of the Council regarding access to the second generation Schengen Information System (SIS II) by the services in the Member States responsible for issuing vehicle registration certificates. COM(2005)237 final, p.43.

³⁹⁸ Joanna PARKIN, *The Difficult Road to the Schengen Information System II, the Legacy of 'Laboratories' and the Cost for Fundamental Rights and the Rule of Law*, CEPS, 2011, p.28 [Online] <http://www.ceps.eu/book/difficult-road-schengen-information-system-ii> [Accessed 12 December 2011]

³⁹⁹ European Data Protection Supervisor points that an error rate of 0, 5 to 1 % is normal which means that the check system at external borders will have a False Rejection Rate (FRR) between 0, 5 and 1 %. EUROPEAN DATA PROTECTION SUPERVISOR, *Opinion of the European Data Protection Supervisor on the proposal for a regulation of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between member states on short stay-visas COM(2004)835 final*, p.19. In case of VIS which is expected to support up to 22 million entries a year 1% will result in 22000 false rejections.

⁴⁰⁰ *Id.*

⁴⁰¹ In 2004, a lawyer from Portland (US) has been jailed for two weeks because his fingerprints matched with one found in Madrid bombings. The lawyer was released after proving that the biometric matching process was flawed and resulted in misinterpretation through such matching process. EUROPEAN DATA PROTECTION SUPERVISOR, *Op. Cit.*, note 397, p44.

⁴⁰² A. FARRAJ, *Op. Cit.*, note 370, pp.936-939.

could be verified through less intrusive means such as the gathering of alphanumeric data⁴⁰³.

The wide biometric data being collected, exchanged and stored for extended periods raises great concerns for the fundamental freedoms of individuals, including asylum-seekers. Especially the processing and the storage of the data in a centralized database such as Eurodac may interfere with the private life of the individual⁴⁰⁴. Moreover, biometrics are susceptible to leaving traces in the virtual spaces, endangering the privacy of the data subjects by leading to possible collection of data without the owner's knowledge⁴⁰⁵. Thus, information on asylum-seekers can become available to their persecutors, the people from whom they are trying to escape.

Given the fact that the biometric technology has been in use not for a long time there are many concerns in regards to the observing the privacy of the data subjects. Having commented on the regulation establishing of biometrics in the passports of EU citizens⁴⁰⁶ the EU Parliament's Committee on Civil Liberties, Justice, and Home Affairs has concluded that "the setting up of a centralised database [such as Eurodac or SIS]

⁴⁰³ European Data Protection Supervisor highlights the intrusiveness of the biometrics by stating that "[u]sing biometrics in information systems is never an insignificant choice, especially when the system in question concerns such a huge number of individuals. Biometrics are not just another information technology. They change irrevocably the relation between body and identity, in that they make the characteristics of the human body 'machine-readable' and subject to further use. Even if the biometric characteristics are not readable by the human eye, they can be read and used by appropriate tools, forever, wherever the person goes". EUROPEAN DATA PROTECTION SUPERVISOR, Op. Cit., note 399, p.19.

⁴⁰⁴ COUNCIL OF EUROPE, The Need for a Global Consideration of the Human Rights Implications of Biometrics, Report, Doc. 12522, 16 February 2011, p.6 [Online] <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=13103&Language=EN> [Accessed 3 October 2012]

⁴⁰⁵ EUROPEAN DATA PROTECTION SUPERVISOR, Op. Cit., note 399, p.19.

⁴⁰⁶ EU Council adopted Regulation (EC) No 2252/2004 on standards for security features and biometrics in EU citizens' passports on 13 December 2004.

would violate the purpose and the principle of proportionality. It would also increase the risk of abuse and of function creep. Finally, it would increase the risk of using biometric identifiers as access keys to various databases, thereby interconnecting data sets”⁴⁰⁷.

The right to privacy is one of the central rights articulated in the art.8 ECHR and is subject to extensive jurisprudence by the ECtHR. In terms of the scope of the right, the Court has stated that a right balance should be struck “between the competing interests of the individual and of the community as a whole”⁴⁰⁸. Since by nature biometrics are intrusive toward the lives of individuals, states should minimise, as much as possible, interference with individuals’ rights

“by trying to find alternative solutions and by generally seeking to achieve their aims in the least onerous way as regards human rights. In order to do that, a proper and complete investigation and study with the aim of finding the best possible solution which will, in reality, strike the right balance should precede the relevant project.”⁴⁰⁹

In a recent landmark decision in regards to the use of biometrics and the right to privacy the Strasbourg court has made some very important conclusions. In a first place, the Court highlighted that States should be aware that the retention and storing of personal data have a direct impact on the private life of the concerned individual “irrespective of

⁴⁰⁷ ARTICLE 29 DATA PROTECTION WORKING PARTY, Opinion on Implementing the Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States, 1710/05/EN, adopted on 30 September 2005, p.5 [Online] http://www.biteproject.org/next_events/WORKING%20PARTY%2029%20wp112_en.pdf [Accessed 5 November 2012]

⁴⁰⁸ *Case of Hatton et al. v. The United Kingdom*, Appl. No. 36022/97 ECHR (Third Section) 2 October 2001, Para 96 [Online] <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/regionalcases/europeancourtsofhumanrights/nr/517> [Accessed 3 November 2012]

⁴⁰⁹ *Id.*, para 97.

whether subsequent use is made of the data”⁴¹⁰. With respect to the collection and storage of data of persons who have been suspected but not convicted of offences, the Court concluded that “the blanket and indiscriminate nature of the powers of retention of [biometric data of such persons... in the present case] constitutes disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society”⁴¹¹. Thus, databases where biometric data of asylum-seekers is retained, stored, and exchanged for use of law enforcement authorities will turn such population of suspect and may subject them to disproportionate criminal investigations.

In respect to data protection, in 1995 EU passed a Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Art.6 of the Directive sets out fundamental principles of data protection such as data to be “collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes”; data to be “adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed”; data to be kept for periods no longer than what is necessary for the purposes for which data is collected or further processed. EU Member States are obliged to set up their national legislation in compliance with those principles. However, on a

⁴¹⁰ *Case of S. and Marper v. The United Kingdom*, Appl.Nos. 30562/04 and 30566/04 ECHR (Grand Chamber) 4 December 2008, Para 121 [Online] <http://www.bailii.org/eu/cases/ECHR/2008/1581.html> [Accessed 4 November 2012]

⁴¹¹ *Id.*, para125.

practical level, the privacy laws are differing from country to country, which will lead to implications with data sharing and the interrelation of databases⁴¹².

In addition to the Directive, art.8 of the EU Charter holds that “everyone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.” The use of Eurodac by law enforcement authorities, for example, is at odds with the right outlined in the Charter, since the collected and processed data on asylum-seekers will not only be used to determine the member state responsible for determination of the asylum claim, but also will be used for enforcement purposes. Moreover, not many asylum seekers would voluntarily agree for their information to be stored in a database, with the possibility that the data will fall in the hands of their persecutors⁴¹³.

4) Accountability

In the context of the principle of availability upon which the data exchange between agencies is based, in case of misuse of information, accountability is rendered meaningless⁴¹⁴. The flow of information between the systems that different authorities access for various purposes will inevitably lead to a *‘function creep’*. This is especially true when data protection legislation is trying to catch up with high-tech IT innovations

⁴¹² ARTICLE 29 DATA PROTECTION WORKING PARTY, Op. Cit., note 407, p.8.

⁴¹³J. P. AUS, Op. Cit., note 314, p.39.

⁴¹⁴ Bunyan rightly concludes that “the ‘principle of availability’ and data protection for the gathering, processing and passing on of personal data are absolutely irreconcilable”. T. BUNYAN, *The “Principle of Availability” - the Free Market in Access to Data/Intelligence will Rely on “Self-regulation” by the Law Enforcement Agencies and Make Accountability Almost Meaningless*, Statewatch, 2006 [Online] <http://www.statewatch.org/analyses/no-59-p-of-a-art.pdf> [Accessed 3 December 2011].

in the border control field. Since data will pass through many channels where it will be edited, it will be virtually impossible for the data subject to track down unlawful exchange of data in order to claim protection of the subject's fundamental rights⁴¹⁵. Furthermore, access to a great amount of information by a great number of officials will likely make the tractability of consultation difficult and lead to security problems⁴¹⁶.

Accountability becomes even more complex with the multiplicity of measures characterising the use of databases by the EU member states and other European states. The UK and Ireland, for example, have complete access to Eurodac, but only partial access to SIS II and no access to VIS. Conversely, non-EU members of the Schengen area, such as Iceland, Norway, Switzerland and Liechtenstein, which have implemented or will implement the EU border acquis have been or will be given access to SIS II and

⁴¹⁵Tony Bunyan gives the following example which leaves the data subject completely unprotected and without track of where their personal data is used and for what purposes. Example: "Information and intelligence on an individual can be gathered in state A for one purpose, passed to state B for another purpose and further processed (added to) and then passed to state C (e.g.: outside the EU) where the same thing happens again with data passed around the agencies. How the individual is meant to get access to this "information trail" is nowhere considered in the data protection proposal [referring to the Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (30.12.2008)]. The accessing and processing of data/intelligence within the EU and outside – about which the individual will have no right to be informed – may well take on ominous implications with the growth of "watch-lists" (e.g.: to travel, financial transactions etc)" *Id.*

⁴¹⁶ EUROPEAN DATA PROTECTION SUPERVISOR, *Preliminary comments of the European Data Protection Supervisor on: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Preparing the next steps in border management in the European Union", COM(2008)69 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Examining the creation of a European Border Surveillance System (EUROSUR)", COM(2008) 68 final; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Report on the evaluation and future development of the FRONTEX Agency." COM(2008) 67 final, p.7.*

VIS⁴¹⁷. However, the EU data protection legislation and the EU Charter are not binding to non-members in the use of databases, which will further impede the accountability.

CHAPTER IV: BORDER CONTROL ACTIVITIES: AVOIDING RESPONSIBILITY FOR POLITICAL CONVENIENCE

Since its inception, Frontex, the EU border control agency, has generated multiple critiques denouncing the lack of transparency in some aspects of its activities. In this context, the joint operations by sea, coordinated by the agency, raise many questions related with the fundamental rights of the people in need of protection. Furthermore, member states participating in such operations have the tendency to misinterpret legal obligations towards populations affected by the international and EU legislation, thus, barring access of asylum-seekers to their territory. Most of the controversial tactics deployed have resulted in turn backs and lost lives of asylum seekers among other migrants. The aim of the following chapter is to outline some questionable tactics deployed by Frontex and member states during sea operations and to highlight the obligations arising from the international and EU law towards the protection of asylum-seekers.

SECTION 1: Frontex: Balancing Prevention of Irregular Migration with Protection of Human Rights of the Asylum seekers?

⁴¹⁷ EUROPEAN COMMISSION, *Amended Proposal for a Regulation (EU) No... of the European Parliament and of the Council on establishing an Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (presented by the Commission pursuant to Article 293(2) of the Treaty on the Functioning of the European Union. COM(2010)93 final.*

Strengthening the control over the EU common borders is a high priority of the member states and EU itself. Since Tampere, the border policies have been subject to a rapid development⁴¹⁸. The integrated border management strategy, discussed earlier in the paper, was employed with the aim to coordinate the administration of the common EU frontiers and foster cooperation among member states when managing the EU external borders. To that end, in December 2001, the Laeken European Council gave the Commission the mandate “to work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created”⁴¹⁹. Followed by lengthy political negotiations within the Council and the Commission⁴²⁰, Frontex (from *frontières extérieures*), the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union⁴²¹, was established in 2004⁴²² as a key player to facilitate the aforementioned aims.

⁴¹⁸ Sergio CARRERA, *Towards a Common European Border Service?*, CEPS Working Document No. 331, 2010, p.10 [Online] <http://www.ceps.be/book/towards-common-european-border-service> [Accessed: 10 December 2011]. Among other actions, the Tampere summit called for “common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes” within the AFCJ. Tampere Programme, Op. Cit., note 225, Para 3.

⁴¹⁹ EUROPEAN COUNCIL, Op. Cit., note 240, Para 42

⁴²⁰ The main contingency issue in the process of creation of common mechanism for controlling the EU borders was the suggested by the Commission common European Corps of Border Guards: a centralized European structure for border control. However, many member states were in favour of more loose intergovernmental entities organised as operational centres in each member state. Sovereignty over the state borders was brought forward as a main issue related with the establishment of unified EU Border Guards. S. CARRERA, Op. Cit., note 418; Andrew NEAL, “Securitization and Risk at the EU Border : the Origins of FRONTEX”, (2009) 47 *Journal of Common Market Studies* 333.

⁴²¹ The emphasis is added to stress that member states are still in control of their own borders. Thus, the external borders are not regarded as EU common frontiers but those of EU member states.

⁴²² Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

Frontex is an intelligence-driven operational agency, whose objective is “to strike a balance between minimising the threat of illegality at the border while maximising the ease and convenience of bona fide travellers”⁴²³. However, the ‘threat of illegality’ referred to by the Agency, as pointed out by Carrera⁴²⁴, is simply persons trying to cross the EU border in a manner non-compliant with the established border framework. The asylum-seekers also constitute such ‘thread of illegality’, as they, in many cases, attempt to cross borders through irregular means and usually travel within the context of mixed flows. However, as it will be argued, the Agency’s main activities are far from balanced. Its efforts are mostly directed towards deterring or diverting migrants from reaching European shores without considering claims for asylum in conflict with core international human rights obligations such as *non-refoulement*.

A. How Frontex Operates

One of the main tasks accorded to the Agency is the coordination of operational cooperation between member states in the field of external border management⁴²⁵. The operational cooperation is facilitated through joint operations⁴²⁶. Those operations are organized at sea, air and land borders of the member states and Frontex coordinates the

⁴²³ FRONTEX, webpage [Online] <http://www.frontex.europa.eu/>

⁴²⁴ S. CARRERA, *The EU Border Management Strategy : FRONTEX and the Challenges of Irregular Immigration in the Canary Islands*, CEPS Working Papers No 261, 2007, p.14 [Online] <http://www.ceps.be/book/eu-border-management-strategy-frontex-and-challenges-irregular-immigration-canary-islands> [Accessed 3 December 2011]

⁴²⁵ Other responsibilities within the Agency’s mandate include: a) assist Member States on training of national border guards, including the establishment of common training standards; b) carry out risk analyses; c) follow up on the development of research relevant for the control and surveillance of external borders; d) assist Member States in circumstances requiring increased technical and operational assistance at external borders; e) provide Member States with the necessary support in organising joint return operations. Council Regulation, Op. Cit., note 422.

⁴²⁶ Frontex’s joint operations are among the most important in terms of expenses as they account for 76% of the Agency’s budgetary expenses (Frontex budget, 2011). Approximately the same percentage is observed in the earliest Frontex’s budgets.

planning and communication⁴²⁷. A joint operation can be initiated by Frontex based on its own risk analysis. Such an operation can be proposed by a member state, and can also be requested by a member state facing a particular situation on its borders that may require assistance. In the two latter cases, the need for conducting a joint operation is evaluated through risk analysis followed by a recommendation for joint operation or refusal⁴²⁸. The participation of the other member states is encouraged but not mandatory. Since Frontex does not carry its own equipment, member states, at their own will, supply surveillance and technical equipment such as vessels, helicopters, and so on for temporary disposal of the host Member State. The available equipment is listed in the “Central Record of Available Technical Equipment” (CRATE)⁴²⁹.

Frontex regulation explicitly states that the responsibility for the control and surveillance of the external borders lies within each member state⁴³⁰. The Agency disposes of its own budget funded by the Community and the member states parties to the Schengen acquis⁴³¹. Since 2005, the Frontex budget is constantly increasing, from approximately 19 million in 2006 to 85 million in 2011⁴³². The Agency’s staff also underwent a significant increase from 43 persons in 2005, to 219 in 2008⁴³³.

⁴²⁷ COWI, *External Evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, Denmark, 2009, p.34.

⁴²⁸ *Id.*

⁴²⁹ Sarah LÉONARD, *FRONTEX and the Securitization of Migrants through Practices*, 9 February 2011, p.16 [Online] <http://www.nuovicittadini.it/briguglio/immigrazione-e-asilo/2011/febbraio/art-leonard-frontex.pdf> [Accessed 2 January 2012]

⁴³⁰ Council Regulation, Op. Cit., note 422, Para 4.

⁴³¹ Elisabeth SPIEGEL, *FRONTEX – Legitimate Agent for Border Security or Ruthless Deportation Agency? : An Analysis of the Activities of the European Union’s Border Agency with a Special Focus on Legitimacy and Controllability of its Operations*, BA Thesis, University of Twente, Netherlands, 2010, p.14.

⁴³² Frontex, budget 2005-2011.

⁴³³ COWI, Op. Cit., note 427, p.24.

B. Joint Operations Conducted by Sea

Frontex sea operations are by far the most expensive and controversial activities conducted by the Agency⁴³⁴. In recent years, pictures of overcrowded fishing boats caring migrants towards EU Southern borders have flooded the media giving an impression of migration crisis and foreign invasion of the EU. In the same time, hundreds of people have lost their lives during perilous sea journey in search for safe haven or better opportunities in foreign lands⁴³⁵. The image of migration crisis at the Mediterranean shores, significantly inflated by the media, urged the EU to focus efforts to reinforce the management of the Southern external maritime borders. The Commission suggested a twofold approach: 1) operational measures with reinforced control and surveillance; and 2) cooperation with third countries⁴³⁶. The focus was set on the first part of the above approach, as it can deliver immediate results, and Frontex was set to playing a crucial role in order to achieve the goal⁴³⁷.

The maritime operational cooperation led by the Agency is taking place in the territorial waters of member states, at high sea or within the coastal waters of third countries. The HERA joint operation, for example, was two-dimensional: 1) to establish migration routes and improve future operations by interviewing migrants already on the shores; 2)

⁴³⁴ Sea operations account for the majority of the expenses- 59% of all funds allocated for joint operations. (Frontex, budget 2011) The pattern is observed in previous Frontex's budgets with the exception of the 2005 budget where no specification of how the budget for joint operations is spread is indicated. The sea operations have generated extensive critiques from civil society, including human rights and pro-migrant NGO's, for example PRO ASYL in Germany, Noborder network and others. S. LÉONARD, Op. Cit., note 429, p.3; for civil society critique and media coverage see E. SPIEGEL, Op. Cit., note 431, p.16-20.

⁴³⁵ According to UNHCR for year 2011 alone, more than 1500 people have lost their lives in attempt to cross Mediterranean Sea. UNHCR.. *More than 1,500 Drown or Go Missing Trying to Cross the Mediterranean in 2011*, [Online] 2012 <http://www.unhcr.org/4f2803949.html> [Accessed 3 May 2012].

⁴³⁶ EUROPEAN COMMISSION, *Commission Communication, Reinforcing the Management of the European Union's Southern Maritime Borders. COM(2006) 733 final*, para 8.

⁴³⁷ *Id.*, Para 11.

to patrol the zone between African coast and Canary Islands in order to deter boats transporting irregular migrants heading to the EU⁴³⁸. If the vessel is detected before leaving the shores of the third state, in this case Mauritania, Senegal, or Cape Verde, it is diverted back with the aim of “reducing the danger of losses of human lives [at sea]”⁴³⁹. Then the control and responsibility over the migrants is taken by the respective third country measures⁴⁴⁰. The approach of diverting boats with migrants before they set off for their journey involves “a process of externalization of EU border control”⁴⁴¹ and will be discussed in the next chapter. Below we will analyze the intercepting joint operations in high sea and the compliance of the involved stakeholders, member states and Frontex, with the international and Community law regarding access to protection of asylum seekers.

Since 2006, Frontex has coordinated multiple joint sea operations the majority conducted in the Mediterranean region⁴⁴². The first sea operation, HERA, was requested by Spain and continued from 2006 to 2008 in different sequences. The aim of the operation was to tackle the irregular migration coming from Africa and disembarking on the Canary Islands⁴⁴³. During the HERA I operation 6,076 out of a total of 18,987 illegal

⁴³⁸ For information about different modules of the HERA joint operation see: FRONTEX, *Longest FRONTEX Coordinated Operation – HERA, the Canary Islands*, 19 December 2006 [Online] <http://www.frontex.europa.eu/news/longest-frontex-coordinated-operation-hera-the-canary-islands-ZubSEM> [Accessed 24 January 2011]; FRONTEX, *HERA III Operation*, 13 April 2007, [Online] <http://www.frontex.europa.eu/news/hera-iii-operation-DLbJwE> [Accessed 4 March 2011].

⁴³⁹ *Id.*, FRONTEX, *HERA III Operation*.

⁴⁴⁰ S. CARRERA, *Op. Cit.*, note 424, p.21.

⁴⁴¹ *Id.*, p.21.

⁴⁴² FRONTEX, *Frontex Press Pack*, 2011, p.13[Online] http://frontex.europa.eu/assets/Media_centre/Frontex_Press_Pack.pdf [Accessed September 2011].

⁴⁴³ FRONTEX 19 December 2006, *Op. Cit.*, note 438

immigrants who landed in the Canary Islands were returned⁴⁴⁴. HERA II prevented more than 3,500 migrants from disembarking the African coast⁴⁴⁵. HERA III diverted back to their points of departure in ports of West Africa 1,167 migrants⁴⁴⁶. In the last HERA operation, run in 2008, along with NAUTILIUS⁴⁴⁷, the total migrants who were diverted back, intercepted at sea, convinced to turn back, or escorted back to the closest shore (Senegal or Mauritania), were 5,969⁴⁴⁸.

Joint operations, including those carried out at sea, have been deemed ‘impressive’ by the Commission⁴⁴⁹. However, it is difficult to assess such statements, given the complete lack of transparency in the manner in which such operations are carried out. Frontex does not keep a publicly available record on the country of origin, sex, protection needs⁴⁵⁰, or the fate of those intercepted and diverted in high sea⁴⁵¹. In regards to the migrants diverted back, Frontex only states that “[p]ersons that were intercepted during Joint Operations (...) at sea ... have either been convinced to turn back to safety, or have

⁴⁴⁴ FRONTEX, *HERA 2008 and NAUTILIUS 2008 statistics*, 17 February 2009 [Online] http://www.frontex.eu.int/newsroom/news_releases/art40.html [Accessed 3 March 2011]

⁴⁴⁵ FRONTEX 13 April 2007, Op. Cit., note 438.

⁴⁴⁶ *Id.*

⁴⁴⁷ FRONTEX, *GO ahead for Nautilus*, 7 May 2008, [Online] http://www.frontex.eu.int/newsroom/news_releases/art36.html [Accessed 7 May 2011].

⁴⁴⁸ FRONTEX, Op. Cit., note 444.

⁴⁴⁹ Anneliese BALDACCINI, “Extraterritorial Border Controls in the EU: the Role of Frontex in Operations at Sea”, in Bernard RAYAN. & Valsamis MITSILEGAS (ed.) *Extraterritorial Immigration Control Legal Challenges*, Boston, Martinus Nijhoff, 2010, p.242.

⁴⁵⁰ *Id.*

⁴⁵¹ Violeta MORENO-LAX, “Seeking Asylum in the Mediterranean : against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea”, (2011) 23 *International Journal of Refugees* 174, 185. The existing official reports also does not avail how the situation of people seeking protection during such operations is dealt with; According to ECRE, some existing reports avail very serious violations of the human rights of people seeking international protection. ECRE, *Defending Refugees' Access to Protection in Europe*, 2007, p.12 [Online] <http://www.unhcr.org/refworld/topic.4565c22514.46545e4c2.4766464e2.0....html> [Accessed 3 November 2011]

been escorted back to the closest shore”⁴⁵². The statement does not indicate if the fundamental rights of asylum-seekers are being respected⁴⁵³. On the contrary, this is an indication that asylum seekers are diverted back without consideration of their need for protection⁴⁵⁴, which is in conflict with the international and European law.

C. Responsibilities during Sea Operations: a Shaky Legal Ground?

Member states responsibilities towards asylum-seekers intercepted and rescued in high sea are not so clearly articulated within the framework of the international maritime law⁴⁵⁵. The question of which member state should hold responsibility for the disembarkation and subsequent review of the application for asylum intensifies within the context of the Frontex joint operations, where many states are taking part. The existing ambiguities stimulate different interpretations of the law and allow for application of erroneous practices, including push backs and refusal of entry to the EU territory, without granting access to refugee determination procedures and appeals against refusal of entry⁴⁵⁶. States “aware of the shaky legal ground ... that no international convention would cover interception operations of unarmed migrants in the

⁴⁵² Seline TREVISANUT, “Maritime Border Control and the Protection of Asylum Seekers in the European Union”, (2009) 12 *Touro International Law Review* 5, 159.

⁴⁵³ *Id.*

⁴⁵⁴ V. MORENO-LAX, *Op. Cit.*, note 451, 185.

⁴⁵⁵ Once asylum seekers are rescued at high sea it is not exactly clear which state should assume responsibility for the rescued. There is also no provision within the international maritime law stating if the asylum-seekers can disembark the ship after rescue therefore, it is not clear which state has to assume responsibility to review the lodged application for asylum. Vladislava STOYANOVA, “The Principle of Non-Refoulement and the Right of Asylum seekers to Enter State Territory”, (2008) 3 *Interdisciplinary Journal of Human Rights Law* 1, p.8; Silja KLEPP, “A Contested Asylum System the European Union between Refugee Protection and Border Control in The Mediterranean Sea”, (2010) 12 *European Journal of Migration and Law* 1, 14.

⁴⁵⁶ STANDING COMMITTEE OF EXPERTS ON INTERNATIONAL IMMIGRATION, REFUGEE AND CRIMINAL LAW, *Proposal for a Regulation Establishing a Mechanism for the Creation of Rapid Border Intervention Teams and Amending Council Regulation (EC) No 2007/2004 as Regards that Mechanism (COM (2006) 401 final)*, UK Parliament.

high sea”⁴⁵⁷ are taking advantage of this situation by evading their responsibilities. In the same vein, Frontex is avoiding accountability by shifting the protection responsibilities to member states that maintain control over the joint operations and are responsible for the control over their borders.

Schengen border legislation is also not precise on the matter. Ambiguities within the Schengen Border Code⁴⁵⁸ allow member states to defer their responsibilities with regard to the Code’s implementation at sea. Moreover, as pointed out by Hobbing and Koslowski “Europe still presents a scattered image of individual state and administrative traditions”⁴⁵⁹ which is especially relevant within the context of the EU border policy, in which the handling of border matters is a responsibility of each of the member states. Therefore, different national law traditions instigate divergent practices in handling similar border matters. One example is the identification of a situation requiring assistance at sea: some member states take the position that the vessel must be sinking in order to be assisted; others will render help to any unseaworthy vessel⁴⁶⁰. The European Council itself acknowledged that there is an express need for “clear rules of engagement

⁴⁵⁷ S. KLEPP, Op. Cit., note 455, 16.

⁴⁵⁸ EUROPEAN COMMISSION, *Proposal for a Council decision supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of the operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders*. COM(2009)658 final, point 2.

⁴⁵⁹ Peter HOBGING & Rey KOSLOWSKI, *The Tools Called to Support the 'Delivery' of Freedom, Security and Justice: A Comparison of Border Security Systems in the EU and in the US*, European Parliament Ad hoc Briefing Paper, 2009, p.3 [Online] <http://www.statewatch.org/news/2009/mar/eu-usa-borders.pdf> [Accessed 4 November 2011].

⁴⁶⁰ Most of the joint maritime operations turn into search and rescue operations which are guided by the international Search and Rescue system (SAR) which rules are not applied uniformly by each state. EUROPEAN COMMISSION, Op. Cit., note 458, point 2.

for joint operations at sea, with due regard to ensuring protection for those in need who travel in mixed flows, in accordance with international law”⁴⁶¹.

One of the most problematic aspects of the joint sea operations is the respect of *the principle of non-refoulement*⁴⁶². Klepp’s research demonstrates that *non-refoulement* is not part of the legal basis of Frontex sea operations. Thus, decisions on how to proceed with the intercepted migrants are taken unaccountably by security and military officials on *ad hoc* basis during the operation⁴⁶³. Even more, some member states are contesting the application of *the non-refoulement* with regard to protection seekers, since “the high seas are extraterritorial”⁴⁶⁴, and others are officially acknowledging that they “do not proceed with the formal identification of migrants who are intercepted at sea”⁴⁶⁵.

The responsibilities of Frontex towards respecting the rights of asylum seekers in high sea during joint operations are also blurred because of the lack of definition of the Agency’s role when coordinating such operations. As mentioned, member states carry the responsibilities of the control and surveillance over their borders. Accordingly, the Agency claims responsibility only for the coordination of the joint operations between

⁴⁶¹ *Id.*, point 9.

⁴⁶² Efthymios PAPASTAVRIDIS, “Fortress Europe’ and FRONTEX : Within or Without International Law?”, (2010) 79 *Nordic Journal of International Law* 75.

⁴⁶³ S. KLEPP, *Op. Cit.*, note 455, 17.

⁴⁶⁴ Andreas FISCHER-LESCANO, Tillmann LÖHR & Timo TOHIDIPUR, “Border Controls at Sea : Requirements Under International Human Rights and Refugee Law”, (2009) 21 *International Journal of Refugee Law* 256, 265.

⁴⁶⁵ V. MORENO-LAX, *Op. Cit.*, note 451, 185.

member states without carrying further responsibilities for actions occurred during those operations, which are to be fully assumed by member states⁴⁶⁶.

D. Responsibilities to be Carried out by All Parties in Sea Operations

1) Framing International Responsibility within the context of EU complexities

Before embarking on analysis of the responsibilities to be assumed by member states and Frontex as EU agency during joint operations conducted by sea, it will be useful to shed more light on the importance of responsibility under the international law and subsequently how such responsibility can be attributed to member states and EU for wrongfully committed acts. Most specifically, attention will be paid to the attribution of responsibility to EU in the context of its complex relations with member states in terms of legislative competences.

Generally, within the AFSJ, member states and the EU enjoy shared legislative responsibilities⁴⁶⁷, which mean that both players can legislate and adopt legally binding acts⁴⁶⁸. However, many exceptions apply to this rule, since AFSJ is a complex area

⁴⁶⁶ The Executive Director of the Agency, Ilkka Latinen has commented that “as regards fundamental rights Frontex is not responsible for decisions in that area. They are the responsibility of the Member States”. Barbara LOCHBIHLER, Ska KELLER, Ulrike LUNACEK & Helene FLAUTRE, MEPs, *Frontex Agency: which Guarantees for Human Rights ? A Study by Migreurop into the European External Borders Agency in View of the Revision of its Mandate*, 2011, p.22 [Online] http://barbara-lochbihler.de/cms/upload/PDF_2011/GL_Frontex_E_1.pdf [Accessed 21 December 2011].

⁴⁶⁷ TFEU, Op. Cit., note174, art.4(2)(j).

⁴⁶⁸ Id., art.2(2). The competences within the EU are divided in exclusive and shared. In case of exclusive competence it is the EU which can adopt legally binding acts. In case of shared competences, the EU and member states are competent to legislate. However, once the EU has legislated in an area of shared

encompassing diverse fields such as border, asylum, visa, immigration, judicial cooperation on civil matters and criminal matters, and police cooperation where member states and EU have either exclusive jurisdiction and/or share competences. In the field of borders and asylum, with some exceptions, the EU enjoys exclusive competence to suggest and to adopt legislative measures; member states exercise their legislative competence to the extent that the Union has not exercised its own.

In addition to according more competences to the EU in the field of borders and asylum, art.78 (1) TFEU offers clear and broad protection framework in terms of asylum, specifying that the asylum policy should offer: 1) appropriate status of any third-country national in need of protection and 2) ensure compliance with the 1951 Refugee Convention and Protocol and other relevant treaties, including human rights treaties and the principle of non-refoulement. Therefore, all EU secondary legislation must be in conformity with all of the above international treaties and norms. Thus, EU and member states' obligations to provide protection to asylum-seekers have more legal force because those obligations are deriving from the founding Treaty itself and will apply to all aspects of the EU's protection-related policies, not only to those related to the 1951 Refugee Convention⁴⁶⁹.

3) EU: Organization with International Legal Responsibilities

competence, it is the Union which possesses the competence to enter into international agreements if the internal legal act implies the conclusion of such agreement. Esa PAASIVIRTA and Pieter KUIJPER JAN, "Does one size fit all? The European Community and the responsibility of international organizations", (2005), 36, *Netherlands Yearbook of International Law*, 176.

⁴⁶⁹S. PEERS, "Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon", (2008) 10 *European Journal of Migration and Law* 219, 233.

According to art.3 Draft Articles on the Responsibility of International Organization (DARIO) drafted by the International Law Commission (ILC) “[e]very internationally wrongful act of an international organization entails the international responsibility of that organization”⁴⁷⁰ However, attributing responsibility to EU for committing an internationally wrongful act is in many instances a complicating task given the EU legal structure and the complexity of the division of legislative competences between the Union and its member states. As argued by the Commission, in submission for the ILC, the EU is not a “classical” type of international organization⁴⁷¹. The EU is an autonomous legal order, which has primacy over the national legal systems of its member states⁴⁷². Member states have given part of their sovereignty to the Union to act in certain aspects in order to achieve goals common to its members. Thus, the Union can enter international agreements on its own right separate from its member states. Moreover, under the Lisbon treaty, the EU acquired legal personality⁴⁷³. Therefore, in

⁴⁷⁰ *Draft Articles on the Responsibility of International Organizations*, with commentaries, ILC, 63d sess., 2011, Suppl. No. 10 (A/66/10).

⁴⁷¹ Auriel SARI & Ramses WESSEL, “International Responsibility for EU Military Operations: Finding the EU’s Place in the Global Accountability Regime” in B. VAN VOOREN, S. BLOCKMANS & J. WOUTERS (eds.), *The Legal Dimension of Global Governance: What Role for the EU?*, Oxford, Oxford University Press (forthcoming), 2012, p.5 [Online] <http://www.utwente.nl/mb/pa/research/wessel/wessel88.pdf> [Accessed 12 June 2012]

⁴⁷² *Flaminio Costa v. E.N.E.L.*, Case 6-64, Judgment of the Court of 15 July 1964, 593 the Court held that “[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.” See also *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62, Judgment of the Court of 5 February 1963 [Online] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962J0026:EN:NOT> [Accessed 12 October 2012].

⁴⁷³ TEU, Op. Cit., note 156, art. 47.

context of international responsibility, EU can be held accountable for committing an internationally wrongful act⁴⁷⁴.

Another particularity of the EU legal order is that once the EU concludes an international agreement, the assumed international obligations are directly applicable in the national legal system of member states without formal transposition. Furthermore, there is a lack of EU institutions/administration on local level⁴⁷⁵. Thus, even in cases when EU and member state/s are individual parties to international legal act, virtually the same institutions of member states carry the implementation of the agreement. In such complex situation, for third parties to an international agreement the question of responsibility for internationally wrongful act is of paramount importance.

According to art.4 DARIO an internationally wrongful act (conduct, action and omission) consists of two elements: a) to be attributable to that organization under international law; and b) to constitute a breach of international obligation of that organization. On the attribution of conduct, given the fact that organizations, like states, cannot act for themselves but through their organs and agents⁴⁷⁶, art.6 (1) DARIO reads that the conduct of the latter in performance of their functions within the organization should be attributed to the organization⁴⁷⁷. The rules of the organization will determine in which cases the organs and the agents have acted in performance of their functions

⁴⁷⁴ A. SARI & R. WESSEL, Op. Cit., note 471, p.3.

⁴⁷⁵ E.g. the custom authorities of ms are entrusted with implementation of EU common custom tariffs, etc.

⁴⁷⁶ Stefan TALMON, "Responsibility of International Organizations: Does the European Community Require Special Treatment?" in Maurizio RAGAZZI (ed.) *International Responsibility Today*, Netherlands, Koninklijke Brill NV, 2005, p.410.

⁴⁷⁷ Frank HOFFMEISTER, "Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?", (2010) 21 *European Journal of International Law* 723, 726.

given to them by the organization⁴⁷⁸. How does such a conclusion resonate with the complex relationship between EU and its member states?

It must be clarified beforehand that within the context of international agreements the attribution of conduct is not an issue in the so called mixed agreements of bilateral nature where EU and member states enter the agreement with third parties as “one legal person [...] [and] [t]heir conduct need not be attributed to each other but is attributed instead to the legal person consisting of the EC and its member States”⁴⁷⁹. The mixed agreements where EU and member states are contracting parties on their own right are found to be more challenging in this context. Frequent practice in such cases is for parties to attach a declaration of competence to the agreement clarifying each party’s responsibility. The declaration of competence demonstrates the separate responsibilities, which reflect different competences of the EU and member states, and makes it clear for third parties⁴⁸⁰ which party is responsible and to what extent. Where no declaration is present, it is assumed that both actors (EU and member states) are jointly responsible⁴⁸¹ (addressed in further details below).

In general, in the areas of exclusive competence (e.g. asylum), the EU is the entity attributed with legislative powers and member states are the ones implementing the EU’s legislative decisions. When implementing EU directives, for example, member states are afforded with certain degree of discretion. Thus, the member state decides on

⁴⁷⁸ DARIO, Op. Cit., note 470, art.6(2).

⁴⁷⁹ S. TALMON, Op. Cit., note 476, 408.

⁴⁸⁰ E. PAASIVIRTA and P. KUIJPER JAN, Op. Cit., note 468, 185.

⁴⁸¹ *Id.*, p.187. This view is supported by the ECJ. However, the joint responsibility in such cases is not articulated in straightforward manner within the doctrine.

how to transpose the act in accordance with the national legal system. Such margin of discretion limits the control that the EU can exercise on member states actions in a national context⁴⁸². Consequently, it can be argued that in case of a wrongfully committed act deriving from incorrectly implemented EU secondary legislation, imputability for such conduct to the EU would not be justified.

However, our analysis points to the opposite conclusion. As mentioned above, when EU concludes an international agreement on its own right, the agreement becomes part of the member states' national legislation and they are the one to carry the implementation of the obligations resulting from the agreement⁴⁸³. The Union should be attributed with the wrongful conduct and should assume responsibility for the internationally wrongful acts in situation when incorrect implementation by member states lead to a breach of international obligation⁴⁸⁴. The European Commission, at least in the context of WTO litigations, has adopted similar position stating that measures adopted by the member states in the areas of exclusive EU competence should be attribute to the EU and engage its international responsibility⁴⁸⁵. The above conclusion follows the understanding that when implementing Union legislation the member states act as its agents according to art 6(1) DARIO⁴⁸⁶.

⁴⁸² A. SARI & R. WESSEL, Op. Cit., note 471, p. 5.

⁴⁸³ Such problems may arise within the framework of the so called mixed agreements when they cover matters of exclusive EU competence. E. PAASIVIRTA and P. KUIJPER JAN, Op. Cit., note 468, 189.

⁴⁸⁴ Eva STEINBERGER, "The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO", (2006) 17 *European Journal of International Law* 873, 849-850.

⁴⁸⁵ A. SARI & R. WESSEL, Op. Cit., note 471, p. 5-6.

⁴⁸⁶ E. PAASIVIRTA and P. KUIJPER JAN, Op. Cit., note 468, 190.

In an advisory opinion on *Reparation for injuries suffered in the service of the United Nations*, the International Court of Justice noted that the word ‘agent’ needs to be understood in the most liberal sense: “... that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions – in short, any person through whom it acts”⁴⁸⁷. As pointed by Talmon the provision of art.6 (1) is wide to cover the relationship between the Union and the authorities of its member states⁴⁸⁸. Therefore, when it can be firmly concluded that a member state’s organ or agent when performing Union’s functions perpetrated the wrongdoing, the wrongful conduct must be attributed to EU, which should assume the responsibility for it.

Some scholars have argued that EU exercise weak control over its member states⁴⁸⁹. However, the Union disposes of panoply of tools to enforce correct application of EU law. The EU can initiate a procedure for non-compliance of a member state with the EU’s primary law, for example. This process can consist of political negotiations as well as ECJ’s involvement. Furthermore, member states’ courts may refer questions to ECJ for interpretation of EU law. Such process is initiated through a preliminary rulings procedure and the ECJ is the final court to decide on the compatibility of the implemented act with EU law. Therefore, the control exercised by the EU is sufficient so that the organization can be held responsible for wrongful conduct of a member state. Thus, “the internal regulatory competence of the Union for matters falling within the

⁴⁸⁷ *Draft Articles on the Responsibility of International Organizations*, with commentaries, Op. Cit., note 470, p.17.

⁴⁸⁸ S. TALMON, Op. Cit., note 476, 412.

⁴⁸⁹ E. PAASIVIRTA and P. KUIJPER JAN, Op. Cit., note 468, 192.

scope of the Treaty is translated into the EU's international responsibility for measures taken under its normative authority”⁴⁹⁰.

Further to the above, even more challenging is the question whether member states can bear international responsibility for EU's acts contrary to international agreement, e.g. when EU institutions have adopted legal act which provisions contravene obligations undertaken by member state/s in the context of international agreement. In the area of human rights, where is our particular interest, it seems that the ECtHR has taken the position to hold member states individually or collectively accountable for legislative acts of EU suspected to be contrary to the ECHR⁴⁹¹. Let us take for example art.3 ECHR that prohibits return of individuals to places of torture and ill-treatment. If EU adopts a legal instrument where possibility for such return may occur, can responsibility be attributed to member states transposing the legislation in the national law? In the context of Dublin Convention⁴⁹² which allows member states to return persons to safe third countries, the ECtHR in case *T.I.v.UK* has ruled that member states cannot automatically return asylum-seekers under the Dublin Convention relying on the assumption that the member state to where the individual is returned will comply with its obligations under the ECHR⁴⁹³.

⁴⁹⁰ Andre NOLLKAEMPER, *Joint Responsibility between the EU and Member States for Non-Performance of Obligations under Multilateral Environmental Agreements*, Amsterdam Law School Legal Studies Research Paper No. 2011-47, 28 [Online] http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966933 [Accessed 5 June 2012]

⁴⁹¹ E. PAASIVIRTA and P. KUIJPER JAN, *Op. Cit.*, note 468, p.193-195.

⁴⁹² UNHCR, among others, has expressed opinion that the application of safe third concept which is central piece of the Convention, may result in chain deportations which will lead to violation of non-refoulement principle. UNHCR, *Implementaton of the Dublin Convention: Some UNHCR Observations*, May 1998 [Online] <http://www.unhcr.org/43662e1b2.pdf> [Accessed 12 October 2012]

⁴⁹³ *T.I.v.UK*, *Op. Cit.*, note 135.

Moreover, in *Mathews v. UK* the ECtHR observed that even, if a member state has transferred some competences to an international organization, the member states' responsibility would continue even after such transfer⁴⁹⁴. Thus, the Court has emphasised that in situation where possible breach of human rights obligations may occur, member states have alternatives at their disposal so to avoid such situation. However, it should be pointed out that the position of ECtHR on these and similar cases is informed by the fact that the EU is not a party to the ECHR. As observed by Paasivirta and Kuijper in such cases probably the EU could possibly have claimed responsibility, if it was party to the Convention. Therefore, such cases should be regarded with reservations⁴⁹⁵.

In the context of border control, more specifically the joint operations conducted by Frontex, the responsibility for internationally wrongful acts remain blurred. It is not clear whether Frontex or member states should be hold accountable for conduct resulted in a wrongdoing. According to Frontex's Regulation, the responsibility for control and surveillance of the external borders lies with the member states and Frontex's role is limited to "facilitat[ing] the application of existing and future Community measures relating to the management of external borders by ensuring the coordination of Member States' actions in the implementation of those measures"⁴⁹⁶. Moreover, significant part of Frontex's staff consists of seconded national experts (SNEs) borrowed to the agency by the member states. Even as Frontex's personnel, those experts are paid by their

⁴⁹⁴ *Case of Mathews v. the United Kingdom*, App. No(s). 24833/94, ECHR (Grand Chamber) 18 February 1999, Judgment (Merits and Just Satisfaction) para 32 [Online] Available: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58910> [Accessed 20 November 2011]

⁴⁹⁵ E. PAASIVIRTA and P. KUIJPER JAN, Op. Cit., note 468, 196.

⁴⁹⁶ COUNCIL REGULATION (EC) No 2007/2004, Op. Cit., note 422, rectal 4.

respective home countries and remain employed by them. Thus, in situations where conduct has led to internationally wrongful act in breach of international obligation, the responsibility shall remain with the respective member state/s.

In terms of SNEs, art.7 DARIO deals with attribution of conduct of state organ when it is placed at the disposal of international organization. The article states that “[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct”. According to the commentary, the article applies in situation where state organ is not fully seconded to the organization but still acts to a certain degree as organ⁴⁹⁷ of the seconding state. The wording implies that the decisive factor for attribution is who has the effective control over the conduct.

The personnel seconded by member states to Frontex during joint operations is still under the command, thus under the effective control of the former. During joint operations, every participating nation keeps command control over their own ships/vehicles. The joint missions are carried out following national law. Finally, according to Klepp’s research “all decisions concerning the operation at sea are reached at a round table with security officials of the member states who are joining the

⁴⁹⁷ The term organ in reference to a state needs to be understood in a broader sense as “comprising those entities and persons whose conduct is attributable to a State according to articles 5 and 8 on the responsibility of States for internationally wrongful acts.” *Draft Articles on the Responsibility of International Organizations*, with commentaries, Op. Cit., note 470, p.20.

operation”⁴⁹⁸. Therefore, it can be concluded that wrongful conduct of Frontex’s seconded personnel should be attributed to the member states that have the effective control over their staff during joint operations.

However, such a conclusion does not mean that Frontex is absent of any responsibility for wrongful conduct during joint operations. In practical terms, the Agency’s role is more than mere coordination and facilitation, especially during joint operations. Frontex can initiate joint operation by itself in agreement with member states. Moreover, request to be placed by member state for joint operation is subject to approval by Frontex. The agency co-finances the joint operations and takes active part in drafting and implementing the operational plans for the particular operation. Then the operation is led by the member state hosting the operation and coordinated by Frontex. Thus, Frontex activities are more operationally oriented and beyond mere facilitation.

In addition to the above, in the context of recently amended Regulation⁴⁹⁹, the Agency has been awarded with even more pro-active functions. Among other activities, Frontex can now purchase/lease its own equipment; its executive Director can decide to discontinue joint operation, if there is a breach of human rights. Therefore, the Agency should be jointly responsible for actions of the personnel seconded to it during joint operations.

⁴⁹⁸ S. KLEPP, Op. Cit., note 455, 16.

⁴⁹⁹ *Regulation (EU) No 1168/2011 Of The European Parliament And Of The Council Of 25 October 2011 Amending Council Regulation (Ec) No 2007/2004 Establishing A European Agency For The Management Of Operational Cooperation At The External Borders Of The Member States Of The European Union.*

4) Joint Responsibility between Member States and EU

Before backing up the argument that member states and EU can be held jointly responsible for internationally wrongful acts, we shall clarify that where the principle of “jointness” is not applicable, e.g. where there is clear division of obligations, the EU and member states are responsible for the wrongdoing caused by their own, separate act⁵⁰⁰. The conduct will be attributed to each one to the extent of its own international obligations. The principle *pacta sunt servanda* implying that every treaty is binding upon the parties to it⁵⁰¹ is fully applicable. Thus, the international obligations are binding only to the parties and to the extent of the individual commitments taken.

Given the complex division of competence between EU and its member states, it is somehow tempting to apply the concept of joint responsibility in order to assure that international obligations stemming from given Treaty are met. Moreover, the division of competences internally can be confusing for third parties⁵⁰². Thus, clarification who should be held responsible in case of internationally wrongful act has important practical significance “for accountability cannot be discharged effectively if it is unclear where responsibility lies”⁵⁰³.

⁵⁰⁰ A. NOLLKAEMPER, Op. Cit., note 492, 5.

⁵⁰¹ *Vienna Convention on the Law of Treaties 1969*, into force 27 January 1980. United Nations, Treaty Series, vol. 1155, art.26 [Online] http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [Accessed 30 November 2012]

⁵⁰² A. NOLLKAEMPER, Op. Cit., note 492, 2.

⁵⁰³ A. SARI & R. WESSEL, Op. Cit., note 471, p.1.

According to art.48 DARIO where international organization and one or more states are responsible for the same internationally wrongful act they can be hold jointly responsible for that act. Similarly, to the responsibility of States for internationally wrongful acts, art.48 (1) provides that the responsibility of each responsible entity may be invoked by the injured State or international organization. In its commentary to the article the ILC provides an example with the mixed agreements (in areas where the EU and member states exercise shared competence) concluded by the EU and member states together, where there is no explicit derogations laid down in the stated Convention. In such cases, the EU and member states will be jointly liable for the fulfilment of the obligations arising from the wrongful act⁵⁰⁴. The Advocate-General Jacobs had reached similar conclusion, in context of unclear division of competences, stating that ‘[u]nder a mixed agreement the [Union] and Member States are jointly liable unless the provisions of the agreement point to the opposite’ adding that the division of competence should not be relevant to third states”⁵⁰⁵.

In such situations, as pointed by Nollkaemper, there is a tendency that joint responsibility is used in terms of “joint and several”. This means that all responsible parties, States and/or international organization (EU and member states in this case), are together responsible for the wrongdoing and claim can be submitted against each one separately. Thus, “the responsibility of one is not reduced, if the other is involved in the

⁵⁰⁴ In the Commentary para 2 ILC also acknowledges that in some cases the responsibility of international organization or state can be subsidiary. Art.62 for example provides that, when the responsibility of a member State arises for the wrongful act of an international organization, responsibility is ‘presumed to be subsidiary.’ *Draft Articles on the Responsibility of International Organizations*, with commentaries, Op. Cit., note 470, para 20, p.77.

⁵⁰⁵ Opinion of Advocate General Jacobs to Case C-316/91, *European Parliament v Council of the European Union*, [1994] ECR I-625, at para. 69 cited in A. NOLLKAEMPER, Op. Cit., note 492, p.16.

perpetration of a wrongful act”⁵⁰⁶. In case of mixed agreements, for example, member states will be responsible for wrongful conduct even though it is EU’s area of competence. In the same vain EU should be held internationally accountable for wrongdoings resulted from incorrect implementation by member state/s. In such situation, the third party to the agreement can bring claim against each one of the responsible parties⁵⁰⁷.

The joint responsibility in the context of EU relations with member states would allow for the fulfilment of the main purpose of the concept, i.e. the ability to direct claim towards all responsible actors⁵⁰⁸. This is more so in cases where it is impossible to apportion the harm caused by one or more wrongful acts between the EU and member states. In such situations, the third party can direct the claim towards the EU and the member state/s and the question on how that responsibility will be divided between them will be an internal matter. The ECJ also adjudicated following the same reasoning⁵⁰⁹. Therefore, in matters where is not clear to whom responsibility for wrongful conduct can be attributed, it is only legitimate to conclude that member states and the EU can be jointly responsible for wrongful acts and the consequence of the division will be matter of EU law.

⁵⁰⁶ *Id.*, p.49. Nollkaemper specifies that the use of the term ‘*joint and several*’ in the international law is not consistent. *Id.*, p.9; See also E. PAASIVIRTA and P. KUIJPER JAN, *Op. Cit.*, note 468, 186-187.

⁵⁰⁷ However, Nollkaemper points that “ it is not obvious that (in a case where damage is caused) international law provides a basis for claiming from each of the responsible parties the full amount of compensation, only on the ground that respective contributions to the injury cannot easily be apportioned. A. NOLLKAEMPER, *Op. Cit.*, note 492, 19.

⁵⁰⁸ *Id.*, p.8.

⁵⁰⁹ *Id.*, p.15.

E. Responsibilities Placed into Context

Despite the erroneous claims outlined above in regards to the obscurity of responsibility at high sea and inconsistent interpretations of international obligations for political convenience, the high sea is not “a legal black hole”⁵¹⁰ where no international or EU treaties apply. The ECtHR already stated that

“the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction”⁵¹¹.

A multitude of international obligations arising from the international human rights law, humanitarian law, refugee law, international maritime law, ECHR and finally EU law, are obligating States and EU to assume responsibility towards asylum-seekers⁵¹². Even though some aspects of the International Maritime Law may consist of lacunae with regard to state jurisdiction and various responsibilities during interception activities at high sea⁵¹³, obligations arising from other branches of international law, including *non-refoulement principle*, should be duly observed and implemented *bone fide* by the states.

⁵¹⁰ ECRE, *Defending Refugees' Access to Protection in Europe*, 2007, p.19 [Online] <http://www.unhcr.org/refworld/topic.4565c22514.46545e4c2.4766464e2.0....html> [Accessed 3 November 2011]

⁵¹¹ *Case of Medvedyev and others v. France*, App. No(s).3394/03, ECHR (Grand Chamber) 29 March 2010, Reports of Judgments and Decisions 2010 cited in *Case of Hirsi Jamaa and Others v. Italy*, Appl. No. 27765/09 ECHR (Grand Chamber) 23 February 2012, Para 178 [Online] <http://www.unhcr.org/refworld/docid/4f4507942.html> [Accessed 20 December 2011]

⁵¹² G. S. GOODWIN-GILL, “The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement”, (2011) 23 *International Journal of Refugee Law* 443; V. MORENO-LAX, Op. Cit., note 451;

⁵¹³ V. MORENO-LAX, Op. Cit., note 451, 186-200.

As long as states exercise jurisdiction⁵¹⁴, including extraterritorial one, over a person, every state must be held accountable for violations of international obligations. Moreover, any conduct that results in breach of international human rights obligations by a State or jointly with other states or organizations will engage their international responsibility regardless of where the conduct took place within its territory or extraterritorially⁵¹⁵. In regards to the extraterritorial obligations, the Maastricht Principles⁵¹⁶ emphasise that such obligations “arise when a state exercises control, power, or authority over people or situations located outside its sovereign territory in a way that could have an impact on the enjoyment of human rights by those people or in

⁵¹⁴ It is important to stress that in terms of responsibility for human rights violations, the notion of jurisdiction has been detached with the state territory or other extraterritorial spaces where state exercises its power. According to Parisiani “[w]hat is crucial is that the individual is under the power, authority or control of a State’s organs, disregarding the geographical zone in which the action take place or generate its effects”. Emanuela PARISCIANI, *Extraterritorial Jurisdiction and State’s Obligations: Are there Human Rights on the high seas?* Essay, Human Rights Law ERASMUS, p.4 [Online] http://www.academia.edu/350954/Extraterritorial_Jurisdiction_and_States_obligations_in_the_fight_against_illegal_immigration#outer_page_5 [Accessed 12 October 2012]; In the same vein, the ICJ in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Territory* in regards to the application of ICCPR concluded,

“[...] while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of [ICCPR], it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions... [The travaux préparatoires of the ICCPR] show that, in adopting the wording chosen, the drafters of the [ICCPR] did not intend to allow State to escape from their obligations when they exercise jurisdiction outside their national territory”. ICJ *Legal Consequences of the Construction of Wall in the Palestinian Occupied Territory*, Advisory Opinion of 9 July 2004, ICJ Reports No.131, §109 cited in E. PARISCIANI, *Id.*, p.5.

⁵¹⁵ *Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, Final version, 29 February 2012, art.11 [Online] [http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1\[downloadUid\]=23](http://www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1[downloadUid]=23) [Accessed 1 December 2012].

⁵¹⁶ The Maastricht Principles are focused on state’s extraterritorial obligations in regards to the economic, social and cultural rights. However, the legal bases of extraterritorial obligations in regards to civil and political rights are broadly similar. Olivier DE SCHUTTER, Asbjørn EIDE, Ashfaq KHALFAN, Marcos ORELLANA, Margot SALOMON & Ian SEIDERMANF, “Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights”, (2012) 34 *Human Rights Quarterly* 1084, Commentary (2) to art.5.

such situations”⁵¹⁷. Goodwin-Gill arrives at the same conclusion pointing out that “international law looks not just to where the impugned act takes place, but also to the actor or actors to whom it is attributable and, above all, to consequences and effects”⁵¹⁸. During joint operations, Frontex and member states take decisions and perform actions which directly or indirectly affect individuals’ lives. There is nothing to disengage both actors from their international responsibility⁵¹⁹. Further to the above, the International Court of Justice in its *Corfu Channel Case*⁵²⁰ held that the state’s international responsibility will be engaged even in cases when it fails to act, in court’s words due to “grave omissions” to prevent possible human rights violations⁵²¹.

Since the intercepting states are responsible for the people on board of the intercepted vessels in high sea, *a fortiori* they are under the obligation to respect *the principle of non-refoulement*⁵²². In terms of seeking asylum, even though *non-refoulement* does not include general right to access; states are obliged to grant at least temporary admission to the territory in order to determine the protection needs of each individual⁵²³. Moreover, as argued by Goodwin-Gill, “there is a corresponding obligation on states not to frustrate the exercise of the right to seek asylum in such a way as to leave individuals at risk of persecution or other relevant harm”⁵²⁴.

⁵¹⁷ *Id.*, Commentary (1) to art.3.

⁵¹⁸ G. S. GOODWIN-GILL, *Op. Cit.*, note 512, 452.

⁵¹⁹ *Id.*, 453.

⁵²⁰ *Corfu Channel Case, (United Kingdom v. Albania)*, [1949] ICJ Reports 4 cited in G. S. GOODWIN-GILL, *Op. Cit.*, note 512, 453.

⁵²¹ This conclusion can be valid when the actor is not a state but international organization (e.g. EU).

⁵²² E. Papastavridis, *Op. Cit.*, note 462, 104.

⁵²³ A. FISCHER-LESCANO, T. LÖHR & T. TOHIDIPUR, *Op. Cit.*, note 464, p.283.

⁵²⁴ G. S. GOODWIN-GILL, *Op. Cit.*, note 512, 445.

In addition to the state's international obligations, responsibilities of the member states towards third country nationals, including toward asylum-seekers, are further defined in the Schengen Border Code (SBC)⁵²⁵. As a legally binding document, the SBC obliges member states to respect the fundamental rights and principles, including those recognized by the EU Charter and those obligations related to international protection and *non-refoulement*⁵²⁶. All border checks must be completed with full respect to human dignity and must be free of discrimination⁵²⁷. The Code maintains special measures for people in need of international protection. Importantly, as stated in art.3, the Code applies without prejudice to the rights of refugees and persons requesting international protection, in particular regarding *non-refoulement*.

Additionally, the SBC requires states to derogate from the normal entry procedures for entries on humanitarian grounds or international obligations⁵²⁸. Asylum-seekers are also exempt from the requirements for refusal of entry applicable to other third country nationals⁵²⁹. The SBC also guarantees the right to appeal when entry is refused. In case of refusal of entry, the person has to be informed duly about the reason for refusal; how to lodge an appeal; and who can act as their representative⁵³⁰. The extraterritorial application of the SCB is implied in the Code itself and in the jurisprudence of the ECJ in regards to the application of Community rules outside the Community territory⁵³¹. In

⁵²⁵ *Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders* [Schengen Borders Code].

⁵²⁶ *Id.*, recital 20.

⁵²⁷ *Id.*, art.6.

⁵²⁸ *Id.*, art.5(4)(c).

⁵²⁹ *Id.*, art.13(1); art. 5(4)(c).

⁵³⁰ *Id.*, art.13(3).

⁵³¹ V. MORENO-LAX, *Op. Cit.*, note 451, 209-210.

addition, a recent Decision adopted by the EU Council⁵³² introduced uniform rules to be followed by the member states when conducting maritime surveillance of the external borders⁵³³. Therefore, states are bound by the SBC provisions and other relevant community law when conducting border operations at high sea.

F. Frontex: the Way Forward

As previously mentioned, with regard to erroneous acts committed in high sea during joint operations, Frontex has adopted a defensive policy, denying any participation and responsibility for such acts⁵³⁴. However, Frontex is liable for acts committed during operations that it coordinates. In the first place, Frontex can be held accountable due to its status of EU agency. As outlined above, Frontex, and the EU, must assume responsibility for international wrongful acts. In addition, a recent amendment to the Frontex Regulation brought more clarity to the question of Agency's responsibilities. Accordingly, the Agency must fulfill its tasks in compliance with the relevant EU and international law, including the 1951 Refugees Convention and obligations related to access to international protection, in particular *the principle of non-refoulement* and fundamental rights⁵³⁵.

⁵³² Council Decision 2010/252/EU of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

⁵³³ Although included in the Annex, thus not legally binding, the Rules for sea border operations coordinated by the Agency are helpful guidelines for the conduct of all parties during such operations.

⁵³⁴ HUMAN RIGHTS WATCH, *Pushed Back, Pushed Around : Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, New York, Human Rights Watch, 2009; G. S. GOODWIN-GILL, Op. Cit., note 512, p.451.

⁵³⁵ Regulation (EU) No 1168/2011 Of The European Parliament And Of The Council Of 25 October 2011 Amending Council Regulation (Ec) No 2007/2004 Establishing A European Agency For The Management

The amended Regulation brought many positive changes to the Agency's mandate and is a decisive step toward more transparency and respect for fundamental rights. First and foremost, Frontex is required to develop a Fundamental Rights Strategy which includes a mechanism of effective monitoring towards the respect for fundamental rights in all its activities⁵³⁶. Such a mechanism is long overdue given the complete lack of transparency and accountability in which the Agency is operating. The establishment of such a mechanism will further the harmonization of the fundamental rights policies across the Union's external borders, therefore improving the overall implementation of the SBC. In developing such a mechanism and other measures to protect fundamental rights, Frontex will be supported by a fundamental rights officer and will receive assistance from a Consultative Forum consisting of representatives from the European Asylum Support Office, the Fundamental Rights Agency, the United Nations High Commissioner for Refugees and other relevant organizations.

The amended Regulation also establishes more clear and visible rules in terms of responsibilities between member states and Frontex during joint operations. Accordingly, each joint operation must be preceded by a detailed operation plan, which outlines the tasks and related responsibilities of all participants⁵³⁷. More specifically, for joint operations at sea, such a plan must contain information about the relevant jurisdiction and the applicable legislation, including information concerning

Of Operational Cooperation At The External Borders Of The Member States Of The European Union, art.1.

⁵³⁶ *Id.*, art.26 (a).

⁵³⁷ *Id.*, art. 3(a).

international and EU law regarding interception, rescue at sea, and disembarkation⁵³⁸. Another significant improvement that must be emphasized is the responsibility of the Executive Director to suspend a joint operation in case of serious violations of fundamental rights⁵³⁹. The reluctance of member states to uphold their international and EU obligations, while operating outside the EU's physical frontiers, is a persistent phenomenon. More clear and visible rules during sea operations, agreed to in advance, will eradicate the possibility for opportunistic political decisions to be implemented during operations at high sea.

Finally, the improved legislation has revived the idea of European Border Guards. Those border officials, although directly accountable to their respective countries, will be available for deployment at the request of Frontex. The agency will be less dependent on the willingness of each member state to participate in a particular operation, as the number of border guards from each member state will be determined each year. States will be obliged to contribute the requested staff⁵⁴⁰ “unless they [states] are faced with an exceptional situation substantially affecting the discharge of national tasks”⁵⁴¹. Lastly, the border guards would be bound to respect fundamental rights, including the access to asylum procedures. Establishing EU Border Guards teams is a decisive step forward towards more Community oriented action regarding border control. This will lead to more transparency and toward a human rights-based approach in all activities undertaken by the teams in the context of border control.

⁵³⁸ *Id.*, art. 3(a)(j).

⁵³⁹ *Id.*, art.3.

⁵⁴⁰ *Id.*, art.3(b).

⁵⁴¹ *Id.*, art.3(b)(2).

CHAPTER V: EXTRA-TERRITORIALIZATION OF EU BORDER CONTROL⁵⁴²

SECTION 1: Brief Overview of the EU Externalization of Asylum

A. Readmission Agreements

It is not in the scope of this paper to discuss in details the external dimension of EU migration policy, however, a quick glance over some of the measures within the external EU legislative framework will demonstrate their function to block access to asylum to the EU. The external dimension of EU asylum currently contains a number of components including, safe country concepts, readmission agreements with non-member states, Regional Protection Programmes (RPP) aiming at capacity building in the area of asylum with country of transit and origin, interceptions in third country coast lines among others. Measures such as processing centres for asylum seekers outside the EU have been considered but not developed yet.

Policies such as ‘safe third country’ concept (explained in length above) and readmission agreements have been in the EU asylum panoply for many years and serve to transfer “*the responsibility to protect*” to countries outside EU. The readmission agreements are considered as “a cornerstone of the European Union’s so-called

⁵⁴² Cremona and Rijpma place the following meaning in extra-territorialisation concept: “[T]he means by which the EU attempts to push back the EU’s external border or rather to police them at distance in order to control unwanted migration flow. Extra- territorialisation includes the way in which EU and its Member States attempt not only to prevent non-Community nationals from leaving their countries of origin, but also to ensure that if they managed to do so, they remain as close to their country of origin as possible, or in any case outside EU territory. It furthermore covers measures that ensure that, if individuals do managed to enter the EU, they will be repatriated or removed to “safe third countries”. Marise CREMONA & Jorrit RIJPMMA, *The Extra-Territorialisation of EU Migration Policies and the Rule of Law*, EUI Working Paper No 2007/01, p.12 [Online] http://cadmus.eui.eu/bitstream/handle/1814/6690/LAW_2007_01.pdf?sequence=1 [Accessed 21 May 2011].

externalization strategy for asylum and migration”⁵⁴³. The readmission agreements have a purpose to stem the flows of asylum-seekers and other migrants to EU by guaranteeing that third country nationals residing illegally in EU member state will be re-admitted unconditionally by the country of origin or transit. The agreements also target the return to the transit country of the asylum-seekers whose protection claims have been rejected on safe third country grounds⁵⁴⁴.

The readmission agreements were introduced as a tool for migration control far back in 1994 within the realm of the intergovernmental cooperation where member states agreed on common specimen agreement to be put in use in any type of negotiations with third countries⁵⁴⁵. Since the Treaty of Amsterdam EU has acquired power on its own to conclude readmission agreements with third countries⁵⁴⁶. In 2002, the EU Council meeting in Seville⁵⁴⁷ firmly expressed Union’s intention to make readmission agreements part of EU’s external policy on migration. The summit concluded the following in this regard:

- Any future cooperation, association or equivalent agreement of EU with third country to include a clause on joint management of migration flows and on compulsory readmission in the event of illegal immigration⁵⁴⁸.

⁵⁴³ Human Rights Watch, *Buffeted in the Borderland. The Treatment of Migrants and Asylum Seekers in Ukraine*, December 2010, p.2 [Online]

<http://www.hrw.org/sites/default/files/reports/ukraine1210WebVersion.pdf> [Accessed 12 November 2012]

⁵⁴⁴ Sílvia MORGADES, *The Externalisation of the Asylum Function in the European Union*, Working Paper Series, Number 4, Spring 2010, p.16 [Online]

http://www.upf.edu/gritim/_pdf/GRITIM_WP4_Spring10.pdf [Accessed 12 November 2012]

⁵⁴⁵ EUROPA, Readmission Agreements, Summaries of EU Legislation,

http://europa.eu/legislation_summaries/other/133105_en.htm

⁵⁴⁶ EUROPEAN COUNCIL, Op. Cit., note 225, Para 27.

⁵⁴⁷ EUROPEAN COUNCIL, Op. Cit., note 241.

⁵⁴⁸ *Id.*, Para 33.

- The readmission by third countries to include their own nationals as well as nationals of other countries provided they passed through the country in question on the way to EU⁵⁴⁹.
- Non-cooperation or inadequate cooperation of the third country in the area of illegal immigration would hamper the relationship between the country and EU⁵⁵⁰.
- In case of “unjustified lack of cooperation in joint management of migration flows” by the third country in question, the EU may adopt measures under the foreign policy or other Union policies while honouring Union’s contractual commitment⁵⁵¹. In other words, the Council threatened to use fully all EU tools in order to “punish” or force cooperation from the state in question.

Pursuant to the Seville summit, EU Council has drafted criteria to identify third countries with which readmission agreements have to be negotiated. Among the criteria, the Council identified the nature and size of migratory flows towards EU; geographical position in relation to EU; attitude towards cooperation on migration issues⁵⁵². Based on the criteria the following countries have been identified as “capable of forming a basis for further progress: Albania, China, the Federal Republic of Yugoslavia, Morocco, Russia, Tunisia and Ukraine”⁵⁵³. Libya and Turkey are also considered as essential to initiate cooperation on controlling migration flows. Up until 2010, eleven readmission agreements negotiated at EU level have entered into force with the following countries: Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, FYROM, Bosnia &

⁵⁴⁹ *Id.*, Para 34.

⁵⁵⁰ *Id.*, Para 35.

⁵⁵¹ *Id.*, Para 36.

⁵⁵² EUROPEAN COUNCIL, Draft Council conclusions on intensified cooperation on the management of migration flows with third countries, 13894/02, 14 November 2002, Para 4. [Online] <http://www.statewatch.org/news/2003/may/12k13894-02.pdf> [Accessed 23 November 2012]

⁵⁵³ *Id.*, para 5.

Herzegovina, Montenegro, Serbia, Moldova⁵⁵⁴. Mandate for negotiations or ongoing negotiations are undertaken with Pakistan, Georgia, Morocco, Cape Verde, China, and Algeria. This is apart from the bilateral agreements with readmission purpose concluded by single EU member states with third countries.

In summation, as pointed by Prof. Peers:

“The EU's approach to readmission agreements involves insisting that more and more non-EU countries sign up to broad readmission obligations to the EU with little or nothing in return. EU policy has been backed up by harsher and harsher rhetoric and threats against third countries, as the EU becomes more and more unilateralist and focused solely on migration control. These policies are unbalanced, inhumane, and internally contradictory.”⁵⁵⁵

The readmission agreements have many serious implications on asylum-seekers subject to return and pose a serious risk for their rights. Usually, returns based on readmission agreements should be initiated after a claim for protection is considered. However, in practice asylum-seekers and members of vulnerable groups whose claim for protection have yet to be determined have been subjected to return from EU territory⁵⁵⁶. In addition, some agreements provide for accelerated procedures for return at the border, which does not allow for thorough consideration of individual's protection needs⁵⁵⁷.

⁵⁵⁴STATEWATCH statistics, for internal use, 22 January 2010 [Online] <http://www.statewatch.org/news/2010/jan/eu-readmission-agreements.pdf>; On 21 June 2012, Turkey and the European Union initialled a readmission agreement after seven years of negotiations. ECRE, *Readmission Agreement between the EU and Turkey Initialled*, Weekly Bulletin, 29 June 2012 [Online] <http://oppenheimer.mcgill.ca/Readmission-Agreement-between-the?lang=en> [Accessed 3 November 2012]

⁵⁵⁵ S. PEERS, *Readmission Agreements and EC External Migration Law*, Statewatch analysis no 17 [Online] <http://www.statewatch.org/analyses/no-17-readmission.pdf> [Accessed 22 October 2012]

⁵⁵⁶ HUMAN RIGHTS WATCH, *Op. Cit.*, note 543, p.22.

⁵⁵⁷ *Id.*

Given that human rights clauses in such agreements are very weak, there is a serious risk that both parties may not honour their obligation stemming from 1951 Refugee Convention and the 1967 Protocol or ECHR and simply use the agreement to enforce a flawed decision⁵⁵⁸. Many of the readmitting countries lack proper refugee determination system or have poor human rights record⁵⁵⁹. Moreover, there is a real risk of “chain refoulement”, i.e. asylum-seekers being returned back to their countries of origin without possibility to claim asylum in any of the countries through which they pass⁵⁶⁰.

On the positive side, following the evaluation of readmission agreements, the EU Commission recommended that the future EU readmission policy include control mechanisms and/or guarantees safeguarding the fundamental rights of returnees all the time⁵⁶¹. The Commission suggested inclusion of relevant NGOs and international organizations in the monitoring of the implementation of the readmission agreements jointly with the Joint Readmission Committee currently responsible for the monitoring⁵⁶². Moreover, after entry into force of the Treaty of Lisbon the Council may adopt readmission agreement only after obtaining the consent of EU Parliament⁵⁶³. Thus

⁵⁵⁸ COUNCIL OF EUROPE, Readmission Agreements: a Mechanism for Returning Irregular Migrants, Resolution 1741 (2010), Para 3 [Online] <http://www.statewatch.org/news/2010/jul/coe-parl-ass-readmission-agreement.pdf> [Accessed 12 November 2012]

⁵⁵⁹ According to the HRW report on EU readmission agreement concluded with Ukraine, country’s asylum system is completely dysfunctional. It has been restructured eight times in ten years resulting in deep protection gaps.(p.31) Moreover, asylum-seekers pending decision are constantly harassed by Ukrainian police (p.35) and subjected to refoulement contrary to art.33 refugee Convention(p.49). The report has founded that many asylum-seekers detained for illegal entry or presence in Ukraine are abused and tortured during interrogation (p.50) including use of electric shock (p.58). Slovakia and Hungary have ignored claims for protection of asylum-seekers who passed through Ukraine and subjected them to a quick return to Ukraine (p.111; 116), HUMAN RIGHTS WATCH, Op. Cit., note 543.

⁵⁶⁰ COUNCIL OF EUROPE, Op. Cit., note 558, para 4.

⁵⁶¹ EUROPEAN COMMISSION, *Communication from the Commission to the European Parliament and the Council, Evaluation of EU Readmission Agreements Brussels, 23.2.2011, COM(2011) 76 final*, para 4.3.

⁵⁶² *Id.*, para 4.1.

⁵⁶³ TFEU, Op. Cit., note 174, art 218.

the Parliament will have a major role but only if it is provided with correct information during negotiations of the agreements⁵⁶⁴.

B. Regional Protection Programs

Other EU asylum policies such as Regional Protection Programs (RPP) are fairly new developments. It was at the Tampere summit when the EU recognized the need for comprehensive approach to migration, which includes the regions of transit and origin⁵⁶⁵. In 2003, building on the Tampere conclusions, the Commission highlighted the need to compliment the first phase of the establishment of the CEAS. Additional policy objectives were identified such as “burden and responsibility sharing within the EU as well as with regions of origin enabling them to provide effective protection as soon as possible and as closely as possible to the needs of persons in need of international protection”⁵⁶⁶.

Keeping refugees as close as possible to their region of origin was seen as a new and more convenient approach for controlling asylum flow to the EU. Such policy was supplemented with co-operation with regions of origin and transit and developmental aid

⁵⁶⁴EUROPEAN PARLIAMENT, Readmission Policy in the European Union, PE 425.632, September 2010, p.8 [Online]
http://cadmus.eui.eu/bitstream/handle/1814/14957/EP_ReadmissionPolicy_en.pdf?sequence=4 [Accessed 12 November 2012]

⁵⁶⁵ EUROPEAN COUNCIL, Op. Cit., note 225, Para 11.

⁵⁶⁶ EUROPEAN COMMISSION, *Communication from the Commission to the Council and the European Parliament on the Managed Entry in the EU of Persons In Need of International Protection and the Enhancement of the Protection Capacity of the Regions of Origin “Improving Access to Durable Solutions”*, Brussels, 4.6.2004, COM(2004) 410 final, Para 4.

to address the root causes of the forced displacement⁵⁶⁷. In 2005, following the line of externalization of EU asylum set by the Hague Programme, the Commission forwarded a proposal for establishing of RPP in transit regions in border areas with the EU and in areas close to regions of origin of refugees. In those regions, the Commission was suggesting that the programs are oriented to capacity building and creating conditions to offer to the displaced one of the three durable solutions (repatriation, local integration or resettlement)⁵⁶⁸.

The RPP were set to be financed through already existing programs such as AENEAS⁵⁶⁹. Thus, taking into consideration diverse factors such as the refugee situation in the specific geographic region; existing relationships and cooperation with EU; availability of funds, the Commission suggested to pilot two RPP: one in the transit region of Western Newly Independent States (Ukraine, Moldova, Belarus) and the other in the region of origin of sub Saharan Africa (Great Lakes/East Africa)⁵⁷⁰.

The RPP raise concerns in regards to the access of asylum-seekers to timely and quality protection. In a first place, there is a possibility for labelling third countries receiving aid through RPP for “safe havens” by EU member states⁵⁷¹. This is real concern given the

⁵⁶⁷ AMNESTY INTERNATIONAL, *EU regional protection programs: Enhancing protection in the region or barring access to the EU territory?* September 2005 [Online] http://www.amnesty.eu/static/documents/2005/05_09_22_protection_programs_EPC.pdf [Accessed 15 November 2012]

⁵⁶⁸ EUROPEAN COMMISSION, *Communication from the Commission to the Council and the European Parliament on regional protection programmes*, COM/2005/0388 final, para 5.

⁵⁶⁹ *Id.*, Para 4. AENAS is a program offering technical and financial support to third countries in area of asylum. Regulation (EC) No. 491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS).

⁵⁷⁰ *Id.*, para 10

⁵⁷¹ AMNESTY INTERNATIONAL, *Op. Cit.*, note 567, p.3.

current tendency of outsourcing protection responsibilities related to asylum to countries outside EU most of which lack capacity to provide adequate refugee protection and respect for fundamental rights (e.g. member states have exercised returns of asylum-seekers to Ukraine or Afghanistan contrary to NGOs' reports for serious human rights violations⁵⁷²). As rightly concluded by State watch with RPPs the Commission "proposes financial and managerial assistance to states in refugees' regions of origin to help them become "robust providers of effective protection ... [which in practice means] funding immigration controls and asylum systems in third countries on the basis of EU *minimum standards*"⁵⁷³.

At the end of 2006, the AENAS programme has been substituted with a new thematic programme. In the field of asylum, the general objective of the new program is "to bring specific, complementary assistance to third countries to support them in their efforts to ensure better management of migratory flows in all their dimensions"⁵⁷⁴. In particular the thematic programme should promote 1) capacity building in third countries to provide asylum and international protection; 2) support registration of refugees; 3) promote international standards for protection; 4) support in providing refugees with durable solutions⁵⁷⁵. However, the change of the programme does not address the concerns expressed above.

⁵⁷² STATEWATCH, *Killing me softly? "Improving access to durable solutions": doublespeak and the dismantling of refugee protection in the EU*, July 2004, [Online] <http://www.statewatch.org/news/2004/jul/refugees-external-processing.pdf> [Accessed 21 November 2012]

⁵⁷³ *Id.*, p.4.

⁵⁷⁴ EUROPEAN COMMISSION, *Communication from the Commission to the European Parliament and the Council, Thematic Programme for the Cooperation with Third Countries in the Areas of Migration and Asylum. COM(2006) 26 final*, para 3.1.

⁵⁷⁵ *Id.*, para 3.2.5.

C. Processing Centres for Asylum seekers outside EU

The ‘managed and orderly arrivals’ of asylum seekers has been for a long time a subject of discussions related to asylum in the EU. Some initiatives have generated wide debates, since they are incompatible with international and EU human rights rules⁵⁷⁶. In 2003, for example, UK announced a new approach to asylum aiming to streamline the migratory flow to the EU and to reduce unfounded asylum claims. This new approach consisted of measures promoting the establishment of ‘*regional protection areas*’ close to the countries of origin and ‘*transit processing centres*’ in third countries where asylum seekers, already in the EU, would be transferred to have their asylum claims processed. Those whose claims are approved would be resettled in the EU on a responsibility-sharing basis. Those whose claims are rejected would be returned to their countries of origin or transit⁵⁷⁷. The proposal generated vigorous criticism. Amnesty International condemned the proposal by stating that “the real goal [of the proposal] appears to be to reduce the number of spontaneous arrivals in the UK and other EU states by denying access to territory and shifting asylum-seekers to zones outside the EU where refugee protection would be weak and unclear”⁵⁷⁸. The idea sparked many controversies and did not generate enough support on the EU level⁵⁷⁹. However, the

⁵⁷⁶ STATEWATCH, *Asylum in the EU: the Beginning of the End?* [Online]

<http://www.statewatch.org/news/2003/mar/25asylum.htm> [Accessed 3 December 2011];

STATEWATCH, *UK Asylum Plan for "Safe Havens": Full-Text of Proposal and Reactions*, [Online]

<http://www.statewatch.org/news/2003/apr/10safe.htm> [Accessed 3 December 2011].

⁵⁷⁷ Tony BLAIR, *New International Approaches to Asylum Processing and Protection*, [Letter] (Detailed proposal to the Greek Presidency of the Council of the European Union, 10 March 2003).

⁵⁷⁸ Alan TRAVIS, “EU Revives Blunkett’s Asylum Camp Plan”, *The Guardian*, 2004 [Online]

<http://www.guardian.co.uk/politics/2004/sep/20/eu.immigration> [Accessed 23 May 2011]

⁵⁷⁹ The EU Council ordered to the Commission to further explore the possibilities mentioned in the proposal “in order to ensure more orderly and managed entry in the EU of persons in need of international protection and to examine ways and means to enhance the protection capacity of regions of origin”. EUROPEAN COUNCIL, *Presidency Conclusions, Thessaloniki European Council, 19 and 20 June 2003, Brussels. 1 October 2003*, conclusion 26; However, the EU Commission in its latter communication highlighted only the possibilities for expanded resettlement to the EU and protected entry procedures as

German and Italian governments revived the proposal one year later by suggesting the construction of processing camps in Africa. As the German interior minister said, “the problems of Africa should be solved with the help of Europe in Africa; they cannot be solved in Europe”⁵⁸⁰. Austria supported the idea of reception camps as part of the EU approach towards the countries of transit and origin⁵⁸¹.

Due to many legal and practical challenges, the idea for extraterritorial processing of asylum applications is not pursued as of yet. The Stockholm Programme does not explore further the concept of outside processing centres, but neither does it rule out such a possibility⁵⁸². While the extraterritorial centres for processing of asylum claims are not feasible in the short term, the persistent proposal of the idea within the EU’s asylum debate is worrisome. It clearly points to attempts of member states and the EU alike to circumvent legal obligations towards asylum seekers to third countries, many of which lack protection capacities or have troublesome human rights records⁵⁸³.

mechanisms for improvement of protection in EU. EUROPEAN COMMISSION, 2004 *Communication to the Council and the European Parliament, On the Managed Entry in the EU of Persons in Need of International Protection and Enhancement of the Protection Capacity of the Regions of Origin: Improving Access to Durable Solutions*. COM(2004) 410 final.

⁵⁸⁰ A. TRAVIS, Op. Cit., note 578.

⁵⁸¹ Tim KING & Weislaw HORABIK, “Asylum-Camp Plan ‘gathering momentum’, say Austrians”, *EuropeanVoice.com*, 23 September 2004 [Online] <http://www.europeanvoice.com/article/imported/asylum-camp-plan-gathering-momentum-say-austrians/50735.aspx> [Accessed 23 August 2011];

⁵⁸² The EU Commission was invited by the Council “to finalise its study on the feasibility and legal and practical implications to establish joint processing of asylum applications” without specifying if such joint processing should take place in EU territory or outside. EUROPEAN COUNCIL, Op. Cit., note 287, Para 6.2.1; In its action plan for implementing the Stockholm program, the Commission furthers the idea of procession centers inside EU territory. EUROPEAN COMMISSION, *Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe’s citizens; Action Plan Implementing the Stockholm Programme*, COM(2010) 171 final, Brussels 24.4.2010, Annex, p.55.

⁵⁸³ E.g., Libya is not party to the 1951 Refugee Convention.

Inevitably, this will lead to creation of detention centres⁵⁸⁴ outside the EU, where people will be stranded for an unspecified time merely for seeking asylum. To direct asylum seekers already at the EU's doorstep to process claims outside the EU is at odds with international treaties for protection of refugees, and with European law⁵⁸⁵.

D. Sea Operations in Territory of Third States

As already mentioned, some joint sea operations coordinated by Frontex also have an external dimension. During such operations, surveillance and subsequent diversion of migrants is extended to the shores of third countries. The legal base is bilateral agreements concluded between the member state requesting the operation and the respective third country. In the context of joint operations in the Mediterranean, bilateral agreements have been concluded with some North African countries, enabling EU member states supported by Frontex to patrol the coastal areas of these countries with the objective of intercepting migrant boats while still in the country of departure. For operation HERA, for example, Spain has concluded bilateral agreement with Mauritania, Senegal and Cape Verde⁵⁸⁶. Such efforts to externalize border control by moving it farther from the EU's physical frontiers is raising numerous controversies with regard to the legality of the actions undertaken by the member states in the territory of third

⁵⁸⁴ S. MORGADES, Op. Cit., note 544, p.26.

⁵⁸⁵ See more on the subject Angus FRANCIS, "Bringing Protection Home : Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing", (2008) 20 *International Journal of Refugee Law*, 273; EUROPEAN NATIONAL RED CROSS SOCIETIES, *Argumentation Tool for PERCO National Societies for Use in Discussions with Their Respective Governments Concerning Transit Processing Centres Outside the EU*, General Meeting in Sofia 13th-14th October 2005.

⁵⁸⁶ V. MORENO-LAX, Op. Cit., note 451, 182. How the operation was carried see Dominic BAILEY, *Stemming the immigration wave*, *BBC News online*, 10 September 2006 [Online] <http://news.bbc.co.uk/2/hi/europe/5331896.stm> [Accessed 5 May 2011]

countries and the right of asylum seekers to access the territory they wish to claim protection.

In first place, boats intercepted within the North African coastal line are presumed to carry irregular migrants. Thus, asylum seekers are placed in the irregular migrant group whose prevention of entering EU territory is the main objective of the border policies. However, labelling or categorising someone as irregular before she/he even enters the EU territory is erroneous⁵⁸⁷. The fact of entering irregularly is established only when a third country national physically enters state's territory in violation of the entry rules established by the state. Even then, exemptions exist, for example asylum seekers (see SBC). Secondly, during sea operations in third countries, officials from those countries are deployed on board of intercepting vessels with the aim of delegating the responsibility for the intercepted migrants to the country in which territory the interception is taking place. Notwithstanding the place in which joint operations are carried out, whether at high sea or in the territorial waters of third states, member states are not released from responsibility for their conduct. Even in the territorial waters of another country, a state cannot outsource or contract out its international responsibilities to that country⁵⁸⁸. Moreover, each state is separately responsible for the committed

⁵⁸⁷ S. CARRERA, *The EU Border Management Strategy : FRONTEX and the Challenges of Irregular Immigration in the Canary Islands*, CEPS Working Papers No 261, 2007, p.25 [Online] <http://www.ceps.be/book/eu-border-management-strategy-frontex-and-challenges-irregular-immigration-canary-islands> [Accessed 3 December 2011]

⁵⁸⁸ G. GOODWIN-GILL, "Extraterritorial Processing of Claims to Asylum or Protection: the Legal Responsibilities of States and International Organisations", (2007) 9 *UTS Law Review* 26, p.34.

wrongful acts. The fact that many states are involved does not diminish in any circumstances the responsibility of each participating state⁵⁸⁹.

The participation of Frontex in operations beyond EU borders is also contested⁵⁹⁰. Although the Agency can facilitate the operational cooperation with third countries through cooperational agreements, neither the Regulation nor the working agreements authorize Frontex to take part in such operations⁵⁹¹. Moreover, it is doubtful that such authorisation is negotiated in the bilateral agreements concluded between the member states and the respective third countries⁵⁹². According to Human Rights Watch, Frontex was involved in highly contestable pushbacks of migrant boats by Italy to Libya⁵⁹³. Recently, the ECtHR has declared the Italian pushbacks to be in violation of the ECHR⁵⁹⁴. Although the Agency had denied participation⁵⁹⁵, such activities raise questions as to Frontex's ability to abide by its responsibilities in accordance with the EU law. As an EU Agency, Frontex has the responsibility not only to strictly obey EU

⁵⁸⁹ INTERNATIONAL LAW COMMISSION & SPECIAL RAPPORTEUR J. CRAWFORD, *Commentary to the Draft Articles on State Responsibility*, Annual Report 2011, Ch. IV, p.314 cited in V. MORENO-LAX, Op. Cit., note 451, 203.

⁵⁹⁰ ECRE, *Defending Refugees' Access to Protection in Europe*, 2007, p.14 [Online] <http://www.unhcr.org/refworld/topic,4565c22514,46545e4c2,4766464e2,0,...html> [Accessed 3 November 2011]

⁵⁹¹ *Id.*, p.14-15.

⁵⁹² *Id.* The agreements are not made public therefore it is difficult to make any conclusions. S. CARRERA, Op. Cit., note 587, p.22; The participation of other member States in that matter is also questionable given that they do not have concluded such agreement with the respective third state. E. PASTAVRIDIS, Op. Cit., note 462, p.90.

⁵⁹³ HUMAN RIGHTS WATCH, Op. Cit., note 534, p.37.

⁵⁹⁴ *Case of Hirsi Jamaa and Others v. Italy*, Appl. No. 27765/09 ECHR (Grand Chamber) 23 February 2012 [Online] <http://www.unhcr.org/refworld/docid/4f4507942.html> [Accessed 20 December 2011]

⁵⁹⁵ The Agency claimed that during that time it was involved in activities that were part of the joint operation NAUTILIUS which was undertaken in a different region. MIGRANTS AT SEA, *Frontex Issues Response to HRW Report (Communiqués)*, 2009 [Online] <http://migrantsatsea.wordpress.com/2009/09/21/frontex-issues-response-to-hrw-report-communiques/> [Accessed 4 December 2011].

legislation, but at the same time to ensure the correct application of these laws by others⁵⁹⁶.

CHAPTER VI: MECHANISMS FOR ENFORCEMENT FOR NON-COMPLIANCE WITH EU LAW

As it was demonstrated, member states, prompted mostly by political reasons, are developing policies and measures, which are in odds not only with the international human rights treaties but also with EU basic treaties. We have outlined above the international responsibility carried by states and international organizations regarding wrongful acts. In the international context, a myriad of bodies and institutional mechanisms rule over responsibility and corresponding compensation, depending on the act committed. However, they are not subject of the present paper. For our purposes, what appears to be a legitimate question is: What are the available tools at the EU level that prevent abuses of fundamental rights enshrined in the EU founding treaties, for short term political gain which is detrimental to the EU legitimacy and the individuals subjected to those policies? In this chapter, we will briefly examine the existing mechanisms for enforcement in the case of non-compliance with the EU law by member states and the usefulness of those mechanisms to accomplish the goal of preventing abuses and harmonizing policies and practices across EU.

⁵⁹⁶ Miriam MIR, *Managing the EU's External Frontiers: Lessons to be Learned from FRONTEX's Action in the Canary Islands*, CHALLENGE project, 2007, p.5 [Online] <http://www.libertysecurity.org/article1405.html> [Accessed 5 December 2011].

SECTION 1: Existing Mechanisms

The supremacy of the European law limits the discretion of the member states when developing respective policies on national level. Each member state should implement EU law by ensuring its conformity to and correct application of the latter. Policies concerning third country nationals, for example, must contain necessary safeguards and conform to fundamental rights such as non-discrimination, right to dignity, non-refoulement, which are proclaimed in the EU Charter and other relevant EU treaties. The legality and conformity of the measures developed within the scope of the EU law are subjected to the scrutiny of institutional monitoring mechanisms available under the EU founding treaties.

A. Art.258 (TFEU)

The EU Commission, as the ‘Guardian of the Treaties’⁵⁹⁷ is entrusted with the role “to promote the general interests of the Union ... ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them ... [and] oversee the application of Union law under the control of the Court of Justice of the European Union...”⁵⁹⁸. Thus, under art.258 TFEU⁵⁹⁹ the Commission can initiate an infringement procedure

⁵⁹⁷ Michael KAEDING D. & Friederike VOSKAMP, *Better Implementation of EU Legislation is not just a Question of Taking Member States to Court, SOLVIT - Street-level EU Law Enforcement through an Effective free-of-charge out-of-court Dispute Settlement Mechanism for a Better Functioning of the Single Market*, European Institute of Public Administration Working Paper 2011/W/01, p.3 [Online] http://www.eipa.eu/files/repository/product/20120228091739_Workingpaper2011_W_01.pdf [Accessed 5 December 2011].

⁵⁹⁸ TEU, Op. Cit., note 156, art.17(1).

⁵⁹⁹ TFEU, Op. Cit., note 174, art.258, (ex Article 226 TEC).

“If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

against a member state that fails to fulfil an obligation under the Treaties, and if necessary may refer the matter to the ECJ.

Two main stages can be distinguished in the procedure under art.258 TFEU. The first is the political stage, where the Commission and member state concerned try to resolve the issue at stake through informal negotiations. The Commission is afforded with wide discretion and room for political manoeuvring in order to bring the infringement to an end⁶⁰⁰. A decision to bring the case before the court is only a last resort in case the political dialogue fails⁶⁰¹. Secondly, in the judicial stage, the Court will be the final instance to determine if there is an infringement and requires the member state to comply with the judgement. In case of non-compliance, the transgressor can be imposed with a lump sum or penalty payment⁶⁰². It should be noted that the aim of the procedure under art.258 TFEU is not to seek remedies for the parties, which suffered damages from the violation, but simply to ensure that the violation had ceased⁶⁰³.

Although this is somewhat a useful tool to enforce member states to comply with the rights and obligations they agreed upon when developing the EU law, two recent cases have revealed gaps in the fundamental rights protection in the EU and the partial

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union”.

⁶⁰⁰ M. KAEDING D. & F. VOSKAMP, Op. Cit., note 597, p.4.

⁶⁰¹ S. CARRERA & Anais F. ATGER, *L'affaire des roms a challenge to the EU's Area of Freedom, Security and Justice*, CEPS, 2010, p.15 [Online] <http://www.ceps.eu/book/1%E2%80%99affaire-des-roms-challenge-eu%E2%80%99s-area-freedom-security-and-justice> [Accessed 5 Decemeber 2011].

⁶⁰² TEFU, Op. Cit., note 174, art.260.

⁶⁰³ DAWSON, M. & MUIR, E., “Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma”, (2011) 48 *Common Market Law Review* 751, 758.

usefulness of the existing enforcement mechanisms⁶⁰⁴. As pointed out by Carrera such events are “testing the efficiency of Europe’s migration policies, but also the legitimacy of the political elements of European integration and the foundations of the EU’s Area of Freedom, Security, and Justice (AFSJ)”⁶⁰⁵. In the first case, the so called ‘*les affaire the roms*’, citizens of Romania and Bulgaria were subjected to discriminative measures by French authorities due to their ethnicity and were forcibly sent back to their countries of origin. Such actions were in violation of EU Charter and other fundamental EU legislation such as the Citizens Directive 2004/38⁶⁰⁶. The EU Commission, after a long period of silence, reacted weakly to the blatant French action against Roma, and after political negotiation, the Commissioner for Justice, Fundamental rights and citizenship, Viviane Reding, satisfied with French *post-factum* measures of correct transposition of EU legislation, announced not to pursue any enforcement action.

This case demonstrates limited usefulness of the enforcement mechanism towards the persons directly affected by measures at variance with fundamental rights stipulated in the EU treaties. France has agreed to bring its national legislation to comply with the relevant EU law. However, the targeted Roma population had already suffered the consequences of the discriminative police actions and returned back forcibly or ‘voluntarily’ to the countries of origin. In this context, there was no personal redress for the violation of victims’ basic rights. Secondly, the process is a politicised one that is

⁶⁰⁴ S. CARRERA, *The EU’s Dialogue on Migration, Mobility and Security with the Southern Mediterranean Filling the Gaps in the Global Approach to Migration*, CEPS, 2011, p.6[Online] http://aei.pitt.edu/32071/1/No_41_Carrera_on_EU_Dialogue_with_SoMed_edited_final-1.pdf [Accessed 3 January 2012].

⁶⁰⁵ *Id.*, p.1.

⁶⁰⁶ S. CARRERA & Anais F. ATGER, *Op. Cit.*, note 601, pp.6-10.

“open to political manipulation and ‘horse-trading’”⁶⁰⁷. Thus, political negotiations may undermine the right of individuals to receive timely justice. A timely remedy is of utmost importance for asylum-seekers as they can be returned to places where their lives will be in danger.

The second case, the so-called “Franco-Italian affair”, is related to migrants coming from North Africa due to the democratic uprising and the ensuing war in Libya. In this case, about two hundred migrants from Tunisia landed in Italy. The Italian government felt overwhelmed by the number of migrants and afforded the migrants with temporary residence permits and travel documents so they could move freely across the EU⁶⁰⁸. Some of the migrants traveled to France, but were faced with pushbacks by French border authorities after France temporarily reintroduced border checks at its frontiers with Italy. Although both countries have acted *mala fides* when applying the EU law, there were no legal or other consequences apart from strong criticism from the EU Commission⁶⁰⁹. In the context of this case, again, individuals were subjected to unfair treatment without any judicial consequences, and political considerations have prevailed. Moreover, this case reveals the susceptibility of the EU’s governing bodies to political pressure from opportunistic governments that attempt to evade their obligations under EU law⁶¹⁰, thus questioning the legitimacy not only of the EU Schengen acquis but of the EU as a whole.

⁶⁰⁷ M. DAWSON. & E. MUIR, Op. Cit., note 603, p.758.

⁶⁰⁸The authorities have omitted to follow some important requirements in breach of SBC. Sergio CARRERA, Elspeth GUILD, Massimo MERLINO & Joanna PARKIN, *A Race Against Solidarity: the Schengen Regime and the Franco-Italian Affair*, CEPS, 2011[Online] <http://www.ceps.eu/book/race-against-solidarity-schengen-regime-and-franco-italian-affair> [Accessed 4 January 2012].

⁶⁰⁹ *Id.*

⁶¹⁰ S. CARRERA, Op. Cit., note 604, p8.

Secondly, this case has also revealed a gap in the way implementation of border policies is done⁶¹¹. No effective mechanism is in place to monitor either the application of the SBC by EU member states, or the general compliance of the member states with the EU border acquis⁶¹². The existing Schengen monitoring mechanism is virtually non-functional, since such monitoring is carried by member states officials in the Schengen Evaluation Working Group within the Council. In the context of the discussed border practices in this paper, the need for independent monitoring and evaluation is urgent⁶¹³.

B. Art.7 (TEU)

Another venue for enforcing compliance with EU law is offered by article 7 TEU. This procedure is initiated to ensure the respect of the EU values by all member states⁶¹⁴. On the initiative of the Commission, one third of the member states and the EU Parliament, the Council may decide to suspend some rights deriving from the application of the Treaties, including the right to vote of a member state found in serious and persistent

⁶¹¹ *Id.*, Para 3.2.

⁶¹² *Id.*

⁶¹³ Currently there is a proposal for revision of the existing Schengen monitoring mechanism. EUROPEAN COMMISSION 2011b. *Amended proposal for a regulation of the European parliament and the Council on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis. COM(2011) 559 final*; For general analysis see Yves PASCOUAT, *The Schengen Evaluation Mechanism and the Legal Basis Problem: Breaking the Deadlock*, European Policy Centre, 2012 [Online] http://www.epc.eu/documents/uploads/pub_1408_the_schengen_evaluation_mechanism.pdf [Accessed 3 February 2012].

⁶¹⁴ Art. 2, TEU stipulates:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

breach of art.2 TEU. So far, this procedure has never been used⁶¹⁵. In the case of asylum seekers, it is less likely that art.7 TEU will provide any immediate or long term remedies and benefits. Considering the treatment of asylum seekers in most of EU countries and ‘race to the bottom policies’ in the context of asylum, it is less likely that a member state will be subjected to such procedures⁶¹⁶.

C. Usefulness of the Existing Mechanisms: Need for Improvement

The member states’ non-compliance with the EU law is not a recent phenomenon. Indeed, this problem is systematic and occurs on a regular basis and with ‘remarkable persistence’⁶¹⁷. While non-compliance with legislation is a disturbing trend, it is more disturbing yet when it directly affects basic human rights of individuals in a negative way, which may lead to serious consequences such as death. To overcome this major backdrop of the EU legal structure, many academics have suggested solutions worth mentioning.

In order to be more effective, institutional enforcement mechanisms, as suggested by Dawson and Muir, can be coupled with so-called ‘collective enforcement,’ where non-governmental organizations and networks with interests of protecting vulnerable groups may intervene⁶¹⁸. As several authors explain, such intervention can be a combination of non-judicial and judicial strategies. Awareness-raising and improving monitoring of

⁶¹⁵ S. CARRERA & Anais F. ATGER, Op. Cit., note 601, p.17.

⁶¹⁶ M. DAWSON. & E. MUIR, Op. Cit., note 603, p.757. The authors have expressed the opinion in regards to the treatment of roma by EU member states. However, such statement holds through also for asylum seekers as our analysis demonstrates.

⁶¹⁷ Maria MENDRINO, “Noncompliance and the European Commission's Role in Integration”, (1996) 3 *Journal of European Public Policy* 1, 2.

⁶¹⁸ M. DAWSON. & E. MUIR, Op. Cit., note 603.

fundamental rights violations may be deployed as part of the non-judicial approach. In terms of judicial involvement, the interested NGOs can engage on behalf, or support the individual claimants in litigation before the ECJ. Up until now, NGOs may take part in a process only as third parties. More prominent engagement of interested NGOs within the infringement proceedings against reluctant states would be beneficial not only for the groups whose rights are violated but would make such proceedings more visible and immune from political power struggles and pressure. Many NGOs have proved their indispensable worth as whistleblowers and true organisms for protection of fundamental rights and freedoms, including those of asylum seekers.

Yet other academics suggest avoiding the time-consuming judicial procedures and finding a cost-effective and fast way to receive a redress in case of violation of fundamental rights by a member state. Dr Michael Kaeding and Friederike Voskamp are in full support of settlements out-of-court, through the EU agencies with a mandate, to ensure the right transposition of the EU law into domestic legal order⁶¹⁹. One such agency, according to the authors, is SOLVIT, which consists of a network between member states that works toward correct application of EU law. In case of infringement of EU law, SOLVIT, approached by a citizen or business, directly contacts the member state authority in violation and attempts to negotiate a settlement, to discontinue the infringement and to ensure the administrative body in violation adopts the correct policy⁶²⁰. Such an approach can also be used in case of asylum seekers and can offer a fast and inexpensive way to counter injustice. However, many of the infringements

⁶¹⁹ M. KAEDING D. & F. VOSKAMP, Op. Cit., note 597.

⁶²⁰ *Id.*

towards asylum seekers are committed even before they reach EU boundaries. Moreover, many individuals seeking protection experience barriers such as language and lack of knowledge of the system and rights to which they are entitled, limiting the usefulness of such procedures. A need exists for complimentary mechanisms to be able to bring wrongdoings to an immediate end. In case of asylum-seekers, this is of utmost importance considering the gravity of the situations they face in countries of origin or transit if protection is not granted in Europe. All the outlined enforcement mechanisms, individually or in combination, are potentially beneficial to any individual subjected to incorrect behaviour by the state. However, none of them will matter, if there is unwillingness to act from the part of member states and EU institutions.

D. ECJ and the Preliminary Rulings Procedure: Multifaceted Solution

When there is reluctance to act, the courts, both national and ECJ, can be very effective and offer meaningful and timely redress for individuals involved. According to art.19 TEU, the ECJ's main responsibility is to "ensure that in the interpretation and application of the Treaties the law is observed". Thus, ECJ is entrusted with jurisdiction to ensure the uniform interpretation and application of EU law. Such a task is accomplished through the preliminary rulings procedure (art.276 TFEU), through which national courts or tribunals may request interpretation by the ECJ of treaties and EU secondary legislative acts. 'EU acts', in the context of the procedure, is interpreted in broad terms to include secondary law instruments such as regulations, directives, and

recommendations⁶²¹. Once such a ruling is issued, it is binding not only on the member state whose court has requested the interpretation but also on all member states⁶²². Therefore, one of the main effects of the preliminary rulings procedure is the harmonization of the EU law across member states⁶²³.

Before the Treaty of Lisbon, art. 68(1) TEC significantly restricted the ECJ's jurisdiction by allowing only the highest national courts to initiate a preliminary rulings procedure. This restriction has determined the scarce jurisprudence in the area of asylum, considering the fact that many asylum cases never reach the court of final instance. One of the reasons for this is that in many EU states the appeal in asylum procedures does not suspend a prior ruling, and therefore claimants are removed from the country of asylum. The Treaty of Lisbon abolished the restriction, enabling also lower courts and tribunals to ask ECJ for preliminary rulings, including on legislation related to asylum.

In addition, if requested or on its own will, the Court may speed up the procedure in cases of urgent matters within the AFSJ, which includes asylum⁶²⁴. In the urgent procedure, a decision can be issued in as little as two months⁶²⁵. Moreover, pursuant to art.279 TFEU the Court can prescribe any necessary interim measures, including stay of

⁶²¹ Art. 228 TFEU cited in Katherina PARASCHAS, *The Role of the National Judge and the Preliminary Ruling Procedure*, 2011 [Online Power Point] http://www.era-comm.eu/oldoku/Adiskri/12_Jurisdictions/2011_03_Paraschas_EN.pdf [Accessed 4 June 2012]

⁶²² Hugo STOREY, *Preliminary references to the Court of Justice of the European Union (CJEU)*, 2010, Para 12 [Online] http://www.iarj.org/general/images/stories/lisbon_sep_2010/storey.pdf [Accessed 4 December 2011].

⁶²³ *Id.*, Para 13.

⁶²⁴ Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991, OJ L 176 of 4.7.1991, p. 7, and OJ L 383 of 29.12.1992 (corrigenda), Para 104b [Online] http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt5_2008-09-25_17-33-27_904.pdf [Accessed 20 May 2012]

⁶²⁵ H. STOREY, *Op. Cit.*, note 622, Para 19

removal, in any case before it. Regarding asylum, the urgency of the ruling coupled with precise interim measures is crucial, since the removal or deportation of an asylum seeker, for example, requires immediate intervention. Therefore, this will reinforce “the judicial protection of individuals by providing them with faster justice”⁶²⁶.

The importance of the preliminary rulings procedure was furthered with the entering into force of the EU Charter. As mentioned, the EU Charter has a statute of primary EU legislation and can be invoked directly in proceedings before national courts, thus offering protection against wrongdoings perpetrated by EU institutions and member states. Although it contains rights mirroring those in the ECHR, it also introduces additional rights such as in art.18 (the right to asylum). The ECJ, through preliminary rulings procedures, is the only court able to interpret the Charter’s rights. Therefore, the preliminary rulings procedure will be the primary source of building the EU acquis on asylum. Given the positive fundamental rights record of the Court and its willingness to strike the correct balance between state needs and asylum seekers rights (as demonstrated by Edjafari case), the ECJ jurisprudence would guarantee fair and uniform treatment of asylum seekers on a national level throughout the EU.

Notably, the ECJ does not have jurisdiction to rule over matters concerning breaches of national laws. In addition, the provisions of the EU Charter are binding to member states only in relation with the Union law. However, individual protection of fundamental rights in cases outside the legislative framework of EU law will be guaranteed by the ECHR. All member states are party to the Convention, and thus responsible for

⁶²⁶ Koen LENAERTS, “The Contribution of the European Court of Justice to the Area of Freedom, Security and Justice”, (2010) 59 *International and Comparative Law Quarterly* 255, 265.

violations of its provisions. Although some procedural hurdles overshadow the effectiveness of the procedure before ECtHR, the Court continues to play a significant role in rendering juridical redress to asylum seekers concerned in the process. Moreover, considering the limited juridical activity of the ECJ in the field of asylum up until recently, ECtHR was the only supranational judicial institution to provide standards of treatment to asylum seekers and guidance to national authorities in upholding the rights of those populations. The ECtHR jurisprudence influenced significantly the EU asylum acquis, albeit in an indirect manner⁶²⁷.

It can be ascertained that the Treaty of Lisbon significantly empowered the judiciary to play an active role in shaping the EU asylum and border acquis. The active engagement on the part of the ECJ is a guarantee of the correct application of EU primary and secondary law by all member states. Independent judiciary rulings at the EU level will build immunity against narrow political interests, to prevail in a supranational and national context, when it concerns the application and interpretation of EU law. Not only is the position of ECJ thus strengthened, but the national courts and tribunals are thus given a main role in ensuring the correct application of the law. In the context of fundamental rights protection, the national courts are the main engine to advance the EU fundamental rights framework, and at the same time, guarantee to the concerned individuals timely and effective remedies for violation of EU rights, not only by member state but also by European Union institutions⁶²⁸.

⁶²⁷ Christian KAUNERT & Sarah LÉONARD, “The Development of the EU Asylum Policy: Venue-Shopping in Perspective”, (2012) *Journal of European Public Policy* 1, 12.

⁶²⁸ K. PARASCHAS, Op. Cit., note 621, p.5.

CONCLUSION

Assuring access to protection of asylum-seekers is one of the most controversial and rigorously debated issues at national and EU level. Since asylum-seekers and refugees are losing their 'political value' increasingly, they are perceived as a burden and a social and security threat, which fuels the widespread anti-immigration political discourse. Thus, lacking the protection of their own country and having fewer rights than the citizens of the countries in which they seek protection, asylum-seekers and refugees are easy scapegoats to justify discriminative and xenophobic policies and practices across EU. In the context of EU asylum policy, member states, driven by narrow political interests and fear of floods of asylum-seekers that have never materialized, have managed to push their exclusionary national asylum agendas at the EU level. Many EU asylum policies have been developed based on the lowest common denominator and are at odds with the 1951 Refugee Convention and other international human rights instruments lacking basic protection guarantees.

In area of border control, databases with diverse functionalities are increasingly used to control cross-border movements. Extensive personal data is stored and shared between agencies within and outside EU for law enforcement or other purposes different than

initially declared. Increasingly, information gathered through the databases for the purpose of criminal investigation of asylum-seekers and refugees will be used for refusing visa and asylum applications, deportation and removal of asylum-seekers from the EU territory, and/or refusal of admission at the external borders⁶²⁹. In the context of SIS, asylum seekers are even further exposed to disproportionate denial of entry. Under article 96, issuing an alert bans the non-EU national in question from entering the whole Schengen zone which is problematic because of the lack of harmonised criteria for refusing entry, as mentioned above. Despite the adverse implications of such decisions, third country nationals outside the EU are deprived from seeking legal remedies against refusal of entry. Therefore, asylum seekers are main targets of policies resulting in final ban in territories where they might have found safety.

Moreover, while new proposals for even more highly sophisticated digital systems for border control, such as the entry/exit system, are being put forward at an accelerated pace, very little attention is given to the protection of the data and of the rights of individuals whose digital information is stored in the databases. The use of biometric identifiers increases the risk of misidentification that may have serious consequence on asylum-seekers such as return to country where torture or other ill-treatment may occur.

The joint operations in high sea and at the shores of third countries coordinated by Frontex are aiming at deterring migrants, including asylum-seekers, to reach EU shores. When dealing with situations of distress, some states are disputing who is to assume rescue and disembarkation responsibility for the people on board, thus putting at risk the

⁶²⁹ B. HAYES, *Op. Cit.*, note 354, p.4.

lives of the migrants⁶³⁰. EU states, such as Italy, have undertaken actions that are even more controversial by blatantly pushing back vessels carrying migrants and possibly asylum seekers to Libya contrary to obligations arising from human rights treaties, including ECHR⁶³¹. Such actions clearly speak of the aggressive policies states are ready to undertake in order to avoid protection responsibilities. The joint sea operations conducted in third countries are particularly demonstrative of the unwillingness of member states to assume responsibilities at any cost, including torture and possible ill-treatment of asylum-seekers in third countries.

In the context of external asylum dimension of the EU policy, some measures clearly aim at contracting out protection responsibilities to third states. Suggestions such as creation of asylum processing centres outside EU territory have not materialized as of the present. However, other policies such as RPP and readmission agreements are pursued intensively, thus, ‘passing the [refugee protection] buck’⁶³² further and further from EU borders. Moreover, the discourse within which such policies are debated is worrisome. Many member states are openly advocating for closed borders to asylum-seekers and also for outsourcing protection to countries that have questionable human rights records and in many cases lack the policies and legal structure to support asylum system in line with the international law.

⁶³⁰ AMNESTY INTERNATIONAL, *Italy/Malta: don't play with human lives*, 7 May 2009, [Online] <http://www.amnesty.org/en/for-media/press-releases/italymalta-don%E2%80%99t-play-human-lives-20090507> [Accessed 3 December 2011].

⁶³¹ *Id.* Also see UNHCR, *UNHCR deeply concerned over returns from Italy to Libya*, 2009 [Online] <http://www.unhcr.org/4a02d4546.html> [Accessed 4 December 2011].

⁶³² Sandra LAVENEX, ““Passing the Buck” : European Union Refugee Policies towards Central and Eastern Europe” (1998) 11 *Journal of Refugee Studies* 126, 134.

However, as it was argued in the paper, the right to asylum is not devoid of legal power. Countries, including EU member states and institutions, are bound under the international law, if not to grant asylum, then at least to secure access to their territory to asylum seekers, and in a case-by-case basis to determine their need for protection. The *non-refoulement principle*, as part of the international customary law, limits state sovereignty over the control of its borders and maintains state responsibility for violating the principle extraterritorially, that is, everywhere the state exercises effective control over a person. This includes the high seas, third countries, and international zones in airports, etc. To deny responsibilities towards asylum seekers for political convenience is in violation of basic human rights laws and standards.

Even though irregular migration poses significant challenges to member states, this should not be used as justification to avoid responsibilities towards people with protection needs. Commonly approved rules exist within the international law to guarantee the rights of those populations. Efforts to misinterpret the rules because of political interests are undoubtedly undermining the international human rights regime and may have dire consequences for the people they are meant to protect. Interception activities at high sea affect the lives of many people, asylum-seekers or other migrants alike, and therefore need to be driven with a human rights based approach where the life of each individual is placed before any political interest. The high seas are not excluded from the applicability of the international law and Community law, and states are responsible for *bona fide* implementation of the law. Otherwise, unnecessary loss of life will continue.

In such climate of hostility towards people in need of protection, the EASO can play indispensable role for setting higher standards of protection. The Office would advance the harmonization of refugee determination practices in different member states by harmonizing the information on countries of origin and transit of asylum-seekers and improving cooperation by offering practical assistance in training asylum officials and developing uniform refugee determination and other guidelines. By working closely with UNHCR, civil society NGOs and European Union Agency for Fundamental Rights (FRA) the EASO will ensure that protection standards set by the 1951 Refugee Convention and other relevant human rights treaties are met. However, in view of the significant gaps in refugee protection among EU member states, the EASO will not be able to make considerable improvements given its non-decisional role with no real power to influence member state decisions. Therefore, in order to advance the development of the CEAS the Office should be given more decision-making authority and discretion in influencing asylum-related decisions of member states. The EASO has the potential to become an Agency with decision-making power on individual asylum claims and authority able to balance the responsibility-sharing for asylum-seekers among EU member states.

Frontex is becoming a more significant actor in the EU border control management. The agency cannot be exempt from responsibility for wrongdoing committed during joint operations at high sea. The recently amended Frontex Regulation will improve accountability and transparency in every aspect of Agency's activities. This will ensure more respect for the international and EU law and more confidence in EU institutions. In addition, the implementation of the EU border guard teams is a step in the right

direction towards more comprehensive approach to the EU border control activities. However, the agency must cooperate more closely with EASO, FRA, UNHCR and civil society NGOs in order to ensure the needs of asylum-seekers are met according to international and EU protection standards. In addition, there is an urgent need for more effective monitoring mechanism with participation of the above-mentioned organization to guarantee transparency of the Agency's operations and day-to-day activities.

The outlined enforcement mechanisms in this paper, individually or in combination, can be beneficial to any individual subjected to incorrect behaviour by the state. Evidently, the EU faces a huge challenge to ensure compliance with EU legislation, the rule of law, and fundamental rights. Some member states led by opportunistic politicians are unwilling to assume responsibilities and to follow the rules that they agreed upon at the EU level. The European Commission, as a guardian of the Treaties, is the main player to ensure member states fully comply with EU values and laws. The Commission must demonstrate strong leadership in enforcing EU rules by reacting more vigorously to any infringement and by pursuing any available channels to ensure EU laws are followed without exception. The preliminary rulings procedure and the ECJ's case law will prove most useful for harmonising EU asylum legislation and in providing individuals with effective remedies in case of violation of their fundamental rights. In case of asylum-seekers, this is of utmost importance considering the gravity of their situation if asylum-seekers do not receive protection in Europe.

In conclusion, in the age of globalization and intensive trade across countries and continents, borders are losing their traditional value. Conversely, while the world is

becoming more borderless, asylum-seekers and refugees are subjected to even more closed borders. In the context of EU, it can be concluded that member states are avoiding international responsibilities out of pure convenience: the fewer people crossing their borders looking for protection, the fewer resources are allocated to accommodate their needs; fewer people with different cultural background who may pose a threat to the nation's unity⁶³³.

In the current security discourse, the 'balance metaphor' implying that a balance should be struck between the security requirements and human rights obligations, is often invoked by the States to justify the reduction of rights accorded to asylum seekers. However, in state practices such balanced approach has actually "favoured the development of a conception of security equal to coercion, surveillance, control and a whole series of practices of violence and exclusion"⁶³⁴ including measures that lack accountability and judicial oversight, thus posing threat to the fundamental human rights⁶³⁵.

As pointed by Henkin, human rights are not a compromise between the exclusive power of the state and competing humanitarian impulse⁶³⁶. When it comes to the protection of human rights, the question of balance or compromise does not stand⁶³⁷. Human rights

⁶³³ J. Hathaway, *Op. Cit.*, note 194, p.137.

⁶³⁴ Didier BIGO, Sergio CARRERA & Elspeth GUILD, *The CHALLENGE Project: Final Policy Recommendations on the Changing Landscape of European Liberty and Security*. CEPS Challenge Research Paper No. 16, 2009, p.3 [Online] Available: <http://aei.pitt.edu/12224/1/1905.pdf> [Accessed 23 May 2011]

⁶³⁵ *Id.*

⁶³⁶ L. HENKIN, *Op. Cit.*, note 81, 118.

⁶³⁷ D. BIGO, S. CARRERA & E. GUILD, *Op. Cit.*, note 634, p.4 point that in the context of the EU Area of Freedom, Security and Justice "[s]ecurity only comes from the respect and protection of human rights

obligations of states towards asylum seekers are not a matter of choice but must be firmly upheld. The 1951 Refugee Convention and the other human rights instruments offer only the basic legal framework for protection opening the door for limitless possibilities. The right to asylum needs to be understood as a basic human right. Otherwise, the right is meaningless. In this context UNHCR stressed that:

“[I]nternational protection can only be provided if individuals seeking protection have access to the territory of States where their claims can be assessed properly. The best quality asylum system will be of little use if it is not accessible”⁶³⁸.

and fundamental freedoms through the rule of law, and liberty should be placed as the starting principle on which the EU’s AFSJ should be rooted and developed”. D. BIGO, S. CARRERA & E. GUILD, Op. Cit., note 634, p.4.

⁶³⁸ UNHCR, *Response to the European Commission’s Green Paper on the Future Common European Asylum System*, 2007, p.46 [Online] <http://www.unhcr.org/refworld/docid/46e159f82.html> [Accessed 4 December 2011].

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