International refugee law and the common European asylum system

Conformity or human rights violation?

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<td>CAT</td>
<td>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
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<td>CEAS</td>
<td>Common European Asylum System</td>
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<td>ComAT</td>
<td>United Nations Committee Against Torture</td>
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<td>Court of Justice of the European Union</td>
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<td>NGO</td>
<td>non-governmental organisation</td>
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<td>OJ</td>
<td>Official Journal of the European Union</td>
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<tr>
<td>SCO</td>
<td>safe country of origin</td>
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<td>STC</td>
<td>safe third country</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<td>UNTS</td>
<td>United Nations Treaty Series</td>
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<td>VCLT</td>
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1 Introduction

1.1 Background

People have always migrated, for many different reasons, both voluntarily and involuntary. When migration is forced, for example by an armed conflict or persecution, the issue is a matter for refugee law. The refugee was first recognized in international law by the League of Nations in the 1920s. Refugee law as it is known today was developed in the aftermath of the Second World War, to manage the refugee flow that followed the war. Since then, the refugee flows have not stopped.

Refugee law is a current issue in the European Union (EU) and the rest of the world today. United Nations High Commissioner for Refugees (UNHCR) reports that over 50 million people are forcibly displaced due to conflict and persecution.¹ For example, the conflicts in Syria and Iraq have resulted in millions of people having to flee their country to seek international protection, and unfortunately no solution to the conflicts seems imminent.

The concept of asylum is evolving, both internationally by the UNHCR, and regionally. Asylum is now offered not only to political enemies to a dictatorship, as it has traditionally been, but also on grounds such as gender and sexual orientation and to children. Climate changes might in the future increase the number of people fleeing natural disasters. Evidently, there is a pressing need for a system equipped to handle a mass influx of asylum-seekers. This puts pressure on the EU and its asylum system, and the international community as a whole.

The European integration started as a peace agreement after the Second World War. About 10 years later the integration had come to include a common market to harmonize economic activities, and in general promotion of closer relations between the European states.² Since then the development has kept going, and the EU has now harmonised a large number of areas, from cucumbers to asylum and border control. The EU is now seen as its own legal order, separate from both international and domestic law.³

¹ United Nations High Commissioner for Refugees [UNHCR], Global Trends 2013 (20 June 2014) 2.
² Craig and De Búrca, EU Law – text, cases and materials (Oxford University Press, 5th ed, 2011) 4-6.
Refugee law is an area of law that is regulated in both international law and EU law. Regional asylum systems are a positive development. A European system is also necessary to be able to deal with the large number of asylum-seekers arriving in Europe, since it creates a more efficient and uniform system. Creating a detailed set of rules on international protection within the EU that will not interfere with rules set out in international law is not an easy task. The fact that EU until recently lacked any form of constitutional protection for human rights has not made it easier. Discrepancies are bound to occur. As far as inconsistencies can be avoided in the legislative materials from the EU, the implementation into domestic law and interpretation in court will give way for further misunderstandings.

1.2 Purpose and delimitations

The purpose of this thesis is to analyse two principles in refugee law, non-refoulement and the right to seek asylum, in relation to international refugee law and EU refugee law.

Non-refoulement is a basic principle in refugee law. Refoulment is French for ‘sending back’. The principle prohibits a state to send a person back to a country where she risks torture or other threats to life and freedom. The two principles are interrelated since non-refoulement plays an important role in the right to seek asylum, which I will return to below. I chose to examine the non-refoulement principle because judgements from different international courts interpreted it differently. I chose the right to seek asylum because I came across possible breaches in EU law that were scantily observed in the literature.

I will look at how the principles are expressed in international instruments, and in EU law. I will base my arguments in treaties and other legislative materials from the EU, but I will also look at how the principles are interpreted in case law in order to see whether they are upheld in practice. The aim is to conclude whether there is conformity in how EU approaches the principles compared to the approach urged by international law, or if there are discrepancies that result in human rights violations.

Refugee law is a complex area of law. Within the EU it is based on a number of regulations and directives, and internationally it concerns multiple treaties and customary rules. My aim is not to give a comprehensive review of the international refugee law and the European asylum system. Instead I am providing a more thorough
analysis of only two principles. The thesis does not include any comparative analysis of the asylum systems in the different European countries. I will, however, use examples from domestic law of United Kingdom and Sweden to illustrate the problems discussed.

1.3 Method and materials

I have used the traditional legal method whilst working on this thesis. The main base for my reasoning is sources of international law: treaties, international custom, general principles of law and judicial decisions. I have also used works of scholars published in books and recognised international journals. Since the thesis to a large extent discusses EU law I have also used the sources recognised in that legal order, such as regulations and directives, and decisions form the Court of Justice of the European Union (ECJ). Other judicial decisions used are mainly from international courts, but when case law from such courts is lacking I have resorted to decisions from national courts. I have also used legislation and decisions from national legal orders to provide examples of implementation of international law and EU law.

In the area of refugee law and human rights law, there are many sources that can be described as soft law. A soft law document is an international document that is not legally binding, in contrast to for example treaties that have binding force. Examples of soft law sources used in the thesis are decisions from United Nations treaty committees and international declarations. Though more frequently, I have used soft law from UNHCR.

In its supervisory role, the UNHCR has published the Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (the Handbook), conclusions, guidelines, notes and positions to guide states to make accurate determinations on the need of international protection. What weight these documents should be given is unclear, partly

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4 Statute of the International Court of Justice (26 June 1945) art 38(1).
because the UNHCR’s mandate is unclear.\textsuperscript{7} Nevertheless, the EU has agreed to take advice from the UNHCR.\textsuperscript{8}

In favour of using UNHCR material is also the fact that scholars argue that soft law is better equipped to deal with questions of global governance than traditional forms of law, and therefore is the future of refugee law.\textsuperscript{9} In light of these arguments, I have chosen to treat the UNHCR material as having great persuasive weight, but not as formally binding.

I have used reports from non-governmental organisations (NGOs) as well. They are not sources of law, and do not provide legal reasoning on relation to human rights issues as the UNHCR does. I have therefore not used them to support my own legal reasoning. Instead they are sources for concerns and human rights violations in the international community.

\textbf{1.4 Terminology}

When using the term ‘international law’ I refer not only to law originated from the United Nations (UN) that has almost a global coverage, but also regional instruments, mostly from the Council of Europe. Materials from the EU are termed ‘EU law’ and are consequently not included in the term ‘international law’.

I have chosen to use the terminology ‘human rights law’ and ‘refugee law’ to represent two different legal areas. Since the purpose and object of refugee law is to protect people from human rights violation, refugee law is also human rights law. My choice of terminology is based on the practical need to differentiate between general human rights law, and the human rights law specific to refugees.

1.5 Disposition

In the first part of the thesis, chapters 2-3, I will introduce the most central parts of refugee law, and the relevant basics of EU law, such as human rights. I will also discuss the principle of *non-refoulement* that is central to the purpose of the thesis. Chapter 4 focuses on whether the Dublin system in the EU is uniform with international law, with focus on *non-refoulement*. The next part, chapter 5, discusses the right to seek asylum in international law and EU law. In chapter 6 I will explain how EU law both develops the right to seek asylum, and possibly breaches it as well. In chapter 7 follows a discussion on the method national courts should use to remedy the effects of discrepancies between EU law and international law. I will end with a chapter including a summary and general conclusions.
2 Refugee Law

2.1 Introduction

Refugee law is an area of law that is regulated both globally and regionally. Since the purpose of this thesis is to compare the two, I first have to explain the foundations of both international refugee law and EU refugee law. I will start by discussing the refugee in international treaties. I will go on to discuss refugee law and human rights law in the EU, as far as relevant to this essay. After that a short discussion regarding the relationship between the two legal orders will follow.

2.2 International law

The main source for international refugee law is the Geneva Convention relating to the status of refugees (Refugee Convention) and its protocol eliminating time- and geographic limitations (1967 Protocol). They are ratified by 147 states, and therefore cover a large part of the world. The Refugee Convention is built on three concepts: the refugee definition, the principle of non-refoulement and the refugee status. Together, these concepts make up the main framework for international refugee law.

The refugee definition in art 1A(2) of the Refugee Convention states that a refugee is a person outside his or her country of nationality, with a well-founded fear of persecution on the ground of race, religion, nationality, membership of a particular social group or political opinion. The person also needs to be unable, or unwilling, to avail herself of the protection of that country. A stateless person can also be a refugee. Due to state sovereignty it is the states themselves that decide whether someone fits the definition or not. If the state finds that someone is a refugee in the meaning of the Refugee Convention she is given refugee status, which leads to certain rights.

The Refugee Convention was drafted after the Second World War and by looking at the definition we can see that it is obviously not up to date. The definition has

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10 Geneva Convention relating to the status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) [Refugee Convention].
been criticised for being too narrow and not taking into account the many reasons people flee their country today.\textsuperscript{13} This effect has been somewhat accommodated by the rise of subsidiary protection, a kind of international protection granted to people in need of protection who do not fit the refugee definition, for example people risking the death penalty, indiscriminate violence or torture or other inhuman or degrading treatment.\textsuperscript{14} There is no definition of subsidiary protection in international law, and the concept is therefore used differently in different regions of the world.

The Refugee Convention also sets out rules regarding cessation of and exceptions from refugee status, as well as a non-discrimination clause. It also holds some rights for refugees, for example the principle of non-refoulement.

There are sources influencing international refugee law, other than the Refugee Convention. By definition, refugees have had their rights violated in their country of origin, and they tend to be one of the most vulnerable groups in society, which is why international human rights law plays an important role in developing refugee law. The most relevant treaties for the purpose of this essay are, respectively: the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),\textsuperscript{15} the International Covenant on Civil and Political Rights (ICCPR)\textsuperscript{16} and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).\textsuperscript{17}

There is no court, other than the International Court of Justice (ICJ),\textsuperscript{18} that has jurisdiction over the Refugee Convention, but it is still a living document that develops over time, just like other human rights treaties. This makes the case law from courts and treaty bodies supervising human rights treaties very important in developing refugee law. Bodies supervising the human rights treaties mentioned above are: European Court of Human Rights (ECtHR), United Nations Human Rights Committee (HRC) and

\textsuperscript{13} See for example Singh Juss and Harvey (eds), above n 9, 1.
\textsuperscript{14} Qualification Directive, above n 8, art 15.
\textsuperscript{16} International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
\textsuperscript{17} Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
\textsuperscript{18} Refugee Convention, above n 10, art 38.
United Nations Committee against Torture (ComAT). The Refugee Convention should be interpreted in light of the developments in human rights law.\[^{19}\]

Some norms expressed in the different treaties have become customary law, which has to be taken into account when interpreting refugee law, such as the principle of *non-refoulement*, which is of main interest in this essay. It can be found in the Refugee Convention and a number of human rights treaties. I will discuss it in more detail below in chapter 3.

### 2.3 European Union law

#### 2.3.1 The common European asylum system

The EU is developing a common European asylum system (CEAS) within the area of freedom, security and justice.\[^{20}\] The goal is to establish an asylum system that works the same way in all states, so that an asylum-seeker will get the same reception, treatment and decision irrespective of which member state she first arrives to. The system is regarded as the most advanced regional system for international protection.\[^{21}\] It is made up of regulations, that are binding and directly applicable in all member states, and directives, that are binding as to the result to be achieved.\[^{22}\] The central legal acts regarding asylum are the Dublin Regulation,\[^{23}\] the EURODAC Regulation,\[^{24}\] the Reception Conditions Directive,\[^{25}\] the Qualification Directive\[^{26}\] and the Asylum


\[^{22}\] TFEU, above n 20, art 288.

\[^{23}\] Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member state responsible for examining an application for international protection lodged in one of the Member states by a third country national or a stateless person [2013] OJ L 180/31.


\[^{26}\] Above n 8.
Procedures Directive.\textsuperscript{27} The directives set out minimum standards, which means that member states can be more generous in national legislation.

The most important piece of EU legislation in the area is the Dublin Regulation. It aims to determine which member state\textsuperscript{28} is responsible for an application for international protection. Such a system is needed to ensure efficiency and uniformity in deciding the responsible state, and prevent asylum-seekers from lodging applications in many countries. The determination of the state responsible is based upon objective criteria in art 7-15 of the regulation. A state can choose to examine an application for international protection even if it is not responsible according to art 7-15, due to the sovereignty clause in art 3(2). The sovereignty clause is rarely and reluctantly used, and some are of the opinion that it is reserved for people too sick to be transferred to another country, or other similar humanitarian interests.\textsuperscript{29} I will return to the position of the sovereignty clause in chapter 4.

2.3.2 Human rights

Human rights were originally not a part of the European integration, it was more focused on the common market. Still EU’s main focus is economic, but has come to include areas like international protection and criminal law, which creates a greater need for human rights protection within EU law.

The first case where ECJ mentioned human rights in the EU framework was the \textit{Stauder} case, where the court said that fundamental rights was a part of EU as general principles.\textsuperscript{30} In subsequent cases the court gave the human rights protection more substance by saying that international human rights treaties, especially the ECHR, should serve as guidelines for human rights protection in the EU.\textsuperscript{31}

The ECJ has also, rather vaguely, drawn inspiration from constitutional traditions common to the member states, to make sure that the EU law is not

\textsuperscript{28} Hereinafter any reference to ‘member states’ in the context of the Dublin Regulation includes Norway and Iceland, which are also connected to the Dublin system.
\textsuperscript{29} Goudappel and Raulus (eds), \textit{The future of asylum in the European Union} (TMC Asser Press, 2011) 3 and Migrationsöverdomstolen [The Migration Court of Appeal] UM 8098-09, reported in MIG 2010:18, 9 June 2010.
\textsuperscript{30} Stauder v City of Ulm (C-29/69) [1969] ECR 419, para 7.
\textsuperscript{31} See for example \textit{Nold v Commission} (C-4/73) [1974] ECR 491, para 13.
incompatible with fundamental rights guaranteed in national constitutions.\textsuperscript{32} Such an approach is not only necessary to protect human rights within EU, but also necessary for the court to be able to legitimately uphold the supremacy of EU law, since the member states will not refrain from interpreting their own constitutions.

These developments have led to a sophisticated human rights system. Art 6 of \textit{Treaty on European Union} (TEU)\textsuperscript{33} now sets out the sources for human rights protection; \textit{Charter of Fundamental Rights of the European Union} (Charter),\textsuperscript{34} the ECHR and constitutional traditions common to the member states.

The Charter was first adopted in 2000 but was ratified and became legally binding in 2009. It has the same legal value as the treaties and thus creates a constitutional protection for human rights within the EU.\textsuperscript{35} It is based upon the ECHR, and some rights have the same meanings as the corresponding right in the ECHR, for example the prohibition of torture and other ill treatment in art 4 of the Charter and art 3 of ECHR. The Charter also encompasses some more innovative rights, see for example art 3(2) concerning medical rights, including a prohibition of cloning. Still the Charter can be described as a compilation of rights from various sources that the ECJ has drawn inspiration from before.\textsuperscript{36} The member states have to consider the Charter when implementing the EU law, and the institutions and bodies of the EU also has to consider it, see art 51.

The ECHR is now very important in EU law. All member states are part to it, and it therefore influences general principles of EU law, it is used to interpret many rights in the Charter, and the EU has taken on itself to accede to it, art 6(2) of TEU. The ECHR is supposed to serve as a minimum standard for human rights protection Art 52(3) of the Charter states that it should give the same, or better, protection as the ECHR. This creates an obligation for the ECJ to interpret the case law from the ECtHR.

Aside from meeting the requirements in the Charter and the ECHR the member states have to fulfil other international obligations, such as respecting various human rights treaties they are part of. This human rights framework, combined with the fact

\textsuperscript{32} \textit{Hauer v Land Rheinland-Pfalz (C-44/79)} [1979] ECR 3727, para 15.


\textsuperscript{34} \textit{Charter of Fundamental Rights of the European Union} [2010] OJ C 83/02.

\textsuperscript{35} TEU, above n 33.

\textsuperscript{36} Craig and De Búrca, above n 2, 395.
that the EU considers itself bound by the Refugee Convention,\textsuperscript{37} ensures comprehensive human rights protection in theory.

2.3.3 The safe country notion

Due to the well-developed human rights system in the EU, the CEAS is built on the presumption that all member states comply with international human rights law, and that asylum-seekers therefore will live under acceptable conditions and get a fair determination of their claim. This assumption is connected to the principle of mutual recognition, a general principle in EU-law. According to it, all states should assume that the other member states meet standards set out in EU law.\textsuperscript{38} This means that the member states can, as a rule, transfer asylum-seekers as the Dublin Regulation dictates, without having to examine the risk of refoulement or other shortcomings in the asylum system of the other state. As long as member states comply with the directives mentioned above under 2.3.1, the presumption is not a problem, since they provide asylum-seekers with a proper standard of living conditions and procedures.

The principle of mutual recognition was first developed in the Cassis de Dijon case, which dealt with discriminatory trade barriers.\textsuperscript{39} Later the principle has been extended to the area of freedom, security and justice, TFEU art 67(4). The principle is necessary for the single market to work. When the EU decided to integrate so many more areas than was originally indented, the principle might not suit the new development. Asylum law has mainly concerns people, contrary to trade law, which deals with goods. Applying the same principle therefore seems peculiar.

In line with the principle of mutual recognition a concept has developed within European asylum law called ‘safe third country’ (STC). The concept is that some countries are considered ‘safe’ for an asylum-seeker to have his application examined.\textsuperscript{40} As I already mentioned, parties to the Dublin Regulation are considered safe (with one exception I will return to), but other states can also be considered ‘safe’.\textsuperscript{41} Generally, an asylum-seeker is sent back to a STC because she passed trough that country before

\textsuperscript{37} TFEU, above n 20, art 78.
\textsuperscript{38} Craig and De Búrca, above n 2, 595-596 and 947.
\textsuperscript{39} Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (C-120/78) [1979] ECR 649.
\textsuperscript{41} Asylum Procedures Directive, above n 27, art 38.
seeking asylum, and that third country is therefore considered responsible for the asylum application.

A concept related to STC is 'safe country of origin' (SCO), which means that some counties are considered safe to return asylum-seekers to, countries that apparently cannot produce any refugees at all. The EU considers all member states to be SCO. The SCO concept is more controversial than the STC concept, but both have been criticized, which I will return to in chapters 4 and 6.

2.4 The relationship between EU law and international law

Before one can determine the uniformity between refugee law in international law and EU law there is need to determine the relationship between the two areas of law. One is not simply superior to the other.

According to art 27 of the Vienna Convention on the Law of Treaties (VCLT) a state cannot use internal law to justify failure to perform a treaty. Since EU law is neither national law, nor international law, it is difficult to say what that provision means for EU law. Still, some conclusions can be drawn. Firstly, if the EU itself is part to the treaty, in accordance with art 261(1) Treaty on the functioning of the European Union (TFEU), EU law must be ‘internal law’ in the meaning of VCLT, and the EU cannot use regulations and directives as excuses for not complying with the treaty. Secondly, the EU has submitted itself to follow human rights as set out in ECHR, meaning that international law overrules EU law in that regard, in accordance with art 52(3) of the Charter. Thirdly, jus cogens norms, discussed below, are superior to all other legislation, international, national or EU.

2.5 Summary and conclusion

The Refugee Convention and its 1967 Protocol are the most important instruments in refugee law, both international and regional, since the EU states are bound by them when interpreting EU law as well. We can see that more detailed rules and new

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concepts, such as STC and SCO, have been developed within the EU. The Refugee Convention does not encompass anything comparable to these concepts, which raises the question whether the new developments correspond with international law.

EU has a well-developed human rights system itself, and in addition the member states are part to the ECHR, this makes the prerequisite for the CEAS very good. Still, the EU’s main interest is not human rights, and therefore there is a risk that the EU will protect its basic principles, such as the principle of mutual recognition, more than human rights, to uphold efficient cooperation.
3 The *non-refoulement* principle

3.1 Introduction

The principle of *non-refoulement* is central in refugee law. It provides all people with protection from the gravest human rights violations. An asylum-seeker who risks such treatment, but not on the ground of race religion, nationality, membership of a particular social group or political opinion can thereby get protecting as well. This makes up for the narrow refugee definition to a small extent. It is the single most important principle in this essay since it is of great importance for the interpretation of the Dublin Regulation, and one of the aspects in the right to seek asylum. In this chapter I will first explain the general meaning of the principle, and then I will discuss its status in international law.

3.2 *Non-refoulement* in international law

The principle of *non-refoulement* is found in art 33(1) of the Refugee Convention, and the exceptions, which I will discuss below, are found in art 33(2). The article states:

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

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of particularly serious crime, constitutes a danger to the community of that country.

The wording suggests that only refugees in the meaning of the Refugee Convention can enjoy that protection, but due to development in international human rights law, mainly by ECtHR and the ComAt, and clarifying statements from UNHCR,
it is now established that all people, not only refugees, benefit from the protection of non-refoulement.\footnote{Briun, ‘Border Control: Not a Transparent Reality’ in Goudappel and Raulus (eds), above n 29, 21, 25, UNHCR, Conclusions adopted by the Executive Committee on the International Protection of Refugees, December 2009, 1997, Conclusion No 81(i).}

Refoulement is also prohibited in CAT art 3, and has been read into the prohibition of torture and cruel, inhuman or degrading treatment or punishment in ICCPR art 7 and ECHR art 3. The principle can be found in other regional instruments as well,\footnote{OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, opened for signature 10 September 1969, 1000 UNTS 46 (entered into force 20 June 1974) art II(3) and American Convention on Human Rights, opened for signature 22 November 1969, [1969] OAS 36 (entered into force 18 July 1978) art 22(8).} and is expressed in various non-binding international instruments. Even if the different treaties concern the same principle, the protection is not the same in them. The Refugee Convention protects ‘life and freedom’, ECHR and ICCPR protect from torture and cruel, inhuman or degrading treatment or punishment, whereas CAT only protects from torture. Another important difference is that there are exceptions from the rule set out in art 33(2) of the Refugee Convention. I will return to the exceptions below when I discuss the status of non-refoulement as a peremptory norm in international law.

Even if there are some differing opinions, it is generally accepted that non-refoulement is part of customary international law.\footnote{See for example Goodwin-Gill and McAdam, The Refugee in International Law (Oxford University Press, 3rd ed, 2007) 345-353, Allain, ‘The jus cogens Nature of non-refoulement’ (2002) 13 International Journal of Refugee Law 533, 538 and UNHCR, above n 45, 1977, Conclusion No 6.}

Since there is no international court or committee that can try an individual claim under the Refugee Convention it is hard to say exactly what art 33(1) encompasses, but the conclusions adopted by the UNHCR executive committee, though not legally binding, can serve as guidance when interpreting the principle. The jurisprudence from mainly the ECtHR and the ComAT, but also the HRC, has become very important in the development of the non-refoulement principle, and as I mentioned above, refugee law should be interpreted in light of this development.

When a person is sent back to her country of origin where she is at risk of torture or other serious human rights abuses, it is called direct refoulement. Being sent back to a third country where she is at risk for direct refoulement is called indirect refoulement. Both kinds of refoulement are prohibited in international law.\footnote{See for example Hathaway, ‘Refugees and asylum’ in Opeskin, Perruchoud and Redpath-Cross (eds), Foundations of International Migration Law (Cambridge University Press, 2012) 195 and T.I. v United Kingdom (Application no 43844/98, ECtHR, 7 March 2000) 15 [T.I. v UK].}
3.3 Peremptory norms in international law (*jus cogens*)

When discussing the interpretation of *non-refoulement* it is important to establish the legal status of the principle in international law.

There are two kinds of norms in international customary law; *jus dispositivum* and *jus cogens*. If a norm is considered *jus dispositivum* states can agree to conclude a treaty contrary to that rule, or in another way deviate from it where it can be motivated. *Jus cogens*, on the other hand, is superior to all other norms and treaties. This means that it cannot be set aside by a treaty or be derogated from.\(^{49}\) Public international law is based on states giving consent to be bound by rules, either by signing a treaty or by obeying a customary rule. Therefore the doctrine of *jus cogens* infringes on state sovereignty, since all states are bound by it whether they like it or not. This means that there are few *jus cogens* norms, which also is desirable to maintain the legitimacy of the concept.

Because of their superiority, only the most fundamental principles of international law can be regarded as *jus cogens*. The concept of *jus cogens* is relatively new, and there are still scholars that argue it does not exist.\(^{50}\) However, the art 53 of the VCLT defines it as ‘a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted’. In my essay I accept the idea that there is such a thing as peremptory norms, just like the ICJ does.\(^{51}\) The few norms that are generally considered peremptory are: the prohibition of torture,\(^{52}\) slavery,\(^{53}\) genocide,\(^{54}\) piracy\(^{55}\) and the use or threat of force.\(^{56}\)

There are different opinions on how to determine whether a norm has the status of *jus cogens*. I will use the definition set out in art 53 of the VCLT. Since the VCLT is the main source for interpretation of rules that might breach a *jus cogens* norm I will use the definition in art 53 in my reasoning.

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\(^{49}\) VCLT, above n 44, art 53.


\(^{51}\) *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgement)* [2012] ICJ Rep 422, 457.

\(^{52}\) Ibid.


\(^{54}\) *Armed Activities (DRC v Rwanda) (Jurisdiction and admissibility)* [2006] ICJ Rep 6, 32.


3.4 Non-refoulement as jus cogens

3.4.1 Derogability
The requirements for a norm to be *jus cogens* are, according to art 53 of the VCLT, that it is accepted by the international community as a whole and that no derogation from it is permitted. I will first discuss whether *non-refoulement* is derogable.

According to UNHCR the principle is not subject to derogation.\(^{57}\) As mentioned above the principle is closely related to the prohibition of torture and inhuman or degrading treatment or punishment, from which states cannot derogate, see art 15(2) ECHR and art 4(2) ICCPR. States generally accept that they cannot derogate from the principle of *non-refoulement*, and instead they use the exceptions provided in art 33(2) together with art 1F of the Refugee Convention, that sets out exceptions to refugee status, in an extensive manner when they want to expel people from their country.\(^{58}\) Art 42(1) states that no reservations can be made to art 33, which has been interpreted as meaning it is non-derogable.\(^{59}\) In light of these arguments, I conclude that *non-refoulement* is non-derogable.

3.4.2 Acceptance by the international community
According to Allain, *non-refoulement* has the status of *jus cogens*.\(^{60}\) After establishing that *non-refoulement* is in fact customary international law, meaning what states actually do, he discusses why they do it. The rationale is that if they do it because they think the principle has the status of *jus cogens*, it means that they have accepted the principle as such.\(^{61}\)

We can conclude that states in general consider the principle binding.\(^{62}\) It is not as clear whether they believe it to be a peremptory norm. By looking at conclusions from UNHCR executive committee we can see a trend towards accepting *non-refoulement* as a peremptory norm. As early as 1982 the committee stated that ‘the principle of *non-refoulement* which was progressively acquiring the character of a

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57 UNHCR, above n 45, 1996, Conclusion No 79(i).
60 Allain, above n 47.
61 Ibid 538-539.
62 Goodwin-Gill and McAdam, above n 47, 228.
peremptory rule of international law’. On later occasions UNHCR has repeated that all states are bound by the principle and that it is of fundamental importance. The 1984 Cartagena Declaration on Refugees expressly states that non-refoulement has the status of jus cogens. The document is not binding, nor are UNHCR’s conclusions, but they illustrate how the states view the principle of non-refoulement.

From these sources Allain comes to the conclusion that non-refoulement is a jus cogens norm. Even though Allain makes a strong case, and many scholars seem to agree with him, some are not convinced. The main critique concerns the fact that states breach the principle time and time again, as well as the fact that there are exceptions in art 33(2) of the Refugee Convention. The first argument can partly be dismantled by referring to the Nicaragua case, where the ICJ said that state practice does not have to be in complete conformity with the rule for it to be considered customary. This line of reasoning can be applied to peremptory norms as well. Torture, for example, is frequently used in many states, and it is still considered the least controversial peremptory norm.

### 3.4.3 The role of the exceptions

The second argument, regarding the exceptions, complicates the determination of the status of the principle. If deviations from non-refoulement are made with reference to art 33(2) of the Refugee Convention, the state can still respect the original rule as customary, but can it be considered jus cogens, even though the definition of the concept is that no deviations can be made?

According to art 33(2) a person can be exempted from protection from refoulement if she is a danger to security or has been convicted of a crime that makes her a danger to the community. These grounds are similar to, but not the same as, the grounds for exclusion form refugee status in art 1F in the Refugee Convention, that

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63 UNHCR, above n 45, 1982, Conclusion No 25(b).
64 Ibid 1989 and 1996, Conclusion No 55(d) and 79(i).
65 *Cartagena Declaration on Refugees*, adopted by Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (22 November 1984), III (5).
67 Duffy, above n 59.
69 Goodwin-Gill and McAdam, above n 47, 345.
excepts people convicted for international crimes or acts contrary to purpose and principles of the UN from acquiring refugee status. The exceptions have been used more frequently since 9/11 due to the constant fear of terrorism. The status of the exceptions from non-refoulement is unclear. On one hand, the ECtHR has not accepted a balancing act between protection of the individual and public security, and neither has the HRC or the ComAt. On the other hand there is some state practice supporting the exceptions. For example, the Canadian Supreme Court found the exceptions applicable in a case when there was a threat of terrorism, and the USA also uses broad exceptions for suspected terrorists in their immigration legislation.

This raises the question whether there are any exceptions from non-refoulement in customary international law and in the Refugee Convention. Human rights courts and committees do not allow any exceptions, and their jurisprudence is what contributes the most to customary law in the area. Therefore some scholars argue that the exceptions in art 33(2) of the Refugee Convention have become redundant.

As I mentioned above, it is difficult to say exactly what is encompassed in the Refugee Convention, due to the lack of guiding judicial decisions. From the wording in art 33 of the Refugee Convention we can conclude that it is supposed to protect individuals from threats of life and freedom. That is a more generous protection than the three human rights conventions, since such threats do not have to be as grave as torture or degrading or inhuman treatment. A threat to life and freedom does not have to be as severe as a risk of torture or inhuman or degrading treatment or punishment. In theory the state can therefore send an asylum-seeker back to face persecution as long as the persecution does not constitute torture or inhuman or degrading treatment or punishment. Therefore it can be argued that there is a small area where the exceptions

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70 Farmer, above n 66, 13-14.
71 Ibid 8-9.
72 Chahal v United Kingdom (Application no 70/1995/576/662, ECtHR, 11 November 1996) and Saadi v Italy (Application no 37201/06, ECtHR, 28 February 2008).
73 HRC, General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 44th sess, UN Doc HRI/GEN/1/Rev.1 (10 March 1992) para. 3 and 9.
75 Suresh v Canada (Minister of Citizenship and Immigration) [2002] 1 SCR 3, para. 129.
77 Goodwin-Gill and McAdam, above n 47, 243.
can be applicable. This reasoning raises questions like the fine line between torture and inhuman or degrading treatment, and between inhuman or degrading treatment and other persecution. Even if there is case law from ECtHR and ComAT discussing those problems, there is a risk that the classification of the treatment risked upon return will be arbitrary to say the least, since refugee law by nature is built upon estimations of future risks.

According to Farmer the exceptions should be read in a very limited manner if we accept the *jus cogens* status of the norm. Duffy argues that *non-refoulement* cannot acquire *jus cogens* status since there cannot be any exceptions from a rule with that status. I do not agree with Farmer since it follows from the concept of *jus cogens* that norms conflicting with a peremptory norm are void. Therefore I find it impossible to accept that a *jus cogens* norm has valid exceptions. I therefore accept Duffy’s argument that a norm is not peremptory if there are exceptions from it, since it goes against the complete superiority of a *jus cogens* norm. I think it is necessary to conclude that the exceptions are no longer valid before we can call *non-refoulement* a *jus cogens* norm. Exceptions in favour of public security set out in national legal orders would then be invalidated in accordance with art 64 of VCLT, since treaties conflicting with a new peremptory norm are void. Duffy’s conclusion is that *non-refoulement* has not yet acquired *jus cogens* status, since the exceptions are still used to combat terrorism in some states.

To determine the status of the exceptions one has to assess how much influence the development in human rights law should have over the principle of *non-refoulement*. To do that we have to look at the law of interpretation of treaties. Art 31 of the VCLT says that treaties should be interpreted in good faith in accordance with the ordinary meaning of the words and in light of its object and purpose. Since human rights treaties have the nature of law making treaties, not contractual treaties for which the VCLT is designed, the main focus for interpreting them is on the object and purpose of the treaty. The object and purpose of the Refugee Convention, CAT, ECHR and ICCPR

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79 Farmer, above n 66, 37-38.
80 Duffy, above n 59, 389.
81 Ibid 390.
are to protect the rights and freedoms of individuals. Therefore the protection from refoulement should be interpreted to give the individual the best protection possible.

Unfortunately, I cannot draw any conclusion on exactly how states draw the line between non-refoulement in the Refugee Convention and in human rights law and what they believe their obligations under customary international law are.\textsuperscript{83} Bearing in mind the development of the Refugee Convention by the UNHCR executive committee, stating that non-refoulement has acquired jus cogens status, and the rules for interpretation of human rights treaties, it becomes difficult to argue that there are situations where a person should not benefit from the protection offered by the principle of non-refoulement. From this reasoning follows that I do not agree with Duffy regarding that exceptions in the Refugee Convention and limited state practice means non-refoulement cannot be declared a peremptory norm. I share this conclusion with Allain, who does not consider the exceptions a barrier against non-refoulement as a peremptory norm.\textsuperscript{84}

3.5 Summary and conclusions

Second to the refugee definition, the principle of non-refoulement is the most important source to international protection. It is difficult to define what the principle means, since there are many sources for it, both treaties and customary law. What can be sure is that it protects people from being sent to a country where they risk being subject to the gravest human rights violations, such as torture, inhuman or degrading treatment or punishment and threats to life and freedom, or to a country from which they risk being sent to a third country where they risk the same treatment.

Due to the many sources for non-refoulement, determining its status in international law is complicated. I have concluded that the principle cannot be derogated from, and that states, as a rule, consider themselves bound by it. I have discussed what impact the exceptions from non-refoulement have on its status as a peremptory norm, and found that the exceptions stated in art 33(2) of the Refugee Convention are not an obstacle to declaring non-refoulement a jus cogens norm. By looking at rules for interpreting human rights treaties, and at case law from ECtHR and ComAT, as well as UNHCR’s interpretation, I conclude that, in practice, there seem to

\textsuperscript{83} Goodwin-Gill and McAdam, above n 47, 350.
\textsuperscript{84} Allain, above n 47, 547.
be virtually no room for the exceptions. The exceptions are therefore invalidated. In sum, the principle of _non-refoulement_ is non-derogable, accepted by the international community as a whole and without valid exceptions, and has therefore acquired _jus cogens_ status in international law.

This conclusion is obviously a great infringement on state sovereignty. It means that a state under certain circumstances cannot expel an alien that is suspected for terrorism or other serious crimes. One has to keep in mind that such crimes are subject to universal jurisdiction, meaning that the state can prosecute the alien and, if found guilty, sentence her. The purpose of the _non-refoulement_ principle is not to give amnesty to terrorists, but to protect all people from human rights violations. The infringement on state sovereignty is therefore somewhat accommodated.
4 The Dublin Regulation and non-refoulement

4.1 Introduction

The concept concerning safe third countries has, as I mentioned above, been criticized. Even at its very early stage, both scholars and NGOs noted flaws in the system, including the risk of both direct and indirect refoulement. The STC concept results in routine-like transfers of refugees, which inevitably leads to refoulement, due to the lack of individual examination. Despite the very nice conception of Europe as a paradise for human rights protection, no one can deny that violations occur frequently.

The purpose of this chapter is to examine to what extent asylum-seekers are protected from refoulement within the Dublin system. I will look at case law from the ECtHR and the ECJ to determine the balance between the principle of non-refoulement and the STC concept. I will analyse how the case law from the two courts fit together, and the consequences of discrepancy. Finally, I will discuss how the future for non-refoulement in the Dublin system appears.

4.2 The beginning: T.I. v UK and K.R.S. v UK

4.2.1 T.I. v UK

The first case involving the Dublin Regulation tried by the ECtHR was T.I. v United Kingdom. The case concerned a Sri Lankan national who claimed asylum in the UK. When the UK authorities found out that he had already claimed asylum in Germany they requested that Germany take responsibility for examining his asylum application. The case made its way to the ECtHR where the applicant complained that his transfer to Germany would violate arts 2, 3, 8 and 13 of the ECHR. The grounds were that he had a negative decision from Germany and that they were not going to reconsider his case, and when deported to Sri Lanka he faced a real risk of treatment contrary to art 3 of the ECHR.

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86 Above n 48.
87 K.R.S. v United Kingdom (Application no 32733/08, ECtHR, 2 December 2008).
The court found that even though the Dublin Regulation was not a problem in itself, it would be incompatible with the purpose of the ECHR if it took away the responsibility under the convention for the transferring state. Therefore the UK could not avoid responsibility by automatically relying on the Dublin system. In this case the court concluded that there was no breach of art 3 of the ECHR since the applicant would be able to submit a new application for asylum or be granted a second interview upon arrival in Germany, which was considered a safeguard for his rights.

*T.I. v UK* laid the ground to approaching the Dublin Regulation in relation to non-refoulement, by concluding that indirect refoulement exists and the Dublin system offers no exception from that, and that the presumption of STC is not irrefutable.

Even though the court more or less said that if Germany deported the applicant to Sri Lanka it would be a violation of art 3, I do not find any reason to criticize the outcome in the case. He had a second chance to have his case reviewed back in Germany. The court was not presented with any evidence suggesting that the German authorities would not make a fair assessment of the case, taking into account all information available.

### 4.2.2 K.R.S. v UK

The next case where the ECtHR came in contact with the Dublin system was *K.R.S. v United Kingdom*. The case concerned an Iranian national who claimed asylum in the UK after a stop in Greece. After a request from the UK, Greece accepted responsibility for the examination of the asylum application. After exhausting domestic remedies the applicant turned to the ECtHR and claimed that a transfer to Greece would violate his rights under art 3 and 13 of the ECHR on the ground that there was a risk for refoulement because of Greece’s substandard asylum system. As evidence for the shortcomings in the Greek system a number of cases and reports were presented to the court. Among them was a position paper from UNHCR, begging EU member states to refrain from Dublin transfers to Greece due to the poor reception conditions, risk for refoulement and deficient asylum procedures.\(^88\) It was also noted that the ECJ only one year earlier found that Greece had failed to implement the Reception Directive.\(^89\) Moreover there were troubling reports from NGOs and from the European Committee

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\(^88\) UNHCR, *UNHCR Position on the return of asylum-seekers to Greece under the “Dublin Regulation”* (15 April 2008).

\(^89\) Commission v Greece (C-72/06) [2007] ECR 234.
for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, complaining on both the reception conditions and the asylum procedure.

In the grounds for the decision the court repeated that the convention is all the while binding on Dublin cases, but also noted that the Dublin system is created to follow human rights law. The court went on to say that UNHCR’s independence, reliability and objectivity are beyond doubt and that various NGOs share its concerns. Still, the court found that the presumption that Greece will adhere to the EU legislation in the area is not in fact broken, and since Greece is also bound by the ECHR there will be no transfers contrary to art 3. Therefore there had been no violation of the ECHR.

The court’s reasoning is not convincing. Even though it is correct that EU legislation is built upon a human rights foundation, it does not create a presumption stronger than in any other case that the ECHR is respected. The ECtHR, however, seems to respect the presumption in EU law of adherence to human rights in a way that it normally does not. After all, most contracting states build their legal system upon a constitution ensuring human rights protection, but that is not used as evidence of respect for human rights. The court also failed to take into account that Greece apparently does not attain the minimum human rights standards set out in the Reception Directive. My opinion is that the court did not make a satisfactory assessment of the applicant individual case. It also failed to make separate evaluations of the risk of indirect and direct refoulement.

The conclusion we can draw from the two first cases is that the safe country notion in Europe is not irrefutable, but after this judgement the exact scope of it remained unclear.

4.3 Admitting defeat? M.S.S. v Belgium and Greece

In 2011 the ECtHR was presented with a case very similar to K.R.S. v UK discussed above. The applicant, an Afghan national, travelled to Belgium where he claimed asylum. On his way there he had passed though, among other countries, Greece. In accordance with the Dublin Regulation, Greece accepted to take responsibility for his asylum application and he was eventually transferred to Greece. There he was immediately put in detention with very poor sanitary conditions. After being released

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90 M.S.S. v Belgium and Greece (Application no 30696/09, ECtHR, 21 January 2011) [M.S.S. v Belgium and Greece].
from detention he was forced to live in the streets. The applicant turned to the ECtHR and claimed that his rights under arts 2, 3 and 13 of the ECHR had been violated by both Belgium and Greece. Belgium had known of the poor reception conditions in Greece and the risk of not having his asylum application examined properly, which put him at risk for *refoulement*. The court’s reasoning is extensive, and here follows a summary of the most important parts.

For the first time the court stated that art 3 includes a positive obligation to ensure that a vulnerable group like asylum-seekers enjoy the most basic socio-economic rights. Greece had failed to do so and violated art 3. Greece also breached art 13, the right to an effective remedy, in combination with art 3 in relation to the asylum procedure since there was no chance of being offered any form of protection, which meant that there was a real risk of *refoulement*.

The court found that the presumption that Greece would follow its obligations under EU law and human rights law should be set aside in this case, and because of that, also Belgium had breached art 3. Due to the fact that the reception conditions in Greece breached art 3, and that there was a risk for *refoulement* from Greece, Belgium was responsible for both direct and indirect *refoulement*. Belgium should have used the sovereignty clause and taken responsibility for the application instead of transferring the applicant to Greece.

The circumstances in this case are similar to *K.R.S. v UK* but the outcome is the opposite. What is it, then, that refuted the presumption of compliance with EU law and human rights law in *M.S.S. v Belgium and Greece*? It can seem as if the court revises its case law, but that is not the opinion of the court itself.\(^91\) According to the court the new information put forward (a letter from UNHCR, reports from NGOs and the fact that the Dublin system was under revision) made this case so different that it breached the presumption. Even though it is true that there were new reports and that the Dublin system was under revision I find it questionable whether there actually were any crucial differences in the evidence presented to the court in this case, since they did not add anything new of importance. The court seems to have attached importance to the letter from UNHCR to the Belgian Minister in charge of immigration, but that letter was only a plea not to transfer people to Greece, just as the position paper presented to the court in *K.R.S. v UK*. The amendment to the Dublin Regulation did not change the principle

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\(^91\) Ibid para. 343.
of non-refoulement, and that was never the intention either, why the reference to that was unnecessary.

In reaching its conclusion the court did not view the EU law as different from national law, and therefore did not allow a higher threshold for treatment to constitute as a violation under EU law than under domestic law, as it seemingly did in K.R.S. v UK. The outcome in M.S.S. v Belgium and Greece is an improvement from previous case law, but one cannot disregard the fact that the ECtHR seemed to protect EU legislation and principles more than human rights in K.R.S. v UK, which now leads to uncertainty regarding the evidence required to prove a breach of art 3 in Dublin cases.

4.4 Summary of ECtHR case law

The development of the non-refoulement principle by the ECtHR in relation to the Dublin Regulation started in T.I. v UK where the court did not give any special consideration to EU legislation. The court simply accepted the notion of the regional set of rules in general, but applied the same standard of human rights protection on it. Eight years later, in K.R.S. v UK, the court was reluctant to rule that the presumption of safety in a European country was breached, in fact more reluctant than when ruling in cases not concerning EU law, since it normally does not use the fact that a country is part to the ECHR as evidence for compliance with the same. Whether this approach was changed or not in M.S.S. v Belgium and Greece is unclear, since there was more evidence presented to the court, but nothing new of importance. Still, it can be concluded that the presumption can be breached, even in an individual case.

4.5 The ECJ’s approach: N.S. v SSHD

In 2011 the ECJ also had to consider the transfers to Greece in relation to the principle of non-refoulement, which led to a cease on transfers to Greece under the Dublin Regulation. The case was a preliminary ruling based on questions submitted by the UK and Ireland concerning the presumption of compliance with applicable law and the

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effect of accepting an asylum application in accordance with art 3(2) of the Dublin Regulation.

In its reasoning the ECJ first said that the member states are bound by the Refugee Convention, and that the regulations and directives in the CEAS comply with the Charter. The court also pointed out that since the member states are bound by the Charter when implementing EU law, they have to interpret the regulation in a manner consistent with the Charter. The court went on to point out that according to the principle of mutual recognition the countries have to assume that the other member states comply with the law and the mentioned rules for interpretation. The court also said this does not mean that there cannot be any infringements on human rights, but not every such infringement should affect the application of the Dublin Regulation, because then the efficient and objective system that is the Dublin Regulation would be lost. Therefore the court found that transfers to another member state in accordance with the Dublin Regulation are prohibited only if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions in the receiving state that would violate art 4 of the Charter, the prohibition of torture and inhuman or degrading treatment or punishment. The court used M.S.S. v Belgium and Greece as evidence when concluding that there are systemic deficiencies in the asylum system in Greece.

The conclusion I draw from the case is that the principle of mutual recognition is not irrefutable, and that a member state cannot transfer someone to a state where they cannot be unaware of the systemic deficiencies in their asylum system.

4.6 The future: how will non-refoulement continue to operate in the Dublin system

4.6.1 Comparison of the ECtHR’s and the ECJ’s case law

According to Van den Sanden, the two cases, N.S. v SSHD and M.S.S. v Belgium and Greece, fit together perfectly. She notes that the ECJ applies art 52(3) of the Charter correctly when taking case law from ECtHR into account when determining the scope of the Charter. This is one possible interpretation of the cases. In this part I will discuss other possible interpretations of the judgements.

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94 Ibid 161.
In *N.S. v SSHD* the ECJ numerous times points out that there need to be ‘systemic’ flaws in the system for a transfer to be ceased. In *M.S.S. v Belgium and Greece* the ECtHR says that a risk can be individual even if many people risk the same treatment, and if a state knows that the general situation in another state is poor they have to verify that a person in the individual case is going to be treated in conformity with the ECHR.\(^{95}\) The ECJ’s approach refrains from assessing the individual risk, which is fundamental in international refugee law when deciding on the need of international protection in accordance with the Refugee Convention.\(^{96}\) This individual approach is also what case law from ECtHR is built upon.\(^{97}\) The result is that a weaker human rights protection follows from the ECJ than from the ECtHR. The applicant would, according to the ECJ’s judgement have to prove that the asylum system in the member state she is being transferred to has systemic flaws in it that result in *refoulement*. The ECtHR does not require evidence of that nature, and focuses only on the situation of the individual.

The Supreme Court of the United Kingdom had the opportunity to evaluate the cases when a number of applicants complained that their transfer to Italy constituted a violation of art 3 of the ECHR, due to poor reception conditions.\(^{98}\) When evaluating *N.S. v SSHD* the court found it remarkable that a person would have to show that he would be subject to torture or inhuman or degrading treatment or punishment due to systemic deficiencies, since there can be just as serious human rights violations without systemic failure. The court was not convinced that it was the ECJ’s intention to impose such strict requirements. A possible interpretation of the case, according to the court, was that the ECJ differentiated between trivial infringements and major problems, where the first should not prevent a Dublin transfer. The court noted that the use of the term ‘systemic deficiencies’ in the ECJ judgement might be because the problems in Greece at the time were well-documented and not questioned in the case, and the court therefore accepted them as systemic, and failed to explain clearly its reasoning in that part.

I agree with the Supreme Court’s interpretation, but they left out one important aspect in their reasoning. Art 52(3) of the Charter states that the protection offered by the Charter should be the same or higher than the ECHR. If *N.S. v SSHD* is interpreted as requiring evidence of systemic deficiencies to avoid a transfer, it provides a weaker

\(^{95}\) *M.S.S. v Belgium and Greece*, above n 90, para. 359.

\(^{96}\) UNHCR, above n 6, para 44.

\(^{97}\) *Soering v United Kingdom* (Application no 14038/88 ECtHR, 7 July 1989) para 91.

\(^{98}\) *R (on the application of EM (Eritrea)) v Secretary of State for the Home Department* [2014] UKSC 12.
protection than the ECHR. Even if M.S.S. v Belgium and Greece also puts a considerable burden of proof on the individual where systemic deficiencies in the asylum system of a state are not widely recognized, there is still a way for an asylum-seeker to show an individual risk for refoulement. Since the member states are bound by the Charter when implementing EU law they have to interpret the ECJ case law in a way that gives the same, or stronger, human rights protection compared to the ECHR. To give the best protection available the interpretation has to be that systemic deficiencies are enough to grant protection when shown, but not necessary for each individual case.

4.6.2 The impact of the cases on the Dublin system
This part will focus on the impact the cases will have on the Dublin system and the principle of mutual recognition. I will discuss whether the system is dismantled, and if the STC concept is threatened.

According to Moreno-Lax the regime is still running, but the balance between the presumptions of the member states as STC have been changed so that the principle of mutual recognition is not as strong in the case of asylum as in other areas.99 This is because member states now are required to refrain from Dublin transfers in cases where there are systemic flaws in the asylum procedure and reception conditions in the receiving state. I agree with her findings, and even if we add N.S. v SSHD, which was not part of her analysis, to the equation, the conclusion is still that the principle of mutual recognition is current in the area of asylum, though not as strong.

Van den Sanden has an approach that differs in this area. She argues that the court’s reasoning in N.S. v SSHD is in line with previous case law when it requires systemic deficiencies for the presumption of STC to be breached. This is because restrictions on the principle of mutual recognition have to be interpreted restrictively. She still arrives at the same conclusion as Moreno-Lax; the principle of mutual trust is not entirely undermined, her interpretation just asks for systemic deficiencies to refute the presumption.100

Since the cases were decided the Dublin Regulation has been amended. Due to these cases a clause has been added in art 3(2), explicitly saying that states should not

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100 Van den Sanden, above n 93, 166-167.
transfer asylum-seekers to another member state where there is reason to believe that there are systemic deficiencies in the reception system and asylum procedure. The choice of wording suggests that the legislator agrees with Van den Sanden, and wants to keep the STC notion strong. Even if that was not the intention it will be difficult to justify another interpretation with that wording in the regulation.

There was need for clarification regarding how and when the member states should use the sovereignty clause, which makes it possible for the state to take over an asylum claim even if the state is not responsible according to the Dublin Regulation.101 The states were, for one reason or another, reluctant to take over the responsibility for the examination of asylum claims, and this amendment is likely to be interpreted as an indication to keep Dublin transfers to a minimum. The introduction of this clause does not mean that the reasoning of the Supreme Court of the United Kingdom is overruled, since the relationship between human rights law and EU law is still the same. Even if the wording in the new Dublin Regulation requires systemic deficiencies in the asylum system, the human rights set out in the Charter and ECHR are still superior to that clause.

As mentioned above under 2.3.3 I was seeking for the ECJ to differentiate between goods and people when applying the principle of mutual recognition, which the judgement also does. Due to the uncertainty N.S. v SSHD has given rise to, as well as the amendment to the Dublin Regulation, the system would benefit from a clarifying judgement from the ECJ.

Case law from regional courts like ECtHR and ECJ is important in the area of refugee law. Some questions covered in the CAES, for example subsidiary protection and the right to asylum, can be tried by the ECJ, but not by the ECtHR, since the ECHR does not include these rights. In these areas it will not be possible to interpret the future ECJ judgements in the light of ECtHR case law, and therefore it is of great importance that the ECJ delivers well thought-out and well phrased judgements for the member states to follow, otherwise many other states will continue to apply refugee law that is contrarious to international law.

4.6.3 The Dublin Regulation as an exception to non-refoulement?

I have concluded that the only acceptable interpretation of the ECJ’s judgement in N.S. v SSHD and art 3(2) of the Dublin Regulation is that systemic deficiencies are not required for a breach of the prohibition of torture and inhuman or degrading treatment or punishment. There are others who are of a different opinion. It is reasonable to assume that member states will interpret the regulation in a way that allows them to transfer people to other member states without closer examination of the receiving state’s reception conditions and asylum procedure. I will now discuss whether such an approach is consistent with the principle of non-refoulement.

Above I concluded that non-refoulement has the status of a peremptory norm in international law, meaning that states cannot set it aside by a treaty or derogate from it. Since breaches of the principle can occur without any systemic flaws in the asylum procedure in the receiving state there is a risk for refoulement when the individual situation is not properly examined. In some cases the principle will therefore be set aside, and there will be a breach of a jus cogens norm. According to art 53 of the VCLT the amendment to the Dublin Regulation is void, since it is contrary to the principle of non-refoulement.

If we do not accept that non-refoulement has acquired jus cogens status, it still is customary international law. As jus dispositivum there is no absolute prohibition from deviations from it. States can therefore conclude a specific treaty conflicting with the norm if they can motivate it. The question at hand is therefore whether the Dublin Regulation can be seen as such a treaty. The Dublin system is motivated by the need within a space without internal borders for a quick and efficient procedure that prevents the applicant from lodging multiple claims for asylum. The system poses no problem in itself, but as we have seen it has consequences for human rights protection. As has been pointed out above, the principle of non-refoulement has to be interpreted broadly, and the only exceptions even conceivable are the ones to protect public order and security. An exception based on efficiency and other practicalities can therefore not be justified, which means that the Dublin Regulation cannot pose as a permitted divergence from non-refoulement as a jus dispositivum norm either.
4.7 Summary and conclusion

In my opinion, the case law from the ECtHR and from the ECJ regarding *refoulement* in Dublin cases differs in one important aspect: the assessment of the individual situation. According to the ECtHR an individual can risk torture or other ill treatment, even if systemic deficiencies are not known in the country he is being transferred to. In contrast, the ECJ and the Dublin Regulation mentions systemic deficiencies when assessing the question of *refoulement*.

When reviewing the ECJ’s judgement the Supreme Court of the United Kingdom found that requiring systemic deficiencies to apply the prohibition of torture and ill treatment was remarkable, and interpreted *N.S. v SSHD* as not introducing such a requirement. Art 52(3) of the Charter also encourages that interpretation, since *M.S.S. v Belgium and Greece* gives better human rights protection than the Dublin Regulation, which sets the lower bar for human rights protection within the EU.

Art 3(2) of the Dublin Regulation requires member states to, under certain circumstances, take over an application for international protection from another member state. Still, the principle of mutual recognition, and thereby the STC concept, is not overruled. It is just not as strong in the area of asylum as in other areas within the EU, for example trade. Some commentators view that as a threat to the principle of mutual recognition all together and expect it to spread to other areas.102 My position is that the STC concept still is upheld to a further extent than it should in relation to the *non-refoulement* principle. We have seen that the interpretation of the sovereignty clause as a strict exception from the principle of mutual trust has resulted in violations of international law. If the STC concept would work as it is meant to, we cannot say that it, as a whole, is contrary to international law. To make it work and to avoid human rights violations it needs a stricter framework and a more human rights orientated interpretation. Because of art 52(3) of the Charter there is room to make such an interpretation of EU law. Therefore it is possible to interpret EU law in uniformity with international law.

If the ECJ were to find that the Dublin Regulation should not be interpreted that way, art 3(2) of the Dublin Regulation should still be void, due to the status of the principle as a peremptory norm in international law.

102 Van den Sanden, above n 93, 170.
5 A right to seek asylum?

5.1 Introduction

For a person to benefit from international protection, she needs to be able to lodge a claim for asylum, and have it examined by a government authority. Without the possibility to do that she will not be able to get her application processed and gain refugee status, and benefit from the protection set out in the Refugee Convention. In this chapter I will focus in the possibility to get an application processed, or, in other words, ‘the right to seek asylum’. I will use the term ‘right to seek asylum’ as a collective term for a number of rights I will discuss in this chapter. We will also see that this right does not have a clear scope, and contrary to the principle of non-refoulement it is not widely recognised as a fundamental principle in international law.

I will discuss the definition of the right and whether there is a right to seek asylum in international law. I will outline the meaning and content of the right, as it has been discussed in international law, and use case law from the ECHR and from the United Kingdom to illustrate how the right to seek asylum has been dealt with by courts.

5.2 The scope of the principle

The Refugee Convention does not mention a right to seek asylum. Nor does any other treaty, but the Universal Declaration of Human Rights (UDHR) guarantees everyone the right to seek and enjoy asylum.\(^{103}\) The right was never incorporated in a binding treaty due to disagreement among states regarding what the right should encompass. After the UDHR was adopted the discussion on the right to asylum continued, and resulted in the Declaration on Territorial Asylum,\(^{104}\) which neither resulted in a binding document. Due to state sovereignty, states have been reluctant to enter into a binding agreement that will give them an obligation to grant an alien asylum.

\(^{103}\) Universal Declaration of Human Rights, GA Res 217A (III) UN GAOR, 3\(^{rd}\) sess, 183\(^{rd}\) plen mtg, UN Doc A/810 (10 December 1948) art 14(1).

\(^{104}\) Declaration on Territorial Asylum, GA Res 2312 (XXII), UN GAOR, 22\(^{nd}\) sess, 1631\(^{st}\) plen mtg, Supp No 16, UN Doc A/6716 (14 December 1967).
More recently the right has been noted in the Vienna Declaration and Programme of Action\(^{105}\) and been stressed multiple times by the UNHCR.\(^{106}\) The EU has noted it by incorporating it in art 18 of the Charter. Since the Charter is a new instrument it is still unclear what influence it will have on the law of asylum. Art 18 of the Charter has been pointed out as a positive development for the right of asylum, and there are expectations that it will develop the area.\(^{107}\) Still, the Charter is generally a codification of rules that already existed in the European states, which suggests that art 18 was not meant to introduce anything new in the area of asylum. I will discuss the influence of the Charter in more detail below.

Despite these international provisions states do not consider there to be an independent right to enter a country to seek and be granted asylum.\(^{108}\) What is expressed in the instruments as a right to seek asylum has instead been interpreted as a procedural right to lodge a claim for asylum when present in the territory of another state or at the frontier, and due to customary international law also enjoy the protection of the principle of non-refoulement,\(^{109}\) as well as a right for a state to grant an alien asylum, vis-à-vis another state.\(^{110}\)

In light of the above, we can conclude that the ‘right to seek asylum’ has no definition in international law. Aside from being set out in general terms in the Charter, it is merely a principle set out in various non-binding documents. However, the right to seek asylum is connected to the right to leave one’s country, which is set out in many treaties, for example ICCPR art 12(2) and is also regarded as customary international law.\(^{111}\) It follows from the refugee definition that the person claiming asylum needs to leave her country. Encompassed in a right to asylum there also needs to be access to a procedure that will determine the claim.

The right to seek asylum is also connected to the principle of non-refoulement since people protected by it cannot be expelled, and therefore gain some sort of international protection. When an alien request to lodge an asylum application the principle of non-refoulement will, as I will discuss below, come into force and protect


\(^{106}\) UNHCR, above n 45, 1998 and 2003, Conclusion No 85(n) and 97(a)(iii).

\(^{107}\) Lambert, above n 21, 11.

\(^{108}\) Goodwin-Gill and McAdam, above n 47, 358.

\(^{109}\) Ibid 383-384.


\(^{111}\) Den Heijer, above n 110, 143-144.
the alien from expulsion. The two principles, *non-refoulement* and the right to seek asylum, are therefore partially overlapping, in the way that an alien can lodge a claim based on the fact that she cannot be returned to her country of origin due to the risk of *refoulement*. As we have seen above, *non-refoulement* has a wider scope, and the principles are not identical.

Below, I will discuss these three components of the right to seek asylum: the *non-refoulement* principle, the right to leave one’s country and access to the asylum procedure.

### 5.3 Non-refoulement and the right to asylum

#### 5.3.1 The issue of jurisdiction

Above I concluded that *non-refoulement* has the status of a peremptory norm in international law and protects not only refugees, but all people. In the context of the right to asylum it is debated when the principle of *non-refoulement* becomes applicable. There are four possible times it may occur: when the person seeking refuge is within the territory of the state, at the frontier, on the high seas, or before they leave their country of origin.

The *refoulement* prohibition in art 33(1) of the Refugee Convention states that ‘no contracting state shall expel or return ("refouler") a refugee in any manner whatsoever’. This has, with reference to the ordinary meaning of the word, art 31(1) of the VCLT, been interpreted as applicable only when the asylum seeker is present within the territory of the state, however, with a more holistic approach, taking human rights treaties into account, as well as the object and purpose, it can be interpreted much more broadly. 112 ECHR, art 1, and ICCPR, art 2(1), apply to all people within the jurisdiction of the state concerned. Their application is therefore not limited by the territorial scope, but by whether the asylum-seeker can be considered to be under the jurisdiction of the state. Under the jurisdiction is, according to HRC someone under power and control of the state, regardless of whether present in their territory or not. 113

According to the ECtHR jurisdiction is primarily to be understood in territorial terms, but allows for extraterritorial jurisdiction in exceptional cases.\textsuperscript{114} The court developed this reasoning further in \textit{Hirsi Jamaa and others v Italy}\textsuperscript{115} where it found that interception on international waters was within the state’s jurisdiction because the government representatives conducting the rescue operation had ‘full and exclusive control’ over the asylum-seekers when they boarded the vessel with the state’s flag. By not looking at each applicant’s individual claim the state breached art 3 of the ECHR as well as the prohibition of collective expulsion.\textsuperscript{116} What the state should have done was to give each and everyone the opportunity to present their reasons for needing protection, and examined them individually.

The case was decided with reference to \textit{non-refoulement} and the prohibition from collective expulsion, and not the right to seek asylum, since there is no right to seek asylum set out in the ECHR or in any of its protocols. Still the ECtHR obliged the state to examine each individual application for international protection from people that where within their jurisdiction. From this we can conclude that the principle of \textit{non-refoulement} is closely connected to the right to asylum.

When an asylum-seeker presents herself at the border, the question whether she gets to enter the country is up to that state to decide, and therefore she is under control of that state. Therefore the principle of \textit{non-refoulement}, as it is expressed in ICCPR and ECHR, is applicable in a border situation. With a holistic interpretation of the Refugee Convention, its prohibition of \textit{non-refoulement} is also applicable. This is also the approach set out in the Dublin Regulation art 3(1) and in the Asylum Procedures Directive art 3(1). In other situations, such as on the high seas, the circumstances in each individual case will determine if the state has jurisdiction, and thereby the applicability of the principle.

\begin{footnotesize}
\begin{enumerate}
  \item \textsuperscript{114} \textit{Bankovic and others v Belgium and others} (Application no 52207/99, ECtHR, 12 December 2001) para. 61.
  \item \textsuperscript{115} \textit{Hirsi Jamaa and others v Italy} (Application no 27765/09, ECtHR, 26 May 2009) para. 77.
\end{enumerate}
\end{footnotesize}
issue in the Roma Rights case in 2004.\textsuperscript{117} The UK had positioned immigration officers at Prague airport to combat the high number of Roma asylum-seekers arriving in the UK and they prevented a group of Roma people from travelling to the UK.

The House of Lords found that even though the procedure constituted unlawful discrimination, there had been no breach of the principle of non-refoulement. Art 33(1) of the Refugee Convention was not applicable when the government representatives were operating within the territory of another country, due to the wording ‘expel or return’. The court did not think that the customary rule of non-refoulement justified another outcome since its applicability also is dependent on someone actually leaving his country of origin. The case has received criticism for not interpreting the Refugee Convention in a way that provides people, especially ethnic minorities, the opportunity to claim asylum.\textsuperscript{118} Without access to the asylum procedure the whole system for international protection is undermined.

The UNHCR has given its own interpretation of the extraterritorial interpretation of the non-refoulement principle. It found, contrary to the House of Lords, that the ordinary meaning of the words in art 33(1) of the Refugee Convention did not limit the application to conduct within the territory of the state.\textsuperscript{119} Taking into account the humanitarian object and purpose of the Refugee Convention and the interest of consistency with international human rights treaties, UNHCR finds that the applicability of non-refoulement is not limited to the territory of a state, but applies when a state exercises effective jurisdiction.\textsuperscript{120}

5.3.3 Summary

Within the EU the principle of non-refoulement is applicable within the territory of the state where asylum is claimed, at the frontier, according to international law and the CEAS, and at the high seas if the state exercises jurisdiction as set out by ECtHR. In circumstances as in the Roma Rights case, the legal position is unclear. According to the UNCHR’s reasoning the principle is applicable if the state exercises jurisdiction, but

\textsuperscript{117} R (European Roma Rights Centre) v Immigration Officer at Prague Airport [2004] UKHL 55 [Roma Rights case].

\textsuperscript{118} See for example Atak and Crépeau, above n 42, 241 and Den Heijer, above n 110, 130.


\textsuperscript{120} Ibid para. 43.
that reasoning raises questions regarding when and how a state can have jurisdiction within the territory of another state.\textsuperscript{121}

Further, we can conclude that the principle of \textit{non-refoulement} is connected to the right to seek asylum because its applicability will determine if someone is given the chance to apply for asylum at all. The two principles still remain divided, and protection against \textit{refoulement} is not the same as being granted asylum, because asylum is supposed to protect from all persecution whereas \textit{non-refoulement} only protects from the most serious human rights violations. As we have seen above, the principle of \textit{non-refoulement} is applicable in situations that do not involve the right to seek asylum as well. \textit{Non-refoulement} is a broad principle that plays an important part in many different aspects of refugee law, and one of them is the right to seek asylum.

\textbf{5.4 The right to leave one’s country}

The right to leave any country, including one’s own, is connected to the right to seek asylum since it means having a right to flee from persecution.\textsuperscript{122} The right is not absolute, and does not entail a right to enter another country.\textsuperscript{123} In the \textit{Roma Rights} case the House of Lords found that strict visa requirements are not a violation of the right, and therefore the pre-frontier control was not illegal either.\textsuperscript{124} It can be argued that such restrictions, applied already in the country of origin, interfere with the right to leave.\textsuperscript{125} It is clear that a country not allowing its nationals to leave to claim asylum in another state, are breaching this provision. Also in this aspect, the \textit{Roma Rights} case diminishes the significance of the Refugee Convention by preventing it from ever becoming applicable in the first place.

Aside from the screening procedure used by the UK in the \textit{Roma Rights} case, the right to leave is not a practical problem within the EU. I will therefore not discuss it further.

\begin{flushright}
\textsuperscript{121} Gammeltoft-Hansen, above n 112, 233.
\textsuperscript{122} Den Heijer, above n 110, 143.
\textsuperscript{123} Ibid 149.
\textsuperscript{124} Roma Rights case, above n 117, para. 28.
\textsuperscript{125} Den Heijer, above n 110, 164.
\end{flushright}
5.5 Discrimination and access to asylum

According to art 3 of the Refugee Convention the convention should be applied without discrimination as to race, religion and country of origin. Art 14 of the ECHR also prohibits discrimination on the ground of national origin in combination with a right set out in the convention. Art 21 of the Charter also prohibits discrimination on the grounds of, among others nationality and ethnicity, and art 18 of the TFEU prohibits all discrimination based on nationality. Equality of all people is also a general principle fundamental in all human rights law, see art 1 of the UDHR.

In the Roma Rights case only ethnic Romas were prevented from travelling to the UK. The court found it to be a breach of domestic anti-discrimination legislation, but not of art 3 of the Refugee Convention, since it was considered to be dependent on the application of art 33, the principle of non-refoulement. With the interpretation advised by the UNHCR, which found that the Refugee Convention is applicable outside the territory of the state, the conclusion would probably have been the opposite. This is because the House of Lords found that the measure was discriminatory under UK law, and logically it would have been discrimination under the Refugee Convention as well to subject only one ethnic group to pre-frontier screening.

5.6 Interpreting treaties in good faith

Above I have used the Roma Rights case to illustrate how the components of the right to seek asylum are interpreted. The House of Lords ultimately did not find a breach of the Refugee Convention. The court’s interpretation of the convention has been questioned, and the UNHCR suggests a different interpretation, that probably would have led to another outcome.

In my opinion, the House of Lords’ interpretation has support in the wording of the Refugee Convention, since the applicants had not left their country of origin and could therefore not be refugees. Still, the UK has ratified the Refugee Convention, but in the judgement the purpose of the convention, to protect people from persecution, is lost. As I mentioned above under 3.4.4, human rights treaties have to be interpreted in light of the object and purpose, and not only by the wording. In my opinion, the House of Lords did not interpret the treaty in good faith when it failed to take the object and
purpose into account. UNHCR put the same concerns forward when intervening in the case.\textsuperscript{126}

In \textit{Golder v UK} the ECtHR concluded that the right to a fair trial in art 6 of the ECHR also included an implied right to access to court, since without that the right would be ineffective.\textsuperscript{127} As I mentioned above the right to seek asylum has been interpreted as including a right to access the asylum procedure. The reasoning in the \textit{Golder v UK} could be applied to the right to asylum, and point to the conclusion that there is an implied right to have one’s applications examined under the Refugee Convention, since the convention otherwise would be ineffective.

5.7 Conclusion

Even though it is expressed in the UDHR, the most fundamental of all human rights instruments, there is no independent enforceable right for an individual to seek asylum. An individual in need of international protection instead has to rely on other rights that together create a framework for something that can be called ‘the right to seek asylum’.

The non-refoulement principle can be used by an individual when present at the territory or at the border of the receiving state, and possibly also on international waters. Towards the country of origin the person can invoke the right to leave. If the person is prohibited from accessing the asylum procedure she might be able to argue discrimination in accordance with art 3 of the Refugee Convention, as well as interpretation of the Refugee Convention in good faith. As far as I know, this is yet to be tried in court.

\begin{flushright}
\textsuperscript{126} UNHCR, \textit{UNHCR intervention before the House of Lords in the case of European Roma Rights Centre and Others v. Immigration Officer at Prague Airport, Secretary of State for the Home Department} (28 September 2004) 4.

\textsuperscript{127} \textit{Golder v United Kingdom} (Application no 4451/10, ECtHR, 21 February 1975) paras. 35-36.
\end{flushright}
6 The common European asylum system and the right to seek asylum

6.1 Introduction

The EU guards its external borders very strictly. As we saw in *Hirsi Jamaa and others v Italy* this has led to people being intercepted at sea and classed as ‘illegal immigrants’ and not being able to lodge asylum claims. The strict visa requirements for some nationalities also lead to a great practical difficulty for people wanting to seek asylum, since it forces them to travel to Europe illegally, subjecting themselves to great risks. These problems might constitute breaches of the right to seek asylum. These are just some of the problems in relation to the right to seek asylum in Europe. The limitation on the right to seek asylum I will discuss in this chapter is the one imposed on EU citizens by the SCO concept.

The CEAS is built upon the SCO notion, meaning that all European countries are safe, and can therefore not produce any refugees. We see this in art 1 of the Qualification Directive, stating that third country nationals and stateless people can apply for international protection in the EU. The other regulations and directives are built upon the same notion.

All nationals of a EU member state are citizens of the EU, art 9 TEU. If a EU citizen seeks international protection in another member state, the application will be dealt with under *Protocol No 24 on asylum for nationals of Member States of the European Union* (the Spanish Protocol). Its preamble points to the fact that all member states protect human rights and respect the Refugee Convention, and that citizens of the EU have free movement within the territories of the member state. The sole article sets out the scenarios where an application of international protection can be taken into consideration or declared admissible. The scenarios are: if the member state of which the applicant is a national has derogated from the ECHR, or if it had been found that the member state of which the applicant is a national has breached the values set out in art 2 of the TEU, an application can, but does not have to, be declared admissible. Neither of those scenarios has occurred.

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129 Duriuex, ‘The vanishing refugee: how EU asylum law blurs the specificity of refugee protection’ in Lambert, McAdam and Fullerton (eds), above n 21, 225, 245.
An application can also be taken into consideration if a state decides so, but then it must immediately inform the European Council and deal with the application on the basis that it is manifestly unfounded. This does not necessarily mean that the decision on the asylum claim will be negative, but it will be harder for the applicant to show that she is in need of international protection, something that is already difficult for asylum-seekers.\footnote{UNHCR, above n 6, para. 196.}

The member states can decide that countries outside the EU also are considered safe if there are generally no persecution, no torture or other ill-treatment and no threat of indiscriminate violence due to armed conflict, and that the state complies with ECHR, ICCPR or CAT, respect the principle of non-refoulement and have effective remedies against human rights violations.\footnote{Asylum Procedures Directive, above n 27, Annex I.} This definition is rather strict, since it does not only take non-refoulement into account, as it does with STC, but also respect for human rights in general. In general those criteria would mean that nationals of that country are not in need on international protection, but it fails to take the situation of the individual into account, as well as the fact that the situation in a country can change rapidly. There is not always updated information on all countries, and therefore especially early arrivals will be treated unfavourably. Still, if the country in practice turns out to be safe for the particular individual, there has been no breach of international law.

The SCO notion is a relatively new concept in refugee law. It stems from Europe, but other countries have taken after it. When it had started being used recurrently, it was pointed out that it resulted in refoulement, and that an absolute bar for some nationalities to claim asylum violates the Refugee Convention.\footnote{Byrne and Shacknove, above n 85, 215 and Noll, above n 43, 537.}

A worrying factor is that SCO has become a more politicized concept.\footnote{Atak and Crépeau above n 42, 244.} Determining that another member state, or any other state, does not provide effective protection for its nationals is a sensitive decision to make. Therefore states will have an incentive to regard countries, with which they wish to have friendly relations, as ‘safe’. Which countries are considered safe will therefore not necessarily correspond with the human rights protection available.
6.2 The Roma example

6.2.1 Claiming asylum

In this part I will use Romas as an example, when discussing the implications of EU law on the right to seek asylum. The Roma ethnic group is a vulnerable minority group and the numbers of European Roma asylum-seekers outside Europe have been rather high.\textsuperscript{134}

Let us imagine a Roma family, victim of forced eviction and racial harassment and violence in their country of origin in southern Europe,\textsuperscript{135} fleeing to a northern European country, hoping to get asylum. Upon arrival, their application will not be dealt with under the CEAS, since they are not third country nationals or stateless. Instead, the Spanish Protocol will be applied when examining their claim. Due to the human rights violations towards Romas, the family’s country of origin does not seem to meet the requirements for being considered a SCO as set out in the Asylum Procedures Directive. However, since the country concerned is a member state, the requirements do not apply. This means that the receiving state probably will not accept their application, since there is a presumption against it. In the unlikely event that it does, the claim will be considered manifestly unfounded, meaning that the family face a stricter level of proof than asylum seekers from countries that are not considered safe.

6.2.2 Non-refoulement and the right to leave

The members of the Roma family therefore find themselves in a situation where they have to put their faith into the hands of the good will of the receiving state. If the claim is not examined at all the risk for refoulement is substantial. Above I have concluded that non-refoulement is a \textit{jus cogens} norm. This means that when the Spanish Protocol results in deportation of the family because a claim for asylum is accepted, or not examined properly, there is a breach of a higher norm, if the treatment they receive back in their country of origin is torture or inhuman or degrading treatment or punishment. Forcing a family, especially with children, to live on the streets might very well constitute such treatment. It follows from the reasoning above that EU law does not

\textsuperscript{134}MacKlin, ’A safe country to emulate? Canada and the Europen refugee’ in Lambert, McAdam and Fullerton (eds), above n 21, 99, 101.

\textsuperscript{135}Not an unlikely scenario, see Amnesty International, "We ask for justice": Europe’s failure to protect Roma from Racist Violence (8 April 2014).
have a special standing in relation to non-refoulement and a member state following the procedure set out in the Spanish Protocol has no excuse for its breach of the principle.

Not being able to lodge an application might result in human rights violations not constituting refoulement, but persecution. This is because treatment constituting persecution does not have to be as serious human rights violation as torture or inhuman or degrading treatment or punishment. There is no breach of non-refoulement in that case. The applicants then have to rely on the other components of the rights to seek asylum. In this scenario there is no breach of the right to leave one’s country.

6.2.3 Discrimination and geographic limitations

The Roma family is not prohibited from applying for asylum due to their ethnicity, but because they are citizens of the EU, which is dependent on national citizenship. Therefore they receive a less favourable treatment because of their nationality.

Art 14 of the ECHR has to be combined with another right set out in the convention, and there is no other right relevant to this scenario other than art 3, the principle of non-refoulement. Therefore the ECHR is not applicable when it comes to assessing the right to asylum outside the scope of non-refoulement.

The discrimination prohibition in the Refugee Convention is applicable only on refugees. In the Roma Rights case, the House of Lords found that the discrimination clause in the Refugee Convention was not applicable, because its application was dependent on the application of the convention as a whole.136 In this scenario, the applicants have left their country and are therefore possibly refugees, in accordance with the definition in art 1A(2) of the Refugee Convention. They do not have refugee status, but it does not mean that they are not in fact refugees. Refugee status is only a declaration, but someone is a refugee if she fits the definition, regardless of whether the application has been processed. Not accepting applications from certain nationalities might therefore be a breach of art 3.

Not all kinds of differential treatment constitute discrimination. If there is a legitimate aim and the means to meet it are necessary and proportional, it is not considered discrimination.137 The purpose of the Spanish Protocol is, according to the preamble, to prevent people not in need of asylum to use it. I consider this to be a legitimate aim. Is it then necessary to refuse people from some countries to lodge an

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136 Roma Rights case, above n 117, para 43.
137 Noll, above n 43, 540-541.
asylum claim, or to consider it manifestly unfounded if accepted? According to Noll it is, since there is no other way to reach the aim of the Spanish Protocol without intruding on procedural safeguards of asylum-seekers.138 I do not agree. There are certain procedures set out in international law designed to determine refugee status according to the Refugee Convention.139 If a state follows them, there should be no need for special rules concerning some nationalities to prevent the abuse of asylum claims. In evaluating the proportionality aspect, Noll finds that the means are not proportionate to the aim, since a significant burden of proof is put on the applicant, and the number of asylum claims from EU citizens is relatively low.140 I agree with Noll in this part. The conclusion is that it constitutes discrimination and that the Spanish Protocol is incompatible with the Refugee Convention.

The 1967 Protocol to the Refugee Convention was introduced to eliminate the time- and geographical limitations that were set out in the convention, since it from the beginning was meant to deal with the refugee problems in Europe after the Second World War. It is therefore ironic that the Spanish Protocol has introduced rules that serve as geographic limitations that practically exclude Europe form the scope of the Refugee Convention. Art 1(3) of the 1967 protocol prohibits such limitations, leading to the conclusion that the Spanish Protocol is incompatible with international refugee law in that aspect as well.

The discrimination prohibition set out in EU law generally refers to discrimination between nationalities within EU. The ECJ has expressed in an obiter dictum that an interpretation of a directive giving third country nationals more favourable conditions than EU citizens would be ‘paradoxical’.141 However, it is difficult to interpret the Spanish protocol in way that does not result in a better treatment of third country nationals.

6.2.4 What about free movement?
There is one important aspect of EU law that we have to consider: the free movement of EU citizens, set out in arts 20-21 of TFEU. Since the Roma family enjoys the right as EU citizens to move freely within the territories of the member states, do they really

138 Ibid 541.
139 Mainly UNHCR, above n 6.
140 Noll, above n 43, 541-546.
need the possibility to claim asylum? The question can be answered by looking at the Free Movement Directive.\textsuperscript{142} According to art 6 of the directive, the family has the right to stay for three months, but after that period someone in the family is required to work, have sufficient resources to provide for the family or be a student to have the right to stay, see art 7(1) of the directive.

Even though this of course is a possibility for the family, and there are special rules for children and their caregivers,\textsuperscript{143} this set of rules is not equivalent to the rights of refugees. Refugees are not required to be able to support themselves and their families, instead their right to stay is entirely based upon the need for protection. The Free Movement Directive sets minimum standards, and the member state might therefore provide more generous requirements. If such more generous rules give EU citizens the same, or better, rights compared refugees, the effect will be accommodated. If not, free movement cannot be used to justify the lack of access to international protection, resulting in a limitation on the access to the asylum procedure based on nationality.

6.2.5 How to interpret the Spanish Protocol

Under normal circumstances, when the asylum-seeker has the burden of proof, but can be given the benefit of the doubt, the experiences of the Roma family would probably be considered persecution on ground of ethnicity, and therefore result in refugee status.\textsuperscript{144} When applying the Spanish Protocol, the family is lucky if they can even lodge an application in another member state, and if they can they will have to provide even more evidence than other asylum-seekers, which will probably lead to a negative decision in the end.

In relation to the principle of non-refoulement we have seen that the ECtHR requires states to examine the risk of refoulement for each individual within its jurisdiction if there is an arguable claim that a deportation would breach art 3 of the ECHR. The same reasoning can be applied to EU citizens, if they have an arguable claim. The Spanish Protocol can therefore be a breach of the ECHR. We have also seen

\begin{flushleft}
\textsuperscript{142} Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States \cite[OJ L 158/77.]
\textsuperscript{143} Ruiz Zambrano v ONEM \cite[C-34/09] \cite[ECR I-1177.]
\textsuperscript{144} UNHCR, \textit{above n 6}, paras. 54-55.
\end{flushleft}
that not giving EU citizens access to the asylum procedure is discriminatory and breaches the prohibition of geographical limitations.

The question I will address in this part is whether the Spanish Protocol can be interpreted in a way consistent with international law, or if it constitutes a breach of the Refugee Convention and the ECHR.

Above I mentioned that it is uncertain what the right to asylum in art 18 of the Charter means. The fact that it refers to the Refugee Convention, which does not hold an independent right to seek asylum, speaks to the conclusion that it was not meant to introduce a new right. Also the fact that many European states mention a ‘right to asylum’ in their constitutions, without guaranteeing an independent right, points to that conclusion, since constitutional traditions common to the member states are a source for EU human rights law. In the Charter the principle of non-refoulement and the right to leave one’s country are set out in articles separate to the right to seek asylum. As discussed above, these are important components in the right to seek asylum. The fact that the right to seek asylum is set out independent from these rights suggests that there was an intention to introduce a new right to EU law. If the right to seek asylum is interpreted as a new independent right, it can be read in light of art 21 of the Charter, which prohibits discrimination on the ground of nationality and applies to all people, and argue that the Spanish Protocol violates the right to seek asylum due to its discriminatory provisions.

There is no case law from the ECJ, or any domestic court as far as I know, where art 18 of the Charter is interpreted, and scholars are not in agreement on its meaning. In light of that, I am not prepared to interpret art 18 of the Charter broadly and say that it invalidates the Spanish Protocol.

6.3 Summary and conclusion

Even though it is expressed in a number of international instruments, the right to seek asylum is not recognised as an independent human right in international law. Instead I have treated the right to seek asylum as a collective term for the right to leave one’s country, the non-refoulement principle and the right to access the asylum procedure

145 Arts 19(2) and 45.
146 Ippolito and Vellutti, ’The relationship between the CJEU and the ECtHR: the case of asylum’ in Dzehtsiarou, Konstadinides, Lock and O’Meara (eds), Human Rights Law in Europe (Routledge, 2014) 156, 159-160.
without discrimination. When analysing the rules concerning EU citizens claiming asylum in another member state, set out in the Spanish Protocol, we can see that there is a risk for breaches of the right to seek asylum, as well as the prohibition of geographic limitations. There is nothing justifying these breaches, since *non-refoulement* is a peremptory norm in international law, and the Refugee Convention prohibits discrimination. However, the prohibition of discrimination in EU law might not forbid less favourable treatment of EU citizens compared to third country nationals.

The right to seek asylum as expressed in the Charter suggests that a new principle is emerging. Due to the lack of case law and other clarifications, it is impossible to draw far-reaching conclusions regarding what the right will come to encompass. There is, however, room for the ECJ to interpret art 18 of the Charter in a way that will protect human rights better for asylum-seekers that happen to be EU citizens.
7 Impact on domestic law

7.1 Introduction

We have seen that there are discrepancies between international refugee law and EU law. When it comes to the Dublin Regulation in relation to the principle of non-refoulement I concluded that there is formal coherence between the two sets of rules, but the interpretation favoured in case law results in human rights violations.

When it comes to the right to seek asylum the wording of the Spanish Protocol prevents even a human rights based interpretation to conform EU law to international law. The member states are obliged to follow both, which leads to the conclusion that they will inevitably breach either the Spanish Protocol, or the Refugee Convention.

In this chapter I will discuss how a domestic court should deal with the problem presented when an applicant facing a Dublin transfer is risking refoulement, and when a national from another member state claims asylum. To illustrate the first point I will use a case from Sweden, which really puts the principle of non-refoulement in relation to the Dublin regulation to the test. When assessing the right to seek asylum I will continue to use Sweden as an example, for the sake of simplicity.

7.2 Sweden, non-refoulement and the Dublin Regulation

7.2.1 The relationship between domestic law, EU law and international law

There are two different approaches states can have in relation to international law: monism and dualism. In monism, national and international law are one and the same legal order. In case of conflict between the two, international law prevails. In dualism, national and international are considered two different systems of law. That means international law is not applicable in national courts if it is not incorporated in national law.147

Sweden follows the dualist tradition. This means that treaties cannot be directly applied in court if they are not incorporated into national legislation. The Refugee Convention as a whole is not incorporated into Swedish law, but the ECHR is.148

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147 Abass, above n 56,160-161.
Despite its status as law, the ECHR is not frequently mentioned in judgements from Swedish migration courts.\textsuperscript{149}

As I mentioned earlier, EU law is not international law in that sense, and follows its own principle of primacy over national law.\textsuperscript{150} Directives are implemented in national law and are therefore directly applicable in national courts, and regulations are directly applicable, relying only on the principle of primacy. EU law is therefore interpreted loyally by Swedish court.

Treaties that are not incorporated in the domestic legal system are not without importance to domestic courts. Courts should interpret national legislation in light of a treaty relevant to that area of law (födragskonform tolkning), meaning that the Refugee Convention should influence the Swedish refugee legislation. The domestic legislation is, however, primary to the treaty, and therefore the treaty cannot lead to a conclusion contrary to the domestic legislation.\textsuperscript{151} Soft law from the UNHCR is not binding in Swedish law, but the Migration Court of Appeal has referred to the Handbook and the conclusions from the executive committee as important sources of law when determining questions relating to refugee status.\textsuperscript{152}

7.2.2 Case law

In Sweden, the authority responsible for determining asylum claims is the Migration Board. A negative decision from the Migration Board can be appealed to the Migration Court. To appeal the judgement from the Migration Court to the Migration Court of Appeal, the latter needs to leave grant for appeal. A decision regarding asylum from the Migration Court of Appeal cannot be appealed to the Supreme Administrative Court.\textsuperscript{153}

An example of indirect refoulement based on the Dublin Regulation is found in a case from the Swedish Migration Court from 2014.\textsuperscript{154} A woman from Eritrea had claimed asylum in Norway and received a negative decision. She went to Sweden and claimed asylum again. The Swedish Migration Board decided to transfer her to Norway,
which meant she would be deported to Eritrea. Recently before that, the Swedish Migration Board had stopped all involuntary deportations to Eritrea, due to the risk of torture and other ill treatment there.\textsuperscript{155} In light of that decision, we can safely say that the Migration Board as a general rule considered a transfer to Eritrea to be contrary to the principle of \textit{non-refoulement}. Since indirect \textit{refoulement} is prohibited, a transfer to Norway also results in the Swedish authorities violating her rights.

The applicant appealed the Migrations Board’s decision to the Migration Court. The court’s motivation in the appeal was that the applicant had failed to show that there were systematic deficiencies in the Norwegian asylum procedure or reception. The burden of proof for such deficiencies rests on the applicant, according to Swedish case law.\textsuperscript{156} In other words: Norway is a safe third country, where there are no violations of \textit{non-refoulement}, and a deportation order to a country where she most likely will be subject to torture is not enough evidence to the contrary. The Migration Court of Appeal did not grant appeal in the case.

In light of the jurisprudence from ECtHR, I think this case was wrongly determined. The applicant in the Swedish case was not going to get a second hearing in Norway. As we saw in \textit{T.I. v UK} that was an important factor in protecting the applicant from a violation of art 3 of the ECHR. The Migration Court neither upheld the burden of proof set out in \textit{M.S.S. v Belgium and Greece}, since they did not evaluate her individual situation based on the evidence presented in her specific case. I believe that if the court had adopted the reasoning of the ECtHR, the applicant might have been able to climb over the Dublin wall, given that she had a negative decision from Norway as evidence. Therefore I can conclude that Sweden in this particular case is responsible for a breach of the prohibition against torture and inhuman or degrading treatment or punishment.

In its reasoning the Migration Court used the wording \textit{systembrister beträffande asylförfarandet och mottagningsvillkoren}, meaning ‘systemic flaws in the asylum procedure and reception conditions’ to motivate why there was nothing stopping a transfer to Norway. By using this wording, it seems as if the court applied a literal interpretation to the Dublin Regulation, and failed to take the ECHR into account at all, even if both international law and EU law requires it to do so. The court also failed to

\textsuperscript{155} Beijer, ‘Rättsligt ställningstagande angående prövningen av skyddsskäl mot Eritrea’ (Rättsligt ställningstagande No RCI 16/2013, Migrationsverket [The Migration Board], 5 December 2013) 18-19.
\textsuperscript{156} Migrationsöverdomstolen [The Migration Court of Appeal] UM1412-13, reported in MIG 2013:23, 9 December 2013.
follow the policy of the individual determination set out in the Handbook, and the fundamentality of non-refoulement set out in UNHCR’s conclusions. Beyond this, it failed to follow the guidelines from the Migration Board regarding involuntary transfers to Eritrea.

The use of international sources in this case represents the use of EU law, unaccompanied by case law from the ECHR, in Swedish courts well. The court’s indifference towards international sources in this case resulted in indirect refoulement. The court could have determined the case on basis of ECHR, but failed to take art 3 into account. It was also bound by EU law to interpret the Charter, and thereby the ECHR. There was also case law, though not legally binding precedence, supporting interpretation of UNHCR materials. There I see no legal obstacle preventing the court from coming to an accurate conclusion.

The lesson to be learned for national courts and other authorities concerned with questions relating to refugee law, such as the Swedish Migration Board, is to carefully evaluate the consequences of a Dublin transfer for the individual in each case, based on the evidence presented before it. Then the court has to look at all relevant law, both national and international, that is available to it. In the case of Sweden, that means looking at the ECHR, the Charter and domestic legislation in light of the Refugee Convention and soft law from UNHCR.

7.3 Letting EU citizens claim asylum?

The member state finding itself in the situation of having asylum seekers from another member state can, in accordance with the Spanish Protocol, choose to examine the claim. The state then needs to inform the European Council, and treat the application as manifestly unfounded. Above I concluded that treating the claim as such might result in refoulement and constitutes discrimination under the Refugee Convention. The question I will address in this part is how the Swedish courts should treat the discrepancy.

Unlike the case from the Swedish Migration Court described above, this scenario does not entail a formal coherence between international law and EU law. The discrimination provision and geographic limitations in EU law seem to be conscious deviations from the Refugee Convention. This is because they perceive Europe as safe for everyone, a place not able to produce any refugees. Due to the relationship between EU law and domestic law and international law, Swedish courts will follow EU law.
The dualist tradition, and reluctance to reference international law also suggests that the courts will not follow the Refugee Convention.

Even though one could argue that Swedish courts should take international law into account to a larger extent than they do, it is harder to argue that they should apply international law instead of EU law. This is because EU law is primary to national law, and that dualist states only apply international law when it is not contrary to national law. Even though the principle of non-refoulement is a jus cogens norm, and can be found in Swedish legislation as well,\textsuperscript{157} the court will not deviate from the general principle of primacy and the dualist tradition.

The choice the state has is whether it should accept the application at all. With a good faith interpretation of the Refugee Convention, discussed above under 5.6, the state should always accept an asylum claim. Since they have to treat the application as manifestly unfounded, the court should ask the ECJ for a preliminary ruling to sort out the discrepancy with international law and the Charter. The questions for the ECJ should concern whether the Spanish Protocol is contrary to the Charter and the principle of non-discrimination on the ground of nationality, and if the court considers the discrepancy with the Refugee Convention to be in line with art 18 of the Charter. The ECJ will not give a ruling on how the Refugee Convention should be interpreted, since that is not its jurisdiction, but it can take it into account by reading EU law in light of it.\textsuperscript{158}

If the Spanish Protocol would be followed, the applicant could turn to the ECtHR. If the court concludes that there is a real risk for refoulement in the other member state, it should, in line with previous case law, not make exceptions for EU law. Such a judgement might trigger the ECJ to a different approach, just as we have seen in \textit{N.S. v SSHD}.

\textbf{7.4 Summary and conclusion}

The varying interpretations of the non-refoulement principle in different international courts create a problem for domestic courts. In Sweden, the dualist tradition aggravates the problem, because it leads to reluctance towards considering international sources of law. On the contrary, EU law, due to its direct effect and primacy over national law, is

\textsuperscript{157} Aliens Act, above n 153, Ch 12 s 1.  
\textsuperscript{158} Oberlandesgericht Bamberg v Mohammad Ferooz Qurbani (C-481/13) ECJ (17 July 2014).
interpreted frequently. The more generous protection in international law, compared to EU law becomes redundant when national courts do not give it any consideration in the individual case. We have seen this effect in relation to the Dublin Regulation and the principle of *non-refoulement* in Swedish courts. Whilst analysing the Spanish Protocol in relation to international law it becomes apparent that the same problem exists in relation to the right to seek asylum as well.

The asylum-seeker will therefore struggle to get her case tried with respect for human rights. Above I suggested the court ask for a preliminary ruling from the ECJ. Even though this is the best option, it is not a satisfactory solution. We have seen that the ECJ does not always produce well thought out judgements that protect human rights in accordance with the Charter and the ECHR. Therefore the individual would benefit more from a domestic system that takes international law into account as well. For example in cases from the UK we can see that courts interpret international treaties. International customary law is also considered a part of the common law, which is directly applicable in courts.

The Migration Board and the migration courts should therefore use the ECHR and the Charter and UNHCR sources that are available to them, to ensure a high standard on human rights protection in every individual case. The human rights protection in general, and the protection for refugees in particular, would also benefit from incorporation of treaties, such as the Refugee Convention, into national law. This would accommodate the unfortunate effect of the dualist tradition.
8 Concluding remarks

In this thesis I have discussed the conformity between EU refugee law and international refugee law. The EU claims the asylum system meets the standards of the Refugee Convention and human rights treaties, but when analysing the non-refoulement principle and the right to seek asylum, it becomes apparent that conformity is a theoretical rather than practical reality.

According to the Dublin Regulation EU member states have to transfer asylum-seekers to the first European country they arrive in, since that state is responsible for the asylum application. There is an exception from such transfers when there are systemic deficiencies in the asylum procedure or the reception conditions in the receiving member state. A member states also has the right to try all asylum applications lodged in their territory. The member states are, however, reluctant to do so. According to international law, mainly derived from the UNHCR and the ECtHR, the examination of an asylum claim has to be based on individual circumstances. This approach gives a better protection for the asylum-seekers than EU law since the ‘systemic deficiencies’ approach does not take into account that some people are more vulnerable than others and other individual aggravating circumstances. Consequently, the Dublin Regulation breaches the non-refoulement principle, which is a peremptory norm in international law.

When the Dublin Regulation is applied there is not necessarily a breach of international law in every individual case. Many asylum-seekers will have an accurate examination of their claims and have acceptable reception conditions in the member state they are transferred to. Those cases do not make up for the cases where people are sent back to their country of origin to be tortured, and sent to member states where they will not get a fair decision and live under horrendous conditions. The Dublin Regulation leads to different results, depending on the country and the individual asylum-seeker’s situation.

Despite the critique expressed in this thesis I do not reject the basic idea of the Dublin Regulation. The Dublin system is not a bad idea if the member states had more or less the same asylum procedure and the reception conditions lived up to the standards set in international refugee law and human rights law, and they still assessed the individual risk of breaches of non-refoulement prior to a transfer. It is obvious that this
is not a reality in the EU today, seeing as states breach their obligations under the directives mentioned under 2.3.1. Instead of introducing the Dublin Regulation in 1997, they should have waited until the asylum procedure and reception conditions were uniform and at the level required by international law.

Despite these concerns, the Dublin Regulation is in force today, and therefore I have recommended a way for domestic courts to avoid breaching EU law and international law. The courts should, in accordance with art 52(3) of the Charter, look at ECtHR case law as the lowest acceptable human rights standard. By doing so they will find that art 3(2) of the Dublin Regulation and the ECJ’s case law puts an unreasonable burden of proof on the applicant. The domestic courts should also use UNHCR materials to interpret the Refugee Convention. Taken together, these approaches will give the domestic courts a better chance to protect the human rights of the individual asylum-seeker.

In the area of the right to seek asylum for EU citizens the problem seems to, for the time being, be more theoretical than practical. There are persecuted minority groups in Europe in which individuals might be in need of international protection, but the number of them seeking international protection within Europe is low.159 The right enjoyed by EU citizens to move freely in the territories of the member states might be the reason for those numbers, even though that right cannot substitute international protection.

In the event that people from vulnerable groups would claim their right to international protection, or in case of drastic changes of the human rights situation in a member state, a practical problem would present itself. The right to seek asylum is not an independent right, but is made up of the right to leave one’s country, the principle of non-refoulment and the prohibition of discrimination. When EU citizens are refused access to the asylum procedure or their asylum application is treated as manifestly unfounded they are discriminated against in a way prohibited in art 3 of the Refugee Convention, and possibly in EU law as well. There is also a risk for breaches of the non-refoulment principle.

159 See for example Migrationsverket [The Migration Board], Applications for asylum received, 2014 (1 September 2014) Migrationsverket <http://www.migrationsverket.se/download/18.7c00d8e6143101d166d1aab/1409563863507/lnkomna+ans%C3%B6kningar+om+asyl+2014+-+Applications+for+asylum+received+2014.pdf>, accessed 21 September 2014.
The problems raised when an asylum-seeker is a EU citizen are hard for domestic court to solve, since they are bound to interpret EU law, and the Spanish Protocol does not leave much room for different interpretations. In that situation, the court has to ask the ECJ for a preliminary ruling regarding the Spanish Protocol’s conformity with human rights standards.

Even though the discrepancies in the right to seek asylum between EU law and international law for the time being are mostly theoretical, the system is flawed and should be amended. In its current state it cannot handle changes in migration flows and rights, such as the protection from *refoulement* and discrimination, becomes illusory rather than real and enforceable.

The EU has developed quickly, from being a trade union with peace as a general goal, to an international organisation integrating not only the common market, but the asylum policy and border control as well. In line with these developments a human rights protection system has emerged, mainly by adopting the Charter and confirm the ECHR as minimum standard for protection. Whilst looking at my conclusions, it becomes evident that the EU has a long way to go before the formal human rights protection becomes reality. To achieve that goal there needs to be a better review of legislative materials from a human rights perspective, both by the legislature and the judiciary.
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