The Right to Seek Asylum and the Common European Asylum System

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Abstract

‘The right to seek asylum’ or what in popular speech is referred to as ‘the right to asylum’ is, not least today with the pending refugee crisis, a highly current and important topic. A right so obvious to many people, but where can it be found and does it even exist? Is the concept of this right different if looking at an international scale or on a regional scale of the European Union? The study in this thesis is based on international law but, since a large amount of refugees and asylum-seekers are fleeing over the Mediterranean Sea and heading to Europe, the study will further focus on the regional law of the EU. The method used for this study is a classic legal approach.

This thesis clarifies that there does not exist a right to be granted asylum under international law. However, an implied right to seek asylum can be derived from the right to leave one’s country of origin. Moreover, the absolute principle of non-refoulement contributes with an implied absolute right to seek asylum in a state of refuge. Additionally, even though there is an expressed ‘right to asylum’ under EU primary law it does not add any wider protection than an implied right to seek asylum. The concept essentially has the same meaning under general EU law as under international law. Moreover, out of four central legislative measures concerning asylum within EU secondary law examined, one directive provides an indirect right to be granted asylum, to those individuals that fall under the scope of the directive.

The study concludes that the principle of non-refoulement, even though not providing a right to be granted asylum, proves to be one of the most important rights for refugees and asylum-seekers. It also concludes that the Common European Asylum System does not live up to its goal of an area of freedom, security and justice open to whom that by forced circumstances legitimately seek protection in the EU.
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### Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<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>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>ECHR</td>
<td>European Convention on Human Rights (formally referred to as the Convention for the Protection of Human Rights and Fundamental Freedoms)</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>ECRE</td>
<td>European Council on Refugees and Exiles</td>
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<td>EU Charter</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<td>HRC</td>
<td>Human Rights Committee</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICJ Statute</td>
<td>Statute of the International Court of Justice</td>
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<td>Refugee Convention</td>
<td>Convention Relating to the Status of Refugees</td>
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<td>Refugee Protocol</td>
<td>Protocol Relating to the Status of Refugees</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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<td>VCLT</td>
<td>Vienna Convention of the Law of the Treaties</td>
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Chapter 1 – Introduction

We live in challenging times and this is particularly true for refugees and the displaced. /…/

Unfortunately, however, finding safety in today's world is becoming increasingly difficult. While developing countries least able to afford it host most of the world's refugees, many industrialised nations continue to impose ever stricter controls on asylum. All of us bear a responsibility for ensuring that those genuinely in need of international protection receive it.¹

Global forced displacement continues to accelerate and today we see the highest numbers of displaced people since the post second World War era. By the end of 2014 59.5 million people worldwide were forcibly displaced as a result of persecution, conflict, violence and human rights violations. That number roughly equals the population of the United Kingdom or Italy. Of these 59.5 million displaced people, 19.5 million are refugees, 38.2 million are internally displaced and 1.8 million are asylum seekers. The civil war and ongoing crisis in Syria, the continuing conflicts in Afghanistan, the Democratic Republic of the Congo and Somalia and new conflicts in Central African Republic, South Sudan, Ukraine and Iraq among others cause suffering and massive displacement. During 2014 more than half of all of the refugees worldwide came from only three countries: Syria (3.88 million), Afghanistan (2.59 million) and Somalia (1.11 million). Lebanon being one of Syria’s neighboring countries hosted, during 2014, the largest number of refugees in relation to its national population, 232 refugees per 1000 inhabitants.²

To put these numbers in perspective, by the end of 2013, 51.2 million people were recorded as displaced worldwide. That level of displacement was the highest figure since 1989, when the statistic keeping began. Of these 51.2 million people displaced at the end of 2013, 16.7 million were refugees, 33.3 million people internally displaced and 1.2 million asylum seekers.³ As we can see, from the end of 2013 to 2014 the number of displaced people increased by 8.3 million people. That number roughly equals the population of Sweden.

To this day 1 007 716 people have arrived by the Mediterranean Sea during 2015 and 3771 people are dead or missing. These people take their chances on unseaworthy boats desperately trying to reach Europe.\(^4\) With no legal ways of getting into Europe, and the EU requesting visas from citizens in many countries where conflict and severe human rights violations take place, this is the only chance these people have of applying for asylum in the EU.\(^5\)

Despite the premise that international refugee law appears to be universal, international refugee protection is in the true sense *international*. Refugee protection exists as a patchwork of commitments signed by states that are tied together by multilateral treaties. Refugee protection is therefore not, strictly speaking, guaranteed on a global level. This becomes clear when looking at the global framework of protection and the fundamental principles by which human rights and refugee law are created. However, refugee protection has also benefitted from this patchwork of claims under specific refugee instruments, consisting of obligations derived from general human rights law. The human rights movement has been focusing on increased state responsibility to ensure the rights owed to its citizens. On the contrary, refugee law takes into account the risk that the realization of fundamental rights will never be possible for some individuals in their country of origin. Consequently, refugee law is not about reform but rather about protection in another state. The starting point being every state’s control over its own territory coexists with the fundamental principle that states cannot send back a refugee, as well as asylum-seekers, to a place where the individual risks persecution. Refugee protection responsibilities generally follow territorial borders and this presupposes some sort of contact between the state and the asylum-seeker.\(^6\)

When refugees fleeing over the Mediterranean Sea reach the territory of a European state the contact between the asylum-seeker and the state is fulfilled. The state’s control over its territory hereby becomes increasingly limited by refugee law and fundamental human rights norms. Questionable is what specific rights these people have towards the states in an initial stage. Of interest in this thesis is to examine this global patchwork of human rights and refugee law and to see what kind of protection it actually gives. Of further interest in this thesis is to examine the framework of the regional organization, the European Union, to see


whether that provides a more far-reaching protection for individuals than under international law.

1.1 Purpose and Research Question

This thesis examines the ‘right to seek asylum’ from the perspective of EU secondary law, seen against the background of global international law and EU primary law. The aim is to create a better understanding of the concept and see how wide the responsibility of EU Member States in the matter actually is and if EU secondary law somewhat has changed the international arena concerning the right to asylum.\(^7\) The purpose is therefore to establish whether there is a right to seek and be granted asylum according to international law and EU primary law, and to establish if there is such a right according to EU secondary law.

For this purpose the thesis is centered around the following questions:

- Is there a right to asylum under international law?
- Where in EU secondary law is the ‘right to seek asylum’ regulated?
- Is there a right to asylum according to the Qualification Directive?
- Is there a right to asylum according to the Asylum Procedures Directive?
- Is there a right to asylum according to the Return Directive?
- Is there a right to asylum according to the Dublin III Regulation?
- How do the answers to the questions above law relate to international law?

1.2 Method and Material

The method used for this thesis is a classic legal method. Thus, the study emanates from the accepted sources of law and will assume an objective approach to a problem, as presented above. The study will also be approached with an analytical legal method. Hence, the accepted sources of law will be examined in order to evaluate what implications they have on the question in matter.\(^8\) This method is the one traditionally used in law and is therefore of

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\(^7\) The right to asylum will be further discussed in chapter 2.

practical importance. It constitutes an important link between the legal sources and an independent legal political analysis which impacts social development.9

Refugee rights stem from international law and can be derived from the three formal sources of international law. These sources are listed in Article 38 in the Statute of the International Court of Justice (‘ICJ Statute’): international conventions (treaties), customary international law and general principles of law.10 According to Article 2.1(a) of the Vienna Convention on the Law of Treaties11 (‘VCLT’) treaties are, simply put, written international agreements between states. Article 38.1(b) of the ICJ Statute provides that customary international law consists as ‘evidence of a general practice accepted as law’.12 Article 38.1(c) of the ICJ Statute provides that the general principles of law are the ones recognized by civilized nations. In Article 38.1(d) of the ICJ Statute judicial decisions and doctrine are described as secondary means for defining established law.

Primary EU law is considered being of a general character, made up of the Treaties of the European Union. The EU secondary law is of a subordinate character consisting of legal instruments based on the primary law.13 Member States of the EU are subjects of international law but other rules of interpretation apply to EU law. These specific rules apply to EU primary law, according to Article 267(1a) of the Treaty on the Functioning of the European Union14 (‘TFEU’) the Court of Justice of the European Union (‘CJEU’) is given jurisdiction to the interpretation of the EU treaties. These specific rules also apply to EU secondary law, according to Article 267(1b) TFEU the CJEU is given jurisdiction to rule upon the validity and interpretation of acts of the institution.15

9 Kleineman, ‘Rättsdogmatisk Metod’, at 44.
10 Statute of the International Court of Justice art. 38(1).
12 See especially the case concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Judgement) [1986] ICJ Rep 14., where the ICJ confirmed that customary international law consists of two elements, the objective one ‘general practice’ and the subjective one ‘accepted as law’, also known as opinio juris.
15 Bernitz & Kjellgren, Europarättens Grunder, at 59-60; See also Van Gend en Loos v Nederlandse Administratie der Belastingen (C-26/62) [1963] ECR 1; Costa v ENEL (C-6/64) [1964] ECR 585.
Furthermore, the European Court of Human Rights (‘ECtHR’) has, pursuant to Article 32 of the European Convention on Human Rights16 (‘ECHR’), the right to interpret the ECHR. Questionable is whether decisions made by the EU are to be treated as a separate source of law since they stem from a constituent treaty of the organization. However, policies from the EU should be considered as important judicial decisions.17 EU law is also known for being subordinate to international law. Therefore, if the protection provided in EU law differs from international law, it can only be towards a stronger protection.

The EU has developed into a major regional organization, created by its founding treaties and has significant supranational components.18 Even though EU law is known to be subordinate to international law it can also be a contributing factor to customary international law. State-made legislation is important forms of state practice. Practice by a small number of states is sufficient to create a customary rule, unless there is a practice that conflicts with that rule.19 Moreover, EU law can influence international law as means of interpretation of treaties, for example as subsequent practice within the meaning of Article 31.3(b) of the VCLT or as supplementary means of interpretation as provided in Article 32 of the VCLT.

Although national precedent is not a source of international law it can still be important for the illustration of the application of international law. The Roma Rights20 case, being a national decision, is important in this thesis because of its illustration of the application of the International Covenant on Civil and Political Rights21 (‘ICCPR’) and the extraterritorial application of the principle of non-refoulement.

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19 Malanczuk, Akehurst’s Modern Introduction to International Law, at 41-43.  
1.3 Limitation

This thesis will focus on the ‘right to seek asylum’ - the meaning of the concept - and whether there is such a right under international law, EU primary law or EU secondary law. The magnitude of this subject, and with several ways to analyze it, has forced me to limit my research questions as stated above. This thesis will therefore mostly focus on the EU secondary law. Thus, the chapter concerning international law and EU primary law is thought to be read as a background chapter and as a foundation to the discussion about the EU secondary law. I will further limit my study by concentrating the discussion on four central sources within the EU secondary law concerning asylum: the Qualification Directive, the Asylum Procedures Directive, the Return Directive and the Dublin III Regulation. These are the sources within the EU secondary law that are the most relevant for the research questions in this thesis.

1.4 Terminology

Since several definitions exist of who is regarded a migrant, it is important to establish clarity on the terminology used in this thesis. A *migrant* is a person who has left his or her country of origin, regardless the reason behind the choice to leave. The definition includes refugees and asylum-seekers, as well as other migrants. A *refugee* is defined in Article 1A(2) of the Convention Relating to the Status of Refugees (‘Refugee Convention’) combined with Article 1.2 of the Protocol Relating to the status of Refugees (‘Refugee Protocol’). The definition says that a person who:

- owing to wellfounded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country

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22 The EU primary law is considered being of general character, made up of the Treaties of the European Union. The EU secondary law is of a subordinate character consisting of legal instruments based on the primary law.

23 See above, chapter 1.1.

of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In history, *asylum* has been considered as a place of refuge where a person could be free from persecutors. There are two different kinds of asylum: territorial asylum and diplomatic asylum. Territorial asylum is provided by a state to an individual within the state’s territory and diplomatic asylum is provided mainly on the premises of an embassy or a legation. A person who seeks protection in another state is referred to as an *asylum-seeker*. An asylum-seeker is a person who claims to be a refugee but whose claim has not been definitely evaluated.

### 1.5 Outline

After this introductory chapter, seven chapters follow. Chapter two works as a background chapter and examines international law and EU primary law, and how they relate to ‘the right to seek asylum’ and the right to asylum. Chapter two begins at explaining state sovereignty and international refugee law and human rights law, by that whether there is a right to seek and be granted asylum and the principle of *non-refoulement*. The major sources of this concept are examined. The EU primary law is examined, including the Charter of fundamental rights. The chapter ends with a conclusion if there is a right to asylum according to international law and EU primary law or not. After this the thesis moves on to EU secondary law. Chapter three examines the Qualification Directive, its contents and if there is a right to asylum according to that directive. Chapter four examines the Asylum Procedures Directive and has the same outline as the previous chapter. Chapter five examines the Return Directive and chapter six the Dublin III Regulation. After these chapters a summary and discussion follows in chapter seven, also containing my concluding remarks.

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Chapter 2 – Background

2.1 Global International Law

The right to seek and enjoy asylum was first given universal recognition in the Universal Declaration of Human Rights28 (‘UDHR’) in 1948. The original text provided that ‘everyone has the right to seek and be granted, in other countries, asylum from persecution’. When some states raised a debate that they regarded asylum as their sovereign privilege the original text was changed to remove this obligations on the states. Thus, the altered text replaced ‘and be granted’ to the more vague wording ‘and to enjoy’.29 The altered wording received support from many states because it imposed no legal obligation on them to grant asylum.30

To first grasp the, somewhat surreal, concept of the ‘right to asylum’ it is important to understand the scope and the legal structure because different ‘rights’ lie within. The wider concept ‘right to asylum’ can be divided into three distinct rights that fall under the bigger scope:

- the right of a state to grant asylum, which follows from the principle of sovereignty of states
- the right of an individual to seek asylum, which is an individual right the asylum-seeker has vis-à-vis his or her state of origin, and
- the right of an individual to be granted asylum, which is the most uncertain of these rights.31

These three rights will be central in this thesis when discussing international law and EU law. After now having specified and broken up the right to asylum let us move on to two important concepts in international refugee law which will help set the foundation of the discussion during this thesis.

2.1.1 State Sovereignty

In a way to analyze the internal structure of a state the theory of sovereignty arose. There must be some entity, within each state, that possesses supreme legislative power and supreme political power, thought political philosophers.\(^\text{32}\) In the Island of Palmas Case\(^\text{33}\) the Permanent Court of Arbitration held that territory serves as an expression of national sovereignty in international law and that sovereignty between states signifies independence. Sovereignty therefore implies exactly that, a state has independence within and without the borders of the state.\(^\text{34}\)

What defines national sovereignty is that nation states have the sole control over its territory and therefore have the right to determine which people are allowed to enter their geographical borders. This power is often used by placing restrictions over their borders of who can enter and remain in the territory. As a result of the sovereignty of states, states can increase their migration controls and in many cases migrants ultimately end up as ‘displaced persons’.\(^\text{35}\) Inevitably, when states by legitimate reasons want to control their borders, this also acts as an effective bar to asylum claims.\(^\text{36}\) This can be explained by the fact that states do have obligations towards those within their territory or jurisdiction.\(^\text{37}\) Thus, the right of a state to grant asylum follows from the principle that every sovereign state has exclusive control over its territory and also over the people within their territory. From that also follows that every sovereign state has the right to grant or deny asylum to the people within their territory.\(^\text{38}\) Traditionally, the ‘right to asylum’, implied exactly that, the right of a state to grant asylum. Lately, the ‘right to asylum’ has gained importance and significance for the individual.\(^\text{39}\)

\(^\text{32}\) Malaczuk, Akehurst’s Modern Introduction to International Law, at 17-18.
\(^\text{33}\) Island of Palmas (or Miangas) (United States of America v Netherlands) (Award of the Tribunal) (1928) PCA 1, (M. Huber).
\(^\text{39}\) Grahl-Madsen, Territorial Asylum, at 2.
The sovereignty of states plays an important role for the continuation of this thesis and the further examination of the ‘right to seek asylum’. After establishing the customary rule of sovereignty of states it is important that we move on to examine states’ obligations towards those who reside within their territory or jurisdiction.

2.1.2 International Refugee and Human Rights Law

Refugee law and the refugee are constructed as oppositional to the national interest. The popular press frequently reminds citizens that a generous asylum policy does not serve the national interest. The refugee presents a problem ‘by lacking an effective state representation and protection; she is uprooted, dislocated and displaced’. 40

In a modern context, the refugee is constructed in contrast to national sovereignty as well as a marker of its limits. As discussed above, states have a well-established right to decide who can enter and reside in their territory. Due to the fact that states have bound themselves to international treaties, in this case human rights treaties, impose responsibility to respect the rights of the individuals of which reside within their territory.41

The universal rights of refugees can be found in two primary sources, general standards of international human rights law and the Refugee Convention.42 The universal principle of non-refoulement, is of outmost importance for all asylum-seekers, and unquestionably the centerpiece of international refugee law.

The principle of non-refoulement stipulates in broad terms that no refugee should be returned to a country where he or she faces persecution, other ill treatment or torture. The term non-refoulement can be derived from the French word ‘refouler’, which means to repel or drive back.43 The principle of non-refoulement has been included in several regional treaties and endorsed in a variety of international documents, explicitly mentioned in Article 33 of the

43 Goodwin-Gill & McAdam, The Refugee in International Law, at 201.
Refugee Convention and Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (‘CAT’).

In the North Sea Continental Shelf Cases the International Court of Justice (‘ICJ’) tried the criteria for how a new customary rule can emerge. The ICJ concluded that for a principle to reach a customary law standard duration may be taken into consideration, but more importantly, it requires consistency and general recognition. The practice also has to be conjured by duties of international law for it to reach a rule of law. As the ICJ concluded in the North Sea Continental Shelf Cases the principle of non-refoulement could therefore be regarded as a rule of customary law by consistency in practice and a general recognition.

Different opinions exist in doctrine whether the principle has reached customary law status. However, a majority argues that the principle has been embraced by custom. Goodwin-Gill and McAdam argue that the principle of non-refoulement has by general consensus attained the status of customary international law. Some argue that the principle has been enshrined in different international instruments and hence gained the recognition of a customary rule. Lauterpacht and Betlehem even argue that the principle has reached a nearly universal recognition because around 90 percent of the UN states are party to one or more conventions that include the principle of non-refoulement, either direct or indirect. Hathaway, on the other hand, argues differently considering the prohibition against refoulement in Article 33 of the Refugee Convention not being part of customary international law, since there exist state practice where this has been violated.

The principle of non-refoulement is an important corner stone in international law as well as refugee law. There is a close relationship between the issue of refugee status and the principle of non-refoulement, as well as the concept of asylum. These three parameters are all part of a

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44 The Refugee Convention will be further discussed below under chapter 2.1.2.4.  
45 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), the CAT will be further discussed below under chapter 2.1.2.3.  
49 Gammeltoft-Hansen, Access to Asylum, at 88; Goodwin-Gill & McAdam, The Refugee in International Law, at 346.  
refugee’s flight to a state of better conditions. It is crucial to understand that the principle does not stipulate that an individual can claim the right to asylum, which will be further developed in this thesis. On the contrary, states have a duty under international law not to hinder individuals’ right to seek asylum. The principle of non-refoulement still stands as the strongest commitment of the international community of states to those who cannot receive protection from their own government.

2.1.2.1 The Universal Declaration of Human Rights

The first international source to examine when examining the right to seek asylum under international law, is the Universal Declaration of Human Rights. The UDHR is an important pillar for the UN’s activity and contains a vast variety of human rights. According to Article 14 of the UDHR, ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution’, and is therefore of prima facie relevance for the first question asked in this thesis. As mentioned above, the word ‘enjoy’ was changed because of the will of the signing states wanting their sovereignty to have priority before the decision regarding asylum. The UDHR does therefore not provide a right to be granted asylum, only a right to seek asylum and then enjoy it when being granted. Thus, the substantial right of asylum was hereby dropped, but the procedural right to an asylum process remained in the Declaration. The right to leave a country is stipulated in Article 13.2 of the UDHR and from that stems an indirect right to seek asylum in another state, an indirect right that the asylum seeker has towards his or her country of origin.

The UDHR was not intended as a legally binding document but, as its last preambular paragraph provides:

*as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms*

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53 Gammeltoft-Hansen, *Access to Asylum*, at 44.
54 Shaw, *International Law*, at 202-203.
55 See above, chapter 2.1.
and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.\textsuperscript{57}

Even though the UDHR is not a legally enforceable instrument in itself, many argue that its rules have become binding either through custom, general principles of law or by subsequent practice.\textsuperscript{58} Still, the Declaration solely provides universal goals instead of obligations on the states parties, which would have been the case if the Declaration had the status of a treaty signed by states. Furthermore, neither state practice nor corresponding \textit{opino juris} regarding the UDHR supports a right to access state territory in order to seek asylum as well as it does not support a duty on the states to grant asylum to those seeking it.\textsuperscript{59}

Consequently, the right to seek and enjoy asylum has between the state parties been decided to work as a common goal. Even though this right cannot be seen as an obligation for the states it is a right the states have agreed to strive for and to be regarded as a fundamental value of the states. The UDHR does therefore not provide a right to be granted asylum but rather constitutes a moral dilemma in that sense. However, there is a right for an individual to seek asylum according to the Declaration.

\textit{2.1.2.2 The International Covenant on Civil and Political Rights}

Unlike resolutions, like the UDHR, Article 38.1(a) of the ICJ Statute stipulates that treaties constitute binding sources of international law, which includes the ICCPR. According to Article 2.1 of the ICCPR all state parties (168 as of April 2014)\textsuperscript{60} are required to ‘respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant’. The Human Rights Committee (‘HRC’) has confirmed that the Covenant applies to all individuals, as the wording of the Covenant, regardless of nationality or statelessness, hence making it an important instrument for refugees.\textsuperscript{61} The HRC has further confirmed that to respect the rights is something every state has the power to act.

\textsuperscript{57} \textit{Universal Declaration of Human Rights}, preambular para 8 (emphasis added).
\textsuperscript{58} Shaw, \textit{International Law}, at 203-204.
\textsuperscript{59} Noll, ‘Seeking Asylum at Embassies: A Right to Entry under International Law?’, at 547.
\textsuperscript{60} United Nations Treaty Collection, \textit{Chapter IV Human Rights: 4. International Covenant on Civil and Political Rights}.
upon to not deny someone a right, hence an extraterritorial application. However, to ensure the rights can only effectively be complied with when the state is acting within its own jurisdiction.\textsuperscript{62}

Some of the rights recited in the Covenant can be recognized from the UDHR and has consequently been given treaty status, for example the right to leave any country, including an individual’s country of origin, in Article 12.2 of the ICCPR. In the \textit{Roma Rights} case this right was in the spotlight when British authority prohibited people of Romani ethnic origin, who claimed to seek asylum in the United Kingdom, to leave the Prague airport and of reaching British territory. This prohibited these individuals of seeking protection abroad but the prohibition was, at least in practice, applied on a race-specific basis. Thus, in a situation like this, both the home state and the foreign country that shares jurisdiction over the departure should be held jointly responsible for a violation of Article 12.2.\textsuperscript{63} In the \textit{Roma Rights} case it was also emphasized that a person who leaves his or her state of nationality and applies for asylum, should not be rejected or returned to the country of origin without an appropriate enquiry into the claimed persecution.\textsuperscript{64}

Although, the right to seek asylum has not been incorporated into the ICCPR, Article 7 of the ICCPR stipulates that ‘[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’ and has been interpreted as containing an indirect prohibition against \textit{refoulement}.\textsuperscript{65} Additionally, an indirect right to seek asylum can also be derived from the ICCPR.\textsuperscript{66} Article 2.1 combined with Article 7 as well as Article 12.2 and also the essential right to life in Article 6 would imply that there is a right to seek asylum in a state of refuge according to the ICCPR. Consequently, the ICCPR must be interpreted as to contain a right for individuals to seek asylum and a prohibition for states to send back individuals to persecution, but it does not contain a right for individuals to be granted asylum.

\textsuperscript{62} Human Rights Committee, \textit{General Comment No. 31} (26 May 2004), para 3, 6 and 10.
\textsuperscript{63} Hathaway, \textit{The Rights of Refugees under International Law}, at 309-310; See also Human Rights Committee, \textit{General Comment No. 31} (26 May 2004).
\textsuperscript{64} \textit{R (European Roma Rights Centre) v Immigration Officer at Prague Airport}, [2004] UKHL 55 (UK HL, Dec. 9, 2004), para 26.
\textsuperscript{65} Human Rights Committee, \textit{General Comment No. 31} (26 May 2004), para 12; See also Goodwin-Gill & McAdam, \textit{The Refugee in International Law}, at 208-209.
\textsuperscript{66} Boed, \textquote{The State of the Right of Asylum in International Law}, at 23-24.
2.1.2.3 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Certain areas of international human rights law have seen rapid change. When regarding torture, the responsibility of the states to prevent such abuse is beginning to be seriously considered and becoming a part of the international human rights law agenda.\(^{67}\) Although the CAT does not directly concern the right to asylum it still has importance due to Article 3. The CAT, alike the Refugee Convention, stipulates the principle of *non-refoulement* as below:

No state party shall expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.\(^{68}\)

The prohibition against torture has become part of customary international law.\(^{69}\) To be read from the wording of Article 3, it is an absolute provision that does not tolerate any exceptions. The principle of *non-refoulement* inherits aspects of the absolute prohibition of torture, perhaps sharing some of its *jus cogens* character.\(^{70}\) However, regardless of the strong provision against *refoulement*, the CAT does not contain a right to be granted asylum.

2.1.2.4 The Convention Relating to the Status of Refugees

The Refugee Convention and its additional Protocol have the apparent purpose to give protection to refugees. Even though the Refugee Convention lacks an enforcement mechanism, the UNHCR works as the overseeing organ to provide international protection to refugees and to assist governments in seeking ‘permanent solutions for the problem of refugees’.\(^{71}\) As can be interpreted by the structure of the Refugee Convention a refugee is granted more rights as the level of attachment increases to the asylum state. According to Article 1A(2) of the Refugee Convention a refugee is a person who ‘is outside the country of his nationality’. The most basic rights inheres when the refugee is within the asylum state’s

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\(^{67}\) Shaw, *International Law*, at 201.

\(^{68}\) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 3.

\(^{69}\) Shaw, *International Law*, at 234.


jurisdiction under its control and authority, the rights increases when the refugee enters the asylum state’s territory, more rights inhere when the refugee is lawfully within the asylum state’s territory, even more when the refugee is lawfully staying in the asylum state and last, a few more rights adds to this structure when the refugee can demonstrate a durable residence in the asylum state.\textsuperscript{72}

Looking at the structure and the wording of the Refugee Convention, most rights in the Refugee Convention are actualized only when the refugee is lawfully in or residing in the asylum state. However, a small number of rights apply to all refugees regardless the level of attachment to the asylum state. Two of those core rights can further be of practical importance to those states that choose to practice extraterritorial jurisdiction over refugees, the duty of non-discrimination between and among refugees in Article 3 and the obligation of \textit{non-refoulement} in Article 33.\textsuperscript{73}

Article 33(1) of the Refugee Convention contains the universal principle of \textit{non-refoulement} and provides that:

\begin{quote}
No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
\end{quote}

Article 33(2) of the Refugee Convention provides exceptions to this rule, either where there exist ‘reasonable grounds’ for regarding a refugee as ‘a danger to the security of the country’ or the refugee ‘having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country’. Hence, the provision of \textit{non-refoulement} in the Refugee Convention is not absolute.

As provided in Article 33 within the meaning of Article 1, the Refugee Convention and the principle of \textit{non-refoulement} only applies to refugees. However, in an initial state the principle also applies to asylum seekers where there is a presumptive or \textit{prima facie} claim to

\textsuperscript{72} Hathaway, \textit{The Rights of Refugees under International Law}, at 156.

\textsuperscript{73} Hathaway, \textit{The Rights of Refugees under International Law}, at 160-163, see further Hathaway, \textit{The Rights of Refugees under International Law}, at 160, n 24 for a list of the core rights when the refugee is under the asylum state’s jurisdiction; Gammeltoft-Hansen, \textit{Access to Asylum}, at 28, 101-102.
refugee status. As UNHCR’s Executive Committee has argued, the principle of non-refoulement applies regardless if the individual has been formally recognized as a refugee.

As can be seen how the principle is stipulated in the Refugee Convention is that it does not provide a ‘right to asylum’ and therefore it is important to separate the two. Firstly, the principle of non-refoulement stipulates that states cannot send back, ‘refouler’, a person to a place where that person faces persecution. It does not establish a duty for the state to receive refugees. This coincides with states’ sovereignty to regulate the entry of non-citizens into their territory. They may therefore deny entry to refugees as long as they do not violate the principle. Secondly, the principle does not force a state to allow a refugee to reside in the territory when the risk of persecution has ended. Hence, refugee status is a temporary status.

The status of refugees under the Refugee Convention is initially set by the person’s plight and situation and will remain so until there has been a negative determination of the refugee’s claim to protection. Thus, state parties have to respect the Convention and the principle of non-refoulement, until and unless the presumption of refugee status is proven otherwise.

Although the Refugee Convention defines a refugee in international law, it does not provide a legal obligation for the states to admit asylum seekers into their territory. When the Refugee Convention was being drafted states were not prepared to include any article on admission of refugees. It may have been that the states wished not to come too close to the, not wanted, duty to grant asylum. Thus, states have no obligation to admit refugees or any other alien.

Another aspect of the Roma Rights case is that one of the arguments was that the British authorities violated Article 33 of the Refugee Convention. To recall, the case concerned British Immigration officials method of ‘pre-clearing’ passengers boarding flights to the United Kingdom. If the officials suspected that certain passengers would claim asylum on arrival, they were refused to enter. This system ‘aimed principally at stemming the flow of asylum-seekers from the Czech Republic, the vast majority of these being of Romani ethnic origin’ and the objects of the controls were understood to prevent refugees to reach British

74 Goodwin-Gill & McAdam, The Refugee in International Law, at 345-346.
75 See UNHCR, Executive Committee Conclusions, No. 6 (XXVIII), ‘Non-refoulement’ (1977), No. 79 (XLVII), ‘General Conclusion on International Protection (1996), No. 81 (XLVIII), ‘General Conclusion on International Protection’ (1997), No. 82 (XLVIII), ‘Safeguarding Asylum’ (1997).
76 Hathaway, The Rights of Refugees under International Law, at 300-302.
77 Ibid at 279.
79 Goodwin-Gill & McAdam, The Refugee in International Law, at 206-207.
territory. The key issue therefore concerned if the United Kingdom’s obligations, particularly under the Refugee Convention, had been violated.\(^\text{80}\) The Court of Appeal as well as the House of Lords determined that a refugee under the Refugee Convention, had to be a person ‘outside the country of his nationality’ and that someone who remains on the same side as they began cannot be said to have been sent back to the ‘frontiers’ of persecution.\(^\text{81}\)

Hathaway argues that this points to a serious protection risk between the gap of the duty on the states of non-refoulement and the notion for the individual of access to asylum. The United Kingdom unquestionably prevented those seeking asylum from gaining international protection. However, this does not change the fact that prohibitions on departure from the territory of one’s own state does not breach the rights under the Refugee Convention. Article 33 of the Refugee Convention is only concerned with where an individual cannot be sent back to and not where the individual is trying to escape from.\(^\text{82}\) Consequently, other than the absolute prohibition against refoulement that can be said to contain an absolute indirect right to seek asylum, the Refugee Convention does however not contain a right to be granted asylum.

\section*{2.2 The European Convention on Human Rights}

Being an international treaty, the ECHR has the purpose of providing minimum standards of protection for human rights. The Convention, together with its fourteen protocols, covers a vast variety of mainly civil and political rights. The ECHR applies within the territory of contracting states and impose obligations upon contracting states to respect the variety of provisions. The 47 member states of the Council of Europe have ratified the Convention. Furthermore, all state parties have also implemented the Convention into domestic legislation.\(^\text{83}\) All Member States of the EU are required to be party to the Convention and the EU as an organization has agreed to accede to it, since the adoption of the Treaty of Lisbon.\(^\text{84}\)

\begin{footnotesize}
\begin{itemize}
\item \(^\text{80}\) R (European Roma Rights Centre) v Immigration Officer at Prague Airport, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), para 1, 3 and 18.
\item \(^\text{81}\) Ibid para 31; See also, R (European Roma Rights Centre) v Immigration Officer at Prague Airport, [2004] UKHL 55 (UK HL, Dec. 9, 2004), para 16.
\item \(^\text{82}\) Hathaway, The Rights of Refugees under International Law, at 308-310; See also, R (European Roma Rights Centre) v Immigration Officer at Prague Airport, [2003] EWCA Civ 666 (Eng. CA, May 20, 2003), para 37, 43.
\item \(^\text{83}\) Shaw, International Law, at 250-251.
\end{itemize}
\end{footnotesize}
all in accordance with Article 6.2 of the Treaty on European Union ('TEU'). Article 6.3 of the TEU provides that:

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.

Additionally, the EU Member States are thereby bound by human rights norms as an outflow from the EU itself. The ECtHR has confirmed that the EU human rights norms is something more than a treaty between a certain number of states but rather a ‘form of common European order for the benefit of individuals’.

The ECHR is of great influence to EU law but also used to interpret the rights included in the Charter of Fundamental Rights of the European Union (‘EU Charter’). The ECtHR has stressed that the Convention is to be interpreted in the light of present-day conditions and to be used as an instrument for the protection of individuals and apply it in such a way to make it practical and effective.

Despite clear influences from the UDHR, the ECHR does not concern the concept of asylum and neither does its subsequent Protocols. In spite of this, the universal principle of non-refoulement has, since the 1960s by the European Commission on Human Rights, been considered to be reflected in the absolute rule of Article 3 of the ECHR. The article states that ‘[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment’. The ECtHR has in several cases stated that the extradition or expulsion of a person, where there are substantial ground for believing that he or she will be subjected to such treatment, constitutes a breach of Article 3 of the ECHR. The ECtHR further sets limits to states’ rights to send back individuals from their borders and states can under some

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86 Ireland v United Kingdom (1978) 25 Eur Court HR (ser A).
88 Shaw, International Law, at 251.
89 Goodwin-Gill & McAdam, The Refugee in International Law, at 210, see further references there.
90 See inter alia, Ireland v United Kingdom (1978) 25 Eur Court HR (ser A); Soering v United Kingdom (1989) 161 Eur Court HR (ser A); Chahal v United Kingdom, 15 November 1996, Reports of Judgments and Decisions 1996-V.
circumstances have an obligation to allow an individual, even without proper authorization, to enter the borders if this is a prerequisite for the individual to gain some Convention rights, especially the right to respect for one's family life, according to Article 8 of the ECHR.91

This clearly illustrates states’ responsibility under Article 3, requiring all contracting states to protect everyone in the state jurisdiction from the real risk of the treatment mentioned in the article. It provides a broader application than the Refugee Convention in the sense that it provides protection to people that have been excluded from refugee status.92 Consequently, there is an unspoken right to seek asylum in a potential state of refuge but there is not a right to be granted asylum according to the ECHR.

2.3 EU Primary Law

After having examined the meaning of ‘the right to seek asylum’ under global international law and in the ECHR in the segment above, establishing that it is part of the vaster more complex concept ‘right to asylum’, it is now time to move on to EU primary law.

2.3.1 The Treaty of Lisbon

The Treaty of Lisbon is an international agreement that amends two of the primary treaties of the EU, thereby forming the constitutional base of the Union. It amends the Maastricht Treaty signed in 1992, also know as the Treaty on the European Union and the Treaty of Rome signed in 1957, also known as the Treaty on the Functioning of the European Union.93 All Member States of the EU are parties to the Refugee Convention and its Protocol. Ratification of the Refugee Convention is a requirement for all states seeking to become members of the EU.94 UNHCR’s supervisory responsibility extends to each EU member state, all whom are parties to the Refugee Convention and its Protocol. UNHCR’s supervisory responsibility is also reflected in EU law, pursuant to article 78(1) of the TFEU and reaffirmed in the earlier

91 See Abdulaziz, Cabales and Balkandali v United Kingdom (1985) 94 Eur Court HR (ser A).
92 Goodwin-Gill & McAdam, The Refugee in International Law, at 210 and 311, see further references there.
93 Bernitz & Kjellgren, Europarättens Grunder, at 47-50.
Treaty of Amsterdam saying that consultations should be made with the UNHCR on matters relating to asylum policy.

The TFEU provides the standardization of the EU’s activity, among others dividing the Union’s competence and provides for the common foreign affairs of the Union. According to the TFEU:

The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

The TFEU does therefore not provide any additional protection besides the provisions in the Refugee Convention. However, the article refers to the EU’s development of subsidiary protection and temporary protection which is something that the Refugee Convention does not cover. Furthermore, the TFEU ensures compliance with the principle of non-refoulement which contains an indirect right to seek asylum.

### 2.3.2 Protocol no. 24 of the Treaty on the Functioning of the European Union

Protocol 24 completing the TFEU adds a heavy limitation to the concept of ‘the right to seek asylum’.

Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters.

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96 Bernitz & Kjellgren, Europarättsens Grunder, at 48.
97 Treaty on the Functioning of the European Union, Art 78(1) (emphasis added).
The additional protocol regulates that an application made in a EU Member State from a citizen in another EU member state may be dismissible on the presumption that the application is unfounded.

2.3.3 The Charter of Fundamental Rights of the European Union

As provided by Article 6.1 of the TEU, the EU recognizes the rights, freedoms and principles set out in the EU Charter. It further establishes that the Charter ‘shall have the same legal values as the Treaties’. Hence, the EU Charter has acquired the rank of EU primary law, by the enforcement of the Treaty of Lisbon. However, following Article 2(1)(a) of the VCLT, the EU Charter is not a treaty under international law, neither has it been signed and ratified by the Member States nor are its provisions included in the Treaty of Lisbon, to which all Member States are parties. According to Article 51.1 of the EU Charter the Charter is only applicable to Member States when implementing EU law and have to comply with the provisions of the Charter. Article 18 of the EU Charter further provides that:

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

First and foremost, the EU Charter is not a binding legal instrument. However, little would be won even if it was, Noll argues. Second, there is no clear definition in the EU Charter on what the ‘right to asylum’ actually means. Even though Article 18 refers to the Refugee Convention it must be recalled that the term ‘asylum’ has no operative significance according to the Refugee Convention. Third, the drafters of the EU Charter were only given mandate to consolidate already existing fundamental rights in EU law. Consequently, the EU Charter

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102 Charter of Fundamental Rights of the European Union, Art. 18 (emphasis added).
103 Noll, ‘Seeking Asylum at Embassies: A Right to Entry under International Law?’, at 547.
does not create any new protection obligations. Additionally, Gil-Bazo argues, Article 18 does not provide who is entitled to this right, whether it is the right of states or individuals. Also, the reference to the Refugee Convention and its Protocol is made in Article 18, despite the fact that neither of these instruments clearly stipulates asylum as a right that refugees are entitled to.

This can be reassured by Article 51.2 which provides that the EU Charter does not ‘establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties’. Additionally, Article 52.2 provides that the rights recognized by the EU Charter that are based on the Community Treaties and the Treaty on European Union ‘shall be exercised under the conditions and within the limits defined by those Treaties’.

As further being stipulated by the preamble to the EU Charter its goal is to make existing rights more ‘visible’:

> To this end, it is necessary to strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.

Furthermore, as expressed in the fifth paragraph of the preamble to the EU Charter the instrument rather seeks to ‘reaffirm’ the rights stemming from international and domestic law. The right to asylum, as expressed in Article 18, stems from the right to seek asylum in Article 14 of the UDHR, which requires states to examine the asylum claims of an applicant to not violate the principle of non-refoulement. Thus, the right is limited to the procedural right to seek asylum and does not imply a right to be granted asylum.

Consequently, the EU Charter expressing a ‘right to asylum’ therefore gives no more protection than already examined sources of law. Since the right in Article 18 is guaranteed in ‘due respect’ for the rules of the Refugee Convention and its protocol it is more reasonable to analyze it from the prohibitions of refoulement instead of speculating about the vague

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104 Noll, ‘Seeking Asylum at Embassies: A Right to Entry under International Law?’, at 547.
107 Goodwin-Gill & McAdam, The Refugee in International Law, at 368.
meaning of the article itself. The right in the EU Charter is therefore limited to a right to seek asylum, including the prohibition to be sent back to persecution, but not a right to obtain it.

### 2.4 Is There a Right to Asylum in International Law or EU Primary Law?

To conclude this section, so far in this thesis there has been established that states have a right to grant asylum and a duty not to prevent individuals wishing to emigrate or seek asylum elsewhere from doing so. States also have a duty not to send back individuals to a state where they would face persecution if they are party to one or more international or regional instruments that prohibit *refoulement*. Additionally, the prohibition against *refoulement* is generally considered to have reached the status of customary international law which makes it a duty for all states, even those that are not parties to such instruments. The closest that an individual gets to a right to asylum in international law is presently the duty of a state not to *refouler* an individual to persecution. A denial to access state territory is for many states the objective to avoid the requirement to obey certain obligations, such as the principle of non-*refoulement*.

Both of the rights, provided in the UDHR and the EU Charter, seem to be more far-reaching on a linguistic level than on a protection level. The concept of asylum fails in terms of obligations of states. The institution is too vague and states continue to be reluctant to formally accept such obligations and to agree on a right to asylum at the insistence of the individual. The only limitation to the sovereignty of states is the non-*refoulement* clause which is the only trump card for asylum-seekers that will require a state to suspend its rules on immigration control and conduct a refugee status determination procedure. Consequently, individuals have an implied right to seek asylum under international law and EU primary law, much through the principle of non-*refoulement*. However, individuals have no right to be granted asylum neither under international law nor EU primary law.

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110 Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?’, at 545.
113 Boed, 'The State of the Right of Asylum in International Law’, at 23.
2.5 Introduction EU Secondary Law

After establishing that there is no right for individuals under international law and EU primary law to be granted asylum, let us move on to examine the concept of ‘the right to seek asylum’ under EU secondary law.

Policies on migration have been a European Community concern since 1974, although they at that time centered on ensuring free movement for European labor forces. When the asylum numbers rose in the 1990s asylum emerged as a highly politicized European issue. Article 63 of the Treaty establishing the European Community stipulating that the Council shall adopt ‘[m]easures on asylum, in accordance with the Geneva Convention’ within a period of five years after the enforcement of the Treaty of Amsterdam in 1997 moved asylum matters from the third pillar to the first pillar of the European Community. This resulted in a new body of secondary legislation based on ‘minimum standards’ and a shared burden between the EU 28 Member States. The Directives of the EU applies to the Member States of the EU and every Member State has to implement the Directives into their national legal framework. Member States can, by their own accord, decide how to implement the rules in a Directive but they are binding ‘as to the result to be achieved’.

O’Nions argues that EU asylum policy is rooted in a wrongful perception of the genuine refugee. Thus, European law absorbs and reflects several generalized misunderstandings regarding the asylum-seeker. Therefore, O’Nions argues, the common legislation deprives many refugees of the protection that they seek for. Samers even argue that immigration policy produce illegal immigration. This would also imply that the Member States and EU institutions are trying to terminate a phenomenon that they themselves created. However, the Committee of Ministers of the Council of Europe has confirmed that the burden-sharing arrangements between states does not change the Member States obligation to respect the

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114 O’Nions, Law and Migration: Asylum – A Right Denied, at 73.
116 O’Nions, Law and Migration: Asylum – A Right Denied, at 4. These ‘minimum standards’ may also extend to Norway, Lichtenstein and Iceland, being EEA states. It may also apply to Switzerland, that has aligned much of its asylum system with the EU’s.
principle of non-refoulement. Furthermore, all Member States are state parties to the Refugee Convention, the ECHR and to the CAT and their importance has been acknowledged by the European Council. Additionally, pursuant to Article 6.1 of the TEU, EU secondary legislation has to be in compliance with the EU Charter, to obtain the validity and legality of the legislation, which includes directives and regulations within the field of asylum. Accordingly, the Member States are required to take the possible steps to eliminate incompatibilities between their obligations under EU law and under international law as well as reassuring that their obligations under EU law complies with international refugee and human rights law and nevertheless comply with general principles of Community law.

### 2.5.1 The Common European Asylum System

The dialogue between national judiciaries within the EU to establish legislation on a common area of freedom, security and justice first came from the Tampere meetings of the European Council in October 1999. At the time, the 15 Member States agreed to work towards establishing a Common European Asylum System (‘CEAS’). In order to achieve this it became very obvious that it required adoption of common legislation.

During the Tampere Conclusions, the European Council reaffirmed the ‘importance the Union and Member States attach to absolute respect of the right to seek asylum’. Further, in the establishment of a CEAS it was agreed that it should be, ‘based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement’. The aim of the Tampere Conclusions was an open and secure European Union, besides being fully committed to the Refugee Convention, also committed to other international human rights instruments and being able to

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respond to humanitarian needs.  

The Tampere Conclusions further stated that in the requirement for the EU to develop common policies on asylum and immigration, the EU should take into account the need for a consistent control of external borders to stop illegal immigration and international crimes.  

The adoption of four key Directives and two Regulations on asylum concluded the first phase towards an establishment of the CEAS.  

In the second phase of this process, which was due to an end in 2012, the European Commission has been aiming towards a fuller harmonization of both legislation and the Member States’ practice concerning questions on asylum.  

How the common legislation is interpreted and applied domestically is equally as important as the legislation itself.  

The illegal immigration discussion has come to dominate the CEAS and it has turned into a matter of security concern.  

The European Council on Refugees and Exiles (‘ECRE’) has described the overall progress since the Tampere Conclusions as disappointing and with a lack of solidarity between the Member States.  

The ECRE is in general skeptical to the CEAS in relation to the current situation in the EU because ‘[a] common European Asylum System based on the highest possible standards will be of little use to refugees if it becomes impossible for them to reach the EU’.  

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127 Ibid para 3.  
128 Lambert, ‘Transnational Judicial Dialogue, Harmonization and the Common European Asylum System’, at 522, see further Ibid at 522 n 17 for a list of all the adopted legislation, among others are the former Qualification Directive and former Asylum Procedures Directive listed.  
131 O’Nions, Law and Migration: Asylum – A Right Denied, at 76.  
Chapter 3 – The Qualification Directive 134

The Tampere conclusions provided that the CEAS should include an approximation of the rules regarding the recognition of refugees and the content of refugee status. It also provided that the rules on refugee status should be complemented by rules on subsidiary forms of protection, to offer an appropriate status to any person in need of international protection.135 The approximation of rules would help to limit the secondary movement by applicants between Member States when that secondary movement was caused by differences in legal frameworks between Member States.136

Prior to the implementation of the Qualification Directive, EU secondary law imposed only a limited role on the decision-making regarding asylum at a national level. The Qualification Directive was and is one of the most important instruments in the new legal order of European asylum law and also represents an outstanding development in the field of international law.137 Hence, the definition and contents of refugee status and other needs of protection has been a matter of international law and not regional law. Accordingly, subsidiary protection was first at the discretion of the Member States.138 The Qualification Directive thus became the first supranational instrument to cover those who fall outside the provisions in the Refugee Convention and the first supranational instrument to handle refugee protection and subsidiary protection under one umbrella.139

To examine whether there is a right to be granted asylum according to the Qualification Directive let us make a closer examination of its contents and structure.

135 Qualification Directive, paras [5]-[6].
3.1 Contents

The preamble to the Directive states that ‘[t]he main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States’.\textsuperscript{140} The Directive therefore establishes the criteria that refugees and asylum-seekers need to meet to qualify as refugees or as persons otherwise in need of international protection, and also the rights that come with that status.\textsuperscript{141}

The purpose of the Directive, is to lay down minimum standards for the qualification of refugee status or subsidiary protection. This minimum must respect fundamental principles within international law as well as EU law. Accordingly, the Member States are free to introduce or maintain a higher standard.\textsuperscript{142} As Article 3 provides, ‘in so far as those standards are compatible’ with the Directive. However, as Goodwin-Gill and McAdam argue, the question whether there is a possibility that the Directive can become incompatible with or lag behind the Refugee Convention or other relevant international protection documents, now or in the future, is not being addressed.\textsuperscript{143} Lambert argues that the wording is problematic due to, if ‘compatible’ would be taken as ‘consistency’, the Member States with less restrictive provisions would have to apply the more strict provisions of the Directive.\textsuperscript{144}

The Directive itself states that it is ‘based on the full and inclusive application of the Geneva Convention’.\textsuperscript{145} The Directive further states that ‘[s]tandards for the definition and the content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention’ and that ‘[i]t is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention’.\textsuperscript{146} Moreover, the Directive states that subsidiary protection should be laid down in the same manner as refugee status and that ‘[s]ubsidiary

\begin{itemize}
\item \textsuperscript{140} Qualification Directive, para 12.
\item \textsuperscript{141} Gil-Bazo, ‘Refugee Status, Subsidiary Protection, and the Right to be Granted asylum under EC law’, at 1.
\item \textsuperscript{142} Lambert, ‘The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of The United Kingdom and International Law’, at 163.
\item \textsuperscript{143} Goodwin-Gill, & McAdam, The Refugee in International Law, at 63.
\item \textsuperscript{144} Lambert, ‘The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of The United Kingdom and International Law’, at 164.
\item \textsuperscript{145} Qualification Directive, para 3.
\item \textsuperscript{146} Qualification Directive, paras [23]-[24].
\end{itemize}
protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention’.\textsuperscript{147} The Directive defines international protection in Article 2(a) as ‘refugee status and subsidiary protection status’, thus widening the scope of the Refugee Convention. The Directive also repeatedly emphasizes the need for Member States to respect their existing international obligations.\textsuperscript{148} Ultimately, the Directive clearly stipulates that ‘Member States shall respect the principle of non-refoulement in accordance with their international obligations’, also stipulating that Member States may refoule an asylum-seeker under the same exceptions to the principle as under Article 33 of the Refugee Convention.\textsuperscript{149}

Preamble 16 of the Qualification Directive especially stipulates:

This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. \textit{In particular} this Directive \textit{seeks to ensure full respect} for human dignity and \textit{the right to asylum} of applicants for asylum and their accompanying family members and to promote the application of Articles 1, 7, 11, 14, 15, 16, 18, 21, 24, 34 and 35 of that Charter, and should therefore be implemented accordingly.\textsuperscript{150}

To recall from the last chapter, Article 18 of the EU Charter holds the wording of the ‘right to asylum’. However, the preamble could be read as if the Directive ‘in particular’ has to ensure and respect the right to asylum, beyond the EU Charter and fundamental rights. The question at hand is therefore whether the Qualification Directive provides additional protection for refugees and asylum-seekers.

The first major point to be made about the Qualification Directive is that it confines the definition of applicant in Article 2(i) to,

\begin{quote}
\textit{a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken}
\end{quote}

\begin{itemize}
\item \textsuperscript{147} Qualification Directive, para 33.
\item \textsuperscript{148} Qualification Directive, see para 16, 17, 34, 40, 48; see also Art. 21.
\item \textsuperscript{149} Qualification Directive, Art. 21 (emphasis in original).
\item \textsuperscript{150} Qualification Directive, para 16 (emphasis added).
\end{itemize}
Thus, the Directive is only setting the standards for qualification of third-country nationals and stateless persons as beneficiaries for international protection. The UNHCR has drawn attention to this matter because, as they say, it is necessary to ensure that all persons who seek protection are entitled to have their claim considered, no matter their country of origin. The UNHCR suggests a wider definition of applicant, which then would apply to anyone who applies for international protection. The UNHCR proposes that the definition of an applicant should be a ‘person who is not a citizen of the Member State in question’. Klug argues that the Directive clearly deviates from the Refugee Convention in this sense because the Refugee Convention applies to anyone outside their country of origin. The mandatory limitation of applicants in the Directive thus vastly contravenes the principle of non-discrimination in Article 3 as well as Article 42 that prohibits States from limiting the personal scope of article 1 of the Refugee Convention. Storey argues differently saying that global international obligations basically cannot be overridden by regional treaties. The Directive’s role is to add more detail to the definition of refugee rather than substitute a different definition.

3.2 Structure

In Article 4(1) of the Qualification Directive it is said that the Member States can consider it the duty of an applicant to submit all the elements that are needed to confirm the application for international protection. However, Article 4(1) also states that it is the duty of a Member State to assess the relevant elements of the application.

154 Storey, ‘EU Refugee Qualification Directive: A Brave New World’, at 8, n 25 where the author refers to Art. 307(1) TEC which states that rights and obligations derived from international treaties concluded by Member States, shall not be affected by the provision of the TEC; Ibid at 8; See also Ibid, at 7, n 24 where Storey argues that the Directive’s more limited personal scope is not contrary to Article 42 of the Refugee Convention since it does not seek to limit the Refugee Convention from EU citizens, building his argument on preamble 20 of the recast Directive.
3.2.1 Refugee Status

According to the Qualification Directive, ‘Member States shall grant refugee status to a third-country national or a stateless person who qualifies as a refugee in accordance with Chapters II and III’. From the wording refugees do have a right to be granted protection under Article 13 in the Directive if the refugee fulfills the provisions in chapter II and III.

In order to be qualified, under Chapter III, as a refugee according to the Directive there has to be an act of persecution and also a reason for persecution and a connection between the two. Article 9 of the Directive stipulates that an act of persecution within the meaning of Article 1(A) of the Refugee Convention must be, ‘sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights’ or ‘be an accumulation of various measures, including violations of human rights which is sufficiently severe’. Article 10 provides the reasons for persecution and corresponds with the reasons given in Article 1(A) of the Refugee Convention. Article 12 stipulates the circumstances when a person is excluded from refugee status, which are aligned with the Refugee Convention.

Moreover, in Aydin Salahadin Abdulla156 the CJEU emphasized that the regulation in the Directive concerning qualification for being granted refugee status and the meaning of refugee status has been provided for the purpose to guide the Member State’s authorities in the application of the Refugee Convention.

3.2.2 Subsidiary Protection

Furthermore, the Qualification Directive provides that ‘Member States shall grant subsidiary protection status to a third-country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V’. Equivalently, third-country nationals or stateless persons have a right to be granted subsidiary protection if they fulfill the provisions in chapter II and V of the Directive.

156 Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland (C-175/08, C-176/08, C-178/08, C-179/08) [2010] ERC-SC I-01493.
157 Qualification Directive, Art. 18 (emphasis added).
Article 15 under chapter V stipulates serious harm as a qualification for subsidiary protection. It provides that Member States cannot return individuals to ‘the death penalty or execution, torture or inhuman or degrading treatment or punishment in the country of origin, or serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’. Although these provisions are based on the Member States’ already existing obligations under international law and primary EU law to respect the principle of *non-refoulement* the Qualification Directive consists of the first binding supranational agreement for determining the status of individuals with subsidiary protection needs. Hence, these international subsidiary protection needs fall outside the scope of the Refugee Convention.\(^{158}\)

### 3.3 Right to Asylum?

Goodwin-Gill and McAdam write that the goals in the preamble of the Directive are only partly met by its following contents.\(^{159}\) O’Nions on the other hand argues that the Qualification Directive has extended the coverage of the Refugee Convention in several areas. For example including the codification of subsidiary protection, the clarification on grounds for protection and the inclusion of persecution by non-agents. Yet she raises concern over the Directive’s compatibility with fundamental human rights norms. The absolute protection in Article 3 of the ECHR is not reflected in the Qualification Directive which thereby continues to include the exceptions provided in the Refugee Convention.\(^{160}\) Article 21(1) of the Directive requires the Member States to comply with their international obligations, but since Article 21(2) provides exceptions from the principle of *non-refoulement*, that unsurprisingly undermines those obligations.\(^{161}\)

Mink writes that the recast Qualification Directive maintain a confusion. Although the Directive includes the principle of *non-refoulement* it fails to acknowledge the absolute nature of the principle. Thus, when the Directive suggests that a refugee would be subject to persecution, it still does not fall under Article 3 of the ECHR. That is why there is a problem

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\(^{158}\) Goodwin-Gill & McAdam, *The Refugee in International Law*, at 211.

\(^{159}\) Ibid at 60.


\(^{161}\) Qualification Directive, Art. 21(2).
with the interpretation of the term ‘persecution’, argues Mink. Article 9 of the Qualification Directive defines persecution as a severe violation of basic human rights, particularly the rights from which derogation cannot be made under Article 15(2) of the ECHR. That is, Article 2, 3, 4, and 7 in the ECHR cannot be derogated in time of emergency. This leads to the conclusion that the provisions in the Qualification Directive are inconsistent. The Qualification Directive, that provides exceptions from the principle of non-refoulement, is therefore not compliant with the fundamental right provided by Article 3 of the ECHR.

To recall, pursuant to Article 32 of the ECHR, the ECtHR only has the right to interpret the ECHR. Thus, the ECtHR cannot hear a dismissal or a cessation of refugee status, according to the Refugee Convention, or a refusal to acknowledge the right to asylum according to the Qualification Directive. The CJEU attempted, in the Elgafaji judgement, to draw a distinction between the Qualification Directive and Article 3 of the ECHR. The Court assessed that Article 15(c) concerning the contents of serious harm, in conjunction with Article 2(e) (Article 2(d) in the recast Directive) concerning the definition of refugee, of the Directive were fully compatible with the ECHR.

Gil-Bazo argues that the obligations of Member States to grant protection, either as refugees or persons otherwise in need of protection, and to recognize the rights of these individuals constitute a subjective right to be granted asylum that confers upon the individuals that the Directive apply to. This right is protected by the EU legal order, national courts and the CJEU. Consequently, the Qualification Directive is based on the full and inclusive application of the Refugee Convention and the Directive has a purpose to guide Member States in their application of the Refugee Convention. The Member States further have to respect their other international obligations, including their obligations under the ECHR. Even if not clearly stipulated as a provision under the qualification for being a refugee, the CJEU has clarified that Article 15 and the definition of refugee were fully compatible with the ECHR.

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163 Mink, ‘EU Asylum Law and Human Rights Protection’, at 146-147.

164 Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie (C-465/07) [2009] ERC-SC I-00921, the case concerned whether the applicants had failed to show their individual circumstances under which they risked serious and individual threat that they would be exposed to if they returned to their country of origin.

with subsidiary protection needs, which fall outside of the scope of the Refugee Convention. Furthermore, the Directive provides the Member States with the obligation to grant asylum to refugees and asylum-seekers if they fulfill the terms and provisions in the Directive. Therefore, disregarding the more limited personal scope of the Directive, this would imply that there exists an indirect right to be granted asylum according to the Qualification Directive.
Chapter 4 – The Asylum Procedures Directive

Asylum procedures vary widely, globally as well as regionally. The access to a fair and efficient procedure to determine claims of asylum and refugee status has long been an important principle in UNHCR’s protection policy. However, many instruments can also be used to keep asylum seekers from their right of access to procedures.\textsuperscript{167}

The Asylum Procedures Directive was also a legislative development pursuant to the CEAS.\textsuperscript{168} The Tampere meetings concluded that the CEAS should include common standards for fair and efficient asylum procedures in the Member States and rules leading to a common asylum procedure.\textsuperscript{169} The Directive contains rules that make it the first supranational instrument to regulate safe third country, safe country of origin and first country of asylum. The Directive has a major impact on access to determination procedures regarding asylum within the EU.\textsuperscript{170} The Asylum Procedures Directive is also the Directive under the CEAS that has attracted the most alarming criticism. I has been described as a ‘catalogue of national practice which allows significant departures from accepted refugee and human rights law’\textsuperscript{171} and a ‘betrayal of the EU’s promise to guarantee fundamental rights’\textsuperscript{172}. O’Nions write that the criticism center on two key aspects, the use of accelerated procedures and the use of so called safe countries.\textsuperscript{173}

4.1 Contents

The objective of the Asylum Procedures Directive is to harmonize the asylum procedures between Member States so that the same level of treatment, regarding procedural arrangements and status determination, should be given to individuals regardless in which

\textsuperscript{167} Goodwin-Gill & McAdam, The Refugee in International Law, at 390.
\textsuperscript{168} Asylum Procedures Directive, paras 2, 7 and 12.
\textsuperscript{169} Asylum Procedures Directive, paras 4.
\textsuperscript{170} Goodwin-Gill & McAdam, The Refugee in International Law, at 396-397.
\textsuperscript{173} O’Nions, Law and Migration: Asylum – A Right Denied, at 99; Cf. Asylum Procedures Directive, paras 20, [40]-[42].
Member State the application is lodged. The objective is that similar cases should be treated alike in every Member State and that they should result in the same outcome. The preamble to the Directive stipulates that the ‘framework on procedures for granting and withdrawing international protection should be based on the concept of a single procedure’. The preamble further states that the approximation of rules on procedures should help create equivalent conditions for the application of the Qualification Directive. The Directive is based on the full and inclusive application of the Refugee Convention thus affirming the principle of non-refoulement.

According to Article 3 of the Asylum Procedures Directive the Directive applies to ‘all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States’. Hence, the Directive’s protective measures are not applicable until the refugee has reached EU territory, the border or the transit zone. Moreover, every person applying for asylum has the right to have their application treated according to the Directive. Article 6 in the Directive provides that Member States are required to ensure that there are authorities that can register and treat applications and make sure that the applicant has an effective opportunity to lodge their application as soon as possible. Article 9 further provides that all persons have the right to remain in the Member State pending the examination of their application. However, the right of an asylum-seeker to have their application treated does not in itself provide a right to asylum. Furthermore, Articles 32 and 33 provide that a Member State can consider an application to be unfounded or inadmissible. Certain guarantees must then be met, a personal interview and the right to appeal before rejection.

4.1.1 List of Safe Countries

The preamble to the Directive states that Member States can designate applicants to safe third countries, unless the applicant presents counter-indications. Moreover, one of the following preambles states that the designation of a third country as a safe country of origin ‘cannot establish an absolute guarantee of safety for nationals of that country’. If the applicant show that the designated country is not safe for him or her, then that designation can no longer be

174 Asylum Procedures Directive, paras 8, 12.
considered as relevant. Member States should ensure that a review of the human rights situation is conducted if the Member State becomes aware of a significant change in the human rights situation in the designated safe country. Questionable is whether this safeguard is enough to ensure that the principle of non-refoulment is not being breached.

The concept of a safe country is used by states as a procedural mechanism for moving asylum seekers to other states that are said to have the primary response for them. In such, the state has avoided the requirement to make a decision on the asylum seeker’s merits because another country is said to be secure. The concept of safe countries is widely used in practice among the European states. This method is being justified with the argument that an asylum seeker would seek protection in the first non-persecuting state. Moving to a secondary state is not for protection seeking but rather for migration.

The recast Asylum Procedures Directive still includes provision for a common list of safe countries of origin, also allowing the national governments within the EU to apply their own list. When Member States apply the concept of a safe country, either on case-to-case basis or designated countries by adopting a list, they have to consider the guidelines and operating manuals and information of the country of origin. The UNHCR affirms that the notion of a safe third country has to be appropriately applied so that it does not violate the principle of non-refoulment or a denial of access to asylum procedures. There must also be substantive and procedural human rights guarantees.

4.1.2 The Concept of Inadmissibility Under The Directive

According to Article 33 of the Asylum Procedures Directive the Member States can consider an application for international protection inadmissible if, inter alia, the Member State can transfer the asylum seeker to another Member State in accordance with the Dublin Regulation if; another Member State has granted international protection according to Article 33.2(a), a

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178 Goodwin-Gill & McAdam, The Refugee in International Law, at 397; see ibid n 234 for further references.
179 Ibid at 392.
180 Asylum Procedures Directive, Art. 36, 37 and 38; See also O’Nions, Law and Migration: Asylum – A Right Denied, at 96.
182 UNHCR, Executive Committee Conclusions, No. 87 (L) ‘General Conclusion on International Protection’ (1999) and No. 85 (XLIX), ‘Conclusion on International Protection’ (1998).
country which is not a Member State is considered as a first country of asylum for the applicant according to Article 33.2(b), a country which is not a Member State is considered as a safe third country for the applicant according to Article 33.2(c) either through transit or access to that country. Similarly, if an asylum seeker is considered to come from a safe country of origin, the application may be treated as unfounded.

Article 35 states that a first country of asylum is a country in which the applicant has been recognized as a refugee or that the applicant enjoys sufficient protection in that country, including the benefits from the principle of non-refoulement, if readmitted. Article 36 states that a safe third country is a country of which the applicant has the nationality of or if the applicant is stateless, that country was where the applicant was a former resident and the applicant has not submitted anything that would make the Member State reconsider that country not to be safe. Article 38 further provides that a safe third country only applies when following principles are respected in that country; life and liberty are not threatened, there is no risk of serious harm as defined in the Qualification Directive, the principle of non-refoulement is being respected, the right to freedom from torture and cruel inhuman or degrading treatment as stipulated in international law is being respected and it exists a possibility to request refugee status. However, if the safe third country does not accept the asylum-seeker into its territory, the Member State must ensure that there is access to an asylum determination procedure according to Article 38(4).

A secondary movement from a first country of asylum can therefore be lawful according to the Asylum Procedures Directive if an individual no longer enjoys effective protection, not given a rightful legal status or no access to effective remedies.

4.2 Right to Asylum?

The 2012 Asylum Procedures Directive has made an important improvement for asylum-seekers in the procedural guarantees compared to the 2005 Directive. However, the accelerated procedures and the various safe country concepts still remain a big concern according to the ECRE. The ECRE raised concern earlier on saying that the procedure has

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been shifted towards techniques to screen out as many applications as possible rather than laying the focus on identifying persons in need of protection.\textsuperscript{184}

The right to an asylum process was established already in Article 14 of the UDHR. Discrepancy between the UDHR and EU asylum legislation is a serious political and legal issue.\textsuperscript{185} The right to seek asylum, understood as an asylum procedural right, has not been reflected as strongly in the actual legislation concerning asylum within the EU. On the contrary, the process within the EU of harmonizing the area on asylum and immigration can be described as to prevent access to asylum procedures in the EU, argue Gammeltoft-Hansen. There are legal instruments in place preventing access to asylum procedures and attempts are made to prevent refugees and asylum-seekers of reaching EU territory. For the refugee and asylum seeker, this means that they risk getting rejected even before they are able to submit an application for asylum.\textsuperscript{186} Even though the Directive is based on the Refugee Convention and affirms the principle of \textit{non-refoulement} it is however noticeable that more and more refugees are unable to access asylum procedures because they are unable to reach the territory of the EU.\textsuperscript{187}

Consequently, the Directive provides a right for asylum-seekers to get their application treated but it also provides a right for the Member States to apply a list of safe countries and value an application as inadmissible under the Directive. Even though the Directive provides a right to get an application treated, that only implies an indirect right to seek asylum and not a right to be granted asylum according to the Asylum Procedures Directive.

\textsuperscript{184} ECRE, \textit{The Way Forward: Towards Fair and Efficient Asylum Systems in Europe} (September 2005), at 5.
\textsuperscript{186} Ibid at 448.
\textsuperscript{187} Ibid at 440.
Chapter 5 – The Return Directive

The Executive Committee of the UNHCR started to look at the question of irregular movement of refugees and asylum-seekers in 1985 and finally adopted a conclusion emphasizing that a return should only be considered when the individual is protected against refoulement. If this is not possible, the individual should be allowed to maintain in the country of refuge pending a durable solution. The Return Directive was, as well as the Qualification and the Asylum Procedures Directive, a legislative instrument pursuant to the CEAS. After 2005, when the Commission adopted a proposal for the Return Directive, three years of difficult negotiation followed which made the Directive develop along different lines than those originally intended. Finally, the European Parliament and the Council reached a deal and the Directive was adopted. The Directive has received tremendous criticism from International Organizations such as the Council of Europe, NGO’s such as Amnesty International and ECRE, UNHCR and individual governments such as Latin America and Africa.

5.1 Contents

Article 1 of the Return Directive stipulates that the Directive ‘sets out common standards and procedures to be applied in Member States for returning illegally staying third country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations’. An illegally staying third country national is defined in Article 3(2) and refers to an individual who does not, or no longer fulfills the conditions of entry in Article 5 of the Schengen

190 Return Directive, para [1]-[3].
Borders Code\textsuperscript{193} or other conditions in that Member State. According to the preamble, a third country national that has applied for asylum in a Member State in accordance with the Asylum Procedures Directive, is not to be regarded as illegally staying in a Member State until a negative decision on the application has been reached or a decision to end the right to stay as an asylum-seeker has entered into force.\textsuperscript{194} A ‘return’ is, according to Article 3(3), the process of a third country national, either voluntarily or enforced, going back to his or her country of origin, a country of transit or another third country of the individual’s decision where he or she will be accepted.

The preamble to the Return Directive states that:

\begin{quote}
It is recognised that it is legitimate for Member States to return illegally staying third-country nationals, \textit{provided that fair and efficient asylum systems are in place which fully respect the principle of non-refoulement}.\textsuperscript{195}
\end{quote}

Moreover, the preamble states that there should be established a common minimum set of legal safeguards regarding decisions related to return, to guarantee effective protection of the interest of the individual.\textsuperscript{196} The Return Directive is furthermore legislated without prejudice to the obligations following from the Refugee Convention and the Refugee Protocol and it respects the fundamental rights and observes the principles that are recognized in the EU Charter. The Directive also corresponds to the ECHR and the respect for family life should be a primary consideration for Member States.\textsuperscript{197} However, neither the preamble nor the obligations under the Refugee Convention, the ECHR or the EU Charter provides a right to asylum under the Directive.

Coercive measures can be used but should explicitly be subject to the principles of proportionality and effectiveness. Furthermore, Member States can establish an entry ban for individuals facing return and by this measure prohibiting ‘entry into and stay on the territory

\textsuperscript{194} Return Directive, para 9.
\textsuperscript{195} Return Directive, para 8 (emphasis added).
\textsuperscript{196} Return Directive, para 11.
\textsuperscript{197} Return Directive, para [22]-[24].
of all the Member States’. The entry ban should be determined with regard to all relevant circumstances of an individual’s case and should not, in a normal case, exceed five years.  

As stated in Article 4(1), the Directive should be implemented without affecting the application of more favorable provisions in bilateral or multilateral agreements between the Community, the Member States and third countries. According to Article 4(2), provisions that may be more favorable in the Community’s legal framework relating to immigration and asylum should not be confined by the Return Directive. Also stipulated in Article 4(3), if a Member State uncompelled wants to maintain more favorable provisions it has the right to do so providing that those provisions are compatible with the Directive. Third country nationals who are excluded from the Directive, that is individuals that are intercepted by the irregular crossing of either land, sea or air of the external border of a Member State and that has not obtained an authorization or right to stay in that Member State, should still according to Article 4(4) be ensured no less treatment or level of protection and still be respected with the principle of non-refoulement.

5.1.1 Return Decisions

Member States are required, according to Article 6(1) of the Directive, to issue a return decisions to every third country national illegally staying on their territory. However, this mandatory rule is mitigated by exceptions in paragraphs 2-5. The most significant of those exceptions is the one stipulated in Article 6(4) saying that Member States can decide not to issue a return decision, or suspend or withdraw a decision, because of ‘compassionate, humanitarian or other reasons’ and may instead grant the individual an autonomous residence permit or other authorization. Member States’ power to issue a return decision was in the original draft of the Directive explicitly subjected to fundamental human rights obligations, derived from the ECHR, the principle of non-refoulement and the right to education and family unit.  

The explicit reference to fundamental human rights obligations have in the current Directive been moved to the preamble, making the obligatory character of the return

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198 Return Directive, para [13]-[14].
decisions problematic. An unspoken human rights safeguard has been preserved in the main text of the Directive in Article 5, saying that the Member States have to respect the principle of non-refoulement. Consequently, the article does not expressly prohibit the issuing of a return decision on such grounds. Not making the principle of non-refoulement a specific ground for exception on the mandatory issuing of a return decision could place migrants in a legal vacuum. Other provisions in the Directive do allow Member States to postpone removal, Article 9(1a) clearly stipulates that Member States have to postpone removal ‘when it would violate the principle of non-refoulement’. Individuals may end up in a legal limbo due to postponed removals, which is why the Directive stipulates certain safeguards in Article 14, such as providing emergency health care.

5.1.2 (Re-) entry Ban

A specifically controversial part of the Return Directive is the entry bans accompanying the return decisions, prohibiting re-entering the territory of the EU after issuing a return decision and the removal has been enforced. EU entry bans are considered being a major deterrent to irregular staying migrants due to its severe consequences for the migrants. However, the deterrent element is doubtful and can be considered counter productive to the extent of reinforcing the irregular circle of migration for whom many will find an illegal entry the only option available. Return decisions should according to Article 11(1a) and (b) be accompanied by an entry ban ‘if no period for voluntary departure has been granted’ or ‘if the obligation to return has not been complied with’. In practice, Member States can choose to withdraw or suspend the entry ban at their own discretion due to Article 11(3) of the Directive. The length of an entry ban should not exceed five years according to Article 11(2) unless the individual ‘represents a serious threat to public policy, public security or national security’. Given that very few migrants with return decisions are being returned, the mandatory entry bans will increase the number of people that are banned from the EU.

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200 Return Directive, para [21]-[24].
204 Ibid at 9-10.
5.1.3 Detention

Additionally, Member States may keep individuals in detention pending their removal according to Article 15, if there is risk of the individual absconding, avoiding or hampering the preparation of the removal process. There is a maximum extension of detention with up to 18 months allowed.205

5.2 Right to Asylum?

The question of where to send back asylum-seekers has not been without difficulty. The inclusion of choice upon the individual and demand that the third country accept the return is a significant improvement from earlier drafts when the return could only take place to ‘another third country’, thus raising the risk of indirect or chain refoulement.206

There were some expectations on the Return Directive, when first proposed, that it would add to the protection of the human rights of irregular migrants. Unfortunately, it has failed to provide minimum standards of protection which should apply to all EU immigration and asylum law. The irregular migrants thus compose a vulnerability. Even though Member States either have to grant the asylum-seeker residence or send the individual back to their country of origin many asylum-seekers whose expulsion cannot be enforced are likely to be kept in limbo for an indefinite amount of time.207 The European Commission has expressed that a future development of the EU return policy is to promote more consistent and fundamental rights compatible practices and among other parameters ensure that non-removable returnees are not left indefinitely without basic rights.208 The consequence for excluding categories of irregular migrants from the scope of the Return Directive is that those who fall outside the scope can be returned without respect to the minimum legal guarantees provided for in the Directive. However, the European Parliament has been able to assure that these individuals are afforded some level of protection.209

207 Ibid at 17.
Consequently, the Directive, just giving reference to the principle of *non-refoulement* is not providing any additional protection for asylum-seekers and does therefore not provide a right to be granted asylum but contains, through the principle of *non-refoulement*, an implied right to seek asylum.
Chapter 6 – The Dublin III Regulation

To reduce the likelihood of multiple, successive applications by asylum-seekers, the Dublin III Regulation establishes criteria and mechanisms for determining which Member State has the responsibility examining an asylum application. The aim is to find one state that will be required to determine the asylum claim. The Dublin Regulation was alike previous Directives a legislative measure pursuant the CEAS. The operation under the Dublin Regulation is depending on the Eurodac Regulation, which collects and compares fingerprints of asylum-seekers. This is to assist the Member States in their responsibility to make sure an application is only tried once.

While the Dublin Regulation might have curbed the shuttling of asylum-seekers from state to state within the EU, the Asylum Procedures Directive might have precipitated to this phenomenon, argue Goodwin-Gill and McAdam. To transfer an asylum-seeker to another state for status determination does not remove that state’s responsibility under international law and the state has to make sure that the asylum-seeker is not sent back to persecution or ill-treatment, even though the asylum-seeker is no longer in that state’s territory.

6.1 Contents

The Dublin III Regulation applies to third-country nationals and stateless persons. However, the scope of the Dublin III Regulation also encompasses applicants for subsidiary protection. To recall, the CEAS stated that the system should include a method for determining the responsible Member State for examining an asylum application. It was also

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211 Dublin III Regulation, Art. 1.
212 Goodwin-Gill & McAdam, The Refugee in International Law, at 400-401.
213 Dublin III Regulation, para 4 and 7.
215 The 28 Member States of the EU has taken part in the application and implementation of the Dublin Regulation, as well as Norway, Iceland, Switzerland and Liechtenstein.
216 Goodwin-Gill & McAdam, The Refugee in International Law, at 402.
217 Dublin III Regulation, Art. 1 and Art. 2(a) and (c).
218 Dublin III Regulation, para 10.
stated that such a method should make it possible to guarantee a more effective access to procedures for granting international protection.\textsuperscript{219} To guarantee the protection of the rights of the asylum-seeker, legal safeguards and an effective remedy should be established regarding transfers. That should include an examination of both the legal and factual situation in the Member State to which the asylum-seeker is being transferred. Moreover, an asylum-seeker should not be held in detention for the sole reason that he or she has made an application for international protection.\textsuperscript{220}

The preamble states that:

\begin{quote}
This Regulation respects the fundamental rights and observes the principles which are acknowledged, in particular, in the Charter of Fundamental Rights of the European Union. In particular, this Regulation \textit{seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter} as well as the rights recognised under Articles 1, 4, 7, 24 and 47 thereof. This Regulation should therefore be applied accordingly.\textsuperscript{221}
\end{quote}

To recall, Article 18 of the EU Charter does not provide a right to asylum but is limited to a right to seek asylum. The preamble to the Dublin III Regulation does therefore not provide an additional right to be granted asylum.

Article 3 of the Regulation stipulates that ‘the application shall be examined by a single Member State’. Where no Member State can be designated, the Member State where the application was lodged is responsible according to Article 3(2), also known as the first country of asylum. Furthermore, Article 3 provides that every Member State can transfer an asylum-seeker to a safe third country, which is based on the presumption that every Member State is considered a safe country why a transfer is not supposed to violate the principle of \textit{non-refoulement}.\textsuperscript{222} The sovereignty clause in Article 17(1) further stipulates that every Member State can decide to examine an application, even if such examination is not under that Member State’s responsibility.

\textsuperscript{219} Dublin III Regulation, para 4 and 5.
\textsuperscript{220} Dublin III Regulation, para 19 and 20.
\textsuperscript{221} Dublin III Regulation, para 39 (emphasis added).
\textsuperscript{222} Moreno-Lax, Violeta, ‘Dismantling the Dublin System: M.S.S. v Belgium and Greece’ (2012) 14(1) European Journal of Migration and Law 1, at 1; Cf. M.S.S. v Belgium and Greece [GC], No. 30696/09, ECHR 2011, where the ECtHR decided that a transfer according to the Dublin Regulation could not be executed towards Greece due to their treatment of asylum-seekers.
The Member States are obligated to take charge and take back an asylum-seeker who has lodged an application in a different Member State. If a Member State finds another Member State responsible for examining the application it may request that another Member State take charge and take back the asylum-seeker. The asylum-seeker on the other hand has the legal safeguards to appeal the decision of transfer.

6.1.2 Mutual trust

The system, to secure that only one Member State is responsible for an application for asylum, is based on a mutual trust between the Member States. In other words, the system builds upon the assumption that every Member State respects the rights of asylum-seekers, in accordance with international law and EU law. All states that have taken part in the application of the Dublin III Regulation are also parties to the ECHR and are subsequently bound to respect the principle of non-refoulement as stipulated in its Article 3.

The preamble to the Dublin III Regulation warns that flaws or a collapse of the asylum system can jeopardize the system put in place under the Regulation and then risk to violate the rights of the asylum-seekers under the EU asylum system, the EU Charter and other international human rights and refugee rights. By enhancing the mutual trust between the Member States, the process of early warning, preparedness and the management of an asylum crisis could improve the solidarity between the Member States and assist the most affected Member States and the asylum-seekers in particular. However, the ECtHR and the CJEU have confirmed that the mutual trust between the Member States is not allowed when that would jeopardize the protection of fundamental rights of the asylum-seeker.

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223 Dublin III Regulation, Art. 18, 21, 23.
224 Dublin III Regulation, Art. 27.
226 Dublin III Regulation, para 21.
227 See M.S.S. v Belgium and Greece [GC], No. 30696/09, ECHR 2011, where the ECtHR finally decided that the mutual trust was not applicable against Greece due to their treatment of asylum-seekers. The applicant, an Afghan asylum-seeker, submitted a claim against Belgium and Greece for the violations of his rights under Article 3 and 13. Both Belgium and Greece were found guilty of breaching Article 3, Belgium were said having violated both an indirect and direct risk of refoulement; See also N.S v Secretary of State for the Home Department (C-411/10) and M.E. and Others v Refugee Application Commissioner and Minister for Justice, Equality and Law Reform (C-493/10) [GC], CJEU 2011.
6.2 Right to Asylum?

European Courts and national courts emphasize the importance of assessing the risk of refoulement when transferring an asylum seeker under the Dublin III Regulation. Additionally, a Member State could still be held responsible without a claim from the transferred asylum-seeker if the state knows or could have known that the asylum-seeker would face real risk of inhuman or degrading treatment.\(^{228}\) All Member States have acceded to the Refugee Convention, the ECHR and they all share the goal to establish a CEAS to harmonize the area on asylum and as Member States of the EU they have to respect and protect the fundamental rights of all individuals.\(^{229}\) However, the Dublin III Regulation does not give any more promise as to whether this presumption is absolute or rebuttable. Sure enough, Article 27 provides the asylum-seeker with the right to appeal the transfer decision under the Dublin III Regulation and provides that Member States shall provide a reasonable period of time within which the person can exercise the right to an effective remedy. However, the Regulation does not specify the grounds on which an appeal could be founded and the wording ‘a reasonable period of time’ gives the Member State a margin of appreciation.\(^{230}\)

Member States have developed very different practices in the use of the Dublin III Regulation, thus a uniform application is essential for its proper functioning. The European Commission’s evaluation of the Dublin system revealed that the application of the sovereignty clause is used for different reasons between Member States, ‘ranging from humanitarian to purely practical’.\(^{231}\) Other reports show that the execution of the responsibility according to the Dublin III Regulation is inconsistent in the Member States and that the extra procedures due to the Regulation detracts from the processing of applications. Hence, the system fails to achieve its, as declared in the preamble, stated objectives regarding international protection.\(^{232}\) Non-consistent treatment afforded asylum-seekers in different Member States has resulted in a dangerous ‘asylum lottery’ within the EU.\(^{233}\)

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\(^{228}\) Brouwer, ‘Mutual Trust and the Dublin Regulation’, at 145-146.

\(^{229}\) Moreno-Lax, ‘Dismantling the Dublin System: M.S.S. v Belgium and Greece’, at 1.

\(^{230}\) Ibid, at 5.


\(^{233}\) Ibid at 14.
To recall, the right to asylum as recognized in Article 18 of the EU Charter achieved legal effect when the Treaty of Lisbon entered into force. The Dublin III Regulation should be read in the light of this provision and where the right to asylum would be jeopardized, returns according to the Dublin III Regulation must be suspended.234 The *M.S.S. v Belgium and Greece* and the *N.S. and M.E.* cases emphasized the primacy of *non-refoulement* over the mutual trust and that the principle of *non-refoulement* should be interpreted in the light of Article 3 and Article 8 (protection of the family unit) of the ECHR which will set the criteria for the Dublin system ensuring that those rights are respected.235 Consequently, the Dublin III Regulation does not make any more promise than to the reference to fundamental human rights and the EU Charter. Moreover, the principle of *non-refoulement* has primacy over the objectives of the Regulation and Member States have to respect the fundamental human and refugee rights provided in international instruments. Thus, the Regulation in itself and the reference to the EU Charter does not give a more far-reaching protection than the principle of *non-refoulement* and does therefore not provide a right to be granted asylum but an implied right to seek asylum and a provision not to be sent back to prosecution.

234 Moreno-Lax, 'Dismantling the Dublin System: *M.S.S. v Belgium and Greece*’, at 19.
Chapter 7 – Summary and Discussion

7.1 Conclusion Global International Law and EU Regional Law

To conclude the previous chapters concerning international law and EU secondary law we have so far established that there is no right to asylum according to international law but an indirect right to seek asylum can be implied due to the principle of non-refoulement and the right to leave the country of one’s own. The absolute principle of non-refoulement has been shown to be the most important protection mechanism for refugees and asylum-seekers.

Furthermore, The Qualification Directive provides stronger measures to be granted asylum since it obligates states to grant asylum when the requirements for refugee status or subsidiary status protection is met, thus actually providing an indirect right to be granted asylum. The Asylum Procedures Directive on the other hand does not provide a right to be granted asylum, even though it contains the right to treat an application. The Directive brings too much uncertainty with the practice of the list of safe countries and the possibility to deem an application admissible. The Return Directive, not giving any additional bound protection than the principle of non-refoulement does not provide an additional right to be granted asylum. The Directive is too fortuitous as to which countries a return is even possible and in ensuring fundamental human rights to non-removable irregular migrants. Additionally, the Member States have an option of issuing entry bans as well as the option of decide upon detention. The Dublin III Regulation, giving reference to the EU Charter does not provide additional protection than what is provided in international law and the principle of non-refoulement and does therefore not provide a right to be granted asylum. The Regulation offers inconsistent practice among the Member States and the principle of first country of asylum in order to only try an application once is obviously in unbalance since all refugees and asylum-seekers fleeing over the Mediterranean enter the EU either through Greece, Italy or Malta.

However, consequently, EU secondary law contains an indirect right to asylum through the Qualification Directive and its rules on granting refugee protection and subsidiary protection.
7.2 Other Forms of Relevance

As discussed above, EU law is subordinate to international law but can also contribute to international law. During the previous chapters we have mainly examined written agreements between states in order to establish what duties the signing states have according to those instruments regarding the right to seek asylum. However, there are other ways to analyze international law. To recall, Article 38.1(b) of the ICJ Statute provides that customary international law consists as ‘evidence of a general practice accepted as law’ and as have been established by the Nicaragua case the two elements consist of ‘general practice’ and ‘accepted as law’ or opino juris. Additionally, Article 38.1(c) if the ICJ Statute provides that ‘general principles of law recognized by civilized nations’ also constitutes international law. Moreover, Article 32 of the VCLT provides that supplementary means of interpretation is applicable to the interpretation of the treaties.

7.2.1 (Regional) Customary Law

One core issue, when European integration began, was to emancipate the law established by the European Communities from international law. In the 1963 van Gend & Loos decision the CJEU established that ‘the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights’. Moreover, the CJEU established in the 1964 Costa v ENEL case that European law has primacy and autonomy over national legal systems and that it abstains from the denotation of international law, hence further emancipating European law from international law. EU law is today understood as an autonomous legal order made up by internal law. However, the basic principles of EU law, as established by the CJEU in the 1960s, could also be explained by its economic dimension rather than by the regional character of the EU. Looking at it that way, regional international law becomes evanescent as a legal concept and is no more than an undefined and intermediate level between national and international law. Moreover, if explaining regional

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236 See chapter 1.2.
238 Van Gend en Loos v Nederlandse Administratie der Belastingen (C-26/62) [1963] ECR 1, 12.
239 Costa v ENEL (C-6/64) [1964] ECR 585, 594.
law by its economic dimension, international law does not grant regional law any specific regime insofar it being special law.\(^{241}\)

In the *Asylum* case the ICJ introduced the concept of ‘regional or local custom’. If the custom in question is considered as regional in character it must be proven ‘that the rule invoked … is in accordance with a constant and uniform usage practiced by the States in question’.\(^ {242}\) Furthermore, in the case concerning *Right of Passage over Indian Territory* the ICJ established that a local custom, based on a long practice, did not necessarily have to be larger than the practice of two states and that regional custom constituting of a ‘particular practice’ between states, ‘must prevail over any general rules’.\(^ {243}\) General principles of international law are established under the same process, that is, general practice and *opinio juris*. Accordingly, regional customary norms only have to be common to the states concerned.\(^ {244}\)

If looking at universal human rights, enshrined in various international sources, as minimum standards in all territorial political entities throughout the world, the universal human right has primacy over regional human rights. The regional human rights law plays an important role of supplementing universal rules, so long as it does not violate the universal rule. The international human rights instruments were thus themselves sources for the rules set in the regional instruments.\(^ {245}\)

State-made legislation is an important expression of state practice and state practice by a small number of states is efficient to create a customary rule.\(^ {246}\) Treaties can, as Malanczuk also argues, be evidence of customary law. However, custom and treaties can now be hard to clearly distinguish from one another. Furthermore, even if not universal, a practice can still be of a general character if that is the wide acceptance of the states involved.\(^ {247}\) Hathaway argues that universal norms of human rights law have to be the product of state consent, thus requiring a relatively constant and uniform state practice in order to generate a sense of mutual obligation among states. Instead of words as a medium of negotiation, as is the case


\(^{242}\) *Asylum (Colombia v Perú) (Judgement)* [1950] ICJ Rep 266, 276.

\(^{243}\) *Right of Passage over Indian Territory (Portugal v India) (Merits)* [1960] ICJ Rep 6, 44.

\(^{244}\) Forteau, ‘Regional International Law’, para 21.


\(^{246}\) See above, chapter 1.2; Malanczuk, *Akehurst’s Modern Introduction to International Law*, at 41-43.

for treaties, action can also be a medium of negotiation which can be said to represent a standard of acceptable behavior.\textsuperscript{248} The EU secondary law, discussed in this thesis, can be said to function as EU treaties for the signing parties and are common to the states concerned. The directives in themselves therefore constitute state practice as well as Member States acts constitute state practice.

Furthermore, the general practice also has to obtain acceptance as law, \textit{opinio juris}, in order to obtain the status of a customary rule. When looking at state practice and the conduct of states in forming a new customary rule, it is also important to examine why states act in certain ways, Malanczuk argues. There also exists a psychological element in the creation of a customary rule, and it must be shown that state practice reflects a legal obligation of a state. The psychological element is often a conviction of states that a certain conduct is required by international law.\textsuperscript{249}

Member States can, as discussed above, choose how to implement the rules in a EU directive, but the directives in themselves are binding to all Member States ‘as to the results to be achieved’ according to Article 288 of the TFEU. The four main EU directives concerning asylum discussed in this thesis have one core task in common, that is to create common criteria to be applied by all Member States in order to harmonize and establish minimum standards in the area on asylum.\textsuperscript{250} Moreover, it is ultimately up to the CJEU to decide the proper application and interpretation of the EU secondary legislation, in order to fulfill the common criteria throughout the EU. All Member States are parties to the directives and they have agreed to the legislation. The directives can therefore be said to have obtained acceptance as law since they are part of every Member States’ legislation. The directives are, as discussed above, an important part of the CEAS which was rooted in the EU’s objective of establishing an area of freedom, security and justice. The European Council thus represented the will of the EU when meeting in Tampere and agreed upon the CEAS. The reason for the Tampere meetings and the creation of the CEAS could have been a conviction within the EU that a certain common conduct was required for the EU in order to correspond with international law. This is possible evidence of why the CEAS was created and that the CEAS is part of a conviction of a legal obligation, hence forming an \textit{opinio juris} of the EU.

\textsuperscript{248} Hathaway, \textit{The Rights of Refugees Under International Law}, at 24.
\textsuperscript{249} Malanczuk, \textit{Akehurst’s Modern Introduction to International Law}, at 44.
\textsuperscript{250} Qualification Directive, para 12, 49; Asylum Procedures Directive, para 12, 56; Return Directive, para 11, 20; Dublin III Regulation, para 40.
The worsening humanitarian situation in a number of countries during the recent year has clearly reflected the statistical data on individuals lodging asylum applications. Over 1.66 million asylum applications were submitted to States or UNHCR during 2014, which was a 54 percent increase from 2013 with an estimated 45 percent increase in industrialized countries. Germany and Sweden were the two countries within the EU that received the most individual asylum applications during 2014. Germany registered 173,100 new asylum claims and Sweden registered 75,100 new asylum claims during 2014, by that being the second and fifth largest recipients of new individual asylum claims worldwide.\textsuperscript{251} With a large amount of the asylum applications being lodged in the EU and more refugees fleeing persecution, conflict, violence and human rights violations are heading to Europe or through Europe one could say that the CEAS, by its wide state practice, could be the holder of a regional customary law.

However, the highest number of positive asylum decisions within the EU has in 2014 been recorded in Germany, Sweden, France, Italy, the United Kingdom and the Netherlands. Accordingly, these six Member States stand for 81 percent of the total number of positive decisions between the EU-28. This can depend on various reasons, first and foremost there is a huge diversity in how Member States handle asylum application across the EU. There are also differences in citizenship of applicants applying to each Member State and even though refugee and subsidiary protection status is defined in EU secondary law, protection because of humanitarian reasons are specific to national legislation within each Member State.\textsuperscript{252} Consequently, customary law formalizes state practice that represents the agreed and accepted relations between states. The custom gains legitimacy by the state’s agreements on the terms and an expressed willingness of the states to be bound by the agreement. Since the CEAS has gotten the Member States agreements and willingness to be bound by the CEAS, as it is a common decision from the European Council’s meeting in Tampere, the CEAS can in that sense be said to constitute (regional) customary law.


\textsuperscript{252} Eurostat, \textit{Asylum Statistics} (Statistic article), available at: http://ec.europa.eu/eurostat (last modified on 29 September 2015).
7.2.2 General Principles of Law

As an alternative to customary law, human rights norms can also be established through general principles of law. Thus, instead of established by uniform state practice it is established by the consistency of domestic laws across a range of countries. Under such circumstances, when states consent to the binding authority within their sphere of governance, it can validly create international law, argues Hathaway.253 The phrase was inserted in the ICJ Statute to provide a solution where treaties and custom did not provide any guidance to the Court. Malanczuk argues that there is no reason for the phrase general principles of law not to contain both general principles of international law and general principles of national law. Many international tribunals had applied both international and national law in this sense before the Permanent Court of International Justice was set up in 1920. Accordingly, gaps in international law may be filled with general principles of national law by borrowing common principles to all or most national systems of law.254

The CEAS is, as discussed above, based on the full and inclusive application of the Refugee Convention and maintaining the principle of non-refoulement.255 The national legislation is in this sense based on already existing international refugee law. However, it has been established in this thesis that the refugee status protection and subsidiary status protection provisions in the Qualification Directive goes farther than the international law in this sense, actually providing an indirect right to be granted asylum. By becoming a member of the EU the Member States have consented to the binding authority within their sphere of governance. Moreover, the EU directives are binding to all Member States according to Article 288 of the TFEU. In this case there is consistency of domestic laws through the EU legislation and there is state consent to the binding authority of the EU. Consequently, the stronger measures of the right to asylum in EU secondary law could in this way, being a general principle of national law, fill the gaps of international law where it lacks consistency with national law. The CEAS could in this way contribute to international law by general principles of law.

254 Malanczuk, Akehurst’s Modern Introduction to International Law, at 48-49.
255 See chapter 2.5.1.
7.2.3 Supplementary Means of Interpretation

Article 32 of the VCLT provides that supplementary means of interpretation can be used in order to interpret international treaties. It must therefore be aligned to consider that the CEAS can influence international law as constituting a supplementary means of interpretation to the Refugee Convention.

The supplementary means of interpretation in Article 32 of the VCLT become applicable when the objective general rules of interpretation in Article 31 of the VCLT is not sufficient for interpreting a treaty. For example, state practice that does not meet the requirements in Article 31(3)(b) as subsequent practice can still constitute a supplementary means of interpretation under Article 32. Firstly, Article 32 considers the case when the interpreter needs to confirm the meaning of a treaty after using the objective general rule in Article 31. Secondly, Article 32 can be used when the interpretation of a treaty leaves the meaning ‘ambiguous of obscure’ or leads to a result which is ‘manifestly absurd or unreasonable’.

Hathaway argues that, before relying on state practice as a supplementary means of interpretation to refugee and other international human rights treaties, particular caution is warranted. The international treaties’ main objective is to constrain state conduct for the benefit of fundamental human rights. If the interpretation of refugee and human rights treaties are interpreted in such a way that it defers to state practice, there is a real risk that the state practice will trump the existence of the obligations under the treaties, Hathaway argues. In accordance with Article 32 of the VCLT it could be argued that the indirect right to asylum according to the Qualification Directive and hence the CEAS, that has been established in this thesis could be used as supplementary means of interpreting the Refugee Convention. Accordingly, the already established indirect right to seek asylum according to the Refugee Convention and its provisions against refoulement in Article 33 could through EU secondary law be interpreted as to also contain an indirect right to be granted asylum when a third-country national or stateless person is within the territory of the state of refuge and an application for international protection has been lodged. Consequently, EU secondary law can

256 The Vienna Convention’s codification of the rules of treaty interpretation has by the ICJ been recognized as constituting customary norms of treaty interpretation; See inter alia Territorial Dispute (Libyan Arab Jamahiriya v Chad) (Judgement) [1994] ICJ Rep 6, 21.
258 Ibid at 71.
contribute to international law by being supplementary means of interpreting the Refugee Convention.

7.3 Concluding Remarks

Europe cannot go on responding to this crisis with a piecemeal or incremental approach. No country can do it alone, and no country can refuse to do its part.259

The U.N. High Commissioner of Refugees António Guterres, laying down fundamental principles in order to resolve the refugee crisis, stresses that it is no surprise that the European system, when it mounts to pressure, gets blocked due to its unbalance and dysfunction. Europe is now facing their moment of truth and ‘[t]his is the time to reaffirm the values upon which it was built’, Guterres urges.260

The UNHCR is particularly concerned about, the recently introduced, restrictive measures made by Hungary. The new legislation, including deterrence measures, results in extremely limited access to the border for refugees and asylum-seekers. Only a few asylum-seekers have been allowed to enter through the official border crossing point of Hungary. People that already suffered so much have been prevented form entering the EU with water cannons and tear gas. Hungary has further denied entry to asylum-seekers under the argument that it is possible to return them to Serbia, even though Serbia’s current asylum system is not able to cope with the current inflow of refugees and asylum-seekers who are in need of effective protection. ‘States should manage their borders in a way that is consistent with International and EU Law, including guaranteeing the right to seek asylum’, Guterres urges.261 The ECRE is also concerned with Hungary’s recently approved more restrictive rules on asylum and the proposal to build a fence alongside the Serbian border, thus limiting the access to asylum.262

The European Commission recently presented a proposal with immediate measures and long term initiatives to find a solution to the crisis situation in the Mediterranean. One of the main objectives of this proposal is to establish provisional measures in order to help Italy, Greece and Hungary to enable them to handle the current significant inflow of third country nationals

259 UNHCR, UNHCR Chief Issues Key Guidelines for Dealing with Europe’s Refugee Crisis (4 September 2015) (emphasis added).
260 Ibid.
261 UNHCR, UNHCR Urges Europe to Change Course on Refugee Crisis (16 September 2015).
in their territory, thus putting their asylum systems under strain. The provisional measures first and foremost concerns the relocating of applicants who appear to be in clear need of international protection from Italy, Greece and Hungary to other Member States.\textsuperscript{263}

The purpose of this thesis has been to examine ‘the right to seek asylum’ and, more explicitly, one of the sub-rights; the right to asylum or in other words, the right of an individual to be granted asylum in a state of refuge. This thesis has clarified that there is no explicit right for an individual to be granted asylum neither under international law nor EU primary law. However, there is an implied right to seek asylum under international law, which essentially follows from the right to leave one’s country of origin. The absolute principle of \textit{non-refoulement} holds an implied right to seek asylum and has, throughout this thesis, been established of being the most important of rights for refugees and asylum-seekers in terms of receiving protection from another state. Even tough there is an expressed right to asylum in EU primary law, the rights under EU primary law do not go any further than what can be derived under international law. What must be criticized is that the UDHR, the Refugee Convention and the EU Charter that at first glance give the impression of providing a strong right to seek asylum all have a much wider meaning than what they in reality actually provide. It is a shame that a right to seek and enjoy asylum, was included almost seventy years ago by states as a goal to aim for, yet the right has not been implemented in any binding international instrument.

This thesis has further clarified that the motives and purpose of the CEAS provide a stronger promise than it actually lives up to. The Qualification Directive is the only directive under the examined legislation that provide an indirect right to be granted asylum, to the individuals that fall under its scope. The Asylum Procedures Directive, the Return Directive and the Dublin III Regulation all respect the principle of \textit{non-refoulement} and thus provide an implied right to seek asylum. What must be criticized is that the CEAS, taking its form more than fifteen years ago with many promises on the systems’ respect of fundamental human rights and the right to seek asylum, is in many ways flawed with various inconsistencies and questionable legislation.

To repeat a previous statement, made in the introduction of this thesis, ‘international refugee protection is in the true sense international’. Guterres makes the most valid of points in this sense, it is not something one country can do alone, there need to be an international cooperation to solve the refugee crisis. The EU Member States especially have a crucial responsibility and it is, as Guterres stresses, time to look back to the common values of the EU and the CEAS, upon which all Member States are part of, and reaffirm the main objective; to establish ‘an area of freedom, security and justice, open to those who, forced by circumstances, legitimately seek protection in the Union’.
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