DEVELOPMENT OF THE EU ASYLUM POLICY: PREVENTING THE ACCESS TO PROTECTION

AYDAN BAHADIR

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DEVELOPMENT OF THE EU ASYLUM POLICY: PREVENTING THE ACCESS TO PROTECTION

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Prof. Dr. Sencer Ayata
Director

I certify that this thesis satisfies all the requirements as a thesis for the degree of Master of Science.

Prof. Dr. Ali Gitmez
Head of Department

This is to certify that we have read this thesis and that in our opinion it is fully adequate, in scope and quality, as a thesis for the degree of Master of Science.

Assoc. Prof. Dr. Mehmet Okyayuz
Supervisor

Examining Committee Members

Assoc. Prof. Dr. Mehmet Okyayuz

Assoc. Prof. Dr. Nuri Yurdusev

Dr. Barış Çakmur

I hereby declare that all information in this document has been obtained and presented in accordance with academic rules and ethical conduct. I also declare that, as required by these rules and conduct, I have fully cited and referenced all material and results that are not original to this work.

Name, Last name : Aydan Bahadır

Signature : A. Bahadır

ABSTRACT

**DEVELOPMENT OF THE EU ASYLUM POLICY:
PREVENTING THE ACCESS TO PROTECTION**

Bahadır, Aydan

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This thesis analyzes the ignored humanitarian concerns in the development of the EU Asylum Policy. As a result of the strict migration control concerns, EU has engaged in forming a new regional refugee protection system which is tacitly based on limiting the access of protection seekers to the EU territories. In that context, the thesis aims to assess the scope and impact of the externalizing tendencies in the EU asylum policy development and thereby aims to attract the attention to the contradiction that EU falls in its human rights and refugee protection commitments while trying to prevent refugees from arriving to the Union's territories.

To this aim, after giving a general account of the development of EU Asylum competence, the thesis will extensively deal with the pre-entry and the post-entry access prevention measures which act to serve to this access prevention strategy. Under pre-entry access prevention measures, the thesis will deal with the visa requirement, carrier sanctions and other complementary tools which prevent the protection seekers from ever arriving at the EU territory. Under the post-entry access prevention mechanisms the thesis will analyze the 'safe third country' and 'host third country' implementations and readmission agreements which aim to divert the

protections seekers summarily out of the EU territories. In analyzing these policies, the thesis will try to demonstrate how EU Member States try to shirk their *non-refoulment* obligation, which is the heart of the refugee protection regime, through applying legitimate deemed means.

Keywords: EU, Asylum, Refugee, Asylum Seeker, Refugee Protection, Human Rights, *Non-refoulment*, Visa, Carrier Sanctions, Safe Third Country, Host Third Country, Readmission Agreement, EU Policy Development

ÖZ

AB SIĞINMA POLİTİKASININ GELİŞİMİ: SIĞINMAYA ERŞİMİN ENGELLENMESİ

Bahadır, Aydan
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Bu tez çalışması Avrupa Birliği Sığınma Politikası gelişiminde gözardı edilen insani unsurları incelemektedir. Uygulanan sıkı göç kontrollerinin etkisiyle, AB zımnen de olsa sığınmacıların AB topraklarına ulaşımını kısıtlamaya dayalı olan yeni bölgesel bir mülteci koruma sistemi oluşturmaya çalışmaktadır. Bu bağlamda, bu tez çalışması AB Sığınma Politikası gelişiminde, sığınmacıları dışlayan bu eğilimin boyutlarını ve etkisini değerlendirmeyi amaçlamaktadır. Bu suretle, bu çalışmada esas itibariyle, sığınmacıların Birlik topraklarına ulaşımını engellemeye çalışırken, AB'nin genel olarak insan haklarına ve mülteci korunmasına dair güçlü taahhütleri açısından düştüğü ikilem vurgulanmaya çalışılacaktır.

Bu amaç doğrultusunda, AB'deki sığınma politikası oluşumunun genel gelişimi incelendikten sonra, tez çalışması özellikle bu dışlayıcı stratejiye hizmet eden, AB topraklarına geçiş-öncesi ve geçiş-sonrası sığınmaya erişimin engellenmesi üzerine uygulamaları etraflıca irdeleyecektir. Geçiş-öncesi uygulamalar başlığı altında, mültecilerin AB topraklarına gelişini önceden engelleme amaçlı, vize uygulamaları, mülteci taşıyan firmalara yönelik cezai yaptırımlar ve diğer tamamlayıcı uygulamalar incelenecektir. Geçiş-sonrası uygulamalar başlığı altında ise

AB topraklarına ulaşabilmiş mültecilerin ivedi bir şekilde AB toprakları dışına gönderilmesini amaçlayan, 'güvenli üçüncü ülke', 'evsahibi üçüncü ülke' ve geri-kabul anlaşmaları incelenecektir. Bu politikalar incelenirken, tez çalışması özellikle, AB Üye Devletlerin, kendilerince meşru varsaydıkları uygulamalarla, öncelikle mülteci koruma sisteminin kalbi olan (non-refoulment) geri-göndermeme yükümlülüğünü ve mülteci korunmasına dair diğer uluslararası yükümlülüklerini yerine getirmekten nasıl kaçındıklarını göstermeye çalışacaktır.

Anahtar Kelimeler: AB, Sığınma, Mülteci, Sığınmacı, Mülteci Korunması, İnsan Hakları, *Geri-göndermeme*, Vize, Taşıyıcıları Yönelik Cezai Müeyyüdeler, Güvenli Üçüncü Ülke, Evsahibi Üçüncü Ülke, AB Politika Gelişimi

…bana ilham ve güç veren herkese

…to all who gives inspiration and strength to me

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CHAPTER I

INTRODUCTION

The issue of refugee protection has been one of the important elements challenging the delicate balance between state interests and international human rights liabilities of states in the contemporary era. Considering the increasing migratory pressures at the doors of relevantly affluent states, asylum policies of these countries proved to have been changing from being primarily rooted in humanitarian considerations to becoming more focused on state interest. Largely putting forward the excuse of frequently pronounced internal societal and economic security challenges posed by the huge migratory flows, it is deemed as a viable and rightful practice by affluent states to be protected from refugees rather than protecting them. In this context, asylum policy development of the European Union has been a significant attempt in terms of institutionalizing such an externalizing tendency, which bears considerable negativities on the levels of refugee protection.

Refugee protection constitutes an important component of the general human rights system. Its main aim is to provide protection for those who fear sufficiently serious human rights violations if returned to their country of origin. Although it contains many other guarding entitlements for protection seekers, the most important and ultimate aim that entire regime persists on is not to return the protection seekers to their country of origin or to any country where they will be exposed to serious human rights violations.

According to international law related to refugee protection, persons have a right to seek asylum but they don't have a right to be granted asylum or refugee status by the hosting states. To wit, states are not obliged to grant asylum or refugee status to protection seekers that arrive to their countries. However, international law texts are certain on the issue that states are clearly obliged not to return protection seekers to the countries where their life is at risk. This normative concern has been embodied in the *non-refoulment* principle (non-return) which was introduced by the 1951 Geneva Convention Relating to the Status of Refugees. This very basic norm of the refugee protection regime has set the framework for the entire refugee protection regime and increasingly been supplemented by other international and regional human rights legal instruments and with time has been qualified as customary law.

Emergence of the refugee protection issue coincides with the rising of a general impetus for human rights protection on the international level in the post 1945 world. After the tragic events of the two world wars, there emerged a milieu conducive to the proliferation of humanitarian initiatives including the ones regarding refugee protection in Europe. Accordingly, main building-stones of international refugee protection regime, such as 1951 Geneva Convention Relating to the status of refugees, the following 1967 New York Protocol, and the 1949 Universal Declaration of Human Rights etc., were introduced in this period by European states. As these instruments indicate, the welcoming attitude towards refugees of post-1945 period did not remain as a tacit commitment but was legalized through international law.

Nevertheless, aroused humanitarian concerns had not merely constituted the very reason of this welcoming attitude. The political affinities due to the Cold War rivalry and the labour-appetite of European economies of the period also considerably contributed to this hospitability towards refugees and asylum seekers in Europe. It can even be said that European states relied heavily on these dynamics to promote the humanitarian component of the refugee protection regime, which is mainly initiated by European efforts. This fact became more evident when the economic motivations increasingly yielded to the deteriorating economic parameters towards the 1980s, and more visibly after the end of Cold War at the beginning of 1990s. With the

disappearance of its vital political and economic backups, the humanitarian tinge of the post-1945 refugee protection regime was destined to fade away. Therefore, in this new period, humanitarian component of the regime would largely rest on the conscience of the European states themselves.

In this context, as the practice has indicated so far, human rights conscience of European states proved far from adequate in terms of offering effective and comprehensive handling of the refugee protection matters. Instead, states have become openly hostile to the arrival of refugees into their territory. Despite their international obligations to offer protection to refugees, which was introduced again by themselves, they recklessly engaged in constructing walls of exclusion around themselves and employed ever restricting measures towards protection seekers. To this end, during the last decades they have individually introduced a wide range of measures that affect the arrival, admission and entitlements of people who wish to seek refuge in their territories.

Although a restrictive approach by European states prevails in various aspects of refugee protection, the main threat derives from the measures preventing the arrival of the asylum seekers to the territories of potential host states. Yet, efforts of the European states have already concentrated on the measures produce this preventive effect. In its essence, this strategy is based on the simple reasoning that if states could prevent the arrival of refugees to their territories, then states wouldn't be obliged to protect the refugees. Assuming the only certain obligation for their part is to observe the *non-refoulment* principle, European states envisaged that if they prevent the territorial contact of refugees, they wouldn't need to observe this principle as well. Therefore, adopting access prevention measures has been a deliberate attempt with a view to shirk the legal protection responsibilities of states without violating the legal provisions related to refugee protection.

In the context of these developments, EU asylum policy development is of a great importance in terms of institutionalizing these restrictive and externalizing positions of EU Member States. Having realized that without a coordinated approach they were not able to achieve this hard access prevention strategy, EU Member States

decided to carry the issue to the EU level. In this way, European states, as they did in the post-1945 era, would designate the EU asylum integration virtually as their new platform to build a new regional refugee protection system based on the exclusion of refugees.

As a matter of fact, EU dimension of the issue has gained momentum with the emergence of the aspiration to abolish internal borders in the European Community. With the abolition of internal borders, it became a deep common interest for Member States to control the external borders of the Community. This concern led to the extensive tightening of immigration policies at the EC level. Consequently, this obsessive concern for the access prevention progressively blurred the distinction between the migration and refugee protection issues. Therefore, asylum institution is heavily considered in the context of migration issues. Regrettably, this mal-perception has haunted the asylum policy development of the EU and its development couldn't be considered beyond being a complementary or flanking migration measure for the abolition of internal borders. Owing to this fact, asylum policy development in the EU has been shaped with the obsessive access prevention aim rather than humanitarian components.

Motivated with the externalising and restrictive approach of Member States, EU extensively engaged in limiting access of asylum seekers to protection under the aim of developing a common asylum policy. To this effect it has been trying to achieve the primary objective, which is to prevent asylum seekers from ever reaching the EU territory. Moreover it has supplemented this objective with additional preventive mechanism, such as safe third country provisions, for the refugees that had been able to arrive at the Member State territory. As a result of these resolute access prevention attempts, EU has been accused of constructing an impenetrable wall around itself, which is captured by the frequently pronounced metaphor of Fortress Europe.

Considering the historic humanitarian tradition and the practice of ensuring the observance of the humanitarian values in European states, the EU emphasizes its commitment to human rights more than anything. Further, it has portrayed itself as the

pioneer and champion of the humanitarian values and human rights in the world. However, although its humanitarian impulse is perceived to be that strong, the current practice proves that it cannot be sustained in the face of refugee protection issues. By predominantly providing restrictive and exclusionary measures, the asylum integration of the EU has been tacitly but systematically shaped so as to keep refugees away from the EU territories rather than offering protection to them. With this exclusionary approach towards them, EU substantially contradicts with its loudly stated vision in human rights field. Therefore, it indeed merits questioning how such a reckless approach to refugees befits in the EU's and its Member States' tradition of respect for human rights and refugee protection.

In the light of these considerations the main aim of this study is to attract the attention to the contradiction that EU fall in its human rights and refugee protection commitment and its determination to prevent refugees from ever arriving to the Union's territories. To this aim, the thesis will try to examine how EU legislation on asylum issue serves to achieve this access prevention aim and circumvent the *non-refoulment* obligation through legitimate deemed means. In this context, Member States' effort to shirk the *non-refoulment* responsibility, which is the most certain obligatory principle of refugee protection system, especially will be given a special emphasis. To shirk refugee burden could only be legitimately realized through shirking *non-refoulment* principle, and the *non-refoulment* principle is deemed to be shirked only by preventing the arrival of refugees to the territory. Therefore, the study will particularly try to give the account of how EU asylum policy development discernibly serves to prevent the access of refugee protection rather than ensuring guarantees to refugees for their access to territory or protection against refoulment. Considering the importance of this access prevention strategy at the EU level, though Member States have already been pursuing such a strategy for the last two decades, EU dimension of the issue rendered the process more significant in terms approving and yet institutionalizing such a reckless approach towards refugees. Eventually, by presenting these concerns, the study will try to point how EU is in contradiction

between its asylum policy development and loud commitments to refugee and human rights protection.

In order to examine these concerns, this study will specifically concentrate on analyzing the policy measures adopted by EU that substantially serve to the access prevention objective. By giving a comprehensive account of the evolution of these measures, the study will try to demonstrate how these measures are set up and how they provide the access prevention result and subsequently evade the *non-refoulment* principle. Besides, other negative implications of these measures will also be dwelled upon with a view to prove how EU employed a restrictive approach towards refugees on the whole. On the other hand, in order to assess the compatibility of these measures to international law relating to the refugee protection, the thesis will give a considerable coverage to the related legal instruments.

Given this framework, there exist two significant policy implementations that act to prevent access to the EU territories and territorial protection. These consist of pre-entry and post-entry measures. Pre-entry measures function to prevent the asylum seekers from ever arriving at the EU territories to seek refuge. These measures are applied through extra-territorial control mechanisms, such as visa requirements, carrier sanctions and other complementary tools. On the other hand, post-entry measures function to cut the asylum seekers' territorial contact to an insignificant minimum by immediately diverting them to other safe considered states. These diversion policies are mainly embodied in the safe third country regulations, which are based on the allocation of asylum seekers to safe third countries according to certain criteria.

Beside their preventive effect, these policy measures are also significant in terms of their being among the rare binding instruments of the EU asylum *acquis.* Although EU asylum policy contains many provisions bearing negative implications on the refugee protection, they have been phrased mainly through non-binding legislative instruments, such as Council directives, recommendations, joint positions etc. Whereas, the access prevention measures have been regulated mostly through binding legislative instruments such as conventions and regulations. This brings us to

the assessment that while Member States are not so much willing to yield their sovereign hands in dealing with other aspects of the asylum issue, they are certain on the aim to prevent access at the EU level and want to channel the EU asylum integration mainly focusing on producing that preventive effect.

Ultimately, the general purpose of this study is to assess the scope and impact of the externalizing tendencies in the EU asylum policy development and how they contradict the refugee protection norms enshrined in the international law and humanitarian soul, which is supposed to set the very basis of refugee protection. Without much dealing with the debate on the interplay between state interest and international humanitarian obligations, assessments of the EU asylum policy development will be mainly made in the light of the need to promote the human rights component of these implementations. Apart from general human rights concerns, this approach, as mentioned above, is particularly motivated against the EU's and its Member States' loud commitment to human rights. Because, EU has always been proud of being the locomotive of human rights promotion in the world. But with its reckless approach to refugee protection, EU considerably contradicted this claimed role. Therefore, in order to refer to this important aspect of the issue, the thesis revolves around the subtle question that "how EU accommodates this kind of reckless approach towards protection seekers in its loud commitments to human rights and refugee protection?"

To concede, to study an EU policy development is a quite difficult work. Because the process is complicated in terms of both keeping track of the legislative developments and seizing the impact of various actors decisive in the process. However, to get a better understanding and to find out the scope of the issue, studying EU policies mostly necessitates a detailed legal analysis of the EU legislative instruments. Therefore, this study finds it essential to give a considerable place to these legal analyses. Besides, not to be a mere baseless criticism about EU implementations, and yet with an aim to argue the issue at a more practical level, the study particularly aims to base its arguments on the potential and practical affects of these adopted measures on the refugee protection.

As among the other difficulties, EU institutions' and Member States' individual approaches may considerably affect the course and content of the policy developments. Yet, the deliberations on the issue are carried on at various institutional and decision making levels and platforms. Though the study takes the impact of these concerns into consideration and make references to these points as it requires so, it would be beyond the scope and capabilities of this modest study to cover extensively all these perspectives. Therefore, the thesis will limit itself to analysing the relevant adopted asylum measures and matters that are clearly reflected in the legislative instruments.

In addition to these EU legislation based legal analyzes, the study shall also undertake to analyse the refugee protection norms enshrined in the related international law instruments. Especially to set the basis for further elaborations on the compatibility of the taken EU measures with these international norms and provisions, thus to ascertain the feasibility of them in terms of humanitarian considerations, respective chapters will be preceded by a brief account of the related provisions and norms in the international refugee protection and human rights law. On the other hand, it will also give emphasis to relevant critics about the issue levelled by refugee and human rights advocates.

While dealing with refugee matters, the distinction between the terms refugee and asylum seeker or protection seeker may generate important implications in terms of the offered protection and legal entitlements to them. Especially considering the frequent attempts to abuse asylum institution by migratory groups, it may prove necessary to make such a distinction between the asylum seekers and refugees, which corresponds with a distinction between bogus and genuine refugees. However, this thesis embraces the approach that every protection seeker regardless of his status as refugee or not, should be presumed as a genuine protection seeker and therefore should, at least, be offered *non-refoulment* protection until his status proves otherwise. Particularly, this inclusive approach becomes much more relevant regarding the access prevention measures in which peoples' protection claims are not given any

consideration. Owing to these concerns, this study does not make distinctions between the asylum seeker, refugee or protection seeker terms and uses them interchangeably.

In the light of these deliberations, this thesis consists of 3 main chapters, in addition to the introduction and conclusion chapters. In the introductory chapter a general framework and background about the content of the thesis is given. After giving the main arguments of the thesis, this chapter outlines the main methodology, scope and limitations in analysing these arguments.

The second chapter of the thesis deals with the gradual development of the EU asylum policy. In order to achieve a better understanding of the refugee matters in general, the chapter will initially mention important international norms and provisions related to refugee protection. After, a brief account of the evolution of the asylum issues in Europe and asylum policy integration of the EU will be given. In this context, the chapter will try to explore the reasons of asylum initiatives and their subsequent shaping into the EU measures. By doing so, it will try to point how Member States' individual restrictive and externalising approach towards refugees have been integrated into the EU asylum policy development.

The third chapter is devoted to the analysis of pre-entry barriers for the access to the EU territory. In this concern as the most important tools of pre-arrival measures, visa requirement, carrier sanctions and other complementary measures producing access prevention effect will be dealt with extensively. After a theoretical and legal analysis of the viability of these measures, the chapter will try to explore how they are set up and how they generate preventive effect and other negative implications on protection seekers and on refugee protection regime in general.

The fourth chapter deals with the post-entry measures, which are mainly phrased through safe third country provisions. In order to view the development of the notion, the chapter first dwells on the intra-EU safe third country arrangements, which bears again important negative implications on asylum seekers. Aftermath, the chapter will give the exportation of this notion out of the EU framework first to neighbouring countries then later to the neighbouring regions by means of 'host third country' provisions and complementary readmission agreements. In giving the account of the

proliferation and expansion of these diversion policies out of the EU framework, the chapter will try to demonstrate how the EU tries to supplement its potential to keep protection seekers away from the EU territory by allocating them to neighbouring regions and thereby at the same time shifting the burden of refugee protection to other countries.

Finally the fifth chapter, the conclusion, reconsiders the observations and conclusions reached in the previous chapters and, with a view to supplement the argument of the thesis, further elaborates on the inconveniency of the mentioned policy measures in terms of human rights and general refugee protection regime.

CHAPTER II

DEVELOPMENT OF THE EU ASYLUM POLICY

Concern for the refugee issues in Europe has initially gained significance from 1950s onwards and followed different path throughout the 20th century. In the early Cold War years, the emerging political atmosphere engendered a welcoming attitude towards refugees and a basis conducive to the proliferation of a humanist international refugee protection regime. Towards the end of the century, as the asylum and other migratory inflows raised steeply, the welcoming attitude began to leave its place to tacit resentment against the arrival of refugees. In response to these migratory pressures, EU Member States individually engaged in a race to apply more restrictive and exclusionary measures towards protection seekers. As repeatedly tightening their asylum policies, they progressively began to look for a comprehensive solution to the issue at the EU level. In response to this, EU asylum policy began to be shaped in line with the Member States' unwelcoming attitude towards refugees.

In this context, this chapter will deal with the gradual development of the EU's asylum competence. In analyzing the historical evolution of the asylum issues in EU, the chapter will try to explore the reasons of asylum initiatives and subsequent shaping of the measures at the EU level. While doing so, it will touch on the impacts of these attempts on the levels of refugee protection in the EU. However, before proceeding with this, it would be meaningful to outline international law norms and provisions that have important implications for the general refugee protection.

Because, to give a brief account of these international provisions will enable us to achieve a better comprehension of the refugee matters in the EU and beyond it is necessary so as to set the necessary basis for assessing the compatibility of the EU measures with previous international refugee and human rights obligations.

2.1 International Law Related to the Refugee Protection

As a result of the appearance of huge number of displaced persons after the two world wars in Europe, international law relating to the refugee protection began to be shaped in the middle of the 20th century. Leaded with the 1951 Geneva Convention Relating to the Status of Refugees, the refugee protection regime is fed with various international law texts and norms pertaining to refugee protection in particular and human rights in general throughout the century. Here, the basic provisions and norms on the refugee protection shall be dealt with a particular focus on the law instruments that have bearing to the access of refugees and asylum seekers to host territories.

In this regard, the first relevant international instrument of this era is the Universal Declaration of Human Rights (1949), which would later be qualified as customary law and set the base for the formation of the ensuing international human rights regimes. As having a prima facie relevance to the refugee protection, the main explicit right provided to refugees is enshrined in the Article 14 of the UDHR, stating that:

> 1. Everyone has the right to seek and enjoy in other countries asylum from persecution.
> 2. This right may not be invoked in the case of persecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

As of great importance, the right to seek asylum is only mentioned that explicitly under this international law instrument. Since international law instruments, including

refugee law, by and large are of interstate character, they do not generally contain such kind of rights that can directly be invoked by individuals.[1] Therefore UDHR is a unique example in the refugee protection regime in terms mentioning such a direct right. However, despite its strong wording, the article only provides the right to seek asylum, not to receive it. Because the granting of asylum is perceived as an exercise entirely falls within the discretion of states. Nevertheless, this shouldn't be perceived as an empty phrase. This right to seek asylum provides the very norm, which the refugee protection regime has been built on, and therefore various ensuing human rights texts have supplemented it.

Without doubt, it is the 1951 Geneva Convention Relating to the Status of Refugees and its supplementing 1967 New York Protocol (herein after referred as Geneva Convention) are the main instruments set the main framework for the international refugee protection regime. With its norm setting provisions, Geneva Convention has been the epicentre of the entire refugee protection regime and it has even been mentioned as the key word for to make short reference to whole norms and obligations related to the refugee protection in various international instruments.

In its Article 1, it gives the definition of a refugee as the person:

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

This definition, together with its derogations in the same article, is considered and embraced by many states as the universally valid definition in assessing the status of persons as refugee. Though it is a generally accepted definition, owing to its nature, it is still open to considerably diverging interpretations in different countries. Unfortunately in an era, prevailed by virtual unwelcoming attitudes towards refugees,

[1] Noll, Gregor, Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection, The Hague: Kluwer Law International (Martinus Nijhoff Publishers), 2000, p.356

states are more inclined to make exclusive interpretations of this definition, which will also be dealt later in this chapter.

As of a more crucial importance and as the main reference point of this study, Geneva Convention in its Article 33 has introduced the famous principle of *non-refoulment*, which would constitute the linchpin of the international refugee protection regime. The principle is laid down in the Article 33 as:

> 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 opinion.

Though in its wording it only referred to refugees, this principle is usually interpreted as to apply to all persons seeking protection. Therefore it does not require a prior formal recognition of the individual's refugee status. In effect this means that states must treat all asylum seekers as presumptive refugees until the otherwise is proved. This approach has primarily been expressed by the UNHCR.[2] Likewise, James Hathaway, as the most important figure in refugee issues, has captured the issue as that:

> It is of course, true that the rights set by the Refugee Convention are those only of genuine Convention refugees, not of every person who claims to be a refugee. But because [as UNHCR mentioned] it is one's de facto circumstances, not the official validation of those circumstances, that gives rise to convention refugee status, genuine refugees could clearly be irreparably disadvantaged by the withholding of protection against *refoulment* pending status assessment. Unless status assessment is virtually immediate, the adjudicating state may therefore be unable to meet its duty to implement the Refugee Convention in good faith unless it grants at least the most basic Convention rights to refugees on a strictly provisional basis. [3]

[2] UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, 1988, parag.28
[3] Hathaway, James, *"Refugee Law is Not Immigration Law"*, Worldwide Refugee Information, http://www.refugees.org/world/articles/refugeelaw_wrs02.htm

This inclusive approach has been supported by many commentators and fortunately agreed by most of the states. With the evolution of the international refugee regime, the norm of *non-refoulment* was gradually strengthened and now recognized as a customary law. However the interpretation of the principle still has not been free from disputes and its scope of application has been considerably debated at various levels. One of the important relevant discussions is on whether it is only applicable on the territory of host state or applicable at the borders of host state or out of the territory. As having a direct bearing to the extra territorial protection issues, these concerns will later be discussed elaborately in this study.

Another important provision of Geneva Convention relevant to the subject of this study is the Article 31, which is related to the illegal entrance of refugees. Accordingly, Article 31 provides that no penalties could be applied to the refugees unlawfully in the country of refuge in the instances that they were fleeing directly from the countries where their life is at risk. This provision also generated disputes since it has been causing the abuse of asylum institution by other migratory groups as to evade the application of penalties for their illegal entry. Mostly due to this fact, in practice most of the European countries implement punitive schemes for asylum seekers during at least some of the stages of the assessment of their asylum application.

Apart from Geneva Convention, there exist various law instruments, which can be invoked under the refugee protection topic. Especially The *non-refoument* principle was generally supplemented by other international texts as well. Most important one in this concern is the 1967 UN General Assembly Declaration on Territorial Asylum. Its Article 3.1 reads as “no person […] shall be subject to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any state where he may be subjected to persecution.”

Another explicit reference to the principle is mentioned under the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment (CAT)[4]. Accordingly the Article 3 of it is phrased as "[n]o 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 subject to torture" Though it is limited to torture cases, it has been a crucial instrument in supporting the *non-refoulment* principle. Relevantly Article 5 of the 1977 European Convention on the Suppression of Terrorism has also expressions as to be considered as a prohibition of *refoulment*.

Besides, there are also other international law instruments that have an implicit bearing to the *non-refoulment* principle and refugee protection. Significantly, Article 7 of the 1966 International Covenant of Civil and Political Rights (ICCPR) and Article 3 of the 1950 European Convention for the Protection Human Rights and Fundamental Freedoms (ECHR) include expressions implying such kind of protection.[5] Further there may exist other relevant human rights instruments that can be mentioned under the refugee protection topic. But in the context of this study, these provisions are enough to view the general framework of international law provisions that have a direct bearing to the measures relating to the access to territory.

To conclude, though there exists ambiguities and different interpretations about some provisions, international law instruments are certain on the right to seek asylum and *non-refoulment* principle as expressed in various instruments. Though EU has not acceded to these agreements, Member States are mostly signatories to them and they have been expressly referred in case of need in the legislative instruments of EU. Beyond since these rights and principles in time are considered as having customary law character, they are binding on all countries and formations, regardless of whether they accepts them officially or not.

[4] 11 of the EU Member States are party to CAT. (except Belgium, Ireland, UK and Germany)

[5] Their similar wordings of these Conventions suggest that "[n]o one shall be subject to torture or to inhuman or degrading treatment or punishment." This and some other provisions of these Conventions have been construed by treaty-monitoring bodies to protect the persons from removal to a state where a claimant would be exposed to certain violations. Noll, op.cit in note 1, p.369

2.2 Historical Background of Asylum Issues in Europe

2.2.1 Early Post-War Years: Welcoming refugees

Following the II.World War, while war-weary European States were to meet the challenge to rebuild their shattered infrastructure and economy, they were also in a position to deal with the settlement of large-scale refugee movements in the post-war Europe. Particularly to compensate the sense of guilt for their joint failure to provide protection to large numbers of Jewish and other refugee groups escaping from Nazi atrocities before 1939[6], there appeared a positive approach towards the refugees in the Western States. With this initial rising of humanitarian concerns and welcoming attitude towards refugees, Western States voluntarily engaged in finding solutions for the protection of this large scale of displaced peoples in Europe.

In conjunction with this, European States took the lead in drafting the 1951 Geneva Convention dealing with refugee rights. The Convention, especially with its cardinal rules on the definition of a refugee and *non-refoulment* principle, set the very framework and epicentre for the international refugee protection regime to date. Since it was originally drafted as a response to the immediate refugee problem in Europe, it had initially been resented for its over-focus on Europe and for its limited scope covering only the pre-1950 events in Europe. But later, this Euro-centric focus was eliminated with the introduction of 1967 New York Protocol, which removed the geographical and time limitations on the provisions of Geneva Convention. Moreover European initiatives did not rest only with the Geneva Convention, but this welcoming attitude towards refugees is reflected on and supported by other related humanitarian initiatives in Europe.

On the other hand, this hospitable attitude of European states did not only owe to the sense of guilt for refugees but to the Cold War politics at a great extent as well.

[6] Before the II.World-War in 1939 leaders of several Western states meeting in Evian agreed on a political decision not to accept Jewish refugees because of economic restrain and not to accelerate the international unrest. Van Selm, Joanne, Kosovo Refugees in the European Union, London; New York: Pinter, 2000, p.55

Beginning with the early post-war years, interpretation of the provisions on refugees are heavily occupied with the ideological concerns related to the polarised political climate of the Cold War politics. As if an extension of the containment strategy, the refugee protection issue was utilized as a tool for the political embarrassment of the Soviet Bloc and for demonstrating the bankruptcy of the Communist system from which people need to escape.[7] Therefore, in this period, most of the people from Communist Bloc seeking refuge in European states were easily granted refugee status, even on quite dubious grounds. Partly added with the perceived racial suitability, the doors of European states were wide open for all refugees coming from Western Europe.[8] Hence, owing to these ideological tinges, in the early Cold War years, refugee protection regime rather took a positive shape. Nevertheless, due to the restrictions on the right to exit in all eastern European states under the auspices of the Soviet bloc, the era didn't witness huge refugee flows thereby the numbers had rather remained at a manageable level.

In the light of these inputs, it can be said that European states practice relating to refugee protection in this era was significantly limited with geographical and ideological considerations that only offer protection to the ones suit to these concerns rather than for humanitarian reasons. In line with this, Charles Keeley claims that during the Cold War years there were two refugee regimes in the world: one in the industrial countries of the first world *vis a vis* communist bloc; and the one in the rest of the world which left in the domain of UNHCR.[9] Truly, it is widely conceded that Europe did not assume itself as responsible for the refugee movements in the Third World or for the ones not related with the Cold War politics. As Peter Schuck argued

> …until the 1980s Europe had come to think of the refugee burden as more of a problem for the Third World and US than for itself. Protected from large scale of refugee movements by an impregnable

[7] Keely, Charles B., *"The International Refugee Regime(s): The End of the Cold War"*, International Migration Review, Vol. 35, No:1, (Spring2001), p.307

[8] They were deemed to have possessed the necessary attributions to be assimilated in Europe. See in Kushner , Tony; Knox, Katharine, Refugees in an Age of Genocide, London: Frank Cass Publications, 2001,p:400

[9] Keeley, op.cit in note 7, p.306

> iron curtain in the East Europe seemed relatively immune to the threat. [10]

Moreover, economic concerns also played crucial role in the refugee policies of European states in this period. Post-war reconstruction and economic growth in 1950s and 1960s prompted an increasing demand for labour force in European industries. To meet the labour shortage European states, led by Germany and France, sought for workers from outside whether in the form of refugees from communist countries, or in the form of guest workers from south Europe, or as immigrants from former colonies. Therefore, this urgent need for labour force allowed refugees to be accepted in West European countries and facilitated their social and political integration in these countries.

Given these political and economic considerations, coincided with the sense of guilt of the early post-war years, the 1950s and 1960s saw the proliferation of a positive approach towards refugees and, thus, important initiatives in terms of refugee protection in Europe. However since this positive atmosphere was mainly initiated and fed as a result of the reasons other than humanitarian ones, refugee protection in Europe would take a course in accordance with the economic and political circumstances changed.

2.2.2 After Mid-1970s: Beginning of restrictive and exclusionary policies

Aftermath of the 1970s economic slump, largely precipitated by the notorious oil shock of 1974, positive approach towards refugees emanated from the economic concerns began to yield to restrictive and exclusionary implementations in European countries during the 1970s and 1980s.

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[10] Schuck, Peter H., *"Refugee Burden-Sharing: A Modest Proposal"* in Schuck, Peter H, Citizens, Strangers and in Betweens, Oxford: Westview Press, 1998, p.282

With the economic recession and rising unemployment rates in the 1980s, immigrants including refugees were no longer seen as a welcome contribution to national workforces. Hence, European states ended promoting migration and increasingly tended also to deter refugees and asylum seekers from coming to their territories. Besides, all immigrant groups, including refugees, became the target of animosity by rightwing groups who blamed them for the high levels of unemployment and declining living standards in European countries.[11] Particularly aggravated with the relative increase in the migratory flows to Europe from the Third World countries, racist considerations began to affect refugee issues in this period and significantly gave way to the deterioration of refugee protection in Europe.

The end of Cold War and the collapse of Communism in 1990 has had a more deep-seated impact on western governments' perceptions about protection seekers. With the decline of polarised politics of nearly a half century, the commitment of western countries to the whole notion of asylum was significantly weakened. As Anne Hammerstad expressed "refugees were no longer perceived as strategically important geopolitical pawns or ideological trump cards for the west in its fight against Communism."[12] Consequently, western governments embarked on employing refugee policies that more plainly mirror their interests in keeping refugees out. Hence, in this period phrases like "Fortress Europe" entered the political agenda to criticize the European governments for "changing rules of the game in reaction to the change in political structure."[13]

Another important implication of the collapse of communism was the abolition of the iron curtain in practical manner as well as in political manner. Because, the restrictions on the right to exit in all East European countries and many of the former Republics of Soviet Union were lifted. With this development, European countries, at the time of being motivated to apply more restrictive immigration and asylum

[11] Parties such as the Austrian Freedom Party, the Swiss Radical Party, the Italian Northern League, and the French National Front, all of which take a hard line on migration issues, began to gain hold in this period.

[12] Hammerstad, Anne, "Whose Security: UNHCR, Refugee Protection and State Security After the Cold War", Security Dialogue, Vol.31, No:4, December2000, p.393

[13] Keeley, op.cit in note 7, p.306

policies, further confronted with a huge migration pressure from the east.[14] To put the situation with the words of Daniel Cohn Bendit, "[h]aving for years berated the Communist powers for blocking their citizens' wishes to move to the West, the West was suddenly confronted with the Eastern exit doors being unlocked without the Western entry doors being ready."[15]

Following the end of the Cold War politics, the war in Yugoslavia broke out at the beginning of the 1990s and the huge number of refugees from the region vastly added to the migratory pressures at the doorsteps of Europe. But this time, the challenge was more severe for Europe because the numbers applying for asylum at the same time was unacceptably higher. Partly due to the unmanageability of reviewing all these applications one by one and partly not to offer that generous Geneva Convention refugee status to that huge number of people, which they considered as unbearable challenge to their societal security, European countries' search for temporary and other kind of subsidiary protection solutions coincided to this period. Though this kind of approach was plausible in the circumstances of that time being, the ensuing practice suggested that European countries continued to apply such kind of solutions to most of the arriving protection seekers regardless of their magnitude and urgency of the situation. Thus they seem to be inclined to replace Convention refugee status progressively with those less-offering protection statuses.

On the other hand, improving communication and transportation possibilities and increasing trafficking and smuggling networks also considerably facilitated the migratory movements, including protection seekers, from all over the world (from Asia, Africa and Pacific Archipelago). Hence these developments also inevitably contributed to the increase of refugee pressures and ensuing deterioration in refugee protection mechanisms in Europe. Having been caught unprepared to deal with that massive refugee influx, added with the absence of prior political and economic

[14] Especially, Germany have been exposed to this pressure relatively more. With the unification of Germany, ethnic Germans from all parts of the former Soviet bloc taking advantage of the law of right to return, poured to Germany in this period.

[15] Cohn-Bendit, Daniel, "*Europe and its Borders: the case for a common immigration policy*", in the Philip Morris Institute for Public Policy Research, Towards a European immigration policy, October 1993, p.35

motivations, Europe was hardly able to deal this huge refugee influx with its preceding welcoming attitude.

To deal with the problem, European countries individually undertook to introduce a wide range of measures that affect the arrival, admission and entitlements of people who wish to claim refugee status in their territory. They imposed visa requirement to the nationals of many countries that produce significant numbers of asylum seekers or illegal immigrants; introduced carrier sanctions; applied 'safe third country' measures, in which asylum seekers are diverted to the safe deemed countries; interpreted the criteria for refugee status in a blatantly restrictive manner, such as excluding non-state persecution as a ground for granting refugee status; conducted tight border controls and interdiction operations where asylum seekers are seized at sea and returned to their country of origin; expanded the use of detention implementations for asylum seekers; significantly limited the entitlements of asylum seekers while their cases pending, etc. To wit, they were making local conditions as austere as possible in order to discourage potential asylum applicants to come to their territories.[16] As a result of these various restrictive and exclusionary measures, the period saw a significant deviation from a protection aimed refugee regime to an unscrupulous regime that rather aims to be protected from refugees. Though, it may be argued that Europe is not supposed to welcome all that huge inflows into their territories, the relentless efforts to establish an impenetrable fortress Europe neither can be considered as a plausible solution to meet this challenge nor befits in the laud humanitarian commitments of the European countries.

2.2.3 Towards the 1990s: Need for cooperation

By the late 1980s, there was little coordination among the EU Member States about their asylum policies and this lack of coordination led to extensive and widely

[16] For more information see: Loescher, Gil, *"State Responses to Refugees and Asylum Seekers in Europe"* in Loescher, Gill; Loescher, Gilburt D. (eds), Refugees on the Asylum Dilemma in the West, Philadelphia: Pennsylvania State University Press, 1992

differing national asylum policies. While they were introducing successive measures individually to stem the asylum flows, they realised that their goals rather necessitates a coordinated approach to the matter. Otherwise this course would generate nothing but a useless and unintended downward spiralling in asylum measures. Because, restriction in one country inevitably incited restriction in another. The measures on the non-arrival and diversion of asylum seekers to elsewhere in Europe were provoking a fear in other countries still applying more lenient measures that they would be left in position to bear the burden of refugee reception. Likewise, not to be more attractive for protection seekers than other countries, they decreased the entitlements of protection seekers in their countries. As a result of these developments, it is deemed to be beneficial to tackle the problems collectively and thus to develop a common European immigration and asylum policy that will guarantee fair burden sharing among the EC Member States.

Actually, the need for a Community level policy for immigration and asylum issues appeared mainly as a result of the EC's own declared and widely supported aspiration to remove its internal borders, which is proposed in the Single European Act and Schengen Agreements. It is feared that the absence of borders would aggravate the already existing imbalance in the distribution of asylum seekers at the European level. Because so far while the more prosperous northern countries were preferred in large by the asylum seekers[17], the southern countries such as Italy, Greece, Portugal and Spain had been perceived mostly as transit countries from which asylum seekers travelled through to reach the northern parts. Additionally, since in the absence of internal borders, for an alien to be able to reach a required country would be a matter of once getting access to the Community from a member state which apply more generous access measures, the lack of migration policy coordination among EC Member States would be more exposed to abuse by migratory groups. Consequently, it was mainly because of the ambition for a borderless Europe, which more than

[17] For instance, Germany, as hosting almost two third of the arriving protection seekers in Europe, was the most resentful party suffering from this unfair distribution.

anything began to mobilize Community countries into their first attempts to address immigration and asylum issues in a coordinated way.[18]

2.3 Initial EU Integration Relating to Asylum Issues

2.3.1 Nascent European Integration in the late 1980s

During the second half of the 1980s, the representatives of the EC Member States very cautiously began to search for multilateral paths in addressing the asylum problem. Although these efforts had generally been ad-hoc and reactionary, they resulted in the creation of several multilateral institutional machineries that intended to create and implement new rules and decision-making procedures for asylum and immigration issues.[19]

In this context, the first relevant attempt to address the issue dates back to the establishment of the ad-hoc TREVI group[20] in 1975, which was formed under the auspices of European Political Cooperation (at the European level but outside the EC framework). It was established in order to enhance practical cooperation in terms of internal security and border control among the European countries. It consisted of the ministers of justice and interior of the EC Member States and was particularly focusing on the fight against terrorism. In 1983, with the establishment of an ad-hoc sub-committee on immigration and asylum issues under the aegis of TREVI group, its mandate became relevant to the asylum integration. However, since there is an implicit negative perception about the link between refugees and terrorism, the conclusions of the TREVI group endorsed the emerging negative and restrictive trends

[18] Fortescue, Adrian, "*Defining a European immigration policy*" in the Philip Morris Institute for Public Policy Research, Towards a European immigration policy, October 1993, p.36
[19] Uçarer, Emek M., "*Managing Asylum and European Integration: Expanding Spheres of Exclusion?*", International Studies Perspectives, Vol.2, 2001, p.295
[20] TIREVI: Terrorism, Radicalism, Extremism and Violence International

in then asylum policies and thus did not encourage the search for positive solutions to the prevailing refugee pressure in Europe.[21]

As an element of TREVI, in 1986 an 'Ad-Hoc Immigration Group' of senior officials was set up by the ministers responsible for immigration of the Member States to assist in the coordination and harmonization of national visa, asylum, and immigration policies. Specifically, it aimed to achieve a certain degree of harmonization of the legal standards to improve the situation of refugees and asylum seekers as well as finding solutions for the 'refugees in orbit', the ones who are shuffled from country to country without finding a state willing to examine their asylum claims. To this end, the development of many asylum related policies, as well as the Schengen and Dublin Conventions, which are among the important policy formulations in the shaping of the EC asylum policy, were prepared by this Ad-Hoc group.

2.3.2 1985 Schengen Agreement and 1990 Schengen Implementation Convention

In an attempt to create a territory without internal borders, on 14 June 1985 France, Germany, and Benelux countries, outside the EC framework, signed the Schengen Agreement which proposing the gradual abolition of checks at their common borders. Later it fleshed out again by the signing of 19 June 1990 Convention Implementing the Schengen Agreement, which entered into force on 1 September 1993. To enable the free movements of persons within the signatory states, the Agreement's key provisions suggested the harmonization of controls at the external borders and adoption of common rules regarding visa issues and asylum rights. This frontier free area came to known as the 'Schengen area' and little by little expanded to include every EC Member State by 1997, except UK and Ireland. With

[21] Cels, Johan, "*Responses of European States to de facto Refugees*" in in Loescher G. and Monahan L. (eds), Refugees and International Relations, Oxford: Clarendon Press, 1989, p.210

the introduction of other supplementary provisions related to the abolition of internal borders, Member States created a general Schengen framework, which would have important implications on refugee matters in the EC area as well.

These extra-EC initiatives motivated a similar important attempt at the EC level as well. In 1986 EC Member States agreed on the Single European Act, which established the goal of the community as the creation of a common market that would "compromise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured."(Art.8a). Accordingly, Member States stated that

> …the community shall adopt measure with the aim of progressively establishing the internal market over a period expiring on 31 December 1992 […] The internal market shall comprise an area without internal frontiers. (Art.8a).

Incorporation of the SEA into the EC *acquis* made Schengen agreement relevant to the creation of a borderless single European market and actually that was the reason why Member States slowly joined in the Schengen Agreement.[22] Subsequently, this borderless Europe ambition stimulated Member States to establish a common visa regime as well as to develop new procedural practices to deal with asylum applications.

The abolition of border controls would necessitate the Member States to thrust each other in inspecting the entrants at the new common external borders of the Schengen area. To address this issue, it was agreed to create a uniform visa regime (intended as a measure to apply common standards to the external borders of the contracting parties) to be applied to those crossing the external borders of the Schengen area. This eventually lead Member States to create a common list of countries whose nationals would be required visas to enter the area, a shared database (Schengen Information System) that all border inspectors can easily check to

[22] Italy signed the agreement on 27 November 1990, Spain and Portugal joined on 25 June 1991, Greece followed on 6 November 1992, then Austria on 28 April 1995 and finally Denmark, Finland and Sweden joined on 19 December 1996. And the agreement took practical effect on 26 March 1995 for the original parties to the Schengen Agreement.

determine who shouldn't be admitted, and other complementary measures, such as carrier sanctions, to check the fulfilment of visa other entry requirements by the entrants.

Consequently, by harmonizing the visa policies and setting up a common list of third countries for visa requirements, it is aimed to do away with policy disparities among Member States, which could be exploited by asylum seekers, and through which Schengen states could be reasonably assured of collectively limiting access to the Schengen area. However visa requirement in combination with its complementary measures would considerably prevent the access of the protection seekers to the EU territories. In the following chapter, this issue will be explored in detail in terms its implications on the refugee protection regime in general.

2.3.3 1990 Dublin Convention

Intended the abolition of internal borders, Member States realized that since all the matter is to gain an entry once to move freely in the Schengen area, asylum seekers, by lodging multiple and simultaneous applications, would shop around the EC for the best country to hear their claim. To reduce this so-called 'asylum-shopping' inside the community, as well as to solve the problem of asylum seekers for whom no country was willing to take responsibility, so called 'refugees in orbit' problem, in June 1990 Member States signed the Dublin Convention on determining the state responsible for examining applications for asylum lodged in one of the Member States of the EC. (It entered into force on 1 September 1997). With this Convention, it is guaranteed that asylum seekers will have their application addressed only one time and by one Member State. Actually, Schengen Implementation Convention in its Chapter 7, has also mentioned similar allocation criteria with those laid down by the Dublin. However, since Dublin Convention deals exclusively with the allocation of applications and having an expanded geographical scope, as

comprising all EU Member States, Dublin represented a gain over the Schengen Implementation Convention.[23]

To consider it in general, as an important underlying motive, though not necessarily the main one, this Convention is intended to relieve the pressure of asylum application upon those countries favored by refugees. However, many refugee advocacy groups and human rights related NGO's interpreted the real motive of Western European countries behind this move as to shirk their responsibilities in providing adequate paths for potential refugees to gain access to the protection mechanisms.[24] Since the account of this and other aspects of the safe third country provisions will be presented in the related chapter of this work, it suffices to say here only that safe third country provisions by diverting the asylum seekers to other Member State and beyond other third countries outside EU generate risks resulting from the return of protection seekers to the countries where they wont be offered adequate protection.

2.4 1992 Maastricht Treaty on European Union

With the Maastricht Treaty, known also as the Treaty on European Union (TEU), migration and asylum issues were for the first time introduced into the EU framework. The treaty by transforming the EC into a three-pillared Union (made up of EC as the first pillar, Common Foreign and Security Policy (CFSP) as the second pillar and Justice and Home Affairs (JHA) as the third pillar) aimed to incorporate all European accumulations, which had not been included so far in the European Community sphere of competence, into this new structure. Based on this rationale, JHA was established to ensure the cooperation in the areas that are deemed

[23] To avoid the possible normative conflicts between the two Conventions, the Schengen Contracting Parties later signed the so-called Bonn Protocol, providing that Chapter 7 of Schengen Convention would ceased to be applicable as soon as the Dublin Convention came into force.
[24] Uçarer, op.cit in note 19 , p.296

necessitating simultaneous development after the abolition of internal borders. However, as Member States have been sensitive about their sovereign rights in the security and home affairs, the new pillars, unlike the EC, took an intergovernmental shape. That means they are dominated by Council of Ministers and unanimity based decision making procedures; and the Commission, European Parliament and European Court of Justice are marginalized from the decision making and implementation processes. Accordingly, as Member States were not ready to yield sovereignty in asylum and immigration issues, competence of these areas was put under the intergovernmental JHA framework (defined under the VI.Title of TEU).

In the Article K.1 of the Treaty, it is mentioned that "for the purposes of achieving the objective of the Union, in particular the free movement of persons," Member States shall regard the asylum policy as "a matter of common interest". To this end, in Art.K.3 it encouraged the Member States to "inform and consult one another within the Council with a view to coordinating their action." Additionally, as an important indication regarding asylum issues, with Art.K.2 Member States assured their compliance with the 1950 European Convention on Human Rights and 1951 Geneva Convention. But this commitment rather remained symbolic at this level. Finally, concerning the policy making, Art.K.3(2) authorized the Council, on the initiative of a Member State, to adapt joint positions, resolutions and recommendations for Member States to harmonize their legislations.

In general, significance of the Maastricht Treaty concerning the asylum issues was to formalize the Member States' cooperation in this area. But this formalization rather lacked drawing a concrete path toward harmonization. Though it placed the asylum within the EU's jurisdiction, by delivering all the power to the Council of Ministers, which works with unanimity and generally represents the narrow national interests of governments, discrepancies among Member States on asylum issues make it difficult to reach a middle course. Yet legal instruments offered for the harmonization- resolutions, joint positions, recommendations- were not of a binding nature. Therefore they stayed weak and couldn't assure the commitment of Member States to the taken decisions. As a result of these institutional constraints, progress on

the asylum matters was fairly limited over the next years and efforts for harmonization generally gravitated to the lowest common denominator.[25]

2.5 Post Maastricht Developments

Following the Maastricht Treaty, the ministers of Immigration of the 12 EC Member States, encouraged cooperating on asylum and immigration issues and with the initiations of Ad-Hoc group, met intergovernmentally outside the framework of the Union and its competence to consider a number of resolutions, recommendations and conclusions to harmonize migration and asylum policies in the Union.

2.5.1 1992 London Resolutions

Dealing with a number of important EU-wide asylum issues, at the end of November 1992 London talks, Ministers agreed and adopted three documents in respect to asylum: *Resolution on Manifestly Unfounded Applications for Asylum*; *Resolution on Harmonized Approach to Questions Concerning Host Third Countries*; and the *Conclusion on Countries in Which There is Generally No Serious Risk of Persecution.*

In the Resolution on 'manifestly unfounded' claims, Ministers agreed that "an application for asylum shall be regarded as manifestly unfounded […] [if] there is clearly no substance to the applicant's claim (and/or) the claim is based on deliberate deception or is an abuse of asylum procedures."(para.1/a) It was agreed that such cases could be dealt with using an accelerated process and dismissed quickly (para.2). Additionally, the Resolution mentioned that Member States may not be charged with

[25] *"The Importance of the Decision-Making Process"*, Worldwide Refugee Information, http://www.refugees.org/world/articles/wrs00_decision.htm

review an asylum claim if the applicant had been through a safe third country (para.1/b).

This Resolution mainly aimed to discern bogus refugees and to dismiss them from the process quickly. Though the accelerated procedures aim to dismiss bogus claims, inherent problems in this procedure may quite possibly victimize the genuine refugees as well. Because, to assess the validity of a claim is a problematic issue. The officers may easily decline an application on the ground of an ignorable inconsistency in the claims of an applicant. Whereas considering the bad psychological and physical situations of some genuine refugees that have been subject to persecution, they may not be able to manifest properly the validity of their claim in the interviews. Yet, it is problematic that to what degree an assessment on the validity of a claim can be healthy through an accelerated procedure. Therefore, though they are not targeted, the procedures on discerning manifestly unfounded applications may have considerable negative implications on the genuine refugees as well.

The second Resolution on host third countries, which norm has also been applied in many European countries since mid-1980s, lays down the procedures for the application of 'safe third country' concept whereby an individual may be returned to non-member states in situations where he may have had the opportunity to lodge an asylum application there. The details and implications of this measure on asylum seekers will be covered in the relevant chapter of this study.

Finally the third document is the *Conclusion on Countries in Which There is Generally no Serious Risk of Persecution*. It was based on the paragraph 1(a) of the *Resolution on Manifestly Unfounded Applications for Asylum*, suggesting that the individuals coming from the countries in which "there is clearly no substance to the applicant's claim to fear persecution." It aimed to establish a harmonized approach to applications from countries "which give rise to a high proportion of clearly unfounded applications" and "in which there is generally no risk of persecution" (para.2). Accordingly, Conclusion set the elements to be taken into consideration while assessing the general risk of persecution in a particular third country as: previous numbers of recognition rates from the country in question; observance of human

rights record of the concerned country; existence of democratic institutions and stability in the concerned third country (para.4). Though the criteria seem conceivable, considering the countries that declared as safe, such as Ukraine, Russia, China, India etc, safety of which countries is quite dubious, this application involves quite much risks for protection seekers. Since the problems with defining the countries of origin as safe are similar with the arguments relating to the implications of safe third country notion, these issues shall be examined in-depth in the chapter on safe third country.

2.5.2 Other EU Council Resolutions and Recommendations

After London Resolutions, to continue with the harmonization aim, the EU Council of Ministers concluded a series of resolutions, recommendations and joint positions, throughout the 1990s. The most important ones among them will be mentioned briefly in the following.

Related to the readmission of asylum seekers to host third countries and safe countries of origin, two documents were concluded as Council Recommendations of 1994 and 1995 concerning *a specimen bilateral agreement between a Member State and a third country*. These Recommendations were introduced to establish a model for bilateral agreements between Member States and third countries about the issue of returning rejected asylum seekers and applicants whose claims are deemed unfounded or who falls under the scope of safe third country provisions.

Faced with mass outflow of asylum seekers from Yugoslav conflicts in the early 1990s, the necessity for a fair burden sharing had become imminent. To face this challenge, between 1993 and 1996 various burden-sharing measures were adopted. Most important among these was the 1995 *Council Resolution on burden sharing with regard to the admission and residence of displaced persons on temporary basis*, which was supplemented by a relevant Resolution of 1996, which additionally included an alert and emergency procedure. The Resolution emphasized the need for refugees and their burden of admission to be distributed evenly among the Member

States. In the case of mass refugee influx, Member States expressed their desire to share responsibility for the admission and residence of displaced persons on a temporary basis and agreed to harmonize their procedures.

In the emergency cases or unmanageable numbers of refugees is the case, temporary protection mechanism seems quite beneficial and practical for both asylum seekers and the host countries in terms of avoiding immediate refoulment and cumbersome individual case examinations. Therefore, many refugee advocates welcomed introduction of it. However temporary protection does not offer much protection as Convention refugee status offers and by definition it is on temporary basis. As UNHCR warned, temporary protection shouldn't be used as a means to preclude genuine refugee who would fall under the scope of the Geneva Convention, from full refugee status.[26] Hence, increasing resort to this kind of subsidiary form of protection statuses by EU Member States could undermine the asylum institution and therefore may prove dangerous for the future of refugee protection regime.

In June 1995, a *Council Resolution on minimum guarantees for asylum procedures* was adopted in order to guarantee adequate protection for refugees in need of such protection in accordance with the Geneva Convention and 1950 European Convention on Human Rights and Fundamental Freedom. The Resolution laid down the minimum guarantees concerning the examination of asylum application, the rights of asylum seekers during examination of their cases, appeal and review procedures and additional safeguards for unaccompanied minors and women. However, though it contains certain safeguards for asylum seekers, the non-binding character of the Resolution does not ensure their observation by Member States. On the other hand, as Sandra Lavanex argues, the Resolution undermines its own principles by allowing exceptions in cases where these principles were most needed. This was particularly relevant to exceptions provided particularly on the suspensive effect of appeals and

[26] Thorburn, Van-Selm, Refugee Protection in Europe: Lessons From the Yugoslav Crisis, The Hague: Kluwer Law International, 1998, p.37

lack of procedural safeguards for manifestly unfounded and safe third country cases as well as readmission agreements.[27]

To harmonize the application of the term refugee, in 4 March 1996, EU Ministers approved a Joint Position on refugee definition[28] in which they sought to reach agreement on how to interpret the refugee definition given in the Article1 of the Geneva Convention related to the status of refugees. It contains an extensive definition of the origins, definition and grounds of persecution, individual and collective determination of refuge status and the establishment of evidences required for granting refugee status. However, as a result of Member States' determination not to lose their sovereign hands in the issue, the Joint Position does not place limitations on Member States' discretion in determination of asylum applications.(Art.1) Hence the criteria for refugee status determination kept on varying substantially from one state to another. On the other hand, Joint position is criticized for granting refugee status to only those who are persecuted by the state or with its tolerance or complicity. By so doing, it meant to ignore all those refugees exposed to persecution by non-state agents, or fleeing from civil wars and generalized violence, as the people who represents the vast majority of contemporary refugee flows.[29]

Apart from resolutions, EU Council has also set up a high level Working Group on Asylum and Migration to produce 'action plans' for various migrant and refugee producing regions of the world. The Group was significant in refugee matters because of its extensive emphasis on the need to contain refugees in their region of origin by addressing the causes of flight and by providing aid locally.[30]

Given these developments, during the post-Maastricht period EU Member States were only able to adopt either restrictive or minimum measures relating the asylum matters, nevertheless with protecting their ultimate sovereign hands in the national implementations. While some of the new norms such as responsible state,

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[27] Lavanex, Sandra, Safe Third Countries, Budapest: Central European University Press, 1999, p.118

[28] Joint Position of 4 March 1996 defined by the Council on the basis of ArticleK.3 of the Treaty on European Union on the harmonized application of the definition of the term "refugee" in Article 1 of the Geneva Convention of 28 July1951 relating to the status of refugees (96/196/JHA**)**

[29] Lavanex, op.cit in note 27, p119

[30] ECRE, "*EU Asylum Policy Harmonization Process*", www.ecre.org/policy/eu_developments.shtml

manifestly unfounded claims, safe third country were of a restrictive and exclusionary nature, the others such as minimum guarantees, burden sharing and temporary protection were the efforts to balance the restrictions of sovereignty principle with the demands of humanitarianism.[31] On the other hand since the resolutions were not legally binding, they left the eventual practice oriented adaptation to the Member States' own considerations. Yet, most of the new, supposedly harmonized, policies and norms have remained to set only general procedures or minimum standards thereby left most of the important matters, truly needs coordination, to the Member States discretion.

2.6 1997 Amsterdam Treaty

Amsterdam Treaty is signed in 1997 following the Intergovernmental Conference (IGC) held in 1996. It was to deal with the leftover issues from the Treaty of Maastricht, which was deemed unable to bring about a convenient framework to ensure an effective mechanism for the integration and enlargement of the Union. Relevantly, concerning the JHA cooperation, Maastricht was criticized for setting up a cumbersome intergovernmental framework in which Member States couldn't overcome their narrow national perceptions, thus couldn't achieve meaningful policy developments. Owing to the lack of binding legal instruments and the absence of parliamentary involvement and judicial supervision, the post-Maastricht period well highlighted the shortcomings of the intergovernmental method in policy development. Hence it is perceived as not conducive to achieve the supposed progress in this field. In order to solve this awkwardness and to develop a coherent and effective framework to develop policies, in the 1996 IGC, it was agreed to move asylum issues from the intergovernmental third pillar to the supranational EC pillar of the EU-communitarization of the asylum issues. To this effect, Amsterdam Treaty transferred

[31] Uçarer, op.cit in note 19 , p.299

all the matters listed under the Art.K.1 of the Maastricht Treaty, except the police and judicial cooperation in penal matters, to the first pillar under the new Title IV, "Visas, asylum, immigration other policies related to free movement of persons".

In order to establish progressively an "area of freedom security and justice", Art.61 of the Treaty charges the Council to adopt the necessary measures related to the abolition of external borders (Art.61/a) and measures in the field of asylum, immigration and safeguarding the rights of nationals of third countries (Art.61/b). Especially to address the concerns about asylum issue, Art.63 of the Treaty directs the Council within a period of five years after the entry into force of the Amsterdam Treaty[32] to adopt:

> 1) measures on asylum, 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, within the following areas:
>
> (a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,
>
> (b) minimum standards on the reception of asylum seekers in Member States,
>
> (c) minimum standards with respect to the qualification of nationals of third countries as refugees,
>
> (d) minimum standards on procedures in Member States for granting or withdrawing refugee status;
>
> (2) measures on refugees and displaced persons within the following areas:
>
> (a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,

[32] The Amsterdam Treaty entered into force in May 1999.

(b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons.

As a result of this agenda, Dublin Convention and other Council Resolutions, adopted in the post-Maastricht period, were incorporated into the Union framework. Additionally, on May 1999, the Schengen Protocol to the Treaty of Amsterdam incorporated the entire Schengen *acquis* into the EU, thereby it would become effective for all the 13 Member States that have signed the Schengen Agreement so far.[33] On the other hand following the Amsterdam Treaty a High Level working Group on Asylum and Migration was established in1998 to help the Council and Commission to prepare action plans for the implementation of adopted measures in Amsterdam.

As a result of shifting to supranational framework, the other EU institutions, namely Commission, Parliament and ECJ, would have role in decision-making procedures and implementation processes of the asylum issues. This dramatic change has been embodied in the Art 67 of the Treaty. According to the Article, until the end of transitional five years period, decision making would continue to be on intergovernmental basis, and allows some states such as those party to the Schengen Agreement, to opt for closer cooperation even if others do not wish to do so. After five years, decision making on asylum issues will be performed according to first pillar procedures in which Commission will have the sole right to initiate legislation (Art.67/a); Parliament will be consulted in decision making (Art.67(2)b); Council of Ministers will be able to take decisions by qualified majority (unanimity is not required) in some issues (Art.67(3)).

Moreover, the transfer of competence to the third pillar implies the recognition of the authority of European Court of Justice in the asylum issues. With the Art.68, Amsterdam significantly increased the jurisdiction of ECJ over the asylum issues. It is permitted to issue preliminary rulings and to act as a last court of appeal in

[33] All EU Member States except Great Britain and Ireland who have the possibility of opting in. There are some special provisions for Denmark.

interpreting the relevant EU Treaty provisions. Together with this development, some argued that a major structural deficit in the European refugee regime (as well as in the worldwide refugee regime established by the Geneva Convention), the lack of independent international supervisory mechanism, has been met.[34] However, Article 68(1) states that only a national court of final instance may seek such a ruling "if it considers that a decision on the question is necessary to enable it to give judgment". That means ECJ ruling is optional and therefore it can optionally, thus hardly, be decisive in the asylum implementations of the Member States.

On the whole, regarding the integration of these capabilities and possibilities, Amsterdam Treaty initiated a relatively effective path for a tangible harmonization and progress in the asylum field. First and foremost, the transfer of asylum related areas from third pillar to the first pillar is the most welcome development achieved by Amsterdam. It created an important impetus for moving beyond soft law and developing binding EU measures.[35] Thereby it enabled the Union to expand its so far modest asylum *acquis*. Nevertheless, considering the content of the adopted measures, which generally offers minimum standards and protects the sovereign hands of Member States, it has also opened the way for the installations of restrictive provisions and logic of exclusion.

2.7 Post-Amsterdam Period

2.7.1 1999 Tampere European Council

Foreseen by the Amsterdam Treaty, a further significant step towards strengthening the cooperation in asylum issues came with the Tampare Summit in

[34] Marx, Reinhard, "*Adjusting the Dublin Convention: New Approaches to Member State Responsibility for Asylum Applications*", European Journal of Migration and Law, Vol.3, No:1, 2001, p:17
[35] Uçarer, op.cit in note 19, p.299

October 1999. In the Summit, European leaders proudly reaffirmed their shared commitment to freedom, and further stated that:

> …this freedom should not, however, be regarded as the exclusive preserve of the Union's own citizens. Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory.(para.3)

Hence, they agreed on the necessity to develop common policies on asylum and immigration while taking into account the need to combat illegal migration. In conjunction with this, the aim of the new measures would be to achieve "an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and [the ability] to respond to humanitarian needs on the basis of solidarity."(para.4) Noticeably, these statements displayed that the justifications for an EU asylum policy finally moved from mere "flanking measures' for the abolition of internal borders towards an independent objective rooted in the human rights dimension.[36]

To serve the mentioned aims, Member States focused on four central elements at Tampere Council. Firstly, the Summit stressed on the need to establish "partnership with the countries of origin" with a view to address the root causes of the migration, namely "political human rights and development issues" in the countries of origin and transit. (para.11) So with these measures it would be possible to combat the causes of migration and refugee flows from these countries. To implement these measures Council supported the High Level Working Group to develop further action plans for cooperation with the countries of origin. (para.12)

Secondly, and more importantly, the leaders, under paragraph 13, underlined their "absolute respect of the right to seek asylum" and agreed to work towards "establishing a common European Asylum System [CEAS] based on the full and

[36] Boccardi, Ingrid, Europe and Refugees: Towards an EU Asylum Policy, The Hague: Kluwer Law International, 2002, p.174

inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of *non-refoulment*." In conjunction with this, for short term period, in paragraph 14, Tampere Conclusions reemphasized the measures that had been set out in Art.63 of the Amsterdam Treaty, and added them with measures on subsidiary forms of protection. And for long term, it called for an eventual common asylum procedure and a uniform refugee status valid across the Union. (para.15)

In addition to this, Member States also agreed to explore the possibilities "for setting up a 'financial reserve' available in situations of mass influx of refugees for temporary protection" (parag.16), which would later pave the way to the establishment of European Refugee Fund. Lastly, Council of Ministers was urged to finalize its work on the system for the identification of asylum seekers (Eurodac). (para.17)

Thirdly, Tampere, in an attempt to struggle with racism and xenophobia, called for "fair treatment of third country nationals" in the Union. (Chapter3) To this end, Council was called to take 'rapid decision' to approximate national legislation "on the conditions for admission and residence of third country nationals based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin" (para.20).

Fourthly, Council emphasized the need for more efficient "management of migration flows", including closer cooperation with the countries of origin and transit for the "development of information campaigns" to discourage potential illegal migrants and to prevent migrant trafficking. It also called for closer cooperation on external border controls and, as a result of enlargement process, stressed the importance of "effective control of the Union's future external borders." (para.24, 25) Finally they agreed to assist the countries of origin and transit in order to promote the voluntary return of refugees to these countries. (para.26)

Given these statements and policy directives, Tampere Summit recorded a real turning point in the development of an EU asylum policy. Above all, it inserted the process a lacking humanitarian dimension. Secondly, Member States have

demonstrated a real political will to speed up the process of implementing the aims set in the Amsterdam Treaty, and to bring about sound asylum procedures. With these noticeably positive obligations, it created a spirit favoring the progress that would increase the protection of refugees in Europe. However it would be later understood whether the implementation of these provisions would reflect the spirit in which they have been written. Acknowledging this possibility, EU Member States also agreed in Tampere to review the progress of these provisions at its December 2001 meeting in Laeken, Belgium.

2.7.2 From Tampere to Laeken

Until the Laeken Summit of 2001, in the name of implementing the asylum agenda set by the Amsterdam and Tampere Summit, EU have recorded a surprising progress in the legislation of asylum related issues. All the proposals necessary for the first stage measures have been submitted in this period: *European Commission Proposal for a draft directive on rules on the balance of effort (burden sharing) concerning asylum seekers and refugees* proposed in December 1999; *a Draft Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status with a view inter alia to reducing the duration of asylum procedures* was presented in September 2000; a *Draft Directive laying down minimum standards for the qualification of status of third country nationals and stateless persons as refugees, in accordance with the Geneva Convention, or as persons who otherwise need international protection* was presented in September 2001. These proposals are still under negotiation.

The adopted proposals by the Commission: in September 2000 *Council Decision establishing European Refugee Fund;* December 2001 *Regulation concerning the establishment of Eurodac*; in July 2001 *Directive on minimum standards for giving temporary protection*; in January 2003 *Directive laying down the minimum standards for the reception of asylum seekers*; in February 2003 Council adopted *Regulation*

establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum applications (the so called Dublin II, an attempt to supplement original Dublin Convention).

In parallel to these developments EU agreed on the European Union Charter of Fundamental Rights at the European Council meeting at Nice on 7 December 2000. With the Art.18 of the Charter, EU Member States guaranteed the right to asylum with due respect for the rules of Geneva Convention relating to the status of refugees and in accordance with the treaty establishing the European Community. But while the inclusion of right to asylum was considered as a welcome development, since it excludes nationals of member states from the right of asylum, it is criticized for setting a discriminatory application of the fundamental rights on the grounds of national origin. This has been commented as a clear violation of the Geneva Convention and other relevant human rights instruments.[37]

As foreseen in Tampere, in September 2000, a European Refugee Fund was established with a budget of 216 million Euros to be invested in improving Member States' refugee and asylum practices until the end of 2004. Moreover, in line with the Tampere Conclusions, Commission presented a communication on a common asylum procedure and uniform status for refugees in November 2000, which would later to be developed into a report of November 2001 (namely, Horizontal paper on Asylum instrument). This report proposed an open procedure foresees a Council adoption of common guidelines on asylum policy, to which states would then approximate their legislation.

However, despite the determination of the Union in asylum issue, progress on many of these proposals was slow and less substantial than expected due to the difficulty in harmonizing divergent and legally very complex national provisions on asylum procedures.[38] Hampered by unanimity requirement, to take decisions on

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[37] Comments by the European Council on Refugees and Exiles (ECRE) on the right to asylum in the draft Charter on Fundamental Rights of the European Union , http://www.ecre.org/statements/f_rights.shtml

[38] Boswell, Christina, "*EU Immigration and Asylum Policy: From Tampere to Laeken and Beyond*", Briefing Paper to The Royal Institute of International Affairs, New Series No: 30, February 2002, p.3

politically sensitive legislations took much more time than expected. Yet during the legislative negotiations, most of the states have exhibited a blatant reluctance to move beyond national practice.[39]

Regarding the implications of these developments for the refugee protection concern, especially, measures taken or currently being considered to combat illegal migration are posing negative hints for the asylum seekers and significantly diminishing the access possibilities for asylum seekers to the European Member States. Moreover, the event of September 11th raised further concerns, which hurried governments' responses to address national security issues. While it has increased the Member States' tendency for issuing restrictive proposals, it much more raised the doubts for the ones involve positive obligations towards refugees.

Given these developments, the picture immediately prior to Laeken was mixed. Although most of the aims set in Amsterdam and Tampere seemed to be, at least, initiated, to comply with the ambit time tables of the aimed measures, most of the Member States and Commission agreed that the process needed renewed political impetus.[40]

2.7.3 2001 Laeken European Council

To address the need for a new political impetus, Laeken Summit was held in December 2001. It aimed to re-ensure the Member States' commitment to a principled and protection oriented harmonization process within the frame of the Amsterdam Treaty and spirit of Tampere Conclusions.

Concerning the asylum integration, the Laeken Conclusions emphasized the need for a "true common asylum and migration policy", "which will maintain the necessary balance between protection of refugees, in accordance with the principles of the 1951 Geneva Convention, the legitimate aspiration to a better life and the

[39] European Council on Refugees and Exiles (ECRE), "*The Promise of Protection: Progress Towards a European Asylum policy since Tampere"*, Report, November 2001, p35
[40] Boswell, op.cit in note 38, p.4

reception capacities of the Union and its Member States."(para.39) To this end, it called for rapid progress towards a common policy on migration and asylum, and new approaches to speed up the progress.

However, in terms content, the Conclusions did not go beyond to restate the Tampere provisions about the components of a common immigration and asylum policy, which were mentioned as "the development of a European system for exchanging information on asylum, migration and countries of origin; the implementation of Eurodac and a Regulation for the more efficient application of the Dublin Convention, with rapid and efficient procedures; the establishment of common standards on procedures for asylum, reception and family reunification, including accelerated procedures where justified; the establishment of specific programmes to combat discrimination and racism." (para.40)

Although the proposals are not new, the real issue is argued as to ensure the Member states to make the necessary political concessionary and legislative changes to implement what was already agreed at Amsterdam and Tampere.[41] Nevertheless the Laeken Summit couldn't achieve the expected effect and, apart from the directive laying down minimum standards for the reception of asylum seekers (agreed in April 2002), the rest of the proposals couldn't be adopted by the time of Seville meeting of the Council of Ministers.

2.7.4 2002 Seville European Council

Since Laeken was found unsuccessful in creating the expected impetus and failed to set deadlines for the adoption of outstanding proposals, Member States agreed to take a firm deal with the issue in Seville European Council in June 2002. This time, they were more determined to speed up the implementation of provisions set in Tampere. As the most significant attempt to serve this aim, Seville Conclusions,

[41] ibid

with the paragraph 7, put deadlines to press ahead with the examination of proposals under discussion.

To this effect European Council urged the Council to adopt: *Dublin II Regulation* by December 2002; the *draft proposal for a Council Directive on the minimum standards for qualification and status as refugees and the provisions on family reunification and the status of long-term permanent residents* by June 2003; the *drat proposal on the common standards for asylum procedures* by the end of 2003. To keep track of the issue, European Council decided to review the progress of Council of Ministers and Commission in this area with a report asked to be given in its meeting in June 2003.

Apart from these, Seville Summit also gained significance for its emphasis on the combat against illegal immigration. (para.30) Besides, it reemphasized for cooperation with the countries of origin and transit in joint management of migration flows and in border controls, as well as in readmission policies. (para.34) These concerns promoted the strengthening of the border controls and measures on the return of illegal entrants. Consequently, owing to the frequent abuse of asylum institution by many migratory groups as to justify their illegal entrances, this intensified concern on the combat against illegal immigration would stimulate more restrictive policies towards asylum seekers.

2.7.5 2003 Thessaloniki European Council

In line with the preceding efforts, Thessaloniki European Council meeting also reaffirmed the need for a more structured EU approach relating to the migration and asylum issues in the EU. To this effect, the Council especially emphasized on the terms for developing a common policy on illegal migration, external borders, the return of illegal migrants and cooperation with third countries.(para.8-23)

Considering the asylum issues, to support the determination to establish a Common European Asylum System, introduced at Tampere, the Council ensured the adoption, before the end of 2003, of the outstanding basic legislation, that is the

proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless *persons as refugees or as persons who otherwise need international protection and the proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status.(*para.24) The first proposal was adopted in April 2004, and regarding the latter one, the European Commission introduced a modified version of the proposal in June 2002, which is still under progress.

Moreover, the Council invited the Commission to explore ways to ensure more orderly and managed entry in the EU of persons in need of protection. (para.26) Furthermore it offered new grounds and measures for the integration of legally residing third country nationals, including refugees, into the territory of the European Union. (para.28-35)

As of an important concern to refugees, in order to meet the Member States' plans to provide protection for refugees in their country or regions of origin, the Council required the Commission to examine ways and means to enhance the protection capacity of the regions of origin. (para.26) That kind of initiatives suggests a kind of containment of refugees in the regions or countries where their life is still at risk. Though it would come to prevent the refugees to avail themselves of the right to seek refuge in other places, as guaranteed in many international law instruments, such kind of containment strategies have been credited by different groups, even including UNHCR. As observed from the Balkan practice of that strategy, negative implications of containment may prove higher than its practicality for the European states.

2.8 Conclusion

Instead of humanitarian considerations, the need to develop a common asylum policy at the EU level primarily emerged as a 'flanking' or "compensatory" measure for the abolition of internal borders. This technical perception haunted the development of asylum *acquis* of the EU in the following periods as well and thus led

to the adoption of measures having negative and preventive implications on the protection seekers. Against the abolition of internal borders, to increase the external barriers to access became the chief concern for the Member States and therefore "protection of the territory sadly overweighed the protection of refugees."[42]

At the beginning of the 1990s, as a result of the immediate competition among Member States for the most restrictive provisions, asylum policy development took place in the manner of selective harmonization, in which Member States could mainly agree on negative obligations, such as manifestly unfounded applications, safe third country arrangements, visa requirement, carrier sanctions etc. Therefore, there was not much structured approach to asylum matter and Member States had mostly ignored the consequences of their 'migration control' obsessed measures related to protection seekers. With the Amsterdam Treaty, more comprehensive framework has been set for the development of EU asylum policy, which is comprised of some measures bringing minimum standards for the asylum procedures to be applied in the national asylum procedures. As of a significant importance, with the Tampere European Council, the emphasis is finally laid down on the respect for human rights rather than obsessive control of access to territory. Therefore Member States only recently acknowledged the existing and potential negative impacts of the migration control on the refugee protection. In the following European Council meetings, this humanitarian aspect has also been reiterated. However taking into account their emphasis on the fight with illegal migration, return policies and containment policies, it is quite likely that the recently raised humanitarian concerns may remain just on the sheet for the following.

Considering content of the up to date development, most of the legislative instruments are of non-binding character (directives and resolutions) and yet reflect a lowest common denominator. Apart from effective burden sharing, embodied in safe third country provisions, and access prevention, as visa requirement and carrier sanctions, EU asylum policy development is mainly framed through non-binding and yet minimum standard setting instruments with a view not to curtail the sovereignty of

[42] Boccardi, op.cit in note 36, p.176

Member States on migration matters. Accordingly, measures on minimum guarantees for asylum procedures, and minimum standards on granting and withdrawing refugee status and reception standards phrased as Council Directives are of non-binding character. In addition to this, most of the measures contain lots of safeguard provisions making it possible for Member States to maintain divergent national policies. With this impossibility of producing legally binding instruments, to what extent a harmonization could be said as have been achieved? Despite adopted provisions, there remain still vast discrepancies between national asylum systems and legal interpretations of the basic legal instruments related to refugee protection by the Member States. The main problem is that since EU couldn't achieve a substantial harmonization in terms refugee protection, most of the positive obligations towards refugees are left to the conscience of Member States whose motivation still prove as to host the least number of refugees or to offer the least entitlements to protection seekers. Then again, if EU is determinate in applying safe third country provision, it should immediately do away with the prevailing disharmony among national asylum policies. Otherwise refugees would be left to bear the brunt of these discrepancies.

Ultimately, the account indicates that the negative implications of the EU asylum policy development do not only emanate from the exclusionary or preventive implications of some measures but from their being deprived of binding nature or containing many safeguards, which strengthen the sovereign hands of Member States. After the harsh competition of the late 1980s and early 1990s among Member States on the most restrictive asylum procedures, EU couldn't offer much on this path of events in terms upgrading the refugee protection in Europe. It rather proved as to communitarize this restrictive and relentless approach towards refugees who are lost in the midst of migration prevention efforts. Despite the recent acknowledgment of the negative impacts of EU measures on refugees at the Tampere Summit, it will be understood in the future whether EU Member States will act in accordance with that recently raised humanitarian consciousness. Because this on the sheet roused humanitarianism does not necessarily guarantee the adoption of measures that will truly serve to the protection needs of refugees.

CHAPTER III

PRE-ENTRY ACCESS PREVENTION MEASURES: EXTRA-TERRITORIAL MECHANISMS

Access prevention efforts by the EU have been carried out through the extra-territorial migration control mechanisms. These mechanisms mainly comprise of the stipulation of entry-visas and other documents, enforcement of these requirements by carrier sanctions and other pre-arrival screening and deterrence mechanisms. These measures in combination act to move the barriers to access out of the EU territory, to the countries of origin or departure and thereby preclude the refugees from ever arriving at the EU territory. As a matter of fact these kind of pre-arrival deterrence mechanisms have been in practice since mid-1970s in Europe with the same motivation of halting migration influx to European countries.[43] However with the abolition of internal barriers and subsequent raise of external barriers, it became a pressing need to harmonize these measures at the EU level.

Initial aim to introduce these measures were claimed to curb migratory flows to Europe and combat illegal immigration, and thus claimed as not aiming refugees. However, indiscriminate application of them affects refugees more than any other groups. Because the related provisions generally do not contain special or exemption measures for refugees lacking necessary documents or made illegal entry. Neither an

[43] For more information see Boccardi, Ingrid, Europe and Refugees: Towards an EU Asylum Policy, The Hague/London/New York. Kluwer Law International, 2002, p:47-50

exculpatory approach towards them is a general occurrence. Taking into account the fact that due to the objective and/or subjective impossibilities, refugees are generally not able to obtain the required documents to enter legally to the EU territory, these pre-arrival barriers filter refugees more than the originally aimed migratory groups.

Beyond the observed practical effects, pre-entry measures contain crucial implications in terms of law of refugee protection. By means of *de jure* extraterritorial barriers, European states prevent the refugees from ever arriving their territories and thereby aim to contain them in the countries where their life is at risk. By this way, since the refugees are not on their territory, Member States consider themselves immune from the *non-refoulment* principle and as a result decline any liability for the protection of these persons. Mostly because of this reason that these pre-arrival measures are providing with an alleged immunity from the *non-refoulment* responsibility, European states are giving a special emphasize to them.

Besides, these pre-entry control mechanisms have also been attractive as regard to the safe third country applications at the EU level, which will be later examined in the following chapter. Not to be the country where the asylum seekers first set foot, thus not to be the responsible country for the asylum claim, Member States particularly give importance to the effective implementation of these pre-entry control mechanisms. This reckless attitude of EU Member States on the issue attracted many critiques from the refugee advocates but unfortunately a due humanitarian consideration about the issue has not yet been accommodated in the relevant legislative elements.

Given the above considerations, in this chapter, the pre-entry barriers in EU will be analysed from the perspective of how they produce preventive effect for the arrival of asylum seekers to the EU territory and what other problems they generate for refugees and refugee protection regime in general. Firstly, as the most important mean of pre-entry mechanisms, visa policies introduced at EU level will be analysed. It shall be analysed in depth because it is the primary tool stimulated the enforcement of subsequent complementary pre-entry measures. Accordingly, carrier sanctions and other pre-screening and deterrence measures will be examined in the following.

Before shifting to the examination of the measures, a theoretical and legal analysis is necessary for understanding the viability of these measures under international law.

3.1 International Law Perspective

Non-refoulment constitutes the main, indispensable and obligatory part of the refugee protection regime. It has been guaranteed as an obligation on states under many international humanitarian law instruments, particularly led by Article 33 of the Geneva Convention. However, state responsibility in terms of *non-refoulment* principle arises only once the asylum seeker has entered the territory of the concerned state. As it is mentioned above, pre-entry measures, such as visa requirements or carrier sanctions, are preventing the territorial contact and thereby render the *non-refoulment* principle inapplicable. In this respect, the questions arise whether states have a right to prevent the access of persons seeking protection and whether an individual have a right to have an access to the potential host state in order to seek protection. By utilizing in depth examinations of Gregor Noll on the issue[44], normative and international law analysis of these two dimensions of the problem will be explored in the following.

Under the international customary law, which is qualified *inter alia* by the rules of refugee law and human rights law, states have the very sovereign right to exclude or admit an alien to its territory. As a corollary of this right, states may apply entry or pre-entry measures to prevent the access of aliens to their territory. Considering the refugee protection issue, states are again not obliged explicitly to admit the access of the asylum seekers, unless they are at their immediate borders. From none of the international law instruments (GC, UDHR, ECHR, ICCPR, CAT) an obligation for states to allow the access of asylum seekers can be deduced in the absence of territorial contact with the potential host state.[45] Therefore an asylum

[44] Noll, Gregor, Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection, The Hague/Boston/London: Kluwer Law International, 2000, p.353-391
[45] ibid, p.387

seeker, whose visa application is rejected at the embassy of a potential host state, cannot invoke the *non-refoulment* obligation of states. In this aspect, however, some may claim an implicit relevance of *non-refoulment* principle here as well. Corresponding to this, Noll, albeit acknowledging the ambiguities, claims that an inclusive and universalistic interpretation of the *non-refoulment* principle may imply an obligation for states in terms of granting extraterritorial protection to asylum seekers.[46]

On the other hand, considering the issue from the point whether an individual have a right to access to another country to seek refuge, international law instruments, except border cases, again do not provide such explicit rights for individuals. Presumably since it may generate an extra-territorial protection obligation, the drafters of the international treaties did not want such a right to exist for asylum seekers. Nevertheless, the absence of such a right, or an obligation for states, should not necessarily be interpreted at the expense of protection of the refugees. Because all the international instruments expressing or in somewhat implying *non-refoulment* principle are deemed to have the ultimate aim of protection of refugees and thus disregarding extraterritorial protection would shadow the good intentions of the international endeavours for protection. Yet, as Noll mentioned, "[a]fter all, a state obligation to protect could [,thus should,] embrace an obligation to allow access as well."[47] Therefore, for a sincere protection aim, silence of the international instruments should be interpreted in good faith. This inclusive approach is also emphasized as a general rule of interpretation of the provisions by the Article 31 of the 1969 Vienna Convention on the Law of Treaties.[48] As the blueprint is set so, considerable safeguards for meeting the protection needs of asylum seekers can be deduced from the international law instruments containing *non-refoulment* norm.

[46] ibid.p.389
[47] Noll, ibid, p.377
[48] Article 31 of the Vienna Conventions reads as: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." This treaty is ratified by the all EU Member States, except France, Ireland and Portugal.

Saving the *non-refoulment* principle apart, primary international law instrument which can be claimed to have a bearing on the issue is the Universal Declaration of Human Rights. In this context, wording of the UDHR Article 14 includes a relevant expression regarding asylum seekers' transgression of the boundaries by reading as: "Everyone has the right o seek and enjoy in other countries asylum from persecution." By making a direct allusion to the individuals' right to seek and enjoy asylum, this provision of UDHR in some sense allows the asylum seeker to access to the territory of potential host states. For that reason, Gregor Noll cites the Article 14 of UDHR as a crucial instrument implying a right to access for asylum seekers and thereby countering the indiscriminate exclusion caused by pre-entry measures.[49]

On the other hand, Noll have also discussed the issue from normative perspective whether such a right to access for asylum seekers may be deduced from the international law provisions concerning the right of individuals to emigrate or right to leave. In this respect, he points out the International Covenant on the Civil and Political Rights of Individuals and the Fourth Protocol to the European Convention of Human Rights as containing pertinent articles.[50] In both law instruments, Art 12(2) ICCPR and Art 2(2), same wording is used concerning the individuals' right to leave: "Everyone shall be free to leave any country, including his own". And both with a similar wording provide the right that "[n]o one shall be arbitrarily deprived of the right to enter his own country"(Art 12 (4) ICCPR). Thus while they both enshrine the right of individuals to emigrate, neither of them, nor any other international law instrument have mention of a right to immigrate into states which are not one's own country.[51]

To summarize, Noll has referred equally to both universalist and particularist reading of the provisions to make a comprehensive handling of the issue. The universalist reading of the provisions concludes that a right to immigrate is a

[49] Noll, op.cit in note 44, p.357-359
[50] Article 12 (2), (3) and (4) ICCPR and Article 2 (2), (3)
[51] Noll, op.cit in note 44, p.377-379

necessary corollary of the right to emigrate, thus admitting the latter while denying the former would be a contradiction.[52] Against this, he argues that a particularist reading would disagree with this reasoning on the ground that such right can not be deduced from the silence of a text. In the clash of these normative approaches Noll couldn't reach clarity on the right to access of refugees.

Against inconclusive evaluations by Noll, James Hathaway brings a clearer viewpoint to the issue with regard to the *non-refoulment* principle. According to Hathaway, *non-refoulment* principle applies as soon as a refugee comes under the *de jure* or *de facto* jurisdiction of a state party. He says that Geneva Convention grants Article 33 protection to 'refugees' without any qualification based on level of attachment to the asylum state.[53] In conjunction with this, he quoted the related comments by Theodor Meron:

> In view of the purposes and objects of human rights treaties, there is no priori reason to limit a state's obligation to respect human rights to its national territory. Where agents of state, whether military or civilian, exercise power and authority (jurisdiction, or de facto jurisdiction) over persons outside national territory, the presumption should be that the state's obligations to respect the pertinent human rights continues. That presumption could be rebutted only when the nature and content of a particular right or treaty language suggest otherwise.[54]

Based on that reasoning by Hathaway and Meron, *non-refoulment* or protection obligation in general applies to the persons who come to the embassies or board on the carriers of host states with the protection claim. Because according to international law embassies or carriers are considered under the jurisdiction of the concerned states thus *non-refoulment* principle is supposed to be applied in that areas.

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[52] ibid, p.386-387
[53] Hathaway, James, "*Refugee Law is not Immigration Law*", Worldwide Refugee Information, http://www.refugees.org/world/articles/refugeelaw_wrs02.htm
[54] Meron, Theodor, "*Extraterritoriality of Human Rights Treaties*", American Journal of International Law 78, 1995 89(1), p.80-81

To conclude, though international law neither creates explicit obligations for states to allow access to protection seekers nor provide asylum seekers with explicit rights to access to seek protection in potential host states, related humanitarian provisions shouldn't be constructed so as to allow states to wash their hands from protection responsibility. Yet, exclusive reading of the silence of these texts would be in contradiction with the good faith of the international refugee protection regime and other humanitarian regimes as well. Taking into account the ultimate protection aim of the *non-refoulment* principle, only inclusive and universalist approaches towards the issue can ensure the humanitarian soul of this regime.

3.2 Visa Requirement

Visa is an authorization given by a state to enter into the territories of the same state. As a corollary of the customary sovereign rights of states, application of visa requirement is allowed to states to control the access of aliens into their territories. Therefore it has been a substantial tool of pre-arrival control mechanisms and has been in use by European governments since the mid-seventies to curb the immigration flows. Since its application does not make a positive discrimination between normal immigrants and protection seekers, visa requirement generates problems for the refugees and asylum seekers more than any other migratory groups.

In the absence of internal borders, diverging procedures for visa applications would be a real trouble for Schengen States. Therefore a common visa policy became a pushing need for the control of entries into the border free area of the EU. Efforts to harmonize visa policy have started with the intergovernmental extra-Union Schengen visa arrangements initiated with the Schengen Agreement of 1985. Subsequently, an elaborate Schengen visa *acquis* relating to the external border controls and visa rules has been shaped by 1997 among the Schengen group. Accordingly, in the Schengen visa regime, 1990 Schengen Implementation Convention sets the general procedures

for visa issues in its Articles 9-18, and the Common Consular Instructions (CCI) in its entirety and with all its annexes, defines in detail the types of visas, the responsible missions and issuing procedures and sets out the application procedures and examination of the applications, decisions and the mode of filling in visa stickers and other administrative procedures.

As the abolition of borders has become a matter at the Union level, visa policy arrangements of the Schengen area were necessarily communitarized, too. To this effect, firstly Maastricht Treaty, acknowledging the visa policy as a common interest of the European Union, bestowed power to the Community to regulate the movement and entry of persons in the Union. To this end, Council of Ministers adopted legislative measures, which is to be examined subsequently. Eventually Amsterdam Treaty brought all aspects of the visa policy into the Union's legal framework by integrating them into the new Title IV of the EU Treaty (visas, asylum, immigration and other policies related to free movement of persons). It established the relevant legal base of the visa policy under the Article 62(2) (b) of the European Community Treaty, and further annexed the Schengen Protocol in order to integrate the entire Schengen visa regime into the Union framework. On the basis of this protocol the harmonization measures introduced by the Schengen group in the field of visas has become part of the EU legislative framework. However the measures stipulated for qualifying for a visa generate various negative implications for protection seekers.

After giving the general development of common visa policy at the EU level, we shall now proceed with the detailed examination of the visa provisions, which have an important bearing on the refugee protection issue. Accordingly, measures pertinent to visa formats and procedures and the Regulations on the listing of third countries whose nationals are subject to visa requirement will be analyzed below. After reviewing the relevant legislative developments, the negative implications of them on protection seekers will be dealt in the following.

3.2.1 Visa Format and Procedures

As it is mentioned above, preceding the full communitarization of the visa issues, Council of Ministers, empowered under the Article 100c ECT by the Maastricht Treaty, had engaged in adopting related legislations. They served as important tools in the course of harmonization of visa policy at the EU level.

To render the common visa policy effective, a uniform format for visas was deemed as an indispensable component. To this effect, the first related legislation adopted at the EU level was the *Council Regulation 1683/95 of 1995 laying down a uniform format for visas.*[55] By standardizing the visas, this Regulation aimed to facilitate the entry controls and enabled the detection of false visas. The uniform format for visas was suggested to conform to the technical specifications set out in the annex to the Regulation, and also conform to the additional secret technical specifications intended to prevent visa counterfeiting and falsification.

According to the Article 15 of the Regulation a visa shall be given for an intended stay in the issuing Member State or in several Member States of no more than three months at all; for transit through the territory or airport transit zone of the issuing Member State or several Member States. The holders of this visa are entitled to travel to all Member States, except the different implementations of the UK and Ireland opt-out.

Subsequently, for a better harmonization of visa policy and practice, Council of Ministers adopted a *Recommendation of 4 March 1996 relating to local consular cooperation regarding visas*. With this Recommendation Member States are encouraged to establish cooperation between their consular services in order to exchange information on the visa procedures and on risks to national security and public order or on risks of clandestine immigration. Moreover they are suggested to

[55] On 18 Feb 2002 this regulation later to be amended by the *Council Regulation (EC) No 334/2002 amending Regulation (EC) No 1683/95 laying down a uniform format for visas*, which further improves security standards of the uniform format for visas.

share information to prevent the simultaneous multiple visa applications by the same person and to help to determine the good faith of the visa applications. Beyond, this information exchange is deemed necessary to take the interests of other Member States into account particularly regarding the protection of national security and public order, and for the prevention of clandestine immigration.

After the communitarization of Schengen *acquis,* some lacking points regarding the visa procedures has been supplemented by the provisions of SIC and Common Consular Instructions. Therefore, albeit not specifically expressed in the mentioned Regulation and Recommendation, the lacking points on visas can be derived from the communitarized SIC provisions.

As having a bearing on the refugee protection concern, one of the important issues should be recalled in the Schengen visa regime is the conditions stipulated for issuing short term visa. According to Article 15 of the SIC, the uniform format visa may in principle only be issued if the third country nationals meet the conditions of entry laid down in Article 5(1):

> (a) in possession of a valid document or documents permitting them to cross the border, as determined by the Executive Committee;
>
> (c) if applicable, submits documents substantiating the purpose and the conditions of the planned visit and has sufficient means of support, both for the period of the planned visit and to return to their country of origin or to travel in transit in a Third State, into which their admission is guaranteed, or is in a position to acquire such means legally;
> (d) has not been reported as a person not to be permitted entry;
> (e) is not considered to be a threat to public policy, national security or The international relations of any of the Contracting Parties.

However in the following of the Article 5, Member States have been allowed the possibility to derogate from the principles contained above on some grounds including humanitarian concerns. Article 5(2) reads as:

> 2. Entry to the territories of the Contracting Parties must be refused to any alien who does not fulfill all the above conditions unless a

> Contracting Party considers it necessary to derogate from that principle on humanitarian grounds or in the national interest or because of international obligations. In such cases permission to enter will be restricted to the territory of the Contracting Party concerned, which must inform the other Contracting Parties accordingly.
>
> These rules shall not preclude the application of special provisions concerning the right of asylum or of the provisions of Article 18.

Given these conditions diplomatic missions and consular offices of the states are empowered to ascertain whether the applicant meets these conditions to qualify for visa. Once it has been ascertained that the visa application can be entertained on the basis of the documentation produced by the applicant, and after the results of the interview, which is normally conducted directly and personally, the Mission carries out the routine preliminary security checks. This involves on-line accessing the SIS (Schengen Information System) to consult the list of aliens to be refused admission into the Schengen area.

3.2.2 Listing of the Third Countries for Visa Requirement

Another important legislation at the EU level, which mainly sets the framework for the harmonization of visa requirement, was on the listing of the nationalities to be required visa: *Council Regulation 574/99 of 12 March 1999 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States.* As in the Schengen listing, the Regulation listed the third countries whose nationals shall be subject to visa requirement when crossing the Union borders. Differently, while the Schengen regime provided three lists (as the negative list, of the visa required nationalities; the white list, of the nationalities exempt from visa requirement and the grey list, of the nationalities from whom some Member States require visa some not), this Regulation

only involved a negative list and containing lesser states than the Schengen's negative list (the Annex of this Regulation included 105 countries).[56]

Subsequently, upon the Commission's progress report as foreseen in Article 3 of the Regulation on the harmonization of national visa policies with regard to the countries not on the common list in the first half of 2001; as well as the Amsterdam Treaty's integration of Schengen *acquis* and thereby empowerment of the Community with new competencies, *inter alia*, drawing up a positive list, a new regulation was adopted in 2001 to expand the scope of the previous one: *Council Regulation 539/01 of 15 March 2001 listing the third countries whose nationals must be in possession visas when crossing the external borders and those whose nationals are exempt from that requirement.*[57] Reacting to the integration of the Schengen *acquis* into the Union framework, this new Regulation raised the number of countries in the negative list, and further introduced a positive list suggests the exemption of entries from visa requirements in the Union.

As it is mentioned, this Regulation establishes two common lists of countries in its annexes: Annex I, negative list of countries whose nationals must be in possession of visas; Annex II, positive list of counties whose nationals are exempted from visa requirement when crossing the Union borders. The negative list contains 135 countries (ex. Afghanistan, Algeria, Pakistan, Rwanda, Turkey etc.) and the positive list contains 48 countries (ex. Argentina, Bulgaria, Japan, USA etc.). With these lists, though open to modifications, the Regulation provides for full harmonization as regard to the third countries in the negative and positive list, and thus prevents Member States to operate differently from the common list. (parag.12)

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[56] Actually the proposal of this Regulation was initiated by the Commission in 1993 and it was adopted in 1995. However EP successfully brought an action for annulment against the Council on the grounds that Council did not asked its opinion on the final shape of the proposal. This previous Regulation included two list as positive and negative and they were expected to be finalized by June 1996. But Commission was criticized for overstepping its limit by creating a positive list. Because before the Amsterdam Treaty, Maastrich only conferred the Community the competency to draw a negative list. Boccardi, op.cit 43, p.96-97

[57] Ireland and UK are not participating in this Regulation. In order to clear the Romania' status as a country in the positive list, this regulation is amended by the Council Regulation (EC) No 2414/2001of 7 December 2001 amending Regulation (EC) No 539/2001.

According to Article 2 of the Regulation, a visa is granted for an intended stay in one or several Member States no more than three months or for transit through the territory of one or several Member States. The visas for transit through the international zones in airports are excluded from the scope of this Regulation since it was arranged in a separate instrument as Joint Action on Airport Transit Arrangements, which is later to be analysed.

Alike the preceding Regulation, this Regulation also allowed the Member States to exempt certain categories of persons from the visa requirement. To this effect, Article 4 of the Regulation enumerates these persons exempted from visa requirement as: holders of diplomatic passport, official duty passports and other official passport; civilian air and sea crew: and crew of ship navigating in international waters and attendants on emergency and rescue flights and other helpers in the event of disaster or accident. Important to note, different from the preceding one, this Regulation does not leave the visa subjection of recognized refugees and stateless persons to the discretion of Member States but brings visa requirement under specific conditions. According to the Article 3, recognized refugees and stateless persons "shall be subject to the visa requirement if the third country where they reside and which issued their travel document is one of the third countries listed in Annex I; or may be exempted from the visa requirement if the third country where they reside and which issued their travel document is one of the countries listed in Annex II."

3.2.3 Airport Transit Arrangements (ATV)

Due to their different status, airport transits have been a weak part of the migration control. As passing through the international zone of airport transit is not considered as a technical entrance to a state, normal or transit visas are not required by states in general practice. Yet 1944 Chicago Convention on International Civil Aviation suggests states to avoid unnecessary constraints on the facilitation of international airport transport. (Art. 22) Nonetheless, requirement of airport transit

visas is a valid legal practice. Particularly, again Annex 9 to the Chicago Convention allows states to do so.

Many flights to the destinations outside Europe have transit at the airports of European countries. Since the airport transit zones has been considered as an effective leeway for illegal migrants and asylum seekers to get access to the territory of the European countries, the Council of Ministers decided to introduce airport transit visa for certain nationalities and to this effect adopted the *Joint Action of 4 March 1996 on Airport Transit Arrangements.*[58]

In conjunction with this, the Joint Action establishes an airport transit visa (ATV), which is defined as "the authorization to which nationals of certain third countries are subject for transit through the international areas of the airports of Member States."(Art.1) It sets up a negative list of third countries whose nationals, unless they already posses an entry or transit visa (Art.3), shall be required to have an ATV when passing through the international areas of airports situated within the territory of Member States. The list is attached as Annex I and comprised of ten countries: Afghanistan, Ethiopia, Eritrea, Ghana, Iraq, Iran, Nigeria, Somalia, Sri Lanka, Democratic Republic of the Congo (ex-Zaire).[59] In addition to this negative list, Article 5 of the Joint Action leaves states free to impose ATV to other third countries existing in the negative list of the normal visa requirement. Likewise, as to give more free hand to Member State, Article 9 lays down that "this Joint Action shall not prevent closer airport-transit harmonization between some Member States, extending in scope beyond the joint list annexed thereto."

Alike in the Regulation 1999 and 2001, the Joint action also offers exemptions from the ATV for the same groups mentioned the normal visa regulations (Article 4). However, airport transit arrangements for the stateless persons and refugees are left to the Member States' discretion (Article 6). However considering these mentioned groups and out of list implementations of Member States, Article 7 stipulates that

[58] Joint action 96/197/JAI, of 4 March 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union on airport transit arrangements

[59] In the updated version of this document, Draft Joint Action of the Council on airport transit arrangements, 16 July 1998, Bangladesh was also added into this list.

"Member States shall notify the other Member States and the Secretariat General of the Council of the [extra] measures taken."

ATVs shall be issued by the consular services of the Member States and they must ascertain that there is no security risk or risk of illegal immigration (Article 2). The conditions and procedures of issuing ATVs shall be determined by each state and shall be subject to the Council adoption of criteria. It is suggested that consular services must be sure that the applicant for an airport transit visa is justified on the basis of the documents submitted by the applicant, and that these documents as much as possible guarantee entry into the country of final destination, especially through the presentation of a visa of that destination country where so required (Art.2 (2)).

To amend this Joint Action another draft Joint action was adopted in 1998 by the Council. However after the Amsterdam Treaty, the latter is not processed further and instead this non-binding instrument is supplemented and rendered binding by the integration of the Schengen *acquis*.

After laying down the legislative development on the visa policy harmonization at the EU level, in the following part we shall proceed on the actual and potential effects and implications of these measures on the refugees and refugee protection.

3.2.4 Effects of the Visa Policy

As it is mentioned before, states have the very sovereign right to control immigration into their territories. As a corollary of this right they are allowed to use visa requirement as a tool for control. Enjoying the most of this right, in order to halt the migratory pressures from these countries EU has introduced visa requirement and prepared an exhaustive list of third countries whose nationals are required to have visas for entry. However, considering their international commitments to refugee protection, as it can be observed in the above-given details of the related provisions,

EU Member States have used this right in an unfettered manner without paying any special consideration to the protection needs of bono fide asylum seekers.

Though visa requirement is not specifically aimed to prevent refugee groups from arriving EU territory, it is in no way intended to exempt them from such impositions. As it can be observed in the measures on visa issues, in no document visa exemptions explicitly covered refugee groups. At best choice, the recognized refugees' exemption from the visa requirement has been left to the discretion of the Member States. Paradoxically, though the paragraph 7 and Article 3 of the 2001 Regulation on listing the countries for visa requirement give express reference to the obligations arising from the international agreements signed by the Member States and in particular from the 1959 European Agreement on the Abolition of Visas for Refugees, the same paragraph of the Regulation stipulates visa requirement for the refugees who are nationals of the third countries included in the negative list. Likewise, it is noteworthy that Article 5 of the SIC, on the conditions to be fulfilled for visa, provides that for a visa applicant who lacks necessary conditions a Member State may derogate from the visa rules "on humanitarian grounds or in the national interest or because of international obligations." (Art. 5(2)) Again the same article reads as "[t]hese rules shall not preclude the application of special provisions concerning the right of asylum". But despite these expressions, in the general wording recognized refugees or asylum seekers are not recognized or mentioned as special persons necessitating different procedures. Neither are they provided with any reductions from the stipulations regarding the visa requirement.

Noll have attributes this paradox to the Member States' confidence that they are not acting against their international obligations. He says that:

> For protection seekers, the message boils down to the following. Provided that 'international obligations' flowing from refugee law or human rights law enshrine a right to entry or, at least, a right to non-rejection for protection-related grounds, this right shall override the rules of the Schengen Convention. If such obligations can be shown

> to exist in international law, the Contracting Party concerned must allow entry in such cases.[60]

In this respect, it is relevant to recall the discussion made in the "International Law Perspective" section which gave an in depth examination on the rights and obligations in this concern. As concluded in those elaborations, to acknowledge such a right or a protection need for asylum seekers and refugees is a matter of bono fide and inclusive interpretation of the international law instruments. So to say, as far as Member States keep in mind the ultimate protection aim, they should deduce responsibility for themselves for the outcomes of the asylum seekers who they denied access to their territory.

This indiscriminate imposition of the visa requirement, albeit expressly not targeted refugees, renders the Member States' customary right to control immigration problematic with regard to their obligations for refugee protection. By not providing exculpatory provisions to protection seekers, they especially prevent this very vulnerable group who mostly cannot meet the normal visa stipulations.

Together with insignificant exceptions, visa measures unrelentingly put that all those lacking visa are legally prohibited from entering the EU territory. As it is mentioned before, the visa applicants are required to possess some documents for visa issuance. However, considering their quite likely desperate situations in their home country, refugees are rarely in a position to procure these necessary documents. Because irrefutably refugees are in many cases unable to apply for a visa without putting themselves at serious risk. Therefore it would be malicious to expect a person, who is being persecuted or targeted by a state, to obtain a valid passport from that state and then attempt to obtain a visa from a foreign consulate, thereby drawing attention to his or her intention to escape. On the other hand, it should also be taken into account that sometimes the need for flight might be so urgent and spontaneous that to prepare the necessary documents is hardly possible for the protection seekers.

[60] Noll, op.cit in note 44, p.174

Besides, it is also problematic that on what grounds these persons shall apply for visa. Because protection related reasons are not mentioned in the CCI, thus, not considered as a valid ground to receive visa in general practice. Though some Member States' consular posts are procedurally instructed for asylum applications[61], in most cases asylum seekers would not be issued a visa if they explained their aim as to apply for asylum.[62] Beyond, even the suspicion of being a potential asylum seeker might be enough for the officer to decline their application.[63] This relentless approach consequently drives the asylum seekers to deceive embassy personnel on their intentions or rely on forged documents to get access to the territories of EU Member States. After all, given these barriers, illegal ways of entry becomes the only avenue left to get access to the EU territories.

In this respect, to emphasize the significance of the matter, Boccardi has cited an interesting acknowledgement by the High Court in London on the necessity for asylum seekers to deceive the authorities. The Court in a case[64] had stated that 'somebody who wishes to obtain asylum in this country […] has the option of: 1) lying to the UK authorities in order to obtain a tourist or some sort of visa; 2) obtaining a credible forgery of visa; 3) obtaining an airline ticket to a third country with a stop over in the UK."[65] As it can be deduced from this telling example, such indiscriminate application of the access prevention measures inevitably incites asylum seekers to use illegal means of entry.

On the other hand, it is also problematic that once an asylum seeker refused visa from a Member State, s/he cannot apply for visa to another Member State. Due to the SIS system and close cooperation between diplomatic and consular offices of the Member States, which mechanisms mainly aim to prevent the visa shopping, asylum

[61] France, the Netherlands, the UK, Spain, Austria somehow may accept such kind of claims as a valid ground for issuing visa. But Belgium, Finland, Germany, Italy, Sweden, Greece, Luxembourg do not accept asylum claims to be filled at consular posts. Noll, op.cit in note 44, p.181
[62] Boccardi, op.cit in note 43, p.52
[63] Morrison, John and Crosland, Beth, "The Trafficking and Smuggling of Refugees: the end game in European asylum policy?", New Issues in Refugee Research, Working Paper No.39, April 2001, p.27
[64] R. v Secretary of State ex parte K. Yassine et alia (1990) IA Rev., p.354 at 359-360
[65] Boccardi, op.cit in note 43, p.52

seekers are deprived of the possibility to try their chance once more. This also points to another problem, which is in general an unjust implementation for all the migratory groups. According to Article 5(1)(e) of the SIC, the persons, who are perceived as a threat to public policy and national security of any of the single Member State, must be refused entry. Though the excuses seem conceivable, it, on the other hand, aggravates the already restrictive implementations to an insuperable level. Because, concerns of public policy and national security vary among the Member States. This comes to mean, a third country national is supposed to meet all Member States' considerations in these terms. If s/he is considered as a threat to public order or national security of a single Member State, s/he won't be issued a Schengen visa, thus wont be allowed to enter to all other Member States. Since Member States would insist on their specific and varying national concerns, the common standards to be applied for all Member States as regards the granting of visa could be set at the strictest level.[66] Consequently, it would be further difficult to get a visa not only for refugees but also for other immigrants, who otherwise would have qualified for visa issuance.

Gravity of the problem compounds as taking into consideration the exhaustive negative list of the third countries. While in the first Regulation (1999), listing the third countries whose nationals shall be required to have visa when crossing the borders, contained 105 countries, this number was increased in the last Regulation (2001) to 135.[67] Together with the positive list the listings of the last Regulation were extended to cover almost all the states in the world (recognized and non-recognized states).

In this concern, it is important to ask according to which criteria a country is determined to be put in the negative list or positive list. In the preamble to the Regulation 2001, paragraph 5 lays down the reasoning as:

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[66] Hailbronner, Kay, Immigration and Asylum Law and Policy of the European Union, The Hague: Kluwer Law International, 2000,p.151

[67] It is also mentioned that German delegation have presented an additional draft regulation proposal which only suggested a positive list, relying on the presumption that all countries were subject to visa requirements unless they were on the positive list. Ibid, p.96

> The determination of those third countries whose nationals are subject to the visa requirement, and those exempt from it, is governed by a case-by-case assessment of a variety of criteria relating *inter alia* to illegal immigration, public policy and security, and to the European Union's external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity.

As specifically emphasized, illegal immigration and public policy and security concerns have been given priority in drawing up the lists. Given these criteria, due to the risk relating to illegal migration connected with refugees, it is especially not coincidence that all the highest refugee producing countries have been put in the negative list (Somalia, Algeria, Rwanda, Afghanistan, Iraq etc.). So the number of protection seekers has been a determinative criterion impacts on the assessment of illegal immigration issue for the purposes of drawing up the common list.[68]

With regard to the close connection between the refugee and illegal migration, ATV arrangements point more to this perception. Since the transit passage is commonly used for the purposes of filing a protection claim, Member States have plainly targeted the top refugee producing countries in drawing up the ATV negative list. For that reason, only the countries like Afghanistan, Iraq Somalia suffering civil unrest and human rights violations, thus producing substantial numbers of asylum seekers, have been included in the negative list. This comes to mean that the consular officers in these countries would be more doubtful about the intentions of transit visa applicants, thus would deny most of the applications even because of a subjective tiny suspicion of illegal migration risk.

Therefore, with these exhaustive negative lists and considering the abovementioned difficulty for refugees to receive visa, EU Member States are resolutely trying to prevent the great majority of world refugees from ever arriving at their territories. Especially, as ECRE pointed out, by including the countries such as Afghanistan, Somalia, Iraq etc., in the negative visa lists, EU insistently ignores the

[68] Noll, op.cit in note 44, p:166

UNHCR's repeated plea for visas not to be imposed on countries in which there are civil wars, generalized violence or wide spread human rights abuse.[69] With this unrelenting hostility towards the arrival of protection seekers, EU measures contribute substantially to the tacit aim of Member States to keep refugees as away as possible.

3.3 Carrier Sanctions

Carrier sanctions are introduced as a complementary measure for the pre-entry control mechanisms in general. In order to effectively enforce pre-entry requirements, states impose sanctions on the carriers, usually an airline or shipping company, for bringing persons, who lack visa or other necessary documents, or with forged documents. By this means, carriers are hold responsible for the prevention of the arrival of undocumented persons. Despite the visa stipulation or other entry requirements, as a corollary of the *non-refoulment* principle, an undocumented asylum seeker once had a territorial connection with a potential host state, has a right to avail himself of the protection of that state. Therefore, not to arise *non-refoulment* obligation for themselves, states have used the carrier sanctions as a complementary tool in preventing the territorial contact of asylum seekers to their territory. In combination with the visa requirement, the sanctions on carriers have effectively shifted the borders away from the EU territories to the carrier embarkation points in the third countries, thereby created a practically impenetrable barrier for the asylum seekers to reach the EU territories.

Connected with the visa requirements, carrier sanctions implementation has been a long practice among the EU Member States to stem the illegal migration. After the increase in the refugee flows to Europe, it has turned increasingly into an effective tool of refugee deterrence systems. As for the implementations at EU level, the measures related to the carrier sanctions are regulated by the Schengen Convention under Chapter VI "*measures relating to organized travel*", specifically under Article

[69] ECRE, *The Promise of Protection: Progress towards a European Asylum Policy since Tampere*, November 2001, p:15

26; and reinforced with the *Council Directive of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.*

To define the carriers' liability in this concern, Article 26 (1)(a) of the SIC reads as:

> If an alien is refused entry into the territory of one of the Contracting Parties the carrier which brought him to the external border by air, sea or land shall be obliged to assume responsibility for him again without delay. At the request of the border surveillance authorities the carrier must return the alien to the Third State from which he was transported , to the Third State which issued the travel document on which he travelled or to any other Third State to which he is guaranteed entry.

To assure the obedience to this liability, the same Article puts a penalizing rule as:

> The Contracting Parties undertake, subject to the obligations arising out of their accession to the Geneva Convention of 28 July 1951 relating to the Status of Refugees, as amended by the New York Protocol of 31 January 1967, and in accordance with their constitutional law, to impose penalties on carriers who transport aliens who do not possess the necessary travel documents by air or sea from a Third State to their territories.(Art 26 (2))

After the Schengen introduction, the intensification of the endeavours to curb migration flows and to combat with illegal migration during 1990s added more weight to carrier sanctions. For the efficient working of the endeavours, it is recognized that all Member States shall introduce carrier sanctions and a harmonized application at the EU level was deemed to be beneficial in this aspect.

Accordingly, the related EC Directive adopted in 2001 requires Member States to harmonize their national law on carrier sanctions and defines certain conditions with respect to their implementation. It extends the scope of carriers' liability to include third country nationals in transit.(Art.2) Of a particular importance, in addition to the liability for reparative costs of the Schengen, it incorporates the European

governments' wide spread implementation of imposing pecuniary punishment and sets the min and max amounts for the penalties to be imposed on carriers.(Art.4) Regarding the refugee protection, the same Article (4)(2) reads as that the application of penalties shall be "without prejudice to the Member States' obligations in cases where a third country national seeks international protection". Nevertheless, while setting the minimum rules, it secured the freedom of Member States to retain or introduce additional measures or penalties for carriers (Art.5).

The carrier sanctions implementation has generated considerable negative effects for the protection seekers since its introduction in the mid-1980s in Europe. Notwithstanding it reserves the freedom to introduce additional sanctions on carriers, this new EU Directive promoted the harmonization and obliged the introduction of carrier sanctions in all Member States. Obviously, carrier sanctions implementation proves to have shifted the liability for immigration control onto the shoulders of carrier companies. Considering the carriers intense and rightful concern to avoid penalties, this de-facto responsibility delegation stimulated a further tightening in the immigration controls. Added with the lack of proper exculpatory measures for protection seekers, carrier sanctions would have dramatic consequences for protection seekers.

3.3.1 Effects of the Carrier Sanctions

Even though they are introduced primarily to fight with illegal migration, taking into account the fact that asylum seekers mostly are not able to obtain the required entry documents, carrier sanctions have dramatic effects on protection seekers. Alike in the visa provisions, the main problem with the carrier sanctions measures is that, beyond the rarely pronounced imaginary "obligations" resulted from Geneva Convention, the legislative instruments again do not introduce proper guarantees for protection seekers. Conditions for the exculpatory measures for refugees are left largely to the jurisprudence of Member States' national legislations.

However, Member States' legislations on the exculpatory measures for asylum seekers and refugees, or exemption to carrier liability, diverge considerably and mostly applied retrospectively after if the refugee status is recognized.[70] Though in most of the legislations, carriers' liability arises on account of the carriers' negligence in transporting the refugees, since the burden of proving the absence of negligence is so difficult for carriers, it is hardly possible for them to escape from sanctions. Further, considering the low refugee status recognition rates, carriers have not been much inclined to take risk to carry people with asylum claims. Therefore, the absence of proper exemptions to carrier's liability in the cases including protection seekers drives the carriers to restrict pre-entry controls unscrupulously. This tightening acted to filter effectively most of the undocumented asylum seekers and thus prevented them to leave the countries of origin or other third countries in which their life is at risk.

As an inherent problem, carrier sanctions application in effect comes to mean the delegation of the responsibility for the control of immigration to the employees of carrier companies. In other words, they are put in a position to act as unofficial immigration officers and authorized to decide who can enter the EU territories and who cannot. Likewise, this also comes to mean that the alleged observance of the obligations resulting from the Geneva Convention, referred in the abovementioned legislations, would also be put onto the shoulders of the carrier employees who have neither the motive nor the expertise in this area. While there is no explicit mention on the issue in the EU legislation, according to the general practice, carriers are sanctioned for carrying the asylum seekers who have no valid visa or other travel

[70] While in some Member States, such as Belgium, Germany, the related law does not provide any exception to carrier sanctions for bringing asylum seekers and refugees, in some Member States, such as France, Luxemburg, Finland, Spain, Italy, UK, the related law establishes such an exception for carrier's liability when asylum seekers are involved. However in the latter case, these exemptions are generally bounded to the condition that if the asylum request is declared admissible (France, Spain) or until the asylum seeker is given a positive status (Finland, UK). UNHCR, "*Carrier Sanctions and Training of Carriers"*, Safeguards for Asylum Seekers and Refugees in the Context of the Prevention of Irregular Migration in to and within Europe (A Survey of the Law and Practice of 31 European States), June 2001 ; ECRE Research Paper, Country up-date on the application of carriers' liability in European States, 1999, p31

documents, unless they are later recognized as refugees. Therefore, in effect, carrier employees are put in the undesirable position to judge who is a refugee and who is not, something for which they are not trained and for which they shouldn't be held responsible.

Carrier sanctions threaten companies with severe financial penalties for violating the legislation, even at the risk of denying refugees their right to seek asylum. The national legislations have already been imposing a considerably high amount of pecuniary penalties for the violation of the related provision. However to raise the dissuasiveness, the new Directive increased the amount of financial penalties significantly.[71] To avoid paying these fines, carriers took number of measures to strict the control of their passengers, whether they posses the required documents or not. These measures included the introduction of staff training courses and the use of more sophisticated equipment to detect forgeries. They are mostly conducted with the initiative and keen technical support of governments.[72] However, these trainings have rather focused on technical aspects of detecting the illegal entries. Elements of refugee protection are not even referred in most of them.[73] Thus, despite trainings, carriers still cannot be considered qualified for assessing the admissibility of asylum claims. As they couldn't validly substitute asylum officers, the obligation to assess refugee status must not be passed onto carriers' personnel.

With the fear of disproportionate fines, carriers strict their measures even sometimes beyond the requirements of the law and with no regard to the risk of leaving people in severe threats of persecution. Carriers' strong motivation to evade fines, in some cases, has even resulted in outright racial discrimination against

[71] While previously the amount of penalties were ranging between EUR1000-4000 for each inadmissible passenger, the EU Directive set the amount at min 3000, at max 5000 for each inadmissible passenger (Art.4)

[72] For instance, as of January 1998, 46 carriers at 163 operating locations world-wide had registered with the UK Government' Approved Gate Check (AGC) system which waives fines provided that a series of rigorous pre-boarding cheeks are routinely followed by airline staff. Morrison, Crosland, op.cit in note 63, p.31

[73] UNHCR, *"Carrier Sanctions and Training or of Carrier"*, Safeguards for Asylum Seekers and Refugees in the Context of the Prevention of Irregular Migration in to and within Europe (A Survey of the Law and Practice of 31 European States), June 2001

passengers or preventing the boarding of correctly documented passengers coming from specific countries.[74] Besides, these measures sometimes also included illegal applications such as unauthorized deportations. Regrettably, it has been a wide spread practice by carriers to kidnap the passengers found without the necessary travel documents at the moment of disembarkation to prevent their contact with the immigration officers. Actually more regrettable than that, the evidence suggests that immigration officials generally tend to turn a blind eye to this carriers' 'kidnappings'.[75] Not to mention, these unfortunate implementations have fatal consequences for protection seekers and the ignoring them cannot be justifiable in any way.

Above all, carriers cannot necessarily be expected to have wholesome humanitarian motivations towards protection seekers, yet are not obliged to do so. This is rather a state responsibility. The responsibility for their breach of the principles under international refugee protection law should be placed onto the very states that have committed to them. Aside from the refugee protection concern, carriers' liability to control the admissibility of all incoming aliens into the EU territory is an unbearable burden for carriers. Added with the lack of certain exculpatory measures, they have no way but to react with relentless measures to all persons, no matter they are protection seekers or not, who they doubt, even slightly, as not admissible. Understandably, rather than humanitarian or refugee protection motivations, they are motivated only by their employers interests in avoiding sanctions and thus would not be willing to take any risk in doubtful situations. Given that motivation, lots of asylum seekers lacking visa or other documents are prevented from a chance to seek refuge in EU territories. Ultimately they are not to be blamed for causing *refoulment* but it is states that turn a blind eye on the improper implementations by carrier companies who are plausibly just interested in evading heavy fines. Therefore, the responsibility is

[74] Morrison and Crosland, op.cit in note 63, p31
[75] Boccardi, op.cit in note 43, p.53-54

incumbent upon states in the subsequent misconduct and abuses displayed by carriers in response to strict carrier sanctions provisions.[76]

To take the issue from international law perspective, the carrier sanctions implementation has been in contradiction with the core of refugee protection regime that is *non-refoulment* principle guarded under the Article 33 of the Geneva Convention. Moreover, placing heavy control liabilities on carriers, as the case in EU Member States, also constitutes a breach to Annex 9 of Chicago Convention on International Civil Aviation (ICAO) 1944, which clearly stated airlines' obligations in terms of document controls and limited penal responsibility.[77] Besides international law instruments, many refugee advocates criticized the sanctions by claiming it as unfeasible and having tragic consequences on refugee protection in effect. As among the most important ones, UNHCR have expressed its concerns on the whole of the carrier liabilities measures introduced at the EU level as:

> In symbiotic relation to visa requirements are the documentation review obligations States in effect impose upon carriers. Forcing carriers to verify visas and other travel documentation helps to shift the burden of determining the need for protection to those whose motivation is to avoid monetary penalties on their corporate employer, rather than to provide protection to individuals. In so doing, it contribute to placing this very important responsibility in the hands of those (a) unauthorized to make asylum determinations on be half of States (b) thoroughly untrained in the nuances and procedures of refugee and asylum principles, and (c) motivated by economic rather than humanitarian considerations. Inquiry into whether the absence of valid documentation may evidence the need for immediate protection of the traveler is never reached. [78]

Eventually, this carrier sanctions implementation, which paved way for unscrupulous tightening of access controls by carriers, has almost certainly rendered the barriers to EU territories impenetrable. The sanctions hardly recognize exemptions

[76] ibid, p.53
[77] ibid, p.54
[78] UNHCR, Position on Conventions Recently Concluded in Europe (Dublin and Schengen Conventions), Geneva, 16 August 1991

in the cases of protection seekers. Together with the absence of exculpatory measures, these strict and relentless controls make it harder for people to leave countries in which they are persecuted. In so doing, states not only deliberately deny the people's right to seek asylum but also drive desperate asylum seekers into the hands of ruthless human traffickers and smugglers.

3.4 Other Pre-Entry Access Prevention Measures

3.4.1 Pre-frontier Assistance

Pre-frontier assistance is another important pre-entry control mechanism introduced at the EU level. Likewise in carriers' liability, this instrument also aims to render the control of travel documents and visas prior to embarkation on flights destined for Member States more effective. Again, likewise in the carriers' liability instrument, this application contributes to prevention of the asylum seekers from ever arriving at the EU territory.

Such kind of implementations has already been in use by Member States and third countries in the past. But, EU provided a common framework for the measures in this field with a non-binding legislation: *Joint Position of 25 October 1996 defined by the Council on the basis of Article K.3 (2) (a) of the Treaty on European Union, on pre-frontier assistance and training assignments.*

According to the Joint Position, Member States shall assign immigration officers to third countries in order to assist local officers in checking the fulfillment of the entry requirements of the EU Member States either on behalf of the local authorities or on behalf of the airlines. (Article1(2)) To this aim, a list of airports at which joint assignments could be carried out on a temporary or permanent basis would be drawn up. Additionally, the pre-frontier assistance contains the training

assignments for the local officers in the third countries in order to describe Member States' documents and visa requirements and the methods by which the validity of documents and visas may be checked. (Article 2(3)) The training and assistance assignments shall be carried out by specialist officers appointed by Member States and costs of them shall be borne by the Member States agreeing to participate in the implementation of these activities. (Article 3(3))

Similarly, Schengen Group under the decision to fight with illegal migration has taken parallel measures to deploy liaison officers from Schengen States to the countries of origin and the transit countries. To this effect it has adopted the *Decision of the Executive Committee of 16 December 1998 on coordinated deployment of document advisers*. Likewise in the previous EU instrument, with this document Schengen States planned to second executive staff as document advisers to assist either carrier companies or local authorities of the third countries.(para 1(a)) Assistance was decided to be delivered in the form of training on forged documents as well as controls in pre-boarding checks at airport or ports of exit. Additionally, it listed 46 locations in 35 countries to deploy document advisers and assigns them to single Schengen counties. Not surprisingly, the list contains the "worldwide elite of refugee-producing countries"[79]: Democratic Republic of Congo, Pakistan, Sri Lanka, Tunusia, Turkey, Vietnam.

Owing to the same reasons mentioned in visa requirement and carrier sanctions, the pre-frontier assistance again ultimately designed to serve to the efforts of EU Member States to prevent asylum seekers from arriving at the EU territories. The assistance and training assignments do not make any reference to possible refugee protection issues or other human rights concerns but just blanket immigration control issues. Thus, without being trained in how to react to such cases, the officers would be more likely to regard protection seekers as undocumented migrants to be filtered out. Hence refugees with this arrangement, again would be prevented from leaving the countries in which they are unsafe. Consequently, these kind of accession prevention

[79] Noll, op.cit in note 44, p.180

mechanisms not only act as a deterrent and barrier to asylum seekers but also lead to an increasing recourse to illegal entry. Desperate asylum seekers deprived of legal means of seeking refuge are once more drived into the ruthless hands of human traffickers or smugglers.

3.4.2 Fight with Human Trafficking and Smuggling

Apart from carrier sanctions, EU has introduced sanctions in various instruments on the fight with human smugglers and traffickers as well. As of a crucial importance, Article 27 (1) of the Schengen Convention obliges contracting states "to impose appropriate penalties on any person who, for purposes of gain, assist or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties contrary to the laws of that Contracting Party on the entry and residence of aliens." To this effect various measures adopted by EU.

Since trafficking and smuggling victimize the persons (generally by being forced into prostitution or intimidated or subject to violence etc.), measures adopted by EU against trafficking and smuggling are welcomed by many human rights groups. However, the measures also attracted critiques by many refugee advocates for not giving any exculpatory reference to the cases of assisting protection seekers. According to general observance of those measures, in most of them, humanitarian concerns in assisting the asylum seekers are negated and the facilitator persons or NGOs with having no gain purposes but humanitarian reasons, are regarded automatically as serious criminals for assisting persons to come to the EU territory. Based on these measures, any organization which help asylum seekers or other undocumented migrants could be shut down, with their funds and property confiscated, and their staff jailed, expelled and banned form working in that field. [80] Thus these measures amplified the risk of helping people to escape persecution. In this

[80] State watch News "EU: An Area of Expulsion, Carrier Sanctions and Criminalization :French Presidency crack down on aiding asylum-seekers", http://www.no-racism.net/migration/eu_area_explusion_01.htm

regard, UNHCR ECRE and other NGOs had argued for a clause in the proposals on combating human smuggling that would exempt from persecution NGOs, relatives and other who offers advise and assistance for humanitarian reasons, rather than profit. Accordingly, on a Proposal for a EU *Council Framework Decision on Combating Trafficking in Human Beings*.[81], UNHCR expressed its observations as:

> [i]n particular those dealing with protection of victims and witnesses, fall considerably short of established international standards. The lack of referance to even basic protective measures for victims and witneses of trafficking, as well as the omission of a saving clause concerning asylum seekers and refugees, may create an impression that such protections are both unimportant and optional in the fight against trafficking[82]

As a matter of fact, these anti-trafficking and anti-smuggling initiatives have further implications as considering that they are almost left as the only viable means to enter the EU territory for many asylum seekers. But, efforts to combat migration again deliberately do not provide adequate safeguards for the asylum seekers as the victims of these crime acts.

In combination, these extra-territorial initiatives operating in countries of origin proved to have negated the right of refugees to leave their own country and to seek asylum from persecution. Actually more than the wording of the measures themselves, the paranoia generated by them on the control officers amplified the negative effect of these measures.

[81] ECRE, "*Promise of Protection: Progress towards a European Alum Policy since Tampere*", November 2001, p.16

[82] UNHCR observations on June 2001 on the Proposal for a EU Council Framework Decision on Combating Trafficking in Human Beings.

3.5 Conclusion

Visa requirements in combination with carrier sanctions and other complementary measures have been claimed to act to curb the migratory flow to Europe in general. However as a result of the efficient and indiscriminate filtering effect of these pre-arrival control measures, refugees are deprived of almost all legal and safe means to enter the EU territory. Thereby, they are incited to resort to illegal means to enter the EU territories more than ever. In this respect, while the strict pre-entry measures are claimed as not aiming refugees, they do not provide proper safeguards for protection seekers. To seek protection is not considered as a valid ground to get a legal access. Although most of the measures are preceded with the clauses as like "without prejudice to state obligations in terms of refugee protection", there is no explicit reference to the legality or validity of the claim to seek refuge for obtaining visa.

Given these considerations, implications of these measures prove that the price of curbing migration and fight with illegal migration has been mostly charged on protection seekers. The unfortunate equation of "most asylum seekers are in fact economic migrants" thwarts Member States to pay due concern to the refugee protection matter thereby they did not introduce meaningful exculpatory provisions for protection seekers regarding the strict pre-entry control mechanisms. For sure, States have a legitimate interest in controlling immigration or requiring visa or imposing carrier sanctions, but they should do it in consistent with human rights and refuge protection principles.

Consequently, the extraterritorial measures are especially important in terms of the motivations to prevent the territorial contact of the protection seekers and thereby to render the *non-refoulment* principle inapplicable. While international law does not create explicit obligations on states, European states proved also unwilling to assume a responsibility on their own concerning the *non-refoulment* principle beyond their territorial borders. However for a genuine and working refugee protection system an inclusive approach to the right of asylum needs to be at the centre of all the

governmental commitments to human rights. Yet, European States shouldn't rely on the illusion to assume that by preventing the territorial contact of persons in need of protection to their territories they wouldn't be in contradiction with the principle of *non-refoulment*. This principle has a blatant humanitarian sole, which is not likely to discriminate between territorial and extra-territorial protection.

To conclude, European States with these effective filtering measures, whether intentionally or unintentionally, created an impenetrable barrier for protection seekers. Most of the Member States individually tended to ignore their international humanitarian obligations in terms of refugee protection and have already been implementing such kind of access preventing measures since years. However, EU level handling of the issue, by only communitarizing the strict measures and leaving the exculpatory measures to the discretion of individual Member States, approved and further communitarized this reckless approach by Member States towards persons in need of protection. For sure, EU cannot host all the persons seeking protection in its territory. But by setting the threshold for entrance that high, EU Member States try to circumvent their responsibilities in terms of refugee protection. With these measures, they are trying to contain refugees in their country of origin or in neighbouring countries, which are most likely not in situation to offer much protection to them. So while affluent EU Member States, as the most proud ones of their human rights commitments, are trying to evade their humanitarian obligations, how they can expect that states to assume this protection duty that easily?

CHAPTER IV

POST-ENTRY ACCESS PREVENTION MEASURES: SAFE THIRD COUNTRY IMPLEMENTATIONS

Safe third country[83] concept is a crucial instrument for the post-entry removals designed to cut the asylum seekers territorial contact to minimum and summarily allocate them to other countries. It is simply described as the denial of access to a comprehensive asylum procedure on the ground that a person, could and thus, should have sought protection elsewhere. As a result of the huge refugee inflow to Europe, safe third country notion provided with an attractive solution to EU Member States to shirk their refugee protection responsibilities. Although, since 1980s similar safe country concepts have been in use by several European States (ex. Denmark and Switzerland)[84], with the recent EU measures the use of this notion has been harmonized and systemized in an expeditious manner for the reallocation of the burden of refugee protection in Europe and more importantly towards its periphery.

To render it more plausible, introduction of safe third country practices has been justified by several reasons: to avoid the asylum shopping phenomenon; removing the refugees in orbit problem; a mechanism for fair burden sharing; to stop the entry of bogus refugees. Above all, although the ultimate aim of the safe third

[83] The notion is also variably called as 'country of first asylum' or 'host third country'.
[84] See Hailbronner Kay, "*The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western European Perspective*", International Journal of Refugee Law, Vol.5, No:1, 1993, p.31-65

country notion was alleged to be a fair burden sharing, in practical terms, the main objective is "to discourage countries from allowing easy entry without bearing the costs and responsibilities for processing claims."[85]

As a result of this implicit approach, EU safe third country regulations are based on the premise that asylum seekers could and, thus, must have sought refuge in the first 'safe' country they arrived or travelled through, or in the country, which have more facilitated or been responsible for the arrival of the asylum seeker into the Union. This is applied to all asylum seekers even if they merely transited through another country on their way to the destination country. In practice this means, rather than the reasons behind the flight, the route an asylum seeker takes till the destination determines whether or not protection will be granted. Without sufficient procedural safeguards, the application of this rule generates the risk of direct *refoulment* or chain deportations in which each state without looking into the merits of his claim, passes the asylum seeker back to the countries which s/he travelled through up to the destination country, or to a country which obviously cannot afford the protection of the asylum seeker, or, worse, back to the origin country. With this chain effect, the safe third country notion would encourage the policy makers across the Europe and elsewhere to wash their hands of the refugee protection responsibility.

In the European Union, exclusion on safe third country grounds is governed by multilateral and bilateral arrangements. First of these was the 1990 Dublin Convention, which later replaced by a Council Regulation[86] adopted in February 2003. It laid down the intra-Union responsibility determination procedures for the asylum applications. Secondly, in order to expand the EU safe third country implementations, *1992 EU Council Resolution on a Harmonized Approach to Questions Concerning Host Third Countries*, and the subsequent bilateral readmission agreements are concluded to arrange the responsibility allocation between EU Member States and non-EU countries. Before proceeding with these instruments of

[85] Abell, Nazaré Albuquerque, "*Safe Country Provisions in Canada and in the European Union: A Critical Assessment*", International Migration Review, Vol.31, No:3, (Fall 1997) p.570

[86] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining an asylum application lodged in on of the Member States by a third-country national

safe third country norm and their implications on the refugee protection, it will be appropriate first to examine the safe third country notion from the international law perspective.

4.1 International Law Perspective

International legal texts on refugee protection have not given an explicit and clear deal to safe third country concept. It is neither totally rejected nor approved by them. Though some legal texts acknowledge such kind of possibility, they are generally referring it as an exceptional application under certain circumstances and solely with certain safeguards. However if it is to consider the issue in the light of implicit references, and especially regarding EU type safe third country implementations, there are many provisions and implications considerably challenging the safe third country notion in international legal texts on refugee protection. In this respect, the main challenges to it come from international customary principle of *non-refoulmet* (obligation not to return refugees to the countries where their life is at serious risk) and the implicitly respected *choice of asylum seeker* notion.

Non-refoulment Principle

According to international law, states retain the very sovereign right to decide which aliens may stay and which have to leave the country. Although *non-refoulment* principle[87] limits this freedom of states, no international legal document in its wording obliges states to grant refugee status. Yet, the provisions of the Geneva Convention

[87] Guaranteed by the Art.33 of the 1951 Geneva Convention; Art.3 of the ECHR; Art.7 of the 1966 International Covenant on Civil and Political Rights, Art.3 of the 1984 United Nations Declaration against Torture and other Cruel Inhuman or Degrading Treatment or Punishment, Art.3&Art.13 of the 1950 European Convention on Human Rights and Fundamental Freedoms For a detailed examination of the issue see "*Explicit Prohibitions of Refoulment*" part in Gregor Noll, Negotiating Asylum: The EU *Acquis*, Extraterritorial Protection and the Common Market of Deflection, the Hague: Martinus Nijhoff Publishers,2000, p.423-445

likewise pre-suppose the granting of refugee status as the prerogative of the sovereign contracting states.[88] Therefore, to grant asylum is ultimately depends on the receiving state's commitment to the refugee protection.

Against this, it is clearly put under the *non-refoulment* principle, enshrined under the Article 33 of the Geneva Convention, that states shall not return a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened". As obvious from the wording, *non-refoulment* must be observed not only in the cases returning to the country of origin but to any country where the refugee's life would be under threat. For that reason, while applying safe third country provisions, states are also supposed to observe whether a serious risk of persecution, inhuman or degrading treatment or punishment exists within the third country or whether there is a possibility to be extradited to the country of origin in the third country. Given this obligation, the principle of *non-refoulment* is the main limitation posed upon states' prerogative to decide on the entry and stay of persons in need of protection.[89] The states are obliged not to return persons to third countries where they would face serious risk of persecution, or *refoulment* to the country of origin.

To assess the viability of issue in international law, wording of the Article 31(1) of the Geneva Convention has generally been interpreted so as to affirm the logic of safe third country implementations.

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees, who coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

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[88] During the *travaux preparatories* of Geneva Convention national governments refused to impose a legal obligation on contracting parties to provide asylum in the form of a subjective right of the refugee to receive asylum. Likewise it is the same in the final version of the 1948 Universal Declaration of Human Rights Art.14 and 1967 United Nations Declaration on Territorial Asylum which confirmed the grant of asylum as the prerogative of the state. Lavanex, Sandra, Safe Third Countries, Budapest: Central European University Press, 1999, p.11-12

[89] ibid.p:12

By emphasising the "who coming directly from" phrase, this article is generally used to justify the pro-safe third country argument that refugees are supposed to apply for asylum in the first country they reach. Whereas, the main objective of the article is only to ensure that states will not refuse asylum applications on the pretext that they had entered their territory illegally. Even if this provision is considered as relevant to the safe third country notion in terms of confirming the direct route from the persecuting country, it is still not clear what is meant by 'direct route'. "Transit through countries lying between the point of departure and point of arrival, stop-overs in ports and airports, brief stays without the intention to settle, should not be interpreted in terms of indirect arrival from the country of origin."[90] Besides, it is not indicated in the provision that this direct flight is necessarily to be from the country of origin but "from a territory where their life or freedom was threatened in the sense of Article 1". So the third country, which the asylum seeker has passed through en route to the final destination and that's why he is made return to, may quite possibly be that mentioned territories where yet again "their life or freedom [is] threatened in the sense of article 1".

Since safe third country concept was not given much concern in the international law, it shall be quite relevant to call relevant Conclusions adopted by UNHCR Executive Committee, which bring considerable clarity to the issue. Although the Conclusions do not have legally binding force, they have proven influential in shaping the way Member States view their obligations. In this context, particularly the Conclusions 58 and 15 of the EXCOM have distinctive importance.

Conclusion 58 of the EXCOM (1989) on *irregular movements of refugees and asylum seekers*[91] states that asylum seekers and refugees may only be returned to a third country in which "they have already found protection". According to the Conclusion, an asylum seeker can be considered to have found protection in a country

[90] Abell, Nazaré Albuqueque, op.cit note 85, p.582
[91] UNHCR EXCOM Conclusion No. 58 (XL), 1989: Problem of refugees and asylum seekers who move in an irregular manner from a country in which they had already found protection.

if s/he has already been granted some legal status to remain in that country in any manner; s/he enjoys effective protection there against *refoulment*; s/he is treated there in accordance with recognized basic human rights standards; his or her re-admittance and reception is assured in that country. In this respect, the crucial question is that whether these provisions are applicable for the transit countries. As it is clear from the wording and detailed conditions stipulated for the return, the Conclusion by no means imply the validity of these conditions for the asylum seekers and refugees who were merely in transit in another country. Because merely transiting asylum seeker, even lawfully present in that country, cannot be considered automatically to have established a formal relation with the country of transit in terms of providing the stipulated measures for refugee protection. At least, it shouldn't be based on a mere presumption but rather should be supported by related evidence.

Conclusion 15 of the Executive Committee on *refugees without an asylum country*[92] as well has a direct bearing with the issue. In its content, the conclusion deals with the issue of resolving the problem of "identifying the country responsible for examining an asylum request by the adoption of common criteria." Accordingly, it confirms the possibility of returning an asylum seeker to a third country by stating (h.4)*:*

> Where, however, it appears that a person, before requesting asylum, already has a connection or close links with another state, he may if it appears fair and reasonable be called upon first to request asylum from that State.

Nevertheless, this provision is preceded by a safeguard that "asylum should not be refused solely on the ground that it could be sought from another State." Therefore, it does not authorize states to remove an asylum seeker to a third country solely on the basis that s/he already has connections or close links there. Yet, this connections or close links with a third country is an ambiguous and insufficient argument for a state to remove an asylum seeker to a third country.

[92] UNHCR EXCOM Conclusions No. 15 (XXX), 1979, Refugees without asylum country, section 4. This Conclusion also have been recalled in other EXCOM Conclusions of UNHCR, 1989, 1991, 1992 etc.

Beyond, both Conclusions accept the possibility of an exceptional case that a refugee, who have already been granted asylum in a country, may again need to seek refuge in another country on the ground that he has compelling reasons to fear persecution or that his physical safety or freedom are endangered in the previous asylum country. Both Conclusions call the second countries to give favourable consideration to the asylum request of such kind of asylum seekers.[93] Given this possibility, the Conclusions pose a significant challenge to the logic of safe third country regulations.

Then again, since it eliminates the possibility of seeking asylum at the border, adoption of the safe third country principle has also been challenged by the EXCOM Conclusion 8 (XXXVIII) and 30 (XXXIV) as well as Council of Europe Recommendation (84) 1 and Recommendation (98) 15. Accordingly, they call on states to ensure that no person should be subjected to refusal of admission or rejection at the border, and request states to assure unimpeded access to the asylum procedures for those seeking protection.[94]

Finally, concerning the place of safe third country concept in international refugee law, so far, a general point has appeared as that it is not a totally rejected application as far as states observe the *non-refoulment* principle and duly establish that the third country is a safe one. In this respect, the whole responsibility must lie with the state, which wishes to return the asylum seeker to a third country. Therefore it is of an utmost importance how they define a country as safe. This necessitates a comprehensive and sensitive elaboration of each asylum application and the actual situation in the third country as well by the sending state. If the asylum seeker is made return to a country where his life and fundamental freedoms are still under threat, this would amount to a grave violation of the international customary principle of *non-refoulment*.

[93] UNHCR EXCOM Conclusion 15(k), Conclusion 58(g)
[94] Guild, Elspeth and Harlow, Carol (eds), Implementing Amsterdam Immigration and Asylum Laws in EC Law, Oxford: Hart Publishing, 2001, p.185

Choice of asylum seeker

Another controversial problem generated by safe third country notion is the asylum seekers' right to choose his asylum country. Safe third country provisions are based on the presumption that it is the states' prerogative to decide where an asylum seeker should apply for asylum. Thus, the decisive factor is not where the refugee would like to go and where s/he feels safe, but the place, which the host state considers as appropriate for applicant in accordance with particular criteria.

At this point, the question arises as whether asylum seekers or refugees have the right to choose their country of asylum. If it is assumed that the economic motivations are the sole factor determining the choice of a refugee, to deprive the refugee of the freedom to choose the asylum country might have been understandable. But states shouldn't ignore the fact that refugees, by very definition, "are people who have been deprived of choices, forced to flee their homes and countries in order to escape persecution, sometimes to save their lives."[95] Thus they shouldn't be labelled with the image of 'welfare seekers'. On the contrary, their primary motivation to choose a particular country for asylum may possibly be that they, based on various reasons, deem there as the safest place for themselves. Bearing these facts in mind, the right to choose the asylum country shouldn't be perceived as that luxurious for refugees.

As a matter of fact, international legal texts do not give an explicit support to the right of asylum seekers to choose the asylum country. But do not deny it either. While Geneva Convention and other human rights instruments confirm the right to seek and enjoy asylum, they have not dealt specifically with the issue in terms of limiting the refugees' choice. The only provision that may be slightly interpreted as a limitation is the Art 1(E) of the Geneva Convention.

[95]Edminster, Steven, "*At Fortress Europe's Moat: The 'Safe Third Country*' Concept", US Committee for Refugees, Immigration and Refugee Services of America, July 1997, p.26

> This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

But obvious enough, it only set limitation to the choice of persons who has already been granted some substantial rights meeting their protection needs in a certain country. Thus, it does not create a general limitation to be applied in terms of the choice of asylum seeker. In the same line, James Hathaway, rather with an ultimate principled viewpoint, argues on the issue as:

> There is no requirement in the Convention that a refugee seek protection in the country nearest her home, or even in the first state to which she flees. Nor is it requisite that a claimant travel directly from her country of first asylum to the state in which she intends to seek durable protection. The universal scope of post-Protocol refugee law effectively allows most refugees to choose for themselves the country in which they will claim refugee status.[96]

In line with this, since they indicate a weakening of the commitment to the refugee's right to decide for herself the most effective means of securing safety from persecution, Hathaway finds safe third country regulations as inconsistent with the spirit of the Geneva Convention.[97]

In this respect, the only document pay direct attention to the issue is again the Conclusion 15 of the UNHCR Executive Committee. In Parag.h.(3) it states: "The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account." Because, an asylum seeker may quite possibly have conceivable reasons to choose a particular country to seek asylum.

Ultimately rather than talking about the provisions securing the right of asylum seekers or refugees to choose a country, it is more relevant to talk that in international

[96] Hathaway, James, The Law of Refugee Status, Toronto: Butterworths, 1991, p.46
[97] ibid.p.47

refugee law there is no direct limitation on the right of refugees to seek to choose their country of asylum.

4.2 Dublin Regulations

Dublin Convention[98] is considered as the first comprehensive international arrangement related to the safe third country concept in the refugee protection history.[99] As another uniqueness of it in this term, though international law does not oblige states to do so, it is obliging the responsible state to examine the asylum application.[100] However the Convention is recently replaced by a related Council Regulation on determining the responsible state. Nevertheless it is considered as a review of the Dublin and based on the very same principles and rules provided in the Dublin.[101]That's why it is called DublinII. The only remarkable changes it brought is limited with the arrangements aiming family reunification and the disputed arrangements for appeal procedures. Dublin principles are still valid with some slight differences. Given this fact and to avoid the conflict between two regulations, hereafter I will refer the whole EU *acquis* on this issue as Dublin regulations.

The main stated objective of the Dublin regulations is to ensure that only one Member State of the Union will be held responsible for processing an asylum

[98] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the Community, Dublin, 15 June 1990. Entered into force 1 September 1997. OJ1997(C 254)1

[99] Actually the notion is first mentioned by the Schengen Convention in its Art.29.2 as "[e]very Contracting Party shall retain the right to refuse entry or to expel any applicant for asylum to a Third State on the basis of its national provisions and in accordance with its international commitments." Likewise, in Schengen Implementation Convention in its Chapter 7, has also mentioned similar allocation criteria with those laid down by the Dublin. However, since Dublin Convention deals exclusively with the allocation of applications and having an expanded geographical scope, as covering all EU Member States, Dublin represented a gain over the Schengen provisions.

[100] Art.3 (1) Dublin Convention, and Art 3(1) and Art. 16 of the Council Regulation on determining the responsible Member State

[101]It is need to be mentioned that regulation is a directly applied instrument of EC. Thus it will be absolutely binding on the Member States and is supposed to eliminate differing national applications in this term.

application submitted by a third country national (the so-called "one-chance only principle")[102]. Whereby, it also ensures that all asylum applications will be examined by Member States. In this way, it aimed both to avoid the "refugee-in-orbit" phenomenon, where asylum seekers travel from one country to another without finding one willing to examine their claim, and to prevent the "asylum shopping", which is defined as the multiple simultaneous or successive applications by the same asylum seeker in different Member States.

As a matter of fact, beyond these stated aims, Dublin regulations primarily intends to make Member States 'answerable' to all others for their 'failures' in controlling the entry and residence of third-country nationals and to signal that "a Member State which does not take effective action against the illegal presence of third country nationals on its territory has an equivalent responsibility vis-à-vis its partners to that of a Member State which fails to control its borders properly."[103] Therefore the criteria set by the Dublin regulations are designed to allocate responsibility for examining an asylum application to the Member State, which has played the most important role in the entry or the residence of the concerned asylum seeker.

Accordingly, the Council Regulation on the responsible Member State, in its Chapter III, sets hierarchically the criteria for determining the responsible state of an asylum application. To mention them in their order, the first three of these are defined:

> Art.6: If the applicant is an unaccompanied minor the Member State, where his or her family is legally present, will be responsible from the application.
> Art.7: The Member State where the applicant has a family member who has been recognized as a refugee and is legally resident in;
> Art.8: or whose asylum application is still being examined under the normal determination procedure will be responsible from the application.

[102] Preamble to the Dublin Convention; Article 3(2) of the Dublin Convention, Article 29(3) Schengen Implementation Convention

[103] ECRE, *"Comments from the European Council on Refugees and Exiles on the Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national"*, 2001, www.ecre.org

These Articles 6-7-8, in accordance with the inclusion of an expanded definition of family members detailed in Art.2(i), have designed for the reunification of family members. However Article 7 is only limited to the family members who granted refugee status and excluding the ones has been allowed to just legally reside in a Member State e.g. on other subsidiary protection grounds like temporary protection. So only the refugee status given family members could be able to reunify with their family. In this respect, as ECRE pointed, considering the unfortunate trend towards lower recognition rates under the Geneva Convention, and concurrent increase in the use of complementary forms of protection in the Union Member States, this family reunification guarantee has been rendered inapplicable for a considerable number of cases.[104] For a meaningful family reunification guarantee this provision should also cover the family members who are given subsidiary protection. Likewise ECRE and ILPA (Immigration Law Practitioners Association) [105] also criticize the Art.8 for excluding the persons whose applications are being examined in admissibility or accelerated procedures in another Member State. Regrettably, under many national asylum procedures an asylum seeker can be placed in an accelerated procedure for not simply relating to the substance of the application. Those applications should not be presumed as having ill-founded claims, and thus already existing differentiation between the normal procedures and accelerated ones shouldn't be extended further at the expense of the latter.[106]

Additionally, Article14 also serves for the family unification. It provides that if several members of a family applies in sufficiently close times to the same Member State, and if, under normal procedures they would be subject to separation because of the application of the graded responsibility criteria, then to unify them the Member State, which is responsible for the largest number of them, failing that, by the one

[104] ibid
[105] ILPA, "*Scoreboard on the Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in on of the Member States by a third country national"*, www.ilpa.org.uk/submissions/dublinIIscoreboard.html
[106] ibid

which is responsible for the oldest family member, will examine the all applications. Compared to the former ones, this provision is quite fair and beneficial for the asylum seeker. As a matter of fact, apart from the humanitarian concerns, the family unification is advantageous for both asylum seekers and the Member States. Because apart from its psychological benefits for the asylum seeker, family members provide the asylum seeker with the economical and other supports in both application assessment and integration periods. By that way Member States will considerably relieve the burden on them in terms of caring the well being of asylum seekers and refugees during the same periods.

The Articles 9 to 13 of the Regulation apply essentially the same criteria for determining the responsibility for an asylum application as are contained in the Dublin Convention. Accordingly, Member State will be responsible for the asylum application, in the order if:

> Art.9: applicant possesses a valid residence permit or visa of that state;
> Art.10: applicant is having made an illegal entry to that state, unless it can be shown that the applicant has been previously living for a period of at least five months in a Member State;
> Art.11: applicant's being waived of the requirement for a visa by the state in question;
> Art.12: applicant has made its application in an international transit area of an airport of that state.
> Art.13: If none of the above criteria apply, then the state to which the claim for asylum was first lodged will be responsible for examining the application.

Noticeably, in line with the main objective of the Dublin regulations mentioned before, Arts. 9 to 12 link the allocation of responsibility for asylum applications to the responsibility for entry controls. Member States are punished for allowing the entry of asylum seekers to the Union. Therefore, it encourages Member States to apply more restrictive entry policies for not to be held responsible for the asylum application. It is partly due to this fact that EU Member States give importance

to the effective implementation of visa requirements, carrier sanctions and other means used to prevent the asylum seekers from reaching their territory.

As for the Article 13, it is a fair and the only provision that takes into account the intentions of the asylum seeker. Application of it is not plagued with bureaucratic and cumbersome systems of negotiation between Member States, thus eliminates the unnecessary delays and provides the efficient processing of asylum applications.[107] But, unfortunately it is the last criterion, which can be applicable only if the asylum seeker could overcome all the entry barriers set above it.

Finally, under the humanitarian clause Chapter, again maintained from the Dublin Convention, the Council Regulation allows Member States to assume extra responsibility of examining an application on humanitarian reasons, such as family or cultural considerations. However, since it is left to the discretion of the Member State, the practice so far proved that Member States are reluctant to apply humanitarian clause.

These initial points provided with a general assessment of the Dublin Regulations and particularly focused on some negativities of the responsibility criteria set for the safe third country implementations. Beyond these points, the Dublin regulations involve many problems in terms of both the ignored humanitarian considerations and difficulties of the application of it. In the following part, as far as possible, some other negativities of the Dublin regulations will be analyzed under certain titles.

4.2.3 Problems with the Dublin Arrangements

Presumption of equal justice in all Member States

Dublin arrangements are based on the presumption that all asylum seekers will be subject to the same procedures, so to the equal protection and equal treatment in

[107] ECRE op.cit in note 103

each Member State. However Member States of the Union have significantly divergent legislations and implementations in terms asylum procedures, especially considering the definition of a refugee and the definition of a safe third country. In the absence of sufficient harmonization, asylum seekers are being subject to different treatments in different Member States and thus their protection need may not be met equally in the safe deemed responsible state, which they are obliged to return.

Though it came into force in 1997, the safe third country notion is being applied through bilateral readmission agreements since 1990 Dublin Convention singed, when there was not so much endeavours for asylum harmonization. Contrary to the claims, this evidently refers that at the time of introducing the safe third country concept, Member States were not having humanitarian priorities, like preventing the refugee in orbit phenomenon, but just shifting the burden of asylum to the state causing or easing the entrance of the asylum seeker. It was only the mid-1990s that Member States began to harmonize their asylum policies. Nevertheless, though safe third country notion has been initiated in the mid-1990s, since Member State are reluctant to lose their sovereign hands on this issue, a binding asylum procedure couldn't be achieved yet.[108] The only adopted EU legislation on this issue has rested with the Resolution for minimum guarantees for asylum procedures in June 1995. However, due to its unbinding nature, a resolution cannot provide with effective guarantees for asylum seekers. Besides, because of its being agreed on the lowest common denominator, it only sets insignificant minimum guarantees and yet involves numerous exceptions, which tend to weaken the effectiveness of these guarantees.[109] Therefore, despite efforts, the asylum procedures still varies along the EU Member States.

The problems connected to this divergence among Member States manifest itself mostly in the definition of agents of persecution among Member States. To

[108] Several proposals have been under discussion for long times: Draft proposal on the common standards for asylum procedures ; Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection; Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status

[109] Lavanex, op.cit in note 27, p.55

illustrate the concern well, we shall take the divergence between the UK, Germany and France in the definition of non-state agents. While the UK recognizes non-state persecution as a valid ground for granting asylum, France and Germany are not considering it as a valid ground for granting refugee status. In that respect, an Algerian applicant fleeing persecution by the Islamic Fundamentalist is likely to be granted asylum in UK. However if he, on the safe third country basis, is decided to be return to France or Germany where persecution by non-state agents, like Islamic Fundamentalists, are not considered as a ground for asylum, the appellant risks the return to Algeria. Accordingly, because of this fact, the UK House of Lords has held that Germany and France are not safe third countries for certain asylum seekers. As it is quite obvious from the example, existence of such kind of differences in asylum procedures may quite possibly work at the expense of protection needs of refugees and beyond may ultimately cause the *refoulment* of the applicant.

Valid reasons to claim asylum in a particular Member State

Due to the attributed 'welfare seeker' image, many argue that the right to choose the asylum country is a luxurious demand for asylum seekers. However, the motives behind a refugee's choosing a specific destination to seek asylum are generally "far more complex than a simple desire to secure a more prosperous life."[110] Therefore, safe third country applications are ignoring the fact that asylum seeker may well have a valid and plausible reason to choose a particular EU country for asylum. As Steve Edminster puts:

> By arbitrarily designating the country of first arrival as responsible for hosting an asylum seeker –often a country with which the asylum

[110] Edminster (1997), op.cit in note 95, p.26

> seeker has had minimal contact and no other connection- governments ignore multiplicity of concerns that are at the heart of making this crucial choice. Consequently, governments risk denying both effective protection and durable solutions for bono fide refugees.[111]

In this context, first of all, it is plausible for an asylum seeker to wish to claim asylum in the Member State where s/he has cultural ties, relatives or an established national community. As it is mentioned previously in the part on family reunification, this kind of links are beneficial for both asylum seeker and the receiving state. However the Dublin regulations only permit the reunification of immediate family members. Thus, let alone the existence of a national community, it doesn't even provide the unification with close relatives. By preventing the asylum seeker's going to the country in which s/he has links, the Member State is depriving the asylum seeker of the psychological, social and economical support that will be supplied by the family members and other peoples connected to asylum seeker. Beyond, that perspective of the issue should also be considered as an integral part of effective refugee protection. As Edminster expressed "[a]sylum seekers themselves, not governments, are in the best position to know who will be able to offer them such support."[112]

Another important and plausible motivation of the asylum seekers is to wish to apply to the country where s/he is more likely to receive refugee status. Due to the divergent asylum procedures, yet furtive race among the Member State for more restrictive ones, it makes much sense for an asylum seeker to apply a particular Member State not to be denied for causes, which are not related with the merits of his or her claim. Referring to this fact, the statistics on refugee recognition rates among the Member States vary substantially in proportion to the numbers of applicants received by each state. While, between 1992-2001, Finland (08%), Norway (1.6%) and Sweden (2.5%) reported the lowest refugee recognition rates out of total

[111] ibid
[112] ibid, p.27

applicants, Belgium (30.3%), France (20.8%) and Denmark (19.5) had the highest rates.[113] Given these rates, it is possible for an asylum seeker to prefer the countries that have more generous in recognition rates.

On the other hand, these differences are also significantly varying for certain nationalities of asylum seekers. For example, based on the UNHCR statistics for 2002, while Afghan asylum applicants' recognition rates are recorded as 100% in Belgium and 91% in Germany, it stood at 0% in Greece and 15% in the Netherlands. Similarly Iraqi asylum applicants' recognition rates were 83 % in Germany and 85% in Finland in comparison to 1% in Greece and 6% in Ireland. [114]These figures are giving asylum seeker a clear message how s/he will possibly be treated depending on which country makes the refugee status determination. Given the considerably differing standards for the recognition of Afghan nationals as refugee, the removal of an Afghan refugee from Belgium to Greece on safe country grounds might come to mean his or her *refoulment* rather than protection.[115] All these facts are proving the importance of preserving a refugee's need to choose where to request asylum.

Delays and disputes in transfer

Although one of the main aims of the safe third country provisions is to remove the refugee-in-orbit phenomenon, the experience so far has proved the opposite. Because different standards relating to the evidence required to determine the Member State responsible for processing an asylum request might result in procedural delays and disputes. Hence, this time, asylum seekers are put in another orbit where they are referred successively from one Member State to another without any of these States acknowledging itself responsible to examine their application and, thus, left in doubt for too long as regards the likely outcome of their applications.[116]

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[113] UNHCR, "*Convention recognition rates in industrialized countries, 1992-2001*", Statistical Yearbook 2001, UNHCR, Geneva, October 2002

[114] 2002 UNHCR Statistics on Asylum Seekers, Refugees and Others of Concern to UNHCR, Table 7: Asylum applications and refugee status determination by country of asylum, http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=statistics

[115] Edminster (1997), op.cit. in note 95, p.27

[116] Noll, op.cit in note 44, p.194

In its paper on the evaluation of the Dublin Convention[117], the Commission states that the average time limits for the transfer of asylum seeker to the responsible state exceeds the targeted 6 months time limit set in the Dublin Convention (Art.11), could be as much as ten months. While, the Member States are, despite the extensions, still perceiving these time limits too short, such long delays, added with the assessment period after the transfer of the applicant, cause great insecurity for the asylum seeker and pushes him further into the limbo of the very orbit situations, which the Dublin Convention was originally set to solve.[118]

Transfer of asylum seekers is generally a complicated process, thus, making the application of safe third country regulations cumbersome and costly for EU Member States. This is mainly because the sending states couldn't find the required proofs pertaining to the route of the asylum seeker up to the destination country (such as passport stamps, travel tickets) necessary to convince those transit countries to readmit the asylum seeker.[119] Because, due to the protection risks associated with safe third country removals, many genuine refugees and asylum seekers are motivated to evade the safe third country policies by way of destroying the evidences in order to conceal the countries through which they traveled. In the absence of such documentary evidence it is often difficult to prove that asylum seeker has passed through another Member State. Mainly owing to this problem and due to the absence of detailed procedures on means of proof[120], Member States applied extremely flexible and wide range of proofs to demonstrate that asylum seeker did not directly come to his territory.[121] This means that Member States may hunt for any tiny and

[117] Commission Staff Working Paper on the "*Evaluation of the Dublin Convention*", Brussels, 13.06.2001, SEC(2001)756
[118] Noll, op.cit in note 44, p.194
[119] Edminster, Steven, "*The High Road or the Low Road: The Way Forward to Asylum Harmonization in the European Union*", US Committee on Refugees, http://www.refugees.org/world/articles/wrs00_highlow.htm, 2000
[120] Dublin Convention defined the proofs only as under general categories as 'conclusive' and 'indicative'. No further detail is given. Chapter VI.4.
[121] For more information on the means of proof see Boccardi, Ingrid, Europe and Refugees: Towards an EU Asylum Policy, The Hague: Kluwer Law International, 2002, p98-99

implausible proof that indicating asylum seeker passed through another Member State and may use this as a ground for returning the asylum seeker. [122]

To solve the means of proof problem, Member States agreed to bring on-line the so-called EURODAC fingerprinting identification system for asylum seekers. Through this system they hope to facilitate the removal of the asylum seeker to the responsible country. However as Steven Edminster mentioned, the system cannot be functional because most of the asylum seekers enter the Union clandestinely or many couldn't be identified or fingerprinted in the first country of arrival. Furthermore Edminster commented that some EU Member States would likely have no incentive to implement Eurodac effectively, because it would at the same time mean for them to assume the responsibility of greater numbers of asylum seekers that they registered.[123]

Besides, responsible Member States are consciously not obeying with the time limits. Because, it is stipulated in the Art. 11 (provided also in Art.20 of the Council Regulation on responsible Member State) that if the transfer does not take place within six months, responsibility shall lie with the Member State in which the application for asylum was lodged. Thereby Member States by extending the readmission process, would try to shirk their responsibilities under safe third country grounds. Consequently, given these implementations, in the middle of the Member States' furtive contest to stick the responsibility to each other, asylum seekers are left in limbo extensively regardless of how much compelling their protection needs or how urgent they need help.

Right to Appeal

[122] Even sometimes they may not feel obliged to find such kind of documentary proof. As an important implementation relevant to this issue, in Germany asylum seekers without documents are presumed to have crossed a safe country and thus not considered as eligible and not allowed to apply for asylum. This approach amounts to the prevention of almost all asylum seekers from obtaining asylum in Germany. Maryllen Fullerton, "Failing the Test: Germany Leads Europe in Dismantling Refugee Protection", Texas International Law Journal, o1637479, Spring 2001, Vol.36, Issue 2

[123] Edminster (2000), op.cit in note 119

The Dublin Convention had not expressly provided the asylum seekers with the right to lodge an appeal against the transfer of responsibility to another Member State, but neither denied this right. Similarly 1992 Resolution on Manifestly Unfounded Applications for Asylum and 1995 Resolution on Minimum Guarantees for Asylum Procedures also failed to provide this right. In practice some Member States, like the UK, do not provide such kind of right to appeal for transfer decisions. But recently adopted Council Regulation on the Responsible Member State, in its Art.19(2), included this as a possibility and reads that "[the transfer] decision maybe subject to an appeal or review." However the article follows as the appeal of the decision "shall not suspend implementation of the transfer" unless the courts or competent bodies decide otherwise. By eliminating the suspensive effect of an appeal, asylum seeker would be transferred to the responsible state as quick as possible without being allowed to wait the end of the appeal process. This implementation is a perfect example ensuring the expeditious and speedy removal aim of the safe third country arrangements.

The Commission in its Explanatory Memorandum motivates its provision as follows:

> Since a transfer to another Member State is not likely to cause the person concerned serious loss that is hard to make good, it is not necessary for the performance of the transfer to be suspended pending the outcome of the proceedings. [124]

Though, the Commission assumes that this wont cause much loss for asylum seekers, it ignores the still existing divergences among the asylum procedures of Member States, which, as it is mentioned before, may lead to the ultimate *refoulment* of bono fide refugees. Because this provision not only abrogates the suspensive effect on the transfer decision, but also comes to mean that the appeal shall not necessarily suspend the implementation of the asylum procedures in the responsible state too.

[124] Explanatory Memorandum on the Proposal for a COUNCIL REGULATION establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Article 20 parag.2, COM/2001/0447 final - CNS 2001/0182

With this implication, it is quite possible that a bono fide asylum seeker, due to the existing disharmony of asylum procedures among Member States, might have already been refouled or moved onward to some other country from the responsible state until his appeal concludes in the first arrival state.

On the other hand, as ILPA pointed, it is very difficult for an asylum seeker, who removed from the arrival country, to follow the court decisions and maintain contact with his lawyers. The problems exacerbates if the asylum seeker does not have a legal representative before the transfer takes place and if the removal means that the asylum applicant is no longer entitled to legal aid to contest the decision.[125] Given these possibilities the appeal, even ends positively, doesn't seem to be much useful for a bono fide asylum seeker.

To conclude, Dublin regulations have not been able to bring the expected benefits in terms of both primarily aimed burden sharing targets and humanitarian concerns. Even after few years Dublin Convention come into force, it became obvious that the system was not operating effectively and there were several problems that plagued its application. Lack of means of proof, lengthy procedures, mutual distrust between Member States reflected on the statistics as low level transfer rates among the Member States, e.g. in 1998-99 actual transfers as a percentage of requests to take charge presented to other Member States is 24,45 %.[126] Besides, this also imply that the rest of this percentage, 75%, have been aggrieved as a result of long transfer disputes between Member State, and deprived for long time of the protection and the help they need. Then again, it didn't prove as an effective mechanism for a just burden sharing among Member States. Germany for example as among the most burdened ones in terms of asylum applications, still continued to receive large number of asylum applications, and even this number is added with the accepted transfers by

[125] ILPA, op.cit in note 105, paragraph41
[126] EU Commission, "Commission Staff Working Paper: Evaluation of the Dublin Convention" Brussels, 13.06.2001, SEC (2001) 756, Annex III

Germany on the safe third country grounds.[127] With these problems, Dublin regulations can hardly be considered as a model for a just burden sharing.

On the other hand, in terms of humanitarian considerations, stated as to solve the refugee in orbit problem, Dublin regulations seem not likely to offer much benefit to refugees. By sending them to transit countries, Member States are both ignoring their valid claims to choose a particular country at the best of their interest, and underestimating their immediate protection claims. Yet the lack of equivalence between the Member States' asylum systems, and the lack of necessary safeguards may possibly lead to loss of protection offered to asylum seeker in the transferred Member State or even to the *refoulment* of the refugee. In spite of these inherent problems of the EU-wide safe third country implementations, Dublin regulations have been rendered binding with the recent Dublin II Regulation. Without providing the necessary safeguards, this insistence on the safe third country provisions will possibly neither serve to the benefit of EU Member States nor be consistent with the EU's commitment to the international law for refugee protection system.

`4.3 Resolution on Host Third Countries

Political changes in Central and Eastern Europe Countries (hereinafter CEEC) rendered safe third country concept more relevant and yet gave it a new context. With the collapse of restrictive communist rule, CEEC emerged as new democracies at the eastern borders. This development led to the rise of the perception that these countries are safe and thus motivated the EU Member States to use this potential in shifting the burden of refugee protection towards its eastern peripheries. In this direction, European states, immediately as from the beginning of 1990, rushed to extend the

[127] According to statistics of UNHCR (Statistical Yearbook 2001, op.cit in note 35) Germany has get 27% of the total asylum applications in the EU Member States, as 708,145 applications, and this number added with 16,915 new asylum applications accepted by Germany on safe third country grounds and only 4,501 application transfer request of Germany is accepted by the other Member States.(EU Commission Staff Paper evaluation of the Dublin Convention, ibid)

application of safe third country policies to these safe deemed countries, even before they signed the 1951 Geneva Convention.[128] Till the mid-1990s, most EU countries were having their own list of safe third host countries and procedures for determining which state should be on that list. Given this situation and also in connection with the Dublin arrangements, the Council adopted *1992 Resolution on a Harmonized Approach to Questions Concerning Host Third Countries* with a view to set objective criteria for the application of the "host third country" [129] implementations.

Likewise in the Dublin Convention, it based on the rationale that the applicant might have had the opportunity in the previous host "safe" countries through which he passed up to the destination country. Differently, this time safe third countries are not confined to the EU Member States, but extended to all potentially safe deemed third countries around it.

The first article of the Resolution comprises the procedural rules on how the host third country principle should be applied. Article 1 sets five principles as:

(a) The formal identification of a host third country in principle precedes the substantive examination of the application for asylum and its justification;
(b) The principle of the host third country is to be applied to all applicants for asylum, irrespective of whether or not they may be regarded as refugees;
(c) Thus, if there is a host third country, the application for refugee status may not be examined and the asylum applicant may be sent to that country;
(d) If the asylum applicant cannot in practice be sent to a host third country, the provisions of the Dublin Convention will apply;
(e) Any Member State retains the right, for humanitarian reasons, not to remove the asylum applicant to a host third country.

[128] For example, in the fall of 1990 Sweden returned to Poland about 600 asylum seekers, coming from Africa and Middle East, one year before Poland signed the 1951 Geneva Convention, and two years before UNHCR opened its office in Warsaw. Judith Kumin, "*Asylum in Europe: Sharing or Shifting the Burden*", http://www.refuges.org/world/articles/europe_wrs95.htm

[129] Instead of "safe third country", this term is used not to confuse it with the "safe country of origin" term used in the previous Resolution on Manifestly Unfounded Applications.

In line with this, Article 3 sets the application procedures of the host third country concept in relation to the Dublin Convention. As implied in the Art.1(a)&(b), Art.3(a) states the precedence of host third country principle over Dublin Convention. It reads as:

> (a) The Member State in which the application for asylum has been lodged will examine whether or not the principle of the host third country can be applied. If that State decides to apply the principle, it will set in train the procedures necessary for sending the asylum applicant to the host third country before considering whether or not to transfer responsibility for examining the application for asylum to another Member State pursuant to the Dublin Convention.
> (b) A Member State may not decline responsibility for examining an application for asylum, pursuant to the Dublin Convention, by claiming that the requesting Member State should have returned the applicant to a host third country.
> (c) Notwithstanding the above, the Member State responsible for examining an application will retain the right, pursuant to its national laws, to send an applicant for asylum to the host third country.

Considering these two articles, it is intended that identification of a possible third country is preceding all the other existing procedures for examining an asylum application, regardless of whether this person is a refugee or an asylum seeker. In other words, before the substantial examination of the applicant's claim, the Member State must first verify the existence of a host non-EU member third country to which the applicant can be expelled to Only if such country does not exist than the Dublin convention applies. If there is one, then the asylum seeker will be handed over to this state, which may also possibly again re-examine the case whether it can expel the applicant further to a third state. To wit, as Sandra Lavanex puts, "externalization of asylum seekers outside the European Union prevails over an internal application of responsibility."[130]

[130] Lavanex, op.cit in note 27, p.52

This kind of pre-procedural removal of the asylum seeker was also the case in Dublin arrangements.[131] Thus the similar negativities mentioned under the Dublin regulations are maintained under the host third country arrangements (transfer delays, risk of *refoulment* in the third country, appeal right etc.) However, quite noticeably, this procedure implies much further deterioration in terms of the refugee protection.

4.3.2 Problems with the Host Third Country Implementations

First of all, if we consider that many of the asylum seekers are not able to directly come to the country, which they like to lodge application, this procedure would not be an exception but a rule. Because, for an asylum seeker, to come directly to the aimed asylum country in the EU is almost impossible. Apart from the non-arrival policies discussed in the previous chapter, since all the adjacent non-member countries to the EU are considered as safe, all by-land arrivals are automatically subject to safe country provisions. Similarly stopovers during the by-air arrivals were even considered as a ground to apply safe third county provisions. By-sea arrivals, beyond mostly being extremely dangerous, may be again subject to safe third country determination investigations. Therefore, Member States, by imposing stipulations on any kind of access to EU, are evidently trying to remove asylum seekers from the Union.

Connected to this, as a result of the chain of bilateral readmission agreements between EU and non-EU countries and among the non-EU countries themselves as well, which will be dealt in the following part, asylum seekers are exposed to the risk of chain deportations in which they, like tennis balls, are transferred from one country to another without finding one to assess their claim in its merits. Eventually, in

[131] The precedence of host third country provision was also emphasized in other EU instruments. 1995 Resolution on Minimum Guarantees for Asylum Procedures, and similarly the 2002 Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status offered precedence of safe host country provision. Besides, 1992 Resolution on Manifestly Unfounded Applications considers the existence of a safe third country is enough to render a claim as manifestly unfounded.

connection with the Dublin arrangements, the Resolution on Host Third Countries, as Ingrid Boccardi mentioned, instead of resolving the refugee in orbit phenomenon, created a further orbit of asylum seekers around the perimeter of the EU.[132]

Beyond and above these, the Resolution, like in the Dublin regulations, again fails to guarantee the safeguards against sending the asylum seeker to a host third country where s/he is at risk of *refoulment*. Both because of their nascent asylum systems unable to afford this burden and, yet, prevailing bad human right records of the countries at EU peripheries, host third country provisions seriously ignore the protection needs of asylum seekers. Without proper safeguards, this chain of deportations is likely to end at the point of departure of the asylum seeker or at any place where his or her life and fundamental freedoms will once more be under threat.

Safety of Host Third Countries

In response to the *refoulment* risk and to harmonize the implementations about the issue, Member States felt the need to create and apply common standards in determining the safety of host third countries. Accordingly, Article 2 of the mentioned Resolution lays down the criteria for the qualification of a third country as safe. With this article, Member State are obliged to make assessment in each individual case whether the following fundamental requirements are met by the host third country:

> (a) In those third countries, the life or freedom of the asylum applicant must not be threatened, within the meaning of Article 33 of the Geneva Convention.
> (b) The asylum applicant must not be exposed to torture or inhuman or degrading treatment in the third country.
> (c) It must either be the case that the asylum applicant has already been granted protection in the third country or has had an opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek their protection, before approaching the Member State in

[132] Boccardi, op.cit in note 43, p.81

which applying for asylum, or that there is clear evidence of his admissibility to a third country.

(d) The asylum applicant must be afforded effective protection in the host third country against *refoulment*, within the meaning of the Geneva Convention.

If countries fulfil two or more of the above conditions, the Member States are allowed to expel the asylum applicant to one of those third countries. Before deciding to send the applicant, Member States are required to take into account the information available from the UNHCR on the existing practice in the third countries, especially with regard to the principle of *non-refoulment*. (Art.2)

However, since a Resolution, by its nature, is not binding, Member States showed little commitment with these criteria. They continued to apply their own standards for determining the safety of third countries.[133] On the other hand, it is also doubtful whether a reliable general determination of safety is possible. Even after the Resolution, there was no consensus among Member States how to define the concept of 'safe'. Therefore the application of this article in practice varied considerably in each Member State.[134] So far, the only and commonly respected criterion to define a country as safe has been the ratification of the Geneva Convention.[135] Apart from this formal minimum requirement, Member States' basis for denial on safe third country grounds, ranged from expeditious requirements, such as accepting the mere transit as sufficient, to relatively more plausible requirements, such as to exist on the territory of third country for a minimum of three months.[136] Consequently, given the non-binding nature of it and yet the difficulty to define general criteria for considering a country as safe, the Resolution couldn't provide beyond a lowest common denominator on the standards to define a country as safe. Therefore, it is far from offering efficient

[133] According to a 1998 Council Survey, not all Member States have laid down the criteria enumerated in Art.2 of the Resolution in their domestic legislation. Moreover the concept of safe third countries is applied to situations of 'mere' transit in five Member States, while eight Member States refrain from doing so. See in Noll, op.cit in note 5, p.209

[134] Lavanex, op.cit in note 27, p.76

[135] Boccardi, op.cit in note 43, p.80

[136] For more information on the host third country practices of Member State: Steiner, Nicklaus, Arguing about Asylum: The Complexity of Refugee Debates in Europe, New York: St. Martin's Press, 2000

safeguards against expeditious and summary removal of asylum seekers to the 'safe' deemed countries.

As to assess the viability of the formal requirements, it is not enough for a third country to be safe in formal terms. So its signing the Geneva Convention cannot be considered solely as a sufficient ground to assume a country as safe. The asylum seekers and refugees must also be able to receive protection and have access to the asylum procedures in practical terms.[137] Although, in the final part Member States are obliged to observe whether these countries implement their formal obligations in terms of refugee law and to keep track of the current developments rendering them unsafe for sending a particular applicant to there, Member States are not so prone to make such kind of detailed and update observations on these countries. Rather, mostly they continue to presume these countries as safe. Regrettably, this presumptive approach is also the case at the EU level. According to a recent decision of the Justice and Home Affairs Council in Luxemburg on 14-15 October 2002, ten EU applicant countries were declared as safe to return asylum seekers. However this approach is contradicted by again the European Commission's own updated reports on the accession countries, which are indicating serious human rights violations in the concerned countries.[138]

Moreover, the recent Amended Proposal for a Council Directive on minimum standards on asylum procedures further loosened the formal minimum requirement of the ratification of 1951 Geneva Convention for considering a country as safe. It reads that "a country that has not ratified the Geneva Convention may still be considered as

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[137] Achrmann, Alberto and Gattiker, Mario, "*Safe Third Countries: European Developments*", International Journal of Refuge Law, Vol.7, No.1, 1995, p.35

[138] For example, according to Statewatch report, the Commission's 2002 report involves the following conclusions: Estonia (use of force by police, arbitrary detention); Czech Republic (widespread discrimination against Roma); Hungary (degrading treatment by police, especially of Roma); Latvia (bad conditions at asylum detention centres); Lithuania (degrading treatment by law enforcement officials); Slovakia (degrading police treatment of people, especially Roma) and Slovenia (instances of the use of excessive force by police against people in custody, particularly Roma) in Statewatch Report and Analysis, "*EU: 'safe and dignified' voluntary or 'forced' repatriation to 'safe' third countries*", http://www.statewatch .org/news/2002/nov/14safe.htm

safe third country if" it observes the *non-refoulment* principle in other manners. [139] With loosening this criterion, Member States are given more free hand to presume any country as safe. Though the Geneva Convention cannot be the sole ground for a country's safety for the asylum seekers, a sincere commitment for effective refugee protection necessitates primarily the accession to the Geneva Convention. Because it is the very beginning for establishing an asylum system, thus the initial proof of an existing asylum system in a country. So, by eliminating this minimum requirement, Member State may quite possibly send an asylum seeker to a country, which does not have an asylum system at all.

Another important point, as it is mentioned at the beginning of the Art 2 of the Resolution, it is a sensitive issue to examine each application individually for determining whether to send an applicant to a specific third country is proper and without risk. Despite this expressed concern about the necessity to consider each claim in its own peculiarities, in 2002 Austrian government put forward a proposal calling for a binding Regulation on all EU Member States for "a European list of safe third countries" to which people could automatically be returned back in all Member States.[140] The list covers again ten applicant countries and additionally Norway, Switzerland, Iceland, Bulgaria and Romania. To wit, the asylum seekers who somehow had territorial connection with these countries would automatically be returned to them. The proposal was taken into account by the JHA Council and agreed to be considered by the Commission for the following. Establishment of such kind of a common list for automatic deportations amounts to a total ignorance of the asylum seekers different concerns in their claims and thus indicates a clear expediency. As Guilt and Harlow argued as:

> …whether a third country is considered 'safe' for an asylum seeker is not a generic question which can be answered for any applicant in

[139] 18.6.2002, Amended Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM (2002) 326 final, 2000/0238 (CNS), Annex I "*Principles with Respect to the Designation of Safe Third Countries*"
[140] Common European list of safe third countries, Note from the Austrian delegation, doc no 12454/02.

> any circumstances… [a] country may be 'safe' asylum country for applicants of a certain origin, and yet 'unsafe' for those originating from another country or representing a different social or ethnic group. [141]

For example to send a Roma automatically to CEEC's where they have always been subject to discriminatory treatment, most possibly won't create beneficial results for him.

On the other hand, the Resolution is also criticized for only creating negative rights, which only relies upon the absence of threats to life or freedom, or exposure to torture, or inhuman or degrading treatment but not involving positive rights to be obeyed by the host third countries.[142] Actually, before coming to this point, an important problem with the Resolution should also be mentioned. Like Lavanex pointed out, from a political perspective and different from the Dublin arrangements, the host third country provisions have been negotiated unilaterally without the participation of the safe third states concerned. Which means, third countries, such as CEEC's, are unilaterally incorporated into the system of redistribution for handling asylum claims. Due to being formulated exclusively from the perspective of the sending countries, it does not stipulate the conditions of the readmission procedures and the third country's duty to grant access to asylum procedures.[143] Although, readmission agreements, as a flanking measure, followed right after the Resolution, it is inadmissible in anyway to presume the consent of the states that directly would be affected by the provisions of the Resolution.

As a matter of fact, these concerns are also relevant regarding the application of the safe country of origin concept. EU Member States in the 1992 *Conclusion on Countries in which there is generally no serious risk of persecution*, display the same careless approach in determining the countries of origin as safe. In addition to the

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[141] Guilt and Harlow, op.cit in note 94, p.187

[142] Byrene, Rosemary; Noll, Gregor and Vedsted-Hansen "*Western European Asylum Policies for Export: The Transfer of Protection and Deflection Formulas to Central Europe and the Baltics*" in Rosemary Byrne and Gregor Noll, Jens Vedsted-Hansen (eds.), New Asylum Countries?: Migration Control and Refugee Protection in an Enlarged European Union, The Hague: Kluwer Law International, 2002, p.23

[143] Lavanex, op.cit in note 27, p.52 and 76

above-mentioned criteria of host third country implementations, the Conclusion put another criterion in assessing the safety of the countries of origin as that low recognition rates from the country in question. Owing to the similar reasons, especially in terms ignoring the necessity of assessing each asylum claim in its own merits, deportations on the ground of safe country origin implementations may quite possibly amount to the *refoulment* of asylum seekers. Especially considering safe assessed countries by some Member States so far, such as Ukraine, Russia, China etc., this kind of careless and expedient approach to this delicate safety assessment issues significantly indicates EU Member States' ultimate aim to keep refugees as away as possible under the veneer of burden sharing mechanisms.

4.4 Readmission Agreements

Though the Member States unilaterally incorporated third countries into their system of 'host third countries', in practice they realized that in the absence of formal agreements with the third states, safe third country principle couldn't be implemented.[144] Subsequently, in parallel with the adoption of the 1992 Resolution, immigration ministers of the EU started to enhance their cooperation on expulsion issues and developed new instruments at the EU level to facilitate the return of asylum seekers to safe third countries or their countries of origin. To this effect in 1992 they adopted the *Council Recommendation regarding the practices followed by Member States on expulsion*.

The Recommendation, while once more emphasizing the precedence of host third country arrangements over the Dublin regulations, has laid down two important principles. Firstly, expulsion to or through the territory of another Member State has to be limited as much as possible and has to be accompanied by substantial guarantees for that state. Secondly, it encourages expulsion from EU territory to third states and

[144] Achrmann, Gattiker, op.cit in note 137, p.23

recommends that these should be as informal and expeditious as possible. For this purpose the recommendation proposed the conclusion of readmission agreements with the third countries concerned.[145] Accordingly, during the 1990s series of readmission agreements were concluded with both in and outside Europe, extending from Western through Eastern Europe and beyond.[146] With this extended web of readmission agreements, which constituted a buffer zone around Europe, Member States corroborated their deflection strategies profoundly and created an outer orbit of asylum seekers around the EU.

In practice, content of readmission agreements is quite varying within Europe considering it both throughout the time and in different bilateral agreements. While initially they were only governing the readmission of the party states' illegally entered nationals, especially with higher level of readmission barriers[147], the current ones, the so-called new generation of readmission agreements concluded after 1990s, have more extended the coverage of agreements. More importantly, they additionally involved the readmission of the third country nationals, including asylum seekers, found either illegally crossing the border or illegally residing in the destination country as a consequence of entry from the other party state. Besides, different from the old ones, by minimizing the readmission requirements, these are designed to facilitate the expulsion of non-EU nationals from the EU territory. Actually these agreements are also relevant in the applications of the safe country of origin norm. But, here, in the context of safe third country provisions, these agreements will be analysed in terms of its implications as being third country nationals.

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[145] Lavanex, op.cit in note 27, p.113

[146] Bilateral Readmission agreements involving European Countries is numerous. But since many agreements remain unpublished the exact number of them is difficult to specify. See in Noll, op.cit in note 5, p.203

[147] Achmann and Gattiker mention the earliest known readmission agreement as dated 1954 between Switzerland and Germany contained the provisions regarding the readmission of third country nationals. See in Achrmann, Gattiker, op.cit in note 137, p.24. As it was also the case in this agreement, by 1990s readmission agreements between Western European states generally were setting higher barriers in terms of proof for the readmission of third country nationals. For more in formation see Lavanex, op.cit, in note 27, p.79

The first relevant agreement of the latter one was concluded between Schengen Countries and Poland in 1991[148] and inspired all subsequent bilateral agreement of this kind.[149] Meanwhile, EU immigration ministers engaged to harmonize the content of readmission agreements further with EU level instruments. To this effect, in November 1994 Council Ministers, under the initiative of German Presidency, adopted the *Recommendation concerning a specimen bilateral admission agreement between a Member State and a Third Country,* designed to serve as a model to be used flexibly by Member States when negotiating agreements with third countries. A year later, in July 1995, *Recommendation on the guiding principles to be followed in drawing up protocols on the implementation of readmission agreements* was adopted by the initiative of French Presidency. In spite of these efforts, since these agreements are legally non-binding and due to the difficulty to bring out multilateral agreements on the issue, Member States preferred and thus continued to put their own stipulations in bilateral agreements. Hence, scope and content of the readmission agreements continued to vary to a considerable extent throughout the EU.[150]

4.4.1 Problems with Readmission Agreements

First of all, the main problem with readmission agreements lays primarily in the fact that although they were mainly designed for illegal migrants, the inclusion of asylum seekers in the agreements generated important negativities for refugee protection.[151] Expulsion procedures of the readmission agreements, mostly applied by border police, have been applied to all illegal entries regardless of whether the person

[148] The agreement was governing the readmission by the parties of aliens who had illegally entered the territory another Member State via their own external border.
[149] The readmission agreements with CEEC's and Baltic states, some North African countries (such as Morocco and Tunisia) through which refugees often pass en route to the EU Member States.
[150] Noll, op.cit, in note 44, p.205-206
[151] According to UNHCR survey, 85% of the readmission agreements concluded in Europe allow the return of asylum seekers to an intermediate country. UNHCR '*Safeguards for Asylum Seekers and Refugees in the Context of the Prevention of Irregular Migration into and within Europe: A Survey of the Law and Practice of 31 European State's,* June 2001

is an asylum seeker or not. In this respect, contrary to the internationally established norms on refugee protection, agreements fail to give the due respect to the special situation of asylum seekers and their immediate need for protection.

Under the host third country provisions, for the persons who legally entered the country or illegally entered but able to lodge their asylum applications, an investigation for their route taken to the destination country precedes any substantive assessment of their claims. Therefore no matter they are legally or illegally existing on the territory of the concerned Member State, asylum seekers transited from the countries party to the readmission agreements, are deprived of their right to seek refuge on the EU territories and summarily expelled to the safe third countries. According to UNHCR, such agreements shouldn't be used as a basis for the automatic return of asylum seekers to intermediate countries, unless they explicitly care the asylum seekers' special situation and protection needs.[152]

In addition to the indiscriminate application of summary expulsion procedures, sending states generally do not notify the readmitting states that the returned person is an asylum seeker or they are deported him on safe third country grounds. Neither the bilateral agreements specifically require this notification that the third country national is an asylum seeker and that his claim has not been examined on its merits.[153] Although 1995 Council Resolution on minimum guarantees for asylum procedures demands it in its para.22 that "[t]he third country authorities must, where necessary, be informed that the asylum application was not examined as to substance", since it is a non-binding decision, Member States' practice differs widely on this issue.[154]

In line with this, readmission agreements have not been framed to create obligations on the part of the safe third countries to ensure that the returned asylum seekers will have access to asylum procedures. According to the UNHCR survey, of the European States whose readmission agreements permit the return of asylum seekers, 81% do not contain any safeguards to ensure access to the asylum procedures

[152] ibid
[153] Byrne, Noll and Vedsted-Hansen, op.cit in note 142, p.21
[154] Except five Member States, Member States of the EU do not inform the country concerned. See in Noll, op.cit in note 44, p.210

in the receiving state.[155] Moreover, agreements do not involve assurances for the prevention of return of the asylum seekers to situations of persecution or other violations of basic human rights either.[156] Although Member State concluded these agreements partly to provide the legal basis for safe third country returns, these bilateral agreements didn't create any obligation on third countries in terms of refugee protection. The absence of these safeguards for refugee protection carries with it a real risk of *refoulment* for the returned asylum seekers.

In the absence of these safeguards, Member States would only rely on their assumptions on the safety of third countries for the returned asylum seekers. In this respect most of the readmission partners of Member States are around the Europe, particularly consists of the CEEC's. These are new democracies without having much experience in refugee protection. Though with time they have tried to establish their own asylum systems, they are still lacking a sincere humanitarian commitment and necessary institutions and resources for the refugee protection. Yet EU Member States' incorporating them to such kind of burden sharing mechanisms through readmission agreements from the beginning of 1990s[157], further contributed to the downgrading of these countries already restrictive asylum policies. This situation is also discernable from the lower level recognition rates in the CEEC's.[158] Although readmission agreements involve the financial and technical support from the Member States, these aids have so far failed to guarantee the establishment of comprehensive asylum procedures in the readmission countries. Yet, these aids were primarily provided to be used for immigration control issues.[159] For that reasons, under these

[155] UNHCR Survey, op.cit in note 151
[156] Abell, op.cit in note 85, p. 583-584
[157] When these countries even had not yet ratified the Geneva Convention and were not having any mechanism for refugee protection other than their national alien acts.
[158] Convention recognition rates out of total asylum applications between 1992-2001: Poland 4%, Czech Republic 2%, Hungary 6%, Romania 7%, Lihuania 1.6%, Latvia 6%, Slovakia 3% etc. UNHCR Survey op.cit in note 151.
[159] For example, Germany offered financial and administrative assistance to Poland and Czech Republic for immigration control and for the development of asylum institutions. However based on reports by the German government to Parliament, most of the money, 87% in the case of Poland, has been spent for the immigration control. ECRE, "*Position on the Enlargement of the European Union Relation to Asylum*" September 1998

circumstances, allocation of asylum seekers to these countries implies a considerable deterioration of protection possibilities for the asylum seekers. [160]

Another important concern for the readmission agreements is the aggravation of problem of chain deportations. To release the added burden of the safe third country mechanism, the Central and Eastern Europe countries followed the track of their Western neighbours and thus further concluded bilateral readmission agreements with other countries. The problem compounds with the reality that, these countries do not have standards, nor pay much concern to the safety of third countries to which they return the asylum seekers. Therefore they generally see no problem in returning the asylum seekers to countries, which can hardly be considered as safe e.g. Poland has concluded readmission agreements with Ukraine (no party to Geneva Convention), Belarus (no party to Geneva Convention), China and India. Therefore, without proper safeguards this rapid proliferation of readmission agreements leads to the chain deportations of asylum seekers towards the places where their lives are threatened or to the country of origin. [161] This means that it became difficult for Member States to control the consequences of returning asylum seekers to these third countries. The returned asylum seeker may possibly be sent on to a fourth or a fifth country, which wouldn't have been considered safe by the state starting the return movement. ECRE has reported several this kind of chain deportations ended in actual *refoulment*.[162]

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[160] Currently since most the CEEC's are on the EU accession process, their incorporation to the Dublin regulations is considered as an integral part of the accession strategy. However, due to their disadvantageous geographical situation, most of the burden of refugee protection will be again left on these new Member States.On the other hand while many of the non-binding positive measures of the EU acquis concerning the refugee protection have not been implemented by the existing EU Member States, adoption and implementation of these measures is held mandatory for these states. This will further add to the burden on new Members. Under these circumstances, they will be again inclined to cut back the protection prospects for asylum seekers.

[161] As a telling example related to this fact, as a result of the readmission agreement between Germany and Poland in 1996, 9,655 people were deported to Poland by Germany. 1,696 of those deported peoples has claimed asylum in Poland upon re-entry, and 1,453 of those applicants were subsequently deported from Poland to its eastern neighbors (Belarus and Ukraine) or directly back to countries of origin, such as Sri Lanka, mostly within 48 hours of being arrested. Morrison and Crosland op.cit in note 63, p.35

[162] ECRE has reported 16 cases of chain *refoulment* in 1994. ECRE "Safe third Countries: Myth and Realities", London, 1995, Appendix B

Given these negativities, bilateral readmission agreements have attracted severe criticisms from many refugee advocates, such as ECRE, Amnesty International and US Committee for Refugees etc. Ultimately as UNHCR also, application of these agreements does not meet the humanitarian requirements of the international refugee protection regime and do not normally take into account of the special situation of asylum seekers.[163] Beyond, proliferation of these agreements eastwards as to conclude readmission agreements with countries even not party to the Geneva Convention, such as Belarus and Ukraine, further aggravated the situation by causing the chain deportations of the asylum seekers to unsafe countries. In the light of these considerations, Readmission agreements ultimately may amount to *refoulment* of the protection seekers to the countries where their life would be at serious risk and as a consequence to a serious offence against the spirit of international refugee protection regime.[164]

From the EU perspective, these agreements provided with a legal basis for the implicit burden shifting endeavours of Member States. They are inclined to conclude as many as possible readmission agreements with third countries without substantively assessing the safety of them and without guaranteeing the access to asylum procedures. Furthermore, as an important problem, which haunts the general asylum policy development of the EU, Lavanex argues that these agreements are "a clear confirmation of the confusion of genuine refugees and the illegal immigrants in the European refugee regime."[165] Indeed, with indiscriminative application of expulsion policies and by not specifying proper guarantees for asylum seekers, readmission agreements totally pointing to this fact that Member States couldn't differentiate the refugee protection from the migration matters in Europe.

[163] UNHCR (2001) *Note for the Standing Committee of the Executive Committee* in Lavanex, op.cit in note 27, p.168
[164] ibid. p.175
[165] ibid. p.168

4.5 Conclusion

Safe third country provisions proved as an important tool of EU Member States' resolute endeavours to shirk the refugee protection responsibility under the veneer of burden sharing goals. Together with the pre-entry policies, 'Fortress Europe' phenomenon is once more strengthened by these deflectionary policies of EU. By means of the safe third country regulations, Member State have found themselves both normative and legal ground to deflect the asylum seekers, whose arrival they couldn't prevent, to the third countries hardly proving safe. Although international refugee law implies the possibility of returning an asylum seeker to the country where he has already found protection and with utmost observance of *non-refoulment* principle, EU Member States' safe third country implementations are not in consistent with the protection motivated humanitarian spirit proposed in those concerned texts. By ignoring the main necessary safeguards, Member States' implementations are rather heavily occupied with the most effective procedures for the summary return of asylum seekers to the safe deemed transit countries.

According to these measures, a person's travel route rather than the reasons behind his or her flight becomes the determinative factor in deciding whether protection will be granted or not. On the other hand, contrary to the burden-sharing justifications, safe third or host country provisions proved to operate entirely on the basis of countries' geographical location in relation to asylum seekers movements and travel routes, and does not imply any element of equity or fair distribution of asylum seekers.[166] Therefore neither the theory nor the outcomes of this safe third or host third country measures can be claimed to serve to the burden sharing objectives.

Actually the root problem of the safe third country provisions is the assumption that asylum application lodged in third countries will have exactly the same outcome. The EU Member States do not perceive the still existing divergences among national asylum procedures as a problem in this respect. Beyond, the problem

[166] Danish Refugee Council, Paper on "*Third Safe Country: Policies in European Countries"*, Copenhagen, 1997, p.5

largely exacerbated by the EU states' keen interest in widening this circle of safe third country implementations towards the countries with premature asylum system and yet with considerably less humanitarian commitment to refugee protection. Moreover, the successive readmission agreements have not been providing basic safeguards to ensure that refugees would in fact have access to a comprehensive and fair asylum procedure in the third countries. Consequently, due to the over-assessment of the protection standards offered to refugees in third countries, safe third country provisions put asylum seekers in grave risk of *refoulment*.

Besides, while these regulations are deemed to avoid refugee in orbit phenomenon, together with the introduction of host third country notion, asylum seekers are further put in an orbit around the community rather than within it. As a significant comment, Boccardi puts:

> The perimeter of this orbit kept being shifted further and further away by an even more intricate web of readmission agreements. The hypocrisy of such a strategy was highlighted by the fact that Member States even resorted to 'bribing' neighbouring states with aid packages in order to dump their own unwanted refugees on them. The 'Common Market of deflection' inherent in the idea of a border-free Europe was slowly taking shape.[167]

Eventually, EU Member States' safe third country regulations are a grand display of how expediency predominated over humanitarian norms. While they are trying to shift the burden of refugee protection as far as possible, EU Member States have almost no regard to the protection needs of refugees and primarily preoccupied with increasing the potential to keep them away. Beyond, by extending this exclusionary unhumanitarian approach to the neighbouring countries, they also export a general false impression to these countries about addressing the protection needs of refugees. While even the EU Member States, as the most proud ones of their humanitarian commitments, are applying such kind of deflectionary policies, who can

[167] Boccardi, op.cit in note 43, p.206

blame the non-EU member third countries for returning asylum seekers further away to other countries?

CHAPTER V

CONCLUSION

The main aim of this thesis was to attract the attention to the contradiction that EU fails in its asylum policy development and its loud humanitarian commitments in that context. As the study demonstrated, shaping of the EU asylum competence proved that humanitarian component of the asylum institution is progressively subordinated to the compulsive aim of keeping the aliens away from the European territories. European states, which are now openly hostile to the arrival of asylum seekers, have already been engaged in introducing restrictive and exclusionary measures towards them since last decades. With the involvement of the EU dimension into the process, this unhumanitarian approach towards protection seekers became regionally sanctioned and institutionalized at the EU level. Through introducing effective pre-entry and post-entry access prevention measures, EU has been interwoven in a largely successful attempt to limit the access of asylum seekers to the European territories. Against its loud and strong commitment to human rights and humanitarian values, the EU tries to design a common asylum policy, which in effect acts to keep refugees as away as from the EU territories. Therefore, this EU backed new emerging refugee regime virtually aims to be protected from refugees rather than protecting them. In the light of these considerations, this thesis study has demonstrated how the evolution of the EU asylum competence proves to serve to this ultimate aim of keeping refugees away from the EU territories.

Emergence and development of the EU asylum policy has been mainly stimulated as a flanking measure for the abolition of internal borders of the European Community. Owing to that reason asylum policy is for the most part considered in the migration policy context and that's why instead of humanitarian protection aims access prevention tendencies preoccupied the process. While the Member States deliberately exposed asylum seekers to the exclusionary provisions of migration policy, asylum policy itself has been used as a complementary tool to filter further the peoples trying to enter into the European territories. Consequently, most of the measures are not drafted to respect the particular situation of asylum seekers but rather to emphasize this exclusionary effect.

This ignorance of humanitarian and protection concerns in the asylum issue can also be noticed by analysing the so far achieved harmonization in the asylum policy of the EU. Since the Member States are reluctant to loose their sovereign hand on them, most of the positive obligations that contain rights and standards for refugees are not agreed yet or agreed on the lowest common denominator, embodied as minimum standards. Further, most of these agreed positive measures are regulated through non-binding legislative instruments of the EU, such as directives, joint positions. By not making the positive measures binding, the EU asylum competence mostly left protection seekers to the conscience of Member States whose motivation obviously proves as to host the least number of refugees or to offer the least standards to them. Against the observed reluctance in the positive obligations, the measures pertaining to the access prevention aim are mostly agreed unanimously and arranged through binding EU legislative instruments, such as regulations. Given these tendencies, it can be rightly said that EU asylum policy development so far couldn't go beyond communitarizing the restrictive and exclusionary provisions of the Member States. Though in the Tampere Summit, EU Presidents acknowledged the ignored humanitarian concerns in the measures pertaining to refugees, and has foreseen to compensate this ignorance for the following, it doesn't seem that this will actually be in the cards in the future. It seems more likely that these humanitarian concerns will

stay as paper commitments and EU Member States will continue to keep the essence of the policy as to deter the arrival of people to the Union.

In analysing this deterrence tendency, the thesis especially gave weight to the measures producing the effect of keeping refugees away from the EU territory. Though the other aspects of the EU asylum policy development may have relevance in terms of ignored humanitarian concerns, the access prevention policies are of more crucial importance since they are pertaining to the pre-refugee status determination process. The importance of this pre-status phase emanates from the perception that it is not regulated by humanitarian and refugee protection law and largely left to the state's discretion. Since granting of asylum is not an individual right but an entitlement up to state discretion, the only legal binding norm is left as having bearing to this pre-status phase is the *non-refoulment* principle. But as this study pointed at, European governments are intensively seeking ways to shirk that responsibility on their part as well. Consequently, effective access prevention measures are introduced at the EU level as to keep refugees away from the European territories and thus to avoid the burden of the *non-refoulment* obligation.

The strategy to keep refugees away has been tried to be realized through two complementary access prevention tools in the EU. They have been studied under the pre-entry and post-entry access prevention mechanisms categories in this study. While at the initial step, under pre-entry access prevention mechanisms, Member States tried to prevent the arrival of protection seekers to the EU territories, through post-entry access prevention mechanisms, they tried to cut the protection seekers' existence on the EU territories to an insignificant minimum by diverting them to safe deemed countries around.

Pre-entry access prevention mechanisms have been an important initial tool in this exclusionary strategy of the EU asylum policy. In this regard, visa requirement and carrier sanctions implementations in combination act to move the barriers to access out of the EU territory, to the countries of departure. Though these measures are introduced as migratory measures and thus claimed as not targeting protection seekers, due to the efficient and indiscriminate filtering effect of them, refugees are

deprived of almost all legal and safe means to enter the EU territory. The unfortunate equation of "most asylum seekers are in fact economic migrants" thwarts Member States to pay due concern to the refugee protection matter, thereby they did not introduce meaningful exculpatory provisions for protection seekers regarding the strict pre-entry control mechanisms.

On the other hand, since they act to prevent the territorial contact of protection seekers, pre-entry measures operate as an effective tool to render the *non-refoulment* principle inapplicable. In the absence of adequate explicit international legal provisions for extraterritorial protection, states are not prone to assume a responsibility on their own concerning the *non-refoulment* principle beyond their territorial borders. Therefore, by relying on the gap in legal instruments on extraterritorial protection, they saw it as a quite feasible implementation to prevent the access of protection seekers indiscriminately besides the other migratory groups. However, European States shouldn't rely on the illusion to assume that by preventing the territorial contact of persons in need of protection to their territories they wouldn't be in contradiction with the principle of *non-refoulment*. This principle has a blatant humanitarian sole, which is not likely to discriminate between territorial and extra-territorial protection.

Post-entry access prevention mechanism, embodied as the safe third or host third country measures, have been another important tool of EU Member States' resolute endeavours to keep the refugees away and to shirk the refugee protection responsibility. With the safe third country regulations they deem to have found both normative and legal ground to deflect asylum seekers, whose arrival they couldn't prevent, to the third countries. However, application of this regulation generates serious negative implications on refugees and creates risk of refoulment. Because, in this implementation each state without looking into the merits of his claim, passes the asylum seeker back to the less safe countries that they travelled through before coming to that country. So instead of the reasons behind the flight, the route an asylum seeker takes till the destination determines whether or not protection will be granted. Worse, due to the widening intricate web of readmission agreements, safe

third country regulations may even result in deportation of the asylum seekers back to the countries of origin.

The main problem with the safe third country regulations is the assumption, or the over-assessment, of the protection standards offered to refugees in third countries. Member States, blinded with an obsession to shift the burden of refugee protection as far as possible, almost pay no regard to where they are sending the protection seekers. As a result of the widening readmission agreements, the countries with premature asylum systems and with considerably less humanitarian commitment to refugee protection are included in this circle. Those agreements mostly lack basic safeguards to ensure that refugees will in fact have access to a comprehensive and fair asylum procedure in the returned countries. Based on this fact, even the chain deportations may not end in the country of origin, sending the protection seekers to lesser and lesser safe countries at each deportation will have almost no difference with refouling them.

Interestingly, generic to the legislative instruments on migration and asylum issues, allusion of refugee protection considerations are made together with the restrictive measures. Though in most of the legislations Member States declared that the taken measures are ‘without prejudice to state’s obligations in terms of refugee protection’, the same legislation deliberately ignored to offer adequate measures to protect refugees from the possible consequences of the indiscriminate application of them to all entrées. Whereas, true caring intentions should have been proved through meaningful exculpatory measures. The grand display of humanitarian considerations in the introductory paragraph did only remain as symbolic commitments and even they are immediately followed by measures in obvious contradiction to the human rights and refugee protection standards. Hence, as this study tried to achieve as well, close examining of the practical and potential effects of these ‘apparently caring’ measures reveals that they generate quite negative effects on protection seekers.

Regarding the general context, the root problem haunts the asylum policy development of the EU has been the issue that asylum institution is heavily considered in the context of migratory dynamics. In other means, asylum seekers are perceived as

among the other economic migrants rather than as peoples with special protection needs. To serve the ultimate goal to keep aliens away from the EU territories, humanitarian component of the asylum institution is subordinated to the compulsive access prevention efforts. Therefore, European governments deliberately opt to extend restrictive immigration policies to cover asylum seekers, too. Actually, primarily owing to that reason asylum policy has been shaped according to migratory concerns instead of humanitarian ones.

To concede, it is a undeniable fact that asylum institution has been frequently abused by economic migrants to ease the access to the affluent states. For this reason, states act rightly to take restrictive measures against this abuse. However, refugee movements cannot be reduced only to a simple abuse of asylum institution by economic migrants. As long as they perceive the asylum seekers as bogus, the guarantees will continue to be regarded as luxurious and unnecessary. Asylum policy shouldn't be designed wholly based on this aspect of the matter. Otherwise, there won't remain an asylum institution at all in the future.

On the other hand, this misperception that protection seekers' are in fact mostly welfare seekers, points to another contradiction by Member States. While Member States are continuously condemning some certain governments, not coincidentally of the countries producing most of the world refugees, for severe human right violations, they attribute almost all the refugee movements to economic reasons. To wit, while they recognize the existence of human rights violations in those states, they are at the same time considering the protection seekers coming from these areas as having only economic motives. Therefore, instead of falling back on this assumption about the asylum misuse, Member States should act according to the fact that there are millions of displaced people seeking refuge without economic motives.

To consider the issue from an upper level that also constitutes the main base of the arguments in this study, refugee protection is an indispensable part of the human rights commitment. Since the beginning of the 20th century world states especially with the lead of European states, have been signing various human rights treaties that set the base for the current human rights system in the world. In the absence of an

adequate commitment to refugee protection, all those multilateral commitments would be nothing but states' defining their own human rights responsibilities to their own citizens. However, human rights perception of these treaties are originally intended and supposed to be more comprehensive and universal, yet they explicitly define the commitment to refugee protection as a fundamental component of the entire human rights regime. Against this background, Member States' blatant efforts to keep refugees away from the EU territories have substantially undermined the norms of refugee protection, especially the *non-refoulment* principle, to such an extent that its importance as an indispensable component of human rights system can no longer be taken for granted. So to consider it in this context, asylum implementations by EU Member States reveal that their human rights understandings are selective and nationality based. Yet, as Harvey puts "the subtle message underpinning the European states' response to forced migration is that human rights are primarily citizens' rights."[168] While in their loud human rights discourse they don't give a hint of that selectivity, the asylum policy implementations are the very proof of this approach in practice. It is no doubt that such a selective approach does pose a substantial challenge to the very essence of the human rights soul. The whole human rights system cannot be assessed on that selective ground with lots of conditions for their observance.

Mass influxes of people can generate many challenges in terms of the economic dynamics, social and cultural cohesion of the society and even national security of the countries. Because it is understandably a sensitive issue for states to sustain and protect the unity and bases of the society. Therefore states rightfully have the right to fix their own migration policies and to protect themselves against terrorism. But the measures they take to halt mass migration pressure and asylum abuse or illegal entrances shouldn't make it difficult, if not possible, for refugees to be protected.[169] A borderless Europe shouldn't necessarily create impenetrable borders

[168] Harvey, Colin, "Dissident Voices: Refugees, Human Rights and Asylum in Europe", Social & Legal Studies, Vol. 9, No.3, 2000, p.371

[169] Loescher, Gil, *"State Responses to Refugees and Asylum Seekers in Europe"* in Loescher, Gill; Loescher, Gilburt D. (eds), Refugees on the Asylum Dilemma in the West, Philadelphia: Pennsylvania State University Press, 1992, p.66

that deny the access of all without caring whether they need protection. EU always perceived itself as a community of common values with special emphasis on human rights. Precisely in the name of this strong commitment to and pioneer position in the protection of human rights, Member States shouldn't subordinate their refugee protection commitments to their compulsive effort to prevent the arrival of migrants. Though the right to asylum does not exist in international law explicitly, respecting the *non-refoulment* is the litmus test for the European states whether they are sincere in their human rights discourse.

Not less importantly, the EU is now constructing a cohesive immigration and asylum policy that will inevitably have implications in the region and on the world refugee protection regime. In the first phase, as the Union enlarges, the CEECs are also tried to be incorporated in this compulsive access prevention strategy. As the external borders of the EU expand so will the restrictive and exclusionary migration and asylum implementations eastwards. Actually the absence of the human rights perspective is well illustrated in this regard when looking at the content and attention paid by the Member States in assisting the CEECs. Because the assistance mainly is concentrated on the improvement of the capabilities to fight with illegal migration and human trafficking rather than securing fair and efficient asylum procedures. As a result of expansion of the borders of this exclusionary strategy, Fortress Europe will now be adjacent to the refugee producing countries that means that refoulment will be more likely than ever.

On the whole, this European refugee protection regime will have substantial effects on the entire refugee protection regime in the world. Because, Europe's leading role as the birth place of refugee protection regime makes it a model for the rest of the world. Therefore if Europe employs such a hostile approach towards the arrival of refugees and increasingly lowering its refugee protection standards, these implementations are likely to be followed soon in other parts of the world. Given these facts, instead of circumventing its refugee protection liabilities, European states by means of the EU asylum policy should reaffirm its global and moral leadership in refugee issues and enforce its solidarity with other regions in facing refugee problems.

On the other hand, Europe should also be aware that it is not the only one who has refugee pressures on its borders. There are approximately 17 million displaced people in the world and Europe host only 2,5 million of them.[170] So the main burden of the refugee protection is mainly on the shoulders of underdeveloped countries that have neither capacity nor much commitment to human rights. Considering that imbalance, EU, though having enough humanitarian impulse and capacity, tries to circumvent its part falls to their share. Based on these concerns, Europe shouldn't and cannot simply isolate or exempt itself from the refugee protection responsibility. Instead of shifting the burden on other regions, European states should bear their part in terms of refugee responsibilities just as other regions have been doing.

Moreover, it is ethically indefensible for Member States to promote human rights and condemn the other states for their bad human rights records at the same time while its own policies and measures are sometimes no better. Likewise they are on the hand trying to shirk their refugee protection responsibilities through access prevention measures, on the other expecting others to welcome these responsibilities though they lack substantial means to sustain such a commitment to refugee protection.

To conclude, while a common EU asylum policy is still some distance away, the emerging forms evidently indicates that it is unlikely to offer protection to those seeking it. Rather than offering protection to asylum seekers, deterring their arrival has been the overwhelming concern for the whole policy development. As a result, the message boils down for asylum seekers as "seek protection elsewhere". But how far EU's and Member States commitment to refugee protection and to human rights at all can be credible by hoping that protection seekers should seek protection wherever they can except within the EU borders?

With these ever tightening measures, it is more likely in the future that the Member States will let no person to seek protection in the EU. Think that, if there is

[170] UNHCR Statistics 2003, *"Table 1. Asylum-seekers, refugees and others of concern to UNHCR, end-2003"*
http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=STATISTICS&id=40d015fb4&page=statistics

no asylum seeker able to arrive to the EU territory then what is the point in having an asylum policy? These prevention measures by EU are rightly commented by many as a big challenge to the existence of refugee protection regime. This course of development will no doubt amount to the ending of asylum institution in Europe.

In the light of these concerns, it is an urgent necessity for EU Member States to review their humanitarian commitments honestly and according to that they should define again why asylum is relevant, if not essential, in their human rights commitment. A true commitment to human rights cannot be thought without an asylum aspect. Likewise a respectable and plausible asylum policy cannot be designed as based on preventing all the arrival of protection seekers but should at least guarantee the leeway, if not for all, for the people who really suffer protection. As the pioneers of humanitarian values and rights in the world and beyond as the originators of the refugee protection regime, Europe is expected to undertake a more responsible attitude towards the people who seek protection. Otherwise the main concern will not only be the EU's being in contradiction with its humanitarian commitments but the serious danger posed to the future existence of the refugee protection regime at all.

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