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# **International Refugee Law and the European Union's Refugee Protection Protocol: A Study on the Ius Cogens Norm of Non-Refoulement**

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# **International Refugee Law and the European Union's Refugee Protection Protocol: A Study on the Ius Cogens Norm of Non-Refoulement**

**Cintia Balogh**

## **Abstract**

International refugee law is binding upon all European Union member states, however European regional instruments, relocation theories and practices may diverge from the 1951 Geneva Convention and 1967 Protocol. This may lead to the violation of the ius cogens norm of the principle of non-refoulement. At the time of massive inflows of refugees from the Middle East - especially Syria - and Africa to the Schengen area, European hosting states are put under major pressure. Being signatories of the main refugee treaties, European states should avoid automatic repatriation of asylum seekers. In order to avoid such violations, it is necessary to incorporate the main Geneva articles into European national legal systems. Accordingly, the current paper is examining the legal background of non-refoulement and refugee protection and the discrepancies between the European Union and United Nations frameworks. The paper answers whether the European system is fully incorporating the ius cogens norm of non-refoulement into its protocol and practice.

**Key words:** asylum; international refugee law; principle of non-refoulement; United Nations High Commissioner for Refugees; intervention; amicus curiae briefs; safe country lists; safe third countries; chain relocation

**JEL classification:** F53, K4, K12, K33, K37

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## 1. Introduction

Refugee<sup>1</sup> and asylum debates have never been more significant within international affairs and international humanitarian cooperation, than they are today. At the end of 2013, three main crises reaching their peak at the same time, have put unprecedented pressure on the whole international community and also on the *United Nations High Commissioner for Refugees (UNHCR)*. The South-Sudanese, Syrian and Central-African refugee crises have caused a major budget boom for the organization. The flight of such great numbers of refugees has made protection protocols almost impossible to implement. As refugee situations cannot be duly solved and the number of refugees assisted by the UNHCR is approaching 39 million, a 5.8 million growth within one year,<sup>2</sup> it is essential to continuously discuss the subject of refuge and protection, and to ensure that non-refoulement in the hosting states is an active policy. Since the end of 2013, the ongoing inflow of Syrian asylum seekers to the Schengen area has already questioned the capacities and willingness of European Union member states to ensure non-refoulement. With the exception of Germany, EU member states are hosting less and less refugees who are fleeing from emergency situations. The pressure put on European countries by numerous unresolved and newly emerging refugee crises is greater than ever. The European Union is constantly challenged due to being the main target destination of asylum seekers from Africa and the Middle East. Intercontinental movements fortified by globalization are considered to be one of the complementary indicators of inflow besides humanitarian crises.

As a result, refugee protection and asylum policies have become essential parts of present European debates. The most important query regarding future European refugee issues is where the real focus will be concerning protection. Current European asylum principles and relocation theories definitely indicate divergence from international refugee law. The practice of the European Union, built on both international and regional principles and theories has already been found problematic by the *European Court of Human Rights (ECHR)*.<sup>3</sup> According to court judgements, the member states focus more on the strengthening of the four-tier border management system, than on the respect of the principle of non-refoulement. Two prominent

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<sup>1</sup>The paper is focused exclusively on refugee issues, not discussing the inflow of economic migrants. The differentiation between the two groups is based on the driving force of leave. While refugees are forced to leave their country because of some sort of persecution, economic migrants are seeking material benefits and have access to protection in their country of origin.

<sup>2</sup>UNHCR (2013) Global trends. In: *Mid-Year Trends - 2013*. Geneva, 19<sup>th</sup> of December.

<sup>3</sup>EUROPEAN COURT OF HUMAN RIGHTS (2011) *Case of M.S.S v. Belgium and Greece, Judgement*. Grand Chamber, Application no. 30696/09, Strasbourg, 21<sup>st</sup> January. and EUROPEAN COURT OF HUMAN RIGHTS (2012) *Case of Hirsi Jamaa and Others v. Italy, Judgement*. Grand Chamber, Application no. 27765/09, Strasbourg, 23<sup>rd</sup> February.

judgements should be especially highlighted. In the case of *M.S.S v. Belgium and Greece*, the violation of the ius cogens norm of non-refoulement and the lack of review of individual asylum applications has been identified by the ECHR as part of chain relocation practices. In the other case, *Hirsi Jamaa v. Italy*, the Court addressed not only non-refoulement, but also violations of basic SAR protocols and human rights.<sup>4</sup> In respect of these ECHR cases, the paper aims to discuss the theoretical and legal background of European refugee practices. The research is a comparative study on the main principles of international refugee law - United Nations framework and supervision - and European theories of refugee protection.

The paper is aiming to answer the following research questions: Do European asylum theories violate the principle of non-refoulement set by the 1951 Convention and the 1967 Protocol?<sup>5</sup> Can the United Nations act as an effective supervisor of states and protect the principle of non-refoulement?

The core element of the research paper is the violation of the ius cogens international law norm of the *principle of non-refoulement*. Ius cogens norms of international law are fundamental principles binding all nation states. Non-refoulement is considered part of these international norms, and ensures that asylum seekers are not automatically repatriated to states where they might face inhuman or degrading treatment.<sup>6</sup> The paper consists of four main chapters. The first segment focuses on the international framework of refugee protection, discussing the main United Nations rules which should be followed by European signing states. The following chapter describes the role of the UNHCR as controller, adviser, and supervisor through its Brussels Bureau and headquarters, and highlights the organization's lack of effectiveness in protecting its own international norms. Chapter four examines the main European principles and theories serving as the basis for member state practices which violate the principle of non-refoulement. Finally, chapter five discusses the practical side of European principles. Here, the description of chain relocation practice serves as an example of the implementation of European asylum theories and principles.

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<sup>4</sup>These protocols are obligatory for those countries responsible for the particular Search and Rescue Area. Main protocols violated in the *Hirsi Jamaa v. Italy* case: the need of disembarkation of refugee or other transportation ships; identification on land and to avoid automatic expel.

<sup>5</sup>UNHCR (1951) *Convention Relating to the Status of Refugees*. Geneva; UNHCR (1967) *Protocol Relating to the Status of Refugees*. New York.

<sup>6</sup>UNHCR (1951) *Convention Relating to the Status of Refugees*, Prohibition of Expulsion or Return ("Refoulement"). Chapter V., Article 33, Geneva.

## 2. International refugee law and United Nations principles of refugee protection

International law is the legal framework established by the practice of the states of the international community. The main aim of international law is to regulate actions between sovereign nations. Besides nations, international organizations and individuals can also be the subjects of international law, however, their international legal entity is functional and limited. Furthermore, international law also serves to reinforce the norms of international relations. Originally the group of sovereign states controlled and created the content of international law and its domains. Today the main sources of international law with binding force are treaties, and international bodies have jurisdiction in cases of violation. Here ad hoc and permanent international courts are distinguished, highlighting that the *United Nations General Assembly (UNGA)* is the only supranational actor which has a mandate to make recommendations for the improvement of international law and human rights.<sup>7</sup> As the most essential principle, throughout the ratification of international treaties, international law is binding upon its signatories. Thus, nation states must act according to the rules of the international agreements they are parties to. This order is called the *international legal system (ILS)*, which is mostly dominated by the United Nations. The United Nations is responsible for the acts of states according to the rules set by the ILS. The international legal system itself: “embraces rules that avoid or peaceably settle disputes among the states, while discouraging the alleged rules that would lead to greater friction or an escalation of the inter-state disputes”.<sup>8</sup>

Within the international legal system, refugee protection is mainly defined as part of public international law. International refugee law is a set of refugee and asylum norms and consists of both international treaties and customary law. The basis of international refugee law obligations is set by the United Nations High Commissioner’s *1951 Convention* and its complementary, *1967 Protocol Relating to the Status of Refugees*.<sup>9</sup> The majority of countries of the international community, including all European Union member states, have signed and ratified these refugee instruments and their acts should be followed accordingly. In some exceptional cases, states are parties to either the first or the second part of the treaty. This way, by partly ratifying the main instruments, these states have not fully adapted to the rules set by

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<sup>7</sup>UN (2014) *Functions and Powers of the General Assembly*. Available from: <http://www.un.org/en/ga/about/background.shtml> [Accessed 15/03/2014]

<sup>8</sup>D’AMATO, A. (2008) *Why is International Law Binding?*. Northwestern University School of Law Scholarly Commons, Faculty Working Papers, Paper 159.

<sup>9</sup>The 1951 Convention was originally created in response to the massive flow of European refugees after the World War II, but later on the 1967 Protocol has widen its field of operation both in time and space, setting the Convention on an internationally applicable level.

the United Nations and international refugee law. The fundamental purpose of the Convention and the Protocol is to provide an international framework for signing countries in asylum and refugee cases. The treaties were created according to three main cornerstones of refugee protection: firstly the explicit definition of refugees, strictly connected to the subject of recognizing refugees as those in need of protection; secondly, the principle of non-refoulement; and finally the treatment of accepted refugees by states. According to international refugee law, the hosting and protection of refugees is the common responsibility of the entire international community. Thus, all European states by signing international refugee and human rights treaties are declaring that they are willing to take action on asylum and refugee cases in emergency situations.

There are only a few cases defined in the 1951 Convention, where refugees are not entitled to receive protection:

1. The person has committed serious crimes, mainly against peace or humanity.
2. Very serious non-political crimes have been previously committed by the asylum-seeker.
3. The acts of the person were against basic United Nations regulations and/or principles.<sup>10</sup>

If these exceptions are not present, European - and other - contracting states are obliged to accept refugees and automatic refoulement is prohibited. Among the three cornerstones and all refugee protection principles, non-refoulement is indeed the most emphasized and most referred to. As an *ius cogens* norm, the proper national interpretation and application of non-refoulement is most essential within international refugee law. Therefore, the need for the discussion of the principle of non-refoulement cannot be over emphasized.

Alongside the 1951 Convention, numerous binding and non-binding, regional and international legal instruments focus on the issue of refoulement. As mentioned above, the 1951 Convention's articles have been composed in order to provide contracting states with harmonized rules and a clear description of their obligations regarding the treatment, protection, non-refoulement and recognition of refugees.<sup>11</sup> According to the Convention, the prohibition of "forced" return - *principle of non-refoulement* - lies in the precept that no contracting state may expel aliens from a safe country back to the state of origin "... where his life or freedom

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<sup>10</sup>UNHCR (1951) *Convention Relating to the Status of Refugees*. Chapter I., Article 1/F, Geneva.

<sup>11</sup>UNHCR (2001) International laws and standards. In: *Refugee Protection: A Guide to International Refugee Law*. Published by the Inter-Parliamentary Union with the UNHCR, pp. 8-10.

would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".<sup>12</sup> As complementary instruments, international, binding and non-binding United Nations treaties confirm the need to avoid in all circumstances, the automatic refoulement of refugees. Article 3 of the *United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) 1984*, prohibits the expulsion of refugees as "1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. ... 2. ... the competent authorities shall take into account all relevant considerations...".<sup>13</sup> UNCAT was one of the first treaties to highlight that refoulement cannot be carried out in cases where refugees may face possible torture in the countries of origin. Together with the *Universal Declaration of Human Rights (UDHR) 1948*, UNCAT forms the human rights basis for the United Nations and its refugee treaties.<sup>14</sup> These two human rights agreements serve not only as guidance, but also as complementary treaties to be followed in those areas where the Convention and the Protocol do not give precise reference. UNCAT as a binding international human rights treaty is focusing on refoulement in one of its first articles, reinforcing the main paragraphs of the Convention. This is especially important as many states are not signatories of both the Convention and the Protocol. In such cases the principle of non-refoulement, or the application of the treaties could be violated by these states. However, by being signatories of human rights instruments like the UNCAT or the UDHR, states are still obliged to act according to the refugee protocol set by the United Nations.<sup>15</sup>

International human rights law is also an aid in helping to cover all issues regarding refugees, which are not detailed or discussed in the main refugee treaties. From the right to asylum to the right to lodge an appeal against repatriation, refugees may refer to these binding international treaties when they face mistreatment by the contracting states. It is crucial that binding human rights treaties complement and support the United Nations treaties, so states understand their obligations better and have fewer chances to violate. It must be further clarified, that while non-refoulement is the most emphasized international refugee law notion,<sup>16</sup> it is also the most

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<sup>12</sup>UNHCR (1951) *Convention Relating to the Status of Refugees*, Prohibition of Expulsion or Return („Refoulement”). Chapter V., Article 33, Geneva.

<sup>13</sup>UN (1984) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Article 3, New York, 10<sup>th</sup> of December.

<sup>14</sup>MOLE, N. and MEREDITH, C. (2010) The applicability of the ECHR to asylum cases. In: *Asylum and the European Convention on Human Rights*. Human rights files, Council of Europe Publishing, No. 9., pp. 19.

<sup>15</sup>UNHCR (1995) How can international human rights law assist UNHCR in protecting refugees. In: *Human rights and refugee law protection (RLD 5)*. October.

<sup>16</sup>UNHCR (1951) *Convention Relating to the Status of Refugees*. Geneva.; UNHCR (1967) *Protocol Relating to the Status of Refugees*. New York. and UNHCR (2011) *Handbook on Procedures and Criteria for Determining*



violated one. Besides public international law, non-refoulement is also considered to be part of customary law, and so it must be followed by every single state of the world and not only signatories to the 1951 Convention and 1967 Protocol. Consequently, through binding international refugee law treaties, binding human rights treaties and customary law, all states are obliged to follow the basic rules of international refugee protection. States are especially expected to avoid the violation of the ius cogens norm of non-refoulement both in theory and practice.

### **3. Lacking effectiveness of United Nations regulations**

It has become clear from a very early stage of modern international relations, that the proper application of international law instruments must be ensured. In order to do so, effective international institutions had to be established. The UNHCR is one of these institutions, focused on international refugee law. It is the UNHCR's role to ensure that the main principles of refugee treaties are upheld in all signing states. In order to do so, the UNHCR monitors, advises and cooperates with states and, when necessary, also acts as a supervisor and intervenes in cases of violation. However, the mandate and tools of the United Nations are limited mostly to soft law. Therefore, ensuring that the acts and principles of the member states comply with non-refoulement is problematic and difficult. As has been discussed above, by ratifying the main refugee treaties, states have accepted the common responsibility to host and protect the world's refugees. These countries must also ensure the appropriate interpretation and application of the treaties. According to the 1951 Convention, 1967 Protocol and the 1979 Handbook, contracting states, so all member states of the European Union:

- are bound to cooperate with the organization;
- are monitored by the United Nations High Commissioner for Refugees;
- may turn to the United Nations for official advising.

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*Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.* HCR/IP/4/Eng/REV.1, Reedited, Geneva, 1979.

It is obligatory for all signatories to acknowledge all of the rules set by international refugee law treaties. This involves the incorporation of the main refugee protection principles into national systems and as mentioned before, cooperating with the UNHCR. International refugee treaties, at least the 1951 Convention, should be incorporated into domestic law and national asylum standards, strengthening the principle of non-refoulement. Nevertheless, European states have different rules regarding the incorporation of international law treaties. In the European Union, for example, France automatically incorporates international refugee law rules into its domestic law, while Germany requires further national legislation.<sup>17</sup> The implementation of the 1951 Convention and the 1967 Protocol is obligatory for all European contracting states, however the UNHCR does not have the mandate of the General Assembly to exert pressure on countries. European and other states are given the freedom by international law to implement these rules in their own ways. Sovereignty of nation states still forms the centre of international relations. This subjective way of incorporating international law is rooted in national sovereignty, and definitely undermines the supervisory power of the United Nations. Nevertheless, in many cases, the UNHCR has a great possibility to influence national authorities throughout its Brussels Bureau, regional offices in the fields or its headquarters placed in Europe.<sup>18</sup>

### ***Soft tools: cooperation, advising and monitoring***

The UNHCR is the only supranational observer of national authorities, refugee and asylum policies. Besides promoting national incorporation, the UNHCR, as an international organization set by the United Nations General Assembly, has the mandate to supervise the actions of signing states - all European states - regarding the application of the treaties. The supervisory mechanism of the organization is rooted in the same refugee agreements. With regard to the 1951 Convention, signing states are obliged to report to the organization and to cooperate with it, especially in the setup of its field refugee offices.<sup>19</sup> In Chapter VI., Article 35, the Convention declares that: “1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees ... shall in particular facilitate

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<sup>17</sup>LEWIS, C. (2012) Implementation of treaties in national law. In: *UNHCR and International Refugee Law: From Treaties to Innovation*. Routledge, Oxford, pp. 40-43.

<sup>18</sup>UNHCR Headquarters Geneva; UNHCR Global Service Centre Budapest.

<sup>19</sup>UNHCR (1995) How can international human rights law assist UNHCR in protecting refugees. In: *Human rights and refugee law protection (RLD 5)*. October.

its duty of supervising the application of the provisions of this Convention”.<sup>20</sup> Article 35 and Article 36 further discuss the obligation of contracting governments *to report to the organization* - explicitly to the Secretary-General - on the characteristics of their national refugee protection system. This may vary, reports can involve statistical data or researches on how and which regulations states integrated into their national regime from the Convention and Protocol. Unfortunately, like the entire Convention, the phrasing of Article 35 and 36 is uncertain, and not fully detailed. Even if the preferred areas of reporting are listed, the Convention does not describe the “whens” and “hows” in further detail. The article make it compulsory for the contracting states *to cooperate with the UNHCR* when it is in need of support. However, just as with reporting, the cooperation obligations of the states are not further expanded upon in the treaties.

The *1979 Handbook on Procedures and Criteria for Determining Refugee Status* was developed in relation to the two main treaties, and gives a framework for the implementation of the articles in the main contracts. However, it doesn’t outline the details for the implementation of cooperation for the signing parties.<sup>21</sup> Nevertheless, the handbook at least declares, that cooperation is indispensable in two main areas for the European Union. Firstly, in the case of determination of refugee status, and secondly regarding the organization’s supervisory functions.<sup>22</sup>

The incomplete wording of the Convention and Protocol allows European signatories to interpret the articles in a subjective and flexible way. Thus, while the United Nations expects a certain adherence to the main refugee law instruments, in reality it doesn’t provide the national governments with sufficient information regarding the accurate protocol. This may be problematic, especially when the UNHCR attempts to monitor the violation of non-refoulement. Nonetheless, it must be mentioned that through its *advisory functions* and its field offices, the organization is continuously guiding national systems in the right direction. As a practical example, European states are often supported by the field offices, or regional headquarters of the organization in the determination of refugee status. Hereby, European

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<sup>20</sup>UNHCR (1951) *Convention Relating to the Status of Refugees*, Co-operation of the National Authorities with the United Nations, Chapter VI., Article 35, Geneva.

<sup>21</sup>UNHCR (2011) Asylum and the treatment of refugees. In: *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. HCR/IP/4/Eng/REV.1, Reedited, Geneva, 1979.

<sup>22</sup>UNHCR (2011) Main provisions of the 1951 Convention and the 1967 Protocol. In: *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. HCR/IP/4/Eng/REV.1, Reedited, Geneva, 1979.

authorities are getting assistance in the examination of asylum claims. The UNHCR is acting as the main advisor at the first phase of refugee protection, the determination of refugee status. States may ask for assistance anytime, and the organization itself can *monitor* deportations and the applications of asylum seekers. Harmonizing European systems with the 1951 Convention is essential for the organization, as mistakes by hosting states at the phase of determination of refugee status may lead right to the violation of non-refoulement.<sup>23</sup> Through its advisory role, the UNHCR can at least ensure that national systems have been appropriately monitored and all refugees have been recognized and are not facing automatic repatriation. Avoiding the violation of Article 1 is essential for the organization,<sup>24</sup> and through its advisory function the UNHCR is able to protect this basic principle. The level of involvement of the organization in advising may vary in different contracting states, and in general states need to request further UNHCR assistance.<sup>25</sup>

It is a big challenge for the European Union itself to maintain an acceptable balance between refugee protection and control over immigration, and this may lead to the violation of international refugee law. It is the UNHCR's role to uphold this balance and also to raise its voice when member states may undermine the main principles of refugee protection, set by international refugee law. Unfortunately, the UNHCR's advisory function, monitoring and cooperation with states are soft tools. These supranational tools cannot ensure the proper application of the principle of non-refoulement or other international rules. However, The UNHCR does have the power to intervene if it adjudges a state to have violated the *ius cogens* norm of non refoulement.

### ***Intervention against the violation of non-refoulement***

In addition to its advisory role, the UNHCR has been established to also take action as a supervisor of refugee treaties as part of its effective power. The supervisory role of the organization is its most important tool to implement international refugee law. Without its

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<sup>23</sup>UNHCR (2001) Individual status determination. In: *Refugee Protection: A Guide to International Refugee Law*. Published by the Inter-Parliamentary Union with the UNHCR, pp. 47-51.

<sup>24</sup>Article 1 of the 1951 Refugee Convention consists of the paragraphs of the Definition of the term "refugee", where the treaty defines under which circumstances, which persons should be recognized by states as refugees.

<sup>25</sup>It should be highlighted that in practice, the UNHCR often acts without further request of the concerned states, as no other authority or international organization has the mandate or experience to do so. As an example, in emergency situations while the organization should act only after being asked - in order not to violate state sovereignty - it is obvious that the organization can take action immediately, as no other institution would.

supervisory function, it would be very problematic to ensure that contracting states truly apply, in both practice and legislation, the rules of the binding treaties they are parties to.

To further discuss the supervisory role of the UNHCR, it must be divided into four main areas. The protocol regarding the European Union's member states and other contracting states is built up as it follows:

1. Monitoring national refugee frameworks and collecting data regarding the acts of states, focusing especially on non-refoulement and the treatment of refugees.

This phase is executed throughout the organization's field offices and regional headquarters. Through its cooperation with national authorities, the UNHCR can be aware of the actual protocol of nation states, and has access to proper information. Here the qualifications of the UN staff working with national authorities is essential.<sup>26</sup>

2/a. Analyzing whether these acts and national rules comply with the set international refugee law standards.

At this crucial stage the UNHCR has the possibility to promote its own understanding of refugee instruments. This role is very subjective, providing the organization with freedom to decide which acts it considers as violations of main principles. It can of course be argued that the comparison of European Union asylum policies and United Nations standards is not a simple task. In general, signing states are left alone when it comes to the realization of the incorporated principles. Thus, the analysis of their various practices may be difficult. Nevertheless, as mentioned before, the misapplication of non-refoulement can be identified very clearly by the UNHCR. And as an *ius cogens* norm, non-refoulement is taken as a primary in this phase.

2/b. When a discrepancy from international refugee law is perceived, deciding whether or not there is a serious violation of the articles.

3. If a serious violation is perceived, the organization may take action.

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<sup>26</sup>TÜRK, V. (2002) *UNHCR's supervisory responsibility*. Department of International Protection - UNHCR, New Issues in Refugee Research. Working Paper No. 67., Geneva, October, pp. 12-16.

Intervention may take place in an informal way as *note verbale*, when a written report is sent, or in a more formal way when negotiations may be launched. In the latter case, UNHCR officials and governments or regional authorities discuss the violation at formal sessions. If necessary, the General Assembly can be also involved.<sup>27</sup> In the case of a violation of the principle of non-refoulement, the UNHCR has a mandate to also take action at court against the violating state or group of states. Here, the organization can initiate so-called *amicus curiae* *briefs*, in addition to policy recommendations and consultations. When the UNHCR is submitting *amicus curiae* briefs, the organization is present at the courts as a third party and consultant, gives non-binding statements and reaffirms its articles.<sup>28</sup> Hereby, the UNHCR has a chance to help the courts with the appropriate interpretation of its articles, in order to allow the court to produce well justified decision.<sup>29</sup> Even though these statements have non-binding powers, the organization has an opportunity to promote its own interpretation of the treaties. Still, *amicus curiae* briefs are considered as soft tools rather than actual intervention.

As discussed above, the UNHCR is endowed with soft powers through cooperation, monitoring and advising and it is also highly questionable how it can be considered an effective supervisor of international refugee law through its interventions. The organization has limited tools to facilitate cooperation with member states, monitoring actions and to intervene in cases of violation. Moreover, the UNHCR lacks actual hard tools of supervision. States established the organization, and the importance of their sovereignty is still at the core of international relations. Even if the UNHCR is capable of monitoring national protocols and determining violations, it is not able to intervene in an effective way. Its intervention is limited to the level of soft tools, launching negotiations with European government officials or submitting *amicus curiae* briefs at international courts. The United Nations currently has no hard tools to enforce its own refugee principles and nation states are free to incorporate international law in their own ways. The lack of actual consequences enables nation states to deviate from the articles of the Convention and Protocol and to interpret the principle of non-refoulement in a subjective way.

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<sup>27</sup>LEWIS, C. (2012) Work related to application. In: *UNHCR and International Refugee Law: From Treaties to Innovation*. Routledge, Oxford, pp. 46-48.

<sup>28</sup>GUILD, E. and MORENO-LAX, V. (2013) International obligations. In: *Current Challenges regarding the International Refugee Law, with focus on EU Policies and EU Co-operation with UNHCR*. CEPS, No. 59., September, pp. 4-5.

<sup>29</sup>TÜRK, V. (2013) *The UNHCR's role in supervising international protection standards in the context of its mandate*. In: SIMEON, J. C. (ed.) (2013) *The UNHCR and the Supervision of International Refugee Law*. Cambridge University Press, 1<sup>st</sup> ed., pp. 50-51.

#### 4. European theories forming the basis for violating practices

The European Union is ensured in three ways legally and in theory regarding refugee protection. Firstly, member states are all signatories of international refugee law treaties. These agreements are mainly incorporated through the *Qualification Directive (2011/95/EU)* of the European Union. Secondly, binding European human rights instruments are present as complementary contracts, also having a focus on non-refoulement and persecution. As a third element, besides legal documents, certain European refugee transfer theories contribute to the formation of member state practices violating the principle of non-refoulement.

##### *The European legal framework of refugee protection*

The Qualification Directive has been adopted in order to fulfil the requirements of Article 78 of the *Treaty on the Functioning of the European Union (TFEU)*. The article requests the establishment of a special policy, which represents the main principles of the 1951 Convention and the 1967 Protocol.<sup>30</sup> The directive contains the principle of non-refoulement, and also focuses on persecution, however the wording very much differs from the drafting of the 1951 Convention. Accordingly, the Qualification Directive in Article 9 describes the importance of protection/non-refoulement as:

“Acts of persecution within the meaning of Article 1a of the Geneva Convention must:

- (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights...; or
- (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual...”<sup>31</sup>

The directive basically attempts to qualify how severe present circumstances need to be in order to consider persecution real and provide protection. If persecution is perceived by European member states as not “sufficiently serious”, refugees may be refouled automatically. The protocol of member states is based on both the *acquis* built by the Union and national practices.

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<sup>30</sup>EUROPEAN COURT OF HUMAN RIGHTS and FRA (2013) *Handbook on European law relating to asylum, borders and immigration*. Luxembourg: Publications Office of the European Union, June, pp. 61-69.

<sup>31</sup>EUROPEAN PARLIAMENT and EUROPEAN COUNCIL (2011) *Acts of persecution*. In: *Qualification Directive (2011/95/EU)*. Official Journal of the European Union, Chapter III., Article 9, 13<sup>th</sup> of December.

Thus, restrictive legal measures on the common level definitely have a negative effect on the way national authorities are applying the principle of non-refoulement. The wording “accumulation of various measures” again indicates that the directive is more focused on defining criteria, than focusing on the need of protection. In contrast, according to the 1951 Convention and the United Nations, protection must be provided regardless, even if there is only a fear of “possible” persecution in the country of origin.

Further problematic issues with the European legal framework, especially with common approaches arose from the Union itself. In its 2011 communication, the European Commission has emphasized that the European Union’s reformed, new *Global Approach to Migration and Mobility (GAMM)* should be more focused on the needs of refugees and international refugee protocols and standards. The Commission has highlighted, that with the European framework being very control-oriented, it is not compatible with the main international refugee law instruments the member states are parties to. As the Communication frames: “The GAMM should be migrant-centred”.<sup>32</sup>

Indeed, the European protocol should be more focused on the need of protection and the humanitarian dimension of asylum in order to better comply with international standards. The communication also points out, that the European framework of refugee protection lacks the external dimension. In other words the European Union, apart from its surveillance activities, has not extended its protection to the international waters around its borders. As the European Union is not in favour of the externalization of its protection,<sup>33</sup> refugees do not have access to safety if they have not reached the borders of the member states. Thus, if they do not meet the set criteria, refugees are not provided with the appropriate protection. This protocol cannot even be compared to the set rules of the 1951 Convention and the 1967 Protocol regarding acceptance and protection.

The *2009 Stockholm Programme* already had a main focus on the externalization of asylum, and also called for a common European policy besides the legal framework. This common approach of refugee protocol was named the *Common European Asylum System (CEAS)*. The

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<sup>32</sup>EUROPEAN COMMISSION (2011) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. The Global Approach to Migration and Mobility*, SEC (2011) 1353 final, Brussels, 18<sup>th</sup> of November.

<sup>33</sup>As the European Union is not an international humanitarian organization, like the UNHCR, it is problematic how much responsibility the member states and the Union have in protecting those refugees who haven’t reached their borders yet. Still, the number of deaths of asylum seekers in international waters close to EU borders indicate that externalization would be indeed necessary.



finishing of CEAS was proposed to be set by the programme by 2012, however the second phase of the system is still not finalized.<sup>34</sup> The CEAS<sup>35</sup> of course would make a difference only if the basis of it is more protection-oriented, rather than simply setting a common base for all member states which now on a joint level, but still follows the previous principles of the European Union.

For further discussion of the European legal framework, two main European human rights instruments should be highlighted regarding refugees' rights and dignity, refoulement and inhuman treatment. These European, regional human rights treaties do not officially reflect the exact and full international refugee law approach towards refuge. The first instrument is the *European Convention on Human Rights (ECHR)*, signed in 1950. The Convention highlights, that refugees may not be refouled from the territory of a state if they face torture or inhuman treatment. The only exception, supporting refoulement appears when: "An alien may be expelled before the exercise of his rights ... when such expulsion is necessary in the interest of public order or is grounded on reasons of national security".<sup>36</sup> As the ECHR is primarily a human rights treaty, it can be easily recognized that the agreement deals with asylum only as a periphery, complementary issue. Thus, the ECHR cannot be considered a fully protective legal instrument for asylum seekers moving towards Europe, neither can it be taken seriously on an international level by the UNHCR. Looking at the cases which have been connected to the ECHR, it is clear that European Union member states require *certainty* of persecution in the country of origin in order to avoid refoulement. In other words, ECHR's Article 3 focusing on the prohibition of torture applies only if there is proof of persecution with the return of the refugee.<sup>37</sup> Within the treaty, qualifications are connected to the implementation of articles and principles.

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<sup>34</sup>UCARER, E. M. (2013) *The Area of Freedom, Security and Justice*. In: CINI, M. and BORRAGAN, N. P. S. (2013) *European Union Politics*. Oxford University Press, 4<sup>th</sup> ed., pp. 290-291.

<sup>35</sup>The Common European Asylum System's main purpose is to set a common basis for all member states regarding refugee protection. This way the minimum of protection would be enabled in the whole Union. The common approach is the European Union's attempt at harmonization. Still, it is not highly focused on implementing more UNHCR protocols or international refugee law standards into the European framework.

See: EUROPEAN COMMISSION, Home Affairs (www) *Common European Asylum System*. Available from: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm) [Accessed 2/06/2014]

<sup>36</sup>COUNCIL OF EUROPE (1950) *European Convention on Human Rights*. Protocol No. 7., Article 1/2., Strasbourg, 22.XI.1984.

<sup>37</sup>EUROPEAN COURT OF HUMAN RIGHTS and FRA (2013) *Handbook on European law relating to asylum, borders and immigration*. Luxembourg: Publications Office of the European Union, June, pp. 67-68.

The other main European regional instrument to be discussed is the *EU Charter of Fundamental Rights*. The charter deals with refugee issues in Articles 18 and 19. The two short paragraphs reaffirm that the European Union should provide protection to refugees, according to the 1951 Convention and the 1967 Protocol. The treaty further defines refugee protection by prohibiting collective expulsion and refoulement where there is a “... serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”.<sup>38</sup> Again, the EU Charter of Fundamental Rights, just like the ECHR specifies refuge and refoulement only as a sub-segment of one of its chapters. The wording of the charter is again specific, indicating that the level of risk of persecution should comply with set criteria. Just like in the case of the ECHR, the charter also cannot be considered as a full regional refugee instrument, as refoulement and persecution are not discussed in detail. The treaty rather focuses on human dignity. However, it must be considered as an addition, compared to the ECHR, that the charter mentions that the European Community should apply its rules in respect to the UNHCR instruments. Moreover, EU member states are requested to respect all articles of the charter when incorporating special EU policies, both horizontal and vertical.

Based on the above, it can be stated that the Qualification Directive, the GAMM and the two European human rights treaties, which involve refugee protection, do not provide accurate protection or even a detailed description of protection. Thus, these instruments cannot be used as an effective legal framework for refugee protection. The human rights treaties at least reaffirm the 1951 Convention and the 1967 Protocol as contracts to be followed by all member states of the European Union. However, as a contradiction, both treaties also highlight that persecution should be connected to a certain level of risk. Therefore, the two regional European instruments are expressing, that while the member states are bound by international refugee law, some serious qualifications should be applied in order to apply the principle of non-refoulement.

It is evident, that there is a huge gap between the European Unions’ and the United Nations’ legal interpretation of persecution, protection and non-refoulement. Unfortunately, during the European harmonization process, the UNHCR faced major disadvantages and the organization and its European headquarter were not considered as a serious partner.<sup>39</sup> Also, European

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<sup>38</sup>EUROPEAN PARLIAMENT, COUNCIL OF MINISTERS AND EUROPEAN COMMISSION (2000) *Charter of Fundamental Rights of the European Union*. Official Journal of the European Communities, 2000/C 364/01, Chapter II., Article 19, December.

<sup>39</sup>The advisory role of the UNHCR is seriously eliminated within the European Union, even though it has a special Bureau for Europe in Brussels. The office is responsible to provide the Union with advice on refugee issues and

regional instruments have played a much more significant role than the international treaties.<sup>40</sup> Though the UNHCR's role is eliminated, European states are trusted by the organization to rely on both international refugee treaties, and regional European human rights treaties, such as the European Convention on Human Rights and the EU Charter of Fundamental Rights.

### *Safe country lists*

As part of European asylum theories: safe country lists, first safe countries and safe third country notions are discussed as protocols leading to the formation of such European practices which are violating the principle of non-refoulement. So-called *safe countries* are considered by the European Union member states and in principle, as states where the level of persecution is very low and where to refugees can be expelled automatically. Generally these are very clear cases with fast procedures, carried out in an accelerated way by the national authorities. In order to expel automatically in cases like this, member states of the European Union first needed to clarify which countries they considered as 'safe'. In other words European states had to define - in a subjective way, obviously - which countries of origin are considered by them as free of 'serious' persecution. If an application arrives from a safe country, the authorities can immediately send refugees back to their home country. The main problem with these protocols is that the system fails to review individual cases.<sup>41</sup> Even though a country is considered 'secure' or 'safe' as emergency situations are not present, is politically and economically stable, persecution cannot and should not be excluded. So we should raise the question: Are these countries really safe enough to be sent back to?

The official lists which are consisting of the names of safe countries may be seriously harmful to the principle of non-refoulement and international refugee law itself. According to the above mentioned, the protection of refugees is the common responsibility of states and they should investigate asylum applications one by one, individually. Even if a certain country is considered to be secure, individual cases should be reviewed and automatic refoulement should be avoided. Refugees in all cases should be treated like individuals and not only as members of a group arriving from safe or unsafe countries. As the most evident protocol, the determination of

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the implementation of international refugee treaties. In: MOLE, N. and MEREDITH, C. (2010) *The Asylum and the European Convention on Human Rights*. Human rights files, Council of Europe Publishing, No. 9., pp. 4-5.

<sup>40</sup>LEWIS, C. (2012) Work related to application. In: *UNHCR and International Refugee Law: From Treaties to Innovation*. Routledge, Oxford, pp. 48.

<sup>41</sup>MOLE, N. and MEREDITH, C. (2010) The role of the ECHR in the protection from expulsion to face human rights abuses. In: *Asylum and the European Convention on Human Rights*. Human rights files, Council of Europe Publishing, No. 9., pp. 72.

refugee status in all hosting states should be highly circumspective according to Article 1 of the 1951 Refugee Convention. Unfortunately, safe country lists of the member states differ from each other as this is decided on a national level. For instance, as of 2004, Germany and France considered Ghana as a safe country, while the Nordic countries like Finland and Sweden, and the European Commission itself, not.<sup>42</sup> Highly developed Western states and member states are treated as 'safe' by the Union. The absence of persecution is based on the assumption that economic and political stability and democracy excludes all kinds of inhuman and degrading treatment.<sup>43</sup> In the case of African and other developing states, it is questionable whether these can be considered as places where refugees can be expelled to without risk and without review of individual cases.

Another list, the 2013 official safe country list of Belgium consists of the following states outside of the European Union: Albania, Bosnia and Herzegovina, India, Kosovo, Macedonia, Montenegro and Serbia.<sup>44</sup> Here, Belgium does not count any African or undeveloped states among safe countries, however refoulement to India could be problematic. It is questionable how exactly different member states identify 'safe' and how much the determination is subjective, or based on economic and political stability. It is difficult not to consider that the safe country theory can be a good opportunity for states to influence the inflow of refugees from certain unwanted areas.

For the United Nations, the most important concern regarding the concept of safe country lists is that throughout its research on the practice of member states, it has found the basis of qualification vague. Even if in general, the United Nations does not consider the practice of returning refugees to safe countries as strictly contravening international refugee law, the theoretic background of this European protocol is still problematic.<sup>45</sup> European states are individually and subjectively defining which circumstances need to be present in a certain

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<sup>42</sup>STATEWATCH (www) *EU divided over list of „safe countries of origin” – Statewatch calls for the list to be scrapped*. Available from: <http://www.statewatch.org/news/2004/sep/safe-countries.pdf> [Accessed 18/06/2014]

<sup>43</sup>It is questionable, regarding the review of individual cases, if any of the states of the world can be treated as 'safe', and if economic and political stability exclude all sorts of persecution. Possibly, not. However, this issue may go beyond the scope of the paper, as here primarily the Dublin system should be examined.

<sup>44</sup>EUROPEAN DATABASE OF ASYLUM LAW (www) *Belgium: Constitutional Court partially annuls the Belgian law that restricted appeal rights of asylum seekers from 'safe countries of origin'*. Available from: <http://www.asylumlawdatabase.eu/en/content/belgium-constitutional-court-partially-annuls-belgian-law-restricted-appeal-rights-asylum> [Accessed 18/06/2014]

<sup>45</sup>REFWORLD (www) *Section 13: The safe country of origin concept*. Available from: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=4bab55ea2> [Accessed 18/06/2014]

country, for the country to be considered as a country free of torture, inhuman and degrading treatment. In this way, states are connecting persecution to a system of set criteria.

### *The notion of safe third countries*

It was the *Dublin II Regulation (EC) 343/2003* which provided the legal basis for the practical application of the notion of *safe third countries* within the European Union. Article 19 of the convention sets out the criteria for the transfer of refugees from one member state to another. Paragraph 3 of Article 19 highlights that the correct national law to be applied to the transfer should be that of the first safe country, and Paragraph 4 highlights that the transfer should be carried out within six or in exceptional cases twelve months. Otherwise the first safe country is responsible to take over the responsibility from the second safe country.<sup>46</sup> This timeframe criteria is also part of the chain relocation practices, discussed below in chapter five.

In 2003, the Dublin system established the theoretic framework of member state cooperation regarding the transportation of refugees. This regulation is considered the official European framework of safe third country practice. The Dublin system has led to cooperation between member states which forms the basis of relocation, chain relocation and transfers among states.

The Dublin system was established to fulfil two main criteria:

1. 'asylum shopping' is restricted, so one refugee cannot submit numerous applications within the area of the European Union;
2. 'refugees in orbit' is enabled, so asylum seekers have access to protection in at least one of the member states of the European Union.<sup>47</sup>

The notion of safe third countries plays a very important role within the European refugee protocol. This restrictive measure originated in the 1980s and still has an essential role within the European theoretic framework. Not every member state applies this particular protocol, however, it is still considered to be a main tool when it comes to cooperation between European Union states regarding the transportation of refugees.

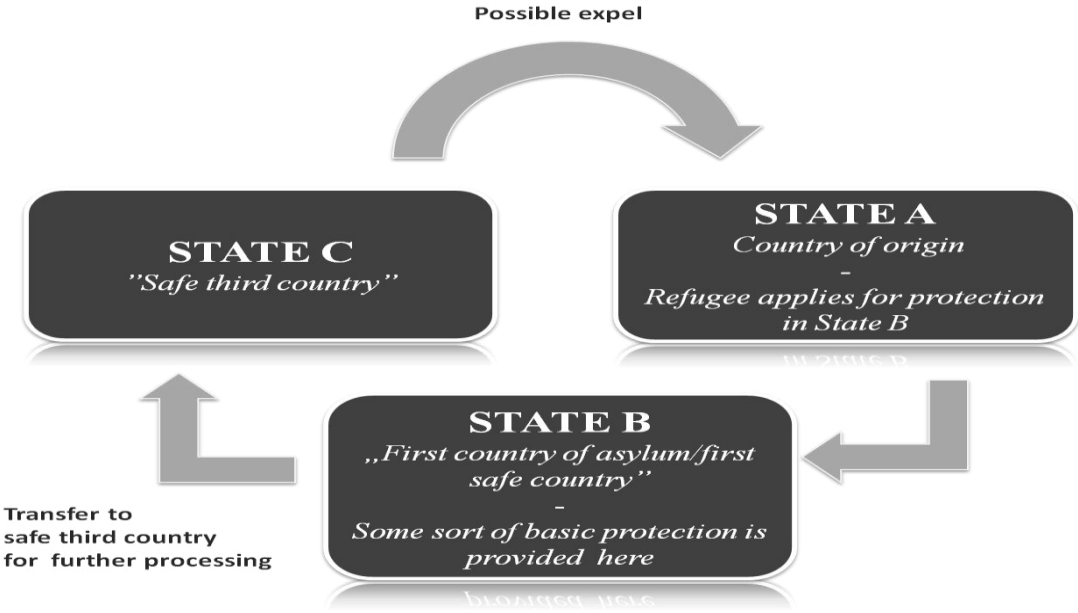
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<sup>46</sup>EUROPEAN COUNCIL (2003) *Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*. Official Journal, OJ L 50.

<sup>47</sup>KAUNERT, C. and LEONARD, S. (2011) *The European Union and Refugees: Towards More Restrictive Asylum Policies in the European Union?*. Universitat Pompeu Fabra, GRITIM Working Paper Series, No. 8, Summer, pp. 8-11.

When applying for asylum in a European Union member state or any other country, refugees should arrive there, according to Article 31 of the Refugee Convention “without delay”. This is a very essential term. The wording “without delay”, can be interpreted in different ways and subjectively, in similarity to many phrases within the 1951 Convention and the 1967 Protocol. Still, the most natural interpretation of the wording is that refugees shouldn’t spend longer time in other safe countries before they reach the state which may provide them with protection. The only issue regarding Article 31 is that relying on the notion of ‘first safe country’ is seriously challenging international refugee law. Looking at the graph below, the European theory of transporting refugees to safe third countries can be seen.

**Graph 1. Transfer of refugees, according to the ‘safe third country’ notion in theory**



Own depiction<sup>48</sup>

The concept of safe third country based on the Dublin system is built up as follows. The refugee is fleeing State A, his country of origin, where he is persecuted. State B is either a country outside the European Union, or a cooperating member state. It is essential to note that in theory, basic protection is already provided in State B, the first country of asylum. When the refugee applies for asylum in State B, he is transferred to State C as member states through cooperation

<sup>48</sup>Graph representing how refugees are being transferred from one safe country to another and then expelled back to their country of origin, where from they have been applying for protection. See: UNHCR (2001) *Background paper no. 2: The application of the ‘safe third country’ notion and its impact on the management of flows and on the protection of refugees*. V.2.4.4.3, May.

decide which state would be the most appropriate to accept and protect the refugee. The most important query here is that many member states - State C - presuppose that the principle of “*first safe country*” is present in this case.<sup>49</sup> The first safe country principle implies that the refugee should reach the state without delay, where he or she receives protection. As the refugee reached State C with delay, the ‘safe third country’ may not have full responsibility for the asylum seeker. A further element is that transported refugees, when the safe third country is outside the European Union, many times do not receive adequate reviewing and thus accumulated circumstances mean that from State C the refugee ends up being refouled into State A, the country of origin and persecution. State C, on the graph is represented as the safe third country where the refugee is transported to and *possibly* would be expelled from back to his country of origin.

For the United Nations, the most challenging issue regarding the concept of transferring refugees from one European Union state to another is that protection must be provided *somewhere*, while the discussed safe third country principle is providing protection *elsewhere*. And these two notions are not perfectly compatible or synonyms. The UNHCR’s point of view is that: “... an asylum seeker cannot be removed to a third country in order for him to apply for asylum there, unless that country agrees to admit him to its territory as an asylum seeker and consider his request”.<sup>50</sup> Thus, again the UNHCR does not explicitly prohibit the practice of transporting to safe third countries. However, it highlights that State C should consider reviewing the application of the individual. Therefore, immediate expulsion should be avoided and safe third country theories of the European Union are truly problematic.

## **5. An example of implementation of European theories: chain relocation practices**

Defining chain relocation in detail is part of the paper as an example of European theories which can be described only by examining actual cases which have been presented at an international court and have been found to be violations of non-refoulement and international refugee law. Chain relocation is represented in this chapter as a unique European asylum theory which can only be described through analysing actual member state practice. *Relocation* is a very common

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<sup>49</sup>LAMBERT, H. (2012) ‘*Safe third country*’ in the European Union: An evolving concept in international law and implications for the UK. *Journal of Immigration, Asylum and Nationality Law*, 26 (4) 2012, pp. 318-336.

<sup>50</sup>MOLE, N. and MEREDITH, C. (2010) The role of the ECHR in the protection from expulsion to face human rights abuses. In: *Asylum and the European Convention on Human Rights*. Human rights files, Council of Europe Publishing, No. 9., pp. 73.

practice,<sup>51</sup> mainly based on cooperation between member states and is strictly connected to the notion of safe third countries. Even though it may seem easy to understand the reasons behind this practice, the issue is more complicated. Relocation is not exclusively carried out in order to expel refugees automatically from the area of the European Union. Nevertheless, requesting the relocation of refugees from one country to another can result in member states neglecting their international responsibilities. Smaller European member states, not having regional UNHCR offices or serious field offices naturally have less developed asylum systems, in comparison to leading European member states. These smaller states are basically using relocation to send refugees to other European states, where protection chains<sup>52</sup> are more improved. Thus, if a member state is unable to handle a certain number of refugees in exceptional times, for instance in an emergency situation another economically more developed member state may take over the responsibility.

The UNHCR's general opinion on the direct effects of relocation theories can be found in an official interview with an officer: "... where relocation of refugees has taken place within the EU ... once relocation has happened, it might be difficult for a member state even if it appreciates the assistance and solidarity shown, to invest in its systems and capacities, rather than to expect relocation".<sup>53</sup> Evidently, the transfer from smaller to bigger European countries is often logical, however as the UNHCR officer has pointed out, this practice means the transporting countries are not going to be involved in refugee issues on a higher level, not to mention the further pressure put on developed Western European countries which are already the main destinations of refugee flows. Unfortunately, abuse of relocation practice is not too difficult as smaller states may not be required to further explain the reasons behind asking for the relocation of groups of refugees. To further understand the issue of relocation, one of the outstanding cases before the court should be examined. It is essential to analyse an actual case in order to understand the logic of this protocol of member state cooperation. Regarding chain relocation practices the paper reviews the case of *M.S.S. v. Belgium and Greece*, which was

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<sup>51</sup>*Relocation* in this sense doesn't refer in any terms to the concept of internal displacement or internally displaced persons (IDPs).

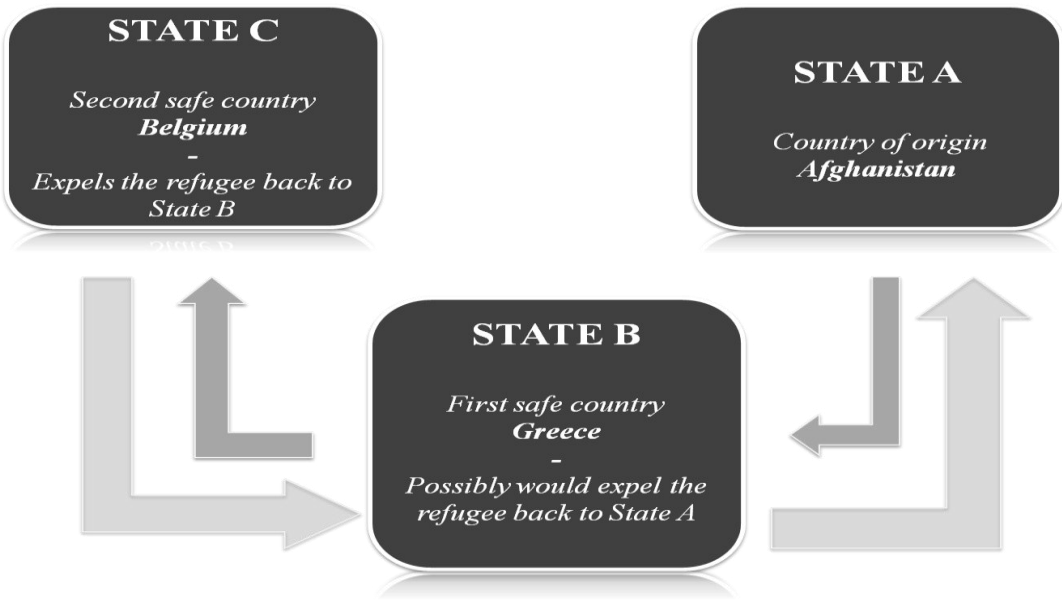
<sup>52</sup>Protection here is not considered as strictly legal protection, so that the state respects the principle of non-refoulement. But rather the capability of providing the refugees with material support and safety through refugee camps and webs of procurement. Evidently, there are major differences between small and big member states' financial resources regarding refugee protection.

<sup>53</sup>EUROPEAN PARLIAMENT (2011) 3.4. *Asylum and protection*. In: The implementation of Article 80 TFEU on the Principle of Solidarity and Fair Sharing of Responsibility, including its Financial Implications, between the Member States in the field of Border Checks, Asylum and Immigration. Directorate-General for Internal Policies, Policy Department – Citizen's rights and constitutional affairs, Brussels, April, pp. 94-95.



discussed before the European Court of Human Rights in Strasbourg in 2011, and has created a precedent. Looking at Graph 2 below, the graphic representation of the case can be seen.

**Graph 2. Transfer and chain relocation according to the case of M.S.S. v. Belgium and Greece**



*Own depiction*<sup>54</sup>

Mr M.S.S., an Iranian asylum seeker arrived in Greece in 2008, and was kept there for a week, and his biometric data logged into the *Schengen Information System (SIS)*. He didn't apply for asylum here, in the first safe country, where some sort of protection was provided for him already. When he left Greece, through France, he has reached Belgium at the beginning of 2009, where he has applied - without having official identification documents - for asylum. Applying the concept of first safe country, which was already discussed as not forming a real part of international law, Belgium attempted to expel Mr M.S.S. back to Greece, so to State B. From Greece, he most possibly would have been refouled back to his country of origin, State A. Mr. M.S.S. turned to the ECHR in fear of not getting appropriate protection in Greece and being deported back to State A, Afghanistan.

<sup>54</sup>EUROPEAN COURT OF HUMAN RIGHTS (2011) *Case of M.S.S. v. Belgium and Greece, Judgement*. Grand Chamber, Application no. 30696/09, Strasbourg, 21st of January, pp. 88-90.

The court has made its decision as: "... there has been a violation by Belgium of Article 3<sup>55</sup> by sending him back to Greece, the Belgian authorities exposed the applicant to risks linked to the deficiencies in the asylum procedure in that State".<sup>56</sup> Thus, Belgium was found deficient for sending the applicant back to Greece, not reviewing which exact conditions were present there, and for only presupposing that the refugee would not be expelled back to State A. The ECHR has built the decision mainly on the vulnerability of the refugee, as Mr M.S.S. being an asylum seeker would have had very limited opportunities in the case of expulsion from Greece.

The case is actually a mixture of safe third country transport and chain relocation protocols. Greece allowed the refugee to leave for Belgium, but Belgium did not automatically expel the refugee, but rather wanted to transport him back to the first safe country which then later possibly would have refouled him back to Afghanistan. The Court highlighted at many points, that the member states are parties to both the 1951 Refugee Convention and the Qualification Directive (2011/95/EU) which incorporates its articles into the *acquis*, and so member states are obliged to respect the principle of non-refoulement. Even if the violation of international refugee law was not part of the judgement, its complementary European instrument was. The court in its judgement underlined, that by merely assuming that through cooperation, State B may not expel the refugee is not appropriate or sufficient. The practice of the state must be examined. Especially in the case of Greece, as it is heavily emphasized in the literature that this country continuously fails to review individual applications of refugees and many times expels them automatically. Chain relocation is another example of the violation of non-refoulement, with the exception that this practice is considered as a pure violation of the rules. In the case of safe country lists and safe third country theories the United Nations has highlighted the practical possibilities of violation, though the European theories themselves are not strictly prohibited.

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<sup>55</sup>Article 3 of the European Convention on Human Rights consists of: "Prohibition of torture; *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*"

<sup>56</sup>EUROPEAN COURT OF HUMAN RIGHTS (2011) Judgement, 10. In: *Case of M.S.S. v. Belgium and Greece, Judgement*. Grand Chamber, Application no. 30696/09, Strasbourg, 21st of January, pp. 88-90.

## 6. Conclusion

The paper purposed to compare international refugee law and United Nations principles of refugee protection with relocation theories and practices of the European Union and its member states. The paper has focused especially on the European violations of the principle of non-refoulement, in theory. The research has attempted to answer two main questions.

*Do European asylum theories violate the principle of non-refoulement set by the 1951 Convention and the 1967 Protocol?*

Main international refugee law instruments, and other European human rights contracts focusing on refugee issues are obligatory to follow for all European signing countries. Unfortunately, the European Union and its member states have only partially incorporated the main principles of the 1951 Convention and the 1967 Protocol. Therefore, nation states are free to apply the incorporated international treaties into domestic law in their own ways, as the mandate of the United Nations is limited. Through the establishment of the European refugee protection framework, the UNHCR had only a complementary position, and member states have implemented their own protocols. In addition, European human rights contracts cannot be considered as part of refugee instruments because of limited focus and qualifications connected to protection. This background has already indicated the possibility of a violation of international refugee principles.

In the research, the Dublin system, safe country lists, the concept of safe third countries and chain relocation of refugees among member states have been questioned regarding their compatibility with main international legal principles. The main problematic issue for the United Nations and the European Court of Human Rights is, that identifying violations of the principle of non-refoulement is a difficult task. Concerning safe country and safe third country protocols of the European Union, the UNHCR itself did not explicitly prohibit the possibility of transferring refugees throughout cooperation between states. However, the organization has highlighted that in practice refugee cases should be reviewed individually. Furthermore automatic expulsion of refugees within any European protocol is considered a violation of non-refoulement. Yet in theory these notions cannot be considered to be *strictly* violating the principle of non-refoulement. The theoretic background of chain relocation, described throughout ECHR judgement and previous practice has been more problematic. The court decision has noted the violation of non-refoulement when expulsion to the country of origin has

occurred, and this European cooperation may represent the main divergence from international refugee law and should be avoided. Thus, it must be noted that European theories may not fully violate the *ius cogens* norm of the principle of non-refoulement. Though the United Nations is aware of the fact that these theories can serve as a strong base for violating practices.

*Can the United Nations act as an effective supervisor of states and protect the principle of non-refoulement?*

As an important matter, that also had to be determined in the paper whether sanctions can be initiated by the UNHCR's side once throughout monitoring, it is determined that the *ius cogens* rule of the principle of non-refoulement has been violated. Once a violation is identified, the international organization throughout its supervisory role may launch negotiations with governments of the European states and issue *amicus curiae* briefs to support court decisions. These acts are considered as part of intervention, however as hard tools are not present, the protection of the principle of non-refoulement is questioned in the first place. Regarding the identification of violations of non-refoulement, it is unclear whether the UNHCR considers the European theoretic framework a pure violation or simply an acceptable discrepancy which enroots in the individual application of international rules. The United Nations definitely lacks supranational tools in intervening in cases of violation of its rules and this fact undermines the importance of the principles themselves. Furthermore the willingness of the European Union to cooperate with the UNHCR and supervisory protocols seems to be limited.

To conclude, European relocation theories like safe country lists, the notion of first safe country and safe third country transfers may undermine parts of international refugee law. In practice, these European theories can lead to the violation of the *ius cogens* norm of non-refoulement. Through chain relocation, non-refoulement is not duly applied in the European Union both in practice and in theory. Furthermore, the United Nations itself is not endowed with hard tools to protect its own refugee protocols and principles. The European Union and United Nations frameworks have major discrepancies. In order to fulfil its international refugee law obligations, it is crucial for the European Union to find a balance between international principles and European theories of refugee transfer.

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