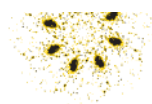


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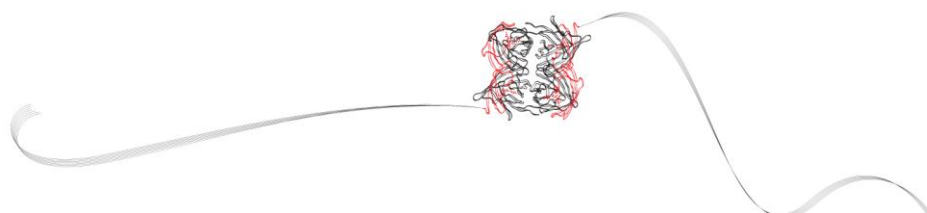
Human Rights Protection Regimes in European Union Asylum Law

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Abbreviations

AFSJ – Area of Freedom, Security and Justice

AG – Advocate General

CFR – European Union Charter of Fundamental Rights

ECHR – European Convention on Human Rights

EcoHR – European Court of Human Rights

ECJ – European Court of Justice

EU – European Union

TEU – Treaty on the European Union

TFEU – Treaty on the Functioning of the European Union

UNHCR – United Nations High Commissioner for Refugees

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1) Introduction

1.1) Problem statement

Asylum law and human rights are intrinsically interlinked. Asylum seekers are fleeing a dangerous situation in their country of origin, as for example war, civil war or oppression of minorities. If national law would be the only legal protection, asylum seekers would not enjoy any kind of protection anymore and might even be prosecuted in their country of origin. Therefore international law becomes of primary importance for asylum seekers.

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When looking at the codified framework establishing EU asylum law, EU member states have to bear attention to a 'triple layer of protection [...] in their national asylum system'¹. Together with the top layer, being constituted of international legal instruments such as the European Convention on Human Rights and the 1951 Refugee Convention, an EU member state also must pay attention to European Union primary and EU secondary law in this regard, representing the middle and bottom layer, according to Lieven. Besides the EU primary and secondary law system, a member state must in addition pay attention to its own constitution². With the entry into force of the Charter of Fundamental Rights, the EU established a new legal instrument therefore further complicating the system of protection of fundamental rights in Europe. In this light, also Article 52 (3) of the CFR, a provision that includes the principles and rights of the ECHR, and Article 6 (2) in the Treaty on the European Union, which is providing for an accession of the EU to the ECHR, make the system of human rights protection in asylum law more complex. Not only do individuals need to see where exactly their rights lie, but the European Court of Justice itself is bound to take into consideration and apply these provisions in the exercise of its. The purpose of this study then is to analyze the impact of these provisions on the decisions of the ECJ.

To this end, the study will investigate the current situation of the system of protection of fundamental rights in the field of EU asylum law. It will analyze the current legislative framework of asylum law in the European Union, being built from secondary legislation on European Union level and from three human rights protection regimes of primary importance. In order to show to what extent the respective protection regimes are reflected in EU jurisprudence on EU asylum law, there will be a two-fold approach in the analysis.

First, an analysis of post-Lisbon case law in the field of EU asylum law will be conducted. There are eight cases that can be used to show whether the EU system can be considered a complete system of protection for asylum seekers not only from a formal perspective but also de facto. In this light, completeness would mean that the ECJ tends to use the provisions of the newly established EU Charter of Fundamental Rights, as a complementary means to the provisions of international but older legal instruments now³. To this end the roles of the respective legal instruments for EU asylum law will be examined. Secondly, the analysis that follows will compare the application of asylum law by the ECJ with the protection of the rights of asylum seekers guaranteed by the ECHR on the basis of the ECHR. As the ECHR system provides for a court and the EU member states are contracting parties to the ECHR and are therefore subject to the jurisdiction of that court, two courts have the potential to influence and assess the behavior of EU member states in the field of asylum law. Due to the fact that member states are tasked with the implementation of measures, it is important to see whether there is a clear line that they can follow. In order to shed light onto this complex framework then, the study will focus on case law showing the relationship with the ECHR. Here it will be seen whether the ECJ and the ECoHR harmonize in their approaches or whether there is potential for conflict. To this end, the study will contrast similar case law of the ECJ and the ECoHR and analyze the respective judgments and probable implications. Especially in light of an accession of the EU to the ECHR, a harmonization of the Luxembourg and Strasbourg courts' approaches to principles such as non-refoulement becomes vital.

¹ Lieven, S. "Case Report on C-411/10, N.S. and C-493/10, M.E. and Others, 21 December 2011". *European Journal of Migration and Law*, Vol. 14, p. 226 (2012).

² Also it is possible that secondary EU law in the field is extended by the member state.

³ At this point one should already keep in mind that for instance the 1951 Refugee Convention is mentioned as being binding in the treaties, as in Article 78 (1) TFEU. An EU system standing completely on its own without other international legal instruments is not possible as a consequence.

1.2) General Introduction

According to the United Nations High Commissioner for Refugees, 800.000 people fled their country of origin in 2011 alone⁴. This number represents humans that do not stand under the protection of their country of origin anymore and therefore need a different source of protection. As a result, a refugee⁵ is protected by international law and can apply for asylum to avail himself of the protection of another state if he is deemed eligible. But also in case he is not eligible, international law grants the individual rights that protect him against harm. According to the principle of non-refoulement, no state *'shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'*⁶. Thus, the well-treatment of asylum seekers is an important topic not at least since the negotiations of the Geneva Conventions. Therefore, in 1951 the contracting parties signed, apart from other conventions within the Geneva Conventions framework, the Convention Relating to the Status of Refugees. This Convention established legal principles of international relevance that from then on until today applied to asylum seekers. The European Convention on Human Rights then is an international treaty with a regional scope⁷. It was signed in 1950 by European contracting parties and has established one of the most important human rights protection regimes to date, therefore building a basis for asylum seekers' rights as well. As will be seen later, the decisions of the ECoHR can also have an impact beyond the territory of the states that are members of the ECHR system. As will be seen in a subsequent section by the example of the case *Soering v United Kingdom*⁸, rights that can be derived from the ECHR are also protected against third states.

The most recent initiative to build up a protection regime for human rights however has been conducted within the European Union. Since the entry into force of the Lisbon Treaty, the EU Charter of Fundamental rights obtained a legal status equal to the TFEU and the TEU. Article 6 of the TEU specifically recognizes 'the same legal value as the treaties'⁹. As a result, this could potentially bring about a heightened foundation for the enforcement of human rights and therefore add to asylum seekers' rights on the EU level. Apart from these three human rights legal instruments, asylum law on the EU level is also framed by secondary legislation. To date, the most important secondary legislation consists of four directives and the so-called Dublin II regulation. EU asylum law must therefore be regarded as a complex framework of intertwined legislation.

In the light of these considerations, the newly created EU Charter of Fundamental Rights could potentially bring about an improvement of the standing of human rights in the European Union. The Research Question that will be answered in this study is *'to what extent is the EU Charter of Fundamental Rights*

⁴ United Nations High Commissioner for Refugees. "UNHCR Global Trends 2011". pp. 1 (2011)

⁵ According to Article 1 (A) (2) of the 1951 Refugee Convention, a Convention Refugee is classified as someone having well-founded fear due to the reason that he is not longer protected by his country of origin.

⁶ Article 33, 1951 Refugee Convention

⁷ Orakhelashvili, A. "Restrictive Interpretation of Human Rights Treaties in the recent Jurisprudence of the European Court of Human Rights". EJIL, pp. 547 (2003).

⁸ European Court of Human Rights. "Soering v UK". Application No. 14038/88 (1989).

⁹ Article 6 (1) TEU

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together with the European Convention on Human Rights and the Geneva Convention relating to the status of refugees reflected in ECJ jurisprudence in EU asylum law?

2) Protection Regimes

In this chapter, the most relevant protection regimes applicable to the field of asylum will be described and contrasted. The legal instruments examined in this section are the EU Charter of Fundamental Rights, the European Convention on Human Rights and the Geneva Convention relating to the status of refugees. It will be examined which human rights provisions and principles the legal instruments establish and how extensively they are protected. As these legal instruments build the human rights basis for EU secondary law in the field of asylum, the rights and principles identified in this section will be relevant in both the next section and the analysis of ECJ case law. While identifying, the rights and principles will also be compared between the legal instruments, in order to clarify where the emphasis of the respective legal instruments lies.

2.1) EU Charter of Fundamental Rights

On the 7th of December in 2000, the European Parliament, the Council of Ministers and the European Commission '*solemnly proclaimed*' the CFR for the first time¹⁰. However, at that time the CFR was not yet legally binding, constituting a situation that only changed with the introduction of the Lisbon treaty. Article 6 (1) TEU now states that '*the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg on 12 December 2007, which shall have the same legal value as the Treaties*'. This means that the CFR is treated as primary source of law, therefore becoming highly relevant for secondary EU law and in effect supervised by the ECJ.

Article 51 (1) of the CFR states that the CFR has to be applied '*when [the institutions and bodies of the Union] are implementing Union law*'. This is limited by Article 51 (2) stating that '*this Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the treaties*'. Article 52 as a whole on the other hand restricts limitations. Article 52 (1) states that '*any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law*' and further continues that '*limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others*'. In that respect, Article 52 (2) further specifies that '*rights [...] shall be exercised under the condition and within the limits defined by [the Community Treaties or the Treaty on European Union]*'. Severely broadening the scope of restrictions on limitations, Article 52 (3) explicitly states that '*the meaning and scope of [...] rights shall be the same as those laid down by the [...] Convention [for the Protection of Human Rights and Fundamental Freedoms]*'. This can be seen as to use the ECHR as a sort of minimum standard for protection¹¹. Some scholars even go so far and say that the ECJ may not overturn decisions taken in cases at the EcoHR¹². This eventually means that the ECHR becomes more important for

¹⁰ McDermott, Y. "Human Rights and the Lisbon Treaty: Consensus or Conditionality". *Whittier Law Review* (31), pp. 734-757 (2010)

¹¹ Morano-Foadi, S., Andreadakis, S. "The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECHR Jurisprudence". *The European Journal of International Law*, Vol. 22, No. 4, p. 1073 (2011)

¹² Lieven, S. "Case Report on C-411/10, N.S. and C-493/10, M.E. and Others, 21 December 2011". *European Journal of Migration and Law*, Vol. 14, p. 235 (2012)

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the EU even before its formal accession to the ECHR¹³ provided for in Article 6 (2) TEU. In line with the previous statement, the Union may, according to the article, '*provide more extensive protection*' if wished for. Also Article 53 of the CFR includes the ECHR by stating that '*nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized [...] by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms*'. Contrary to the first two provisions, the latter provisions do not rely on the European Union system itself, but rather rely on an external legal instrument and therefore directly link the European Union system to the ECHR. This also is in line with Article 6 (3) TEU, stating that '*rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the member states, shall constitute general principles of the Union's law*'. Reflecting Article 6 (2) TEU on accession to the ECHR, the aforementioned Article in the CFR therefore reflects the current stance of the EU to include the ECHR into its fundamental rights system.

The CFR, it deals with '*rights, freedoms and principles*'¹⁴. This is identically in line with the wording of the first paragraph of Article 6 (1) TEU¹⁵. According to recent literature, the term right is probably used as a 'catch-all term' to have a similar meaning as the German term 'Grundrechte'¹⁶. There is no '*legally relevant distinction drawn*'¹⁷ between rights and freedoms. When looking at the difference between rights and principles, Anderson & Murphy are of the opinion that '*principles do not give rise to direct claims for positive action by the Union's institutions or Member States*'¹⁸. Overall however, fundamental rights compose of each of these three forms..

Article 18 of the CFR is a key provision when dealing with asylum, as it states that '*the right to asylum shall be guaranteed*' while adhering to the Geneva Convention relating to the status of refugees as amended. This provision has its basis in Article 78 (1) of the TFEU, which states that EU law must be '*in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees [...]*'. Whereas the Geneva Convention does '*not recognize asylum as a right to which refugees are entitled*'¹⁹, the CFR thereby goes a step further by guaranteeing it. Although there is a discussion about whether Article 18 provides the state with a right for granting asylum²⁰ or whether it guarantees the individual the right to asylum, scholars tend to argue for the right to asylum for an individual²¹.

¹³ Morano-Foadi, S., Andreadakis, S. "The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECHR Jurisprudence". *The European Journal of International Law*, Vol. 22, No. 4, p.1084 (2011)

¹⁴ 7th Recital of the preamble to the CFR

¹⁵ '*The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...]*'

¹⁶ Anderson, D., Murphy, C.C. "The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe". *EUI Working Papers 2011/08*, p. 5 (2011)

¹⁷ Anderson, D., Murphy, C.C. "The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe". *EUI Working Papers 2011/08*, p. 6 (2011)

¹⁸ Anderson, D., Murphy, C.C. "The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe". *EUI Working Papers 2011/08*, p. 6 (2011)

¹⁹ Gil-Bazo, M. "The Charter of Fundamental Rights of the European Union and the Right to be granted asylum in the Union's law". *Refugee Survey Quarterly*, Vol. 27, No. 3, p. 37 (2008)

²⁰ Article 2 (1) of the Charter of the United Nations states that '*the organization is based on the principle of sovereign equality of all member states*'. Therefore every state is sovereign in its decisions and so already would have a right to

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Article 19 is a specific provision framed for any field involving third-country nationals' extradition from EU territory. It deals with the principle of non-refoulement, stating that *'no one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'* which links to article 4 of the ECHR. Like the qualification to be a Convention Refugee, the principle of non-refoulement is directly linked to the concept of well-founded fear, which was originally expressed in the Geneva Convention relating to the status of refugees²². Article 19 therefore not only becomes applicable in the process of granting someone Convention refugee status, but also is crucial when an asylum application has been rejected.

In addition to specific provisions, several of the rather general rights in the CFR are then also of concern for the field of asylum. Article 47 of the CFR safeguards the right to effective remedy and to fair trial. The CFR in that Article states with regard to a right to a fair trial that *'everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law'*. The right to effective remedy is more explicit than the equal ECHR provision, because it grants right to effective remedy before a court²³.

The CFR in total is rather restating rights that have already been arranged for in other legal instruments and did not introduce a wholly new provision. However, as can be seen at the example of Article 18, the CFR increased the scope of some provisions or made them more specific. Despite the fact that there is a Charter dealing with fundamental rights in the European Union now, an individual can however not enforce it in front of the ECJ directly like he could enforce the ECHR in front of the ECoHR. The only way an individual can bring a case in front of the ECJ is when a Court in a national system refers to the ECJ for a preliminary ruling procedure, where the ECJ gives its opinion on the case in order to ensure the goal of harmonization of the EU legal system.

2.2) European Convention for the Protection of Human Rights and Fundamental Freedoms

The ECHR is an international protection regime with regional scope. It has come into effect in 1953 and was amended by 14 protocols to date. Every contracting party to the Council of Europe, where every member state of the European Union is party to, is member to the ECHR. In order for the ECHR not to be without teeth, the European Court of Human Rights was established as a Court safeguarding that the ECHR is followed by its contracting parties²⁴.

According to Stone Sweet, the ECoHR is identical to a constitutional Court since the entry into force of protocol 11, which is backed by Rosenfeld, who categorizes 'constitutionalism' as 'imposing limits on powers of government', 'adherence to the rule of law', and 'protection of fundamental rights'²⁵. Whereas

grant asylum before such a codification. As Gil-Bazo puts it, viewing the provision as a right of states would mean *'the right of states to grant asylum if they so wish in the exercise of their sovereignty, without being considered a hostile act towards other states [...]'*. The matter therefore rather revolves around other states respecting such a decision than the right to the decision itself.

²¹ Gil-Bazo, M. "The Charter of Fundamental Rights of the European Union and the Right to be granted asylum in the Union's law". *Refugee Survey Quarterly*, Vol. 27, No. 3, p. 41 (2008)

²² Article 1A (2)

²³ Hermann in Hailbronner, K. "EU Immigration and Asylum Law – Commentary". *Verlag C.H. Beck*, p.1383 (2010)

²⁴ Articles 32,33,34,46 & 47 of the ECHR

²⁵ Rosenfeld, M. "The Rule of Law and the Legitimacy of Constitutional Democracy". *Public Law Research Paper*, No. 36, p. 3

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before Protocol 11 the ECoHR was restricted to give advisory opinions, Protocol 11²⁶ gave the ECoHR discretion in the ECHR by giving it the opportunity to 'interpret Convention rights authoritatively'²⁷ and therefore enabled it to shape the ECHR via case law. Contrary to the ECJ however, the ECoHR does not have 'authority to annul legal acts'²⁸. Equally important though, individuals can bring a case before the ECoHR²⁹, while this is not possible in for the ECJ directly. Moreover, the ECoHR may rule that the individuals receive compensation³⁰.

Article 53 states that '*nothing in this convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party*'. It is therefore an article similar to Article 53 in the CFR safeguarding that fundamental rights are not limited in any way. Whereas the CFR system additionally relies on the ECHR as an external human rights protection system to counter any limitation, the ECHR relies only on its own system.

Contrary to Article 18 of the CFR there is no explicit right to asylum in the ECHR. Instead, the ECoHR holds that '*contracting states [...] have the right to control the entry, residence and expulsion of aliens*'³¹. This means that the ECHR is relevant for the field of asylum only in the concrete process of applying for asylum and when it comes to denying an application for asylum.

Concerning the application for asylum itself, the principles of fair trial and effective remedy are of importance in the CFR. Article 6 in the ECHR states that '*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*'. By giving minimum rights in Article 6 (3), the ECHR article on fair trial is more extensive than Article 47 in the CFR. Article 13 states that '*Everyone whose rights and freedoms as set forth in this convention shall have an effective remedy before a national authority [...]*' and is not different in scope from the provision on effective remedy of Article 47 in the CFR.

When being denied refugee status, the principle of non-refoulement may come into play. The CFR places the principle of non-refoulement in one Article of primary importance and in Articles 4 and 5³², the ECHR makes use of one primary article as well, supplemented by other articles. Article 3 of the ECHR states that '*no one shall be subjected to torture or to inhuman or degrading treatment or punishment*' and therefore is worded nearly identical to the second part of Article 19 in the CFR. This term was further defined in 'Ireland v United Kingdom' as '*deliberate inhuman treatment causing very serious and cruel suffering*'³³. In Article 19 the CFR, the legislator furthermore refers to '*death penalty*', which is dealt with in Article 2 (1) of the ECHR. It states that '*no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*'.

²⁶ Article 32 of Protocol 11 builds the framework and refers to the specific legal action the ECoHR can take: 'The jurisdiction of the court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47.'

²⁷ Stone Sweet, A. "On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court". *Revue trimestrielle de droit de l'homme*, pp. 4 (2009)

²⁸ Stone Sweet, A. "On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court". *Revue trimestrielle de droit de l'homme*, pp. 2 (2009)

²⁹ Article 34 ECHR

³⁰ Article 41 ECHR

³¹ European Court of Human Rights. "Vedran Andric v. Sweden". Application No. 45917/99 (1999)

³² Article 19 CFR

³³ European Court of Human Rights. "Ireland v United Kingdom". Application No. 5310/71 (1978)

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Contrary to Article 19 of the CFR, the provision on right to life provides for exceptions to it that are laid out in Article 2 (2). Article 19 of the CFR must therefore be seen as narrower when just looking at the provisions of the treaties themselves. Authors however argue that the principle of non-refoulement as a whole has to be seen as 'absolute' when taking relevant ECoHR case law into account as well³⁴. This can be seen in *Soering v. UK*³⁵, where the ECoHR concluded that *'having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering such exceptional intensity or duration. Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3.'* Even though Mr. Soering conducted a capital crime and would have been extradited to a democratic country, Article 3 was treated as being absolute with the result that not even in this case a derogation from the principle took place. This is echoed in *Chahal v UK*³⁶, where the ECoHR ruled that *'the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct'*.

Additionally, several articles can be used as supplementary specific provisions non-refoulement. Article 4 stating that *'no one shall be held in slavery or servitude'*, Article 5 stating that *'everyone has the right to liberty and security of person'*, Article 8 stating that *'everyone has the right to respect for his private and family life, his home and his correspondence'*, Article 9 stating that *'everyone has the right to freedom of thought, conscience and religion'*, Article 10 stating that *'everyone has the right to freedom of expression'* and Article 11 stating that *'everyone has the right to freedom of peaceful assembly and to freedom of association with others [...]'* could be used to supplement well-founded fear resulting from an individual's wish to exercise his right in a country where it would not be safe to do so. This view is supplemented by Den Heijer who expresses that *'in principle, all of the Convention rights can contain a prohibition of refoulement'*³⁷. Nevertheless, according to the same author, case law of the ECoHR shows that other Articles than Article 2 and Article 3 are not used concerning non-refoulement.

The ECHR in conclusion does not grant the explicit right to asylum. However, it is still relevant for the whole framework around asylum, such as the application or an expulsion in case that an application was unsuccessful. Also, the principle of non-refoulement was strengthened by means of ECoHR case-law, therefore making it possible for the CFR to have a specific provision to it by developing and strengthening it first.

2.3) Geneva Convention relating to the status of refugees

The Geneva Convention relating to the status of refugees builds the framework for classification and treatment of refugees.

³⁴ Den Heijer, M. "Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights". *European Journal of Migration and Law*, 10 (2008), pp. 277-314 (2008).

³⁵ European Court of Human Rights. "Soering v UK". Application No. 14038/88 (1989)

³⁶ European Court of Human Rights. "Chahal v United Kingdom". Application No. 70/1995/576/662 (1996).

³⁷ Den Heijer, M. "Whose Rights and Which Rights? The Continuing Story of Non-Refoulement under the European Convention on Human Rights". *European Journal of Migration and Law*, 10 (2008), p. 279 (2008)

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Article 1 (A) (2), as amended by the 1967 protocol, defines a refugee as someone *'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it'*. Basically, the concept of individual well-founded fear then becomes the basis classifying someone as a refugee in connection with a situation in which an individual does not enjoy *'de jure protection'*³⁸ by his country of origin anymore. The normal case of having well-founded fear is that the applicant is *'a member of a group systematically exposed to practice of ill-treatment'*³⁹. However, if that is not the case an applicant must be able to *'show that there are special distinguishing features in his or her case'*⁴⁰. This Article builds the basis for Article 18 of the CFR guaranteeing the right to asylum based on the classification in the 1951 Refugee Convention. Subsequent provisions within Article 1 provide for exceptions to being classified as a refugee. This however acts as a minimum standard for classifications as a refugee, as practice within the Contracting Parties may be more favorable⁴¹.

Article 33 (1) states that *'no contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'*. Therefore, the concept of a safe country becomes relevant. The specifics of the notion of a safe country are not completely agreed on by scholars. According to Fullerton, a safe country can be *'a safe country of origin, a safe country of asylum or country of first asylum or a safe third country'*⁴². Hathaway in this regard specifies that a safe country in relation to asylum law is a country that grants an applicant of asylum the rights conferred upon him in the Convention, as well as *'other international legal rights'*, as soon as he enters its territory⁴³. Nonetheless, a safe country can also take other forms, such as the *'internal flight alternative'* established by the ECoHR⁴⁴. This refers to a legal test on whether the asylum applicant would maybe not be threatened in another part of his country. The concept of well-founded fear as established in Article 1 (A) (2) is also of relevance in this provision, with the reasons for fear being worded identically to the provision in Article 1 (A) (2). Therefore, the 1951 Refugee Convention builds the basis for the relevant similar articles in other legal instruments of the field, as the ECHR's Article 2 and Article 3 or Article 19 in the CFR. Article 33 (2) then provides for exceptions on grounds of being a *'danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'*. Overall this means that an individual may not be expelled from the territory of the country he applies for refugee status. Therefore

³⁸ McAdam, J. "Complementary Protection in International Refugee Law". *Oxford Monographs in International Law*, pp. 32 (2007)

³⁹ European Court of Human Rights "Saadi v. Italy", Application No. 37201/06, p. 31 (2008)

⁴⁰ Peers, S. "EU Justice and Home Affairs Law". *Oxford University Press*, p. 319 (2011)

⁴¹ McAdam, J. "Complementary Protection in International Refugee Law". *Oxford Monographs in International Law*, pp. 33 (2007)

⁴² Fullerton, M. "A Tale of Two Decades: War Refugees and Asylum Policy in the European Union". *Brooklyn Law School Legal Studies Research Papers Accepted Paper Series*, Paper No. 175, p. 34 (2009)

⁴³ Hathaway, J.C. "The Rights of Refugees under international law". *Cambridge University Press*, p. 332 (2005)

⁴⁴ Hailbronner, K. "The Concept of 'Safe Country' and Expedient Asylum Procedures: A Western European Perspective". *International Journal of Refugee Law*, Vol. 5, No. 1, pp. 43 (1993).

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the principle of non-refoulement '*gives rise to an implied right to remain on the territory*'⁴⁵ if the above-mentioned criteria apply.

The right of fair trial is also dealt with in the 1951 Refugee Convention. Article 32 (2) for example states that '*the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority [...]*'.

In general, the 1951 Refugee Convention then acts as a *lex specialis* in the field of asylum and by that complements the *lex generalis* of international human rights law⁴⁶, such as the ECHR. The 1951 Refugee Convention is both important in classifying refugees, as it is for establishing rights, especially regarding the principle of non-refoulement.

Conclusion

This section has analyzed a number of legal instruments that provide protection for asylum seekers. Several rights and principles are given a basis in each of the legal instruments, such as the rights to a fair trial and to an effective remedy. But also the principle of non-refoulement has its basis in each of the legal instruments. Apart from these common features that can however vary in scope, there are also differences. While the classification of a refugee in the 1951 Refugee Convention does not appear in any of the other legal instruments, a very important difference is also the scope of the provisions within the legal instruments. The principle of non-refoulement for instance is protected strongest in the ECHR system. Two legal instruments, namely the CFR and the ECHR, moreover have courts that are able to shape their system along the provisions given.

In general however, the legal instruments are also interconnected to some degree. This can be seen via direct connections, such as the reference to the 1951 Refugee Convention in Article 18 of the CFR, or in an indirect way, like for example by means of identical wording as in Article 4 of the CFR which is worded as Article 3 of the ECHR. The CFR connects to both other legal instruments as well directly as indirectly, so that the CFR is interconnected with the ECHR and 1951 Refugee Convention to a great extent. ECHR and 1951 Refugee Convention are not interlinked by express references but rather complement each other in the field of asylum law. As an asylum-specific legal instrument, the 1951 Refugee Convention for instance provides a classification of a refugee as a basis on which ECHR provisions can be applied.

By having examined that the CFR is rather restating rights from other legal instruments, that the ECHR is a vast catalogue of rights which are well developed and furthered by case law, and the 1951 Refugee Convention is, apart from building principles, especially important concerning the classification of refugees, the basis for examining how the secondary legislation has been influenced by human rights provisions has been laid.

3) EU Asylum Law framework

In the following sections, the current framework of EU asylum law will be analyzed. Whereas the foregoing section focused on the EU and international layer of asylum law dedicated to the protection of asylum seekers and refugees, this section will deal with substantive EU legislation, both at primary and

⁴⁵ Peers, S. "EU Justice and Home Affairs Law". *Oxford University Press*, p. 317 (2011)

⁴⁶ McAdam, J. "Complementary Protection in International Refugee Law". *Oxford Monographs in International Law*, pp. 33 (2007)

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secondary level. Firstly, primary legislation, the legal basis for the secondary legislation, will be examined. With regard to the secondary legislation, it will be described in how far and which human rights provisions or principles affect the respective directives and regulations, in order to be able to conduct the analysis of the ECJ case law dealing with the secondary legislation. Also the essential mechanisms the secondary legislation provides for will be discussed.

3.1) Primary legislation

The primary legislative framework of the European Union in asylum law is laid down in Title V on the 'Area of Freedom, Security and Justice'. The EU objective for the AFSJ is broadly laid down in Article 3 TEU, where it is stated that the AFSJ shall be an area 'without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'⁴⁷. The AFSJ is a shared competence of EU law according to Article 2 (2)⁴⁸ in the TFEU, as affirmed in Article 4 (2) (j) in the TFEU. Within Title V of the AFSJ, particularly the part named 'Policies on border checks, asylum and immigration' in Chapter 2 of the TFEU is of relevance for EU asylum law. Article 78 (1) of the TFEU calls for the European Union to 'develop a common policy on asylum, subsidiary protection and temporary protection'. It further affirms that secondary legislation in the field of asylum shall be adopted in accordance with the Geneva Convention relating to the status of refugees and its protocol⁴⁹. Secondary legislation in this regard is to be adopted via the ordinary legislative procedure, as stated in Article 78 (2). Furthermore, measures to be adopted are stated, which in turn provide the basis for the regulations and directives in this field⁵⁰. Article 78 (3) regulates the proceedings in an emergency situation⁵¹.

3.2) Secondary legislation framework of EU asylum law

3.2.1) Regulation 343/2003

Within the field of EU asylum law, there are several regulations and directives aiming to harmonize asylum provisions of the EU member states. Article 78 (1) TFEU affirms the importance of the Geneva Convention relating to the status of refugees, so that each secondary legislation must be in line with its provisions.

The Dublin regulation 'lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country

⁴⁷ The overall EU objective is further complemented by Article 67 TFEU.

⁴⁸ '[...] the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence'

⁴⁹ Peers, S. "EU Justice and Home Affairs". Oxford University Press, pp. 331(2011)

⁵⁰ Article 78 (2) (c) for example calls for establishing measures to build a 'common system of temporary protection for displaced persons in the event of a massive inflow'. This is the basis for Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

⁵¹ 'in the event of one or more Member States being confronted by an emergency situation characterized by a sudden inflow of nationals of third countries, the Council on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.'

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national', as stated in Article 1⁵². For EU Member States it succeeded the Dublin Convention and now, together with the regulation on Eurodac⁵³, builds the fundament for the so-called Dublin system.

According to Hermann, the regulation tries to achieve 6 crucial objectives, which are 'avoiding multiple applications for asylum', 'exclusive responsibility of states for examining an application for asylum', 'complete conducting of asylum procedure', 'avoiding secondary movements', 'unity of family' and 'burden sharing'⁵⁴. The objective around which most cases center is the objective of exclusive responsibility. Chapter III regulates this system of '*exclusive responsibility*' by ordering criteria for responsibility in a hierarchical way. These criteria are, apart from the derogations in Articles 6, 7, 8 and 14, built on the principle of authorization⁵⁵, meaning that '*the more a Dublin Member State has consented to the presence of an asylum seeker, the greater is his responsibility*'⁵⁶.

By making clear competences and responsibilities, the EU legislator aims to, apart from avoiding that the asylum seeker chooses the easiest-to-access member state, avoid the so-called '*in orbit phenomenon*'⁵⁷ for an asylum seeker. If responsibilities would not be coined out, the asylum seeker could be sent from one EU member state to the next one without any country dealing with his application. To this end, the Dublin regulation lays out which of the member states is responsible for dealing with the asylum application so that the individual can have 'effective access' in line with recital 4. More specifically, Article 3 (1) states that the application of any applicant shall be examined.

Due to the reason that no one may be sent away, the notion of non-refoulement becomes important in this regard⁵⁸⁵⁹. A discussion of this principle in this study is vital. The principle is directly connected to asylum seekers and adopted by every legal instrument relevant to asylum law. Successful asylum applications are seldom brought before a court, so that rejected asylum applications are the matters considered by a court. Apart from human rights considerations with regard to procedures of the asylum application process or the status of being classified as a Convention refugee, a refugee deemed not eligible for being classified as a Convention refugee might still be in need of protection. Human rights as guaranteed by international law do not cease to apply to the individual only because his asylum application has been rejected or withdrawn. The principle of non-refoulement therefore links to asylum by protecting individuals that could face serious harm in their country of origin after having unsuccessfully applied for asylum or during the application process. The afore-mentioned Article 3 (1) thus indirectly links

⁵² Council of the European Union. "Council Regulation on 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". *OJ* (L 50), 18.02.2008, No. 343/2003 (2000).

⁵³ European Commission. "Council Regulation No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention". *OJ* (L 316). 15.12.2000, No 2725/2000, pp. 1-10 (2000).

⁵⁴ Hermann in Hailbronner, K. "EU Immigration and Asylum Law – Commentary". *Verlag C.H. Beck*, p.1374-1382 (2010)

⁵⁵ Kjaerum, M. "The Concept of Country of First Asylum". *International Journal of Refugee Law*, Vol. 4, No. 4, pp. 5 (1992).

⁵⁶ Hermann in Hailbronner, K. "EU Immigration and Asylum Law – Commentary". *Verlag C.H. Beck*, p. 1395 (2010)

⁵⁷ Hermann in Hailbronner, K. "EU Immigration and Asylum Law – Commentary". *Verlag C.H. Beck*, p. 1371 (2010)

⁵⁸ Hermann in Hailbronner, K. "EU Immigration and Asylum Law – Commentary". *Verlag C.H. Beck*, p. 1394 (2010)

⁵⁹ According to Article 33 (1) of the 1951 Refugee Convention, no state '*shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*'

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to the 1951 Refugee Convention by the principle itself. In combination with Article 16 (b) a responsibility to examine an application is framed. If EU member states wish to extend their responsibility by examining an asylum claim that is not its original responsibility, they may do so under Article 3 (2), the so-called sovereignty clause⁶⁰. A member state is therefore free under this provision not to use the criteria provided for by this regulation, in accordance with the notion of international law stating that every state is allowed to grant an individual asylum⁶¹. Some scholars however disagree that a state may use this clause at its discretion and state that the EU member state is bound by the principle of *effet-utile*⁶². The only derogation that could apply then is if an individual is sent to a safe third country, corresponding to Article 3 (3). Interestingly, this provision was inserted in the Council negotiations, as no similar provision can be traced in the European Commission proposal⁶³. In any case, the responsible member state is not the only member state that is competent to examine an application. Rather, there is 'merely a right to request the Member State responsible to take charge of or to take back the applicant for asylum'⁶⁴ as laid down in Chapter V. Therefore, an individual cannot rely on any individual rights from the provisions of the Dublin regulation, except for the right not to be refouled. Instead, it is aimed to be a system on which member states put mutual trust in order to be able to rely on it.

All member states must be party to the 1951 Refugee Convention as emphasized by recitals to the regulation 2 and 12. As recital 2 calls for 'full inclusion of the Geneva Convention relating to the status of refugees', every EU member state should be considered a safe country on paper, as guaranteed by commitments under EU and international law. There are some cases however that show that the theory is not entirely correct⁶⁵. Apart from the principle of non-refoulement, standards in the other member state do not have to be equally good in order to satisfy the Dublin system⁶⁶. This is in line with the whole EU asylum framework that must be considered as a minimum-standards approach. Recital 12 also emphasizes the importance of the ECHR to which every member state is party to. Adherence to the CFR on the other hand is emphasized in recital 15 only. This is put into perspective by the fact that the directive came into effect at a time when the CFR was not yet legally binding.

The most important human rights principle the Dublin regulation centers around is the principle of non-refoulement. The principle of non-refoulement implies for the Dublin regulation that 'a person seeking international protection may not be turned back or transferred to another Dublin Member State if that State would send this person to a third state where he or she has a well-founded fear of persecution or torture'⁶⁷. In the case *'T.I. v United Kingdom'*⁶⁸, an individual applied for asylum in Germany which was rejected. He then travelled to the United Kingdom where he applied for asylum again. When the United

⁶⁰ Lieven, S. "Case Report on C-411/10, N.S. and C-493/10, M.E. and Others, 21 December 2011". *European Journal of Migration and Law*, Vol. 14, p. 225 (2012)

⁶¹ Goodwin-Gill, G. "International Law and the movement of persons between states". *Oxford University Press*, p.137 (1978)

⁶² Filzwieser, C., Liebinger, B. "Dublin II Verordnung: Das Europäische Asylzuständigkeitssystem, *BWV Berliner-Wissenschaft*, 2nd edition, Article 3 Dublin Regulation, Note K8 (2007)

⁶³ COM (2001) 447, "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).

⁶⁴ Hermann in Hailbronner, K. "EU Immigration and Asylum Law – Commentary". *Verlag C.H. Beck*, p.1377 (2010)

⁶⁵ See section 4.1 on Regulation 343/2003.

⁶⁶ Hermann in Hailbronner, K. "EU Immigration and Asylum Law – Commentary". *Verlag C.H. Beck*, p. 1395 (2010)

⁶⁷ Hermann in Hailbronner, K. "EU Immigration and Asylum Law – Commentary". *Verlag C.H. Beck*, p.1372 (2010)

⁶⁸ European Court of Human Rights. "T.I. v United Kingdom". Application No. 43844/98 (2000).

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Kingdom handed the case back over to Germany, the individual issued a request for judicial review on the grounds that Germany would send him back to his country of origin, relying on Article 3. Although the Court rejected the individual's view that Germany would refoul the individual to his country of origin, this case illustrates the importance of the principle within the Dublin regulation.

3.2.2 Directive 2004/83/EC

Due to the reason that treatment of asylum applicants is different in all member states, *'there are large disparities between the acceptance rates of asylum applications among the member states'*⁶⁹. This coincides with the reasoning of the NS and M.S.S. v Belgium and Greece cases examined in this paper when dealing with the Dublin regulation in the analysis chapter. Although the case is rather new, the goal of the directive 2004/83/EC according to recital 7 is to approximate *'the rules on the recognition and content of refugee and subsidiary protection status'* in order to *'help limit the secondary movements of applicants for asylum between member states, where such movement is purely caused in differences in legal frameworks'*⁷⁰.

Council Directive 2004/83/EC of 29 April 2004 is on *'minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted'*.

Recital 9 states that *'those third country nationals or stateless persons, who are allowed to remain in the territories of the member States for reasons not due to a need for international protection but on a discretionary basis [...] fall outside the scope of this directive'*. This means that the refugees allowed to stay by good will of the respective member state only, as provided for in Article 3, are not in the scope of the directive.

The directive deals with *'common criteria for recognizing applicants'*⁷¹. It distinguishes between Convention refugees and applicants receiving subsidiary protection and regulates who qualifies for which category. Recital 17 emphasizes the need to conform to the 1951 Refugee Convention for a definition of Convention refugees. An individual receiving subsidiary protection is someone who is not eligible for having the status of being a Convention refugee, but however has a well-founded fear. Whereas Chapters III and IV deal with the status as a Convention refugee, Chapters V and VI show who is eligible only for subsidiary protection.

Apart from the rules for qualification, some specifics of protection are dealt with. Chapter VII the focuses on the rights both categories enjoy. Article 20 (1) hereby states that there shall not be *'prejudice to the rights laid down in the Geneva Convention'*. This provision therefore aims at including the rights of the 1951 Refugee Convention in the directive and putting the directive in perspective. Article 20 (6) for instance states that for refugees *'within the limits set out by the Geneva Convention, Member states may*

⁶⁹ Lieven, S. "Case Report on C-411/10, N.S. and C-493/10, M.E. and Others, 21 December 2011". *European Journal of Migration and Law*, Vol. 14, p. 228 (2012)

⁷⁰ European Commission. "Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted". *OJ (L 304)*, 30.09.2004, 2004/83/EC (2004).

⁷¹ Hailbronner & Alt in Hailbronner, K. "EU Immigration and Asylum Law – Commentary". *Verlag C.H. Beck*, p. 1010 (2010)

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reduce the benefits of this chapter [...]'. Article 20 (7) states the same for individuals eligible for subsidiary protection.

3.2.3 Directive 2005/85/EC

The directive 2005/85/EC of 1 December 2005 deals with '*minimum standards on procedures in Member States for granting and withdrawing refugee status*'⁷².

Articles 23 and 24 deal with the procedures to follow in the examining asylum applications. However, important specifics like the timeframe to be followed are not seen as an obligation for states, meaning that there is also no possibility for sanctions in case of breach.

Concerning human rights, the most important seem to be rights connected to fair trial and effective remedy. Article 6 calls for '*access to the procedure*' of applying for asylum. This article is supplemented by other, more specific articles such as the article on a right to explaining the matter in a personal interview as provided for in Article 12 or the '*right to legal assistance and representation*' in Article 15. Article 39 deals with the right to an effective remedy directly and thus paves the floor for appeals against decisions in the system. The UNHCR gets a special role in Article 21 of the directive according to Article 35 of the 1951 Refugee Convention. Here, the UNHCR namely obtains '*supervisory responsibilities*' that he may use in the directive by '*access to applicants for asylum, including those in detention and in airport or port transit zones*'. Apart from linking the directive directly to the 1951 Refugee Convention, the provision also provides for a human rights actor in the system.

Also the principle of non-refoulement is dealt with. Article 26, although indirectly, and Articles 27, 31 and 36 directly deal with the definition of a safe country. The bottom line is that a safe country constitutes a country that provides protection from refoulement⁷³, in accordance with Article 27 (1) (b) linking the principle to the 1951 Refugee Convention. Also the country must be party to the 1951 Refugee Convention according to Article 36 (2) (a) and to the ECHR according to Article 36 (2) (c). Article 29 refers to Annex II where a '*minimum common list of third countries regarded as safe countries of origin*' can be found. Concerning the principle of non-refoulement specifically, Article 7 entails the '*right to remain in the Member State pending the examination of the application*'. This provision directly concerns Article 3 of the ECHR. If an individual is removed without having had his application for asylum examined, Article 3 is immediately infringed⁷⁴.

Conclusion

If looked at these directives in total, the legal framework for protecting the rights enshrined in the human rights legal instruments is well established. The regulations and directives either refer to the respective legal instrument directly in order to safeguard for human rights or establish the right with a wording similar to the legal instruments. Each regulation and directive covers a different part of the asylum system, providing for the necessary human rights protection throughout the whole asylum system.

⁷² European Commission. "Council Directive on minimum standards on procedures in member states for granting and withdrawing refugee status". *OJ* (L 326), 12.12.2005, 2005/85/EC (2000).

⁷³ Spijkerboer in Hailbronner, K. "EU Immigration and Asylum Law – Commentary". *Verlag C.H. Beck*, p.1288 (2010)

⁷⁴ Spijkerboer in Hailbronner, K. "EU Immigration and Asylum Law – Commentary". *Verlag C.H. Beck*, p.1266 (2010)

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Therefore, the different pieces of secondary legislation complement each other in terms of human rights protection.

The Dublin regulation regulates the responsibilities of member states for asylum seekers by means of reliance on mutual trust that rests on assuming that other EU member states not only adhere to the principle of non-refoulement, but also are considered to be a safe country. To this end the regulation relies on both the 1951 Refugee Convention and the ECHR especially. It therefore is important in the very first step of assuming responsibility for examining the claim of an asylum seeker. Directive 2004/83/EC on the other hand regulates who qualifies for which type of protection, a step that can only ensue after the step provided for in the Dublin regulation. Consequently, the most important human rights measure for the directive is the principle of non-refoulement like in the Dublin regulation, dealt with in Article 21. Exceptions to this principle are the same as in the 1951 Refugee Convention, which is the cornerstone in this directive. Also equally to the Dublin regulation, the CFR is not dealt with extensively due to the fact that it was not legally binding when the directive came into effect. It is only dealt with in a general provision in recital 10. Directive 2005/85/EC then regulates the procedures for granting and withdrawing refugee status. In total, this directive seems rather concerned with human rights connected to the concrete asylum application procedure, such as the principles of fair trial and effective remedy⁷⁵.

4.) The application of EU asylum law at a crossroad: between human rights obligations and member states' execution

In the following, an analysis of the relevant case law by the European Court of Justice in the period after entry into force of the Lisbon Treaty will be conducted. Special attention will be paid to the principles and provisions of the respective legal instruments. The analysis will also be set in relation with the legislative framework of secondary legislation in the European Union. First, the cases will be examined in terms of human rights issues with the secondary legislation. Second, the cases will be mirrored to their equivalents in EcoHR case law. Hereby, approaches of both the Strasbourg and the Luxembourg courts can be compared.

4.1) Regulation 343/2003

There are two cases dealing with regulation 343/2003⁷⁶. The first case that deals with regulation 343/2003 is the case '*Migrationsverket v Nurije Kastrati, Valdrina Kastrati and Valdrin Kastrati*'⁷⁷. It is about an

⁷⁵European Commission. "Council directive lazing down minimum standards for the reception of asylum seekers". *OJ* (L 31), 27.01.2003, 2003/9/EC (2003) and European Commission. "Council Directiev on temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof". *OJ* (L 212), 20.07.2001, 2001/55/EC (2001) were not dealt with in this study for the reason that the ECJ did not issue a judgment concerning these directives. However they also add to the EU asylum law system of secondary legislation bringing about a protection for human rights.

⁷⁶ Council of the European Union. "Council Regulation on 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". *OJ* (L 50), 18.02.2008, No. 343/2003 (2000).

⁷⁷ European Court of Justice. "*Migrationsverket v Nurije Kastrati, Valdrina Kastrati and Valdrin Kastrati*". C-620/10 (2012)

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individual with children that obtained a short-term visa in France but applied for asylum in Sweden only. Sweden then rejected the asylum claim redirecting the individual to France, also because the individual withdrew her application in the meantime and applied for a residence permit. The questions referred to the Court then were connected to state responsibilities in the event of a withdrawal of an application for asylum. The ECJ then ruled that once an application has been withdrawn, the provisions of regulation No 343/2003 do not apply anymore. Human rights issues were not applicable in this case contrary to the next case.

In the joined cases '*N.S. v Secretary of State for the Home Department*'⁷⁸, the first individual was first detained in Greece, without having applied for asylum, and from where he subsequently was sent to Turkey where he was detained '*in appalling conditions*'. From there he managed to come to the United Kingdom where the individual lodged an application for asylum. In the following, Greece was said to be responsible to handle the asylum claim under the Dublin regulation, however constituting a decision the individual appealed against due to the reason that the individual had the belief that his human rights would be violated in Greece. Ensuing, appeals and judicial reviews failed until the individual stated that '*the protection conferred by the Charter is higher than and goes beyond that guaranteed by, inter alia, Article 3 of the ECHR*'. In connection to this and the provisions of the regulation No 343/2003 regulating who is responsible for examining an asylum claim, a preliminary ruling was asked from the ECJ. In the other case contributing to the joined case, five individuals arrived first in Greece, where they did not lodge asylum and then travelled to Ireland. Identically, the individuals appealed against being sent to Greece and the case was referred to the ECJ for a preliminary ruling as well. The Court ruled most importantly that an individual applying for asylum may not be transferred to even an EU member state, when Article 4 of the CFR might potentially be in breach. It is important in this light to examine the conditions carefully for every single case in order to be sure to safeguard Article 4 of the CFR, albeit the functioning of the Dublin system is an important goal. Nevertheless, even if responsibility for an asylum seeker is found out by means of the provisions in the Dublin regulation, if '*there is a serious risk that its Charter rights will be violated*'⁷⁹.

The Court interlinks the regulation to other secondary legislation in the field of EU asylum law. Especially it looks at recital 10 in Directive 2004/83/EC, at recital 5 in directive 2003/9/EC and at recital 15 in regulation No 343/2003. The two last recitals already put emphasis on adherence to Article 18 of the CFR as well.

Interestingly if compared to other cases, the Court relies on post-Lisbon case law in this field already. By referring to paragraph 38 of the '*Bolbol Nawras*'⁸⁰ case, the Court seeks to adhere to the Charter in general. While referring to paragraph 53 in the '*Salahadin Abdulla and Others*'⁸¹ case on the other hand,

⁷⁸ European Court of Justice. "*N.S. v Secretary of State for the Home Department and M.E., A.S.M, M.T., K.P., E.H*". Joined Cases C-411/10 and C-493/10 (2011).

⁷⁹ Lieven, S. "Case Report on C-411/10, N.S. and C-493/10, M.E. and Others, 21 December 2011". *European Journal of Migration and Law*, Vol. 14, p.224 (2012)

⁸⁰ European Court of Justice. "*Nawras Bolbol v Bevandorlasi es Allampolgarsagi Hivatal*". C-31/09 (2010).

⁸¹ European Court of Justice. "*Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland*". Joined cases C-175/08, C-176/08, C-178/08 and C-179/08 (2010).

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the Court puts in light Article 18 of the CFR. Both provisions in turn seek adherence to the 1951 Refugee Convention. Of all three legal instruments, the CFR is dealt with most extensively as several of its articles appear in the questions already. In the first question, the Courts answers in the affirmative that a member state is liable under the CFR both in the situation of a transfer of an individual and under employment of the sovereignty clause. The CFR is therefore strengthened by the Court in this ruling. Apart from the principles of effective remedy and fair trial set out in Article 47, Article 18 on the right to asylum and Article 1 on human dignity, the provisions on the principle of non-refoulement are dealt with most extensively. As the principle of non-refoulement is the most important human rights principle in the Dublin Regulation, Article 4 on prohibition of the reasons to the principle of well-founded fear and Article 19 on non-refoulement are referred to in the questions and therefore at the very heart of the case. The Court in the following does not refer actively to these articles any more, as there is no need to introduce these provisions then anymore. The principle itself is given a further fundament in other ways.

Namely, the Court refers to EcoHR case law, which represents the second approach of the analysis. The '*M.S.S. v Belgium and Greece*'⁸² case is referred to by the ECJ, which is an identical situation the Court in the '*N.S.*' case was also concerned with. According to Lieven, the so-called sovereignty clause '*left sufficient discretion to the Member States for them to be held responsible under the ECHR*'⁸³. An individual arrived in Greece but applied for asylum in Belgium only. In line with the Dublin regulation, the responsibility for the individual was subsequently transferred back to Greece. The individual then went to the EcoHR because he saw the principle of non-refoulement, so Article 3 ECHR, and his right to effective remedy, Article 13 of the ECHR, breached by both Greece and Belgium. The EcoHR concluded that transferring the individual to Greece would violate both Article 3 and Article 13 of the ECHR. It was argued that in Greece '*systemic deficiencies*' in the asylum procedure are apparent. Concerning the transfer to Greece, which constitutes the part identical to the NS case, the EcoHR found that '*the respect enshrined in the ECHR prohibits member states from blindly trusting other member states under the Dublin Regulation mechanism*'⁸⁴. This means that the EcoHR takes the opinion that every state has the obligation to check for the non-refoulement principle. Therefore, an EU member state cannot transfer an asylum seeker if the other member state does not fully respect the ECHR. This judgment comes as no surprise, because the EcoHR already held in '*T.I. v UK*'⁸⁵ that the Dublin system does not prevent contracting parties to the ECHR from being liable under the ECHR.

During the NS case, the judges were then confronted on whether to follow the line of the EcoHR. Following this line would mean to disregard the foundation of mutual trust of the Dublin regulation. Especially the presumption that every EU member state is a safe country is challenged by this ruling. Thus, the Dublin regulation is '*[suspended] in case of serious risks that the fundamental rights of the applicant*

⁸² European Court of Human Rights. "*M.S.S. v Belgium and Greece*". Application No. 30696/09 (2011).

⁸³ Lieven, S. "Case Report on C-411/10, N.S. and C-493/10, M.E. and Others, 21 December 2011". *European Journal of Migration and Law*, Vol. 14, p. 230 (2012)

⁸⁴ Lieven, S. "Case Report on C-411/10, N.S. and C-493/10, M.E. and Others, 21 December 2011". *European Journal of Migration and Law*, Vol. 14, p. 230 (2012)

⁸⁵ European Court of Human Rights. "*T.I. v United Kingdom*". Application No. 43844/98 (2000).

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*will be breached*⁸⁶. Due to the fact that the ECJ indeed followed the line of the '*M.S.S. v Belgium and Greece*' ruling, the ECoHR case served as some kind of precedent for the ECJ in this regard. However, the ECJ did not completely follow the ECoHR line. Rather it stated in paragraphs 82,83,84 and 85 that '*not every infringement of a fundamental right by the responsible member state will have consequences on the application of the Dublin regulation*'⁸⁷.

Also the '*K.R.S. v United Kingdom*'⁸⁸ case of the ECoHR is of importance here. As a general provision in this regard, the ECJ uses the case to refer to Article 33 (1) of the 1951 Refugee Convention. However, the case is also important in line with the '*M.S.S. v Belgium and Greece*' judgment. In *K.R.S. v United Kingdom*, a case where an individual was also to be transferred to Greece, the ECoHR held that '*there is no violation of Article 3 ECHR by the UK if an asylum seeker should be sent to Greece where he or she [...] would have access to an effective remedy as provided by Art. 13 ECHR*'. The ECoHR argued that Dublin returnees to Greece may apply to the ECoHR from Greece for a '*Rule 39 measure to prevent any onward removal to a third country where they will face ill-treatment in breach of Article 3 ECHR*'⁸⁹. The '*M.S.S. v Belgium and Greece*' judgment therefore constitutes a change, as ECoHR did not hold the United Kingdom liable for transferring an individual to Greece under the Dublin regulation.

The *N.S.* case in turn signifies a possible turn in ECJ judgments. Contrary to earlier cases, the Charter is the point around which this case revolves. Whereas the CFR had supplementary character at best in the four cases that were judged upon earlier in time, this goes for the 1951 Refugee Convention and the ECHR in this case. But also in light of the relationship between ECJ and ECoHR, the case is a turning point for the Dublin regulation. The foundation of mutual trust within the Dublin regulation was first eroded by the '*M.S.S. v Belgium and Greece*' case and later by the '*N.S.*' case for reasons of human rights. Therefore the so-called sovereignty clause⁹⁰ in the Dublin regulation becomes more important. As shown before, especially Article 3 of the ECHR became absolute by the judgment of the case '*Soering v UK*'. In light of an accession of the EU to the ECHR, the ECJ was concerned with harmonizing the approaches between the systems in order not to cause future problems. Also this might show the importance of the new CFR for the relationship with the ECHR. Article 52 (3) namely states that the rights guaranteed by the CFR shall be the same as in the ECHR. If one would spin this thought further, the ECJ could have felt obliged by this provision not to rule against the ECoHR.

4.2) Directive 2004/83/EC

The case '*Aydin Salahadin Abdulla and others v Germany*'⁹¹ was judged upon on 2nd of March 2010. This joined case in general dealt with people having been granted status as a Convention Refugee due to the situation in their country of origin. However, their status of being a Convention Refugee was revoked by

⁸⁶ Lieven, S. "Case Report on C-411/10, *N.S.* and C-493/10, *M.E. and Others*, 21 December 2011". *European Journal of Migration and Law*, Vol. 14, p. 229 (2012)

⁸⁷ Lieven, S. "Case Report on C-411/10, *N.S.* and C-493/10, *M.E. and Others*, 21 December 2011". *European Journal of Migration and Law*, Vol. 14, p. 234 (2012)

⁸⁸ European Court of Human Rights. "*K.R.S. v United Kingdom*". Application No. 32733/08 (2008).

⁸⁹ Hermann in Hailbronner, K. "EU Immigration and Asylum Law – Commentary". *Verlag C.H. Beck*, p. 1372 (2010)

⁹⁰ Lieven, S. "Case Report on C-411/10, *N.S.* and C-493/10, *M.E. and Others*, 21 December 2011". *European Journal of Migration and Law*, Vol. 14, p. 232 (2012)

⁹¹ European Court of Justice. "*Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland*". Joined cases C-175/08, C-176/08, C-178/08 and C-179/08 (2010).

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the German authorities due to the favorably changed political situation in their country of origin. As a result the individuals lodged an appeal against the revocation and the German Court issued questions for a preliminary ruling to the ECJ. The Court then ruled that the recognition of refugee status indeed stops for an individual in case the situation initially bringing about the refugee status changed in a favorable way. In order to be able to *'assess a change in circumstances of a significant and non-temporary manner'*⁹² one must look at whether there is an effective legal system in place. Hereby actors of protection can be various, including a multinational force.

In general, the case deals with Art 7 of the Council Directive 2004/83/EC⁹³.

During this early post-Lisbon case, the Court took the CFR as basis only without explicit character. It cites Article 6 (1)⁹⁴ therefore recognizing the general importance of the CFR and human rights in general. In line with this, it goes on to point out recital 10 of the preamble to Directive 2004/83/EC⁹⁵ that also reflects the will to adhere to fundamental rights. Apart from these general provisions, the ECJ relies on Article 18 of the CFR concerning the right to asylum.

Whereas the Court does not refer to the CFR extensively, the 1951 Refugee Convention is dealt with to a greater degree. Recitals 2⁹⁶, 3⁹⁷, 16⁹⁸ and 17⁹⁹ of the directive deal with the 1951 Refugee Convention in general terms. The Court then consequently becomes more specific. It refers to Article 1 (A)(2) of the 1951 Refugee Convention which defines a refugee. The Court goes on to cite Article 2 of the directive, which defines a refugee for the directive. Not surprisingly, the definition in Article 2 (c) is worded identically to the definition in Article 1 (A)(2) of the 1951 Refugee Convention. Also Article 1 (C)(5) is looked at which refers to a revoking of refugee status when the circumstances have changed in a favorable way¹⁰⁰. The

⁹² European Court of Justice. "Aydin Salahadin Abdulla and Others v Bundesrepublik Deutschland". Joined cases C-175/08, C-176/08, C-178/08 and C-179/08 (2010).

⁹³ European Commission. "Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted". *OJ* (L 304), 30.09.2004, 2004/83/EC (2004).

⁹⁴ *'the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg on 12 December 2007, which shall have the same legal value as the Treaties'*

⁹⁵ *'This Directive respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members'*

⁹⁶ *'The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967, thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution'*

⁹⁷ *'The Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees'*

⁹⁸ *'Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention'*

⁹⁹ *'It is necessary to introduce common criteria for recognizing applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention'*

¹⁰⁰ *'He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to avail himself of the protection of the country of his nationality; Provided that*

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Court however not only has recourse to who is a refugee but also to who should not be seen as a refugee. Article 2 also refers to Article 12 of the directive, which in turn refers to Article 1D of the 1951 Refugee Convention dealing with persons the Convention does not apply to. The Court also refers to Article 14 of the directive which redirects to Article 12 of the directive and in turn refers back to Article 1(D) of the 1951 Refugee Convention in order to state reasons for exclusion described similar to the 1951 Refugee Convention. This is in line with the framework of the directive, which is concerned with the question who qualifies in order to be a refugee.

Article 10 of the directive deals with reasons for persecution and in particular mentions religion in Article 10 (1)(b), political opinion in Article 10 (1)(e) and being in a particular social group in Article 10 (1)(d), where the latter is worded exactly like in the 1951 Refugee Convention. These articles are however only defining concepts and the directive is not explicitly granting rights connected to these concepts itself. Rather, the rights in connection to these concepts stem from the fundamental rights legal instruments. The concept of religion for example, as defined in Article 10 (1)(b) entails a right to exercising one's religion if looked at in the light of Article 9 of the ECHR or to Articles 3 and 4 of the 1951 Refugee Convention. The Court refers to exactly these provisions in Article 14 (6) of the directive.

Not only does the Court look redirect to definitions, but also does it have an interest in the principles established by the 1951 Refugee Convention. The Court then refers to Article 15 of the directive which deals with serious harm, being analogous to the concept of well-founded fear, a concept originally derived from the 1951 Refugee Convention. In line with this, the Court also refers to Article 4 and Article 5 of the directive in part dealing with the same concept. Also the Court refers to Article 11 of the directive also dealing with serious harm, and in turn well-founded fear, as a reason for cessation of the status of being a Convention Refugee. As a basis for this concept, the Court looks at Article 9 of the directive where acts of persecution are defined¹⁰¹. These are specified building on Article 1 (A) of the 1951 Refugee Convention which defines a refugee according to well-founded fear. Acts of persecution are in turn reasons for well-founded fear.

The Court goes on to cite Article 8 of the directive dealing with the concept of a safe country which is directly linked to the principle of non-refoulement. Also, Article 11 of the directive concerns itself with the safe country concept. The safe country concept is originally derived from the 1951 Refugee Convention.

The legal framework itself, meaning the directive referred to, builds up the definition of who qualifies as a refugee mostly by means of the 1951 Refugee Convention. Interestingly, the ECJ does not recur to the CFR for the principles but rather looks at 1951 Refugee Convention where the principles were developed originally. Also the most important basis for the ECJ's judgment, such as Article 1 (C)(5) of the 1951 Refugee Convention is not taken from the CFR and therefore not from the Union's own system. The directive in this case is complemented by the 1951 Refugee Convention. This however is in line with the directive as it recurs to the 1951 Refugee Convention in Article 20 (1) as the main guiding instrument.

this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality'

¹⁰¹ An act of persecution according to this article [in the directive] is defined as being ' (a) sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or b) an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in a)'

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The case is representative for judgments issued early in the post-Lisbon case law, as the ECJ does recur to the CFR only for general purposes but looks to international human rights legal instruments when it comes to specific provisions.

The second case dealing with the directive '*Nawras Bolbol v Bevandorlasi es Allampolgarsagi Hivatal*'¹⁰² is about an individual that applied for asylum in Hungary. Like the first case, this case deals with the qualification for being a refugee. Her claim was denied for the reason that she did not '*leave her country of origin owing to persecution for reasons of race, religion, nationality or because of political persecution*'. The individual appealed stating that Article 12 (1)(A) of Directive 2004/83/EC referred to Article 1D of the 1951 Refugee Convention guaranteeing her protection for the reason of being a displaced Palestinian. Subsequently the matter was referred to the ECJ by means of a preliminary ruling, where the ECJ ruled that someone who '*receives protection or assistance from an agency of the United Nations other than UNHCR, when a person has actually availed himself of that protection or assistance*'. This means that someone who does not make use of the aid, although being eligible for it, did not '*avail himself of that protection or assistance*' having the result that Article 12 (1)(A) does not apply to him.

Even more extreme than the case '*Aydin Salahadin Abdulla and others v Germany*', the only provision concerning the CFR the Court refers to in this early post-Lisbon case is recital 10 of the preamble to the directive which functions as a general provision.

Also in this case, the 1951 Refugee Convention is looked at more extensively. The Court introduces general provisions by referring to Recitals 2,3,16 and 17 of the directive, which have already been looked at in '*Aydin Salahadin Abdulla and others v Germany*'. Identical to the '*Aydin Salahadin Abdulla and others v Germany*' case, the Court refers to the definitions provided for in Article 2. These definitions are borrowed to a great degree from the 1951 Refugee Convention. Even more specifically, the Court refers to Article 1(A)(2) of the 1951 Refugee Convention defining a Convention Refugee in the original sense. Like in the aforementioned case, the Court also refers to Article 12 (1)(A) of the directive. This Article then redirects to Article (1)(D) of the 1951 Refugee Convention dealing with exclusion from having the status of a Convention refugee. In this case however, the Court in addition also refers to Article 1(D) explicitly. Therefore, the Court uses the same definitions as in the fore-going case.

After looking at the concepts itself, the Court turns to the principles it needs to adhere to. Also in this case, the Court refers to Article 15 of the directive on serious harm which derives from the principle of well-founded fear. Contrary to the foregoing case though, the Court refers to Article 21(1) of the directive stating that the principle of non-refoulement should be adhered to. Whereas the '*Aydin Salahadin Abdulla and others v Germany*' case did not even address the concept directly, this article at least refers to the principle indirectly by stating '*in accordance with their international obligations*'. This provision might not only include Article 33 of the 1951 Refugee Convention, but also Articles 3 and 4 of the ECHR.

Contrary to the fore-going case, the Court in this case deals with subsidiary protection as well. It namely refers to Article 17 of the directive dealing with exclusion from being eligible for subsidiary protection. This provision is similar to Article 33 (2) of the 1951 Refugee Convention, which is however not explicitly mentioned.

¹⁰² European Court of Justice. "*Nawras Bolbol v Bevandorlasi es Allampolgarsagi Hivatal*". C-31/09 (2010).

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Similar to the first case, this case only uses the CFR for general provisions and rather relies on provisions from the 1951 Refugee Convention. Also the central provision of the case, namely Article 12(1) (A), is linked to the 1951 Refugee Convention. Also the case is concerned with the qualification for being Convention refugee.

In the third case '*Germany v B and D*¹⁰³, two Kurdish individuals have seen their refugee status revoked due to their past membership in the PKK who appealed to this decision. The national Court then referred the case by means of issuing a preliminary question to the ECJ. The Court hereby ruled that '*the fact that a person has been a member of an organization which [is involved in terrorist acts] [...] and that that person has actively supported the armed struggle waged by that organization does not automatically constitute a serious reason for considering that that person has committed as serious non-political crime or acts contrary to the purposes and principles of the United Nations*'. This means that such a person cannot automatically be excluded from obtaining the status of a Convention refugee. Also the Court states that a member state may grant an individual refugee status under national law although the individual is not eligible for refugee status under Article 12(2) of Directive 2004/83/EC.

Like in the two former cases, this case deals with the qualification for being eligible for the status of being a Convention refugee. Also here, the CFR is only looked at in general terms emphasizing the role of fundamental rights in general. In this regard, the Court only refers to recital 10 of the preamble to the directive.

Also here, the 1951 Refugee Convention is dealt with more extensively. Recitals 3, 16 and 17 to the directive are referred to again by the Court as general provisions dealing with the 1951 Refugee Convention. For purposes of definition the ECJ once again refers to Article 2 of the directive which is close to the 1951 Refugee Convention. In line with that the Court also refers to Article 1 (A) of the 1951 Refugee Convention. Furthermore, also in this case, the Court not only indirectly refers to it by Article 14, but also looks at Article 12 (2) and (3) of the directive directly in order to define who is not falling under the classification of being a Convention refugee. This central provision of the case is worded identical to Article 1 (F) of the 1951 Refugee Convention albeit extended slightly. Also the Court refers to Article 1 (F) directly.

Apart from looking at definitions, the ECJ once puts emphasis on non-refoulement, the most important human rights provision in the directive. Article 21 (1) and (2), as referred to by the Court, look at this principle that was framed by the 1951 Refugee Convention. However, the Court also refers to Article 33 in the 1951 Refugee Convention, dealing with this principle, directly. Contrary to foregoing cases, the Court in this case refers to Article 3 of the ECHR directly, which deals with exactly the same issue.

Like in the first two cases then, this case also uses the CFR only for the general provisions. Emphasis is once more put on the 1951 Refugee Convention. In this case however, an ECHR is linked to the directive for the first time. This is mainly due to the reason that ECHR case law made the principle of non-refoulement absolute and therefore stronger than in the provisions of other human rights legal instruments.

¹⁰³ European Court of Justice. "Bundesrepublik Deutschland v. B and D". Joined Cases C-57/09 and C-101/09 (2010).

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In the last post-Lisbon case '*Federal Republic of Germany v Y and Z*'¹⁰⁴, two individuals applied for asylum and were rejected as the German authorities evaluated a lack of well-founded fear. However it was also established that the individuals would see their security threatened in their country of origin due to their practice of religion. In this respect questions were referred to the ECJ, centering, apart from Directive 2004/83/EC, on Article 9 of the ECHR. Currently, only the opinion of the Advocate General is available. He is of the opinion that '*there is a well-founded fear of persecution where the asylum-seeker intends, once back in his country of origin, to pursue religious activities which expose him to a risk of persecution*'. The Advocate General in this context refers to a similar case before the ECoHR, namely '*Z. and T. v United Kingdom*'¹⁰⁵. Here the Court did not hold the inability to practice one's religion as enough for the principle of non-refoulement to apply. As a result, Article 9 of the ECHR is not tied with the principle of non-refoulement.

The Advocate General introduces the CFR in general terms and recognizes the need to adhere to it as a whole. In line with that, he refers to recital 10 of the directive doing the same. Contrary to early cases, the CFR is used to build up the basis for principles and rights discussed in this case. The principle of non-refoulement is established by referring to Article 19 (2) of the CFR. Remarkably, the principle of non-refoulement is not given further basis by means of referring to other legal instruments. Also the AG refers to Article 1 of the CFR which deals with human dignity and to Article 21 which deals with non-discrimination. Both these provisions are also not supplemented by other legal instruments. The AG referred to Article 10 (1) of the CFR which is about freedom of religion. This principle is however complemented by the AG referring to Article 9 of the ECHR. More interestingly though, the right to religion is connected to the principle of non-refoulement by ECoHR case law. The case '*Leyla Sahin v Turkey*'¹⁰⁶ is an example the AG refers to in order to show that the concept of religion should be assessed in broad terms with the result that more activities fall into practicing religion and therefore the individual becomes increasingly exposed to risk in a country that does not accept his religion. Consequently, this would stress the notion of non-refoulement. The CFR then is used by the AG in order to build a basis for freedom of expression and freedom of assembly by Articles 11 and 12. These however are also supplemented by the AG pointing out Articles 10 and 11 of the ECHR. The 1951 Refugee Convention is referred to only for the sake of categorizing by means of Article 1 (A)(2).

In total then, the CFR is used to build a basis for the rights and principles the case revolves around. More importantly though, all the cases center around the 1951 Refugee Convention, showing that it is the most important human rights legal instruments for this directive. The only principle applicable to human rights in the directive is the principle of non-refoulement. The cases however mostly concern themselves with specifics of refugee status instead of human rights. In connection to the ECoHR, it seems as if the ECJ is likely to follow its line also in this regard. Due to the fact that only the opinion of the AG is available until now, it is not possible however to state more than a potential trend in this regard.

¹⁰⁴ European Court of Justice, Opinion of Advocate General BOT. "*Federal Republic of Germany v Y and Z*", C-71/11 and C-99/11 (2012)

¹⁰⁵ European Court of Human Rights. "*Z and T v. United Kingdom*", Application No 27034/05 (2006)

¹⁰⁶ European Court of Human Rights. "*Leyla Sahin v Turkey*". Application No. 44774/98 (2005)

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4.3) Directive 2005/85/EC

The case '*Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*'¹⁰⁷ is about an individual who applied for asylum in Luxembourg and was rejected under an accelerated procedure due to entering the country with wrong identity documents and '*reasons [that] [...] were economic in nature and did not satisfy any of the substantive criteria giving grounds for international protection*'. As a reason of the proceedings of the individual seeking annulment of that action, the national Court issued preliminary questions to the ECJ concerning article 39 of directive 2005/85/EC¹⁰⁸ on the right to effective remedy. The Court subsequently ruled that dealing with asylum applicants via an accelerated procedure is possible if the possibility of judicial review is provided for.

The Court refers to Article 47 of the CFR. The central principles at hand in this case, namely the principles of fair trial and effective remedy, are dealt with in this article. In this regard, the Court also refers to the '*DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Germany*'¹⁰⁹ case, where it is stated in paragraph 30 that the CFR has to be considered in general and in paragraph 31 the principles stated in the CFR article uphold in general. The same goes for paragraph 25 of the '*Claude Chartry v Belgium*'¹¹⁰ case. However, this paragraph also refers to two articles about the ECHR.

Namely, the Court refers to Article 6 of the ECHR dealing with fair trial and Article 13 of the ECHR which is about effective remedy. Concerning the 1951 Refugee Convention, the Court referred to recital 13 of the directive. This recital redirects to Article 1 of the 1951 Refugee Convention in order to classify a refugee. As a basis for the safe country notion, the Court refers to for example Article 23 which in turn refers to Articles 29,30 and 31 in order to classify what constitutes a safe country. These classifications are however not of vital nature for the case.

Everything the Court refers to in this case is dealing only with the principles of fair trial and effective remedy, to a marginal degree also the safe country notion. As a basis for the rights of fair trial and effective remedy, the Court relies on both the CFR and ECHR. With regard to the safe country concept, the Court relies on the directive which partly rests on the 1951 Refugee Convention.

In the case '*M. v Ireland*'¹¹¹, an individual applied for asylum first and for subsidiary protection after. Both applications however were rejected. In the following, the individual asked for judicial review as he saw a '*failure to comply with their duty of cooperation*'. The questions referred to the Court then concern the principle of fair trial and effective remedy and Article 4(1) of Directive 2005/85/EC. For this case only the opinion of the AG is accessible at this moment.

¹⁰⁷ European Court of Justice. "*Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*". C-69/10 (2011).

¹⁰⁸ European Commission. "Council Directive on minimum standards on procedures in member states for granting and withdrawing refugee status". OJ (L 326), 12.12.2005, 2005/85/EC (2000).

¹⁰⁹ European Court of Justice. "*DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*". C-279/09 (2010)

¹¹⁰ European Court of Justice. "*Claude Chartry v Belgian State*". C-457/09 (2011)

¹¹¹ European Court of Justice, Opinion of Advocate General BOT. "*M v Minister for Justice, Equality and Law Reform, Ireland, Attorney General*". C-277/11 (2012).

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The AG introduces adherence to the CFR in general terms by recital 10 of directive 2004/83/EC. The principles of effective remedy and fair trial have their base built on Articles 47 and 48 of the CFR. Article 41, the right to good administration, complements this. Apart from these provisions, the case mostly relies on specific provisions of the directives that do not concern human rights legal instruments. The 1951 Refugee Convention is only used by the AG in order to define concepts.

In total, both cases show that the ECJ tends to rely more and more on the CFR for building a fundament for the principles. Mostly the cases concern themselves with the principles of fair trial and effective remedy, so that Article 47 of the CFR becomes important. The other two human rights legal instruments are not of primary importance for this directive.

Conclusion

The case law on regulation 343/2003 refers back to the ECHR, but to an even greater degree to the CFR, showing its increasing importance within the EU asylum law system. Hereby Articles 4 and 18 are the most important provisions. The pending case *'Federal Republic of Germany v Y and Z'* on directive 2004/83/EC, with the AG's opinion issued in 2012 only, shows a trend concerning the CFR. Whereas early case law on the directive 2004/83/EC refers to CFR only in a general way and used Articles 15 and 33 of the 1951 Refugee Convention for establishing the basis for the principle of non-refoulement, this case used Article 19 of the CFR. The cases dealing with directive 2005/85/EC also established a basis for the right to fair trial and effective remedy in Article 47 of the CFR. The ECHR is used to complement these provisions in most cases, whereas the 1951 Refugee Convention is relied on for definitions of a refugee, especially in the cases dealing with both the directives. Article 1 (A) (2) is hereby used extensively. Concerning the relationship with the EcoHR, cases like *'N.S.'* show, that even important community mechanisms important for the functioning of the EU asylum system may be held back in case that there are human rights infringements apparent in the system. This is in line with the judgment of the EcoHR on the *'M.S.S. Belgium'* case where the Court held that the *'ECHR prohibits member states from blindly trusting other member states under the Dublin regulation mechanism'*¹¹². Although the ECJ has put this in perspective by saying that *'not every infringement of a fundamental right [...] will have consequences on the application of the Dublin regulation'*¹¹³, this case might show the ECJ's interest in harmonizing the two systems.

In order to establish *to what extent the EU Charter of Fundamental Rights together with the European Convention on Human Rights and the Geneva Convention relating to the status of refugees are reflected in ECJ jurisprudence in EU asylum law*, the findings will be put in perspective.

5) Overall Assessment

In order to come to a conclusion of how the status quo of the system of protection of fundamental rights in the field of EU asylum law looks like, this chapter will assess the most important findings. There is a

¹¹² Lieven, S. "Case Report on C-411/10, N.S. and C-493/10, M.E. and Others, 21 December 2011". *European Journal of Migration and Law*, Vol. 14, p. 230 (2012)

¹¹³ Lieven, S. "Case Report on C-411/10, N.S. and C-493/10, M.E. and Others, 21 December 2011". *European Journal of Migration and Law*, Vol. 14, p. 234 (2012)

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trend that can on the one hand be assessed over time and for the respective legal instruments as such, and on the other hand with regard to the relationship with the EcoHR.

If looked at the development of the eight cases over time, early cases tend to rely on human rights legal instruments that are integrated into the EU system indirectly, later cases tend to rely on the CFR. In the very beginning the CFR was only used in general terms. In the end, Articles of the CFR became the part some cases revolved around. In this light, the ECHR and 1951 Refugee Convention were better reflected in EU jurisprudence in EU asylum law in the early post-Lisbon period, whereas the CFR became more and more important. Also the trend is likely to continue.

Besides an examination over a period of time, one can also look at the impact of the legal instruments for the respective secondary legislations. The CFR is hereby of crucial importance for both directive 2005/85/EC and regulation 343/2003. It is used to build the legal fundament for the principles and rights. These are primarily connected to the principle of fair trial and effective remedy. Also for definition the ECJ in general relies on the 1951 Refugee Convention, although the EU has definitions in its secondary legislation. This point can however be put into perspective, as many provisions therein are worded at least similar to the 1951 Refugee Convention. For directive 2004/83/EC, the older legal instruments like the 1951 Refugee Convention are more important. They deal with the principle of non-refoulement, which finds strong expression in Article 33 of the 1951 Refugee Convention and case law around Article 3 of the ECHR.

These findings then have to be complemented by an assessment of what extent the EcoHR has an influence on ECJ jurisprudence in the field of EU asylum law, due to the fact that provisions in the legal instrument is not the only influence the ECHR system can have on the EU asylum law system. By representing a system to which all EU member states are party and which has an own court that is also able to shape its system in a sovereign way the relationship with the EcoHR becomes important for examining the extent to which the ECHR is integrated into the EU jurisprudence in the field of asylum law. Not only do ECoHR cases tend to be increasingly used in ECJ cases, showing the special relationship between the two legal systems but also the ECJ tends to confirm the approach of the EcoHR and thus contributes to harmonizing efforts between the ECHR and the EU system in the light of EU accession to the ECHR. The 'N.S.' judgment as a similar case to the EcoHR case 'M.S.S. v Belgium and Greece'¹¹⁴ for regulation 343/2003 raises the possibility that 'problem member states', so EU member states having problems in keeping up with their obligations under the Dublin system like Greece or Hungary, are more vulnerable to their own deficiencies vis-a-vis asylum seekers and their lawyers and in turn could cause problems for the entire Dublin system. Therefore, the judgment puts light on one of the objectives of the Dublin regulation which was named '*burden sharing*'. Also, member states that fully observed the Dublin regulation without employing the sovereignty clause are forced to rethink their approach. Now in the aftermath of this judgment, EU member states cannot employ mutual trust in its entirety anymore. Instead, EU member states from now on have to examine potential risks in the systems of other EU member states. Therefore, it is likely that at some point member states will have to rethink the Dublin system. The system of mutual trust might not bring about the deserved human rights effect in the end and instead rather acts in the negative. If EU member states however would like to stay their grip on the mutual trust principle, they might have to help other member states with systemic problems of having a high burden by being overloaded with asylum applicants. For the Dublin regulation, the EcoHR had a

¹¹⁴ European Court of Human Rights. "M.S.S. v Belgium and Greece". Application No. 30696/09 (2011)

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serious impact then by bringing the debate about the principle of mutual trust in the Dublin system into motion.

Concerning Directive 2004/83/EC, the cases deal with human rights only marginally. The importance of the principle of non-refoulement is stressed, however the cases rather deal with specifics concerning the qualification of refugees. Also in the cases dealing with this piece of secondary legislation, the ECJ is likely to follow the case law of the EcoHR. The EcoHR case '*Leyla Sahin v Turkey*'¹¹⁵ is an example the AG refers to in order to show that the concept of religion should be regarded in broad terms. The result of doing so means that more activities fall into the concept of '*practicing religion*' and therefore the individual becomes increasingly exposed to risk in a country that does not accept his religion. In turn, this would strengthen the notion of non-refoulement. One can see that this is in line with EcoHR judgments because the EcoHR made the principle of non-refoulement absolute by means of the '*Soering v UK*'¹¹⁶ case and therefore has a strong interest in promoting this principle. By strengthening the principle as well, the ECJ thus tries to harmonize with the EcoHR. Therefore the ECJ tends to harmonize its approach with the EcoHR in case law applying to its secondary legislative framework.

In order to establish *to what extent the EU Charter of Fundamental Rights together with the European Convention on Human Rights and the Geneva Convention relating to the status of refugees are reflected in ECJ jurisprudence in EU asylum law*, all three legal instruments have their place in EU asylum law. By its '*M.S.S. v Belgium and Greece*' judgment, the EcoHR had a direct influence on the EU asylum system. The EcoHR thus takes part in shaping the EU asylum system by putting pressure on the EU member states to which the ECJ subsequently has to react. As a result, the ECHR system as a whole is of crucial importance for the EU asylum law framework. But also the 1951 Refugee Convention is of importance, as it still is the primary basis for the legal definition of who qualifies as a refugee. The CFR on the other hand has experienced a gradual trend of being used more and more by the ECJ in order to establish express legal foundations for human rights.

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