

The Violation of The Principle of Non-refoulement in the European Union

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LIST OF ABBREVIATIONS

AG	Advocate General
AFSJ	Area of Freedom, Security and Justice
CAT	Convention Against Torture
CISA	Convention implementing the Schengen Agreement
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
COI	Country of Origin Information
DAA	Draft Accession Agreement
EASO	European Asylum Support Office
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EFTA	European Free Trade Association
EIO	European Investigation Order
EPC	European Political Community
EU	European Union
EUAA	European Union Agency for Asylum
EU	Charter of Fundamental Rights of the European Union
Euratom	European Atomic Energy Community
EEC	European Economic Community
FRA	European Agency for Fundamental Rights
ICCPR	International Covenant on Civil and Political Rights
OAU	Convention Governing the Specific Aspects of Refugee Problems in Africa
SCO	Safe Country of Origin
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights

UNCLOS	United Nations Convention on the Law of the Sea
UNHCR	United Nations High Commissioner for Refugees

Daniele Grippo

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ABSTRACT

This doctoral thesis aims to study the legal system of the European Union (EU) with a focus on the EU's responsibility in asylum policy in relation to the principle of non-refoulement.

The principle of non-refoulement, as widely recognised as an absolute norm, prohibits the transfer of people to countries considered unsafe. However, its correct application in the EU seems to be circumvented by the principle of mutual trust and the concept of safe country. Therefore, this research, by analysing legal texts, case law and policy documents, critically examines how these two concepts attempt and sometimes succeed in circumventing the principle of non-refoulement.

The examination conducted shows a considerable discrepancy between the theoretical construct of the non-refoulement principle and its application in practice within EU Member States. Mutual trust often results in infringements of the rights of asylum seekers when they are transferred from one EU country to another, and at the same time, the safe country concept, which is open to political interpretation, also most frequently leads to these infringements.

This thesis, by illustrating the practical difficulties of protecting the principle of non-refoulement and how some policy choices are not in line with the EU's human rights obligations, contributes to the debate in the EU on asylum and refugees.

INTRODUCTION

This research aims to conduct a detailed examination of the EU legal framework, with a focus on the principle of non-refoulement and its complex interactions with EU asylum and refugee policies. Central to this study are the dynamics between the principles of mutual trust and the safe country concept and their impact on the application of non-refoulement. In fact, the principle of non-refoulement, considered a cornerstone of international refugee law, prohibits the return of individuals to areas where their life or freedom may be at risk. However, due to the complexity of the EU's legal and political context, this fundamental right is often subject to different interpretations and challenges, especially when it interacts with the principles of mutual trust and a safe country.

The primary objective of this research is to critically assess how the safe country concept and the principle of mutual trust, as implemented in the EU, may undermine the correct application of the principle of non-refoulement.

To achieve this aim, the research explores the different processes through which the principle of non-refoulement can be limited or circumvented in practice. In particular, it analyses the relationship between the principle of non-refoulement and the concepts of mutual trust and safe country, and how these two mechanisms challenge its application and, arguably, its absolute nature. Indeed, despite the theoretical absoluteness of non-refoulement, its practical application within the EU shows limitations that manifest themselves through the strategic use of mutual trust and safe country concepts. These mechanisms are often applied in such a way as to shift responsibility or reduce control, thus creating legal and practical obstacles to the protection of asylum seekers.

This study thus lays the groundwork for a comprehensive exploration of the challenges faced in safeguarding the rights of refugees and asylum seekers within the complex legal and policy framework of the EU. It contributes to the academic discourse by examining the interplay between legal norms and institutional practices, highlighting the gap between formal legal protections and their actual implementation. Moreover, this study seeks to provide further insight into existing studies by analysing the principle of non-refoulement in light of contemporary developments in EU asylum governance and offering a critical perspective on legal techniques used to manage, divert or limit protection responsibilities.

Furthermore, it should be pointed out that key legal concepts such as ‘undermining’, ‘circumvention’ and ‘violation’, which are often mentioned, are not interchangeable. In fact, undermining refers to situations in which the effectiveness of the principle is weakened in practice. Circumvention refers to structural or procedural strategies that allow states or institutions to avoid applying the principle without necessarily violating it. Violation, on the other hand, indicates a direct breach of the legal obligation. These distinctions are developed in this thesis to provide a structured framework for analyzing how EU mechanisms operate in relation to non-refoulement and for assessing their legal implications.

The research is divided into four chapters. The first one begins with an in-depth analysis of the legal framework pertaining to the rights of refugees and asylum seekers within the EU. Beginning with the historical development of the 1951 Refugee Convention and ending with the Common European Asylum System (CEAS) and its latest updates, this chapter lays the groundwork for a more in-depth investigation of how these systems interact and, on some occasions, conflict, particularly in the context of non-refoulement.

The second chapter then focuses on the principle of non-refoulement, analysing its evolution and confirming its status as an absolute principle in the EU legal and political context. This part of the research aims to examine the theoretical and practical boundaries of non-refoulement, highlighting the challenges and opening the door to the next chapters where its violations introduced by the concepts of mutual trust and safe country are analysed.

The third chapter thus turns to the evolution and concept of mutual trust within the EU framework. Originally used in commercial interactions, mutual trust has evolved to become a central element in the Area of Freedom, Security and Justice (AFSJ), significantly influencing criminal and asylum procedures. This chapter therefore aims to critically assess the impact of mutual trust on asylum policies, focusing on its interaction and violation of the principle of non-refoulement.

The final chapter examines the safe country concept and how it is strategically used within the EU asylum and refugee policy framework. The study focuses on the concepts of European safe country, safe third country and safe country of origin, assessing the potential implications for human rights and in particular the correct application of the principle of non-refoulement.

This research adopts a doctrinal legal method, supported by the analysis of EU and international legal sources. The method focuses on the careful reading and interpretation of legislative texts,

case law and policy documents in order to clarify how legal norms are constructed, applied and challenged in practice. This approach allows for a structured examination of the principle of non-refoulement within a multilevel legal framework, where the interplay between EU law and international obligations is central. The thesis is based on instruments such as the CEAS, the EU Charter of Fundamental Rights, the 1951 Refugee Convention, the European Convention on Human Rights (ECHR) and the relevant jurisprudence of regional courts and UN bodies. The decision to consider both European and international legal sources reflects the complex nature of asylum governance in Europe, where national implementation is influenced by overlapping legal regimes. The doctrinal method is therefore particularly suited to explore how legal reasoning, procedural rules and institutional presumptions affect the practical provision of refugee protection. The analysis also draws on and responds to a substantial body of legal scholars.

For instance, Christine Janssens explored the basis of mutual trust in EU law,¹ while authors such as Cathryn Costello,² Vincent Chetail, Philippe De Bruycker and Francesco Maiani examined the legal architecture of the CEAS and its implications for human rights.³ Also, contributions by Guy S. Goodwin-Gill on the principle of non-refoulement remain fundamental.⁴ Other scholars such as Evelien Brouwer, Hemme Battjes and Giulia Vicini have explored how judicial interpretation of mutual trust can erode fundamental rights protections.⁵ Vicini's argument that the Court of Justice has developed a different version of the principle of non-refoulement that has adapted to the European legal framework provides a fundamental basis for understanding how legal standards change according to context.⁶ In relation to the safe country concept, the work of Natalia Gierowska and Matthew Hunt has identified the risks of politically oriented designations and the marginalisation of individual assessments.⁷ Nevertheless, while much of this literature offers in-

¹ Christine Janssens, *The Principle of Mutual Recognition in EU Law*, (2013) Oxford University Press.

² Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law*, (2015) Oxford University Press.

³ Vincent Chetail, Philippe De Bruycker and Francesco Maiani, *Reforming the Common European Asylum System: The New European Refugee Law*, (2016) Human Rights and Humanitarian Law E-Books Online.

⁴ Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021)

⁵ Evelien Brouwer, Hemme Battjes, *The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law?* (2015) *Review European Administrative Law*, 8(2).

⁶ Giulia Vicini, *The Dublin Regulation Between Strasbourg and Luxembourg: Reshaping Non-Refoulement in the Name of Mutual Trust?*, (2015) *European Journal of Legal Studies*, 8(2).

⁷ Natalia Gierowska, *Why Does No Common European List on Safe Country of Origin Exist Despite Numerous Efforts Aimed at the Harmonisation of European Asylum Policy?*, *Journal of International Migration and Integration*, (2022) 23:2031–2046; Matthew Hunt, *The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future*, *International Journal of Refugee Law*, (2014), Vol. 26, No. 4, 500-535.

depth legal analysis of individual mechanisms, relatively little attention has been paid to their combined legal effect and how their interaction shapes access to protection in practice.

Despite considerable academic work on both the safe country concept and the principle of mutual trust, there remains a significant gap in the literature concerning their combined functioning within the EU asylum system. As mentioned, scholars such as Cathryn Costello, Vincent Chetail and Philippe De Bruycker have critically examined these mechanisms individually, particularly in relation to their human rights implications. This thesis builds on these analyses, agreeing with the scholars' assessments of the challenges posed by both safe country practices and mutual trust. However, the focus is not on each mechanism in isolation, but on how their interaction can undermine the principle of non-refoulement, which is often described as an absolute guarantee. The originality of this research lies in bringing these two areas together, examining how their combined application affects the practical implementation of the principle of non-refoulement within the EU asylum system. In doing so, this study situates itself within existing doctrinal and theoretical debates, while contributing to a more integrated critique that highlights how these mechanisms collectively shape accessibility to protection.

Beyond the EU legal framework, the thesis acknowledges the structural limitations of the international legal system. Unlike human rights treaties, which are supported by quasi-judicial bodies such as the Human Rights Committee or the Committee against Torture, the 1951 Refugee Convention lacks an institutional mechanism to assess states' compliance or to authoritatively interpret the treaty.⁸ This absence has led some scholars to propose a more prominent role for the International Court of Justice, notably through the Convention's arbitration clause or its advisory jurisdiction.⁹ Although this thesis does not explore this possibility in detail, it recognises the implications of this accountability gap and the growing importance of regional systems such as the EU in upholding fundamental principles of refugee law.

The legal and political context of this research makes its contribution particularly urgent. The adoption of the New Pact on Migration and Asylum in April 2024, after years of negotiations, represents a significant change in EU asylum policy. Although the Pact aims to harmonise

⁸ James C Hathaway, 'The Architecture of the UN Refugee Convention and Protocol' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021).

⁹ Anthony M. North and Joyce Chia, 'Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees' in James C. Simeon (ed), *The UNHCR and the Supervision of International Refugee Law* (Cambridge University Press 2013).

procedures and strengthen solidarity among member states, critics argue that it could further erode asylum standards, in particular through accelerated border procedures and increased use of detention. Concerns have been raised about the potential risk that these measures could undermine the principle of non-refoulement and the rights of asylum seekers.¹⁰ At the same time, the EU's continued use of externalisation strategies, such as agreements with third countries to manage migration flows, has been criticised as transferring responsibilities and potentially exposing individuals to rights violations.¹¹ Reports by NGOs and international organisations have documented widespread rejections at EU borders, indicating a systemic disregard for procedural safeguards and international obligations.¹² These developments underline the profound challenges facing the EU asylum system and highlight the need for a critical analysis of current policies and practices.

At the same time, recent case law and institutional responses continue to test the limits of mutual trust and the safe country doctrine. Against this perspective, the thesis offers a reflection on how legal mechanisms can be used to shape, and in some cases restrict, the scope of basic guarantees of protection. The analysis aims not only to clarify the legal dimensions of these developments but also to support approaches to asylum governance to ensure that they remain consistent with international and EU legal obligations.

¹⁰ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A New Pact on Migration and Asylum' COM (2020) 609 final.

¹¹ Violeta Moreno-Lax, 'Crisis as (Asylum) Governance: The Evolving Normalisation of Non-Entrée at the EU External Borders' (2024) 9(1) *European Papers* 179.

¹² European Council on Refugees and Exiles (ECRE), Pushbacks at Europe's Borders: A Report on Practices and Responses (Report, 2024); UNHCR, Regional Overview of Pushback Practices in Europe (Report, 2024).

CHAPTER 1

LEGAL TEXTS

1.1.Introduction

This chapter aims to explore in detail the complex legal framework that defines and regulates the rights of refugees and asylum seekers within the European Union. The doctrinal method adopted consists of a critical analysis of legal texts, case law and policy documents to clarify how the principle of non-refoulement is constructed and applied within the EU legal systems. Although the focus of the analysis is based on EU law, the thesis also incorporates international legal sources and soft law instruments, where relevant, in order to provide a comparative framework and verify the consistency of EU practices with international standards. The choice to focus mainly on EU law arises from the central role the EU plays in shaping asylum policy in the region. However, references to international law, including the 1951 Refugee Convention, General Comments and decisions of UN treaty bodies, are justified by their interpretative value and influence on the evolution of regional standards.

In order to maintain a consistent analytical framework, this thesis limits its analysis to legal instruments and case law available until November 2024. Where more recent reforms or pending judgments are not analysed in detail, their exclusion is indicated and justified in the relevant sections. The chapter does not include a detailed analysis of national jurisprudence, as the thesis focuses mainly on EU legal mechanisms and on international ones. However, references to national jurisprudence may be included where illustrative. Issues of extraterritorial jurisdiction are briefly mentioned in this chapter and will be explored in more detail in Chapter 2, in line with the broader structure of the thesis.

In particular, by analysing the interplay between the principle of non-refoulement, the concept of mutual trust and the notion of safe countries, this chapter lays the groundwork for a broader critical examination of how legal techniques can be used not only to enforce, but also to circumvent and undermine basic standards of protection.

This chapter sets out the basic legal framework of the thesis, providing an overview of the instruments and principles governing refugee and asylum law at both the international and EU levels. It examines the 1951 Refugee Convention and its 1967 Protocol, the European Convention

on Human Rights (ECHR), the Charter of Fundamental Rights of the European Union (EU Charter) and the Common European Asylum System. These instruments interact in a complex and sometimes conflicting way, particularly with regard to the interpretation and implementation of the principle of non-refoulement.

The aim of the chapter is not simply to describe these legal sources, but to explore how EU asylum law has evolved in ways that might enable, undermine or circumvent the correct application of the principle of non-refoulement. This includes an analysis of both EU and international legal material, as the principle of non-refoulement derives from multiple legal traditions and has been interpreted in different ways by various courts and monitoring bodies.

The chapter begins with an analysis of the origins and evolution of the 1951 Refugee Convention and its key provisions, including the criteria for refugee status, exclusion and cessation clauses, and fundamental principles such as protection against refoulement and non-punishment of illegal entry. It then analyses how this international framework intersects with the protection of human rights enshrined in the ECHR and the EU Charter, and then moves on to the structure and functioning of the CEAS and its main elements.

Through this analysis, the chapter highlights the legal and structural differences between obligations under international refugee law and those under EU law. This sets the stage for the following chapters, in which these differences will be analysed in the EU context in relation to how mutual trust and the safe country concept may affect the interpretation and implementation of the principle of non-refoulement.

1.2.Detecting the Mysteries of the Refugee Convention

Conflicts, violence and persecutions we witness today cause the displacement of millions of people. Such movement, however, is not a recent phenomenon, over the centuries persons were forced to leave their countries. The international community, nevertheless, began to pay attention in international legal terms to the refugee problem only at the beginning of the twentieth century.¹³

¹³ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1Reedited, Geneva, January 1992, UNHCR 1979, para 1.

In that period, several wars led four dynastic Empires into ruin and the creation of new states forced millions of people to flee their countries in search of protection.¹⁴

A concerted international response came in 1921 when the International Committee of the Red Cross asked the Council of the League of Nations to support refugees left without legal protections. This request led to the appointment of Dr. Fridtjof Nansen as High Commissioner for Refugees, a role created to address European refugee issues.¹⁵ In addition, entities such as the Nansen International Refugee Office, the Office of the League of Nations High Commissioner for Refugees, and the Intergovernmental Committee on Refugees were born under the League.¹⁶ In the early 1930s, however, the refugee situation did not stabilise. The 1926 and 1928 Arrangement relating to the Refugee's Legal Status failed to stem the rise of anti-alien feelings and the increase of economic and political instability led states to adopt policies only in favour of their citizens.¹⁷ In order to mitigate such sentiments that were spreading in Europe, the League of Nations proposed a new convention that would help to stabilise the situation of refugees,¹⁸ and at the 1933 Intergovernmental Conference, the Convention relating to the international Status of Refugees was adopted,¹⁹ marking it the first multilateral treaty offering refugees legal protection.²⁰

However, the exponential rise of Jews fleeing Nazi Germany highlighted its limitations and further attempts to strengthen it were then abandoned with the outbreak of the Second World War.²¹ Following the atrocities of the war, in 1950 a Conference of Plenipotentiaries of the United Nations was held in Geneva and the Convention relating to the Status of Refugees (Refugee Convention) was adopted on 28 July 1951.

The Convention, which entered into force on 21 April 1954, had temporal and territorial limitations, it applied only to persons who had become refugees as a result of events occurring in Europe before 1951.²² These limitations deriving from the desire of states not to assume unforeseen

¹⁴ See for example the Balkan Wars (1912-1913), World War I (1914-1918), the Soviet Revolution (1917), the wars in the Caucasus (1918-1921), and the Greco-Turkish War (1919-1922).

¹⁵ Fridtjof Nansen was a Norwegian diplomat who worked for displaced people in the early twentieth-century conflicts.

¹⁶ Gilbert Jaeger, *On the History of the International Protection of Refugees* (2001) International review of the Red Cross, Vol.83, No. 843, Geneva, page 729.

¹⁷ Peter Fitzmaurice, Anniversary of the forgotten Convention: The 1933 Refugee Convention and the search for protection between the world wars, Legal Aid Board.

¹⁸ Ibid.

¹⁹ Convention Relating to the International Status of Refugees, adopted the 28 October 1933 and entered into force the 13 June 1935.

²⁰ Peter Fitzmaurice (No 17).

²¹ Ibid.

²² See Article 1 of the Convention relating to the Status of Refugees.

obligations did not raise any specific problem when the Convention was adopted, since at that time such a document practically extended to all known groups of refugees.²³ After 1951 however, new conflicts in Africa generated a new wave of refugees. Hundreds of thousands of people fled from political conflicts in Rwanda and Burundi in the 1960s but due to the limitations of the Convention, those persons could not be recognized as refugees. To cope with these new emergencies, the international community felt the need to extend the provisions of the Convention to new refugees.²⁴ As a result, the Protocol relating to the Status of Refugees (1967 Protocol) was prepared and, after consideration by the General Assembly of the United Nations, it entered into force on 4 October 1967.²⁵

Although the Protocol has removed the time and geographical limits set out in Article 1 of the Convention, it is considered an independent instrument and its accession is not limited to States party to the Convention.²⁶ As a matter of fact, there are states like the USA which are signatories to the Protocol but not to the Refugee Convention and vice versa.²⁷ Nevertheless, even though some states have only signed the Protocol, this text obliges them to comply with the provisions of the Convention. In this regard, Article 1 of the protocol states: “*The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.*”

With 145 States Parties to the Convention and 146 to the Protocol,²⁸ these documents, under the stewardship of the United Nations High Commissioner for Refugees (UNHCR), serve as the cornerstones of contemporary international refugee protection.²⁹

Although the 46 articles of the Convention outline a protective framework, many principles are stated only in general terms and thus remain undefined.³⁰ In this regard, it is possible to consider the foundational documents and dialogues that shaped the Convention's drafting process, which in

²³ UN High Commissioner for Refugees (UNHCR), *Proposed measures to extend the personal scope of the Convention relating to the Status of Refugees of 28 July 1951 (Submitted by the High Commissioner in accordance with paragraph 5 (b) of General Assembly Resolution 1166 (XII) of 26 November 1957)*, 12 October 1966, A/AC.96/346, para 2.

²⁴ Handbook (n 10) 8.

²⁵ Ibid.

²⁶ Ibid.

²⁷ In this regard, see respectively the signatories of the Convention and the Protocol.

²⁸ UN High Commissioner for Refugees (UNHCR), *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*.

²⁹ UN High Commissioner for Refugees (UNHCR), “*The 1951 Convention relating to the Status of Refugees and its 1967 Protocol*”, 2011, page 2.

³⁰ See for instance Article 1, para 2 which does not include the definition of persecution.

fact offer interesting insights into those unspecified principles. Specifically, a close examination of the travaux préparatoires highlights the awareness shown by states regarding the limitations and challenges included in the concepts of refugee and asylum at the time.³¹ Indeed, an examination of these materials provides a clearer understanding of the intentions and considerations states had. This framework can offer insight into the delicate balance between humanitarian protection and state obligations that also occur today. In addition, to resolve ambiguities left by the Convention, UNHCR has over time disseminated non-binding manuals and guidelines in order to assist state parties. These interpretive manuals were thus designed to provide greater clarity on the Convention's provisions, and have aided the application of those norms, their enforcement and interpretation in the complex and evolving landscape of refugee protection.

For the purposes of this thesis, as stated above, legal instruments, case law and academic commentary are considered until November 2024. Where more recent proposals are excluded, the choice is deliberate and based on their limited practical impact at the time of writing.

1.2.1. Criteria for the determination of refugee status – Inclusion Clauses

The Refugee Convention and the 1967 Protocol are based on Article 14 of the 1948 Universal Declaration of Human Rights, which recognizes the right of persons to seek asylum from persecution in other countries.³² However, in order to obtain such rights a person must be firstly considered as a refugee. In this regard, paragraph 28 of Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Refugee Handbook) reads: *“A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which refugee status is formally determined. Recognition of refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee”*.

In essence, the Refugee Convention delineates the circumstances under which individuals are accorded refugee protection. More specifically, Article 1, paragraph 2 of the Convention defines a refugee as a person who: *“[o]wing to well-founded fear of being persecuted for reasons of race,*

³¹ The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis.

³² See Article 14 para 1 of the Universal Declaration of Human Rights

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

The specific criteria that an individual must fulfil to be considered a refugee are referred to as inclusion clauses.

1.2.2. Well-founded fear of being persecuted

The first clause considered by this paragraph is the “well-founded fear of being persecuted”, which can be considered as the main factor concerning the determination of refugee status.³³

The term "fear" refers to the existence of a fear of persecution in the mind of the refugee.³⁴ The phrase "well-founded", as an objective element, means that it is not only a person's state of mind that determines the refugee status. As indicated by Guy S. Goodwin-Gill, there must be sufficient facts to justify the conclusion that the asylum seeker would face a real risk of being subjected to persecution if he or she returned to the country of origin.³⁵ The term "well-founded fear" therefore, contains both an objective and a subjective component and, as suggested by the United States Supreme Court in the *I.N.S. v. Cardoza-Fonseca* case, by interpreting the Refugee Convention, if well-founded fear exists both elements must be considered.³⁶

The term "persecution" is not defined in the Refugee Convention. Its definition however can be indirectly traced to Articles 31 and 33 thereof, which refer to threats to life or freedom.³⁷

³³ UN High Commissioner for Refugees (UNHCR), *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, page 7.

³⁴ *Rajudeen, Zahirdeen v. M.E.I.* (F.C.A., no. A-1779-83), Heald, Hugessen, Stone (concurring), July 4, 1984. Reported: *Rajudeen v. Canada (Minister of Employment and Immigration)* (1984), 55 N.R. 129 (F.C.A.), at 134.

³⁵ Guy S. Goodwin-Gill, “Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees.” (1982) Michigan Yearbook of International Legal Studies, page 299.

³⁶ *Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421; 107 S. Ct. 1207, United States Supreme Court, 9 March 1987.

³⁷ Richard Plender, *International Migration Law*, (second rev. ed. Dordrecht, 1988), page 417 and 418.

Globally there is no unanimous acceptance of this term,³⁸ but it is commonly recognized by the doctrine that persecution cannot correspond to any violation of human rights³⁹ and it should be related to the degree of severity and the nature of a violated right.⁴⁰ In this regard, Richard Plender suggests that the term persecution might be linked to Article 3 of the ECHR.⁴¹ Similarly, Scott Rempell proposes a connection with Article 3 of the Convention against Torture⁴² and declared that persecution should be defined as “*the illegitimate infliction of sufficiently severe harm*”.⁴³ Furthermore, the term persecution cannot be confused with discrimination. A person who receives discriminatory treatment is not necessarily a victim of persecution unless such discriminatory measures lead to substantially prejudicial consequences for the person concerned.⁴⁴

1.2.3. Grounds of persecution

Under the Refugee Convention, however persecution per se, as an element to be considered as a refugee, is not enough. There must be a causal link between the well-founded fear of persecution and one of the five grounds mentioned in Article 1 paragraph 2 (i.e. race, religion, nationality, membership of a particular social group and political opinion).

The term "race", as indicated in the Refugee Handbook, should include all kinds of ethnic groups that are referred to as races in common usage.⁴⁵ In this regard, scholars linked such definition with a particular population, geographic distribution and a social and political construct.⁴⁶

There is no universally accepted definition of ‘religion’. The Refugee Convention and other international instruments have avoided defining such a complex term. This may be due to the fact that such a delimitation would risk going against the principle of religious freedom and marginalizing minorities. Nevertheless, certain guidelines on what freedom of religion is can be

³⁸ Handbook (n 13) 51.

³⁹ See for example Gregor Noll, *Asylum Claims and the Translation of Culture into Politics*, 41 Texas International Law Journal (2006) 491-501; Fatma E. Marouf and Deborah Anker, *Socioeconomic Rights and Refugee Status: Deepening the Dialogue Between Human Rights and Refugee Law* (2009) 103 American Journal of International Law, 784.

⁴⁰ Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021) 133; Hathaway, page 109.

⁴¹ Richard Plender, (n 37).

⁴² Both Article 3 refer to torture, inhuman and degrading treatment.

⁴³ Scott Rempell, *Defining Persecution* (2013) Utah Law review, page 343.

⁴⁴ Handbook (n 13) 54.

⁴⁵ Ibid, para 68.

⁴⁶ Hoffman Sharona, "Is There A Place for Race As a Legal Concept" (2004) *Faculty Publications*. 227, page 1096.

found in Article 18 of the Universal Declaration of Human Rights (UDHR)⁴⁷ and the International Covenant on Civil and Political Rights (ICCPR).⁴⁸ Both Articles include the rights to change religion, to manifest it in public or in private, to teach it and to practice it. In the European context, an analogous direction is reflected in Article 10 of the EU Charter⁴⁹ and in Article 9 of the ECHR.⁵⁰ The term "nationality" does not only include citizens.⁵¹ In fact, it could be difficult to understand how a citizen of a country can be persecuted by his own government because of his nationality.⁵² In this respect, the Refugee Handbook refers also to membership of an ethnic or linguistic group.⁵³ At this point, it can be noted that this term may be closely linked to the notion of race. Indeed, at the national level, the United States Court of Appeals in the *Baballah v. Ashcroft* case pointed out that ethnicity is a category between and within race and nationality grounds.⁵⁴ The notion of nationality, under the Refugee Convention, also includes stateless persons since such individuals have been persecuted by reason of their status as foreigners.⁵⁵ Similar to the other grounds, the refugee Convention does not offer a definition of "particular social group", nor includes a list of social groups.⁵⁶ According to the Refugee Handbook, such a term must be interpreted in a way that should evolve with the changing of society.⁵⁷ In this regard, two approaches at the national level have influenced its definitions; the so-called "*ejusdem generis*" and the "social perception". The last ground of persecution, as indicated in the Refugee Convention is to hold a political opinion. It is commonly accepted that the term "political opinion" does not only include people involved in political parties, with party memberships or political roles but also those at risk from political forces within their country.⁵⁸

⁴⁷ See Article 18 of the Universal Declaration of Human Rights.

⁴⁸ See Article 18 of the International Covenant on Civil and Political Rights.

⁴⁹ See Article 10 para 1 of the Charter of Fundamental Rights of the European Union.

⁵⁰ See Article 9, para 1 of the European Convention on Human Rights.

⁵¹ Handbook (n 13) 74.

⁵² James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (2014) Cambridge University Press, page 397.

⁵³ Handbook (n 13) 74.

⁵⁴ *Baballah v. Ashcroft*, 335 F.3d 981 (USCA, 9th Cir., Jul. 11, 2003), para 10.

⁵⁵ Atle Grahl-Madsen, *The Status of Refugees in International Law* (Vol. I, 1966), at 217–18, in James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (2014) Cambridge University Press, page 397.

⁵⁶ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, para 1 and 3.

⁵⁷ *Ibid*, para 3.

⁵⁸ James C. Hathaway and Michelle Foster, (n 52) 405.

1.2.4. Being outside the country of nationality

The other inclusion clause, under the Refugee Convention, is that a person must be outside the country of his nationality. This means, that a person cannot be considered a refugee if he or she asks for protection in his or her own country. The Refugee Handbook points out that there are no exceptions to this rule.⁵⁹

As a form of support, there is the fact that it is not possible to obtain asylum protection in embassies or consulates, since these structures cannot be considered as a full part of the territory of their nation.⁶⁰ In the European context, confirmation of such rule comes from the Court of Justice, which in the *X and X* case stated that EU Member States can examine any application made on the territory, at the border or in the transit zones, but not in diplomatic premises.⁶¹ Nevertheless, although, the Refugee Handbook does not include exceptions, it is interesting to note that there have been cases where States have accepted asylum applications in embassies,⁶² as proof that such a rule is not considered absolute. In addition, the ECtHR in *Hirsi Jamaa* case stated that the asylum procedure, would be applied also during military and coast guard operations on the high seas,⁶³ hence also outside the territory of the country.

1.2.5. Unwillingness to avail of the protection of the country

An individual can also be considered a refugee if he or she is unable to enjoy the protection of the country of origin or return to it fearing persecution. This is the last inclusion clause in the Refugee Convention.

The concept of refugee protection is based on principles and standards established by various international instruments and case law.⁶⁴ Different is, however, when the lack of protection is used as an inclusion clause. In this regard, it becomes hard to find a definition of lack of protection or

⁵⁹ Handbook (n 13) 88.

⁶⁰ In the 1961 Vienna Convention on Diplomatic relations there is no notion of extraterritoriality but only reference to Immunity from jurisdiction and inviolability of the premises (See Articles 30 and 31 thereof).

⁶¹ CJEU, Case C-638/16 PPU *X and X* EU:C:2017:173, para 49.

⁶² Gregor Noll, Seeking Asylum at Embassies: A Right to Entry under International Law (2005) 17 Int'l J. Refugee L. 542, page 542.

⁶³ *Hirsi Jamaa and Others v Italy* App no. 27765/09, (ECtHR 23 February 2012) page 75.

⁶⁴ Erika Feller, International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present and Future (2001) International Review of the Red Cross, page 582.

even identify the level of protection that must be provided by a state, as The Refugee Convention does not define these elements. Nevertheless, as it will be considered later, in the EU, such definitions are included in the Qualification Directive.

Moreover, when protection is lacking due to a conflict and not for the reasons mentioned above, the Refugee Convention does not apply. In fact, individuals who are forced to leave their country as a result of armed conflicts are not considered refugees under the Convention.⁶⁵ Other international instruments, nonetheless, have extended the refugee definition to cover also such people. Specifically, the 1969 OAU Convention Governing Specific Aspects of the Refugee Problems in Africa incorporated among the inclusion clauses external aggression, occupation and foreign domination.⁶⁶ Similarly, the 1984 Cartagena Declaration included foreign aggression and internal conflicts.⁶⁷ At the European level, on the other hand, the definition of refugee has been transposed without extensions. Article 2 (d) of the Qualification Directive corresponds exactly to Article 1 paragraph 2 of the Refugee Convention. This does not mean, however, that people who escape war cannot receive protection in the EU. In fact, as will be analyzed in the last section, according to Article 2 (f) of the Qualification Directive, although such persons are not considered refugees, they could be entitled to subsidiary protection.⁶⁸

1.3. Criteria for the determination of refugee status – Exclusion Clauses

The above list of inclusion clauses represents the elements necessary to guarantee refugee status. A person, therefore, cannot be considered a refugee, under the Convention, in case of the absence of one of those factors. This does not mean, however, that if all the inclusion clauses are present, a person is automatically considered a refugee. There are indeed cases in which, even though a person fulfils all the conditions, he or she cannot be a refugee. These cases are all indicated in Article 1 paragraphs (D) (E) (F) of the Refugee Convention.

⁶⁵ Such people can still obtain protection under the 1949 Geneva Conventions on the Protection of War Victims. In addition, it must be taken into account that protection or refugee status is often granted to people in this context where in addition the conditions of refugee status are demonstrated.

⁶⁶ See Article 111 para 2 of the 1969 OAU Convention Governing Specific Aspects of the Refugee Problems in Africa.

⁶⁷ See Conclusion No. 312 of the 1984 Cartagena Declaration.

⁶⁸ See Article 2 (f) of the Directive 2011/95/EU.

The first circumstance, provided in Article 1 paragraph (D),⁶⁹ concerns persons who already receive protection or assistance from the United Nations. A clear example of this clause comes from people who are currently under the protection of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).⁷⁰

The UNRWA aims to protect and assist only Palestine refugees⁷¹ spread in different areas of the Middle East, such as Lebanon, Syria, Jordan, the West Bank and the Gaza Strip.⁷² Therefore, as long as a person is in those places can obtain protection from the UNRWA and not from the Refugee Convention.⁷³

The other exclusion clause included in Article 1 paragraph (E), refers to persons, who may be eligible to be refugees but enjoy, in the country where they are present, equivalent or most of the rights enjoyed by nationals.⁷⁴ Therefore, although they are not citizens, but have acquired such rights, they are excluded from the protection guaranteed by the Refugee Convention.

The last exclusion clause, indicated by the Refugee Convention, concerns persons who have committed crimes or acts of such importance that they are not considered worthy of obtaining international protection.⁷⁵ Specifically, Article 1 paragraph (F) (a) considers crimes against peace, war crimes, or crimes against humanity. Their definitions can be found in different International Documents, such as the Nuremberg Charter and the 1998 Rome Statute of the International Criminal Court (ICC).

Paragraph (F) (b) of the Refugee Convention provides for another exclusion clause. A person cannot be considered a refugee, according to it, if he or she has committed a serious non-political crime outside the country in which international protection is sought and before his or her admission. It seems that the Refugee Convention specified the term "non-political" because a crime of a political nature could fall within acts of persecution for political opinions.⁷⁶

⁶⁹ See Article 1(D) of the Convention relating to the Status of Refugees.

⁷⁰ The UNRWA was established by the UN General Assembly Resolution No 302 (IV) of 8 December 1949.

⁷¹ The term "Palestine refugee" applies to people whose usual place of residence was Palestine between 1946 and 1948, and who were forced to flee following the Arab-Israeli conflict of 1948. This term was later extended to also include those who, as a result of the 1967 Arab-Israeli conflict, were displaced from the Palestinian territory occupied by Israel.

⁷² European Asylum Support Office, *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU)*, A Judicial Analysis, page 13.

⁷³ Handbook and Guideline on Procedures and Criteria for Determining Refugee Status, under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Geneva 2011, para 143.

⁷⁴ See Article 1(e) of the Convention relating to the Status of Refugees.

⁷⁵ See Article 1(F) of the Convention relating to the Status of Refugees.

⁷⁶ See Article 1, para (a) (1) of the Refugee Convention (persecution on the ground of holding political opinions).

Particularly difficult could be giving a definition of "crime" as, considering the background of diverse legal systems, this term may vary from legislation to legislation.⁷⁷ In this regard, as indicated by the European Asylum Support Office, it would be reasonable to apply international standards.⁷⁸ An example of this approach emerges from the Dutch Council of State, where it had to be established whether female genital mutilation in Sierra Leone should be considered a serious non-political crime. The Dutch Council of State referred to international standards and consequently, although in Sierra Leone this practice was not a crime, it was nonetheless considered a violation of human rights and therefore fell under the exclusion clauses.⁷⁹

The last exclusion clause indicated in Article 1 (F) (c) refers to acts contrary to the purposes and principles of the United Nations.⁸⁰ The definition of such purposes and principles can be found in the Preamble and in Articles 1 and 2 of the Charter of the United Nations. This paragraph, even though it does not introduce anything new compared to the others above mentioned, has been inserted with the aim of including other aspects that may not be covered in the previous exclusion clauses.⁸¹

Although the exclusion clauses are rooted in the Refugee Convention, as will be seen in the following sections, their application in EU asylum law is further guided by the Qualification Directive, which reflects and refines these grounds by incorporating definitions from international law into EU law.

1.4. Criteria for the determination of refugee status – Cessation Clauses

The Refugee Convention does not only indicate when a person can or cannot be a refugee. Its Article 1 considers also cases in which a person, who had already obtained protection, ceases to be a refugee. These are the so-called cessation clauses which, illustrated in paragraph (C)⁸², are mainly based on the fact that such persons no longer need international protection.⁸³

⁷⁷ Handbook (n 13) 155.

⁷⁸ European Asylum Support Office, *Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU)*, A Judicial Analysis, page 23.

⁷⁹ *X v. the Dutch Minister for Immigration and Asylum and his successor the State Secretary for Security and Justice*, 201208875/1/V1, Netherlands, The Council of State (Raad van State), 10 February 2014, para 2.4.

⁸⁰ See Article 1(F) © of the Convention relating to the Status of Refugees.

⁸¹ Handbook (n 13) 162.

⁸² See Article 1(C) of the Convention relating to the Status of Refugees.

⁸³ Handbook (n 13) 111.

The paragraph included six different clauses and as indicated by the UNHCR in its guidelines, they must be interpreted restrictively, in the sense that no other cessation clauses are allowed or recognized beyond those mentioned.⁸⁴

The first four conditions reflect a change in the refugee's mind and are based on his or her willingness to return permanently or to re-avail the protection of his or her country. Also, here the Refugee Handbook is very clear in its interpretation. In order for such clauses to occur, there must be voluntariness and intention.⁸⁵ In other words, a refugee cannot be forced against his or her will and the protection must actually be obtained.⁸⁶

The last two clauses, on the contrary, do not reflect the refugee's mind but are based on the fact that international protection is no longer necessary following changes in the country of origin. This means that even though a refugee continues to refuse to avail him or herself of the protection of the country of origin, the Refugee Convention will cease to apply. However, considering the sensitivity of the matter, these changes must be concrete and fundamental such as to remove the basis of the fear of persecution.⁸⁷

Such a rule, however, does not have an absolute character. There could be cases where a refugee continues to be protected by the Convention, even though the country of origin substantially changed. In fact, in case a refugee has suffered atrocious forms of persecution, he or she cannot be expected to return to that country.⁸⁸ In order to understand whether or not the circumstances are concretely changed, in 1992 the UNHCR's Executive Committee established that states should carefully assess the fundamental character of the changes in the country of origin, including the human rights situation and the causes of persecution.⁸⁹ Similarly, these principles were followed by the Court of Justice in the *Salahadin* case.⁹⁰

1.5. Convention Relating to the Status of Refugees – Main Principles

⁸⁴ Ibid, para 116.

⁸⁵ Ibid, para 119.

⁸⁶ Ibid.

⁸⁷ Ibid, para 135.

⁸⁸ UN High Commissioner for Refugees (UNHCR), Guidelines on International protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses), 2003, para 20.

⁸⁹ UN High Commissioner for Refugees (UNHCR), Cessation of Status No. 69 (XLIII) - 1992, 9 October 1992, No. 69 (XLIII) – 1992.

⁹⁰ Joined cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla and Others* [2009] ECR I-1493, para 70.

The Refugee Convention, as previously explored, is accurate in indicating when a person can be or is not considered a refugee. However, the Convention is not limited only to these conditions, the text outlines other fundamental principles, designed to guarantee the protection of refugees and asylum seekers. For instance, a key principle of the Refugee Convention articulated in Article 31, is the non-penalization of refugees for illegal entry. Despite this provision, it is commonly known that asylum seekers are placed in detention facilities in the European Union, North America and Australia, due to their illegal entry, reflecting a discrepancy between the established principle and its practical application.⁹¹

Equally significant is the principle of family unity, a concept extensively recognized and upheld by various international instruments.⁹² The UNHCR, in its 2001 Summary Conclusions on Family Unity, asserted that the obligation to respect refugees' right to family unity is fundamental and applies irrespective of a country's status regarding the 1951 Convention.⁹³ The Refugee Convention however does not explicitly include this principle among its articles. Nonetheless, the final act of the conference that adopted the Convention recommended that Governments should take necessary measures to ensure the unity of the refugee's family.⁹⁴

Prominent among these principles is the cornerstone of refugee protection: the principle of non-refoulement. Its importance is evident from the fact that it has been defined in several international documents, both at the universal and regional levels.⁹⁵ Its position in the international legal system is further emphasized by the fact it is also considered to be a norm of international customary law.⁹⁶ The principle of non-refoulement, under the Refugee Convention, protects refugees against return to places of persecution. In other words, contracting states cannot expel a refugee if there is a risk that such a person may run a risk of being persecuted.⁹⁷ Nevertheless, under the Convention, the principle is not absolute. Article 33, Paragraph 2 of the Convention provides an exception, by

⁹¹ Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection*, (2003) Cambridge University Press, page 187.

⁹² See Article 16 of the Universal Declaration of Human Rights; Articles 7 and 9 of the EU Charter and Article 8 ECHR.

⁹³ UN High Commissioner for Refugees (UNHCR), Summary Conclusions on Family Unity, 2001, para 4.

⁹⁴ See para B of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.

⁹⁵ UN High Commissioner for Refugees (UNHCR), UNHCR Note on the Principle of Non-Refoulement, November 1997, para b.

⁹⁶ Ibid.

⁹⁷ See Article 33 para 1 of the Convention Relating to the Status of Refugees.

establishing that if a refugee is a danger to the security of the state, where he or she is present, can be expelled, regardless of whether or not will be persecuted.⁹⁸

Due to its central role and undeniable importance in the framework of refugee protection, the principle of non-refoulement will be examined in detail in the following chapters, providing an in-depth analysis of its frequent violations within the EU. This exploration aims to unravel its complexities and how it is applied, thus offering valuable insights into how it functions in practice and the challenges it faces in the complex legal context of refugee protection in the EU. With this in-depth legal analysis, the chapter also aims to lay a solid foundation for further exploration by highlighting specific cases where violations of the principle of non-refoulement occur within the EU. This examination is therefore central to this scholarly research, as it highlights the differences between the main international documents, the diverse nature of non-refoulement and its precarious position within the EU legal framework.

1.6. The Cornerstone of European Human Rights: The European Convention for the Protection of Human Rights and Fundamental Freedoms

As noted in the previous section, the Refugee Convention and the UNHCR establish very specific rules to guarantee the protection of refugees and their families. The Convention, however, did not provide for the creation of a special body that could enforce and ensure its rightful application. Indeed, as indicated in Article 38, disputes between contracting states can be submitted to the International Court of Justice.⁹⁹ However, the Court notoriously does not possess any specific competence in the field of human rights and it is appointed to the resolution of disputes arising exclusively between States.¹⁰⁰ This means, that individuals cannot appeal before the International Court for the protection of rights guaranteed by the Refugee Convention.

At the European level, on the other hand, human rights are guaranteed by two specific documents: the ECHR and the EU Charter. The correct application and interpretation of such Documents are assured by two different Courts: the Court of Justice of the European Union and the European

⁹⁸ Ibid, para 2.

⁹⁹ See Article 38 of the Convention relating to the Status of Refugees.

¹⁰⁰ Statute of the International Court of Justice, Article 34: “*Only states may be parties in cases before the Court.*”

Court of Human Rights, which, as it will be later analyzed, have jurisdiction to deal with submissions from individuals.

1.6.1. Evolution and Structure of the ECHR

At the end of the Second World War, the leaders of the European countries understood that the time had come to create something to guarantee peace in Europe and avoid, that the horrors resulting from the war could occur again. In May 1948, over 750 delegates from civil society members, religious and political groups gathered in The Hague for the so-called "European Congress".¹⁰¹ Among the matters under consideration, the question of human rights was of great attention.¹⁰² It was thus decided that a common declaration of rights should have been drawn up and, the proposal emerged was then included in the framework of the Council of Europe.¹⁰³ A year later, more than 100 parliamentarians from the twelve Member States of the Council of Europe met in Strasbourg to draft the Human Rights Charter. Following this meeting, the Convention was signed in Rome on 4 November 1950 and came into force on 3 September 1953.¹⁰⁴

The ECHR, based on the Universal Declaration of Human Rights, is divided into three titles and consists of 59 articles. Over the years, it has been integrated and modified by 16 additional Protocols. The last one, which entered into force in 2018, concerns, among other things, the possibility for the ECtHR to issue non-binding opinions.¹⁰⁵

In order to ensure that states observed their obligations under the Convention, the ECtHR was set up under Article 19.¹⁰⁶ Specifically, the system set up by the ECHR originally provided for three control institutions: the European Commission on Human Rights¹⁰⁷, the European Court of Human Rights and the Committee of Ministers of the Council of Europe¹⁰⁸. Since 1998, with the entry into

¹⁰¹ The Virtual Centre for Knowledge on Europe, *The post-war European idea and the first European movements*, The Congress of Europe in The Hague (7 to 10 May 1948), page 1.

¹⁰² Gordon L. Weil, The Evolution of the European Convention on Human Rights (1963) *The American Journal of International Law*, Vol. 57, No. 4, page 804.

¹⁰³ Ibid, page 805.

¹⁰⁴ The Convention was signed by the twelve states at the time members of the Council of Europe (Belgium, Denmark, France, Greece, Ireland, Iceland, Italy, Luxembourg, Norway, the Netherlands, the United Kingdom, Sweden, Turkey).

¹⁰⁵ Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁰⁶ See Article 19 of the European Convention on Human Rights.

¹⁰⁷ Established in 1954 with the function of filtering the activity of the Court.

¹⁰⁸ The Committee of Ministers is the Council of Europe's statutory decision-making body. Its role and functions are defined in Chapter IV of the Statute.

force of Protocol 11, the Convention has been reformed through the merger of the Commission and the Court into a single permanent Court,¹⁰⁹ which is composed today of 47 judges, one for each state member of the Council of Europe.

In addition to disputes between states, the Court, as mentioned above, can also be appealed by individuals. In particular, Article 34 ECHR allows application from any person, nongovernmental organisation or group of individuals who are subject to the jurisdiction of one of the states that have ratified the ECHR.¹¹⁰ The term "any person" means that an applicant before the ECtHR is not required to be a citizen or resident of one of the Member States, except in specific cases.¹¹¹ Moreover, the Court in the *Loizidou v. Turkey* case, specified that the concept of "jurisdiction" is not restricted to the national territory of the High Contracting Parties but also where it exercises control.¹¹²

Although the Court can be appealed by states and individuals in case of violation of one or more rights guaranteed by the ECHR, as indicated in Article 35 ECHR, certain requirements must be met.¹¹³ While some conditions are common to both inter-state and individual cases, others are only applicable to the latter. The common conditions are: exhaustion of domestic remedies,¹¹⁴ term of six months,¹¹⁵ incompatibility *ratione personae* and incompatibility *ratione temporis*. Individual claims, on the other hand, are inadmissible if: the action is anonymous or is the same as another one already examined by the Court; in case of incompatibility *ratione materiae*, the action is manifestly ill-founded or in case of abusive application.

No sums of money to be paid as fees for proceedings before the Court are required and once finalized, the Court's decision is motivated and published. It has binding force for the States parties involved and it is forwarded to the Committee of Ministers which oversees the execution.¹¹⁶ In the event that the Court finds a violation, the punishment corresponds to the payment of a sum of

¹⁰⁹ Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

¹¹⁰ See Article 34 of the European Convention on Human Rights.

¹¹¹ European Union: European Agency for Fundamental Rights, *Handbook on European law relating to asylum, borders and immigration*, June 2013, ISBN 978-92-9239-105-8 (FRA), page 15.

¹¹² *Loizidou v. Turkey*, App no 40/1993/435/514 (ECHR 23 February 1995) para 62.

¹¹³ See Article 45 of the European Convention on Human Rights.

¹¹⁴ The existence of such remedies must be sufficiently certain not only in theory but also in practice, in the absence of them, they would be without the requirement of accessibility and effectiveness. See *McFarlane v. Ireland*, App no 31333/06 (ECtHR 10 September 2010) para 114; *Riccardi Pizzati v. Italy*, App no. 62361/00, (ECtHR 29 March 2006) para 38.

¹¹⁵ The term of six months, when Protocol 15 will enter into force, will be reduced to four months.

¹¹⁶ See Article 46 of the European Convention on Human Rights.

money. However, the ECtHR in the *Scozzari v. Italy* case has specified that a State has a legal obligation not just to pay those concerned the sums established, but also to choose measures to be adopted in its domestic legal order to put an end to the violation and to redress so far as possible the effects.¹¹⁷

1.6.2. Refugees' Protection under the ECHR

The European Court of Human Rights, as emphasized in the *T.I. v. UK* case, is not competent to examine asylum claims or the application of the Refugee Convention.¹¹⁸ This is due to the fact that under the ECHR, there is no right to asylum as such. Nevertheless, the member States of the Council of Europe have the obligation to guarantee to all those who fall within their jurisdiction, including refugees, respect for the rights guaranteed by the ECHR.¹¹⁹

A clear example is the prohibition of torture and inhuman or degrading treatment established in Article 3 of the Convention. In this regard, the ECtHR, in the *Soering v. UK* case, recognized the responsibility of the States in cases where an individual is to be returned to a third State where he or she could be subjected to torture or ill-treatment in violation of Article 3.¹²⁰ The principle of non-refoulement, affirmed for the first time in that decision, was then extended in the 1990s to asylum cases, by the *Vilvaraja*¹²¹ and *Chahal*¹²² judgements. In addition, in the *T.I. v. UK* case, the Court held that the return of an asylum seeker from the United Kingdom to Germany, where an order had been previously issued to expel him to a third country, did not exclude the United Kingdom's responsibility that such person may suffer inhuman or degrading treatment in that state.¹²³ With this statement, thus, the Court went further by establishing also the prohibition of an indirect refoulement.

Connected to the principle of non-refoulement is the prohibition of collective expulsions included in Article 4 of Protocol 4 of the ECHR.¹²⁴ As repeatedly stated by the ECtHR, states cannot force

¹¹⁷ *Scozzari and Giunta/Italy*, App no. 39221/98 (ECtHR13 July 2000) para 249.

¹¹⁸ *T.I. v. The United Kingdom*, App no. 43844/98 (ECtHR 7 March 2000) page 16.

¹¹⁹ European Convention on Human Rights, Article 1: “*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.*”

¹²⁰ *Soering v. The United Kingdom*, App no. 14038/88 (ECtHR 7 July 1989) para 86.

¹²¹ *Vilvarajah and Others v. The United Kingdom*, App no 45/1990/236/302-306 (ECtHR 26 September 1991).

¹²² *Chahal v. The United Kingdom*, App no 70/1995/576/662 (ECtHR15 November 1996).

¹²³ *T.I. v. The United Kingdom*, App no. 43844/98 (ECtHR7 March 2000) page 15.

¹²⁴ See Article 4 Protocol No. 4 of the ECHR.

a group of people to leave their territory unless such a decision is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual foreigner in the group.¹²⁵

As indicated by the Refugee Convention, when an asylum seeker arrives illegally in the territory of a state, he or she should not be prosecuted.¹²⁶ In this case, the individual should without delay present him or herself to the authorities and apply for asylum or be allowed to do so. A clear example of such a rule, as will be better analysed in the last chapter, is found in the *Hirsi Jamaa and Others v. Italy* case, where the applicants were intercepted by the Italian coastguards on the high seas and pushed back to Libya without the possibility of being able to apply for asylum.¹²⁷ This action resulted in a violation of Article 13 ECHR which guarantees the right to an effective remedy. Furthermore, the ECtHR also condemned the Italian authorities for violation of Article 3 ECHR, since they knew or should have known that the applicants, once returned to Libya as irregular immigrants, would be exposed to treatment in violation of the ECHR.

Under the ECHR there is no provision governing the status of asylum seekers during the processing of their applications.¹²⁸ In this regard, the Court, in the *Saadi v. UK* case, held that the entry of an asylum seeker remained unauthorized until it had been formally authorized by the national authorities.¹²⁹ Indeed, it is quite common that within the European Union, such persons are placed in detention while the procedure is finalized.¹³⁰ This possibility is also included in Article 5 ECHR, which allows the detention of persons to prevent them from effecting an unauthorized entry into the territory of a state.¹³¹ Among the conditions to consider detention as a lawful measure, the ECtHR held that the time limit is an essential component. In the *Auad v. Bulgaria* case it established that the length of detention should not exceed the duration reasonably required for the purpose pursued.¹³² In particular, in the *Saadi* case, the Court found that there had been no violation of Article 5 where an asylum seeker had been lawfully detained for seven days while his asylum

¹²⁵ Council of Europe: European Court of Human Rights, *Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights - Prohibition of collective expulsions of aliens*, 30 April 2017, page 5.

¹²⁶ See article 31 of the Refugee Convention.

¹²⁷ *Hirsi Jamaa and Others v. Italy*, App no. 27765/09 (ECtHR 23 February 2012).

¹²⁸ European Union: European Agency for Fundamental Rights, *Handbook on European law relating to asylum, borders and immigration*, June 2013, ISBN 978-92-9239-105-8 (FRA), page 44.

¹²⁹ *Saadi v. the United Kingdom*, App no. 13229/03 (ECtHR 29 January 2008) para. 65

¹³⁰ European Agency for Fundamental Rights, *Handbook on European law relating to asylum, borders and immigration*, (ISBN 978-92-9239-105-8 FRA, 2013), page 143.

¹³¹ See Article 5 para 1 of the European Convention on Human Rights.

¹³² *Auad v. Bulgaria*, App no. 46390/10 (ECtHR 11 January 2012) para 128.

application was being processed.¹³³ It should be stressed that detention, however, is an exceptional measure of the right to liberty; it must be established by law and cannot be arbitrary.¹³⁴ As indicated in the 2014 Handbook on European Law relating to asylum, by the European Agency for Fundamental Rights (FRA),¹³⁵ detention of asylum seekers should only be used as a measure of last resort, after the exhaustion of alternative measures.¹³⁶

1.7. A Comprehensive Overview of EU Law

As mentioned above, with the end of the Second World War a period of peace began in Europe and different institutions were created.

The first step towards the creation of the European Union took place in 1951 with the Treaty of Paris on the European Coal and Steel Community signed by six states. Subsequently, a few years later with the Rome Treaty, the same states formed the European Economic Community and the European Atomic Energy Community (Euratom).

Unlike the Council of Europe, the main purpose of the European Economic Community (EEC) was to establish a political and economic union among the European States.¹³⁷ In fact, the Treaty of Rome did not address the issue of fundamental rights or the relationship between the Community and the ECHR. In addition, there was also no reference to refugee's and asylum seekers' rights. States were, nonetheless, bound to respect the Refugee Convention as individual signatories.

An attempt to connect the EEC to the ECHR was made with the Treaty establishing the European Political Community (EPC). However, after France's failure to ratify the European Defense Community Treaty in 1954, the EPC was abandoned.¹³⁸ A turning point started in 1969 with the *Stauder* case. For the first time, the Court of Justice ensured the respect of fundamental human rights as general principles of Community law.¹³⁹ From that judgment follows the 1970 *Internationale Handelsgesellschaft* case where the Court declared that: “*Respect for fundamental*

¹³³ See the *Saadi v. UK* case.

¹³⁴ FRA (n 130).

¹³⁵ The Handbook is a non-binding document jointly produced by the European Court of Human Rights and the FRA.

¹³⁶ European Union: European Agency for Fundamental Rights, (No 130) 143.

¹³⁷ Tony Joris and Jan Vandenberghe, *The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?* (2009) *Columbia Journal of European Law*, pages 1, 2,3 and 4.

¹³⁸ Gráinne de Búrca, *The Road Not Taken: The European Union as a Global Human Rights Actor* (2011) *American Journal of International Law*, page 649.

¹³⁹ Case C-29/69 *Stauder v City of Ulm*, [1969] ECLI:EU:C:1969:52, para 7.

rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.”¹⁴⁰

In the nineties, after the fall of the Berlin Wall and the dissolution of the Soviet Union, a period of democratization of the countries of Central and Eastern Europe began. These events led to important institutional reforms for the European Community. In 1992, the Maastricht Treaty transformed the EEC into the European Community (EC), and it created the European Union, which was placed at the top of a three-pillar system.

In the area of fundamental rights, the case law of the Court of Justice was codified.¹⁴¹ Therefore, with the Maastricht Treaty, fundamental rights became officially part of the EU and the Luxemburg Court started to recognize a series of such rights as general principles of EU law.¹⁴² Despite the development of these new rights, however, the Court failed to create a complete system of fundamental rights covering all areas of Community law. In fact, the recognition of these new rights took place on a case-by-case basis.¹⁴³

1.7.1. The Charter of Fundamental Rights of the European Union

At the beginning of the twenty-first century, the EU has been transformed further. A big step forward took place with the Laeken Declaration which was signed in 2001 by the 15 States that were part of the European Union at that time. Among the various objectives of the Declaration, there was the division of competencies between the EU and national States, and the enlargement of the Union to new States.¹⁴⁴ Furthermore, the so-called European Convention was created. It was a temporary and extraordinary organ whose purpose was to find a solution to problems of an institutional nature not resolved by the Treaty of Nice. The Convention concluded its work in 2003 with the drafting of the Treaty establishing a Constitution for Europe. In that draft was also included an EU Charter of Fundamental Rights, which was concluded the previous year and it

¹⁴⁰ Case C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECLI:EU:C:1970:114, para 4.

¹⁴¹ See Article F of the Treaty of Maastricht.

¹⁴² Dean Spielmann, *The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights Or how to remain good neighbours after the Opinion 2/13* (2017) Frame, page 7.

¹⁴³ *Ibid.*

¹⁴⁴ Laeken Declaration on the future of the European Union, December 2001, available at: <https://www.consilium.europa.eu/media/20950/68827.pdf>.

would have been binding for all the EU Member States.¹⁴⁵ However, after the failure to ratify the Constitution of France and the Netherlands, there was a period of uncertainty about the Charter's legal status and effects.¹⁴⁶ In fact, it was recognized as binding only with the entry into force of the Lisbon Treaty.¹⁴⁷

The Charter contains a total of 54 articles divided into seven Chapters. The first six refer to substantive rights, which are based on the ECHR, the jurisprudence of the Court of Justice and the constitutional traditions of the Member States. The last Chapter contains four clauses concerning the interpretation and application of the EU Charter.¹⁴⁸

Many of the rights contained in the EU Charter correspond to those guaranteed by the ECHR. In this regard, in order to officially clarify the relationship between the two Documents,¹⁴⁹ Article 52 paragraph 3 of the Charter ensured consistency between them. In particular, such paragraph states that in so far as the Charter contains rights that correspond to the rights guaranteed by the ECHR, the meaning and scope of these rights must be the same.¹⁵⁰

However, the EU Charter also specified that the EU law can provide more extensive protection. Therefore, the CJEU is perfectly entitled to grant wider and greater protection than those guaranteed by the ECHR.¹⁵¹

As indicated by Article 51 paragraph 1, the EU Charter's provisions are addressed to EU institutions and Member States when they are implementing EU law. In this regard, the Court of Justice, in the *Fransson* case, specified that the term "implementing EU law" should be equivalent to falling within the scope of EU law.¹⁵² In other words, the Court stated that is possible to refer to the EU Charter only in cases when the EU law is applicable. In the field of asylum law, therefore, as most of it is part of EU competencies, the Charter should consequently apply.¹⁵³ Furthermore, Article 51 does not contain any jurisdictional clauses. However, even though the CJEU in the *Mallis* case indicated that the

¹⁴⁵ See the Draft Charter of Fundamental Rights of the European Union.

¹⁴⁶ Paul Craig, Gráinne de Búrca, *EU Law, Text Cases and Materials*, Chapter 11, *Human Rights in the EU* (2007) Oxford University Press, 4th ed, page 15.

¹⁴⁷ See Article 6 of the Treaty of the European Union.

¹⁴⁸ European Council on Refugees and Exiles, *The EU Charter of Fundamental Rights; an Indispensable Instrument in the field of Asylum*, January 2017, page 2.

¹⁴⁹ Dean Spielmann, (n 142) 10.

¹⁵⁰ See Article 52 para 3 of the EU Charter of Fundamental Rights.

¹⁵¹ Case C-279/09, *Energiehandels- und Beratungsgesellschaft mbH v. Germany*, [2010] I-13849, para 35.

¹⁵² Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, [2013] ECLI:EU:C:2013:105 paras 17, 18 and 19.

¹⁵³ European Council on Refugees and Exiles, *The EU Charter of Fundamental Rights; an Indispensable Instrument in the field of Asylum*, January 2017, page 3.

Charter applies to the EU institutions, even when they are acting outside the EU legal framework,¹⁵⁴ in the *Polisario* case, it stated that the Charter does not apply outside the territory of the EU.¹⁵⁵

In addition, similar to the ECHR, individuals can directly invoke the provisions of the Charter. This has been confirmed by the Court of Justice, allowing persons to use the Charter to challenge either EU or national law.¹⁵⁶ However, as long as Article 6 paragraph 2 of the Treaty of the European Union (TEU) is not formally enforced, the two Documents should not be considered equivalent. Referencing Opinion 2/13 of the Court of Justice, which opposed the EU's accession to the ECHR, illustrates this point.¹⁵⁷ Specifically, The Court pointed out that the introduction of the legal basis for accession to the Union's system was not enough and the accession would challenge the autonomy of the EU legal system. Therefore, the ECHR could not be considered a source of EU law.¹⁵⁸

Contrastingly, the Charter, bearing equal legal value as the EU Treaties,¹⁵⁹ can be invoked directly before national courts and holds precedence over conflicting national legislation.¹⁶⁰ In other words, if a national Court finds that an internal law conflicts with a norm of the Charter, that Court can directly apply the Charter and set aside the national law. Furthermore, individuals have the prerogative to petition national courts to refer cases to the Court of Justice to ascertain whether a national or EU norm violates the Charter.¹⁶¹ Conversely, if a national rule is directly in contrast with a disposition of the ECHR, a national judge might not have the authority to override it directly. In this case, as it happens in most Member States, the intervention of the Constitutional Court is required, which may declare the internal rule unconstitutional.¹⁶²

¹⁵⁴ Joined Cases C-8-10/15P and C-105-109/15P, *Konstantinos Mallis and Others v European Commission and European Central Bank (ECB)* [2016] ECLI:EU:C:2016:702.

¹⁵⁵ Case C-104/16 P, *Council of the European Union v Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario)* [2016] T-512/12, paras. 107 and 125.

¹⁵⁶ Cases C-293 and 594/12 *Digital Rights Ireland v. Minister for Communication et al* [2014] EU:C:2014:238; Case C-617/10 *Åklagaren v. Hans Åkerberg Fransson* [2013] EU:C:2013:105.

¹⁵⁷ Opinion 2/13, on EU Accession to the ECHR EU:C:2014:2454.

¹⁵⁸ *Ibid*, para. 182.

¹⁵⁹ See Declaration Concerning Provisions of the Treaties No 17.

¹⁶⁰ See ECJ Case C-106/77, *Simmmenthal* ECR 629.

¹⁶¹ See Article 267 of the TFEU.

¹⁶² See for instance the Constitutional Court of Italy, Judgments of 24 October 2007, Nos. 348–349/ 2007, the Court established that the ECHR has a sub- constitutional status, as an interposed source of law.

As previously noted, the EU Charter mainly reaffirms the rights already existing in the EU. A clear example is the right to asylum under Article 18,¹⁶³ Which finds its foundation in Article 78 of the Treaty on the Functioning of the European Union (TFEU).¹⁶⁴

Article 19 of the Charter encompasses the prohibition of refoulement and collective expulsions,¹⁶⁵ explicitly aligning with established human rights norms. However, unlike its preceding Articles, which make reference to the Refugee Convention, Article 19 uniquely incorporates the jurisprudence of the European Court of Human Rights, particularly in relation to Article 3 of the ECHR.¹⁶⁶ In fact, as it will be further analysed, this article does not mention refugees or asylum seekers but prohibits the expulsion of anyone who may be subjected to torture or inhuman or degrading treatment in the receiving state. Similarly, as indicated by the 2007 Explanation relating to the Charter, the prohibition of collective expulsions has the same meaning and scope as Article 4 of Protocol No. 4 of the ECHR.¹⁶⁷

1.7.2. The Common European Asylum System

The right of refugees and asylum seekers is not limited exclusively to those indicated in the Charter of Fundamental Rights. On the contrary, since the nineties, a broad and complex asylum framework has been established in the European Union.

Following the creation of the Schengen System, in an area without internal borders, creating a common asylum system was, thus, necessary. In fact, without frontiers between states asylum seekers could move freely from one country to another and choose where to apply for asylum.¹⁶⁸ The problem of secondary movements was then resolved through the 1990 Dublin Convention, which established common criteria for determining which Member State was responsible for examining the asylum seekers' application.¹⁶⁹

Subsequently, with the 1992 Maastricht treaty common rules were pursued in the shape of an intergovernmental cooperation. The turning point came with the 1999 Treaty of Amsterdam, where

¹⁶³ See Article 18 of the EU Charter on Fundamental Rights.

¹⁶⁴ See page 8 of the Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007.

¹⁶⁵ See Article 19 of the EU Charter of Fundamental Rights.

¹⁶⁶ Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, page 8.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities ("Dublin Convention"), 15 June 1990, Official Journal C 254.

asylum and immigration became an area of EU supranational competence and the foundations for the Common European Asylum System were laid. In this regard, Article 63 of the Treaty establishing the European Community (TCE) provided that the Council was to adopt within five years a specific set of measures on asylum and refugees.¹⁷⁰ Following this rule, in Tampere, the European Council established a two-phase program to be adopted for the creation and development of this new system.¹⁷¹ It was concluded that the CEAS should have been broader than the Refugee Convention. The purpose was not only to establish the conditions for obtaining refugee status but was to create a common structure for regulating all procedural steps.¹⁷²

The first phase was marked by the promulgation of secondary legislation, where Directives and Regulations were crafted to delineate common standards that necessitated adoption by Member States. Pertinently, the Directives concerned the reception condition of asylum seekers,¹⁷³ the qualification for international protection,¹⁷⁴ and procedures concerning the granting and withdrawal of refugee status.¹⁷⁵ The Dublin II Regulation, replacing the Dublin Convention, established rules to determine which Member was responsible for examining the asylum application.¹⁷⁶ Complementary to this, the Eurodac Regulation included the creation of a database to store and compare fingerprints.¹⁷⁷

The other phase of harmonization began in 2004 when the Hague Programme indicated that the instruments and measures of the second phase should have been implemented by 2010.¹⁷⁸ With the European Pact on Asylum in September 2008, this deadline was then postponed to 2012.¹⁷⁹ Subsequently, with the Stockholm Programme, adopted by the European Council in 2009, it was

¹⁷⁰ See Article 63 para 1 of the TCE.

¹⁷¹ Council of the European Union, Presidency Conclusions, Tampere European Council, 15-16 October 1999, 16 October 1999.

¹⁷² Ibid.

¹⁷³ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18.

¹⁷⁴ Council Directive 2004/83/EC of 29 April 2004 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 [2004] OJ L 304/12.

¹⁷⁵ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L 326/13.

¹⁷⁶ Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L 222/3.

¹⁷⁷ Council Regulation (EC) 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 [2000] OJ L 316/1.

¹⁷⁸ The Hague Programme: *Strengthening Freedom, Security and Justice in the European Union*, 13 December 2004, 2005/C 53/01, point 1.3.

¹⁷⁹ European Pact on Immigration and Asylum of 24 September 2008, EU Doc 13440/08.

reiterated that the EU's objective was to establish a common area of protection based on a common asylum procedure and a uniform status for those beneficiaries of international protection, through high protection standards.¹⁸⁰ Moreover, it stressed the need to promote effective solidarity with those Member States facing particular pressures.¹⁸¹

These objectives enunciated in Stockholm were also specified in the 2007 Treaty on the Functioning of the European Union. Article 78, paragraph 1 provides for a common policy on asylum, protection of third-country nationals and compliance with the principle of non-refoulement, in accordance with the Refugee Convention.¹⁸² Furthermore, paragraph 2 has modified the decision-making procedure, introducing the ordinary legislative procedure for matters falling within the CEAS.¹⁸³ Similarly, Article 80 TFEU confirmed the principle of solidarity and fair sharing of responsibilities between Member States.¹⁸⁴

The second phase was concluded in 2013 through the modification of the previous regulations and directives. The only exception concerns the directive on temporary protection which was not subject to modifications.¹⁸⁵

Subsequently, in 2016, following the so-called European refugee crisis, the Commission proposed to reform the Common European Asylum System, providing for new Directives and Regulations.¹⁸⁶ Specifically, the Commission proposed to improve the EU fingerprint database, reform the reception conditions, harmonize EU procedures and reduce differences in recognition rates among member states.¹⁸⁷ It also proposed to create a permanent EU resettlement framework and to establish a fully-fledged EU asylum agency.¹⁸⁸ However, due to the lack of short-term commitment from member states, these proposals have encountered several obstacles.

Moreover, after the Commission's Proposal, to address the new challenges that have arisen in migration management, the European Commission presented the New Pact on Migration and Asylum in 2020. This crucial initiative represented a renewed commitment, compared to the 2016

¹⁸⁰ The Stockholm Programme: An Open and Secure Europe Serving and Protecting the Citizens, 2 December 2009, in: [2010] OJ C 115/1, Section 6.2.

¹⁸¹ Ibid.

¹⁸² See Article 78, para 1 of the TFEU.

¹⁸³ See Article 78, para 2 of the TFEU.

¹⁸⁴ See Article 80 of the TFEU.

¹⁸⁵ European Union: European Asylum Support Office (EASO), *An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis*, August 2016, pages 16-17.

¹⁸⁶ European Commission, *Towards a sustainable and fair Common European Asylum System*, Brussels, 4 May 2016.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

proposals, to address the most important aspects of the asylum system, and highlighted a continued effort by the Commission to improve the Common European Asylum System after the 2016 crisis. The new pact thus aims to facilitate simpler and faster management of migration and asylum in all member states.

Following the goals of the pact, in December 2021, the Council approved a regulation, which transformed the European Asylum Support Office (EASO) into a full EU agency, the European Union Asylum Agency (EUAA). This transformation can be seen as an integral part of the planned CEAS reforms, which focus on improving asylum and reception practices within the EU.

Further steps in CEAS reform were then taken in 2021, with the introduction of key policy and practical developments, including the implementation of temporary protection for Ukrainian displaced persons.

Further changes occurred in 2022 with the appointment of a new EU Return Coordinator and the introduction of a Voluntary Solidarity Mechanism, which further demonstrated the EU's commitment to perfecting CEAS.

Then, also in 2023, an Operational Strategy designed to simplify repatriations was launched. Moreover, in the same year, an International Summit was held, where representatives of EU member states joined forces to find a common solution in case of crisis situations.

This series of developments culminated in the European Parliament's adoption of the New Pact on Migration and Asylum in April 2024, which introduced new measures, such as enhanced border screening and a mandatory solidarity mechanism. In addition, as will be analyzed in detail in the last chapter, the creation of common EU lists of safe third countries and safe countries of origin was also proposed again.

It seems thus clear from these proposals that the EU is committed to harmonizing asylum procedures, improving reception conditions, and ensuring a fair and effective asylum system in all its member states.

1.7.2.1.Dublin III Regulation

As already mentioned, one of the main problems the EU wanted to address was the secondary movement of asylum seekers. For this reason, the Dublin III Regulation, which replaced the previous one, aims to prevent asylum seekers from choosing which Member State to apply for

asylum.¹⁸⁹ This mechanism inadvertently gives rise to phenomena like "asylum shopping", when the third-country national applies again for asylum in the same or in another Member State.¹⁹⁰ Consequently, the Regulation has created a set of rules to establish which Member State is responsible for examining the asylum application.

These rules, included in Chapter 3 of the Regulation, must be applied following a hierarchical order.¹⁹¹ As primary conditions, the Regulation pays more attention to family relationships. For instance, if an unaccompanied minor seeks international protection, the responsible Member State is the one where a member of his or her family is legally located.¹⁹² Similarly, if a family member of the applicant is in another EU State, that State should be responsible.¹⁹³ Successively, the Regulation considers the documents held by the applicant. As indicated in Article 12, if the applicant is in possession of a valid residence document or a visa, the responsible Member State is the one that issued the documents.¹⁹⁴ The last rule of this chapter concerns transit zones. In this case, where the application for international protection is filed in an international transit area, such as an airport, that Member State is responsible for examining the application.¹⁹⁵

Article 3 of the Dublin Regulation sets out also a general rule, which notoriously is the most applied. The Article states that in the event it is not possible to designate a responsible Member State on the basis of the hierarchical criteria, the first Member State in which the application for international protection was presented is competent to examine it.¹⁹⁶ According to these rules therefore, once identified, the responsible Member State has the duty to take charge or to take back applicants who have submitted an application in a different Member State.¹⁹⁷

A careful analysis reveals that these provisions seem to mainly facilitate the transfer of asylum seekers between states. These provisions, as will be deeply analysed in the following chapters, could therefore potentially conflict with the principle of non-refoulement, previously discussed. In

¹⁸⁹ Commission staff working document accompanying the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions - Policy plan on asylum: an integrated approach to protection across the EU - Impact Assessment {COM(2008) 360 final} {SEC(2008) 2030}, page 10.

¹⁹⁰ Ibid, page 9.

¹⁹¹ See Article 7, para 1 of the Regulation (EU) No 604/2013.

¹⁹² See Article 8, para 1 and 2 of the Regulation (EU) No 604/2013.

¹⁹³ See Regulation (EU) No 604/2013, Articles 9, 10 and 11.

¹⁹⁴ See Articles 12 paras 1 and 2 of the Regulation (EU) No 604/2013.

¹⁹⁵ See Article 15 of the Regulation (EU) No 604/2013.

¹⁹⁶ See Article 3, para 2 of the Regulation (EU) No 604/2013.

¹⁹⁷ See Regulation (EU) No 604/2013, Article 18.

this regard, in order to circumvent a possible violation of this fundamental principle, the concept of ‘safe country’ has been invoked, as clarified in Recital 3 of the Dublin III Regulation, which states: “[M]ember States, all respecting the principle of non-refoulement, are considered as safe countries for third country nationals”.

Despite this principle, however, condemnations from the ECtHR to the EU States were not long in coming. In fact, over the years, the ECtHR has condemned several EU Member States for violating refugees’ fundamental rights.¹⁹⁸ Explicitly, the ECtHR more than once stated that, when there is a risk of inhuman or degrading treatment in the State of destination, asylum seekers cannot be transferred,¹⁹⁹ thus, regardless of the concept of a safe country. In this regard, the Court also specified that the “Bosporus presumption” is not applicable. Member States are not obliged, under the Dublin rules to transfer asylum seekers. On the contrary, through the sovereignty clause, they can decide to accept an asylum application even if they are not responsible.²⁰⁰ Therefore, States are not absolved from their responsibility under the ECHR when implementing Dublin transfers. Even the CJEU has ruled several times on these matters but with a more restricted approach and an attitude in favour of the Dublin Regulation and EU principles.²⁰¹ In particular, in the *N.S.* case, the Court of Justice relied upon the principle of mutual trust between Member States, which is based on the presumption that all Member States observe EU law, in particular fundamental rights.²⁰²

Following this approach, concerns have been raised among scholars.²⁰³ Gill-Pedro and Groussot argued that in asking Member States to trust each other and thus preventing them from conducting their own assessments of individual human rights protection, the EU has undermined the ability of member states to respect the commitments that they have assumed under the ECHR.²⁰⁴

¹⁹⁸ See for instance, *Soering v. The United Kingdom*, App no. 14038/88, (ECtHR 7 July 1989); *MSS v Belgium and Greece*, App no 30696/09, (ECtHR 21 January 2011); *Dougoz v. Greece*, App no. 40907/98, (ECtHR 6 March 2001).

¹⁹⁹ *Safaii v Austria*, App no 44689/09 (ECtHR 7 May 2014) paras 45-50; *Tarakhel v Switzerland*, App No 29217/12 (ECtHR 4 November 2014) paras 94, 104 and 120.

²⁰⁰ *MSS v Belgium and Greece*, App no 30696/09 (ECtHR 21 January 2011) paras 238-340.

²⁰¹ Case C-4/11 *Federal Republic of Germany v Kaveh Puid* (Reference for a preliminary ruling from the *Hessischer Verwaltungsgerichtshof* (Germany)) [2011]; Case C-394/12, *Shamso Abdullahi v Bundesasylamt* [2013] ECLI:EU:C:2013:813.

²⁰² Joined cases C-411-10 and C-493-10 of *N.S. v United Kingdom and M.E. v Ireland*, [2011] ECLI:EU:C:2011:865, para 83.

²⁰³ See for instance Evelien Brouwer and Hemme Battjes, (n 5); Koen Lenaerts, *La Vie Après L’avis: Exploring the Principle of Mutual (Yet not Blind) Trust* (2017) Common Market Law Review.

²⁰⁴ Eduardo Gill-Pedro and Xavier Groussot, *The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights: Can the EU’s Accession to the ECHR Ease the Tension?* (2017) Nordic Journal of Human Rights, Vol. 35, No. 3.

The interpretation of the CJEU on the principle of mutual trust has, therefore, intensified an already existing tension between the obligations that Member States have under EU law and those which have as parties of the ECHR.²⁰⁵ Nevertheless, as it will be discussed in the next chapters, it is also interesting to notice that recently the same Court changed its opinion regarding the interpretation of the ECtHR.²⁰⁶ This shows how the transfer of asylum seekers and the prohibition of refoulement were and still are a subject debated in the EU. The tension that emerged between the principle of mutual trust and the duty of states to respect fundamental rights will then be profoundly explored in the next chapters.

1.7.2.2. Eurodac Regulation

Regulation No. 603/2013 also called the Eurodac Regulation recast is the legislation that provides for the creation of an asylum fingerprint database.²⁰⁷ It requires all Member States to take fingerprints of every person of at least 14 years of age, who applies for international protection.²⁰⁸ The fingerprints taken must then be transmitted within 72 hours after the lodging of his or her application, to the Central System.²⁰⁹

The original reason behind this rule is that its main objective is to facilitate the application of the Dublin Regulation.²¹⁰ In fact, together are commonly referred to as the Dublin System.

Through this Central System, EU States are able to know in which country the asylum seeker has applied for protection. In this way, as indicated by the Dublin Regulation, if the asylum seeker subsequently lodges an application in another state, that country can send him or her back to the responsible state.²¹¹

Unlike the previous Eurodac Regulation, which was based exclusively on the implementation of the Dublin norms, the current Regulation has extended its scope of application. Indeed, it also refers to the authorities of the Member States and the European Police Office (Europol), which

²⁰⁵ Ibid, page 269.

²⁰⁶ Case C-163/17, *Abubacarr Jawo v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2019:218.

²⁰⁷ Regulation (EU) No 603/2013 (recast).

²⁰⁸ See Article 9 para 1 of the Regulation (EU) No 603/2013.

²⁰⁹ Ibid.

²¹⁰ See Article 1 para 1 of the Regulation (EU) No 603/2013.

²¹¹ See the Dublin Regulation.

have the possibility to analyze the data stored in the Central System.²¹² This extension was logically carried out for the purpose of preventing and fighting terrorist and other serious crimes.²¹³

1.7.2.3. Qualification Directive

The Qualification Directive, as indicated at the beginning of this first chapter, is the legislation that transposed the Refugee Convention into the European Union framework. Its main purpose is to establish the criteria for obtaining international protection for third-country nationals or stateless persons.²¹⁴ Specifically, the Directive sets out the conditions for obtaining refugee status or subsidiary protection.

As with the Dublin Regulation, the Directive also seeks to limit secondary movements by approximating the rules on recognition of refugee status and subsidiary protection.²¹⁵ However, not all provisions of the Directive are mandatory for Member States, thus with the risk of occurrence of such movements.²¹⁶

Notably, the Qualification Directive refers only to third-country nationals or stateless persons. This means that EU citizens cannot obtain international protection within the borders of the Union. This does not mean however that an EU citizen cannot obtain protection in Europe. The protocol provides for exceptional cases in which it is possible to apply for asylum. In addition, it does not exclude the possibility of obtaining protection under the Refugee Convention.²¹⁷

As indicated above, the Directive does not extend the definition of refugee included in the Refugee Convention. Nonetheless, it specifies certain concepts. For instance, the Refugee Convention does not define persecution. On the contrary, Article 9 of the Directive considers it as an act sufficiently serious by its nature to constitute a severe violation of basic human rights.²¹⁸

²¹² See Article 1 para 2 of the Regulation (EU) No 603/2013.

²¹³ See Recital 8 of the Regulation (EU) No 603/2013.

²¹⁴ See Article 1 of the Directive 2011/95/EU.

²¹⁵ See Recital 13 of the Qualification Directive.

²¹⁶ European Union: European Asylum Support Office (EASO), *An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis*, August 2016, page 42.

²¹⁷ See Protocol No 24.

²¹⁸ See Article 9 of the Directive 2011/95/EU.

Similarly, the Refugee Convention does not give a definition of state protection or lack of it, as a condition to obtain the refugee status. On the other hand, Article 7 paragraph 2 of the Qualification Directive includes such an explanation.²¹⁹

By explaining certain concepts, it may also happen that the Qualification Directive reaches different conclusions than those indicated by the UNHCR. For instance, the UNHCR, as mentioned before, separates the cancellation clauses from the revocation clauses.²²⁰ On the contrary, the Qualification Directive in Article 14 uses indifferently the terms revoke, terminate or refuse to renew the refugee status when a person has never been a refugee, should have been excluded or obtained refugee status by fraud.²²¹

Another element that differs from the Refugee Convention is that EU Member States have the possibility to extend international protection to other persons in need, who do not fall under the definition of refugee explained in section 1. The Qualification Directive, in fact, has also provided for the so-called "subsidiary protection".

This form of protection, considered complementary and additional to the Refugee Convention,²²² is guaranteed to persons who do not qualify for refugee status but would face a real risk of suffering serious harm if returned to their country of origin.²²³ Therefore, as indicated in Article 15, persons who are at risk of death, torture or a serious and individual threat for reasons of indiscriminate violence in situations of international or internal armed conflict can obtain protection.²²⁴

While the Qualification Directive sets out the criteria identifying persons eligible for international protection, it presents an important similarity to the 1951 Refugee Convention in emphasizing the principle of non-refoulement.²²⁵ However, it is worth mentioning that the expression and scope of the principle of non-refoulement within these two instruments may diverge. In this regard, a more detailed explanation of this aspect will be undertaken in the next chapter.

1.7.2.4. Asylum Procedure Directive

²¹⁹ See Article 7 paragraph 2 of the Directive 2011/95/EU.

²²⁰ See para 1 of the UN High Commissioner for Refugees (UNHCR), Note on the Cancellation of Refugee Status (2004).

²²¹ See the Directive 2011/95/EU Article 14 para 3.

²²² See Recital 33 of the Directive 2011/95/EU.

²²³ See Directive 2011/95/EU, Article 2 (f).

²²⁴ See Article 15 of the Directive 2011/95/EU.

²²⁵ See Article 21, para 1 of the Directive 2011/95/EU.

The European Union also provides for a common procedure for granting and withdrawing international protection. This system is indicated in the Directive 2013/32/EU (Asylum Procedures Directive). As with the Qualification Directive, however, not all its provisions are mandatory.²²⁶ In fact, Member States have the possibility to choose whether to adopt certain provisions, hence, with the risk of having different procedures within the Union. This is also confirmed by the fact that the Directive grants States the possibility of adopting more favourable rules regarding the procedures.²²⁷

In accordance with the UNHCR, such Directive covers all applications for international protection that are presented in the territory, at the border or in the transit zones of the Member States, with the exception of diplomatic premises and embassies.²²⁸ In this regard, in order to ensure effective access to the examination procedure, it is necessary that the officials, who first come into contact with asylum seekers, receive necessary and relevant training to deal with even the most delicate cases.²²⁹ The Directive in fact pays particular attention to persons in need of special procedural guarantees due, inter alia, to their age, gender, disability, serious illnesses, mental disorders, rape or other serious forms of violence.²³⁰

When an asylum seeker arrives, legally or illegally, in the territory of the EU, the responsible Member State has the duty to ensure that he or she obtains adequate support in order to create the conditions necessary for effective access to the procedures.²³¹ The application for international protection must be submitted to the competent authorities and the registration must take place within three working days after the application is submitted.²³² In the event that it is difficult to meet this deadline, due to a large number of simultaneous applications, Member States can extend it to 10 working days.²³³ Nevertheless, States are obliged to ensure that the application submitted is lodged as soon as possible.²³⁴ Once lodged, the competent authority, when examining the application must first ascertain whether the applicants qualify as refugees, and if not, verify

²²⁶ European Union: European Asylum Support Office (EASO), *An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis*, August 2016, page 47.

²²⁷ See Article 5 of the Directive 2013/32/EU.

²²⁸ See Article 3, paras 1-2 of the Directive 2013/32/EU.

²²⁹ See Recital 26 of the Directive 2013/32/EU.

²³⁰ See Recital 29 of the Directive 2013/32/EU.

²³¹ Ibid.

²³² See Article 6, para 1 of the Directive 2013/32/EU.

²³³ See Article 6, para 5 of the Directive 2013/32/EU.

²³⁴ See Article 6, para 2 of the Directive 2013/32/EU.

whether they are eligible for subsidiary protection.²³⁵ This rule seems constructed to protect asylum seekers, who, at the time of submitting the application, may not know whether they meet the conditions for obtaining refugee status or subsidiary protection.

In addition, pending the examination, asylum seekers have the right to remain in the territory of the State,²³⁶ and the right to communicate with the UNHCR or any other organisation that provides legal advice.²³⁷ It is ensured free legal assistance and an effective remedy before a court or tribunal in the event of rejection of the application.²³⁸ Moreover, the applicant has the opportunity to conduct a personal interview.²³⁹ In this event, the responsible authority must take into account the personal and general circumstances surrounding the application, including the cultural origin, gender, sexual orientation, or vulnerability of the applicant.²⁴⁰ Special care is also taken in the case of an interview with a minor.²⁴¹

As we will explore in the final chapter, this directive also establishes the foundations for the safe country concept and the EU-Turkey Declaration.

1.7.2.5.Reception Condition Directive

The 2013 Reception Conditions Directive is another legislation under the CEAS. As indicated in Article 1, its purpose is to lay down common standards for the reception of applicants for international protection,²⁴² to ensure them a dignified standard of living.²⁴³ In this regard, under the Directive, Member States have a duty to achieve this purpose by protecting the physical and mental health of the asylum seekers.²⁴⁴

These reception methods can take various forms including allowances or financial vouchers.²⁴⁵ This amount, however, may vary depending on the national legislation of the Member State

²³⁵ See Article 10, para 2 of the Directive 2013/32/EU.

²³⁶ See Article 9, para 1 of the Directive 2013/32/EU.

²³⁷ See Article 12, para 1 (c) of the Directive 2013/32/EU.

²³⁸ See Directive 2013/32/EU, Articles 20 and 46.

²³⁹ See Article 14, para 1 of the Directive 2013/32/EU.

²⁴⁰ See Article 14, para 3 (a) of the Directive 2013/32/EU.

²⁴¹ Ibid, para 3 (e).

²⁴² See Article 1 of the Directive 2013/33/EU.

²⁴³ See Recital 11 of the Directive 2013/33/EU.

²⁴⁴ See Article 17, para 2 of the Directive 2013/33/EU.

²⁴⁵ See Article 17, para 5 of the Directive 2013/33/EU.

concerned.²⁴⁶ For these reasons, although the Directive seeks to limit secondary movements, asylum seekers commonly move from one State to another, influenced by the diversity of reception conditions.²⁴⁷

The Directive, to achieve a harmonisation of legislation, imposes mutual obligations. Member States, in fact, have the duty to inform applicants, within a period not exceeding 15 days of any benefits and obligations with which they must comply in relation to reception conditions.²⁴⁸

Those who apply for protection are guaranteed the right to move freely within the territory of the host Member State or within an area assigned to them.²⁴⁹ In addition, States can provide for housing units, such as reception centres, private houses, hotels or other suitable premises.²⁵⁰ Member States should also adopt appropriate measures to ensure the family unit is present in their territory and to protect family life.²⁵¹ In this regard, the Directive, similarly to the UNHCR, gives a broad definition of family members, including the spouse or partner and unmarried minor born in marriage or adopted.²⁵²

As previously mentioned, the EU pays special attention to the detention of asylum seekers. The Reception Condition Directive provisions are in particular noteworthy. Article 8 specifies that Member States cannot hold a person for the sole reason that he or she is an asylum seeker.²⁵³ Nevertheless, States have the possibility to evaluate individual cases and when it proves necessary, they can detain an applicant for international protection if other less coercive alternative measures cannot be effectively applied.²⁵⁴ In this regard, applicants must be detained in specialized detention facilities.

1.7.2.6. Temporary Protection Directive

In conclusion, it is worth briefly mentioning the 2001 Temporary Protection Directive. This directive played a significant role as part of the initial phase in establishing the CEAS. However,

²⁴⁶ Ibid.

²⁴⁷ See Recital 12 of the Directive 2013/33/EU.

²⁴⁸ See Article 5, para 1 of the Directive 2013/33/EU.

²⁴⁹ See Article 7, para 1 of the Directive 2013/33/EU.

²⁵⁰ See Article 18, para 1 of the Directive 2013/33/EU.

²⁵¹ See Article 12, para 1 of the Directive 2013/33/EU.

²⁵² See Article 2(c) of the Directive 2013/33/EU.

²⁵³ See Article 8, para 1 of the Directive 2013/33/EU.

²⁵⁴ See Article 8, para 2 of the Directive 2013/33/EU.

this directive had not been activated until recently. Its objective was to delineate minimum standards for granting temporary protection in the event of a mass influx of displaced persons and to propagate a balanced effort among Member States bearing the impacts of such an influx.²⁵⁵ The prescribed measures were exceptional, demanding the directive's adoption particularly when a Member State's asylum system was at risk of being overwhelmed, thereby compromising its efficient functioning.²⁵⁶ It was envisaged that the activation of the directive would provide immediate and short-term protection status, avoiding the need for an individual assessment of eligibility for international protection, thus reducing the burden of member states' asylum procedures.²⁵⁷

However, until 2021, the EU or its member states were not inclined to activate this directive. The 2021 reform, however, marked significant political and practical progress, including the provision of temporary protection for displaced persons from Ukraine, marking the initial activation of this directive. In March 2022, the European Council recognised the massive influx of displaced persons fleeing Ukraine, making temporary protection necessary. This decision followed a Commission proposal to activate the mechanism of the 2001 Temporary Protection Directive, with the aim of managing the influx of displaced persons from Ukraine in a controlled and effective manner.²⁵⁸ The directive, first triggered in response to Russian aggression against Ukraine, has since facilitated the provision of immediate protection to approximately 4 million people within the EU, demonstrating the directive's instrumental role in easing tensions on member states' asylum systems in the midst of significant migratory movements. Furthermore, due to the ongoing war in Ukraine, EU member states decided to extend the current Temporary Protection Directive by one year, until 4 March 2025, allowing refugees from Ukraine to remain in EU member states for a further year.²⁵⁹

1.8. Conclusion

²⁵⁵ See Article 1, para 1 of the Council Directive 2001/55/EC.

²⁵⁶ See Article 2 (c) of the Council Directive 2001/55/EC.

²⁵⁷ European Union: European Asylum Support Office (EASO), *An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis*, August 2016, page 54.

²⁵⁸ See Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

²⁵⁹ See the recent European Council Presse releases, available at: <https://www.consilium.europa.eu/en/press/press-releases/2023/09/28/ukrainian-refugees-eu-member-states-agree-to-extend-temporary-protection/#:~:text=In%20order%20to%20provide%20certainty,2024%20to%204%20March%202025.>

This chapter provided a comprehensive analysis of the legal norms and standards concerning the rights of refugees and asylum seekers in the European Union. Specifically, legal documents essential to the purpose of this thesis were explored, such as the 1951 Refugee Convention, the European Convention on Human Rights, the Charter of Fundamental Rights and the regulations and directives of the Common European Asylum System. This chapter, therefore, not only provided a comprehensive overview of the legal landscape of asylum in the EU but also contributed to laying the groundwork for a more in-depth exploration of the principle of non-refoulement. In fact, its introduction in this chapter serves as a prologue, to be further explored in detail in subsequent chapters. The in-depth examination of the legal instruments in this chapter has also helped to reveal the complexity and differences of these instruments by highlighting the responsibilities that countries have on the application and enforcement of these rules. Indeed, this detailed study has prepared the ground for future chapters where the principle of non-refoulement will be explored in relation to other concepts. Thus, this chapter has laid the groundwork for an understanding that the principle of non-refoulement, even when integrated into various legal systems, can be open to different interpretations and applications. This openness, however, as will be seen in the following chapters, may lead to conflicts with other essential legal and political obligations that countries have to fulfil.

Following this analysis, the next chapter will focus on the principle of non-refoulement, where a comprehensive analysis of this principle will be carried out, allowing us to analyze all its elements and characteristics in order to understand the implications of its application in relation to the policies and protection of refugees and asylum seekers within the EU.

This comparative doctrinal basis will be expanded in the following chapters, where international and EU legal interpretations will be critically assessed in relation to the principle of non-refoulement.

CHAPTER 2

THE EXTENT OF THE NON-REFOULEMENT PRINCIPLE

2.1. Introduction

The previous chapter presented an overview of EU legal instruments for the protection of refugees and asylum seekers. After this analysis, this chapter goes on to analyse the principle of non-refoulement in detail.

The chapter will begin by analyzing Article 33 of the Refugee Convention, which prohibits the transfer of a refugee and asylum seeker to a country where there is a risk of persecution. However, the Convention provides limits to this principle, which therefore cannot be considered an absolute norm within the Convention.

Subsequently, the principle of non-refoulement under the Convention against Torture and the International Covenant on Civil and Political Rights will be considered. Contrary to the Refugee Convention, in these documents, the principle of non-refoulement is extended without exception to all individuals, thus not only to refugees and asylum seekers.

In addition, it will be studied how the principle of non-refoulement is also viewed as a rule of customary international law, which means that even non-party states have an obligation to abide by it. However, it will be also shown that it is difficult for individuals to enforce their rights because the decisions of international monitoring bodies are not binding.

The analysis will then shift to the European context, where it will be highlighted that protection against refoulement is different; in fact, the decisions of the European Court of Human Rights and the Court of Justice are binding on member states. The analysis will also show that although the European Convention on Human Rights does not expressly provide for the prohibition of refoulement, the European Court of Human Rights has included it in Article 3 and other articles of the Convention, considering it as an absolute rule and applicable to anyone.

In addition, the chapter will conduct an analysis of this principle in the context of the European Union, in which the application of the principle of non-refoulement appears to be more complex. In this regard, primary sources of European law, secondary sources and decisions of the European Court of Justice will first be considered in order to have a detailed picture of its application.

In summary, this chapter aims to explore how the principle of non-refoulement is applied and the challenges it encounters. This analysis will be conducted by exploring the tensions between its theoretical absoluteness and practical application, in order to clarify the dynamic and often controversial nature of non-refoulement within the EU legal system.

Moreover, by demonstrating how the principle of non-refoulement is an absolute norm, this chapter lays the groundwork for subsequent chapters, which will show how, despite the absolute nature of the principle, the concepts of mutual trust and safe country are used by the EU to circumvent its proper application. Therefore, this chapter contributes to the research question by highlighting the theoretical absoluteness of the principle of non-refoulement, which is thus essential for understanding the subsequent analysis of how it is limited in practice within the EU.

2.2. Deciphering Non-Refoulement within the 1951 Refugee Convention

As discussed in the previous chapter, one of the main principles of international refugee protection is the principle of non-refoulement. According to the 1951 Refugee Convention, such a principle protects refugees and asylum seekers against return to places of persecution. The prohibition of refoulement, however, even though is a fundamental element of the Convention, was not created by it. The principle was officially mentioned for the first time during the 1892 Geneva session of the Institut de Droit International.²⁶⁰ In that session, it was established that a refugee should not be turned over to another country that sought him.²⁶¹ Subsequently, with the growing of international tensions, the principle of non-refoulement was included in several international conventions. The first agreement to explicitly guarantee the prohibition of removal was the 1933 Convention Relating to the International Status of Refugees.²⁶² Furthermore, although the 1938 Convention concerning the Status of Refugees coming from Germany²⁶³ was modelled on the 1933 Convention, neither the 1936 Provisional Agreement,²⁶⁴ nor the 1938 Convention ensured a strong

²⁶⁰ Tamás Molnár, “The Principle of Non-Refoulement Under International Law: Its Inception and Evolution in a Nutshell” (2016) *Corvinus Journal of International Affairs*, Vol. 1, page 51.

²⁶¹ *Ibid.*

²⁶² Peter Fitzmaurice (No 17).

²⁶³ League of Nations, Treaty Series, Vol. CXCII, No. 4461.

²⁶⁴ League of Nations, Treaty Series, Vol. CLXXI, No. 3952.

prohibition from refoulement; it was only qualified in certain respects.²⁶⁵ In addition, under such Convention, in extreme cases, refugees could be sent back to the frontier of the Reich.²⁶⁶

When the 1951 Refugee Convention was created, it was decided to adjust the principle of non-refoulement and reduce its scope. In fact, its scope under the 1933 Convention was broader, if not to say, almost absolute.²⁶⁷ Nevertheless, despite some limitation, the principle of non-refoulement today is the cornerstone of refugees' protection,²⁶⁸ and its importance is also recognized by the fact that it is not subject to reservations or derogation by contracting States.²⁶⁹

The principle is enshrined in Article 33 of the 1951 Refugee Convention, whose paragraph 1 states: *“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”*²⁷⁰

Following this paragraph, the protection against refoulement applies to any person considered as a refugee under the 1951 Refugee Convention.²⁷¹ This basically means that such a principle protects anyone who falls under the inclusion clauses embodied in Article 1 paragraph 2. Therefore, under the Convention, in the event of the absence of one of these clauses, a person cannot be protected from refoulement. Consequently, the same logic applies to the exclusion clauses included in Article 1 paragraphs (D) (E) (F). In other words, even though all the inclusion clauses are present but not all the conditions set out in those paragraphs are met, a person does not receive protection from the Refugee Convention and its articles.²⁷²

²⁶⁵ See Article 5 para 3 (a) of the Convention concerning the Status of Refugees coming from Germany, 10 February 1938.

²⁶⁶ Gilbert Jaeger, ‘On the History of the International Protection of Refugees’ (2001) 83 *Revue Internationale de la Croix-Rouge*, page 731.

²⁶⁷ See Article 3 of the Convention Relating to the International Status of Refugees, 28 October 1933.

²⁶⁸ Convention relating to the Status of Refugees, Introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR), page 2.

²⁶⁹ See Article 41, para 1 of the Convention relating to the Status of Refugees. The non-derogable character of the principle of non-refoulement is also included in Article VII(1) of the 1967 Protocol and it has been recognised by the Executive Committee and by the UNGA.

²⁷⁰ It can be noted that the term “non-refoulement” derives from the word *refouler* in French, which means to drive back or repel.

²⁷¹ Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2nd edn, Oxford University Press 2024).

²⁷² For a more complete view of the inclusion and exclusion clauses, please refer to chapter 1 paragraphs 2.1 and 2.2 of this thesis.

It should be highlighted that although Article 33 paragraph 1 only mentions refugees, it is commonly recognised that the principle of non-refoulement is also extended to protect asylum seekers. In fact, it would not be reasonable to expel or repatriate a person who is waiting for a definitive determination of his or her status. In this regard, as already mentioned in the first chapter, the refugee status determination is declarative in nature.²⁷³ This means that a person does not become a refugee because of recognition but is recognized because he or she is a refugee.²⁷⁴ Therefore, based on these elements, it is possible to extend the principle of non-refoulement also to those whose status has not been formally declared, such as asylum seekers.²⁷⁵ In addition, it is important to notice that the prohibition from refoulement is extended not only to the country of origin or, in the case of a stateless person, to the country of former habitual residence, but to any other place where there is a risk of persecution on the grounds set out in the Refugee Convention.²⁷⁶ As indicated in the UNHCR Advisory Opinion on Non-Refoulement, from the wording of Article 33 paragraph 1, which refers to expulsion “*in any manner whatsoever*”, it seems that the principle of non-refoulement is extended to any form of forcible removal, including deportation, expulsion and extradition.²⁷⁷ However, during the Travaux Préparatoires of the Refugee Convention,²⁷⁸ some delegates suggested that such a principle does not apply to extradition cases or to non-admittance at the frontier.²⁷⁹

The interpretation of Article 33 paragraph 1 has also been extended to territorial applications. In fact, it would appear that the obligation not to send refugees or asylum seekers to a country where they could be at risk of persecution is not subject to territorial restrictions and it applies wherever a state exercises its jurisdiction.²⁸⁰

At a national level, however, not everyone shares this interpretation. In the United States, for instance, the Supreme Court ruled that Article 33 paragraph 1 of the Refugee Convention is

²⁷³ UN High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (2007), page 2.

²⁷⁴ Handbook (n 13) 28.

²⁷⁵ UN High Commissioner for Refugees (UNHCR) (n 270) 3.

²⁷⁶ UN High Commissioner for Refugees (UNHCR) (n 270) 4.

²⁷⁷ UN High Commissioner for Refugees (UNHCR) (n 270) 3.

²⁷⁸ *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis* (1995) Cambridge University Press, page 341.

²⁷⁹ Elihu Lauterpacht and Daniel Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press 2003) 112.

²⁸⁰ *Ibid*, page 4.

applicable only to persons within the territory of the United States.²⁸¹ Such, judgment was then contradicted by the Inter-American Commission on Human Rights, and the opinion of the UNHCR,²⁸² which established that the US Supreme Court's decision did not accurately reflect the scope of Article 33, paragraph 1.²⁸³ As it will be further analysed, similar is the vision in the European context, where the ECtHR in the *Hirsi Jamaa* case extended the territorial scope of the principle of non-refoulement to state jurisdiction.²⁸⁴ It is also important to emphasize that the Refugee Convention was created with a humanitarian purpose.²⁸⁵ Therefore, restrictive interpretations of measures that could in any way favour the transfer of refugees to a country where they are at risk of persecution, seem to be contrary to such objective.

Following this approach, the principle of non-refoulement could also be extended to cases of the mass influx of refugees or asylum seekers. This interpretation, however, found some objections in the Travaux Préparatoires of the Convention, where some scholars argued that the principle did not apply to such situations.²⁸⁶ These views, nevertheless, were not then supported by the adopted text or subsequent practices.²⁸⁷

2.3. The Limits of the Principle of Non-Refoulement

The principle of non-refoulement, under the Refugee Convention, is not absolute. In fact, regardless of its extensive interpretation, there are exceptions to its application. Such exceptions are included in paragraph 2 of Article 33, which reads: “*The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*”

The first thing that immediately stands out, by reading this paragraph, is that, although not expressed in identical terms, there is a certain similarity with the exclusion clauses indicated in

²⁸¹ *Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc., et al.*, 509 U.S. 155; 113 S. Ct. 2549; 125 L.Ed. 2d 128; 61 U.S.L.W. 4684; 93 Cal. Daily Op. Service 4576; 93 Daily Journal DAR 7794; 7 Fla. Law W. Fed. S 481, United States Supreme Court, 21 June 1993.

²⁸² *The Haitian Centre for Human Rights et al. v. United States, Case 10.675*, 10.675, Inter-American Commission on Human Rights (IACHR), 13 March 1997.

²⁸³ UN High Commissioner for Refugees (UNHCR) (n 273) 12.

²⁸⁴ *Hirsi Jamaa and Others v Italy* [GC], App no. 27765/09, (ECtHR 23 February 2012).

²⁸⁵ UN High Commissioner for Refugees (UNHCR) (n 273) 14.

²⁸⁶ *The Refugee Convention* (n 278).

²⁸⁷ Lauterpacht and Bethlehem, (n 279) 119.

Article 1 paragraph (F). However, the purpose and scope of these two paragraphs are very different. In fact, as suggested by Lauterpacht and Bethlehem, paragraph 2 of Article 33 refers to different circumstances than those contained in paragraph (F).²⁸⁸ Specifically, one refers to the expulsion of a person already considered a refugee or in the process; the other lists the condition for not obtaining refugee status.

These differences are also reflected by other elements. For instance, in order to exclude the application of the principle of non-refoulement, a refugee must also constitute a danger to the security of the country in which he or she is present.²⁸⁹ In addition, while paragraph (F) refers to crimes committed outside the country of refugee, before the admission, paragraph 2 is silent on the question of where and when a crime must have been committed.²⁹⁰ In this regard, Grahl-Madsen in his commentary, suggested that paragraph 2 should be interpreted in reference to a crime committed in the country of refuge or another but after his or her admission as a refugee.²⁹¹ Paragraph 2 of Article 33 provides very precise exceptions to the principle of non-refoulement. This essentially means that refugees can exceptionally be repatriated only for two reasons: in the event of a threat to the national security of the host country; and if after being convicted of a particularly serious crime, a refugee poses a danger to the community.²⁹²

It is also important to stress, that the Refugee Convention does not give a definition of serious crime, national security or danger to the community. As a result, contracting states have a margin of discretion in applying these exceptions.

Despite these lacks and the margin of appreciation, the term “security of the country” could be considered equivalent to the well-known term “national security”.²⁹³ According to Grahl-Madsen, in fact, this concept corresponds to serious acts that endanger directly or indirectly the constitution, the territorial integrity, the independence or the external peace of the country concerned.²⁹⁴ This approach was also confirmed by Lauterpacht and Bethlehem.²⁹⁵

²⁸⁸ Ibid, page 130.

²⁸⁹ Ibid, page 129.

²⁹⁰ Ibid.

²⁹¹ UN High Commissioner for Refugees (UNHCR), *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)* (1997), page 237.

²⁹² UN High Commissioner for Refugees (UNHCR) (n 270) F.

²⁹³ UN High Commissioner for Refugees (UNHCR) (n 288) 140.

²⁹⁴ Ibid.

²⁹⁵ Lauterpacht and Bethlehem, (n 279) 165.

The second exception of this paragraph includes two different terms that should be read together, “particularly serious crime”, and “danger to the community”. In fact, both conditions must be fulfilled in order to apply this exception.²⁹⁶ This means that if a refugee has been convicted of a particularly serious crime but he or she does not represent a danger to the community of that country, the exception of the principle of non-refoulement does not apply.²⁹⁷ However, without a clear definition of these concepts, countries could freely interpret the disposition of the refugee Convention. In this regard, at the national level, the Federal Court of Australia ruled that the principal statement of exclusion in Article 33, paragraph 2 of the 1951 Convention is that the individual constitutes a danger to the community or national security, not that he or she was convicted of a particularly serious crime.²⁹⁸

Similarly, this also arises with the definition of “particularly serious crime”. For instance, in the United Kingdom, this concept occurs if a person has been sentenced to a period of imprisonment of at least two years.²⁹⁹ In the United States, on the other hand, different factors must be taken into account, and only the determination of all these factors would satisfy the imposition of the exception to non-refoulement under the Refugee Convention.³⁰⁰ Differently is the approach of the Austrian Supreme Administrative Court, which specifically includes the notion of “particularly serious crime”, “*homicides, turnips, child abuse, arson, drug trafficking, armed robbery, and the like*”. This definition is also in line with the international level. In fact, in the Travaux Préparatoires of the refugee Convention is possible to find the same criminal offence,³⁰¹ and the UNHCR stressed that the crime itself must be of a very grave nature.³⁰² In a similar vein, within the European framework, reference can be made to Article 83, paragraph 1 of the TFEU, which delineates the parameters for defining criminal offences and sanctions within the ambit of particularly serious crimes.³⁰³

²⁹⁶ Stenberg Gunnell. *Non-expulsion and Non-Refoulement: The Prohibition against Removal of Refugees with Special References to Articles 32 and 33 of the 1951 Convention Relating to the Status of Refugees*. (Uppsala (Suède):Iustus förlag, cop. 1989); James C Hathaway and Colin J. Harvey, *Framing Refugee Protection in the New World Disorder* (2001) 34 CORNELL INT'L LJ 257, 291.

²⁹⁷ UN High Commissioner for Refugees (UNHCR) (n 291) 140.

²⁹⁸ *A v Minister for Immigration & Multicultural Affairs* [1999] FCA 227, para 3.

²⁹⁹ Nationality, Immigration and Asylum Act 2002, section 72, para 2.

³⁰⁰ See page 17 of the United States Court of Appeals, Ninth Circuit, *Hernan Ismael Delgado, A#78-431-226, Petitioner. v. Eric H. Holder, JR., United States Attorney General, Respondent*, No. 03-74442.

³⁰¹ *The Refugee Convention* (n 278) 342.

³⁰² UN High Commissioner for Refugees (UNHCR) (n 291) F.

³⁰³ See Article 83, para 1 of the Treaty on the Functioning of the European Union.

The last element under paragraph 2 is the notion of “danger to the community”. This concept, unlike the term “national security”, which focuses on the largest interests of the state, mainly refers to the safety and well-being of the population.³⁰⁴ This interpretation is also based on the notion of non-refoulement included in other international documents. For instance, according to the Bangkok Principles and the Declaration on Territorial Asylum, the principle of non-refoulement can be limited to safeguard the population.³⁰⁵

It is also important to notice that, as indicated by the UNHCR, this concept of “danger to the community” should not only refer to the existence of a past crime but should be assessed in relation to a present or future danger to the community.³⁰⁶ In other words, it should not be the acts that the refugee has committed to justify his or her expulsion, but that these acts can serve as an indication of his or her future behaviour and therefore indirectly justify the expulsion.³⁰⁷

As for its meaning, the Refugee Convention is also silent in this case. However, it could be possible to rely on national dispositions. In the UK for example, a conviction of at least two years is required to endanger the community.³⁰⁸ In the United States, on the other hand, the Ninth Circuit of the Court of Appeal requires several factors.³⁰⁹

As has already been pointed out, when these concepts are analysed, it should be kept in mind the humanitarian character of the Refugee Convention. Therefore, the exceptions to the principle of non-refoulement contained in paragraph 2 of Article 33 should be interpreted strictly.³¹⁰

Furthermore, this chapter not only clarifies the scope and legal implications of Article 33 of the Refugee Convention but also shows that although the principle of non-refoulement is widely accepted, its exceptions leave room for state discretion. This tension between humanitarian protection and national interest lays the groundwork for the following sections, which will analyse the application of the principle in light of other international and European legal instruments.

³⁰⁴ Lauterpacht and Bethlehem, (n 279) 140.

³⁰⁵ See Article V, paragraph 1 of the Asian-African Legal Consultative Organization (AALCO), *Bangkok Principles on the Status and Treatment of Refugees* (“*Bangkok Principles*”), 31 December 1966; See Article 3, para 2 of the UN General Assembly, Declaration on Territorial Asylum, 14 December 1967.

³⁰⁶ UN High Commissioner for Refugees (UNHCR) Criminal Justice and Immigration Bill, Briefing for the House of Commons at Second Reading, July 2007, para 11.

³⁰⁷ *Ibid.*

³⁰⁸ Nationality, Immigration and Asylum Act 2002, section 72, para 2.

³⁰⁹ See page 18 of the United States Court of Appeals, Ninth Circuit, Hernan Ismael Delgado, A#78-431-226, *Petitioner. v. Eric H. Holder, JR.*, United States Attorney General, Respondent, No. 03-74442.

³¹⁰ This restrictive interpretation is also supported by the section F of the 1997 Note on the Principle of Non-Refoulement.

2.4. A Journey through International Human Rights Conventions

The previous section shows that the principle of non-refoulement is an essential element of the 1951 Refugee Convention. However, this principle is not only a fundamental aspect for refugees and asylum seeker protection, but it is also a principle of international human rights law. In fact, the incorporation of the principle of non-refoulement into the international human rights protection system has been strengthened several times by the United Nations.³¹¹ The UNHCR itself recognized that this principle has developed into a human rights obligation beyond the asylum context.³¹²

This recognition is based on the fact that over the years the prohibition against refoulement has been included in various international instruments.³¹³ Specifically, such principle can be found in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Its Article 3 explicitly prohibits the transfer of a person to a country in which there are reasonable grounds to believe that he or she would be in danger of suffering torture.³¹⁴

Another significant document is the International Convention for the Protection of All Persons from Enforced Disappearance, which includes this principle in Article 16.³¹⁵ Furthermore, although not expressly mentioned, the principle of non-refoulement, as it will be further analysed, was also included in Articles 6 and 7 of the 1966 International Covenant on Civil and Political Rights.³¹⁶

The prohibition against refoulement is not only recognized in Universal Treaties but is also firmly established at the regional level. In Africa for example, this principle can be found in Article 2 of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention).³¹⁷ On the American continent, it is included in Article 22 of the 1969 American Convention on Human Rights.³¹⁸ At the European level, the European Charter of Fundamental

³¹¹ Tamás Molnár, (n 260) 58.

³¹² UN High Commissioner for Refugees (UNHCR) (n 303) 8.

³¹³ Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007).

³¹⁴ See Article 3, para 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

³¹⁵ See Article 16, para 1 of the International Convention for the Protection of All Persons from Enforced Disappearance.

³¹⁶ See Article 6, para 1 of the International Covenant on Civil and Political Rights.

³¹⁷ See Article 2, para 3 of the Convention Governing the Specific Aspects of Refugee Problems in Africa.

³¹⁸ See Article 22, para 8 of the American Convention on Human Rights.

Rights mentions the principle of non-refoulement in Article 19³¹⁹ and the ECHR indirectly recognized it under Article 3.³²⁰

Furthermore, this principle can also be found in other important non-binding international Documents. It is worth mentioning the 1984 Cartagena Declaration,³²¹ on the protection of refugees in Latin American countries,³²² and the 1967 Declaration on Territorial Asylum.³²³

Although the principle of non-refoulement is recognised in various regional systems, this thesis focuses primarily on the European framework, in particular the interaction between EU law and the ECHR, given the unique role that mutual trust plays within the EU legal system.

2.4.1. Navigating the Intricacies: Asylum versus Human Rights Contexts

As previously indicated, the purpose and scope of the principle of non-refoulement under the Refugee Convention are different from those included in other international Documents. In fact, if we take into consideration Article 3 of the CAT, it is possible to notice immediately important differences.

The first discrepancy is given by the fact that the Refugee Convention refers, as widely explained, only to refugees and asylum seekers. On the contrary, Article 3 of the CAT protects anyone from the risk of expulsion. Specifically, it reads: "*No State Party shall expel, return ("refouler") or extradite a person to another State ...*". Similarly, this extension is found in other Texts, such as the EU Charter of Fundamental Rights, which refers to "*no one*" and indirectly in the ECHR.³²⁴ In these formulations, thus, the subject of protection is the 'individual' as such, not a specific category of persons. In addition, following a literal interpretation, it could be assumed that not only foreigners are protected from refoulement, but also citizens of contracting states.³²⁵ From these

³¹⁹ See Article 19, para 2 of the Charter of Fundamental Rights of the European Union.

³²⁰ See Article 3 of the European Convention on Human Rights.

³²¹ See section III, para 5 of the Cartagena Declaration on Refugees.

³²² Although not legally binding, the provisions of the Cartagena Declaration have been incorporated into the legislation of several Latin American states.

³²³ See Article 3, para 1 of the UN General Assembly, Declaration on Territorial Asylum, 14 December 1967, A/RES/2312(XXII).

³²⁴ Eman Hamdan, *The Principle of Non-Refoulement under the European Convention on Human Rights and the United Nations Convention Against Torture* (Brill 2016).

³²⁵ Tamás Molnár, (n 260) 58.

factors, therefore, it is clear that the personal scope of the principle of non-refoulement is wider in the context of human rights than refugee law.³²⁶

Another important aspect to consider is the limits of this principle. According to the 1951 Refugee Convention, the principle of non-refoulement is not formulated in absolute terms. As previously indicated, a contracting state may reject a refugee or asylum seeker in the event that he or she is a danger to the security of the country or as a result of a conviction he or she is a danger to the community.

In the context of human rights protection, on the other hand, the 1984 Convention against Torture and the American Convention on Human Rights formulate an absolute prohibition of refoulement. This means that under such Documents, exceptions or derogations are not permitted. Specifically, Article 2 paragraph 2 of the CAT expressly establishes that: “*No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.*”

Similarly, the principle of non-refoulement has been recognised as an absolute norm under the ICCPR.³²⁷ In fact, Article 4 of the ICCPR excludes derogations from Article 7.³²⁸ This was also confirmed by the Human Rights Committee, which established that no justification or other circumstances can be invoked to justify a violation of Article 7 of the ICCPR.³²⁹

In addition, as will be analysed in the next sections, the absolute term of the principle of non-refoulement has been recognised by the European Court of Human Rights in relation to Article 3 ECHR, and in the EU Charter of Fundamental Rights. It is also important to keep in mind that the absolute aspect of the principle of non-refoulement, is not only a feature of these human rights Conventions, but it can be found also in the asylum context. For instance, the 1969 OAU Convention does not mention exceptions to such principle.³³⁰

Another important element to consider is the relation of the principle of non-refoulement with extradition. As mentioned in the previous section, under the Refugee Convention, it is not clear if

³²⁶ Roberta Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (Cambridge University Press, New York 2016), page 96; Kees Wouters, International Legal Standards for the Protection from Refoulement (2010) *International Journal of Refugee Law*, Volume 22, Issue 2, page 434- 435.

³²⁷ Eeva Nykänen, “The European Convention on Human Rights, Prohibition of Refoulement and Non-State Actors”, In *Fragmented State Power and Forced Migration*, Brill (Nijhoff 2012), page 226.

³²⁸ See Article 4, para 2 of the International Covenant on Civil and Political Rights.

³²⁹ See General Comment No. 20 of the Human Rights Committee, see also the HRC *Mansour Ahani v. Canada*, June 2004 para. 10.10

³³⁰ UN High Commissioner for Refugees (UNHCR) (n 273) 7.

this principle includes protection from extradition. On the contrary Article 3 of the CAT explicitly forbids extradition and the ECtHR and the Human Rights Committee recognised it in their decisions.³³¹ However, it is interesting to notice that many countries are bound by extradition treaties and their obligations under those treaties may conflict with their duty to respect the principle of non-refoulement.³³² In this regard, different scholars have expressed themselves in favour of the supremacy of the principle of non-refoulement. John Dugard and Christine Van den Wyngaert, for instance, suggested that human rights treaties arising from notions of *jus cogens*, thus, as a result to their higher status, should prevail over extradition treaties.³³³ On the other hand, Walter Kälin used an indirect approach.³³⁴ He considered the supremacy of the UN Charter over other treaties³³⁵, which according to Articles 55 and 56 member states are bound to respect human rights.³³⁶ Hence, extradition requests that conflict with the principle of non-refoulement are accordingly in contrast with the provision of the UN Charter.³³⁷

When we consider the principle of non-refoulement under the asylum and human rights context, it can be assumed, therefore, that it applies in the event that there is a real risk of persecution, violations of the right to life, torture, punishment, inhuman or degrading treatment. Furthermore, it is extended to all persons who may be in the territory or jurisdiction of a State, including asylum seekers and refugees. In addition, it is also considered an absolute principle and cannot be limited, not even in exceptional circumstances such as terrorism or armed conflict.³³⁸

However, this broad definition may highlight other aspects. In practice, following what has been specified, it could be argued that if a refugee were to be removed, under Article 33, paragraph 2 of the Refugee Convention, but the prohibition from refoulement is forbidden by the other Human Rights treaties, the logical result would be that the person would maintain the refugee status and it would be practically impossible to send him or her back. Furthermore, if the individual falls within

³³¹ See *Soering v. The United Kingdom*, App No. 14038/88, (ECtHR 7 July 1989); *Joseph Kindler v. Canada*, Communication No. 470/1991, U.N. Doc. CCPRIC/481D/470/1991.

³³² David Weissbrodt and Isabel Hortreiter, *The Principle of Non Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1 (1999), page 60.

³³³ Ibid; John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights* (1998) 92 AM. J. INTL. L. 187, 195.

³³⁴ David Weissbrodt and Isabel Hortreiter, (n 329) 60.

³³⁵ See Article 103 of the United Nation charter.

³³⁶ See Article 55 of the United Nation charter.

³³⁷ David Weissbrodt and Isabel Hortreiter, (n 332) 61.

³³⁸ UN High Commissioner for Refugees (UNHCR) (n 306) 10.

the scope of the exclusion clause of the Refugee Convention, he or she will not be granted refugee status. However, as established by the Human Rights Conventions, he or she would be authorised to continue to remain in the country, consecutively, without a certain status.³³⁹

2.4.2. Unravelling the Nuances in Comparing Human Rights Treaties

The scope of the principle of non-refoulement not only differentiates between the Refugee Convention and the Human Rights Treaties, but there are also some discrepancies between them. As mentioned before, Article 3 of the CAT explicitly provides for an absolute prohibition of refoulement. However, if we compare it to the ECHR and the ICCPR, it is possible to notice that this principle, under the Convention Against Torture, contains some significant restrictions. Specifically, according to Article 3 of the CAT, a person cannot be removed only in case of a risk of torture in the country of destination. This means that other less severe forms of punishment, serious harm or ill-treatment are not taken into account for that purpose.³⁴⁰ In fact, Article 1 of the CAT gives a precise definition of torture, which is considered an act of severe physical or mental pain intentionally inflicted with the aim of obtaining information or a confession.³⁴¹

The Convention Against Torture is the only document, among those mentioned, that defines the concept of torture. In this regard, three essential elements can be configured.³⁴² Firstly, in order to qualify as torture, the pain suffered must be considered "severe ". Herman Burgers and Hans Danelius suggested that prolonged insolation, and deprivation of food, water or sleep may also fall within this concept.³⁴³ Secondly, the act must be performed in order to achieve a purpose, such as information or confession. David Weissbrodt and Isabel Hortreiter specified that the list of purposes indicated in Article 1 of the CAT "*is not exhaustive, but rather an enumeration of the most common purposes.*"³⁴⁴ Third, in order to be considered torture, this act must be committed by

³³⁹ Tamás Molnár, (n 260) 58.

³⁴⁰ See Article 16, para 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

³⁴¹ Ibid, Article 1, para 1.

³⁴² Kristen Rosati, The United Nations Convention Against Torture: A Viable Alternative for Asylum Seekers, 74 Interpreter Releases, (1997),1775.

³⁴³ Herman Burgers and Hans Danelius, *The United Nations Convention against Torture: a handbook on the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 125 (1988), page 118.

³⁴⁴ David Weissbrodt and Isabel Hortreiter, (n 332) 10.

a state representative. This means that pain inflicted by private actors does not fall under the concept of torture and a victim cannot be protected by the Convention.³⁴⁵

The principle of non-refoulement under the ICCPR and the ECHR, on the contrary, is also extended to less serious forms of punishment. In fact, the Human Rights Committee, in relation to Article 7 of the ICCPR, interpreted the principle of non-refoulement as a prohibition against any return that would lead not only to torture but also to inhuman or degrading treatment or punishment.³⁴⁶ Similarly, as it will be further analysed, the European Court of Human Rights, in relation to Article 3 of the ECHR, has also extended the prohibition of refoulement upon the existence of these factors.

Following these interpretations, therefore, it seems clear that the principle of non-refoulement under the ECHR and the ICCPR has a wider scope than the one provided in Article 3 of the CAT.³⁴⁷

The prohibition against refoulement, as already mentioned, is not expressly included in the ICCPR. It was confirmed for the first time by the Human Rights Committee in 1967, in the *Torres v. Finland* case.³⁴⁸ The decision concerned a former Spanish political activist, who was arrested in Finland. Subsequently, following a request from the Spanish government, the claimant was extradited to Spain. The applicant, then turned to the Human Rights Committee claiming that his extradition would expose him to treatments contrary to Article 7 of the ICCPR.³⁴⁹ Although his application was rejected, the Committee recognized the prohibition from refoulement in case of a risk of torture in the country of destination.³⁵⁰

It can be noted that the principles stated in Article 7 of the ICCPR and in Article 3 of the ECHR are almost identical. Therefore, it is not surprising that the Human Rights Committee, in its decisions, developed the concept of non-refoulement in a very similar way to the approach adopted by the ECtHR.³⁵¹ In the *Kindler v. Canada* case, for example, the Committee specifically referred to the *Soering v. United Kingdom* case of the ECtHR.³⁵² In addition, the Committee has gone even

³⁴⁵ Ibid, page 11.

³⁴⁶ UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para 9; UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 12.

³⁴⁷ Roberta Mungianu, (n 323) 97.

³⁴⁸ *Torres v. Finland*, CCPR / C / 38 / D / 291/1988, UN Human Rights Committee (HRC), 5 April 1990.

³⁴⁹ Ibid, para 5.2.

³⁵⁰ Ibid, para 6.

³⁵¹ David Weissbrodt and Isabel Hortreiter, (n 332) 44.

³⁵² *Kindler v. Canada*, CCPR/C/48/D/470/1991, UN Commission on Human Rights, 11 November 1993, para 15.3.

further. General Comment No. 31 extended the application of the principle of non-refoulement to Article 6, which concerns the right to life.³⁵³ Specifically, the Committee has established that the obligation imposed on member states not to extradite, expel or remove a person from their territory occurs also in cases enshrined in Article 6 of the ICCPR.³⁵⁴ In other words, under the Covenant, the prohibition of non-refoulement applies not only if there is a risk of torture, punishment or inhuman or degrading treatment, but also in case of a danger to the life of an individual.³⁵⁵

Nevertheless, it is important to consider that the absolute nature of the principle of non-refoulement, pursuant to Article 7, finds a limit in Article 6. In fact, even though this Article prohibits the arbitrary deprivation of life, it does not forbid the death penalty.³⁵⁶ Therefore, it might be possible to send a person to a country where capital punishment is still in force. However, on several occasions, the Human Rights Committee denied extradition in situations where the applicant would have faced the death penalty in the country of destination.³⁵⁷

In addition, the way in which the death penalty is executed may also be relevant.³⁵⁸ The Human Rights Committee, in fact, in the *Chitat Ng v. Canada* case specified that not the death penalty itself, but the way it is imposed on the applicant, constitutes a limit for removal.³⁵⁹ From these decisions, therefore, Article 6 does not appear to limit the absolute character of the principle of non-refoulement.

The General Committee No. 20 has extended the prohibition against refoulement, under Article 7 of the ICCPR, also to cases where the risk of torture or ill-treatment comes from private individuals or non-state actors in the country of destination.³⁶⁰ Specifically, it stated that contracting States have a duty to ensure protection through legislative and other measures that may be necessary against the acts prohibited by Article 7, regardless of whether they have been committed by persons

³⁵³ See Article 6, para 1 of the International Covenant on Civil and Political Rights.

³⁵⁴ Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, para 12

³⁵⁵ Başak Çalı, Cathryn Costello and Stewart Cunningham, “Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies” (2020) *German Law Journal* 21, page 367.

³⁵⁶ See Article 6, para 2 of the International Covenant on Civil and Political Rights.

³⁵⁷ See *Roger Judge v. Canada*, CCPR/C/78/D/829/1998, UN Human Rights Committee (HRC), 13 August 2003, para 10.2; *Keith Cox v. Canada*, CCPR/C/52/D/539/1993, UN Human Rights Committee (HRC), 9 December 1994, para 16.1; *Kindler v. Canada*, CCPR/C/48/D/470/1991, UN Commission on Human Rights, 11 November 1993, para 14.2; *Charles Chitat Ng v. Canada*, CCPR/C/49/D/469/1991, UN Human Rights Committee (HRC), 7 January 1994, para 15.2.

³⁵⁸ Eeva Nykänen, (n 327) 227.

³⁵⁹ *Charles Chitat Ng v. Canada*, CCPR/C/49/D/469/1991, UN Human Rights Committee (HRC), 7 January 1994, para 16.1.

³⁶⁰ Eeva Nykänen, (n 327) 265.

acting in their official capacity or private capacity.³⁶¹ Also, in this case, the standards that arise from the ICCPR and the ECHR differ from those provided by the CAT. In fact, as already stated, the concept of torture indicated in Article 1 of the CAT includes only measures enacted by a state or with the consent of the state, but not measures imposed by private individuals.³⁶² This firm concept of torture was also confirmed by the United Nations Committee against Torture, which specified that the obligation to refrain from expelling a person who could be subjected to torture inflicted by private actors and without the consent of the country, does not fall within the scope of Article 3 of the Convention.³⁶³

The reason behind the decision not to include private persons in the definition of torture could be justified by the fact that if such acts are committed by private individuals and without any involvement of the state, authorities are expected to adopt normal justice procedures and punishment to protect the victim.³⁶⁴

The scope of the principle of non-refoulement has been extended to a level that covers also indirect removal. This means that people are also protected from being transferred to a state which may not itself endanger them, but which would not effectively protect them from a subsequent transfer to a country that would violate their human rights.

The international community commonly adopted this approach, also in relation to the Refugee Convention. In fact, the UNHCR recognised that the principle of non-refoulement under Article 33 of the 1951 Convention implies that contracting states have a duty to take measures to avoid direct or indirect removal of refugees and asylum seekers in a place where their lives or freedoms would be in danger.³⁶⁵ In the same way, the Committee Against Torture, in the *Motumbo v. Switzerland* case, established that the principle of non-refoulement apply also to indirect transfer.³⁶⁶ Correspondingly, the Human Rights Committee stated that states have an obligation

³⁶¹ UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para 2.

³⁶² Eeva Nykänen, (n 324) 266.

³⁶³ *V.X.N. and H.N. v. Sweden*, CAT/C/24/D/130/1999; CAT/C/24/D/131/1999, UN Committee Against Torture (CAT), 2 September 2000, para 13.8.

³⁶⁴ Herman Burgers and Hans Danelius, (n 343) 119

³⁶⁵ UN High Commissioner for Refugees (UNHCR) (n 306) 8.

³⁶⁶ *Mutombo v. Switzerland*, Committee Against Torture, Communication No. 13/1993, U.N. Doc. A / 49/44 at 45 (1994).

not to extradite, expel or remove a person from their territory to any country where the person may subsequently be removed.³⁶⁷

In regional contexts, the Inter-American Court of Human Rights, and the ECHR, as mentioned in the previous chapter, have also extended the prohibition from refoulement to any state where a person can be subsequently expelled, returned or extradited.³⁶⁸

2.5. Non-Refoulement as a Cornerstone of Customary International Law

The importance of the principle of non-refoulement is recognized not only by the fact that it is contained in various international conventions but also that it is commonly accepted as a norm of customary international law.

The concept of customary international law has been defined by the Statute of the International Court of Justice as a general practice accepted as a law.³⁶⁹ In this regard, the Court of Justice, in the *North sea Continental Shelf* case, established that two elements are necessary to form a custom, one objective and the other subjective. Precisely, the practice of the States “*usus*” and the belief that this practice is required, prohibited or permitted by a rule of law “*opinio juris sive necessitates*”.³⁷⁰

In addition to these requirements, it is also important to verify whether a norm enshrined in an international convention can become a norm of customary international law. On this point, the ICJ, in the above-mentioned case, established that a norm of customary international law can derive from the practices of states in accordance with a conventional rule.³⁷¹

This approach was later confirmed in the “*Nicaragua*” case where the ICJ specified that conventional rules can exist alongside customary principles of similar content. The Court, in that decision, recognized that the prohibition of threat or use of force referred to in Article 2 paragraph

³⁶⁷ UN Human Rights Committee (HRC), *General comment no. 31 [80]*, *The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 12.

³⁶⁸ *Caso Familia Pacheco Tineo vs Estado Plurinacional de Bolivia*, Inter-American Court of Human Rights (IACrHR), 25 November 2013, para 153.

³⁶⁹ Statute of the International Court of Justice, Article 38, para 1 (b): “*international custom, as evidence of a general practice accepted as law*”;

³⁷⁰ *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, I.C.J. Reports 1969, p.3, International Court of Justice (ICJ), 20 February 1969, para 77.

³⁷¹ *Ibid*, para 73.

4 of the United Nations Charter also applied as a principle of customary international law.³⁷² Specifically, according to the Court, the fact that a customary principle was contained in a multilateral treaty did not mean that it ceased to exist as a principle of customary law.³⁷³

Having delineated the contours of customary international law, the next step is a discerning examination of the non-refoulement principle's status within this framework. This necessitates a nuanced differentiation between the incarnation of non-refoulement as articulated in the Refugee Convention and its manifestation within the broader spectrum of Human Rights Conventions.

In relation to the notion of “state practice”, the ICJ has specified that for a conventional rule to be considered customary international law, there should be a very broad and representative participation in the convention.³⁷⁴ In this regard, it is important to consider that 145 States are members of the 1951 Refugee Convention and 146 of the 1967 Protocol.³⁷⁵

Moreover, it often happened that when states, not members of the Refugee Convention, did not comply with its provisions, they referred to the principle of non-refoulement, claiming to have respected it.³⁷⁶ Therefore, this direct and indirect recognition of this principle shows that the prohibition against refoulement, under the 1951 Convention is accepted worldwide.

As regards the concept of “*opinio juris sive necessitates*”, the ICJ, in the *North sea Continental Shelf* case, requested that the practice must be considered mandatory by the existence of a rule of law requiring it.³⁷⁷ In this respect, it is essential to remember that, the Refugee Convention is binding for contracting states, and Article 33 is not subject to reservations. Moreover, member states and the UNHCR³⁷⁸ have specifically recognized the compulsory aspect of the principle of non-refoulement as a norm of customary law.³⁷⁹

Based on these characteristics, and as also generally recognized by scholars, therefore, it should be accepted that the principle of non-refoulement, under Article 33 of the Refugee Convention,

³⁷² Elihu Lauterpacht and Daniel Bethlehem, (n 279) 141.

³⁷³ *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392, at para. 73

³⁷⁴ *North Sea Continental Shelf Cases* (n 370).

³⁷⁵ UN High Commissioner for Refugees (UNHCR), *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol* (as of April 2015).

³⁷⁶ Roberta Mungianu, (n 325) 96; Kees Wouters, (n 326) 100.

³⁷⁷ *North Sea Continental Shelf Cases* (n 370) 77.

³⁷⁸ UN High Commissioner for Refugees (UNHCR), (n 274) 15.

³⁷⁹ UN High Commissioner for Refugees (UNHCR), *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR / MMSP / 2001/09, para 4.

has become an element of customary international law.³⁸⁰ There is still a doubt, on the other hand, whether the principle of non-refoulement under Article 33 of the Refugee Convention can be considered a peremptory norm of general international law or *jus cogens*.³⁸¹

In the context of human rights, the principle of non-refoulement can be associated with the prohibition of torture, punishment and inhuman and degrading treatment. In this regard, it is widely accepted that the prohibition on torture, included in the Convention Against Torture, has a customary status³⁸² and it is also considered to be a norm of *jus cogens*.³⁸³ Although the CAT is the only Convention that mentions the concept of torture, separated from additional forms of punishment, the other international instruments consider torture, punishment and inhuman and degrading treatment all together, as a single prohibition.³⁸⁴ These Conventions are recognised worldwide and they have a binding nature,³⁸⁵ thus, the customary status of these prohibitions is commonly accepted.³⁸⁶

³⁸⁰ Roberta Mungianu, (n 326) 96; Kees Wouters, (n 326) 102; Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021); Elihu Lauterpacht and Daniel Bethlehem, (n 341) 149.

³⁸¹ Scholars have different opinion in this matter. In favour of a recognition see: Alexander Orakhelashvili, *Peremptory Norms in International Law* (2007) *British Yearbook of International Law*, Volume 78, Issue 1, pages 480–482; Jean Allain, *The jus cogens Nature of non-refoulement* (2001) *International Journal of Refugee Law*, Volume 13, Issue 4, Pages 533–558; on a contrary position, see: Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021); Rene Bruin, Kees Wouters, *Terrorism and the Non-derogability of non-refoulement* (2003) *International journal of refugee law*, Vol 15, pages 1-29.

³⁸² Elihu Lauterpacht and Daniel Bethlehem, (n 276) 151; *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998; *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001.

³⁸³ UN Human Rights Committee (HRC), *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994, CCPR/C/21/Rev.1/Add.6, para 10; Hannikainen, Lauri. 1988. *Peremptory norms (jus cogens) in international law: historical development, criteria, present status*. Helsinki: Finnish Lawyers' Pub. Co; Dire Tladi, *Second Report on Jus Cogens (International Law Commission, 16 March 2017)* UN Doc A/CN.4/706; Dire Tladi, *Fourth Report on Jus Cogens (International Law Commission, 31 January 2019)* UN Doc A/CN.4/727.

³⁸⁴ See Article 5 of the Universal Declaration of Human Rights; Articles 2 and 3 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 3 ECHR; Article 7 ICCPR; Article 5, para 2 of the American Convention on Human Rights; Article 5 of the African Charter on Human and Peoples' Rights.

³⁸⁵ 169 states are parties to the CAT; 173 states are parties to the ICCPR; 24 states are parties to the American Convention on Human Rights; 47 states are parties to The European Convention on Human Rights.

³⁸⁶ See for instance, Elihu Lauterpacht and Daniel Bethlehem, (n 277) 151; N Human Rights Committee (HRC), *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994, CCPR/C/21/Rev.1/Add.6, para 8.

The principle of non-refoulement, therefore, as an integral part of the prohibitions of torture, punishment and inhuman and degrading treatment,³⁸⁷ it is also configured as a norm of customary international law.³⁸⁸

This section therefore distinguishes between the recognition of non-refoulement as a customary norm under the Refugee Convention and its articulation within broader human rights law, thus reinforcing its fundamental role in the legal systems. However, although global acceptance of the principle is widespread, some regional variations persist in the way it is interpreted and applied. Indeed, there is an ongoing debate among scholars as to whether the principle of non-refoulement should be recognised as a norm of jus cogens. Lauterpacht and Bethlehem argue that the principle constitutes customary international law but disagree on classifying it as peremptory.³⁸⁹ In contrast, Goodwin-Gill, McAdam and Emma Dunlop argue that its close connection with the absolute prohibition of torture, already recognised as jus cogens, may justify a similar classification.³⁹⁰ Moreover, Jean Allain goes further, stating that non-refoulement clearly fulfils the criteria for a jus cogens norm.³⁹¹

This Thesis is in line with the latter positions, considering that the principle of non-refoulement fulfils the main criteria commonly required for a norm to be classified as jus cogens. In particular, its close connection with the absolute prohibition of torture, the broad recognition of the principle, its non-derogable character and its essential role in the protection of fundamental rights in international law support this assertion.

Further support for this position can also be found in the work of Costello and Foster, who argue that the principle of non-refoulement, particularly when linked to the prohibition of torture and inhuman treatment, satisfies the legal and normative criteria of jus cogens.³⁹² This view is further reinforced by the approach to jus cogens adopted by the International Law Commission itself in

³⁸⁷ See Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; *Soering v. The United Kingdom*, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989; UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992.

³⁸⁸ Elihu Lauterpacht and Daniel Bethlehem, (n 279) 158.

³⁸⁹ *Ibid.*, 87.

³⁹⁰ Guy S Goodwin-Gill, Jane McAdam and Emma Dunlop, *The Refugee in International Law* (4th edn, Oxford University Press 2021).

³⁹¹ Jean Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13(4) *International Journal of Refugee Law* 533.

³⁹² Cathryn Costello and Michelle Foster, 'Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' in Maarten den Heijer and Harmen van der Wilt (eds), *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* (TMC Asser Press 2016) 273.

its Draft Conclusions on Mandatory Norms of General International Law. In fact, in his Second and Fourth Reports, Special Rapporteur Dire Tladi explicitly referred to the prohibition of refoulement as an example of a norm that can rise to the level of jus cogens, especially when derived from the prohibition of torture.³⁹³ These authoritative developments additionally strengthen the position of the thesis that non-refoulement has become as a peremptory norm of international law.

2.6. The principle of non-refoulement under the ECHR

In the previous sections, it has been highly demonstrated that the principle of non-refoulement is placed among the most important refugee and human rights legislations.

However, based on the analysis of the documents reviewed in the previous chapter, the enforcement of this principle by individuals could be problematic. The 1951 Refugee Convention, for instance, does not provide for an international body to monitor its implementation. Furthermore, although Article 38 establishes that disputes relating to its interpretation between contracting States may be submitted to the International Court of Justice, no procedure is available for individual complaints.³⁹⁴ As a result, a refugee or asylum seeker is not able to obtain protection in the event of a violation of the principle of non-refoulement. A form of protection, however, might be ensured by national courts, in case states have transposed the Convention into domestic legislation.³⁹⁵

Under the Convention against Torture, the procedures are different. Article 17 of the CAT provides for a body responsible for monitoring the provisions of the Convention.³⁹⁶ Thus, in the event that an individual suffers for a violation of one or more rights guaranteed by the Convention, he or she can lodge an application to the Committee Against Torture.

As to the requirements for referring to the ECtHR, in order to apply to the Committee certain conditions must be met. The individual must have exhausted all available domestic remedies

³⁹³ International Law Commission, ‘Second Report on Jus Cogens by Special Rapporteur Dire Tladi’ (16 March 2017) UN Doc A/CN.4/706; and ‘Fourth Report on Peremptory Norms of General International Law (Jus Cogens)’ (31 January 2019) UN Doc A/CN.4/727.

³⁹⁴ See Article 38 of the Convention Relating the Status of Refugees.

³⁹⁵ David Weissbrodt and Isabel Hortreiter, (n 332) 27.

³⁹⁶ See Article 17, para 1 CAT.

unless the application of the remedies is unreasonably prolonged.³⁹⁷ In addition, the same matter must not be under another procedure of international investigation³⁹⁸, and the application is inadmissible if it is anonymous.³⁹⁹

It is important to note, however, that contracting states are allowed to recognize the competence of the Committee at any time and that the decisions taken during the procedures are not binding for those states.⁴⁰⁰ In fact, the Commission only reviews the petitions and forwards its opinion to the state concerned.⁴⁰¹

The procedure under the ICCPR is not very different.⁴⁰² The 1966 Optional Protocol to the International Covenant on Civil and Political Rights, guarantees the possibility for individuals to submit communications to the Human Rights Committee, in the event of a violation of the Convention by Member States.⁴⁰³ Also in this case, however, if the communication is admissible, the Committee issues a decision that is not binding on the states.⁴⁰⁴

In Europe, on the other hand, protection against the prohibition of refoulement is different. The principle, in fact, can be concretely enforced, both under the ECHR and in the EU legislation by the Court of Justice. Specifically, as mentioned in the previous chapter, in the event that the ECtHR ascertains a violation of one or more rights contained in the Convention, it can force a State to put an end to the violation of such right.⁴⁰⁵ Nonetheless, the judgment issued does not require the country to annul or change the national legislation in contrast with the ECHR. On the contrary, Article 41 provides for an obligation of compensation, which generally consists of a sum of money that must be paid to the applicant.⁴⁰⁶

2.6.1. Tracing the Evolution of Non-Refoulement in the ECHR Framework

³⁹⁷ Ibid, Article 22, para 4 (b).

³⁹⁸ Ibid, para 4 (a).

³⁹⁹ Ibid, para 2.

⁴⁰⁰ Ibid, para 1.

⁴⁰¹ Ibid, para 7.

⁴⁰² See Article 5, para 2 of the Optional Protocol to the International Covenant on Civil and Political Rights.

⁴⁰³ Ibid, page 3.

⁴⁰⁴ Ibid, Article 5, para 4.

⁴⁰⁵ See Article 46, para 1 of the European Convention on Human Rights.

⁴⁰⁶ Ibid, Article 41.

As already widely indicated, the ECHR does not contain a specific provision of the principle of non-refoulement. Nonetheless, the European Court of Human Rights and the Commission have developed over the years a guarantee against any type of forced expulsion.

The first decision of the European Commission of Human Rights related to Article 3 of the ECHR and the prohibition of expulsion took place in 1961 in the *P. v. Belgium* case.⁴⁰⁷ Subsequently, the Commission, in the *X v. the Federal Republic of Germany* case, specified that extradition could raise a problem if it was carried out to a country where human rights guaranteed by the Convention would be violated.⁴⁰⁸

The matter of non-refoulement was then addressed for the first time by the European Court of Human Rights in 1989, in the *Soering* case. The case involved Jens Soering, a German citizen who, in 1985, was accused of killing his girlfriend's parents in the United States. He fled to England where he was arrested by the English police the following year. Subsequently, the US government asked for his extradition, where he would be sentenced to death. According to the ECtHR, the so-called "death row phenomenon", and other specific factors, such as his young age, mental condition, and the risk of homosexual abuse and physical attack, fell within the concept of inhuman and degrading treatment.⁴⁰⁹ Consequently, the Court stated that the extradition of a person to a state where there was a real risk of exposure to torture, punishment or inhuman or degrading treatment was precluded by Article 3 of the ECHR.⁴¹⁰

Although the right to asylum is not guaranteed by the European Convention, in the following years, given its universal nature, the principle of non-refoulement was also extended to asylum seekers.⁴¹¹ In the *Vilvarajah* case, for example, the Court ruled that even though states have the right to control the entry, residence and expulsion of foreigners, the expulsion by a Contracting State of an asylum seeker can give rise to a problem under Article 3, and hence engage the responsibility of that State under the Convention.⁴¹²

Given its close relations with the European Union, it is imperative to emphasize that the ECtHR has extended the scope of the principle of non-refoulement also in relation to EU law. In this

⁴⁰⁷ *P. v. Belgium*, App no 984/61 (Commission Decision, 29 May 1961).

⁴⁰⁸ *X v. the Federal Republic of Germany*, App no 1802/62 (Commission Decision 17 June 1974).

⁴⁰⁹ *Soering v. The United Kingdom*, App no 1/1989/161/217, (ECtHR July 1989), para 98-99.

⁴¹⁰ *Ibid*, para 111.

⁴¹¹ See for example: *Cruz Varas and Others v. Sweden*, App. no. 15576/89 (ECtHR 20 March 1991); *Chahal v. United Kingdom*, App. no. 22414/93 (ECtHR 15 November 1996)

⁴¹² *Vilvarajah and Others v. United Kingdom*, App nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, (ECtHR 30 October 1991) para 69-70.

regard, as it will be further analysed, the Court more than once reiterated that the prohibition against refoulement, given its absolute nature, does not allow for exceptions, and consequently also prevails over European Union law. This approach was shown in the *M.S.S.* case, where the Belgian authorities, following the Dublin Regulation and the principle of mutual trust, transferred an asylum seeker to Greece. However, considering the inhuman and degrading conditions, Greece could not be considered a safe country, as recognised instead by the European Union.⁴¹³ For these reasons, both Greece and Belgium were condemned by the ECtHR for violation of Article 3 of the ECHR.⁴¹⁴

2.6.2. Delving into the Absolute Nature of Non-Refoulement

Since the *Soering* case, it has been clear that the principle of non-refoulement under Article 3 of the ECHR has its own scope of application, which is independent of the one included in the Refugee Convention and other International Treaties.⁴¹⁵ In fact, according to the European Court, although the principle of non-refoulement is included in other International Conventions, states are not excluded from complying with the provision of the ECHR.⁴¹⁶

As suggested by Eeva Nykänen, this declaration of autonomy has allowed the ECHR to maintain the flexibility of the principle of non-refoulement and avoid being trapped by the limitations enshrined in the other Conventions.⁴¹⁷ Indeed, a notable distinction from the Refugee Convention lies in its scope and limitations: the Convention's coverage is exclusive to refugees and asylum seekers, and its non-refoulement principle can be subject to limitations under certain circumstances. In contrast, the ECHR guarantees protection universally to everyone, upholding the principle of non-refoulement unconditionally. Additionally, the ECHR's Article 3, in comparison to the CAT, encompasses not only instances of torture but also extends to other forms of punishment and inhuman or degrading treatments.

⁴¹³ See the report of the Human Rights Watch: "Greece: Unsafe and Unwelcoming Shores", October 2009.

⁴¹⁴ *M.S.S. v Belgium and Greece*, App no 30696/09 (ECtHR 21 January 2011).

⁴¹⁵ Eeva Nykänen, (n 327) 232.

⁴¹⁶ *Soering v. The United Kingdom*, App no 1/1989/161/217, (ECtHR 7 July 1989), para 86.

⁴¹⁷ Eeva Nykänen, (n 327) 232.

The absolute nature of the principle of non-refoulement was first recognized by the ECtHR in 1991 in the *Vilvarajah* case⁴¹⁸, and then subsequently reconfirmed in the *Chahal* judgment.⁴¹⁹ In that case, the Court rejected all objections from the British government that it wished to balance the protection offered by Article 3 with the limit of “national security”, including in Article 33 paragraph 2 of the Refugee Convention. Specifically, the Court stated that: “[t]he Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.”⁴²⁰ Consequently, the protection offered by Article 3 of the ECHR must be extended to expulsions every time there is a real risk of inhuman and degrading treatments, regardless of the individual's conduct.⁴²¹

Following this important decision, many states tried to question this absoluteness, especially in relation to anti-terrorist measures.⁴²² In this regard, an emblematic pronouncement is the *Saadi* judgment. In that case, the applicant, an asylum seeker, was arrested by the Italian police and suspected of terrorist activity. The British government also intervened during the investigation, stressing the need for the Strasbourg Court to review its position taken in the *Chahal* case. The British government, in fact, specified that the ECHR does not recognize the right of asylum. That right is included in the Refugee Convention, which explicitly limits it in cases of national security or where the asylum seeker has been responsible for acts contrary to the principles of the United Nations.⁴²³ The Court, nevertheless, confirmed the absolute nature of the non-refoulement principle.

A more recent affirmation of these principles can be seen in the recent judgments of *N.D. and N.T. v. Spain*, *M.H. and Others v. Croatia*, and *J.K. and Others v. Sweden*.⁴²⁴ This case involved three Iraqi nationals who were denied asylum in Sweden and faced deportation to Iraq. The European Court of Human Rights found substantial grounds to believe that, if returned to Iraq, the applicants would face a real risk of treatment that contravenes Article 3 of the ECHR, thus reinforcing the

⁴¹⁸ *Vilvarajah and Others v. United Kingdom*, App nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR 30 October 1991).

⁴¹⁹ *Chahal v. United Kingdom*, App no. 22414/93 (ECtHR 15 November 1996).

⁴²⁰ *Ibid*, para 79.

⁴²¹ *Ibid*, para 80.

⁴²² See for instance *Saadi v. Italy*, App no. 37201/06, (ECtHR 28 February 2008).

⁴²³ *Ibid*, para 119.

⁴²⁴ *J.K. and Others v Sweden*, App no 59166/12 (ECtHR, 23 August 2016); *N.D. and N.T. v. Spain*, App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020); *M.H. and Others v. Croatia*, App nos 15670/18 and 43115/18 (ECtHR, 04/04/2022).

absolute nature of the principle of non-refoulement within the context of the European human rights framework.

This absolute character is also confirmed by Article 15 paragraph 2 of the ECHR, which does not allow exceptions to Article 3 even in the case of armed conflict.⁴²⁵ This provision was confirmed in the *Ireland v. the United Kingdom* case, where the Strasbourg Court stated that the Convention prohibits torture and inhuman or degrading treatment or punishment in absolute terms, regardless of the victim's conduct and there can be no derogations even in the event of a public emergency that endangers the life of the nation.⁴²⁶

In addition, the ECtHR has commonly recognised the prohibition of refoulement in case of inhuman or degrading treatment inflicted by non-state actors.⁴²⁷ In this regard, it is worth mentioning the *Ahmed v. Austria* judgment.⁴²⁸ The case concerns a person from Somalia, who obtained refugee status in Austria. However, the Austrian authorities subsequently decided to expel the applicant to Somalia because he had committed crimes while residing in Austria. Since Somalia was in a state of civil war at the time and different clans were fighting in order to take control of the country, the ECtHR held that the applicant's deportation to Somalia would have resulted in a violation of Article 3 of the ECHR.⁴²⁹ The Court, therefore, implicitly acknowledged that the prohibition against refoulement is also applicable in situations where the damage in the country of destination comes from a different body than state authorities, such as in that case rival clans.

Another judgment in which the ECtHR has explicitly addressed this issue is the *H.L.R. v. France* case. Although it rejected the applicant's request, the Court did not exclude that in other circumstances the violation of Article 3 of the ECHR may also occur in case of ill-treatment inflicted by non-state actors.⁴³⁰

2.6.3. Non-refoulement under Article 3 of the ECHR

⁴²⁵ See Article 15, para 2 ECHR.

⁴²⁶ *Ireland v. The United Kingdom*, 5310/71, ECtHR, 13 December 1977, para 163.

⁴²⁷ Eeva Nykänen, (n 327) 264.

⁴²⁸ *Ahmed v. Austria*, App no 71/1995/577/663, (ECtHR 17 December 1996).

⁴²⁹ *Ibid*, para 44.

⁴³⁰ *H.L.R. v. France*, App no 24573/94, (ECtHR 29 April 1997).

An important aspect to consider is to understand in what circumstances the principle of non-refoulement applies under Article 3 of the ECHR. In this regard, it is necessary to distinguish the three different forms of prohibited treatment covered by that Article. This relationship has been discussed quite extensively by the Commission on Human Rights in its report on the Greek case⁴³¹, which is one of the few interstate complaints handled by the Commission.⁴³² Following this report, the ECtHR distinguished torture, inhuman and degrading treatment based on the degree of intensity of the suffering caused to the victims. Specifically, torture is considered the most serious form of prohibited treatment, and degrading is the least serious.⁴³³ In this regard, in the *Ireland v. the United Kingdom* case, the ECtHR stated that the level of severity should be evaluated according to all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, sex, age and state of health of the victim.⁴³⁴ In the *Soering* case for instance, the “death row phenomenon” was considered an inhuman and degrading treatment mainly because of the length of detention before execution, and the severity of the special detention regime, where the person concerned, given his age, nationality and colour, could have suffered homosexual abuse and physical assault.⁴³⁵

With these factors in mind, as has already been analysed, “torture” occurs in case of serious mental or physical suffering with the aim of obtaining information or a confession. “Inhuman”, on the other hand, is a treatment inflicted with premeditation, which lasts for hours, causing bodily injury and intense physical or mental suffering.⁴³⁶ By “degrading” is meant the treatment that humiliates a person, without respecting his or her human dignity and even diminishing it.⁴³⁷

It is also relevant to note that the scope of application of Article 3 is not only limited to these aspects. It appears that the Strasbourg Court has extended the protection against refoulement in cases involving risks resulting from generalized violence.⁴³⁸ In the *Sufiji* case, for example, the ECtHR ruled that the violence in Somalia was of such an intensity that the transfer of the applicant

⁴³¹ Report of 5 November 1969, *The Greek Case* (1969) Yearbook XII of the European Convention on Human Rights, pages 186–510.

⁴³² Eeva Nykänen, (n 327) 224.

⁴³³ *Ibid*, page 240.

⁴³⁴ *Ireland v. the United Kingdom*, App no. 5310/71, (ECtHR 18 January 1978), para. 162.

⁴³⁵ *Soering v. The United Kingdom*, App no 1/1989/161/217, (ECtHR 7 July 1989).

⁴³⁶ UN High Commissioner for Refugees (UNHCR), *Manual on Refugee Protection and the ECHR Part 2.1 – Fact Sheet on Article 3*, para 3.3; *M.S.S. v Belgium and Greece*, ECtHR, [GC], Application No. 30696/09, para 220.

⁴³⁷ *Ibid*.

⁴³⁸ Eeva Nykänen, (n 327) 279.

to Mogadishu would lead to a real risk of a treatment prohibited by Article 3 of the Convention.⁴³⁹ Similarly, the Court also held that harsh medical conditions could lead to a violation of Article 3 of the ECHR.⁴⁴⁰ In the case of *D. v. United Kingdom*, the Court stated that removing an individual affected by AIDS from the UK to Saint Kitts and Nevis would result in a violation of Article 3 since the medical facilities and care in that country were inadequate for people suffering from AIDS.⁴⁴¹

It is also important to consider that non-refoulement cases analysed by the ECtHR might differ from the other cases set out in Article 3. This is due to the fact that the prohibition from refoulement refers to potential violations of the article of the Convention.⁴⁴² In other words, ill-treatments, under Article 3 of the ECHR, may or may not occur if the contracting state removes an individual from its territory.⁴⁴³ On the contrary, in other cases, the violation has already happened.

This difference can be found in the fact that the Strasbourg Court does not normally rule on the existence of potential violations of the Convention.⁴⁴⁴ However, as the ECtHR stated, if an applicant claims that a decision to extradite him or her, would be contrary to Article 3, an exception to this principle is necessary “*in view of the serious and irreparable nature of the alleged suffering risked, in order to ensure the effectiveness of the safeguard provided by that Article*”.⁴⁴⁵ Therefore, as established by the Court, this exception is justified by the serious and irreparable consequences that might occur as a result of the refoulement and not by those that have already occurred.

This approach can also be confirmed by the definition of non-refoulement contained in the other Conventions and by the ECtHR itself.⁴⁴⁶ In fact, the removal is prohibited when there are substantial grounds to believe that the applicant would face a real risk of suffering torture or inhuman or degrading treatment or punishment in the country of destination.⁴⁴⁷ The term “real risk” hence, refers to the probability that such circumstances may occur.

Furthermore, from the notion of “substantial grounds” a further aspect emerges. According to Eeva Nykänen, such a term would refer to the standard of proof, which seems to be reduced in

⁴³⁹ *Sufi and Elmi v. United Kingdom*, App nos. 8319/07 and 11449/07, (ECtHR, 28 June 2011), para 250.

⁴⁴⁰ UN High Commissioner for Refugees (UNHCR), *Manual on Refugee Protection and the ECHR Part 2.1 – Fact Sheet on Article 3*, para 3.9.

⁴⁴¹ *D. v. United Kingdom*, App no. 30240/96 (ECtHR 2 May 1997), para 53.

⁴⁴² Eeva Nykänen, (n 327) 260.

⁴⁴³ *Ibid.*

⁴⁴⁴ *Soering v. The United Kingdom*, App no 1/1989/161/217, (ECtHR 7 July 1989), para 90

⁴⁴⁵ *Ibid.*

⁴⁴⁶ See Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture.

⁴⁴⁷ *Soering v. The United Kingdom*, App no 1/1989/161/217, (ECtHR 7 July 1989), para 91.

these cases.⁴⁴⁸ In fact, the Strasbourg Court recognised that in non-refoulement cases, applicants often find it difficult to prove their claims.⁴⁴⁹ Specifically, the ECtHR, in the *Said* case stated that the establishment of documentary evidence is not a prerequisite for complying with the required standard of proof.⁴⁵⁰ Nevertheless, the applicant must be able to make sufficiently coherent and reliable statements regarding the risk of harm that he or she will encounter after the transfer.⁴⁵¹

Although the burden of proof is limited, as it was also recently confirmed in the *F.G. v. Sweden* case⁴⁵², the Court has specified that it does not fall solely on the applicant.⁴⁵³ On the contrary, as stated in the *Cruz Varas* case, the Court itself can also gather evidence on its own initiative.⁴⁵⁴ This occurred, for example in the *N v. Finland* case, where the ECtHR exceptionally appointed two delegates from its members to travel to Finland in order to collect evidence.⁴⁵⁵ Similarly, in the *S.H. v. the YK*, the ECtHR imposed the burden of proof on the state.⁴⁵⁶

Furthermore, the Court, in its decision-making process, does not just analyse the evidence of the parties involved but also uses information collected from other states, United Nations agencies and non-governmental organizations.⁴⁵⁷ However, it is also important to note that the ECtHR has not always followed this burden of proof method. In the *Garabaye v.* case, for example, the Court, in assessing the evidence on which to base the decision on whether there has been a violation of Article 3, requested the evidence beyond reasonable doubt.⁴⁵⁸

2.6.4. Non-refoulement beyond Article 3 of the ECHR

Although the principle of non-refoulement is included in Article 3 of the ECHR, the Strasbourg Court, over the years, has connected it with other articles, thereby extending its scope.

A clear example is found in the *Gomes v. Sweden* case which concerns an expulsion order issued by the Swedish government to Bangladesh, where the applicant, an asylum seeker, would have

⁴⁴⁸ Eeva Nykänen, (n 327) 261.

⁴⁴⁹ *Said v. The Netherlands*, App no 2345/02, (ECtHR 5 July 2005).

⁴⁵⁰ *Ibid*, para 49.

⁴⁵¹ *Ibid*.

⁴⁵² *F.G. v. Sweden*, App no 43611/11 (ECtHR 23 March 2016).

⁴⁵³ Başak Çalı, Cathryn Costello and Stewart Cunningham (n 93) 381.

⁴⁵⁴ *Cruz Varas and Others v. Sweden*, App nos 46/1990/237/307, (ECtHR 20 March 1991), para 75.

⁴⁵⁵ *N. v. Finland*, App no 38885/02, (ECtHR, 26 July 2005), para 152.

⁴⁵⁶ *S.H. v. the United Kingdom*, App no. 19956/06 (ECtHR 15 June 2010).

⁴⁵⁷ *Salah Sheekh v. The Netherlands*, App no. 1948/04, (ECtHR 11 January 2007), para 136.

⁴⁵⁸ *Garabaye v. Russia*, App no 38411/02, (ECtHR 7 June 2007), para 76.

been sentenced to capital punishment. In that case, the prohibition from refoulement was linked to Article 2 of the ECHR which guarantees the right to life⁴⁵⁹, and to Article 1 of the Additional Protocol No. 13 which abolishes the death penalty.⁴⁶⁰ The ECtHR, although declared the case inadmissible, stressed the need to analyse the two articles jointly in combination with Article 3, and recognized the risk that the applicant, once expelled, would be in danger due to the imposition of the death penalty that awaited him in that country.⁴⁶¹

The extension of the scope of the principle of non-refoulement appears also in Article 5 of the ECHR, where the Court, in the *Othman v. the United Kingdom* case, considered that a contracting State would be in violation of the right to liberty and security if it removed an applicant to a state where he or she was at real risk of a flagrant breach of Article 5.⁴⁶²

The Strasbourg Court in its jurisprudence also mentioned a possible effect of the principle of non-refoulement on Article 6 of the ECHR, which concerns the right to a fair trial. In the *Soering* case, the ECtHR did not exclude the possibility that extradition could cause problems in relation to Article 6.⁴⁶³ This position was later reaffirmed in the case of *Al-Moayad v. Germany*⁴⁶⁴ and subsequently also in the *Othman* case, where the Court found that there was a real risk of violation of the right to a fair trial, and therefore the deportation of the applicant would have resulted in a violation of Article 6.⁴⁶⁵

More doubtful is the correlation with Article 8 of the ECHR, in which the Court hesitated to extend the scope to the principle of non-refoulement. In the *F. v. the United Kingdom* case, for example, the applicant claimed that his expulsion to Iran would violate his right to physical and moral integrity under Article 8 of the ECHR. The Court, nonetheless, rejected the possibility of such a link.⁴⁶⁶

It is also pivotal to consider that the European Court of Human Rights has not yet explicitly broadened the principle of non-refoulement to encompass other articles comprehensively. However, this restraint should not be interpreted as a permanent boundary. The Court's perspective

⁴⁵⁹ See Article 2, para 1 of the European Convention on Human Rights.

⁴⁶⁰ See Article 1 of Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty in all circumstances.

⁴⁶¹ *Gomes v. Sweden*, App no 34566/04, (ECtHR 7 February 2006), page 9.

⁴⁶² *Othman (Abu Qatada) v. The United Kingdom*, App no 8139/09 (ECtHR 17 January 2012), para 233.

⁴⁶³ *Soering v. The United Kingdom*, App no 14038/88, (ECtHR 7 July 1989), para 113.

⁴⁶⁴ *Al-Moayad v. Germany*, App no 35865/03, ECtHR, 20 February 2007.

⁴⁶⁵ *Othman (Abu Qatada) v. The United Kingdom*, App no 8139/09 (ECtHR 17 January 2012), paras 263-267.

⁴⁶⁶ *F. v. United Kingdom*, App no. 17341/03 (ECtHR 22 June 2004), page 12.

of the European Convention on Human Rights as a "living instrument" is particularly significant in this context. This perspective suggests that the Convention's standards are not static but are intended to be interpreted in light of the evolving conditions of modern times.⁴⁶⁷ Such an approach has been both directly and indirectly reaffirmed by the Court over the years. Consequently, it leaves open the possibility for further expansion in the application of the non-refoulement principle, hinting at a future where this principle might extend its protective reach to other realms of the Convention, adapting to the ever-changing landscape of human rights and judicial interpretation.

2.6.5. Indirect refoulement

As previously mentioned, the principle of non-refoulement has been extended to such a level that it also includes the violation of indirect transfers.

In the asylum context for instance, it has been argued that sending people to third countries which are not parties to the Refugee Convention or whose asylum systems do not comply with international standards involves a violation of non-refoulement.⁴⁶⁸ In this regard, the ECtHR, in the *Abdolkhami* case, ruled that Turkey had a duty to ensure that Iranian applicants expelled to Iraq were not exposed to treatment contrary to Article 3 of the ECHR. Specifically, Turkey was held responsible for the violation of refoulement due to the fact that there was a real risk that the applicant transferred to Iraq would have been removed to Iran due to the lack of an internal protection system against the refoulement of the Iraqi government.⁴⁶⁹

Indirect refoulement is also recognized not only in the case where the intermediate country is not a member of the main international human rights conventions but also when it is considered a safe country. A clear example is the *T.I. v. UK* judgment.⁴⁷⁰ The case concerns a person who applied for asylum in Germany after fleeing Sri Lanka. The German government, however, rejected his application and issued an expulsion order. Following this decision, the applicant decided to move

⁴⁶⁷ *Pretty V. The United Kingdom*, App no. 2346/02 (ECtHR 29 July 2002); *Mizzi v. Malta*, App no. 26111/02 (ECtHR 12 January 2006); *Bayatyan v. Armenia*, App no. 23459/03 (ECtHR 7 July 2011); *X and Others v. Austria*, App no. 19010/07 (ECtHR 19 February 2013); *Pichkur v Ukraine*, App no 10441/06 (ECtHR 7 November 2013); *Vallianatos and Others v Greece*, App nos 29381/09 and 32684/09 (ECtHR 7 November 2013).

⁴⁶⁸ Moira Sy, "UNHCR and Preventing Indirect Refoulement in Europe" (2005) 27 *International Journal of Refugee Law* 457, page 473.

⁴⁶⁹ *Abdolkhami and Karimnia v. Turkey*, App. no. 30471/08 (ECtHR 22 September 2009), para 89.

⁴⁷⁰ *T.I. v. The United Kingdom*, App no. 43844/98, (ECtHR 7 March 2000).

to the United Kingdom, where he again applied for asylum. Following the Dublin Convention, the United Kingdom ordered the removal of the applicant to Germany where he would be deported. The Strasbourg Court, despite the Dublin Convention, found that this indirect removal did not exclude the UK's responsibility to ensure that the applicant, subsequent to his expulsion decision by the German government, was not exposed to torture or ill-treatment in the final country of destination.⁴⁷¹

This decision particularly underlines the Strasbourg Court's approach to the application of the principle of non-refoulement within the EU framework. The *T.I. v. the United Kingdom* case, in fact, clearly highlights that accession to the Dublin Convention and the recognition of a country as 'safe' does not exempt member states from their obligations under the principle of non-refoulement. In effect, with this ruling, the Court strongly reaffirms that the responsibilities of EU member states extend beyond the boundaries of intra-EU agreements and the perceived safety of third countries. This landmark judgment, therefore, plays a fundamental role in establishing a more comprehensive and human rights-centred approach to asylum procedures within the EU, strongly affirming that the principle of non-refoulement is a cornerstone in the protection of refugees and asylum seekers.

2.6.6. Non-refoulement beyond territorial control

Another important aspect, as already mentioned, is the concept of jurisdiction. The ECtHR in its decisions repeatedly stated that jurisdiction is not limited to the national territory of the contracting states.⁴⁷² In this regard, an emblematic case that requires particular attention is the *Hirsi Jamaa* judgment, where the Strasbourg Court expresses its decision on the critical situation involving European external borders and applies the prohibition of refoulement also in international waters.⁴⁷³

This case is also a clear example of the clash between the principle of non-refoulement and the concept of a safe country, illustrating how the latter was employed to circumvent the proper application of non-refoulement. This aspect will be then analysed in the final chapter.

⁴⁷¹ Ibid, page 15.

⁴⁷² *Droz and Janousek v. France and Spain*, App No 21/1991/273/344, (ECtHR 26 June 1992); *Loizidou v. Turkey*, App no 40/1993/435/514 (ECtHR, 23 February 1995).

⁴⁷³ *Hirsi Jamaa and Others v Italy* [GC], App no. 27765/09, (ECtHR 23 February 2012).

The case concerns the rescue of 11 Somalis and 13 Eritreans by the Italian authorities on the high seas and their transfer to Libya. The applicants argued that during that rescue, they were not identified and did not have the chance to formalize their asylum application.⁴⁷⁴ In addition, they claimed that they were not informed that they would be brought back to Libya and when they became aware of it, they expressed their willingness to go to Italy, because Libya could not be considered a safe country.⁴⁷⁵

On the contrary, according to the Italian government, the refoulement was legitimate since Libya at the time was considered a safe country, as it had ratified the CAT, the ICCPR and the UNHCR and the IOM offices operated in its territory.⁴⁷⁶ Furthermore, Italy argued that the rescue had taken place outside Italian territory and according to bilateral agreements between Italy and Libya, on the control of migratory flows, those who were recovered on the high seas were sent back to Libya. Therefore, no violation was committed.

The ECtHR, in that case, ruled that there was jurisdiction whenever a state exercises control and authority through its agents operating outside its territory.⁴⁷⁷ This was also confirmed by the United Nations Convention on the Law of the Sea (UNCLOS), which states that a ship in international waters is subject to the jurisdiction of the state whose flag it flies.⁴⁷⁸ In addition, this rule could be found also in the Italian navigation code, which establish that ships flying the Italian flag must be considered national territory.⁴⁷⁹

In relation to the concept of a safe country, the Court relied on the reports of international organizations which stated that Libya could not be considered safe. In fact, these reports demonstrated the systematic ill-treatment of irregular migrants perpetuated by the Libyan government.⁴⁸⁰ Furthermore, it was believed that Libya's ratification of human rights treaties was not an adequate guarantee against the risk of undergoing inhuman treatment,⁴⁸¹ and the presence of the UNHCR was not relevant, given that that office did not obtain recognition from the Libyan political authorities.⁴⁸²

⁴⁷⁴ Ibid, paras 85-91.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid, paras 93-97.

⁴⁷⁷ Ibid, para 74.

⁴⁷⁸ See Article 92, para 1 of the United Nations Convention on the Law of the Sea.

⁴⁷⁹ See Article 4 of the Italian Navigation Code.

⁴⁸⁰ *Hirsi Jamaa and Others v Italy* [GC] App no 27765/09, (ECtHR 23 February 2012), para 136.

⁴⁸¹ Ibid, para 128.

⁴⁸² Ibid, para 130.

The Court also considered the risk of indirect refoulement, and in this regard, it stated that Italy had to ensure that the intermediate country gave sufficient guarantees regarding non-refoulement.⁴⁸³ However, it was commonly known that Libya sent back asylum seekers to their country of origin.

For these reasons, the Court condemned Italy for violation of Article 4 of Additional Protocol No. 4 which prohibits collective expulsions, Article 13 on the Right to an effective remedy, and Article 3 on the prohibition from refoulement.⁴⁸⁴

From this decision, and considering the cases previously analysed, it becomes increasingly clear that the Strasbourg Court has significantly extended the scope of the non-refoulement principle. Following this analysis, this principle is now applied not only in its absolute and indirect forms but also independently of other international norms and concepts that are part of EU law. For example, the *Hirsi Jamaa* judgment clearly demonstrates this expansion, highlighting how the Court seeks to extend and apply the principle of non-refoulement even in difficult circumstances, such as those involving European external borders and international waters. This decision, along with others discussed in this section, marks a decisive step in the evolution of the Court's jurisprudence, demonstrating its firm commitment to human rights. Indeed, the Court's approach is indicative of a comprehensive and evolving interpretation of the principle of non-refoulement, thus ensuring that it is applied beyond conventional borders.

The European Court of Human Rights, with its decisions, underlines the central objective of this chapter, which is to demonstrate that the principle of non-refoulement is an absolute principle, which also applies indirectly and also extends beyond territorial control so that no form of limitation is permitted. The analysis carried out in this chapter therefore lays the groundwork for the following chapters, in which it will be shown how within the EU, despite having highlighted this absoluteness, attempts are nevertheless made to circumvent the correct application of this principle through the concepts of mutual trust and safe country.

2.7. The Principle of Non-Refoulement in the European Union Tapestry

⁴⁸³ Ibid, para 147.

⁴⁸⁴ Ibid, paras, 198-205.

The prohibition from refoulement, as previously discussed, is not only a requirement included in International Conventions. Over the years, it has also become a fundamental element of European Union law, both at primary and secondary levels.

Under the primary source of EU law, the principle can be found in Article 78 paragraph 1 of the Treaty on the Functioning of the European Union and in the Charter of Fundamental Rights, which expressly guarantee compliance with the principle of non-refoulement.

Even though these two documents are placed on the same level, the scope of the principle of non-refoulement in the Charter and the TFEU appears to be different. In fact, under Article 78 of the TFEU, it can be immediately noticed that the principle is not related to the human rights context. On the contrary, that Article links the principle of non-refoulement to a common asylum policy and in accordance with the Refugee Convention.⁴⁸⁵ Consequently, with all the limitations provided.

On the other hand, under the Charter of Fundamental Rights, the prohibition from refoulement is not bound by the Refugee Convention. Article 19 paragraph 2 reads: “*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*”. From the words used in this article, it is therefore clear that the scope of the principle of non-refoulement is not limited to refugees and asylum seekers but applies to anyone. Furthermore, Article 19 does not mention limitations, therefore, it might lead to consider the prohibition from refoulement as an absolute principle.

This approach can be confirmed if we read Article 19 in conjunction with Article 4 of the Charter, which establishes the prohibition of torture, inhuman and degrading treatment. In this regard, in the *Căldăraru* case, the Court of Justice specified that Article 4 cannot be limited⁴⁸⁶ and the judicial authority has the duty to verify whether the transfer of a person to another state would lead to a violation of that Article.⁴⁸⁷

Another factor that might prove the absolute character of Article 19 is based on the relationship between EU law and the ECHR. As demonstrated in the first chapter, although the Council of Europe and the European Union are separate legal systems, there is an increasing relationship

⁴⁸⁵ See Article 78, para 1 of the Consolidated version of the Treaty on the Functioning of the European Union.

⁴⁸⁶ Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198, para 85.

⁴⁸⁷ *Ibid*, para 94.

formed between the two, in terms of their influence on each other's legal regimes. In this regard, a clear example is provided by Article 52 paragraph 3 of the EU Charter, which states that the rights contained in the Charter have the same meaning and scope of those rights guaranteed by the ECHR. To this end, it is commonly accepted that, although Article 19 Paragraph 2 of the EU Charter does not exactly reproduce the text of Article 3 of the ECHR, it incorporates, nonetheless, the relevant case law of the ECtHR relating to such Article.⁴⁸⁸ Furthermore, as established by the Explanations Relating to the Charter of Fundamental Rights, this correspondence of the EU Charter with the ECHR also covers the limits of the latter.⁴⁸⁹ Therefore, since there are no restrictions regarding the prohibition of refoulement under the ECHR, the same should apply to the EU Charter.

Another element supporting this theory is given by Article 53 of the EU Charter, which prohibits restrictive or negative interpretations of human rights as recognized by International Agreements, including the ECHR. Consequently, the application of any limitations to Article 19 paragraph 2 of the Charter would lead to a violation of Article 53.⁴⁹⁰ In addition, it should be kept in mind that although the principles enshrined in the EU Charter have the same meaning and scope as the rights included in the ECHR, it does not mean that the protection of human rights is the same. This is demonstrated by the last sentence of Article 52 paragraph 3 of the EU Charter, which establishes that European Union law can provide broader protection.⁴⁹¹ Accordingly, as Roberta Mungianu suggested, Article 3 of the ECHR and the case law of the ECtHR related to it should constitute only a minimum standard of protection.⁴⁹² Therefore, there are no reasons to doubt the absolute character of the prohibition from refoulement.

The last sentence of paragraph 3 of Article 52 of the Charter also highlights the fact that the scope of the principle of non-refoulement is wider in the European Union. In fact, following this paragraph, it seems that Member States can guarantee a higher level of protection of fundamental rights than those enshrined in the ECHR.⁴⁹³

In addition, this approach seems also evident from the relation between Article 4 of the EU Charter and Article 3 of the ECHR. Both articles establish that no one can be subjected to torture or to

⁴⁸⁸ Explanations Relating to the Charter of Fundamental Rights, *Official Journal of the European Union* (2007/C 303/02), Explanation on Article 19; Roberta Mungianu (n 326) 120-121.

⁴⁸⁹ Official Journal of the European Union, *Explanations Relating to the Charter of Fundamental Rights*, (2007/C 303/02), Explanation on Article 52.

⁴⁹⁰ Roberta Mungianu, (n 326) 121.

⁴⁹¹ See Article 52, para 3 of the Charter of Fundamental Rights of the European Union.

⁴⁹² Roberta Mungianu, (n 326) 128.

⁴⁹³ Ibid, page 126.

inhuman or degrading treatment and punishment. The prohibition against refoulement, thus, could have been included in Article 4 as it is enshrined in Article 3 of the ECHR. However, the reason that led the EU Charter to express the prohibition of refoulement in one Article and the prohibition of torture in another was made, as indicated in the preamble of the Charter, to strengthen the protection of fundamental rights.⁴⁹⁴ From these reasons, therefore, it seems clear that the principle of non-refoulement in the EU has a broader scope than that provided for by the other Conventions protecting human rights.

2.7.1. Non-refoulement as a general principle of EU law

Another factor that reinforces the scope of the principle of non-refoulement is given by Article 6 paragraph 3 of the TEU, which establishes that fundamental rights guaranteed by the ECHR constitute general principles of EU law. Consequently, the prohibition of refoulement as recognised in the ECHR, should be considered as a general principle of EU law.

However, before going further, it is relevant to consider whether the ECHR itself, as a general principle of the Union's law, is considered an integral part of EU law or not. In this regard, Roberta Mungianu clearly analyses different approaches.⁴⁹⁵ Specifically, she mentioned that the Court of Justice had conflicting opinions. In some cases, the CJEU established that the ECHR does not have a special role and is equivalent to other international conventions, in others, it claimed that the European Convention forms an integral part of the EU legal order through the concept of general principles of EU law.⁴⁹⁶ Similarly, also among scholars, there are different approaches. Some authors believe that the ECHR and its jurisprudence are not part of EU law until the EU accedes to the European Convention. In the meantime, the principles enshrined in ECHR are only considered as authoritative guidelines for the determination of general principles of law EU.⁴⁹⁷ On the other hand, different authors believe that Article 6 paragraph 3 clearly states that the rights included in the ECHR form general principles of EU law and consequently they are part of the EU legal order.⁴⁹⁸ In this regard, she specifically mentioned Bruno de Witte, who affirmed that the

⁴⁹⁴ See the Preamble of the EU Charter.

⁴⁹⁵ Roberta Mungianu (n 326).

⁴⁹⁶ Ibid, page 112.

⁴⁹⁷ Ibid.

⁴⁹⁸ Ibid.

CJEU has no discretionary power on how to dispose of the rights of the ECHR, as Article 6 paragraph 3 of the TEU is clear in this regard.⁴⁹⁹

In order to establish whether or not the principle of non-refoulement is part of the general principles of EU law, the *Elgafaji* judgment of the Court of Justice is worth mentioning.⁵⁰⁰ The case concerns an Iraqi couple, who applied for a temporary residence permit in the Netherlands on the basis of the risk of returning to Iraq. Following the rejection of the request, they decided to appeal the decision. The Dutch Council of State suspended the procedure and asked the Court of Justice whether Article 15 of the Qualification Directive offered protection only in those situations in which Article 3 ECHR applies, or whether the directive offered additional protection.⁵⁰¹ The Luxemburg Court held that even though Article 15 of the Directive corresponded essentially to Article 3 of the ECHR, its interpretation had to be carried out independently.⁵⁰² However, that interpretation must take into account Article 3 of the ECHR, which is part of the general principles of Community law.⁵⁰³

That decision therefore clearly proved that the principle of non-refoulement, under the ECHR is considered as a general principle of EU law. This approach was also later confirmed in the case famous *N.S.* case, which will be analysed in the next chapter in relation to how the concept of mutual trust is used as a limit to the principle of non-refoulement.

In addition, although other International Conventions are not expressly mentioned by Article 6 paragraph 3, the Court of Justice has taken them into account in its jurisprudence, albeit to a more limited extent.⁵⁰⁴ In the *Nold* case, for example, the Court stated that fundamental rights form an integral part of the general principles of law and the international treaties which protect these rights can be considered as guidelines to be followed in the framework of Community law.⁵⁰⁵ This decision, therefore, can be considered as further confirmation that although the other International Conventions that protect human rights do not have the same value as the ECHR in the EU, the

⁴⁹⁹ Ibid, page 113.

⁵⁰⁰ Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] I-921.

⁵⁰¹ Article 15 of the previous Qualification Directive established the conditions under which a person could benefit from subsidiary protection.

⁵⁰² Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] I-921, para 28.

⁵⁰³ Ibid.

⁵⁰⁴ The EU and International Human Rights Law, *OHCHR Regional Office for Europe Publications*, UN Doc. HRI/GEN/1/Rev.9, Vol. I and Vol. II, page 9.

⁵⁰⁵ Case C-4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491, para 13.

fundamental principle of non-refoulement, enshrined in them, is recognized as a general principle of law.

2.7.2. Understanding Non-Refoulement within the Framework of Secondary EU Law Sources

The principle of non-refoulement is not only guaranteed among the primary sources of European law but is also reflected in secondary EU legislation. In fact, there are several regulations and directives that contain a provision in this regard. For instance, within the CEAS, the Qualification Directive, which is particularly relevant, expressly provides for the prohibition of refoulement in Article 21. Unlike the EU Charter, however, this Article provides for limitations on the principle of non-refoulement. In fact, it states that in the event that there is a danger to national security, or a person has been convicted of a serious crime and constitutes a danger to the community of that Member State, he or she can be removed.⁵⁰⁶

Following a literal interpretation, thus, it seems clear that the Qualification Directive reproduces Article 33 paragraph 2 of the Refugee Convention. Nevertheless, although the prohibition from refoulement is similar in both documents, the directive extends the scope of the principle of non-refoulement to another category of people. In fact, not only refugees and asylum seekers are protected under Article 21 but also those entitled to subsidiary protection.⁵⁰⁷ This protection, as mentioned in the previous chapter, is granted to those who do not have the conditions for obtaining refugee status but if returned to the country of origin, they would face a real risk of suffering serious harm.⁵⁰⁸

The extension of the principle of non-refoulement is also confirmed by the Asylum Procedures Directive, which establishes that pending the examination for obtaining refugee or subsidiary protection status, applicants have the right to remain in the Member State.⁵⁰⁹ Such a directive went also further by specifying that the prohibition from refoulement must be direct and indirect.⁵¹⁰

It is very important to mention that the exceptions to the principle of non-refoulement under Article 21 of the Qualification Directive are clearly in contrast with its absolute character expressed by

⁵⁰⁶ See Article 21, para 2 of the Directive 2011/95/EU.

⁵⁰⁷ Ibid, Article 20, para 2.

⁵⁰⁸ Ibid, Article 2, letter f.

⁵⁰⁹ See Article 9, para 1 of the Directive 2013/32/EU.

⁵¹⁰ Ibid, para 3.

the EU Charter and pursuant to Article 6 paragraph 3 of the TEU. In fact, Article 21 of the Qualification Directive does not affirm that Member States must respect the absolute principle of non-refoulement, or the principle of non-refoulement in accordance with the EU Charter, on the contrary, the Qualification Directive expressly mentions the 1951 Refugee Convention.⁵¹¹

However, the absolute nature of the principle of non-refoulement, under that directive, should not be excluded beforehand. In fact, it might be recognised under its Recital 16, which establishes that the directive shall respect and observe fundamental rights recognised by the EU Charter.⁵¹² Similarly, Article 21 paragraph 1 states that Member States must respect the principle of non-refoulement in accordance with their international obligations.⁵¹³ Consequently, it could be relevant to consider that all EU states are also members of the ECHR, the CAT and the ICCPR and in these documents the prohibition of refoulement is absolute.

This discrepancy between the limitations introduced by Article 21(2) of the Qualification Directive and the absolute nature of Article 19(2) of the Charter has also generated academic debate. Roberta Mungianu, for example, argues that the Charter offers a higher standard of protection and that the principle of non-refoulement should be interpreted in line with its absolute wording, particularly when read in conjunction with Article 4 of the Charter and Article 3 of the ECHR.⁵¹⁴ Similarly, Cathryn Costello stresses that the Charter's prohibition of refoulement must prevail over conflicting provisions of EU secondary legislation, especially where the latter reflects the more limited scope of the Refugee Convention. Specifically, according to Costello, Article 21(2) of the Qualification Directive should be interpreted within the margins allowed by the fundamental rights enshrined in the Charter.⁵¹⁵ These doctrinal positions, therefore, reinforce the view that although EU secondary legislation may formally replicate the Refugee Convention, its implementation must remain consistent with the EU's broader human rights obligations.

In this regard, also the Court of Justice in the *Ordre des barreaux* case confirmed that if the formulation of secondary EU law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with primary law rather than

⁵¹¹ See Article 20, para 1 of the Directive 2011/95/EU.

⁵¹² Ibid, recital 16.

⁵¹³ Ibid, Article 21, para 1.

⁵¹⁴ Roberta Mungianu, *Frontex and Non-Refoulement: The International Responsibility of the EU* (Oxford University Press 2016) 165–168.

⁵¹⁵ Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press 2016) 190–194.

with the interpretation that makes it incompatible with that law.⁵¹⁶ In addition, the Court also stated more than once that EU secondary law should be interpreted as far as possible, in such a way as not to affect its validity and in compliance with primary law and in particular, with the provisions of the EU Charter.⁵¹⁷

Following this approach, the doubt whether Article 21 paragraph 2 of the directive should be considered absolute or not, has been definitively resolved with the *M v. Ministerstvo vnitra* decision.⁵¹⁸ The case recently analysed by the Grand Chamber concerns three different people, an Ivorian, a Congolese, and a Chechen, who obtained international protection respectively in the Czech Republic and Belgium. These people were convicted and based on the serious nature of the crimes committed, they were considered a danger to the community. For these reasons, as indicated by Article 21 paragraph 2 of the Qualification Directive, these people should have been sent back to their countries of origin. However, the CJEU held that while Article 33 Paragraph 2 of the Refugee Convention denies the refugee the benefit of the principle of non-refoulement, Article 21 paragraph 2 of the Qualification Directive must be interpreted and applied in a way that respects the rights guaranteed by the EU Charter. Specifically, such paragraph must respect Article 19 paragraph 2 of the EU Charter, which prohibits in absolute terms the transfer to a State where there is a serious risk that a person is subjected to torture, inhuman or degrading treatments.⁵¹⁹

The principle of non-refoulement is also included in other secondary sources of law that are not part of the CEAS but are still connected to it. A clear example is the 2008 Return Directive, which applies to all third-country nationals who are illegally present on the territory of a Member State.⁵²⁰ According to Article 5 of this directive, when member states remove a person, they must take into account the principle of non-refoulement.⁵²¹

From the words used in that Article, it seems that the prohibition from refoulement applies to anyone who is illegally present on the territory of a Member State, without exceptions. In fact, according to Article 9, the procedure to be adopted for the removal of a person should be postponed

⁵¹⁶ Case C-305/05, *Ordre des barreaux francophones et germanophone and Others v Conseil des ministres*, [2007] ECLI:EU:C:2007:383, para 28.

⁵¹⁷ Case C - 601/15 *J. N. v Staatssecretaris van Veiligheid en Justitie*, PPU [2016] EU:C 2016:84, para 48; Joined Cases C-391/16, C-77/17 and C-78/17 *M v Ministerstvo vnitra, X and X v Commissaire général aux réfugiés et aux apatrides*, OJ [2019] para 77.

⁵¹⁸ Joined Cases C-391/16, C-77/17 and C-78/17 *M v Ministerstvo vnitra, X and X v Commissaire général aux réfugiés et aux apatrides*, OJ [2019].

⁵¹⁹ *Ibid*, para 94.

⁵²⁰ See Article 2, para 1 of the Directive 2008/115/EC.

⁵²¹ *Ibid*, Article 5.

every time there is a risk of violating the principle of non-refoulement.⁵²² This interpretation was also confirmed by the Court of Justice in the *Abdida* case. In that decision, the CJEU held that in the event that the removal of a third-country national suffering a serious illness to a country in which there are no adequate therapies would violate the principle of non-refoulement, the Member States cannot proceed with such removal.⁵²³ The Court specified that Article 5 of the Return Directive must be read in conjunction with Article 19 paragraph 2 of the EU Charter.⁵²⁴

The obligation of EU Member States to respect the principle of non-refoulement also applies when people have reached EU borders. In this regard, it could be mentioned the Schengen Borders Code which establishes the rules governing the movement of people across the Schengen borders.⁵²⁵ According to Article 3 letter b), the Code applies to anyone who crosses the internal or external borders of the EU without prejudice to the rights of refugees and persons requesting international protection, in particular as regards non-refoulement. Similarly, the Regulation for the Surveillance of the External Sea Borders requires that no one can be disembarked, forced to enter, conducted or otherwise handed over to a country's authorities if there is a serious risk of violating the principle of non-refoulement.⁵²⁶ It is interesting to note that this regulation reflects the judicial developments of the *Hirsi Jamaa* case of the ECtHR, which as previously stated, concerned the responsibility of the Italian government for intercepting people on the high seas and then returning them to the Libyan authorities.⁵²⁷

Also under these regulations, the prohibition of refoulement can be considered as an absolute norm as both of them ensure compliance with the principle of non-refoulement as defined in the EU Charter and interpreted by the jurisprudence of the European Court of Human Rights.⁵²⁸

It is also important to mention the Regulation (EU) 2019/1896 on the European Border and Coast Guard Agency (Frontex).⁵²⁹ The new regulation has strengthened the competencies of the Agency

⁵²² Ibid, Article 9.

⁵²³ Ibid, para 48.

⁵²⁴ Ibid.

⁵²⁵ Regulation (EU) 2016/399.

⁵²⁶ See Article 4, para 1 of the Regulation (EU) No 656/2014.

⁵²⁷ European Council on Refugees and Exiles, *The application of the EU Charter of Fundamental Rights to asylum procedural law*, October 2014, page 35.

⁵²⁸ See Recital 12 of the Regulation for the surveillance of the external sea borders and Recital 36 of the Schengen Borders Code.

⁵²⁹ Regulation (EU) 2019/1896 and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624.

which has the duty to coordinate maritime and land-based activities for one or more Member States and third countries at the external borders in order to manage migration in these areas.⁵³⁰

The relationship between Frontex and the principle of non-refoulement is very close since the agency has also the responsibility to provide assistance in the support of search and rescue operations for persons in distress at sea and to coordinate and conduct return interventions.⁵³¹ In fact, the risk of violating the principle of non-refoulement is considerably larger when the agency performs its duty. Thus, this might be the reason why the regulation mentions several times the responsibility of the Agency to respect this principle during its activities.⁵³²

2.7.3. Exploring State Responsibility in the Context of the European Union

From the analysis that emerged in this section and in the previous ones, the principle of non-refoulement can be considered a fundamental norm within European Union law and under international law. In this regard, we should keep in mind that all EU states are also members of the Refugee Convention, the CAT, ICCPR and ECHR. Consequently, it transpires that states have an obligation to respect the principle of non-refoulement laid down in both international and European legislations. As a result, the possibility that a conflict may arise between states' obligations to respect international conventions and EU law cannot be excluded.

The European Court of Human Rights has ruled more than once against EU states for violation of their obligations under the ECHR for having complied with EU law.⁵³³ A clear example of such responsibility can be found also in the famous *Bosphorus* judgment.⁵³⁴ The case began in 1994 when the Irish Ministry of Transport seized an aircraft belonging to Bosphorus Airways based on Article 8 of Regulation (EEC) 990/93.⁵³⁵ The dispute then reached the Supreme Court of Ireland which suspended the procedure and referred for a preliminary ruling to the Court of Justice. In 1998, after the Luxembourg Court confirmed the correct application of the regulation, the company

⁵³⁰ Ibid, Article 10 on the Tasks of the European Border and Coast Guard Agency.

⁵³¹ Ibid, recital 3.

⁵³² The regulation expressly mentions the duty to respect the principle of non-refoulement in Recital 84 and 103; Articles 36, 48, 50, 71, 72, 73, 80 and 86.

⁵³³ See for example *Emesa Sugar NV v. Netherlands*, App No. 62023/00 (ECtHR 13 January 2005); *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, App no. 56672/00 (ECtHR 10 March 2004).

⁵³⁴ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, App no. 45036/98 (ECtHR 30 June 2005).

⁵³⁵ See Article 8 of the Council Regulation (EEC) No 990/93.

went before the ECtHR claiming violation of Article 1 of the ECHR and Article 1 of Protocol No 1 for the enormous economic damage suffered. The Grand Chamber confirmed that contracting states are responsible under the ECHR for all acts regardless of whether such acts were a consequence of the necessity to comply with international legal obligations.⁵³⁶

Nevertheless, despite that constant approach, the Strasbourg Court went further, by establishing that an EEC member state is not responsible for violation of human rights if it implements a Community act without having in this regard any discretionary power, provided that in this organisation the fundamental rights receive an equivalent protection to that guaranteed by the ECHR.⁵³⁷ In this historic decision, the Court reiterated that states have an obligation to respect the ECHR regardless of their international obligations. However, the European Union has a special place, and fundamental rights guaranteed by the EU can be considered equivalent to those guaranteed by the ECHR. According to the European Court of Human Rights, therefore, whenever an EU state complies with European legislation it does not incur a violation of the ECHR. The violation of the ECHR might follow only in the event that a state has a margin of discretion in the implementation of the EU rules.

The responsibility of the European Institutions, on the other hand, is different. In this regard, it is important to specify that the EU is not a party to any of the international treaties above mentioned. Consequently, it cannot be held responsible for violation of the principle of non-refoulement in proceedings before the Human Rights Committee, the Committee against Torture, or the ECtHR.⁵³⁸ Nevertheless, although the Union is not a party to these treaties, it does not mean that it should not respect them. In fact, in different articles, the TEU establishes that the Union has a duty to respect international law and the principles of the United Nations Charter.⁵³⁹ Similarly, Article 78 of the TFEU affirms that the Common European Asylum Policy must comply with the Refugee Convention, the 1967 Protocol and other relevant treaties.⁵⁴⁰ However, despite these obligations to respect human rights in the EU Treaties, the Union is not part of those international conventions and is not bound by them. In fact, as stated in Article 216 paragraph 2 of the TFEU, only the agreements signed by the EU are binding for European institutions. Moreover, even

⁵³⁶ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland*, App no. 45036/98 (ECtHR 30 June 2005), para 153.

⁵³⁷ *Ibid*, para 155.

⁵³⁸ Roberta Mungianu, (n 326) 91.

⁵³⁹ See Article 3 para 5 and Article 21 of the treaty of the European Union.

⁵⁴⁰ See Article 78 of the Treaty on the Functioning of the European Union.

though Article 6 paragraph 2 of the TEU expressly stated that the Union shall access the ECHR, the Court of Justice in Opinion 2/13 ruled against it.⁵⁴¹

This approach was also confirmed by the CJEU in the *Kadi* case. In fact, in that decision, the Court annulled two previous judgments of the Court of First Instance stating that the Community acts implementing UN Resolutions on international security and counterterrorism would enjoy a sort of regime of immunity from any judicial control.⁵⁴² Specifically, the Court of Justice held that the European Community is based on the rule of law, and an international agreement cannot affect the system of competencies outlined by the EC Treaty or the autonomy of the Community legal order itself.⁵⁴³

Despite that decision, however, it must be remembered that the Union is still an international organization and as such is required to respect the norms of customary law.⁵⁴⁴ In fact, it is commonly accepted that international organizations are bound by obligations under customary international law.⁵⁴⁵ In this regard, the Court of Justice expressed several times the obligation upon the EU to respect the rules of customary law.⁵⁴⁶ Specifically, it is worth mentioning the *Opel Austria* case, where the Court recognized the customary principle of good faith as binding for the EU.⁵⁴⁷ Similarly, in the *Racke* case, the Court confirmed that the rules of customary international law are binding upon the Community institutions and form part of the Community legal order.⁵⁴⁸

⁵⁴¹ Opinion 2/13, on EU Accession to the ECHR EU:C:2014:2454, para. 182.

⁵⁴² Case T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, ECR II-2387; Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* ECR II-3649.

⁵⁴³ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, [2008] ECR II-2387, from para 281 to 285.

⁵⁴⁴ Case T-115/94 *Opel Austria GmbH v. Council of the European Union* [1997] ECR II-39, para. 90; Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-3655; [1998] 3 CMLR 219, paras 45–46.

⁵⁴⁵ Niels Blokker, “International Organizations and Customary International Law”, *International Organizations Law Review*, vol 14 (Brill | Nijhoff, 2017), page 1; August Reinisch, ‘Sources of International Organizations’ Law: Why Custom and General Principles are Crucial’ in S. Besson and J. d’Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press, 2017).

⁵⁴⁶ Case C-366/10 *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change* [2011] ECR I – 13755; Case C-286/90 *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.* [1992] ECR I-6019, para 9; Case C-410 / 11 *Espada Sanchez and Others* [2012] judgment of the Court of 22 November 2012; [2013] 1 CMLR 55, para 21.

⁵⁴⁷ Case T-115/94 *Opel Austria GmbH v. Council of the European Union* [1997] ECR II-39, para. 90.

⁵⁴⁸ Case C-162/96 *Racke GmbH & Co. v Hauptzollamt Mainz* [1998] ECR I-3655; [1998] 3 CMLR 219, paras 45–46.

These decisions, therefore, clearly demonstrated that the EU can be responsible for violations of customary principles. Hence, the principle of non-refoulement, as a norm of customary law, is binding not only for member states but also for the European Union itself and its institutions.⁵⁴⁹ This position has been confirmed by the UN Human Rights Committee and the Committee Against Torture, both of which have underlined that international organisations must comply with the principle of non-refoulement whenever they exercise de jure or de facto authority in asylum and migration matters.⁵⁵⁰ Similarly, the doctrine of international responsibility affirms that international organisations can be held accountable for violations of customary norms, even in the absence of formal treaty obligations.⁵⁵¹ According to legal scholars, and in particular Hathaway, whenever an international organisation, such as the EU, designs or implements policies that result in indirect refoulement, it must share responsibility with the implementing Member State.⁵⁵² In this sense, the doctrine of effective control has become fundamental, as it establishes responsibility based on the level of influence exercised over a given act, rather than on formal legal obligations alone. Therefore, the EU may also be responsible for violations of the principle of non-refoulement, especially when it is engaged in activities that, through legislative or operational mechanisms, directly or indirectly expose individuals to the risk of torture or inhuman and degrading treatment.

Based on what emerged in this analysis, it is therefore clear that the principle of non-refoulement in the European context is considered a customary and absolute law, applicable to anyone and binding not only for the member states but also for the European institutions. For these reasons, it could be argued that such a principle is one of the most important fundamental rights recognized at the European level.

In light of this conclusion, it is evident that third-country nationals possess rights that states and EU institutions are obliged to protect. However, in recent years it has become apparent that states actively seek to discourage these people from reaching their territories. This is clearly illustrated

⁵⁴⁹ Roberta Mungianu, (n 326) 110.

⁵⁵⁰ Human Rights Committee, *Teitiota v New Zealand*, Communication No 2728/2016 (24 October 2019) UN Doc CCPR/C/127/D/2728/2016, paras 9.11–9.13; Committee Against Torture, *Flor Calfunao Paillalef v Switzerland*, Communication No 859/2018 (20 January 2020) UN Doc CAT/C/67/D/859/2018.

⁵⁵¹ International Law Commission, *Draft Articles on the Responsibility of International Organizations, with Commentaries* (2011) UN Doc A/66/10, arts 4, 14, 31; August Reinisch, ‘The International Responsibility of the EU’ in Malcolm Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013) 62.

⁵⁵² James C Hathaway and Thomas Gammeltoft-Hansen, ‘Non-Refoulement in a World of Cooperative Deterrence’ (2015) 53(2) *Columbia Journal of Transnational Law* 235, 273–277.

by the creation of ‘anti-migrant’ barriers in several EU countries, such as Spain, Greece and Hungary, in 2014 and 2015.⁵⁵³ The justification for these barriers has often been based on national security, in response to the increasing movement of third-country nationals.⁵⁵⁴ Even in more recent years, this trend of building ‘anti-migrant’ walls has intensified in the EU. For example, in 2021 Bulgaria expanded its existing border fences to deal with increasing flows of migrants. Similarly, in 2020 Lithuania started building a barrier along its border with Belarus, motivated by immigration control and national security. These situations create doubts in relation to compatibility with the principle of non-refoulement, as these measures effectively prevent entry into the territories, even for asylum seekers. Thus, these barriers not only physically block access, but could also represent an obstacle to the rights enshrined in European and international human rights norms.

Concern about frequent violations of this principle is growing. The investigations carried out by organisations, such as Amnesty International in Poland, point to significant violations of rights. Specifically, the reported cases of asylum seekers from Belarus, forcibly returned and left in desperate conditions, clearly challenge EU law, international law and the principle of non-refoulement.⁵⁵⁵ However, such actions are not isolated to Poland but reflect a broader European trend of undermining protections related to the principle of non-refoulement. Furthermore, even the unprecedented challenges posed by the COVID-19 pandemic have not discouraged states from ignoring this fundamental principle, despite the clear directives issued by the United Nations High Commissioner for Refugees.⁵⁵⁶

These developments in recent years, in contrast to European states' commitments to international obligations, highlight a worrying paradox. These aspects will be analysed in more detail in the following chapters, where it will be highlighted how these states, bound by the non-refoulement principle enshrined in the EU Charter and Article 3 of the ECHR, find themselves as if they were

⁵⁵³ Naydès Jeanty, 'How Effective is the Principle of Non-Refoulement in Europe Today?' (Generation for Rights Over the World, 2022).

⁵⁵⁴ Julien Ancelin, 'Le principe de non-refoulement et l'Union européenne à l'épreuve de la crise syrienne' 49(2) (Études internationales 2019) 355-389.

⁵⁵⁵ Amnesty International, 'Digital Investigation Proves Poland Violated Refugees' Rights' (9 September 2021) <https://www.amnesty.org/en/latest/news/2021/09/poland-digital-investigation-proves-poland-violated-refugees-rights/> accessed 12 November 2023.

⁵⁵⁶ UN, 'La COVID-19 s'accompagne d'une « pandémie de la pauvreté », avertit le Haut-Commissaire pour les réfugiés devant la Troisième Commission' (2020) <https://www.un.org/press/fr/2020/agshc4308.doc.htm> accessed 12 November 2023.

at a crossroads between meeting their international responsibilities and their evolving political obligations.

2.8.Conclusion

This chapter has thoroughly highlighted the scope of the principle of non-refoulement. In particular, it has been shown that this principle plays a special role not only in the field of asylum but also in the field of human rights. In the context of the 1951 Refugee Convention, this principle plays a prominent role in that it is not subject to reservations by States Parties. However, it cannot be considered an absolute principle and states have the possibility to circumvent its application. On the other hand, the application of this principle under the major international human rights conventions is different; the prohibition of refoulement is considered an absolute rule and no exceptions to its application are allowed. Moreover, the scope of application of the principle of non-refoulement has been further expanded as it is considered customary international law. Consequently, it should be respected by all states in the world, not just those that are signatories to the Conventions. These factors therefore highlight how the principle of non-refoulement is one of the most important principles of international law

In the European framework, on the other hand, human rights protection would appear to be broader. The ECHR, for example, guarantees respect for the absolute principle of non-refoulement, and decisions of the European Court of Human Rights can be appealed by individuals and are binding on the contracting states. This protection is further extended in the European Union, where the prohibition of refoulement is guaranteed by both primary and secondary sources of EU law. Moreover, the EU Charter and the regulations and directives, in which the principle is included, are directly applicable, and citizens can defend their rights by invoking the Court of Justice. According to this analysis, therefore, individuals within the European Union receive special protection from refoulement, as all states are bound by EU norms, the ECHR, as well as other international conventions that prohibit refoulement. However, this apparently broad protection on non-refoulement is conflicted by Instances in which EU member states have circumvented its absolute nature. As a matter of fact, these contrasts between the absolute nature of non-refoulement and its application by states highlight the gaps between the professed human rights commitments of the EU and its states and their practical actions. This chapter has thus laid the groundwork for

the next exploration, which aims to investigate the EU's paradoxical relationship with the principle of non-refoulement. In particular, the next chapter will highlight how, despite the asserted absolute nature of this principle, it is specifically violated within the EU framework, by the principles of Mutual Trust and Safe Country. This investigation is therefore essential to understanding the dichotomy between the EU's legal obligations and member states' practices in dealing with asylum and refugee issues.

CHAPTER 3

UNRAVELING THE PARADOX OF MUTUAL TRUST IN THE NON-REFOULEMENT PRINCIPLE

3.1. Introduction

In the last chapter, it was shown how the principle of non-refoulement is considered one of the most important human rights provisions. It is indeed an absolute principle and at the European level, it can be enforced by the Court of Justice and the European Court of Human Rights. Despite these factors, however, this chapter will show how this principle is circumvented through the concept of mutual trust. The principle of mutual trust has evolved considerably within the European Union over the years. Initially created for the area of the common market in the late 1960s, mutual trust later became a determining factor in the Area of Freedom, Security and Justice, especially in the criminal and asylum fields.

The first section focuses on how this principle was born, how it has evolved and how it has become an essential factor for the European Union. In particular, the relationship between mutual trust and the concept of mutual recognition within the common market, where both principles were formed, will be discussed. The second section will focus on the application of mutual trust in the Areas of Freedom, Security and Justice. In particular, the section will focus on the area of criminal law, where mutual trust has had the most influence. Indeed, this principle has found its greatest expansion in criminal judicial cooperation in relation to the European Arrest Warrant (EAW). The section will also consider the importance that mutual trust had in the Court's opinion on the accession of the EU to the ECHR and how it was elevated to a constitutional principle of the EU. The third section will consider the conflict between the duty to respect mutual trust and the duty to guarantee human rights between Member States. The section will focus in particular on the limitation of mutual trust in the criminal field and the decisions of the Court of Justice, from the *Lanigan* to the more recent *LM* case. The violation of the rule of law in Poland and Hungary and the activation of Article 7 TEU will also be discussed. Finally, the last section will focus on the relationship with the principle of non-refoulement. In particular, the section will focus on the contrast between the ECtHR and the CJEU raised in the *M.M.S.* and *NS* cases and how the CJEU used the systemic deficiencies test to limit the prohibition of refoulement. Subsequently, the

analysis will focus on the most recent CJEU judgments where it will be highlighted that although the Court seeks to align with the ECtHR, mutual trust remains an obstacle to non-refoulement. Therefore, this chapter is not merely an exposition of the principle of Mutual Trust, but critically highlights its paradoxical implementation within the EU asylum system, offering an intricate narrative of legal developments, human rights considerations and judicial complexities.

3.2. Unveiling the Dynamics of Mutual Trust within the Common Market Arena

The principle of mutual trust is regarded as a fundamental element of the European Union. The Court of Justice, in fact, in more than one ruling, has considered this principle as a necessary instrument for the implementation of European Union law.⁵⁵⁷ However, it is important to note that the principle of mutual trust is not explicitly mentioned in the EU Treaties. Although the CJEU has recognized its significance and existence, the Court has often been hesitant to delineate the conditions, content, or implications of this principle.⁵⁵⁸ Additionally, even though mutual trust has been mentioned more frequently in the European political and legal debate in recent years, scholars have repeatedly indicated the lack of conceptualization of such principle.⁵⁵⁹ For these reasons, it might be difficult to give a univocal and coherent definition of mutual trust within the EU law.

The concept of mutual trust is discernible through the decisions of the Court of Justice and the objectives of the European Union, rooted in the notion of "common values." According to the CJEU, the respect of common values by the Member States is a prerequisite for European integration. In Opinion 2/13, in fact, the Court specified that the legal structure of the European Union is based on the fundamental premise that each Member State shares with all the other Member States, a set of common values on which the EU is founded.⁵⁶⁰ This statement finds its basis in Article 2 of the TEU,⁵⁶¹ and the respect of common values, as indicated in this Article, implies and justifies the existence of a mutual confidence that those values will be recognised and

⁵⁵⁷ Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, [2010] ECLI:EU:C:2010:828; Case C-168/13 PPU, *Jeremy F. v Premier ministre*, [2013], ECLI:EU:C:2013:358; Case C-399/11, *Stefano Melloni v Ministerio Fiscal*, [2013], ECLI:EU:C:2013:107

⁵⁵⁸ Evelien Brouwer and Damien Gerard, Mapping Mutual Trust - an Introduction, *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (2016) EUI Working Paper MWP 13, page 1.

⁵⁵⁹ Ibid.

⁵⁶⁰ Opinion 2/13, on EU Accession to the ECHR EU:C:2014:2454, para 168.

⁵⁶¹ See Article 2 of the Consolidated version of the Treaty on European Union.

the law that implements them will be respected.⁵⁶² For these reasons, trust between Member States is deemed fundamentally important, as it fosters the implementation of the integration process.⁵⁶³ Essentially, if Member States can trust each other due to a shared community of values, they are more likely to engage in robust cooperation, despite substantial and procedural differences in their legal systems. In this context, it's worth noting that one of the European Union's primary objectives is to diminish if not entirely remove, the physical and legal barriers between Member States within the European area.⁵⁶⁴ This harmonization process could be facilitated through mechanisms based on mutual trust, potentially opening up the legal systems of Member States.⁵⁶⁵

Based on the premise just outlined, the principle of mutual trust can, therefore, be defined as an obligation for each Member State to presume that other States adhere to common values and, consequently, comply with EU law. This involves the recognition of foreign laws and prohibits mutual verification of compliance with EU law by the Member States.⁵⁶⁶

The duty of mutual trust has been mandated in many different areas of European Union law. As will be analysed in subsequent sections, this principle has seen its most significant expansion in the Area of Freedom, Security, and Justice (AFSJ), where it emerges as a crucial element in civil⁵⁶⁷ and criminal judicial cooperation instruments,⁵⁶⁸ as well as in the Common European Asylum System, particularly concerning fundamental rights.⁵⁶⁹

3.2.1. Exploring the Synergy of Mutual Trust and Mutual Recognition

Although the principle of mutual trust has become increasingly relevant in various sectors, its initial and sporadic references date back to the 1960s case law concerning the free movement of

⁵⁶² Ibid.

⁵⁶³ Ibid, para 172.

⁵⁶⁴ Cecilia Rizcallah, *The challenges to trust-based governance in the European Union: Assessing the use of mutual trust as a driver of EU integration* (2019) *European Law Journal* 25:37–56, page 37.

⁵⁶⁵ Ibid.

⁵⁶⁶ Opinion 2/13, on EU Accession to the ECHR EU:C:2014:2454, para 168-191.

⁵⁶⁷ See for example, Whereas 21 of the Council Regulation (EC) No 2201/2003; Whereas 26 of the Regulation (EU) No 1215/2012; Whereas 65 of the Regulation (EU) 2015/848.

⁵⁶⁸ See for example the Whereas 10 of the 2002/584/JHA; Whereas 9 of the Council Framework Decision 2006/783/JHA.

⁵⁶⁹ See for example the Whereas 22 of the Regulation (EU) No 604/2013.

goods in the common market.⁵⁷⁰ Notably, the principle of mutual trust was first mentioned in the 1963 case of *Italy v. Commission*.⁵⁷¹ In this judgment, the Commission had authorized a special tax on the importation of refrigerators and household electrical appliances from Italy into France. Contesting this decision, the Italian government invoked the necessity of trust between Member States to bolster its argument. Specifically, it stated, "*An atmosphere of trust is necessary for cooperation, and the campaign launched by the French press in 1962 against Italian products, which led to the disputed Decision, was not conducive to such an atmosphere*".⁵⁷²

While the Italian government invoked the principle of mutual trust, it took over a decade for the Court of Justice to explicitly refer to it, as seen in the *Bauhuis* case.⁵⁷³ This case revolved around the health control of products traded between Member States. A Dutch livestock trader sought reimbursement for fees paid to the state for health controls conducted at the time of export to other Member States, as mandated by the Council Directive 64/432 on animal health problems affecting intra-Community trade and imposed by Dutch law. The trader argued that these fees were contrary to Article 30 of the EEC Treaty, which prohibits quantitative restrictions between Member States.⁵⁷⁴

In its judgment, the Court stated that the health inspections were in the general interest of the European community. It affirmed that: "*This system is based on the trust which Member States should place in each other as far as concerns the guarantees provided by the inspections carried out initially by the veterinary and public health departments of the Member States from which the animals are exported*".⁵⁷⁵ In essence, the Court assumed that Member States must trust each other in the correct application of Community legislation, eliminating the need for them to verify whether the rules or in this specific case, health inspections, have been duly respected.

However, it should be noted that initially, although mutual trust played an important role in the internal market, the Court of Justice considered such principle as a prerequisite for mutual recognition.⁵⁷⁶ This link between the two principles seems based on the fact that States not only

⁵⁷⁰ Nathan Cambien, 'Articles Special Section – Mutual Recognition and Mutual Trust : Reinforcing EU Integration ? (Second Part) The Interaction Between Mutual Trust, Mutual Recognition and Fundamental Rights in Private International Law in Relation to the EU ' s Aspiratio' (2017) 2 117, page 107.

⁵⁷¹ Case 13-63, *Italian Republic v Commission of the European Economic Community*, [1963] ECLI:EU:C:1963:20

⁵⁷² Ibid, page 168.

⁵⁷³ Case 46/76 W.J.G. *Bauhuis v The Netherlands State*, [1977] ECLI:EU:C:1977:6

⁵⁷⁴ See Article 30 of the Treaty establishing the European Community.

⁵⁷⁵ Case 46/76 W.J.G. *Bauhuis v The Netherlands State*, [1977] ECLI:EU:C:1977:6, para 22.

⁵⁷⁶ Nathan Cambien (n 570) 110.

have a duty to trust each other and that the rules are respected, but through mutual recognition Member States have also a duty to recognize each other's national norms as binding.⁵⁷⁷ Specifically, in the context of the internal market, EU law mandates the mutual recognition of products, technical regulations, diplomas, and professional qualifications.⁵⁷⁸ This is also confirmed by Article 57 EEC Treaty (Article 53 TFEU) which established the power of the Council to issue directives for the mutual recognition of diplomas, certificates and other qualifications issued by the Member States.⁵⁷⁹ Consequently, as suggested by Nathan Cambien, this approach indicates that the principle of mutual recognition plays a crucial role in establishing and operating the internal market, as it relieves economic operators from the burden of complying with multiple and varied national standards.⁵⁸⁰

The principles of mutual trust and mutual recognition are commonly recognized as the cornerstone of the European internal market since the historic *Cassis de Dijon* judgment.⁵⁸¹ The case concerned the importation of French fruit liqueur from France to Germany, where the product was contrary to German law as it did not respect the requirement of at least 25% alcohol content for fruit liqueurs. The issue to solve was whether this violated the free movement of goods, as there was no evident discrimination since German law imposed the same minimum alcohol requirements for both imported and domestic drinks.⁵⁸²

The Court of Justice held that this type of obstacle resulting from differences between national legislations might violate Article 30 EEC Treaty, as Member States cannot adopt specific rules for the import of goods if the same goods have been legally produced and marketed in other member states, unless there is a good and proportionate justification.⁵⁸³ Essentially, the CJEU required Member States to trust the legislation of other Member States regarding the production and marketing of alcoholic beverages.⁵⁸⁴

From this case, it is evident that the Court imposed a qualified obligation of mutual recognition, based on a qualified mutual trust. Germany could not reject the French liqueur simply because it

⁵⁷⁷ Ibid, page 98.

⁵⁷⁸ Ibid, page 110.

⁵⁷⁹ See Article 57, para 1 of the Treaty establishing the European Economic Community.

⁵⁸⁰ Nathan Cambien (n 570) 98.

⁵⁸¹ Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, [1979] ECLI:EU:C:1979:42.

⁵⁸² Jukka Snell, *The Single Market: Does Mutual Trust Suffice?*, 'Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law' (2016) EUI Working Paper MWP 2016/13, page 11.

⁵⁸³ Ibid.

⁵⁸⁴ Evelien Brouwer, 'Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' (2013) 9 *Utrecht Law Review* 135, page 136.

was different, as this would contravene the free movement of goods. This means that Germany could not refuse a product merely because it did not conform to its own national legislation, as long as the product was legally permissible under the legislation of another Member State. This point of view, thus, imposed the recognition of different legislation and the confidence that such legislation respected the standards of Community law.

The approach of requiring mutual trust as a prerequisite for mutual recognition was also evident in the *Bouchara* case.⁵⁸⁵ That judgment concerned the legitimacy of the French legislation which required its economic operators to verify whether the imported product, placed on the French market for the first time, complied with national regulations. This legislation, therefore, seemed to induce French economic operators to choose domestic products instead of foreign ones. Consequently, this behaviour represented an obstacle to the intra-community trade. For these reasons, the Court stated that there was an obligation for the authorities of the Member States to accept certificates, controls and analyses that were carried out by the authorities of the country of origin of the product.⁵⁸⁶

The obligation to recognize foreign controls, as affirmed by the Court of Justice, was a manifestation of mutual recognition based on the mutual trust that must exist between Member States.⁵⁸⁷ In fact, it is precisely the mutual trust that exists between states that leads to relying on what is affirmed and declared by another country. Substantively, the concept of mutual recognition founded on mutual trust was confirmed by the Court of Justice in the *Van Wesemael*, and *Säger* cases.⁵⁸⁸

Following the decisions of the Court, mutual trust and mutual recognition have become such relevant elements for the common market, that the European Commission started to rely on the duty of mutual recognition in order to develop a new approach to complete the internal market.⁵⁸⁹ Similarly, as indicated by Jukka Snell and Christine Janssens, in order to ensure the abolition of internal frontiers within the European Union, a qualified duty of mutual recognition based on

⁵⁸⁵ Case 25/88, *Criminal proceedings against Esther Renée Bouchara, née Wurmser, and Norlaine SA*, [1989] ECLI:EU:C:1989:187.

⁵⁸⁶ *Ibid.*

⁵⁸⁷ *Ibid.*

⁵⁸⁸ Cases 110 and 111/78, *Van Wesemael*, [1979] EU:C:1979:8, Case C-76/90, *Säger*, [1991] EU:C:1991:331.

⁵⁸⁹ Karen J. Alter and Sophie Meunier-Aitsahalia, 'Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision' (1994) 26 *Comparative Political Studies*, 535, 541.

qualified mutual trust was inferred by the Court of Justice on the basis of a presumption of legal equality between the different EU systems.⁵⁹⁰

However, it is important to acknowledge, as generally agreed upon by most scholars, that the two principles are not identical or interchangeable.⁵⁹¹ In this context, efforts to define these principles have been made through jurisprudence. For instance, in the *Gasparini* case, Advocate General (AG) Sharpston considered mutual trust and mutual recognition as different names for the same principle.⁵⁹²

Nevertheless, this interpretation might create confusion if we consider that these two terms are ontologically different. In fact, on the one hand, mutual trust, as a subjective element, should be the goal which Member States should achieve. On the other hand, mutual recognition, which has an objective nature, might configure the technical-legal mechanism which would lead to the final goal, namely mutual trust.⁵⁹³ Indeed, Advocate General Sharpston's thesis was not followed by AG Colomer in the *Gözütok and Straaten* judgments.⁵⁹⁴ In these cases, the AG qualifies mutual trust as an essential element of the evolutionary process which currently involves the European Union.⁵⁹⁵ In essence, mutual trust would constitute an inspiring principle of the system, and as such it would be suitable for guiding the action of the authorities of the Member States.⁵⁹⁶

According to this perspective, mutual trust could be considered a consequence of mutual recognition. Similarly, AG Got, in the *Kossowski* case, asserted that mutual trust is not a prerequisite for the operation of mutual recognition, but rather a consequence that is imposed on Member States through the application of this principle.⁵⁹⁷ Specifically, he stated that the

⁵⁹⁰ Christine Janssens, (n 1) 29; Jukka Snell, *The Single Market: Does Mutual Trust Suffice?*, 'Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law', EUI Working Paper MWP 2016/13, page 14.

⁵⁹¹ Christine Janssens, (n 1) 142; Koen Lenaerts, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice*, pp. 3-4; Markus Möstl, *Preconditions and Limits of Mutual Recognition* (2010) in *Common Market Law Review*, page 408; Auke Willems, *Mutual Trust as a Term of Art in EU Criminal Law: Revealing its Hybrid Character*, (2016) in *European Journal of Legal Studies*, 231-232.

⁵⁹² Opinion of Advocate General Sharpston delivered on 15 June 2006, case C-467/04, *Criminal proceedings against Giuseppe Francesco Gasparini and Others*, [2006], ECLI:EU:C:2006:610, note 87.

⁵⁹³ Stefano Montaldo, *I limiti della cooperazione in materia penale nell'Unione europea* (2015) Quaderni del Dipartimento di Giurisprudenza dell'Università degli Studi di Torino, page 369.

⁵⁹⁴ Opinion of Advocate General Dámaso Ruiz-Jarabo Colomer delivered on 19 September 2002; Joined cases C-187/01 and C-385/01, *Criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, ECLI:EU:C:2002:516, point 124; Opinion of Advocate General Dámaso Ruiz-Jarabo Colomer delivered on 8 June 2006, C-150/05, *Jean Leon Van Straaten v. Staat der Nederlanden and Republiek Italië*, ECLI:EU:C:2006:381, point 61.

⁵⁹⁵ Opinion of Advocate General Dámaso Ruiz-Jarabo Colomer (641); Joined cases C-187/01 and C-385/01, *Criminal proceedings against Hüseyin Gözütok and Klaus Brügge*, ECLI:EU:C:2002:516, point 124.

⁵⁹⁶ Stefano Montaldo, (n 590) 369-370.

⁵⁹⁷ Opinion of Advocate General Bot delivered on 15 December 2015, case C-486/14, *Criminal proceedings against Piotr Kossowski*, para 43.

application of the principle of mutual recognition requires Member States to place mutual trust regardless of differences in their national laws.⁵⁹⁸

This approach, as anticipated, is also followed by scholars. It is believed that the two concepts must be distinguished, and not only because they are mentioned separately by the Court of Justice,⁵⁹⁹ but also because it is considered that the duty imposed on a Member State to trust the legal system of another Member State is broader than the duty to recognize certain rules from that legal system.⁶⁰⁰ In this regard, mutual trust might necessitate something more essential, which in many circumstances will require a more secure and complex relationship. In fact, it would seem easier for a country to recognize the decisions of other states than to trust them.⁶⁰¹ This thesis can be confirmed by the fact that mutual trust, as will be seen in the following sections, has been considered an EU fundamental legal principle more recently than mutual recognition when the relationship among states has become more solid.⁶⁰²

3.2.2. The Pivotal Role of Mutual Recognition in the EU Integration Process

Mutual trust and mutual recognition are not only interrelated concepts but have also become fundamental elements of the common market.⁶⁰³ As previously mentioned, from the *Cassis de Dijon* case, the European Community has started to promote the principle of mutual recognition and completion of the single market despite its inability to agree on the harmonization of rules.⁶⁰⁴ It is interesting to note how the differences between Member States are addressed by the European Union. On the one hand, there is the harmonization of legislation, which aims to find a common denominator to overcome the differences between States. On the other hand, these divergences can be addressed through the recognition of the rules of the country in which an activity or product's control takes place.

Following this approach, seems reasonable to consider mutual recognition as an alternative to harmonization. In fact, harmonization of legislation was the method used to achieve European

⁵⁹⁸ Ibid.

⁵⁹⁹ Christine Janssens, (n 1) 142.

⁶⁰⁰ Nathan Cambien (n 570) 99.

⁶⁰¹ Ibid.

⁶⁰² This happened when the relations between states have become more solid.

⁶⁰³ Susanne K. Schmidt, Mutual recognition as a new mode of governance (2007) *Journal of European Public Policy*, 14:5, 667.

⁶⁰⁴ Ibid.

integration of the common market before the introduction of mutual recognition and since its development, mutual recognition has been used as a method of integration in the context of the single market.⁶⁰⁵ Essentially, markets are governed by specific rules for goods, services, or professions, with each country having its own set. Through mutual recognition, these specific rules can be integrated. Consequently, if a product is legally marketable in one state, it should also be distributable in the markets of other member states.

The advantage of using the principle of mutual recognition, in this area, seems to have an economic benefit which would appear to arise from the fact that Member States do not have to face the bargaining costs to achieve harmonization, since only legislation or control of the country of origin is required. For example, companies would avoid the corporate costs of having to adapt to different national standards. However, it has been pointed out that the principle of mutual recognition based on the exclusive control of the State of origin could imply a horizontal transfer of sovereignty.⁶⁰⁶ According to this view, Member States could no longer follow their own legislation but would have to adapt to the rules of other countries. Nevertheless, it must be remembered that not only Member States have decided to limit some aspect of their sovereignty by joining the European Union.⁶⁰⁷ Additionally, countries must trust each other on the rules and controls of goods and services, in order to reach a real common market. In this regard, mutual trust is also an instrument that can be used in those areas in which States hesitate to develop the harmonization process.⁶⁰⁸ In situations where specific objectives need to be achieved, it might be easier to adopt foreign rules or decisions and trust in their adherence.

This approach was also underscored in the *Cassis de Dijon* case, where the Court of Justice explicitly acknowledged a lack of harmonization of legislation in that sector and noted that States imposed different minimum requirements for the alcohol content of beverages.⁶⁰⁹ Moreover, the Court pointed out the necessity to respect the separation of powers between States and the European Community in the sectors in which the harmonization process had not taken place.⁶¹⁰

⁶⁰⁵ Ibid, page 671.

⁶⁰⁶ Kalypso Nicolaidis, Mutual Recognition: Promise and Denial, from Sapiens to Brexit (2017) Current Legal Problems, Vol. 70, No. 1, page 18.

⁶⁰⁷ See for the example Article 3 TFEU on Exclusive competences of the EU and Article 4 TFEU on shared competences between states and EU.

⁶⁰⁸ Evelien Brouwer (n 558), page 136.

⁶⁰⁹ Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, [1979] ECLI:EU:C:1979:42, page 656.

⁶¹⁰ Ibid.

Therefore, this section highlights that mutual trust and mutual recognition have been employed as alternative methods to achieve integration in the common market. Although they have distinct natures, these elements are interrelated concepts⁶¹¹ and are frequently mentioned together across different sectors, particularly in the Area of Freedom, Security, and Justice.⁶¹²

3.3.Exploring the Intricacies of Mutual Trust in the Area of Freedom, Security, and Justice

While mutual recognition and mutual trust have become critical elements of the common market, their significance expands beyond the economic sphere.⁶¹³ Notably, mutual trust mutual trust has acquired increasing importance in the area of judicial cooperation to the point of being defined as the cornerstone of the Area of Freedom, Security and Justice.⁶¹⁴

This EU sector, established by the Treaty of Lisbon and originally part of the third pillar introduced by the Maastricht Treaty, includes a wide range of policy areas such as criminal justice, immigration, and asylum.⁶¹⁵ In these domains, the EU emphasizes the need for a stronger cooperation between Member State in order to promote freedom of movement, while guaranteeing security and justice throughout the European Union.⁶¹⁶ In fact, with the abolition of internal borders and the freedom of movement, it became easier for criminals and individuals accused of crimes to evade prosecution by moving to another country. Similarly, asylum seekers began to migrate within the EU, often applying for asylum in multiple states, a practice known as asylum shopping.⁶¹⁷ Therefore, a system of recognition and trust between Member States was necessary.

⁶¹¹ Giandomenico Majone, *Mutual Recognition in Federal Type Systems* (1993) in EUI Working Papers, No. 1, page 15.

⁶¹² Case C-241/15, *Nicolaie Aurel Bob-Dogi*, [2016] ECLI:EU:C:2016:385, paras, 52 and 65.

⁶¹³ Eduardo Gill-Pedro and Xavier Groussot (n 204) 263.

⁶¹⁴ Ibid; Stefano Montaldo, On a Collision Course! Mutual Recognition, Mutual Trust and the Protection of Fundamental Rights in the Recent Case-law of the Court of Justice (2016) European Papers Vol. 1, No 3, page 968; Eduardo Gill-Pedro and Xavier Groussot (201); Kalypso Nicolaïdis, *Trusting the Poles? Constructing Europe through mutual recognition*, *Journal of European Public Policy*, 14:5, 682-698, (2007) DOI: 10.1080/13501760701427847, page 682.

⁶¹⁵ See Title V of the TFEU, Articles 67 to 89.

⁶¹⁶ Fenella M. W. Billing, Limiting mutual trust on fundamental rights grounds under the European arrest warrant and lessons learned from transfers under Dublin III (2020) *New Journal of European Criminal Law*, Vol. 11(2) 184–203, page 187.

⁶¹⁷ Tampere European Council Presidency Conclusions, 15 and 16 October 1999.

The definition and scope of mutual trust and mutual recognition vary depending on their application within the common market or the AFSJ.⁶¹⁸ In the common market, these principles are related to the recognition of different legislations and confidence that such rules comply with EU standards. Conversely, in the AFSJ the principle of mutual recognition would also require courts and authorities of the Member States to recognize and give effect to the decisions of the institutions of another member state. Consequently, this recognition is based on the assumption that Member States have confidence in each other justice systems.⁶¹⁹ Hence, as will be explored shortly, this confidence is founded on the presumption that all Member States uphold the principles of freedom, democracy, human rights, and the rule of law.⁶²⁰ Without these foundational presumptions, the construction of trust between states could not be achieved.

According to some scholars, the implementation of mutual recognition in the AFSJ was also viewed as an effective method to ensure judicial cooperation in civil and criminal matters without the need to proceed with the harmonization of legislation. Such harmonizations would have encountered significant resistance from Member States.⁶²¹ This does not mean that the field of the common market might not be challenging, but usually, it concerns areas of law where Member States find it easier to accept reduced jurisdiction. On the other hand, in the field of cooperation in criminal matters, individuals may become subordinate to foreign criminal procedures which could limit their freedom of movement. For this reason, in the AFSJ, in the scope of mutual trust seems more complex than the one applied within the common market. In addition, it has been argued that the scope of the principle of mutual trust might also change within the AFSJ itself. Indeed, its range would also seem slightly different depending on whether it is applied in the migration field, in civil or criminal matters.⁶²²

Although there is a significant difference between the common market and the AFSJ, the principle of mutual trust in this area derives from that sector. In fact, in light of the differences between the legal systems of the Member States and the difficulties in reaching a harmonization of legislation,

⁶¹⁸ Madalina Moraru, Mutual Trust from the perspective of national courts: a test in creative legal thinking” in Mapping Mutual Trust – Understanding and Informing the Role of Mutual Trust in EU Law, *Max Weber EUI MWP Working Paper* 2016/13, page 40; Malin T.Schunke, *Whose Responsibility? A Study of Transnational Defence Rights and Mutual Recognition of Judicial Decisions within the EU* (2013) Intersentia Cambridge.

⁶¹⁹ Asif Efrat, 'Assessing Mutual Trust among EU Members: Evidence from the European Arrest Warrant,' (2019) *Journal of European Public Policy* 26:5, 656-675, page 657.

⁶²⁰ Ibid; in addition see Article 2 TEU.

⁶²¹ Eduardo Gill-Pedro and Xavier Groussot (n 201) 264.

⁶²² Madalina Moraru (n 618) 40.

it was proposed to draw inspiration from the way the common market was constructed to conceive a situation in which each Member State could recognize the validity of court decisions of other member states.⁶²³

The idea of expanding the scope of the principle of mutual trust and mutual recognition to the AFSJ stemmed from a political initiative taken by the United Kingdom during the 1998 European Council. Subsequently, during the 1999 European Council in Tampere, the concept of mutual trust was taken into consideration in the EU policy as a founding principle for the application of mutual recognition within the Area of Freedom, Security, and Justice.⁶²⁴ Following the Tampere conclusions, the 2001 Council developed a Program for the implementation of the principle of mutual recognition of decisions in criminal matters. This program clearly states that: *“Implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other’s criminal justice systems. That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.”*⁶²⁵ Subsequently, in 2004, the European Commission proposed an ambitious framework decision aimed at harmonizing the procedural legislation of criminal proceedings.⁶²⁶ However, several Member States opposed allowing the EU to legislate in a field so closely linked to national sovereignty.⁶²⁷ As a result, the Commission's intentions were not fully realized due to these concerns. The Lisbon Treaty later acknowledged the application of the principle of mutual recognition in the field of judicial cooperation through several articles. Notably, Article 67, paragraph 4, and Article 82, paragraph 1 of the TFEU state that judicial cooperation in civil and criminal matters is based on the principle of mutual recognition. Similarly, Article 82, paragraph 2 of the TFEU appeared to incorporate the project of harmonising criminal procedures to facilitate mutual recognition.⁶²⁸

As previously indicated, although the concept of mutual trust is not included in the Treaties, an explicit reference was made during the Brussels Council in 2014, in which it was expressly

⁶²³ See the Vienna European Council (Dec 11-12, 1998).

⁶²⁴ Tampere European Council Presidency Conclusions, 15 and 16 October 1999, para. 53.

⁶²⁵ Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, (OJ 2001, C12/10), page 1.

⁶²⁶ Commission, Proposal for a council framework Decision on certain procedural rights in criminal proceedings throughout the European Union COM (2004) 328 final, recitals 7, 12, 13 and paras. 19-30.

⁶²⁷ Jacob Öberg, Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure, (2020) European Constitutional Law Review, 16: 33–62, page 35.

⁶²⁸ See Article 82 para 2 of the TFEU.

specified that: “*The smooth functioning of a true European area of justice with respect for the different legal systems and traditions of the Member States is vital for the EU. In this regard, mutual trust in one another's justice systems should be further enhanced.*”⁶²⁹

Although the EU Council recognised the importance of mutual trust, it is crucial to emphasise that the Court of Justice, more than any other EU institution, has emerged as one of the most ardent defenders of this principle. In fact, the Court began applying the concept of mutual trust across various areas of judicial cooperation.⁶³⁰ Notable cases include the *Gasser and Turner* judgments related to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.⁶³¹ In these judgments, the Court specified that the Convention was founded on the trust that the Contracting States have in each other's legal systems and judicial institutions.⁶³²

Similarly, in matters pertaining to family law, the Court reached the same conclusion in the *Zarraga* judgment. This case involved a child born to a Spanish father and a German mother. Following their divorce, both parents sought exclusive custody rights. The Spanish court granted custody to the father, but the mother moved to Germany with the child. When the father initiated proceedings in Germany, the German court did not recognize the Spanish ruling. In a preliminary ruling, the Court of Justice stated that under the Brussels II bis regulation, a decision ordering the return of a minor issued by the competent court in the Member State of origin must be recognized and automatically enforced in another Member State, without the possibility of opposition. Importantly, the Court affirmed that the recognition and enforcement of judgments under this regulation are based on the principle of mutual trust between Member States. This trust relies on the presumption that their respective national legal systems are capable of providing equivalent and effective protection of fundamental rights, as recognized at the European Union level, particularly in the Charter of Fundamental Rights.⁶³³ From this decision, it becomes evident that the principle of mutual trust is grounded on the presumption that all Member States respect fundamental rights. Indeed, the Court adhered to this “*quasi-absolute*” presumption for several

⁶²⁹ European Council Brussels, 27 June 2014 EUCO 79/14, page 5.

⁶³⁰ Auke Willems, The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal (2019) German Law Journal 20, page 470.

⁶³¹ Case C-116/02, *Gasser v. MISAT*, [2003] E.C.R. I-14693.

⁶³² Case C-159/02, *Turner v. Grovit*, [2004] E.C.R. I03565, paras. 24–28.

⁶³³ Case C-491/10 PPU, *Joseba Andoni Aguirre Zarraga v Simone Pelz*, [2010] EU:C:2010:828, paras 70-71, 75.

years, not only in the context of criminal proceedings but also, as will be discussed in subsequent sections, in the field of asylum law.

3.3.1. Exploring the Nexus of Mutual Trust and Criminal Law in the EU

In the field of criminal law, the Court of Justice first mentioned mutual trust in the *Gözütok and Brügge* case, in relation to the principle of *ne bis in idem*.⁶³⁴ This principle can preclude a Member State from exercising its right to prosecute criminal conduct over which it has jurisdiction if that conduct has already been subject to a final judgment in another Member State.⁶³⁵ Essentially, individuals have the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

The principle of *ne bis in idem* is enshrined in various international human rights treaties⁶³⁶ and is included in Article 50 of the EU Charter of Fundamental Rights.⁶³⁷ It is also embedded in Article 54 of the Convention implementing the Schengen Agreement (CISA).⁶³⁸ According to Auke Willems, the aim to include the *ne bis in idem* in the Schengen acquis stem from the intention to avoid any possible negative effects occurring from the abolition of borders.⁶³⁹ ⁶⁴⁰ In fact, the abolition of internal borders could have facilitated transnational criminality and increased complicated cross-border cases.⁶⁴¹

In the joint cases of *Gözütok and Brügge*, the Court of Justice was asked to interpret Article 54 of the CISA through a preliminary ruling procedure. The issues arose in two separate criminal cases, one in Germany against Mr. Gözütok for crimes committed in the Netherlands and one in Belgium against Mr. Brügge, for crimes committed in Belgium. In both cases, the suspects had agreed a financial settlement with the prosecutor. However, despite these agreements, new proceedings were initiated in another Member State.

⁶³⁴ This landmark case is one of the most important judgments of the Court in criminal matters and the first judgment on the interpretation of the Schengen acquis.

⁶³⁵ Cecilia Rizcallah (n 564) 44.

⁶³⁶ See Article 14 paragraph 7 of the IPCCPR and Article 4 of Protocol 7 to the ECHR. However, these documents refer to *ne bis in idem* only within the domestic sphere.

⁶³⁷ See Article 50 of the Charter of Fundamental Rights of the European Union.

⁶³⁸ See Article 54 of the Schengen acquis.

⁶³⁹ Auke Willems (n 630) 472.

⁶⁴⁰ Ibid

⁶⁴¹ Tomasz Ostropolsky, *The CJEU as a Defender of Mutual Trust* (2015) 6 NEW J. EUR. CRIM. L. 166, page 168.

The central question was to establish whether the principle of *ne bis in idem* also applied in the event that the prosecuting authorities decided to stop the proceeding once the accused had fulfilled his obligations, such as paying a sum of money determined by the same authorities, without involving the court. Despite the hostilities of some Member States,⁶⁴² the Court of Justice ruled that the principle does apply in such scenarios. The primary justification for this expansive application of *ne bis in idem* was mutual trust. In fact, the Court affirmed that: “*whether the ne bis in idem principle enshrined in Article 54 of the CISA is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.*”⁶⁴³ In other words, with this statement, the Court ruled that the EU Member States have to trust each other criminal justice systems and presume that all these different systems function efficiently. Consequently, each State recognizes the criminal law in force in all other Member States, even if the application of their national law would lead to another result.⁶⁴⁴

With this decision, it seems that the Court took mutual trust for granted, making it an autonomous concept regardless of the similarities or divergences of Member States’ legal systems.⁶⁴⁵ Following this approach, some authors suggested that mutual trust has not been subordinated to the approximation of legal procedures, but rather seems comparable to a quasi-absolute presumption.⁶⁴⁶ Even though the principle of *ne bis in idem* is not considered an absolute right, as the CISA allows Member States to limit the application of this principle for different reasons, such as national security,⁶⁴⁷ the concept of mutual trust is not among them. Consequently, this decision gives the impression that the Court places greater emphasis on mutual trust than on fundamental rights.

The principle of mutual trust and mutual recognition found their most extensive application in criminal judicial cooperation through the EAW. Governed by the EU Framework Decision

⁶⁴² Ibid, page 169.

⁶⁴³ Joint cases C-385/01 *Gözütok and Brügge* [2003] ECR I-01345, I-1378, para 33.

⁶⁴⁴ Ibid.

⁶⁴⁵ Tomasz Ostropolsky (n 641) 169.

⁶⁴⁶ Ibid; De Schutter, La contribution du contrôle juridictionnel A la confiance mutuelle, in G. de Kerchove, A. Weyembergh (ed.), La confiance mutuelle dans l'espace penal europeen, (2005) page 102.

⁶⁴⁷ See Article 55 of the Convention implementing the Schengen Agreement.

2002/584 and its amendments,⁶⁴⁸ the EAW has been the focus of significant rulings by the Court of Justice.

Through this process, the authorities of the Member States are required to execute a warrant mandate issued by the authorities of another Member State and extradite the arrested person to such State. Specifically, according to the Framework Decision, the extradition process within the EU begins with the completion of a standard form by a judge or a prosecutor that requires another Member State to arrest and hand over a person.⁶⁴⁹ This form should detail certain aspects, such as the individual's identity, nationality, and evidence of an enforceable judgment or arrest warrant.⁶⁵⁰ Once completed, the EAW is transmitted from the issuing authority to the executing judicial authority, which is then responsible for arresting the requested person and informing them of the warrant.⁶⁵¹ The aim of the EAW seems therefore to speed up and simplify the normal extradition process adopted internationally.⁶⁵² For example, the EAW does not include the nationality exception and it requires Member States to surrender their citizens.⁶⁵³ In addition, unlike the international extradition process in which the final surrender decision is in the hands of the political authorities, the EAW establishes an entirely judicial surrender procedure.

The Framework Decision also includes explicit grounds under Articles 3 and 4 for Member States to refuse the execution of the EAW.⁶⁵⁴ However, it is crucial to note that among these specified grounds, there is no explicit mention of human rights. This omission means that specific rights, such as the violation of the principle of fair trial and the prohibition of refoulement, are not included as grounds for refusing its execution.

Nonetheless, the Framework Decision makes several references to fundamental rights. For instance, Article 1, paragraph 3, states that the Decision must respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the TEU. Additionally, Article 23, paragraph 4, mentions that the surrender may be temporarily postponed for serious humanitarian reasons. Furthermore, recitals 12 and 13 indicate that national courts may refuse the execution of the EAW in cases of human rights violations. Specifically, recital 12 prohibits executing the EAW

⁶⁴⁸ The 2002 Framework Decision was later amended by the Council Framework Decision 2009/299 / JHA of 26 February 2009.

⁶⁴⁹ Daniel Flore, *Droit pénal européen*, Les enjeux d'une justice pénale européenne, (Larcier 2014), page 662.

⁶⁵⁰ See Article 8 of the Framework Decision 2002/584/JHA.

⁶⁵¹ Ibid, Article 11.

⁶⁵² Asif Efrat (n 619) 657.

⁶⁵³ See Article 5 para 3 of the 2002/584/JHA.

⁶⁵⁴ See Article 3 of the EAW.

on grounds of sex, race, religion, ethnic origin, nationality, language, political opinion, or sexual orientation. Similarly, recital 13 states, "*No person should 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.*" Therefore, while the violation of these principles is not among the explicit refusal grounds of the EAW, these recitals suggest that extradition is not permissible on discriminatory grounds and if there is a risk of violating the principle of non-refoulement. However, as will be demonstrated, for several years the Court of Justice interpreted the Framework Decision restrictively without considering the violation of human rights among the reasons for refusing extradition. This approach has, in fact, led to the violation of some fundamental rights in favour of the principle of mutual trust.

3.3.2. Deciphering the Constitutional Essence of Mutual Trust in the EU Framework

The explicit absence of human rights grounds for non-execution of the EAW, coupled with the Court's restrictive interpretation, has led legal scholars to believe that the 2002 Framework Decision fails to adequately ensure the fundamental guarantees for the accused.⁶⁵⁵ It could therefore be assumed that also for these reasons some Member States have included within their legislation the respect of fundamental rights among the execution clauses of the EAW.⁶⁵⁶ In fact, when the Framework Decision was adopted and the EAW was integrated into the national laws of Member States, constitutional concerns began to emerge.⁶⁵⁷ For instance, the Polish Constitutional Court declared the provision of the EAW unconstitutional.⁶⁵⁸ Similarly, the German Constitutional Court and the Supreme Court of Cyprus overturned the national law implementing the EAW.⁶⁵⁹ Following these doubts about the validity of the European Arrest Warrant, the Court of Justice swiftly responded. In the *Advocaten voor de Wereld* case, for instance, the Court ruled on the validity of the EAW despite a violation of fundamental rights.⁶⁶⁰ Specifically, in the case it was argued that the abolition of verification of the double criminality for the crimes listed in Article 2

⁶⁵⁵ Nina Marlene Schallmoser, *The European arrest warrant and fundamental rights* (2014) in *European Journal of Crime, Criminal Law and Criminal Justice*, page 135.

⁶⁵⁶ Two-thirds of Member States have enacted these clauses.

⁶⁵⁷ Jan Komárek, *European Constitutionalism and the European Arrest Warrant: in search of the Limits of "contrapunctual principles"* (2007) 44 *Common Market Law Review* 9.

⁶⁵⁸ Constitutional Tribunal of Poland reference No P 1/05, 27th April 2005.

⁶⁵⁹ Supreme Court of Cyprus, No. 294/2005, 7 November 2005; *Europäischer Haftbefehl*, 113 BVerfGE 273 (2005).

⁶⁶⁰ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECLI:EU:C:2007:261.

paragraph 2 of the Framework decision would violate the principle of equality, non-discrimination, and the principle of legality in criminal matters.⁶⁶¹ The Belgian Court posited that there was a risk that persons suspected of having committed such crimes might receive different treatment since the double criminality test did not apply.

In this respect, the Court of Justice affirmed that the EU is founded on the principle of the rule of law and respects the fundamental rights as guaranteed by the ECHR, and as they result from the constitutional provisions common to the Member States, as general principles of Community law.⁶⁶² Furthermore, it stated that the principles of legality, equality and non-discrimination are included in Articles 49, 20 and 21 of the EU Charter of Fundamental Rights⁶⁶³ and Member States are subjected to compliance with these principles when they implement European Union law.⁶⁶⁴ Consequently, a waiver of the control of double criminality is justified by the fact that the Framework Decision is based on a high degree of trust and solidarity between States⁶⁶⁵ that leads to presume that they respect fundamental rights. According to this decision, therefore, it seems clear that the Court gave priority to the principle of mutual trust rather than the respect for fundamental rights.

This high level of trust accompanied the Court of Justice for many years in its decisions, to the point of establishing an almost absolute presumption that all Member States comply with fundamental rights. The approach followed by the CJEU appears to have transformed mutual trust into a fundamental principle, equal to or almost superior to respect for fundamental rights, as it seems to preclude EU States from controlling if such rights are concretely respected.

In this regard, the *Dominic Wolzenburg* case is worth mentioning.⁶⁶⁶ Advocate General Yves Bot, in his opinion, stated that, by accepting the European arrest warrant system based on the principle of mutual recognition, Member States have given up part of their sovereign powers. Furthermore, he stressed that each Member State has confidence in its own criminal law systems and that each of them accepts a potentially different outcome from the application of its laws. This acceptance

⁶⁶¹ Ibid, para 44.

⁶⁶² Ibid, para 45.

⁶⁶³ Ibid, para 48.

⁶⁶⁴ Ibid, para 45.

⁶⁶⁵ Ibid, para 57.

⁶⁶⁶ Case C-123/08 *Dominic Wolzenburg* [2009] ECLI:EU:C:2009:616.

is based on the fact that by joining the EU, Member States have committed themselves to respect fundamental rights.⁶⁶⁷

Similarly, in the *Mantello* judgment, the Court of Justice clearly prioritizes the principle of mutual trust at the cost of limiting fundamental rights.⁶⁶⁸ An analogous approach was also reached, in the *Radu* judgment.⁶⁶⁹ The case concerns a person who was arrested in Romania with four German EAWs. Before the execution of the warrant, the accused raised several objections, in particular, he pointed out that the executing State had to ensure that the issuing State respects the fundamental rights guaranteed by the ECHR and the EU Charter and, in the event of a violation, the executing authority should have had the right to refuse the execution of the EAW.⁶⁷⁰ Specifically, the accused claimed the violation of fair trial as he was not heard by the German authorities before issuing the warrants.

In this regard, Advocate General Sharpston affirmed that the violation of human rights should be considered as a ground for refusal of the EAW.⁶⁷¹ On the contrary, the CJEU rejected this argument by ruling that the executing authority cannot refuse to execute an EAW on the basis that the requested person was not heard by the issuing authority.⁶⁷²

The Court of Justice, therefore, did not consider the opinion of the AG and decided to follow its consolidated jurisprudential line.⁶⁷³ Once again, the Court recalled that the establishment of a simplified and more effective system for the surrender of persons under the EAW is aimed at contributing to the objective set for the European Union to become an area of freedom, security and justice based on the high degree of trust that should exist between the Member States.⁶⁷⁴ Thus, also with this decision, the Court did not recognize human rights as a ground to refuse the execution of the EAW and prioritized mutual trust over fundamental rights.

The Court had an analogous approach in the *Melloni* judgment.⁶⁷⁵ This case involved an Italian citizen convicted in *absentia* for the crime of fraudulent bankruptcy. The Italian authorities issued a European Arrest Warrant for the execution of the sentence, which the Spanish authorities

⁶⁶⁷ Opinion of Advocate General Bot C-123/08 - *Dominic Wolzenburg*, [2009] ECLI:EU:C:2009:183.

⁶⁶⁸ Case C-261/09 *Gaetano Mantello*, [2010] EU:C:2010:683.

⁶⁶⁹ Case C-396/11, *Ciprian Vasile Radu* [2013] ECLI:EU:C:2013:39.

⁶⁷⁰ *Ibid*, paras 16-19.

⁶⁷¹ Opinion of Advocate General Sharpston, Case C-396/11, *Radu* [2012] ECLI:EU:C:2012:648, para 97.

⁶⁷² *Ibid*, para 43.

⁶⁷³ See C-192/12 *PPU - West* [2012] ECLI:EU:C:2012:404, point 53.

⁶⁷⁴ Case C-396/11, *Ciprian Vasile Radu* [2013] ECLI:EU:C:2013:39, para 34.

⁶⁷⁵ Case C-399/11, *Stefano Melloni v Ministerio Fiscal* [2013] ECLI:EU:C:2013:107.

accepted. However, the convicted individual opposed his surrender to the Italian authorities, citing a violation of the right to a fair trial due to his absence at the hearing.

In this regard, the Spanish Constitutional Court asked the Court of Justice whether the national standard of protection of human rights should prevail over the Framework Decision since violation of fundamental rights was not among the grounds to refuse the EAW. The CJEU, however, claimed that the Framework Decision complied with the EU Charter and the Spanish courts could not apply a higher standard of protection of fundamental rights as this would undermine the priority and effectiveness of EU law.⁶⁷⁶ In addition, the Court of Justice, referring to the *Radu* case, established that Member States can refuse to execute the EAW only in cases expressly established by the Framework Decision.⁶⁷⁷ Consequently, allowing a Member State not to execute the EAW for cases not covered by the Framework decisions would undermine the principles of mutual trust.⁶⁷⁸ Also, from this decision, therefore, it seems that the Court of Justice sacrificed the possibility of better protection of fundamental rights in favour of mutual trust and broad EU law.

The importance of the principle of mutual trust has been elevated to such an extent that it has been used by the Court of Justice as one of the essential elements to prevent the accession of the EU to the ECHR. In its opinion 2/13, in fact, one of the reasons that led the Court of Justice to consider the Draft Accession Agreement (DAA) of the EU to the ECHR incompatible with the EU treaties was that the accession would compromise the principle of mutual trust.⁶⁷⁹ Specifically, as it emerged previously, according to the principle of mutual trust, when implementing EU law, States should be required to presume that fundamental rights have been observed by the other Member States.⁶⁸⁰ However, one of the possible consequences of the Accession to the ECHR would be to ask an EU Member State to verify whether or not another Member State respects fundamental rights. Consequently, according to the Court, verifying that another Member State has respected fundamental rights, even if EU law imposes the obligation of mutual trust between States, would upset the underlying balance of the EU and undermine the autonomy of EU law.⁶⁸¹

⁶⁷⁶ Ibid, paras 58 and 59.

⁶⁷⁷ Ibid, para 38.

⁶⁷⁸ Ibid, para 63.

⁶⁷⁹ Opinion 2/13, on EU Accession to the ECHR EU:C:2014:2454.

⁶⁸⁰ Ibid, para 192.

⁶⁸¹ Ibid, paras 191-195.

In addition, by referring to the *N.S. and Others* case, where it defines the principle of mutual trust as the "*raison d'être*" of the European Union,⁶⁸² the CJEU seems to suggest that Member States are required to preserve the effectiveness of EU mechanisms, even at the cost of protecting fundamental rights.⁶⁸³ In other words, with such an Opinion, it appears that the Court of Justice confirmed its previous decisions by giving more importance to the principle of mutual trust than to the obligation of Member States to respect fundamental rights.⁶⁸⁴

This approach has been critically examined by several scholars. For instance, Moreno-Lax argues that the CJEU's reliance on mutual trust reflects a systemic weakness in the protection of fundamental rights within the AFSJ, especially when these rights conflict with efficiency-based integration goals.⁶⁸⁵ Similarly, Moraru has identified how mutual recognition, in the absence of adequate guarantees for fundamental rights, can effectively undermine the protections of the EU Charter, particularly in the field of asylum and criminal judicial cooperation.⁶⁸⁶

Furthermore, it is essential to note that the importance of mutual trust has not only been considered by the Court of Justice but also by other European institutions. For instance, the European Council stated that strengthening the rights of defence is vital in order to maintain mutual trust between the Member States.⁶⁸⁷ Therefore, these approaches would give the impression that mutual trust has been elevated to a constitutional principle of the EU, to the point of considering that the protection of fundamental rights is a means to achieve mutual trust.⁶⁸⁸

3.4. The Clash between Mutual Trust and Fundamental Rights

In the previous section, it was demonstrated how the Court of Justice has elevated the concept of mutual trust to a fundamental principle of the European Union. According to its Opinion 2/13,

⁶⁸² Case C-411/10 and C-493/10, *N.S. and Others* [2011] EU:C:2011:865, para. 83.

⁶⁸³ Meijers Committee, Note on Mutual trust and Opinion 2/13 on accession of the European Union to the European Convention on Human Rights, CM1604, page 1.

⁶⁸⁴ Valsamis Mitsilegas, 'The Symbiotic Relationship Between Mutual Trust and Fundamental Rights in Europe's Area of Criminal Justice' (2015) 6 *New Journal of European Criminal Law*.

⁶⁸⁵ Violeta Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017) 285–292.

⁶⁸⁶ Madalina Moraru, 'Mutual Trust: Between Judicial Dialogue and Undue Deference?' in Madalina Moraru, Galina Cornelisse and Philippe de Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union* (Hart Publishing 2020) 43–66.

⁶⁸⁷ Resolution of the Council on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, 2009/C 295/01, recital 9.

⁶⁸⁸ Eduardo Gill-Pedro and Xavier Groussot (n 204) 263.

mutual trust is predicated on the presumption that all States respect fundamental rights. This confidence implies that there is no necessity to verify whether other Member States actually respect these rights. However, a problem arises when a Member State is concretely unable to respect fundamental rights. In such cases, the presumption, and consequently the mutual trust, would be undermined. Despite this possibility, the Court's jurisprudence, as analysed so far, seems to suggest that mutual trust could not be limited, as this hypothesis was not even considered.

This approach was quite perplexing, particularly in relation to the violation of fundamental rights such as the principle of non-refoulement, which, as extensively emphasized in the previous chapter, is an absolute principle and does not permit exceptions. Indeed, mutual trust should not be applied in situations where there is a risk of inhuman or degrading treatment within an EU country. However, the Court's decisions appeared to be incompatible with each other. On one hand, it stated several times that the EU is based on respect for fundamental rights, and it recognised the scope of the principle of non-refoulement.⁶⁸⁹ On the other hand, it affirmed that Member States cannot verify if other States respect fundamental rights as this would undermine the principle of mutual trust. However, not giving the possibility of verifying that the States actually respect fundamental rights, such as the prohibition against refoulement, would create an indirect limit to its correct enforcement, and would violate its absolute nature.

As will be analysed in the this and the next section, the Court of Justice has begun to change its attitude on the principle of mutual trust by adopting limitations. However, these limitations appear not to have been sufficient to ensure the correct application of fundamental rights, especially the principle of non-refoulement.

3.4.1. Rethinking the Limits of Mutual Trust in EU Law

It is essential to remember that all EU Member States are also members of the Council of Europe and, consequently, are signatories to the ECHR. Furthermore, these States are obligated to respect the Charter of Fundamental Rights, which constitutes a primary source of EU law. This means that fundamental rights should prevail over mutual trust which is not even included in the EU Treaties. In addition to these documents, fundamental rights are protected within the European Union

⁶⁸⁹ Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198, para 85.

through various secondary sources of EU law. For instance, the 2002 Framework Decision on EAW and the Regulations and Directives of the CEAS include such protections.⁶⁹⁰ On the other hand, as has been previously emphasized, States are duty-bound to presume that all other Member States respect fundamental rights.⁶⁹¹ This presumption, as highlighted by Lenaerts, entails a duty of sincere cooperation among the Member States and between the Member States and the Union.⁶⁹² In the context of criminal law, it's important to note that the executing State is obliged to execute or recognize an EAW except for the reasons explicitly stated in the Framework Decision. This implies that a State must accept and recognize the legislations and criminal procedures of another Member State. Such recognition requires a high level of confidence between Member States⁶⁹³ and, as argued, this trust is rooted in the implementation and respect for the common values outlined in Article 2 of the TEU.⁶⁹⁴ Specifically, the CJEU affirmed that mutual trust is based on respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights.⁶⁹⁵ Furthermore, all Member States are obligated to respect the EU Charter of Fundamental Rights and the ECHR. Consequently, mutual trust presupposes that all Member States equally guarantee fundamental rights as they share common values and standards of protection.⁶⁹⁶ Therefore, the approach of the Court of Justice, as analysed thus far, was not completely illogical. In fact, the absence of mutual trust would lead judicial authorities of Member States to refuse the application of mutual recognition. As a result, this stance would undermine the effectiveness of EU judicial cooperation and, more broadly, the realization of the Area of Freedom, Security, and Justice. Nonetheless, presuming that all EU Member States uniformly respect fundamental rights can be challenging. Indeed, due to socio-economic and geopolitical disparities, there is a concrete disparity among States in respect of fundamental rights.⁶⁹⁷

⁶⁹⁰ See Articles 6, 8, 9, 10 11 and 27 of the Dublin III Regulation.

⁶⁹¹ Case C-216/18 PPU *LM*, EU:C:2018:586, para. 40; Case C-220/18 PPU *ML*, EU:C:2018:589, para. 53.

⁶⁹² Koenraad Lenaerts, *La vie après l'avis: Exploring the principle of mutual (yet not blind) trust* (2017) *Common Market Law Review*, Vol. 54 No. 3, page 813.

⁶⁹³ Valsamis Mitsilegas (n 684) 457.

⁶⁹⁴ Tony Marguery, *Towards the end of mutual trust? Prison conditions in the context of the European Arrest Warrant and the transfer of prisoners framework decisions* (2018) *Maastricht Journal of European and Comparative Law*, Vol. 25 (6) 704–717, page 707.

⁶⁹⁵ Opinion 2/13, on EU Accession to the ECHR EU:C:2014:2454, para 168; C-216/18 PPU *LM*, para. 35; C-220/18 PPU *ML*, para. 48.

⁶⁹⁶ Tony Marguer (n 694).

⁶⁹⁷ *Ibid*, page 711.

Consequently, over the years, national judges in the Member States have voiced significant concerns about applying mutual trust in relation to the EAW. Despite the decisions of the Court of Justice, national judges were hesitant to transfer a person to a requesting state that did not respect human rights.⁶⁹⁸ Following this, legal scholars⁶⁹⁹ and other European institutions began to critique the Court of Justice's stance.⁷⁰⁰ Specifically, the Council, the Commission, and the European Parliament started to acknowledge that mutual trust cannot be simply presumed.⁷⁰¹ In this context, in 2014, the European Investigation Order (EIO) was adopted, which explicitly states that the AFSJ is based on mutual trust and a rebuttable presumption of compliance by Member States with fundamental rights.⁷⁰²

Following such criticism, the Court of Justice began to revise its perspective. Initially, it stated that mutual trust could be limited in exceptional cases,⁷⁰³ and subsequently, it broadened these restrictions.⁷⁰⁴ However, as will be analysed shortly, this development occurred cautiously, with particular attention to the principle of mutual trust. In this context, Opinion 2/13 is noteworthy. In its ruling, the CJEU extended the principle of mutual trust to a fundamental element of the EU legal system but also specified that the presumption that all states respect fundamental rights cannot be absolute. Specifically, the Court asserted: "[w]hen implementing EU law, the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU."⁷⁰⁵ From this statement, albeit in a restricted way, it is clear that the Court has opened a prospect to the possibility of limiting the principle of mutual trust.

⁶⁹⁸ German Constitutional Court, Judgment of 30 June 2009 2 BvE 2/08, para. 113; Polish Constitutional Court, 27 April 2005, Decision P 1/05.

⁶⁹⁹ Susie Alegre and Marisa Leaf, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study - The European Arrest Warrant' (2004) 10 European Law Journal, page 200; Steve Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?' (2004) 41 Common Market Law Review, page 5.

⁷⁰⁰ Jacob Öberg (n 624) 35.

⁷⁰¹ Auke Willem (n 627) 227.

⁷⁰² See Recital 19 of the Directive 2014/41/EU.

⁷⁰³ Joined cases C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] ECLI:EU:C:2011:865.

⁷⁰⁴ Case C-216/18 *PPU LM* [2018] ECLI:EU:C:2018:586.

⁷⁰⁵ Opinion 2/13, on EU Accession to the ECHR EU:C:2014:2454, para 192.

This limitation was first recognized, as will be discussed in the next section, within the CEAS. However, in the criminal law area, this new approach was not immediately adopted by the Court of Justice. For instance, in the Lanigan case, the Court was asked whether non-compliance with custody terms under Article 17 of the Framework Decision 2002/584 could negate the duty to execute the EAW. Specifically, the case involved a person arrested under an EAW in Dublin, pending extradition to Northern Ireland for trial. Article 17 of the EAW Framework Decision stipulates that the maximum duration of custody for executing the EAW is 90 days. However, the accused remained in custody for approximately two consecutive years. Consequently, Lanigan contested the execution of the EAW on the basis that the EAW could not be executed once the deadline expired, in light of Article 6 of the EU Charter. The CJEU dismissed Lanigan's arguments, holding that non-execution of the EAW after the deadline would undermine the objective of accelerating and simplifying judicial cooperation.⁷⁰⁶ Furthermore, the Court ruled that according to the principle of mutual recognition, Member States are principally obliged to execute a European arrest warrant and can only refuse its execution in the cases provided for in Articles 3, 4, and 4 bis of the Framework Decision.⁷⁰⁷ With this judgment, the Court did not consider fundamental rights as grounds for non-execution of the EAW and did not take into account the limitation of mutual trust as articulated in another area of EU law.

The turning point for the Court in the area of criminal justice occurred in the 2016 joined cases of *Aranyosi and Căldăraru*.⁷⁰⁸ The central question was whether the execution of the EAW was admissible in cases where there were strong reasons to believe that the detention conditions in the requesting state violated fundamental rights.

In the first case, Hungarian judicial authorities issued an EAW for several theft offences against Mr Aranyosi. In the second case, a Romanian court of first instance issued an EAW against Mr Căldăraru for the execution of a prison sentence of one year and eight months for driving without a license. Both defendants, arrested in Germany, did not consent to their surrender.

The German authorities expressed serious concerns about the risk of violating the prohibition of inhuman and degrading treatment due to poor prison conditions in the requesting States. These concerns were primarily based on the rulings of the ECtHR, which had repeatedly reported

⁷⁰⁶ Case C-237/15 PPU *Minister for Justice and Equality v Francis Lanigan* [2015] ECLI:EU:C:2015:474, para 40.

⁷⁰⁷ *Ibid*, para 36.

⁷⁰⁸ Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] EU:C:2016:198.

violations of Article 3 of the ECHR by Romania and Hungary due to prison overcrowding.⁷⁰⁹ In this regard, the European Court in its rulings stated that Article 3 ECHR, which corresponds to Article 4 of the EU Charter, implies the obligation to ensure that the conditions of detention respect the health and human dignity of prisoners.⁷¹⁰

Referring to this jurisprudence, the German court consequently asked the CJEU whether, considering the conditions of the Romanian and Hungarian prisons, it was possible to proceed with the execution of the EAW, taking into account the absolute nature of Article 4 of the EU Charter. In this context, Advocate General Bot, following the consistent jurisprudence of the Court of Justice in this area, confirmed the exhaustive nature of the impediments established by the Framework Decision.⁷¹¹ He held that mutual trust precludes a Member State from verifying whether another Member State has actually complied with fundamental rights.⁷¹²

AG Bot's approach thus clearly demonstrates how the principle of mutual trust has been used to circumvent the correct application of fundamental rights, particularly an absolute right such as the prohibition of torture, inhuman, and degrading treatment. Additionally, this approach seemed to indirectly violate the principle of non-refoulement. In fact, although this principle is expressly included in Article 19 of the EU Charter, it is widely recognized that it can be interpreted in conjunction with Article 4.

Despite AG Bot's opinion, the Grand Chamber of the Court of Justice chose to diverge from his conclusions. It began its analysis by affirming that mutual trust is an essential element of the AFSJ and that the EAW is based on the principle of mutual recognition.⁷¹³ This principle then rests on the confidence that all EU Member States can provide effective and equivalent protection of fundamental rights.⁷¹⁴ Moreover, the CJEU confirmed that the EAW cannot be executed only on the grounds expressly indicated in Articles 3 and 4 of the Framework Decision.⁷¹⁵

The turning point here is that the Court, unlike its past rulings, stated that if the judicial authorities of the executing state have evidence that there is a real risk of inhuman or degrading treatment of

⁷⁰⁹ See, *Vociu v. Romania*, App. no. 22015/10, (ECtHR 10 June 2014); *Varga v. Hungary*, App. nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, & 64586/13 (ECtHR 10 June 2015).

⁷¹⁰ *Ibid.*

⁷¹¹ Opinion of Advocate General Bot, Joined Cases C404/15 & C659/15, *Aranyosi and Căldăraru* (2016), paras. 78–93.

⁷¹² *Ibid.*, para 109.

⁷¹³ Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] EU:C:2016:198, para 75.

⁷¹⁴ *Ibid.*, para 77.

⁷¹⁵ *Ibid.*, para 80.

persons detained in the requesting country, those authorities can decide whether or not to proceed with the execution of the EAW, and hence with the transfer of the person to that Member State.⁷¹⁶ In this context, the Court developed a two-level test. Firstly, the executing authorities must rely on objective, reliable, specific, and up-to-date information about the detention conditions in the requesting state, demonstrating systematic or generalized deficiencies.⁷¹⁷ Subsequently, if such deficiencies are identified, the executing judicial authorities must conduct a precise and specific assessment to determine whether there are substantial grounds to believe that the person in question would be subjected to inhuman or degrading treatment.⁷¹⁸ Therefore, EU States are allowed to deviate from the assumption that all Member States uniformly respect fundamental rights. In essence, the Court recognized that mutual trust can be limited under exceptional circumstances.⁷¹⁹

However, it should be noted that the CJEU stated that the execution of the EAW cannot be abandoned, but only postponed, in cases where there is a real risk of inhuman or degrading treatment.⁷²⁰ According to this stance, the Court appears to have attempted to balance the duty to respect fundamental rights with the obligation to comply with the principle of mutual trust. Some authors view the Court's decision as an attempt to ensure greater protection of fundamental rights while guaranteeing the principle of mutual trust.⁷²¹ However, the doubt that may arise from this approach is that continuing to protect mutual trust would pose the risk of not guaranteeing the correct and effective application of fundamental rights. In addition, although the principle of non-refoulement was not explicitly mentioned in this specific case, the CJEU recognised that Article 3 ECHR, which includes the prohibition of refoulement, corresponds to Article 4 of the EU Charter. Therefore, the transfer of a person to a country where there is a risk of inhuman and degrading treatment might involve its violation. Nevertheless, as will be seen in the next section, the Court of Justice with its double test and the verification of systematic deficiencies seems to have introduced a limit to the absolute principle of non-refoulement.

⁷¹⁶ Ibid, para 88.

⁷¹⁷ Ibid, para 89.

⁷¹⁸ Ibid, para 92.

⁷¹⁹ Ibid, para 78.

⁷²⁰ Ibid, para 98.

⁷²¹ Wouter van Ballegooij and Petra Bárd, 'Mutual Recognition and Individual Rights. Did the Court Get It Right?' (2016) 7 NJECL 439; Adriano Martufi and Daila Gigengack, Exploring mutual trust through the lens of an executing judicial authority: The practice of the Court of Amsterdam in EAW proceedings (2020) New Journal of European Criminal Law, Vol. 11(3) 282–298, page 284.

The limitation to the principle of mutual trust is reaffirmed by the Court of Justice in more recent decisions, such as the *Puig Gordi*, *EDL* and *ML* case,⁷²² which involved a request for an EAW for a Hungarian individual who had fled to Germany. Following the *Varga* case, in which the ECtHR identified the risk of violations of inhuman and degrading treatment in Hungarian prisons,⁷²³ the German authorities sought to verify the conditions of the prison where the accused would be detained.

Based on the information received, the German authorities had no objections to executing the EAW. However, a complication arose when the Hungarian authorities indicated the possibility of transferring the individual to other prisons. Consequently, the execution authorities sought information about the conditions of these other institutions and requested the intervention of the CJEU. In this case, as well, the Court of Justice reiterated that mutual trust is a fundamental element of EU law, requiring the presumption that all Member States comply with fundamental rights.⁷²⁴ Therefore, except in exceptional circumstances, States cannot verify whether another Member State has actually observed the fundamental rights guaranteed by the EU.⁷²⁵ Furthermore, the Court of Justice recalled that the execution of the EAW can be limited only for the grounds exhaustively listed in the Framework Decision.⁷²⁶ Nonetheless, if there is a risk of violating the prohibition of inhuman and degrading treatment, the executing authorities can verify the detention conditions in the requesting State. Thus, the Court reconfirms that the principle of mutual trust can be limited⁷²⁷ and appears to have given priority to the absolute nature of Article 4 of the EU Charter.

The CJEU, however, recalled that the control by the executing authorities has an exceptional nature. Thus, verifying if all prisons, where the individual concerned might be detained, violate the prohibition of inhuman and degrading treatment would be excessive, since such an assessment would render the EAW ineffective.⁷²⁸ It was concluded that, in light of the principle of mutual trust, the executing authorities are only required to assess the conditions of detention in the prisons

⁷²² Case C-158/21 *Puig Gordi and Others* [2023] ECLI:EU:C:2023:57; Case C-699/21 E.D.L. (Motif de refus fondé sur la maladie) ECLI:EU:C:2023:295; Case C-220/18 PPU, *ML v Generalstaatsanwaltschaft Bremen*, [2018] ECLI:EU:C:2018:589.

⁷²³ *Varga and Others v. Hungary* App nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, (ECtHR, 10 March 2015).

⁷²⁴ Case C-220/18 PPU, *ML v Generalstaatsanwaltschaft Bremen*, [2018] ECLI:EU:C:2018:589, para 49.

⁷²⁵ *Ibid*, para 50.

⁷²⁶ *Ibid*, para 54.

⁷²⁷ *Ibid*, para 56.

⁷²⁸ *Ibid*, para 84.

where it is anticipated that the individual will be detained, even if only on a temporary or transitional basis.⁷²⁹ In other words, a Member State can verify the conditions of the prisons where the person will be detained for a short period but is not obliged to check the conditions of prisons where the person might be transferred in the future.

Following this approach, although there is a risk of violation of fundamental rights, the Court, in order to guarantee the effectiveness of the EAW and mutual trust, does not give the possibility to verify whether or not such rights are concretely violated. Hence, it appears that even though the CJEU stated that mutual trust can be limited in case of fundamental rights violations, in practice found a way to circumvent such limit.

This progressive shift of the Court in the area of criminal law in favour of human rights also developed in parallel within the field of asylum. However, as will be seen in the following sections, even in this area, the Court, while acknowledging the significance of upholding human rights and further limiting the principle of Mutual Trust, fails to adopt a definitive stance in support of the principle of non-refoulement.

3.4.2. The Hungarian and Polish Cases on Mutual Trust and Their Political Implications in the EU

As noted above, mutual trust is based on the assumption that all member states respect EU law, particularly fundamental rights. However, a significant challenge arises when the risk of not respecting fundamental rights stems from the political decisions of one or more member states. A clear example comes from the erosion of the rule of law in Poland and Hungary in recent years. Specifically, as will be further examined in the final chapter, we can consider the implementation of the “safe third country” concept and “push-back” policies adopted by Hungary, and the situation in Poland that led the European Commission to activate Article 7 of the TEU.

These political changes show concretely that not all EU Member States guarantee the same level of fundamental rights protection. Consequently, the presumption on which the mutual trust is based can no longer be assumed. In the past few years, in fact, the Hungarian and Polish governments have been criticized for adopting reforms that have damaged the independence of the justice system. In Hungary, the government has been accused of forcibly retiring numerous judges and

⁷²⁹ Ibid, para 87.

granting political bodies increased control over the judiciary.⁷³⁰ Similarly, in Poland, the government has increased political control over the judiciary and adopted a law that forced several Supreme Court judges to retire unless they were granted an extension from the government.⁷³¹

As a result of these reforms, the question arose in Europe as to whether these countries were still able to ensure the standards set by Article 2 TEU.⁷³² Numerous national and international bodies have expressed significant concerns regarding the rule of law and respect for fundamental rights in Poland.⁷³³ Addressing these concerns, the Polish Supreme Court asked the Court of Justice to decide whether the forced retirement of judges violates the EU guarantees on the independence of the judiciary.⁷³⁴ Simultaneously, the European Commission initiated several infringement procedures against Poland.⁷³⁵

Marking a significant development, the Commission activated the procedure under Article 7 of the TEU for the first time.⁷³⁶ This procedure empowers the Council to determine if there is a clear risk of a serious breach by a Member State of the EU values referred to in Article 2 TUE.⁷³⁷

Consequently, these political reforms have led national courts within the EU to raise questions about whether the principle of mutual trust and mutual recognition should continue to apply to the Polish judicial system.⁷³⁸ This reassessment can be shown in the *LM* judgment.⁷³⁹

The case concerns a series of European arrest warrants issued by the Polish authorities against a Polish citizen accused of drug trafficking. The accused person was then arrested in Ireland and brought before the High Court where he claimed that he did not consent to his surrender. To confirm his position, he argued that the transfer to Poland would expose him to a real risk of denial

⁷³⁰ Ronan McCrea, Hungary, Poland bigger threat to EU than Brexit: Opinion Mutual ..., *The Irish Times* (1921-Current File), 14 September 2018, European Newstream, page 16.

⁷³¹ Adam Łazowski, *The Sky Is Not the Limit: Mutual Trust and Mutual Recognition après Aranyosi and Caldaru* (2018) *Croatian Yearbook of European Law & Policy*, Vol. 14 No. 1, page 19.

⁷³² *Ibid.*

⁷³³ See Case C-216/18 PPU *LM*, [2018] ECLI:EU:C:2018:586, point 20 and 21; Poland: Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session (Venice, 14-15 October 2016)

⁷³⁴ Case C-537/18 *YV v Krajowa Rada Sądownictwa* [2020] ECLI:EU:C:2020:136; Case C-585/18 *A. K. v Krajowa Rada Sądownictwa*, (2020/C 27/07)

⁷³⁵ Elisa Cimador, *La Corte di giustizia conferma il potenziale della procedura d'infrazione ai fini di tutela della rule of law. Brevi riflessioni a margine della sentenza Commissione/Polonia (organizzazione tribunali ordinari)*, eurojust.it, ISSN 2384-9169, Fascicolo n. 1, (2020), page 61.

⁷³⁶ Reasoned Proposal In Accordance With Article 7(1) Of The Treaty On European Union Regarding The Rule Of Law In Poland, Brussels, 20.12.2017, COM(2017) 835 final.

⁷³⁷ See Article 7 para 1 of the TEU.

⁷³⁸ Adam Łazowski (n 731) 20.

⁷³⁹ Case C-216/18 PPU *LM* [2018] ECLI:EU:C:2018:586.

of justice. In particular, he stated that the legislative reforms of the Polish justice system would deny his right to a fair trial. Thus, according to him, those reforms would undermine the mutual trust between the issuing and executing authority and put into question the validity of the EAW.⁷⁴⁰ At this juncture, the European Commission had already activated the procedure under Article 7 TEU, and its recommendations were publicly available. Consequently, the Irish High Court made a reference for a preliminary ruling to the Court of Justice. The Irish Court asked whether, in case of cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the judicial system itself in the issuing Member State no longer functions according to the rule of law, it should make any further assessment of the exposure of the interested party to the risk of an unfair trial.⁷⁴¹

In its ruling, the Court of Justice began by reaffirming the two-step approach established in the *Aranyosi* case. Initially, the Court stated that the executing judicial authority, as a first step, must assess the existence of a real risk of violation of the fundamental right to a fair trial, connected with a lack of independence of the courts on account of systemic deficiencies.⁷⁴² Then, the authority must specifically and precisely assess whether there are substantial grounds to believe that the requested person, upon surrender to the issuing Member State, would face such a risk.⁷⁴³ Interestingly, the activation of Article 7 TUE by the Commission seemed not be relevant for the Court, which affirmed that such factor can be taken into account as a ground to limit the execution of the EAW only when the European Council determine a serious and persistent breach in the issuing Member State of the principles set out in Article 2 TEU.⁷⁴⁴

Furthermore, the Court acknowledged the obligation under the Framework Decision to respect fundamental rights as enshrined in Article 1, paragraph 3. It emphasized the necessity for national authorities to engage in dialogue to ascertain the existence of a real risk of violation of fundamental rights.⁷⁴⁵ If the information received from the issuing authority does not lead to the exclusion of the existence of a real risk that the person concerned will suffer a violation of his fundamental right

⁷⁴⁰ Ibid, point 16.

⁷⁴¹ Ibid, point 25.

⁷⁴² Ibid, point 61.

⁷⁴³ Ibid, point 68.

⁷⁴⁴ Ibid, points 71 and 72.

⁷⁴⁵ Ibid, points 76 and 77.

to an independent tribunal, the executing judicial authority must refrain from executing the European arrest warrant.⁷⁴⁶

This decision highlights an evolution in the Court's approach of not only considering legal aspects but also looking at the complex political landscape of the European Union.

In fact, while adhering to the two-step test for assessing violations of fundamental rights, the Court has shown a willingness to incorporate Article 1(3) of the Framework Decision as an additional criterion for failure to execute the EAW. This approach therefore underscores the Court's awareness of existing political realities.

Moreover, even the need for dialogue between member state authorities, as called for by the Court, goes beyond legal procedures, and seems more reflective of diplomatic and political interactions. Thus, it appears from these decisions that the Court is trying to delicately balance legal principles with prevailing political dynamics. In fact, on the one hand, the Court continues to uphold the principle of mutual trust, albeit with new limits, but on the other hand, it demonstrates a greater sensitivity to the political climate that influences, and sometimes complicates, the application of fundamental rights in the area of EU justice.

It should also be emphasized that this delicate political climate is reflected not only within the EU through the Court's decisions, but also in the EU's foreign policies, particularly in agreements between the EU and third states. For example, as will be seen in the next chapter, through the EU-Turkey agreement it appears that the EU has sacrificed its values in the field of human rights in favour of political arrangements.

3.4.3. Navigating Mutual Trust and Non-Refoulement within the CEAS

As pointed out earlier, the principle of mutual trust is a fundamental component of the AFSJ, and its interaction with fundamental rights has been especially recognized not only in the field of criminal law but also in the field of asylum. Indeed, as will be seen in these sections, the Court's approach to asylum closely reflects its position in criminal law. This might suggest that perhaps the position adopted in criminal law has made it difficult for the Court to sustain a different strategy in the asylum context, thus forcing it to maintain the same approach in applying legal principles in both areas.

⁷⁴⁶ Ibid, point 78.

Within the European Union, the right to asylum is safeguarded by the EU Charter of Fundamental Rights.⁷⁴⁷ Additionally, the TEU has established a Common European Asylum System, which sets minimum standards and procedures for granting refugee status and subsidiary protection to third-country nationals.⁷⁴⁸

In order to ensure effective and prompt access to procedures for international protection, the Dublin III Regulation has established a hierarchical method for determining the Member State responsible for examining the asylum application.⁷⁴⁹ As explored in the first chapter, primary considerations include family reunification criteria. For example, if an unaccompanied minor seeks international protection, the responsible Member State is the one where a family member is legally residing.⁷⁵⁰ Similarly, if a family member of the applicant is located in another EU State, that State is deemed responsible.⁷⁵¹

Subsequently, the Regulation takes into account the documents held by the applicant. As stipulated in Article 12, if the applicant possesses a valid residence document or visa, the Member State that issued these documents is responsible.⁷⁵² The Regulation also addresses transit zones, specifying that if an application for international protection is filed in an international transit area, such as an airport, the Member State of that area is responsible for examining the application.⁷⁵³ The last and also the notoriously most applied rule establishes that if it is not possible to adopt this hierarchical order, the first Member State in which the application for international protection was presented is competent to examine it.⁷⁵⁴ From the Regulation therefore is clear that in the EU, asylum seekers cannot choose where to lodge an application for international protection. In fact, according to the hierarchical criteria of the Regulation, there is only one State competent to examine this application.⁷⁵⁵

Furthermore, the established order serves a dual purpose. Firstly, the Regulation aims to prevent the phenomenon of “refugees in orbit,” which occurs when asylum seekers are transferred among States, and not a single State recognised itself responsible to examine the asylum application.

⁷⁴⁷ See Article 18 of the Charter of Fundamental Rights Of The European Union.

⁷⁴⁸ See Article 78, para 1 of the TFEU.

⁷⁴⁹ See Chapter 3 of the Dublin III Regulation.

⁷⁵⁰ See Article 8, para 1 and 2 of the Regulation (EU) No 604/2013.

⁷⁵¹ See Regulation (EU) No 604/2013, Articles 9, 10 and 11.

⁷⁵² See Articles 12 paras 1 and 2 of the Regulation (EU) No 604/2013.

⁷⁵³ See Article 15 of the Regulation (EU) No 604/2013.

⁷⁵⁴ See Article 3, para of the Regulation (EU) No 604/2013.

⁷⁵⁵ Ibid, Article 3 para 2.

Secondly, the Regulation has tried to solve the problem of asylum shopping, which is the practice of applying for international protection in more than one State Member.⁷⁵⁶ This means that if a third-country national applies for asylum in a Member State that is not primarily responsible for examining that application, the State is authorized to transfer the applicant to the competent Member State.⁷⁵⁷ Consequently, the Regulation is based on an automatic interstate cooperation mechanism. In fact, the Member State responsible under the Regulation is obliged to take charge or take back asylum seekers and to examine the application for international protection.⁷⁵⁸

This transfer mechanism is further supported by the Eurodac Regulation, which established a fingerprint database system. Specifically, Member States are required to take fingerprints of individuals applying for international protection and transmit them to a central system accessible to all EU countries.⁷⁵⁹ Through this Central System, all Member States are able to know in which country the asylum seeker applied for protection. In this way, as indicated by the Dublin Regulation, if the asylum seeker subsequently lodges an application in another State, that country can send him or her back to the responsible State. This automatic mechanism highlights the objective of the Dublin System which is to ensure a rapid processing of applications for international protection. This was also confirmed by the Court of Justice which stated that one of the main objectives of the Dublin Regulation is the establishment of a clear and workable method for quickly determining the Member State responsible for processing an asylum application.⁷⁶⁰

Therefore, through the Dublin system, an EU State is authorized to transfer an asylum seeker to another Member State. This interstate movement falls within the ambit of the principle of non-refoulement, highlighting the complex interplay between the mechanisms of the Dublin Regulation and fundamental rights within the EU asylum framework.

In this context, it's crucial to recall that the European Union, as delineated in Article 2 of the TEU, is founded on respect for human rights.⁷⁶¹ Additionally, the transfer of individuals must align with Article 19 of the EU Charter of Fundamental Rights, which explicitly prohibits the removal, expulsion, or extradition of a person to a state where they risk facing the death penalty, torture, or

⁷⁵⁶ Adelina Adinolfi, *Riconoscimento dello status di rifugiato e della protezione sussidiaria: verso un sistema comune europeo?* (2009) *Rivista di diritto internazionale*, ISSN 0035-6158, Vol. 92, N° 3, page 673.

⁷⁵⁷ Opinion of Advocate General Trstenjak, Case C-411/10, *N.S. v. Secretary of State for the Home Department*, paragraphs 94.

⁷⁵⁸ See Article 18 of the Regulation (EU) No 604/2013.

⁷⁵⁹ See Article 9 para 1 of the Regulation (EU) No 603/2013.

⁷⁶⁰ Case C-394/12, *Shamso Abdullahi v Bundesasylamt*, [2013] ECLI:EU:C:2013:813, para 59.

⁷⁶¹ See Article 9 para 1 of the TEU.

other inhuman or degrading treatment or punishment.⁷⁶² As a primary source of EU law, the Charter holds the same legal status as the Treaties and must be respected by both European institutions and Member States.⁷⁶³ This means, that everyone can invoke the provisions of the Charter to challenge EU law or national law. In addition, it should be noted that the prohibition of refoulement is also included in Article 3 of the ECHR,⁷⁶⁴ and according to Article 6, paragraph 3 of the TEU, fundamental rights as guaranteed by the ECHR constitute general principles of the Union's law.⁷⁶⁵ Additionally, as previously mentioned, Article 3 of the ECHR corresponds to Article 4 of the EU Charter, suggesting that the principle of non-refoulement can be indirectly derived from this Article as well.

The principle of non-refoulement, as outlined in these two documents, is considered an absolute right, not subject to any limitations. This position has been consistently upheld by the ECtHR⁷⁶⁶ and is reinforced by Article 52, paragraph 3 of the EU Charter, which stipulates that the rights contained in the Charter have the same meaning and scope as those guaranteed by the ECHR.⁷⁶⁷

The principle of non-refoulement can also be found in the Preamble of the Dublin III Regulation which states that the Regulation must operate in compliance with the principle of non-refoulement.⁷⁶⁸ In addition, as already indicated in the previous chapter, the prohibition of refoulement is also foreseen in several international treaties, including the 1951 Refugee Convention and the Convention against Torture, and all EU member states are also parties to these Documents. This means, that all EU countries are required to respect the provision foreseen by these Treaties.

Therefore, considering such obligations, it is clear that when a State has to transfer an asylum seeker to another Member State, under the Dublin III Regulation, it must first ensure that this person does not run the risk of suffering torture, inhuman or degrading treatment in the country of

⁷⁶² See Article 19 of the EU Charter of Fundamental Rights.

⁷⁶³ See Article 6, para 1 of the TEU.

⁷⁶⁴ See *Soering v. United Kingdom* App no 14038/88 (ECtHR, 7 July 1989), para. 91; *Cruz Varas v. Sweden* App no 15576/89 (ECtHR, 20 March 1991), para 69; *Vilvarajah v. United Kingdom* App no 13163/87 (ECtHR, 30 October 1991), para 103; *Ahmed v. Austria* App no 25964/94 (ECtHR, 17 December 1996), para 39.

⁷⁶⁵ Ibid, Article 6, para 3.

⁷⁶⁶ See for example *Vilvarajah and Others v. United Kingdom*, App nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87 (ECtHR 30 October 1991), *Chahal v. United Kingdom*, App no. 22414/93 (ECtHR 15 November 1996); *Saadi v. Italy* App no 37201/06 (ECtHR, 28 February 2008), para 127; *Hirsi Jamaa and others v. Italy* App no 27765/09, (ECtHR, 23 February 2012), para 146.

⁷⁶⁷ See Article 52, para 3 of the EU Charter of Fundamental Rights.

⁷⁶⁸ See recital 3 of the Regulation (EU) No 604/2013.

destination. Consequently, if there is a serious risk that the responsible State will not comply with its protection obligations, the first State cannot transfer the applicant, otherwise, it would violate the principle of non-refoulement.

However, the Dublin system operates on an almost automatic and rapid mechanism, and continuous verification that the destination country respects fundamental rights could compromise its efficiency. For this reason, the automatic transfer of asylum seekers from one Member State to another is justified based on a high level of confidence that fundamental rights are fully respected by all EU Member States. Therefore, also the Dublin System implements the principle of mutual trust. The Dublin III Regulation requires that all Member States comply with EU law and fundamental rights, as a necessary condition for the transfer of persons among States. Specifically, as indicated by Recital 3 of the Regulation, mutual trust is based on the presumption that all Member States respect the principle of non-refoulement, consequently all EU states can be considered safe countries for third-country nationals.⁷⁶⁹ This principle is further reiterated in Recital 22, which envisions the development of mutual trust among Member States with respect to asylum policy.⁷⁷⁰ Consequently, mutual trust in the quality and efficiency of each other's asylum systems is deemed a necessary condition for the functioning of the Dublin system and an essential element of the Common European Asylum System.⁷⁷¹ Based on this trust and the presumption that all EU countries are safe, it should be possible to transfer applicants for international protection without the risk of violating the principle of non-refoulement.

As previously indicated, however, the conflict between mutual trust and fundamental rights emerged when it was demonstrated that not all Member States can respect fundamental rights equally.⁷⁷² In the CEAS, this tension was further intensified during the so-called EU refugee crisis. In fact, the country of first entry rule established by the Dublin Regulation has proved to be ineffective as it has overloaded a limited number of Member States which, due to their geographical location, constitute the traditional points of entry into the EU territory for those seeking international protection.⁷⁷³ The exponential increase in migratory flows led to the collapse

⁷⁶⁹ Ibid.

⁷⁷⁰ See recital 22 of the Regulation (EU) No 604/2013.

⁷⁷¹ Joined Cases C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department*, [2011] ECLI:EU:C:2011:865, para 79.

⁷⁷² See also *M.S.S. v Belgium and Greece*, App no. 30696/09 (ECtHR 21 January 2011) where the ECtHR condemned Greece for violation of Article 3 ECHR.

⁷⁷³ Georgios Anagnostaras, *The Common European Asylum System: Balancing Mutual Trust Against Fundamental Rights Protection* (2020) *German law Journal* 21, page 1196.

of the reception infrastructures in these States, resulting in the degradation of their asylum systems. As a result, serious concerns have been raised about their ability to respect the fundamental rights of applicants for international protection.⁷⁷⁴

The collapse of the asylum system and the poor conditions in reception centres led applicants for international protection to migrate within the EU to countries offering better protection conditions. However, due to these secondary movements, under the Dublin Regulation, Member States had to transfer these persons to the country responsible for examining the application for international protection. This duty to respect the Dublin Regulation and the risk of violating fundamental rights has therefore raised several concerns among Member States about which rules to follow. In fact, on the one hand, if a Member State transfers an asylum seeker to another member state without verifying that the fundamental rights of the asylum seeker have been respected in the State of destination, the first State may be responsible for violating the principle of non-refoulement. On the other hand, if an EU Member State, before transferring the asylum seeker, controls whether the State of destination respects the fundamental rights or not, the first State might undermine the principle of mutual trust and consequently the efficiency of the entire Dublin System.

In this context, the European Court of Human Rights has consistently prioritized the principle of non-refoulement, as demonstrated in judgments like the *T.I.* case. This case involved the transfer of an asylum seeker from the UK to Germany under the Dublin Convention, the precursor to the Dublin II Regulation. According to the Convention, Germany was the country responsible for examining the asylum application. However, the applicant argued that there was a risk that the German authorities would transfer him to Sri Lanka where he could face a real risk of torture and inhuman treatment. The ECtHR without explicitly mentioning the principle mutual trust, stated that the UK could not automatically enforce the provisions of the Dublin Convention.⁷⁷⁵ In essence, the Court held that Germany's status as a party to the ECHR did not absolve the UK from verifying whether there was a risk of violating the principle of non-refoulement. Similarly, in the *K.R.S.* case, the ECtHR examined the situation of an Iranian asylum seeker facing expulsion from the UK to Greece under the Dublin Regulation. Mirroring the *T.I.* case, the Court reaffirmed that transferring an individual to an intermediary country, even if it is a Contracting State, does not

⁷⁷⁴ Ibid, page 1197.

⁷⁷⁵ *T.I. v. The United Kingdom*, App. no. 43844/98, (ECtHR 7 March 2000) page 15.

diminish the responsibility of the original country (in this case, the UK) to ensure that the applicant is not subjected to treatment contrary to Article 3 of the ECHR.⁷⁷⁶

3.4.4. Judicial Crossroads: Analysing the Diverging Paths of the ECtHR and the CJEU

In these two cases, however, it appears that the ECtHR did not thoroughly consider the relationship between mutual trust and non-refoulement. On the contrary, in the *M.M.S* case, the court underlined the superiority of the principle of non-refoulement, over the rules of the Dublin system. The case concerns an Afghan citizen who fled Kabul and entered the European Union via Greece. Subsequently, the applicant moved to Belgium and applied for asylum there. However, under the Dublin Regulation, Greece was the responsible State to examine the asylum application, hence the Belgian authorities ordered his transfer back to Greece. Despite the applicant's attempt to challenge the transfer decision, complaining about the deficiencies of the Greek asylum system, the transfer took place. In Greece, the applicant was detained in a centre for asylum seekers and after his release he was forced to live on the streets, completely without assistance from local authorities. Thus, he applied to the ECtHR alleging that the Greek and Belgian authorities had failed in their obligations under Articles 2, 3 and 13 of the Convention.

In its decision, the European Court of Human Rights recognised that the Member States placed at the EU external border were encountering considerable difficulties in coping with the growing influx of migrants and asylum seekers, and with the transferring under the Dublin Regulation, the situation for some States had further aggravated. However, given the absolute nature of Article 3 ECHR, these problems cannot absolve a State of its obligations under that provision.⁷⁷⁷ Consequently, the Court held both Greece and Belgium responsible for their failure to uphold these obligations.

In relation to Greece, the European Court of Human Rights found that the country had violated Article 3 of the ECHR due to the degrading conditions of the detention centre where the asylum seeker was held, as well as the inhumane living conditions he faced after his release.⁷⁷⁸ The Court took into account reports from various international organizations that had visited the detention

⁷⁷⁶ *K.R.S. v. United Kingdom*, App no. 32733/08, (ECtHR, 2 December 2008) page 16.

⁷⁷⁷ *M.S.S. v Belgium and Greece*, App no. 30696/09 (ECtHR, 21 January 2011) para 223.

⁷⁷⁸ *Ibid*, para 234.

centres and documented the living conditions of the detainees. These reports confirmed, among other issues, that detainees did not have access to water fountains outside and were compelled to drink water from the toilets. Furthermore, it was noted that there was insufficient space for all detainees to lie down and sleep simultaneously. Access to toilets was severely restricted, forcing detainees to urinate in plastic bottles which they emptied only when allowed to use the toilets.⁷⁷⁹ Consequently, these conditions in the centres were found to be in clear violation of the prohibition of inhuman and degrading treatment as stipulated in Article 3 of the Convention. Furthermore, the Court condemned Greece for the violation of Article 13 in conjunction with Article 3 of the ECHR due to the deficiencies in the asylum procedures and the risk that the applicant faced of being repatriated to his country of origin without a serious examination of his application.⁷⁸⁰

Regarding Belgium, the Court stated that the conditions of the detention centres and the asylum procedures in Greece were well-known prior to the transfer of the applicant and were freely ascertainable from a large number of sources. For these reasons, at the time of the applicant's transfer, the Belgian authorities knew or should have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities.⁷⁸¹ Consequently, by transferring the applicant to Greece, Belgium violated the principle of non-refoulement, as it removed him without concretely verifying that the destination country respected human rights.⁷⁸² Moreover, given the risk of expulsion to Afghanistan due to the inadequate asylum procedures in Greece, Belgium was also found to have violated the prohibition on indirect refoulement.

It is noteworthy that in this instance, the ECtHR did not apply the *Bosphorus* presumption. Belgium transferred the asylum seeker to Greece under the Dublin Regulation, consequently, according to the presumption of equivalent protection developed in the famous *Bosphorus* case, the State action taken in compliance with its legal obligations would be justified. However, the Dublin Regulation includes a sovereignty clause, which indicates that each Member State may examine an application for international protection lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation.⁷⁸³ This means that Belgium, based on the sovereignty clause, had the option to become the responsible

⁷⁷⁹ Ibid, para 230.

⁷⁸⁰ Ibid, para 321.

⁷⁸¹ Ibid, para 358.

⁷⁸² Ibid, para 360.

⁷⁸³ See Article 3 para 2 of the Dublin II Regulation and currently Article 17 para 1 of the Dublin III regulation.

State for examining the asylum application, had it chosen to do so.⁷⁸⁴ Therefore, since Belgium was not obligated to transfer the asylum seeker to Greece, the presumption of equivalent protection did not apply in this case.⁷⁸⁵

In the *M.M.S* case, the European Court has expressly given priority to the absolute prohibition of refoulement. In fact, Belgium should have verified whether or not there was a risk of violation of inhuman or degrading treatment in Greece. Therefore, through this decision, the ECtHR clearly puts a brake on the principle of mutual trust and the presumption that all member states respect fundamental rights.⁷⁸⁶ The principle of non-refoulement necessitates a thorough assessment of the risks the person might face in the destination country and, in cases of serious human rights violation risks, the state is obliged to refuse the transfer.⁷⁸⁷

Contrary to the cases previously examined by the Court of Justice, it is clear that the ECtHR does not accept compromises, and it confirmed that the principle of non-refoulement prevails over the application of the Dublin System, hence the principle of mutual trust cannot be applied.⁷⁸⁸

Following this ruling, some scholars have argued that this decision put an end to the principle of mutual trust in European asylum law.⁷⁸⁹ In fact, under the principle of non-refoulement, a State cannot transfer a person where there is a risk of persecution, torture, and violation of inhuman or degrading treatment. Consequently, a State should have always the duty to verify if there are such risks in the country of destination. Moreover, since it has been established that not all EU Member States are equally capable of respecting fundamental rights, the foundational presumption of the Dublin system is called into question, rendering its automatic nature untenable. Interestingly, the EU legislator attempted to address this issue by introducing the new Article 3, paragraph 2 of the Dublin III Regulation. However, this provision reflects the stance of the Court of Justice in the *N.S.* case, which diverges significantly from the decisions of the ECtHR.

In the *N.S.* case, the Court of Justice adopted a different approach. Similar to the previous situation, the case concerns an Afghan national who entered illegally to Greece. After a brief detention, he

⁷⁸⁴ *M.S.S. v Belgium and Greece*, App no. 30696/09 (ECtHR, 21 January 2011) para 339

⁷⁸⁵ *Ibid*, para 340.

⁷⁸⁶ Sophie Lieven, Case Report on C-411/10, *N.S.* and C-493/10, *M.E. and Others*, 21 December 2011 (2012) *European Journal of Migration and Law* 14, page 230.

⁷⁸⁷ Francesco Maiani, Emmanuelle Néraudau, L'arrêt *M.S.S./Grèce et Belgique* de la Cour eur. D.H. du 21 janvier 2011: De la détermination de l'État responsable selon Dublin à la responsabilité des États membres en matière de protection des droits fondamentaux (2011) *Revue du droit des étrangers* 162, page 6.

⁷⁸⁸ *Ibid*, page 5.

⁷⁸⁹ Laurens Lavrysen, *M.S.S. v. Belgium and Greece* (2): The impact on EU Asylum Law, Strasbourg Observers 2011.

was sent to Turkey, where he was held in degrading conditions for two months. Subsequently, the applicant escaped from detention in Turkey and from that country arrived in the United Kingdom. There, he applied for international protection, but according to the Dublin II Regulation, Greece was the competent state to analyse his application. However, the applicant denounced that his transfer to Greece would entail a violation of the rights guaranteed by the ECHR, and he requested the Secretary of State to make use of the sovereignty clause and accept responsibility for the asylum application.⁷⁹⁰ Nevertheless, the Secretary of State decided to proceed with the transfer to Greece, as it was listed as a Safe Country under the Asylum Act of 2004. Consequently, the applicant's complaint, grounded in the ECHR, was deemed manifestly unfounded.⁷⁹¹

Seeking judicial review, the applicant filed an action in the High Court of Justice, which deemed the risk of refoulement to be inconsistent.⁷⁹² As a result, his claim was rejected, but the Court acknowledged his right to appeal to the Court of Appeal. The Court of Appeal then referred several questions to the CJEU for a preliminary ruling.⁷⁹³ The critical question centred on whether the Court would follow the same interpretation given by the ECtHR in the *M.M.S.* case on the compatibility of the Dublin Regulation with the EU Charter and what consequences would occur on the transfer from one EU State to another in the light of that interpretation.

In its ruling, the CJEU affirmed that the Common European Asylum System is based on the application of the Refugee Convention and on the guarantee that no one will be sent back to a place where he risks being persecuted again.⁷⁹⁴ However, the Common European Asylum System is also based on the principle of mutual trust and on a presumption of compliance by Member States with the EU law, and in particular with fundamental rights. Therefore, the Court acknowledged a relationship between mutual trust and the principle of non-refoulement and it admitted that some Member States could experience major operational problems.⁷⁹⁵ In other words, the Court recognised that there is a substantial risk that asylum seekers would be treated in a manner incompatible with their fundamental rights in the event of a transfer between Member States.⁷⁹⁶

⁷⁹⁰ Joint cases C-411-10 and C-493-10, *N. S. v. Secretary of State for the Home Department and M. E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, [2011] ECR I-0000, para 37.

⁷⁹¹ *Ibid.*, para 39.

⁷⁹² *Ibid.*, para 41.

⁷⁹³ *Ibid.*, para 46.

⁷⁹⁴ *Ibid.*, para 75.

⁷⁹⁵ *Ibid.*, para 81.

⁷⁹⁶ *Ibid.*

The CJEU, taking into account the *M.S.S.* decision, affirmed that the presumption of compliance with fundamental rights, upon which the Dublin Regulation is based, must be regarded as rebuttable.⁷⁹⁷ However, the Court also clarified that no infringements of the EU legislation can overcome the presumption of compliance with fundamental rights and prevent a Member State from transferring an asylum seeker to the State competent to examine his or her application.⁷⁹⁸ According to the Court, such a scenario could endanger the *raison d'être* of the European Union and the realisation of the objective of Dublin system's objective of swiftly designating the Member State responsible for examining an asylum application.⁷⁹⁹ Nevertheless, the CJEU stated: "*if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision.*"⁸⁰⁰ Therefore, according to the Court, Member States should not transfer an asylum seeker in cases of systemic deficiencies in the asylum procedure and reception conditions in the Member State responsible for examining the application for international protection.⁸⁰¹ In other words, similar to the *M.S.S.* case, the Court indicates that the presumption that EU Member States respect fundamental rights is not absolute, but relative. However, unlike the ECtHR, the CJEU recognized that only in exceptional circumstances, such as systemic flaws, can a State verify whether another Member State respects fundamental rights.

With this decision, the Court of Justice has thus interpreted the ECtHR's decision in the *M.M.S.* case restrictively. According to the Strasbourg Court, the principle of mutual trust cannot prevent a state from verifying whether the transfer of an asylum seeker to another state violates the principle of non-refoulement. In contrast, the CJEU stated that in exceptional circumstances, the principle of mutual trust can limit the possibility for states to verify that other states respect fundamental rights.

Therefore, with this historic ruling, the Court of Justice has put an end to blind trust by placing a limit on the principle of mutual confidence. However, by allowing a state to verify whether other

⁷⁹⁷ Ibid, para 104.

⁷⁹⁸ Ibid, para 84.

⁷⁹⁹ Ibid, paras 83 and 85.

⁸⁰⁰ Ibid, para 86.

⁸⁰¹ Ibid, para 94.

states respect fundamental rights in cases of systematic deficiencies, the Court also created a limit to the principle of non-refoulement. According to the Court, this principle prohibits Member States from transferring asylum seekers to another Member State where there are systemic deficiencies in asylum procedures and reception conditions for asylum seekers. In other words, only systemic deficiencies resulting in torture, inhuman, or degrading treatment would rebut the absolute presumption that all EU states are safe and would render a transfer incompatible with Article 4 of the EU Charter.⁸⁰² Therefore, the scope of the prohibition against refoulement appears to be limited to the sole hypothesis of the existence of systemic deficiencies, which are detected only in the presence of a particularly high level of infringement of fundamental rights.⁸⁰³

However, as highlighted in the previous chapter, the absolute prohibition of refoulement, as established in the EU Charter and the ECHR, does not allow for any limitations. Furthermore, while the 1951 Refugee Convention includes a limitation to this principle, it makes no mention of systemic deficiencies in asylum procedures and reception conditions. This means that in the EU, only when a person faces a serious and individual risk of being subjected to torture, inhuman and degrading treatment in the country of destination, a State should refuse to transfer a person to that state, and not in the hypothesis of systemic deficiencies. In fact, this criterion makes the principle of non-refoulement more difficult to apply, since, according to the CJEU, it is not sufficient to prove that there is a serious risk of inhuman or degrading treatment, but it is necessary to prove that such risks derive from systematic deficiencies of asylum procedures and reception conditions. However, it has been argued that the CJEU adopted the concept of systematic deficiencies in order to try to balance the two principles. On the one hand, this concept is used as a preliminary condition to rebut the presumption of mutual trust. On the other hand, it is also a requirement to activate the principle of non-refoulement.⁸⁰⁴

From this decision, therefore, it becomes evident that the Court preferred to impose a limit on the principle of non-refoulement to safeguard the principle of mutual trust, which is considered the

⁸⁰² Vassilis Pergantis, The “sovereignty clause” of the Dublin Regulations in the case-law of the ECtHR and the CJEU: The mirage of a jurisprudential convergence?, Giovanni Carlo Bruno, Fulvio Maria Palombino, Adriana Di Stefano (eds), *Migration Issues before International Courts and Tribunals*, (CNR Edizioni 2019), page 7.

⁸⁰³ Alessia di Pascale, *El principio de non refoulement y su aplicación judicial en el marco europeo*, in J.I.U Gartemendia YH. Labayle (Dirs.), *El Espacio de Libertad, Seguridad y Justicia y el Derecho del Convenio Europeo de Derechos Humanos* (2018) European Inklings (EUi) 15, IVAP, Oñati, page 15.

⁸⁰⁴ Anna Lübke, “Systemic Flaws’ and Dublin Transfers: Incompatible Tests before the CJEU and the ECtHR?” (2015) *International Journal of Refugee Law* 27:1, page 135.

raison d'être of the European Union. According to the Court, further limiting this principle would jeopardize the entire AFSJ, which, as already indicated, is based on the principle of mutual trust.⁸⁰⁵ The criterion of systematic deficiency as a threshold for the rebuttal of mutual trust was also confirmed by the CJEU in the *Abdullahi* case. In that ruling, in fact, the Court stated that the only way in which an asylum seeker can call into question the applicability of the Dublin criteria is by pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in the competent Member State.⁸⁰⁶ This approach therefore appears to exclude the relevance of an individual risk faced by the applicant of being subjected to inhuman or degrading treatment.⁸⁰⁷ Hence, even in this case, mutual trust was considered so important as to exclude the possibility for States to verify whether another Member State has actually observed fundamental rights.⁸⁰⁸

As a result of these decisions, some authors have started to assume that within the CEAS the relevance of the individual risk test used for the activation of the prohibition against refoulement under the ECHR and the EU Charter was replaced by the much stricter systemic deficiencies test.⁸⁰⁹ It has been particularly argued that the CJEU redefined the principle of non-refoulement by stating that mutual trust could only be rebutted in cases of systemic flaws, thus diminishing the emphasis on the individual risk faced by an asylum seeker.⁸¹⁰ These arguments gained further ground when the new Dublin III Regulation incorporated the concept of systemic deficiencies as a criterion for activating the principle of non-refoulement.⁸¹¹ Following the approach adopted by EU institutions, it appears that in the interest of preserving mutual trust, the EU has developed a new principle of non-refoulement which applies solely within the EU and differs from the principle recognized internationally.⁸¹² In fact, according to the Dublin III Regulation and CJEU decisions,

⁸⁰⁵ Joint cases C-411-10 and C-493-10, *N. S. v. Secretary of State for the Home Department and M. E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, [2011] ECR I-0000, para 83.

⁸⁰⁶ Case C-394/12, *Shamso Abdullahi v Bundesasylamt*, [2013] ECLI:EU:C:2013:813, para 60.

⁸⁰⁷ Giulia Vicini (n 6) 66.

⁸⁰⁸ *Ibid.*

⁸⁰⁹ Romain Tinière. *Confiance mutuelle et droits fondamentaux dans l'Union européenne*. Nicolas Kada. *Mélanges en l'honneur du professeur Henri Oberdorff* (2015) LGDJ-Lextenso éditions, page 78; Emmanuelle Bribosia, Anne Weyembergh, *Confiance mutuelle et droits fondamentaux : "Back to the future"* (2016) Cahiers de droit européen Vol. 52, N° 2, page 487.

⁸¹⁰ Giulia Vicini (n 6) 66.

⁸¹¹ Article 3 paragraph 2 of the Regulation (EU) No 604/2013.

⁸¹² Giulia Vicini (n 6) 66.

the prohibition against refoulement can only be triggered in cases of systemic deficiencies in a Member State, leading to torture, inhuman, or degrading treatment.

This interpretation has been the subject of significant academic debate. In particular, Hathaway argued that non-refoulement constitutes an absolute right that should not be constrained by interstate cooperation mechanisms such as mutual trust.⁸¹³ In his view, introducing limitations based on structural or institutional assumptions seriously undermines the very architecture of international refugee law. Similarly, Giulia Vicini suggested that this new intra-EU principle of non-refoulement appears different and less protective than the one enshrined in Article 3 of the ECHR.⁸¹³ However, although Vicini's focus remains on the structural imbalances in the EU legal framework, this thesis goes further, arguing that the use of the systemic deficiency test has not simply reshaped procedural standards, but has also altered the substantive nature of the principle of non-refoulement itself. In doing so, it has created a narrower and more conditional parallel system of protection, which risks undermining the absolute nature of non-refoulement recognised by international human rights law and the EU Charter.

This interpretation has been the subject of significant academic debate. In particular, Hathaway has affirmed that non-refoulement constitutes an absolute right, which should not be constrained by mechanisms of interstate cooperation, such as mutual trust.⁸¹⁴ According to his view, introducing limitations based on structural or institutional assumptions seriously undermines the very architecture of international refugee law. In a similar vein, Giulia Vicini has suggested that this new intra-EU principle of non-refoulement appears to be different and less protective than the one enshrined in Article 3 of the ECHR.⁸¹⁵ However, while Vicini's focus remains on the structural imbalances of the EU legal framework, this thesis goes one step further by arguing that the reliance on the systemic deficiencies test has not merely reshaped procedural standards, but has also altered the substantive nature of the non-refoulement principle itself. In doing so, it has created a parallel system of protection that is narrower and conditional, and which risks weakening the absolute character of non-refoulement as recognised under international human rights law and Article 2 of the TEU.

⁸¹³ Ibid.

⁸¹⁴ James C. Hathaway, *The Rights of Refugees under International Law* (2nd edn, Cambridge University Press 2021) 437–459.

⁸¹⁵ Giulia Vicini, (n 6) 66.

3.4.5. The Evolving Nexus between Mutual Trust and Non-Refoulement

The systematic deficiencies criterion used as a limit to the mutual trust and as a trigger for activation of the principle of non-refoulement was not adopted by the ECtHR, which, in the 2014 *Tarakhel* case, outlined the need for an individual approach to ascertain the prohibition of refoulement.⁸¹⁶

The case concerns an Afghan family, who applied for asylum in Switzerland. However, under the Dublin Regulation, Italy was the country responsible for examining their application. Consequently, the Swiss authorities ordered the expulsion to Italy. However, the expulsion order was contested, and the case reached the ECtHR, where the applicants argued that in case of transfer to Italy, they would have been victims of inhuman and degrading treatment due to the systematic deficiencies of the Italian reception conditions.⁸¹⁷

In this regard, the Court stated that the situation of the reception centres in Italy was different from the one in Greece, and it could not be compared with the systematic deficiencies of the asylum procedure and reception conditions of that country, identified in the *M.M.S.* case.⁸¹⁸ Nonetheless, the ECtHR condemned Switzerland for violating Article 3 of the ECHR, since the Swiss authorities should have obtained suitable guarantees from the Italian authorities that the applicants would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.⁸¹⁹ In fact, according to the Court, the presumption that the State responsible for examining the asylum application, under the Dublin Regulation, complies with Article 3 ECHR can be rebutted when there are substantial grounds to believe that the person would face a real risk of being subjected to treatment contrary to that provision.⁸²⁰ The Court further held that the fact that a State is part of the Dublin system does not exempt it from carrying out a thorough and individualized examination of the situation of the person concerned and from suspending enforcement of the removal order should the risk of inhuman or degrading treatment be established.⁸²¹ Following this decision, we can observe the differing approaches adopted by the CJEU and the ECtHR regarding the rebuttal of mutual trust in non-refoulement cases. According

⁸¹⁶ *Tarakhel v. Switzerland*, App no 29217/12 (ECtHR, 4 November 2014)

⁸¹⁷ *Ibid*, paras 2 and 3.

⁸¹⁸ *Ibid*, para 114.

⁸¹⁹ *Ibid*, para 122.

⁸²⁰ *Ibid*, para 104.

⁸²¹ *Ibid*.

to the CJEU, transfers under the Dublin system can only be limited in exceptional circumstances, which are aligned with systemic deficiencies in the asylum procedures and reception conditions of the Member State responsible for examining the application for international protection. In contrast, the ECtHR does not require systemic deficiencies to rebut the presumption of compliance with fundamental rights, placing greater emphasis on individual assessments.⁸²² In other words, it emerged that before transferring a person, a Member State must take into consideration the rights of a specific individual in order to ensure the effective protection of fundamental rights. These distinct approaches highlight a divergence between the principle of non-refoulement as understood in human rights law and the actual practice adopted by the EU up to that point.

In a more recent development, similar to the shift observed in the criminal law area, the CJEU's stance on fundamental rights has started to evolve. This change is exemplified in the *C.K.* case, which involved the transfer of a family of asylum seekers from one Member State to another.⁸²³ Specifically, this family entered the European Union with a visa issued by Croatia, then moved to Slovenia, where they applied for international protection. Croatia was deemed the responsible country for examining the asylum application. However, the transfer was initially postponed due to the wife's advanced pregnancy. A few months after the birth of their child, Slovenia issued a decision to transfer the family back to Croatia. The family appealed against this decision, citing the wife's psychiatric issues. They argued that the transfer could constitute inhuman and degrading treatment, potentially causing significant and permanent deterioration in the wife's mental health. Since there were no systemic deficiencies in Croatian asylum procedures and reception conditions, the Supreme Court of Slovenia asked the Court of Justice whether the obligation to transfer an asylum seeker ceases only in the case of systematic deficiencies in the country of destination or even when there is an individual risk of violating Article 4 of the EU Charter.

The CJEU, referencing its prior cases, reiterated that the rules of secondary EU law, including the provisions of the Dublin III Regulation, must be interpreted and applied in a manner consistent with the fundamental rights enshrined in the Charter.⁸²⁴ Diverging from its approach in the *N.S.* and *Abdullahi* cases, the Court recognized that individual circumstances should be considered.⁸²⁵ This shift in perspective was attributed to the differences between the Dublin II and Dublin III

⁸²² Giulia Vicini (n 6) 55.

⁸²³ C-578/16 PPU, *C. K., H. F., A. S. v Republika Slovenija*, [2017] ECLI:EU:C:2017:127.

⁸²⁴ *Ibid*, para 59.

⁸²⁵ *Ibid*, para 44.

Regulations. The CJEU noted that the latter regulation has strengthened its connections with fundamental rights and made significant improvements in the protection afforded to asylum seekers.⁸²⁶ Consequently, it affirmed that even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining an asylum application, the transfer can be suspended when the transfer itself might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment.⁸²⁷

This decision marked a turning point for the protection of the fundamental rights of asylum seekers within the EU. Nonetheless, it should be noted that, unlike the cases previously analysed, here the principle of mutual trust was not a relevant element of the judgment. In fact, the case concerned a person suffering from serious health problems that could lead to dangerous and permanent consequences in the case the transfer took place. The fact that the State of destination respected fundamental rights or not was irrelevant and the risks arising from the transfer could not be attributed to that Member State.⁸²⁸ Therefore, although the Court gave great relevance to fundamental rights it did not dissolve the conflict between mutual trust and the principle of non-refoulement. In fact, here the convergence with the ECtHR appears to occur outside the context of mutual trust.

The interplay between these two principles was further examined in the more recent *Jawo* case. This case involved a third-country national who arrived in Italy by sea and applied for asylum. The applicant then travelled to Germany and submitted another asylum application. The German authorities dismissed his application on the grounds that Italy was the competent Member State. However, the applicant appealed against his removal to Italy, arguing that there were systemic deficiencies in the asylum procedure and in the reception conditions in that Member State.

When the matter reached the Court of Justice, it reaffirmed that provisions of the Dublin III Regulation must be interpreted and applied in accordance with fundamental rights, particularly Article 4 of the Charter.⁸²⁹ Nonetheless, the Court also highlighted the fundamental importance of mutual trust which requires, save in exceptional circumstances, to consider all Member States to be complying with EU law and particularly with fundamental rights.⁸³⁰ Specifically, according to

⁸²⁶ Ibid, para 61.

⁸²⁷ Ibid, para 96.

⁸²⁸ Georgios Anagnostaras (n 773) 1185.

⁸²⁹ Case C-163/17, *Abubacarr Jawo v Bundesrepublik Deutschland*, [2019] ECLI:EU:C:2019:218, para 78.

⁸³⁰ Ibid, para 81.

the Court, in the context of the Common European Asylum System, it must be presumed that the treatment of applicants for international protection in all Member States complies with the requirements of the EU Charter, and the 1951 Refugee Convention.⁸³¹ Nonetheless, by recalling the *N.S.* case, the CJEU stated that the system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that applicants for international protection may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights.⁸³²

However, in this case, the Court did not emphasize the distinction between the Dublin II and Dublin III regulations as it had in the *C.K.* case. Instead, it affirmed that in case there are systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State, it is possible not to proceed with the transfer.⁸³³ In its decision, the Court went beyond the *N.S.* case and stated that based on the absolute nature of Article 4 of the EU Charter, the transfer must be avoided in any situation in which there are substantial grounds for believing that the applicant runs a risk of being subjected to inhuman or degrading treatment.⁸³⁴ However, the Court also stated that in the event that the applicant proves the existence of such risks, the national courts are then obliged to verify whether there are systemic or generalised deficiencies, which may affect certain groups of people in the country of destination.⁸³⁵ Furthermore, the Court clarified that such deficiencies must reach a particularly high level of severity,⁸³⁶ such as situations of extreme material poverty.⁸³⁷

From this decision, it is therefore clear that when a case concerns the principle of mutual trust, the Court of Justice no longer takes into consideration only the individual risks of suffering inhuman or degrading treatment, as it did in the *C.K.* case and established by the ECtHR. On the contrary, the Court came back to the systematic deficiencies developed in the *N.S.* case. In fact, while confirming the absolute nature of the prohibition of degrading treatments, the Court interprets its scope very restrictively, by confirming that national courts must, in any case, verify whether there are systematic deficiencies in the country of destination and in case of element of extreme material

⁸³¹ Ibid, para 82.

⁸³² Ibid, para 83.

⁸³³ Ibid, para 85.

⁸³⁴ Ibid, para 87.

⁸³⁵ Ibid, para 90.

⁸³⁶ Ibid, para 91.

⁸³⁷ Ibid, para 92.

poverty a state can refuse the transfer. This approach places further limitations on the principle of non-refoulement. By introducing additional criteria such as systemic deficiencies and extreme material poverty, the CJEU makes it more challenging to ensure the correct enforcement of this principle. This indicates that the Court, once again, tries to prioritize the principle of mutual trust over individual protection, even in circumstances where the fundamental right at stake is an absolute right.⁸³⁸ The same approach was subsequently followed in the *Ministero dell'Interno* case,⁸³⁹ the *Ibrahim* case,⁸⁴⁰ and the more recent *X v Staatssecretaris van Justitie en Veiligheid* case,⁸⁴¹ where the Court reaffirmed the importance of the principle of mutual trust and the systemic deficiencies conditions. However, over the years, the Court, while maintaining the same approach, seems to demonstrate greater alignment with Article 4 of the Charter of Fundamental Rights. Indeed, in this latest case, for example, while maintaining the previous line of systemic deficiencies, the Court also states that the transfer cannot be made if there is a violation of Article 4 of the Charter.

It thus appears from these decisions that the Court is increasingly seeking to ensure the proper application of fundamental rights and to align itself with the European Court of Human Rights. However, when the case concerns mutual trust, this alignment is not fully realized. Thus, it appears that the divergence with the ECtHR is more based on context than indicative of a broad divergence between the two courts.

The CJEU rulings analysed so far thus highlight an evolution, in which greater emphasis is placed on fundamental rights and the prohibition of refoulement while continuing to uphold the principle of mutual trust. The CJEU's approach seems to be moving toward a harmonious integration of these principles, intending to safeguard both fundamental rights and the integrity of the CEAS and the AFSJ. This balancing effort, as pointed out by some scholars, is particularly challenging for the CJEU, which must navigate between the application of mutual trust and the enforcement of fundamental rights while simultaneously managing member states' obligations under the CEAS.⁸⁴² However, it is crucial to note that this balancing effort must take into account the inviolable nature

⁸³⁸ Georgios Anagnostaras (n 770) 1196.

⁸³⁹ Joined Cases C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21, *Ministero dell'Interno, Dipartimento per le libertà civili e l'immigrazione, DG, XXX.XX, PP, GE v CZA*, [2023] ECLI:EU:C:2023:934.

⁸⁴⁰ Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17, *Ibrahim and others v Bundesrepublik Deutschland*, [2019] ECLI:EU:C:2019:219.

⁸⁴¹ Case C-392/22, *X v Staatssecretaris van Justitie en Veiligheid* [2024] ECLI:EU:C:2024:195.

⁸⁴² Georgios Anagnostaras (n 770).

of certain fundamental rights, such as non-refoulement, which, being absolute, cannot be subject to limitation in the name of compliance with EU principles. This approach by the CJEU, thus, highlights the intricate challenges of EU jurisprudence, where the alignment of general EU objectives with inviolable individual rights continues to be an extremely complex task.

3.4. Conclusion

The analysis has shown that the Court's evolving interpretation of mutual trust has led to a situation where this principle, originally a pillar of commercial integration, has expanded to such an extent that it has become a limitation on the application of fundamental rights, especially in the areas of asylum and criminal law.

The chapter has shown that, while recognising the absolute nature of the principle of non-refoulement, the Court has developed a restrictive approach, using the concept of systemic deficiencies as a criterion to limit this principle. From this perspective, the Court tried to create a balance between the two principles, however by doing so, it has introduced significant challenges to the practical application of non-refoulement. A change of course has occurred more recently and although the Court's latest decisions seem to align more closely with the decisions of the European Court of Human Rights, these rulings still attempt to balance mutual trust with fundamental rights, unfortunately at the expense of absolute rights.

Moreover, this chapter has also highlighted another aspect, which is the tendency to prioritize the political agenda and internal legal consistency at the expense of respect for fundamental rights. This trend thus seems to challenge the EU's commitment to its founding values and priorities. This aspect will be more emphasised in the next chapter, where it will be shown how policies have influenced the application of safe country and safe third country in a way to circumvent the principle of non-refoulement.

CHAPTER 4

SAFE COUNTRY: BEYOND THE FACADE

4.1.Introduction

In the previous chapter, it has been demonstrated how the concept of mutual trust has been used by the European Union and its Member States to circumvent the proper application of the absolute principle of non-refoulement. Similarly, this chapter will try to reach the same objective through the concept of safe country. However, it is important to bear in mind that this concept is not univocal. On the contrary, it branches out into the concept of European safe country, safe third country, and safe country of origin, and this chapter will try to demonstrate how they have all been used to circumvent the correct application of the principle of non-refoulement.

The first part will focus on the concept of a European safe country, and how it is connected with the principle of mutual trust. In this regard, as it has been previously analysed, within the EU, Member States trust each other in respecting fundamental rights. Therefore, as indicated by the Dublin Regulation, it is presumed that all countries are considered safe for third-country nationals. As a result, it is possible to transfer an asylum seeker from one EU country to another without the risk of violating the principle of non-refoulement. However, not all EU States are able to respect fundamental rights equally. Therefore, not only the principle of mutual trust but also the concept of safe country should not be used as an element to transfer asylum seekers from one State to another.

The second section will analyse the concept of safe country of origin and how it evolved in the European Union. In this context, particular attention will be paid to the proposal for an EU Common list and National lists of safe countries of origin. This section will also consider how different political factors have influenced the use of this concept.

Similarly, the third section will raise the same concerns in relation to the concept of safe-third country, with particular attention to the EU-Turkey Declaration. The examination will reveal how this concept, and the declaration, were supported by political motivations rather than genuine security and human rights assessments, which then led to the violation of the principle of non-refoulement.

This chapter, therefore, aims to provide a comprehensive understanding of how the safe country concept has been used within the EU asylum and refugee policy framework through a critical analysis of law, policy and human rights.

4.2. The Inter-connection Between Mutual Trust and the EU Safe Country Concept

The previous chapter has shown how the principle of mutual trust was created and evolved. Initially, it was seen as a sub-aspect of mutual recognition in the common market and then became an essential element of the entire AFSJ. In particular, in the area of criminal and asylum law, mutual trust has found its greatest expression. In fact, in these sectors, mutual trust has become of such high relevance that it has been considered more important than respect for fundamental rights. This approach can be demonstrated by the fact that, over the years, the Court of Justice has stated in many rulings that it is not necessary to verify that Member States respect fundamental rights due to a high level of trust between them.⁸⁴³ Moreover, the significance of mutual trust has been so pronounced that it has been cited by the Court of Justice as a barrier to the EU's accession to the ECHR, essentially becoming the "*raison d'être*" of the European Union.⁸⁴⁴

This high level of trust accompanied the Court of Justice for many years in its decisions, to the point of establishing an almost absolute presumption that all Member States comply with fundamental rights.⁸⁴⁵ As a result, the CJEU has at times, favoured the principle of mutual trust at the expense of fundamental rights protection.⁸⁴⁶ The previous chapter, therefore, focused exclusively on these aspects leaving out that the principle of mutual trust rests on another essential element, namely the safe country concept.

This connection is based on the fact that the EU Member States trust each other to respect fundamental rights because they are considered to be safe. A clear example of this relation can be found in the Dublin Regulation, which establishes that the Member States, all respecting the principle of non-refoulement, are considered safe countries for third-country nationals.⁸⁴⁷ Indeed,

⁸⁴³ Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad* [2007] ECLI:EU:C:2007:261.

⁸⁴⁴ Case C-411/10 and C-493/10, *N.S. and Others* [2011] EU:C:2011:865, para. 83.

⁸⁴⁵ Case C-261/09 *Gaetano Mantello*, [2010] EU:C:2010:683; C-396/11, *Ciprian Vasile Radu* [2013] ECLI:EU:C:2013:39; Case C-399/11, *Stefano Melloni v Ministerio Fiscal* [2013] ECLI:EU:C:2013:107.

⁸⁴⁶ Valsamis Mitsilegas (n 684).

⁸⁴⁷ Regulation 604/2013 recital 3.

for the transfer of an asylum seeker from one Member State to another, all countries must comply with EU law and fundamental rights.

As highlighted in previous chapters, the primary aim of the Dublin Regulation is to establish the criteria and mechanisms for determining which Member State is responsible for examining an asylum application submitted in the EU by a third-country national.⁸⁴⁸ Thus, if an international protection applicant seeks asylum in another Member State, that State has the prerogative to transfer the individual to the responsible State. However, this transfer, as extensively demonstrated, can potentially clash with the principle of non-refoulement, as enshrined in Article 19 of the EU Charter of Fundamental Rights.⁸⁴⁹ To mitigate the risk of violating such a principle, the European Union has built the CEAS on the concept of mutual trust and safe country. In other words, the system is based on the confidence that the EU Member States can be considered safe for asylum seekers because they all equally respect fundamental rights.⁸⁵⁰

The fundamental element underlying this system is that each member state is considered safe for asylum seekers. Indeed, the Dublin system is based on the belief that the possibility of obtaining protection, as well as the quality of protection, is uniform across all member states, and these aspects are rooted in the principle of mutual trust. As indicated earlier, this trust is based on the formal adherence of all states to the Refugee Convention and the ECHR, which reinforce the belief that being a signatory to these conventions is equivalent to complying with their affirmed principles.⁸⁵¹

The concept of a European safe country is explicitly outlined in the Asylum Procedure Directive, which stipulates that a state can only be deemed safe if it has ratified and adheres to the provisions of the Refugee Convention, possesses an established asylum procedure, and has ratified the ECtHR.⁸⁵² Thus, based on the trust that the receiving State will respect and uphold the human rights obligations by which all EU states are legally bound, it is possible to transfer an asylum seeker without the risk of violating the principle of non-refoulement.⁸⁵³

⁸⁴⁸ See Article 1 of the Regulation 604/2013.

⁸⁴⁹ See Article 19 para 2 of the EU Charter of Fundamental Rights.

⁸⁵⁰ Regulation No 604/2013, note 14, preamble, paragraph 2.

⁸⁵¹ Sílvia Morgades-Gil, The “Internal” Dimension of the Safe Country Concept: the Interpretation of the Safe Third Country Concept in the Dublin System by International and Internal Courts (2020) *European Journal of Migration and Law*, 22(1), 82-113, pages 90, 91.

⁸⁵² Directive 2013/32/EU, Article 39, para 2.

⁸⁵³ Ibid.

However, it has been extensively demonstrated that not all EU countries are capable of upholding fundamental rights. Therefore, if they fail to respect fundamental rights, they cannot be considered safe for asylum seekers. In other words, such a presumption of safety based on mutual trust cannot be entirely justified. Consequently, if an EU Member State is not safe, it cannot be trusted to respect fundamental rights.

This assumption was further validated by the Court of Justice in the *N.S.* case.⁸⁵⁴ In that ruling, the Court clarified that the concept of a European safe third country, as defined by the Asylum Procedure Directive, and the presumption that all countries respect fundamental rights cannot be absolute but must be relative.⁸⁵⁵ In fact, the court recognized that the level of respect for fundamental rights is not equivalent in all Member States. However, as already demonstrated in the previous chapter, the Court found a way to limit the principle of non-refoulement, by stating that the transfer of an asylum seeker can only be avoided in the event of systematic deficiencies in the asylum procedure and the reception conditions of asylum seekers in the country of destination.⁸⁵⁶

Although the court's approach has changed over the years, recognizing the importance of respect for fundamental rights over the principle of mutual trust, the link with the safe country concept is undeniable, and it has been consolidated over the years. For instance, it was first established by the European Court of Human Rights in the *T.I.* decision.⁸⁵⁷ The case, as already considered in the second chapter, involved a Sri Lankan national who, after being persecuted by a pro-government organization, fled to Germany and applied for asylum. The Bavarian Administrative Court dismissed the asylum application, stating that the ill-treatment suffered by the asylum seeker was not attributable to government officials.⁸⁵⁸ Thus, the Court concluded that the applicant was safe from persecution if he returned to Sri Lanka.⁸⁵⁹ Following this ruling, he moved to the United Kingdom to apply for asylum.⁸⁶⁰ However, according to the Dublin Convention, Germany was responsible for his application. Nevertheless, the applicant resisted being transferred back to Germany, arguing that the country was not safe for him.⁸⁶¹ He substantiated his claim with the

⁸⁵⁴ Case C-411/10 and C-493/10, *N.S. and Others* [2011] EU:C:2011:865.

⁸⁵⁵ *Ibid.*, para 102, 103, 104.

⁸⁵⁶ *Ibid.*, para 106.

⁸⁵⁷ *T.I. v. UK*, App no. 43844/98, (ECtHR 7 March 2000).

⁸⁵⁸ *Ibid.*

⁸⁵⁹ *Ibid.*

⁸⁶⁰ *Ibid.*

⁸⁶¹ *Ibid.*

argument that Germany did not recognize individuals as refugees if their persecution did not originate from government officials but from non-state agents.⁸⁶²

In its judgment, the ECHR first acknowledged that both Germany and the United Kingdom were signatories to the 1951 Refugee Convention, which obliges its members to adhere to the principle of non-refoulement.⁸⁶³ However, the UK argued that this principle was not violated due to the fact that Germany was an EU State and a member of the Convention, and it had to be considered a safe country. Nevertheless, the ECHR held that the UK, irrespective of this presumption of safety, had to ensure that the applicant was not exposed to treatment contrary to Article 3 of the Convention.⁸⁶⁴ With this statement, the ECtHR for the first time not only ruled on indirect refoulement but also on the concept of safe country, which underlies the mutual trust between the Member States under the Dublin system. Therefore, it might be argued that when the ECtHR stated that the UK had to ensure not expose an asylum seeker to treatment contrary to Article 3 of the ECHR, it questioned the compatibility of the presumption of the safe country with the duty to respect fundamental rights by the Member States.

Another connection between these two concepts can be found also in the famous *M.S.S.* case. As mentioned in the previous chapter, according to the ECtHR, Belgium should have verified that Greece actually respected fundamental rights. In other words, it should have controlled concretely whether Greece could be considered a safe country for the transfer of an asylum seeker.

With this decision, the Court recognized that the concept of safe third country, as expressed in the principle of mutual trust between the Member States might sometimes be inapplicable with the consequence of precluding the application of the intra-EU mechanism for international cooperation on asylum.⁸⁶⁵ Therefore, the ECtHR effectively imposed a limit on the principle of mutual trust and the assumption that all Member States equally respect fundamental rights.⁸⁶⁶

Similarly, the ECtHR in the *Tarakhel* case reached the same conclusion. According to the European Court, the presumption that the State responsible for examining the asylum application, under the Dublin Regulation, complies with Article 3 ECHR can be rebutted when there are substantial grounds to believe that the person would face a real risk of being subjected to treatment

⁸⁶² Ibid.

⁸⁶³ Ibid.

⁸⁶⁴ Ibid.

⁸⁶⁵ Maria-Teresa Gil-Bazo, *The Safe Third Country Concept in International Agreements on Refugee Protection Assessing State Practice* (2015) *Netherlands Quarterly of Human Rights*, Vol. 33/1, 42-77, page 69.

⁸⁶⁶ Sophie Lieven (n 773).

contrary to that provision.⁸⁶⁷ Thus, by condemning Switzerland for transferring an asylum seeker to Italy, the Court held that the fact that a State is part of the Dublin system does not exempt it from carrying out a thorough and individualized examination of the situation of the person concerned. This implies that if the risk of inhuman or degrading treatment is then established, the transfer to that country must be suspended.⁸⁶⁸ Hence, the assumption that all EU Member States are unequivocally safe for asylum seekers cannot be applied.

From the examples provided, it is clear that the principle of mutual trust and the concept of a safe country are closely related. Indeed, without the latter, establishing mutual trust between states would be difficult. In other words, if a member state is not regarded as safe for asylum seekers, it can hardly respect fundamental rights and, accordingly, comply with the principle of non-refoulement. Following this approach then, it is clear that the concept of a European safe country cannot guarantee that all EU member states respect fundamental rights and, consequently, this also extends to the principle of mutual trust.

4.3. The Political Underpinnings of the Safe Country of Origin Concept

It's crucial to distinguish that the definition of a European safe country differs from the concepts of safe third country and safe country of origin, which do not inherently rely on the principle of mutual trust. However, this distinction does not imply that these latter two concepts have not impacted the principle of non-refoulement. On the contrary, the following discussion will explore the concepts of safe third country and safe country of origin, demonstrating how the EU and its member states have used these concepts to circumvent the application of the principle of non-refoulement.

A safe country of origin is defined as the country of nationality for asylum seekers where there is no risk of persecution or other serious harm that would compel such individuals to flee and seek asylum.⁸⁶⁹ Conversely, a safe third country is a non-EU country and differs from the asylum seekers' country of nationality, through which they may be transferred.⁸⁷⁰ The asylum application

⁸⁶⁷ *Tarakhel v. Switzerland*, App no 29217/12, (ECtHR, 4 November 2014) para 104.

⁸⁶⁸ *Ibid.*

⁸⁶⁹ Opinion of the European Union Agency for Fundamental Rights concerning an EU common list of safe countries of origin, FRA Opinion – 1/2016 [SCO], Vienna, 2016, page 7.

⁸⁷⁰ EuroMed Rights “Safe” countries: A denial of the right of asylum, (AEDH FIDH 2016) page 5.

is then processed not by the EU State where the asylum seeker initially applied but by a third country, presumed to be safe.⁸⁷¹

Following this difference, it appears that the concept of a safe country of origin may refer to particular procedural channels through which asylum applications are examined on the merits.⁸⁷²

In fact, this notion has historically been linked to procedures for manifestly unfounded applications and to accelerated asylum procedures, in which asylum applications were then assessed and rejected with particular rapidity.⁸⁷³

The first discussion on accelerated procedures emerged during the UNHCR Executive Committee meeting in 1983,⁸⁷⁴ acknowledging that some asylum applications, clearly unfounded, could be expedited through an accelerated procedure.⁸⁷⁵ Initially, such acceleration was limited to cases that were clearly fraudulent or unrelated to the grounds for international protection. However, the idea of processing some applications faster than others remained rather general and was still very much tied to procedural guarantees. As a matter of fact, during the Executive Committee, the concept of safe country of origin was not explicitly mentioned.

It was only later, due to the increase in the number of asylum applications submitted in Europe, that the Member States, considered it necessary to discuss the risk that their asylum systems might be overburdened by applications from people who did not need international protection. Therefore, in 1992 they presented the so-called London Resolution on Manifestly Unfounded Applications for Asylum, which was the first non-binding European agreement on asylum matters. The Resolution linked the accelerated asylum procedure with the concept of safe country of origin on the basis that, since there was no risk of persecution in the country of origin, decisions were quickly executed and declared manifestly unfounded.⁸⁷⁶ This stance is echoed in the preparatory work for

⁸⁷¹ Ibid.

⁸⁷² Jens Vedsted-Hansen, Admissibility, border procedures and safe country notions, Forum on the new EU Pact on Migration and Asylum in light of the UN GCR (2020).

⁸⁷³ Ibid.

⁸⁷⁴ Claudia Engelmann, Convergence against the Odds: The Development of Safe Country of Origin Policies in EU Member States (1990-2013) (2014) *European Journal of Migration And Law* 16, 277-302, page 284.

⁸⁷⁵ Executive Committee of the High Commissioner's Programme, The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30 (XXXIV), 1983.

⁸⁷⁶ Council of the European Union, *Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum*, 1992

the Resolution, which explicitly calls for a unified stance against unnecessary asylum claims in Member States.⁸⁷⁷

To decide if asylum claims could be considered manifestly unfounded, the decisions relied on a general security assessment of the asylum applicant's country of origin. The criteria for such assessment included various factors, such as the previous number of refugees, recognition rates, respect for human rights, and the country's democracy and stability.⁸⁷⁸ If these criteria were met, it was presumed that the conditions for refugee status outlined in the 1951 Refugee Convention were not satisfied, given the lack of a credible fear of persecution in the applicant's home country.⁸⁷⁹ These common conditions reflected the aim of the London Resolution which was to adopt a common list of safe countries at the European level. In fact, the European ministers present at the agreement emphasized not only the possibility of accelerated processing of asylum applications but also the need for harmonized action.⁸⁸⁰

As mentioned above, the EU Member States were not bound by the London Resolution, as it was a measure of soft law. The first binding agreement on safe country of origin was stipulated in 1999, with the Treaty of Amsterdam, where it was decided that all EU Member States would be considered as safe countries of origin.⁸⁸¹ Subsequently, in 2002, the JHA Council went a step further and designated all candidate states of the European Community as safe countries of origin from the date of signature of the accession treaties.⁸⁸² This classification meant that all asylum applications from countries like Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia during those years were considered manifestly unfounded.⁸⁸³ Although the London Resolution first introduced the concept of a safe country of origin, and this idea was later reaffirmed in the Treaty of Amsterdam, there was no common

⁸⁷⁷ Council of the European Union – Ad Hoc Group Immigration, *Draft Resolution on manifestly unfounded applications*, 1992.

⁸⁷⁸ Ibid

⁸⁷⁹ Ibid.

⁸⁸⁰ Claudia Engelmann (n 874) 285.

⁸⁸¹ Consolidated version of the Treaty on the Functioning of the European Union, Protocol No 24 on Asylum For Nationals of Member States of The European Union.

⁸⁸² Council meeting - Justice, Home Affairs and Civil Protection, *Declaration by the Ministers of Justice and Home Affairs of the Member States of the EU on Asylum*, 15 October 2002.

⁸⁸³ Claudia Engelmann (n 874) 285.

legislation governing these matters at the time. Only some Member States had incorporated this concept into their national asylum laws.⁸⁸⁴

The notion of safe country of origin was then incorporated into EU legislation in 2005 with the Asylum Procedures Directive, which established the criteria for designating countries as safe.⁸⁸⁵ The Directive allowed for two methods of identifying a safe country of origin: one through a common European list and the other through national lists.⁸⁸⁶ According to Article 29 of the Directive, the European common list would be adopted by a qualified majority of the Council, on a proposal from the Commission and after consultation with the European Parliament. However, in 2006, the European Parliament, supported by the Commission, asked the Court of Justice to annul the first paragraph of Article 29 on the Council's mandate to create such a list. The Parliament argued that by accepting this rule, the Council had adopted Community legislation and consequently the co-decision procedure was applicable.⁸⁸⁷ The Court of Justice, upholding this argument, annulled such paragraph, nonetheless, Article 29 was never put into practice. A revised version of the Asylum Procedures Directive was approved in 2013 and one of the objectives was to achieve greater convergence on the application of safe country of origin practices. For instance, the Directive still includes the opportunity to adopt accelerated procedures for asylum seekers from safe countries of origin,⁸⁸⁸ although the option for a common European list of safe countries of origin is no longer included.

The revised Directive omitted a common list, which, according to the previous Directive, should have already been established.⁸⁸⁹ In response, the European Commission presented in 2015 a Proposal for a Regulation establishing an EU common list of safe countries of origin. This proposal was presented as one of the key measures of the European Agenda on Migration, which aimed to offer a solution to the emergency situation in the reception and management of the influx of migrants and asylum seekers into Europe.⁸⁹⁰ Specifically, the introduction of a common list aimed

⁸⁸⁴ Council of the European Union, Monitoring the implementation of instruments adopted concerning asylum: Summary report of the Member States' replies to the questionnaire launched in 1997 (ref. 8886/98), 17 July 1998.

⁸⁸⁵ See Articles 30 and 31 and Annex 1 of the Directive 2005/85/EC.

⁸⁸⁶ See Articles 29 and 30 of the Directive 2005/85/EC.

⁸⁸⁷ Case C-133/06, *European Parliament v. Council of the European Union*, ECJ (2006), ECLI:EU:C:2008:257.

⁸⁸⁸ See Articles 31, paragraph 8 (b), 33, 38 and 43 of Directive 2013/32/EU.

⁸⁸⁹ See Article 29 paragraphs 1 and 2 of the Directive 2005/85/EC.

⁸⁹⁰ European Commission, *Managing migration better in all aspects: a European Agenda on Migration*, 13 May 2015

to facilitate the swift processing of potentially manifestly unfounded international protection applications, thereby enhancing the efficiency of the asylum systems across Member States.⁸⁹¹ Following the Commission's proposal, the EU Council requested the European Asylum Support Office to organise a consultation with experts from various Member States. During the consultation, information from the European External Action Service (EEAS), EASO, UNHCR, the Council of Europe, and other international organisations was collected and analysed. However, the European Parliament rapporteur at the time, Sylvie Guillaume, pointed out that the information only came from official European or international bodies and civil society was excluded from the consultation.⁸⁹² Consequently, she advocated for postponing the assessment of the list of safe countries pending further evaluation. According to her view, the exclusion of civil society contradicted the recommendations of the EASO elaborated a few years earlier, which emphasised that it was necessary to seek as broad a range of sources as possible reflecting divergent opinions on the issue, in order to ensure a more balanced framework for the report on the country of origin.⁸⁹³

Despite the consultation, the EU Council did not reach an agreement on the European list of safe countries of origin as proposed by the Commission and to date there is still no such list in the European legal framework. Nevertheless, even recently, the Commission has reiterated the need for streamlined and harmonised rules on safe countries of origin.⁸⁹⁴ It has been suggested that a common European list could reduce existing divergences between Member States, facilitate the convergence of procedures and consequently discourage secondary movements of applicants for international protection, which is also one of the primary objectives of the Dublin Regulation.⁸⁹⁵ The concept of a common European list has been consistently advocated by the Commission in recent years, and as mentioned in the first chapter, it was re-proposed in the 2024 New Pact on Migration. However, its introduction has faced resistance from several Member States, many of

⁸⁹¹ EuroMed Rights (n 870)11.

⁸⁹² European Parliament, *Draft Report on the proposal for a regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU*, 13 April 2016

⁸⁹³ European Asylum Support Office (EASO), *Country of Origin Information report methodology*, July 2012.

⁸⁹⁴ European Commission, Amended Proposal for a Regulation of The European Parliament and of The Council Establishing a Common Procedure for International Protection in The Union and Repealing Directive 2013/32/EU, Brussels, 23 September 2020.

⁸⁹⁵ European Asylum Support Office (EASO), '*Safe country of origin*' concept in EU+ countries, Situational Update, Issue No 3, 9 June 2021, page 3.

which prefer to maintain their national lists.⁸⁹⁶ It has been argued that the failure to achieve a consensus on a unified EU Safe Country of Origin list stems from the divergent migratory pressures faced by Member States and the variance in procedural applications within their national legal frameworks.⁸⁹⁷

This lack of consensus and uniformity in the approach towards establishing a unified EU Safe Country of Origin list is also evident from the 2010 UNHCR report on the Asylum Procedures Directive which brought to light significant discrepancies in the criteria employed by Member States to determine the safety of countries.⁸⁹⁸ In this regard, an example is vividly illustrated in the controversial debate over the inclusion of Botswana in the Safe Country of Origin (SCO) list.

Despite concerns raised by some Member States regarding human rights issues in Botswana, such as the criminalization of homosexuality, the application of capital punishment, and reports of torture, a majority still supported its classification as a safe country under European law.⁸⁹⁹ This decision was made even though the primary evidence considered was a single report from the US State Department.⁹⁰⁰ The eventual backing by the Czech Republic for including Botswana as a safe country, after initial hesitations and their assertion of 'no major obstacles', highlights a wider inconsistency among Member States.⁹⁰¹ They recognize substantial human rights issues yet still designate a country as safe based on their constitutional safeguards.⁹⁰²

A similar situation occurred with Ghana, where despite widespread issues like police brutality, child trafficking, and Female Genital Mutilation, the majority of Member States leaned towards inclusion due to the legal protections theoretically in place, despite practical enforcement being questionable.⁹⁰³ This was in contrast to the reality of over 10,000 Ghanaian refugees residing in Togo⁹⁰⁴ and over 20,000 were recognized as refugees in other countries at the time.⁹⁰⁵

⁸⁹⁶ EuroMed Rights (n 870) 2.

⁸⁹⁷ Natalia Gierowska (n 7) 2032.

⁸⁹⁸ UNHCR, 'Improving Asylum Procedures - Comparative Analysis and Recommendations for Law and Practice: Key Findings and Recommendations' (2010) 67.

⁸⁹⁹ Matthew Hunt (n 7) 508.

⁹⁰⁰ Statewatch, 'EU divided over list of 'safe countries of origin'- Statewatch calls for the list to be scrapped' (2004) page 8-9.

⁹⁰¹ Council of the European Union doc 8772/04 ADD 8, Reply from the Czech delegation.

⁹⁰² Statewatch, 'EU divided over list of 'safe countries of origin'- Statewatch calls for the list to be scrapped' (2004) page 7.

⁹⁰³ Matthew Hunt (n 7) 508.

⁹⁰⁴ Statewatch, 'EU divided over list of 'safe countries of origin'- Statewatch calls for the list to be scrapped' (2004) page 12.

⁹⁰⁵ UNHCR, A Year of Crises: UNHCR 2011 Global Trends' page 42-45.

From these examples, it becomes apparent that the main objective of these negotiations was not an objective assessment of safety but rather to establish a policy framework that could facilitate the almost automatic dismissal of asylum applications without in-depth examination.⁹⁰⁶ This tendency is notably evident in countries experiencing significant migratory pressures, which are likely to oppose any transfer of authority to the EU in this area. Instead, they choose to maintain national lists and introduce complications in the ‘security’ assessment process, with the aim of controlling migration in a way that suits domestic political agendas.⁹⁰⁷ This stance is reinforced by the fact that migration is a divisive topic among national voters, who frequently express opposition to increased migration.

As Moravcsik and Schimmelfennig argue, national governments' attitudes towards immigration often reflect those of their voters, with the primary aim of remaining in power.⁹⁰⁸ This political reality suggests that facilitating safe migration to Europe, ensuring equitable refugee distribution, and preserving the stability of the Schengen area are secondary to managing issue-specific social interdependence through national strategies designed to limit migratory pressures to levels acceptable within each Member State's political compromise.⁹⁰⁹

As mentioned earlier, the Asylum Procedures Directive allows for the creation of national SCO lists. However, it is important to emphasize that the Directive does not obligate Member States to create such lists.⁹¹⁰ Currently, as highlighted in the latest report from the EUAA, 22 EU States have adopted such lists, 7 countries do not use a list, and Norway, while not having a fixed list, applies the safe country of origin concept on a case-by-case basis.⁹¹¹ The first countries to introduce a list in the early 2000s included France, Ireland, Luxembourg, Malta, and Slovakia, with Cyprus and Sweden being the most recent, adopting their lists in 2020 and 2021, respectively.⁹¹²

The discussions on the adoption of a unified European list of SCO mentioned above, are reflected in the considerable discrepancies observed between the national lists. For instance, according to

⁹⁰⁶ Matthew Hunt (n 7) 508.

⁹⁰⁷ Natalia Gierowska (n 7) 2032.

⁹⁰⁸ Andrew Moravcsik and Frank Schimmelfennig, ‘Liberal intergovernmentalism’. In A. Wiener and T. Diaz (Ed.), *European integration theory* (2009) Oxford University Press. Page 65-85.

⁹⁰⁹ Natalia Gierowska (n 7) 2041.

⁹¹⁰ See Article 37 paragraph 1 of the Directive 2013/32/EU.

⁹¹¹ European Asylum Support Office (EASO), ‘*Safe country of origin*’ concept in EU+ countries, Situational Update, Issue No 3, 9 June 2021, page 2.

⁹¹² Ibid.

the latest EUAA report, 20 Member States consider Albania a safe country of origin, while Bosnia and Herzegovina and Kosovo are deemed safe by 19 countries. Turkey is recognized as safe only by Croatia and Hungary.⁹¹³ Among African nations, Ghana and Senegal are listed as safe by 12 countries; Algeria, Morocco, and Tunisia by 9; and Togo was added by Cyprus in 2021 but removed from the Netherlands' list in 2020.⁹¹⁴

The disparities extend beyond countries to specific regions. For example, Georgia is considered safe by 3 countries, excluding certain areas. The Czech Republic and Switzerland view Moldova as safe, excluding Transnistria.⁹¹⁵ Hungary deems the United States safe, excluding states that enforce the death penalty.⁹¹⁶ Moreover, these lists also distinguish between different groups of people. Luxembourg considers Benin and Ghana safe but only for men.⁹¹⁷ Denmark views Russia as safe except for the LGBTI community, Jews, and political opposition members.⁹¹⁸ Given the ongoing conflict with Ukraine, national lists featuring Russia may soon undergo revisions.

The EUAA Report highlights significant discrepancies in the national safe country of origin lists, primarily due to the absence of uniform regulations and Member States' reluctance to harmonize their asylum and migration policies. Therefore, also the variation in safe country designations emphasizes the political nature of these decisions, confirming that although the criteria for labelling countries as safe suggest a comprehensive evaluation of a country's human rights situation, in practice, the decisions appear to be influenced by concerns over asylum seeker numbers and external political considerations.⁹¹⁹ This revelation, as pointed out by Cathryn Costello, highlights that legal definitions of a safe country are less influential than the institutional context in shaping these decisions. Essentially, the process of designating safe countries seems predominantly political, aimed at guiding the outcomes of administrative decisions.⁹²⁰ Indeed, reports on country evidence are frequently disputed, and various national studies, conducted by academics, national asylum agencies, advisory bodies, and NGOs, have pointed out numerous

⁹¹³ Ibid, page 4.

⁹¹⁴ Ibid, page 4 and 5.

⁹¹⁵ Ibid, page 7.

⁹¹⁶ Ibid.

⁹¹⁷ Ibid.

⁹¹⁸ Ibid.

⁹¹⁹ Cathryn Costello, Safe Country? Says Who? (2016) *International Journal of Refugee Law*, Vol. 28, No. 4, 601-622, page 609.

⁹²⁰ Ibid, page 610.

deficiencies in Country of Origin Information (COI) reports.⁹²¹ These include inconsistent and selective use of information, perhaps influenced by political prejudices, reliance on outdated data, omission of relevant or contradictory information, and financial and time restrictions.⁹²² Moreover, this policy tool's objective is not to accurately catalogue safe countries globally but to serve as a practical means for nations to expedite the processing and removal of asylum seekers.⁹²³

Similarly, Matthew Hunt posits that the use of the Safe Country of Origin concept in Europe is driven by the perception that many asylum claims are unfounded, thus, necessitating a mechanism to screen out such applicants and restrict their access to comprehensive asylum procedures.⁹²⁴ In fact, the SCO concept, aimed at reducing asylum applications both within individual countries and across the region, seems to be appealing because it minimizes the need for individual assessments, allowing for collective decision-making.⁹²⁵ However, this strategy may lead to several issues. It encourages asylum seekers to move across the EU in search of countries with more favourable conditions. Furthermore, as we will explore, the adoption of such lists risks violating human rights, especially the protection against discrimination and the principle of non-refoulement.

4.3.1. The Criteria for a Nation's Status as a Safe Country

Although a common European asylum list was not established, the legal foundation for the concept of safe countries of origin in EU law was introduced in 2005 with the initial Asylum Procedures Directive and was retained in the recast Directive of 2013. Specifically, according to Annex I of the revised Directive, a country of origin can be deemed safe if: *"on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2011/95/EU, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict"*.⁹²⁶ In making this evaluation, the Directive contains a non-exhaustive list of indicators to help EU

⁹²¹ Femke Vogelaar, The Presumption of Safety Tested: The Use of Country of Origin Information in the National Designation of Safe Countries of Origin (2021) Refugee Survey Quarterly, Volume 40, Issue 1, Pages 109, 110.

⁹²² Ibid.

⁹²³ Natalia Gierowska (n 7) 2037.

⁹²⁴ Matthew Hunt (n 7) 503.

⁹²⁵ Ibid.

⁹²⁶ Annex 1 of Directive 2013/32/EU.

Member States assess whether a country of origin can be considered as effectively safe. In particular, it is necessary to take into account the extent to which protection against persecution or ill-treatment is provided under the legal framework of the country of origin and how these rules are applied. In addition, it must be evaluated if the Country of origin respects the rights and freedoms enshrined in the ECHR, ICCPR and CAT, with particular attention to the respect of the principle of non-refoulement. Finally, the Directive indicates that it is necessary to verify whether there are effective remedies against violations of these rights and freedoms.⁹²⁷

The definition contained in the directive seems to have particularly high standards for the respect of human rights. The reason for such standards is based on the fact that the evaluation influences the examination of the application for protection of persons who have generally left their country due to fear for their life or that of their family members. In fact, to be included in a list of safe countries of origin, a State must ensure that these rights are respected not only in theory but also in practice.⁹²⁸ This concrete evaluation is ensured by Article 37 of the Directive, which stipulates that Member States must regularly review the situation in third countries designated as safe countries of origin. This ongoing assessment should be based primarily on a variety of sources from other Member States, EUAA, UNHCR, the Council of Europe and other relevant international organisations. Then, once this information is obtained, Member States have a duty to notify the Commission of which countries are designated as safe countries of origin.⁹²⁹

These stipulations extend to EU candidate states which, to join the EU, must meet the criteria outlined in the Asylum Procedures Directive in addition to adhering to the Copenhagen criteria.⁹³⁰ This implies that when EU Member States presume a country to be safe, they must assess the human rights situation in the country of origin, as reflected in reliable, objective, accurate and up-to-date information.⁹³¹ The European Union Agency for Fundamental Rights has also weighed in on this issue, advising that Member States must proceed with the utmost caution when determining a country's safety.⁹³² The FRA highlighted that the results of previous asylum applications made in EU Member States can be used as one of the indicators to assess the degree of safety in a third

⁹²⁷ See Article 37 paragraph 3 and Annex 1 of the Directive 2013/32/EU.

⁹²⁸ Opinion of the European Union Agency for Fundamental Rights concerning an EU common list of safe countries of origin, FRA Opinion 1/2016 [SCO], Vienna, 23 March 2016, page 14.

⁹²⁹ Article 37 of the 2013/32/EU.

⁹³⁰ EuroMed Rights (n 867) 5.

⁹³¹ Opinion of the European Union Agency for Fundamental Rights concerning an EU common list of safe countries of origin, FRA Opinion 1/2016 [SCO], Vienna, 23 March 2016, page 14.

⁹³² Ibid page 15.

country. However, such indicators should only be used if European and international human rights monitoring bodies have not expressed any relevant criticism of the concrete and current situation in the country of origin.⁹³³

Constant and concrete verification of whether a country is safe is, therefore, crucial. This is underscored by the Asylum Procedures Directive, which effectively shifts the burden of proof. According to the Directive, if a third country is deemed safe, Member States are to assume its safety for a particular applicant, unless he or she provides evidence to the contrary.⁹³⁴ In essence, while the gathering of evidence is a task normally shared between the official assessing the application and the applicant, in case a country is considered safe, the burden of proof is entirely on the applicant. This means that if an asylum seeker has presumably arrived from a safe country, he or she must prove that this is not the case. This reversal of the burden of proof is also confirmed by Article 36 of the Directive, which considers a country of origin to be safe only if the applicant has not put forward any serious grounds for considering the country unsafe in his or her particular circumstances and in terms of his or her qualification as a beneficiary of international protection. Consequently, if a person arrives from a safe country, it may be more difficult for him or her to prove that there is a real risk of persecution.⁹³⁵

Consequently, it is clear that the status of countries should be reviewed regularly, and if a country no longer meets the criteria to be considered “safe,” it should be removed from the lists of EU member states. Thus, in order to assess whether a country qualifies as safe, it is essential to verify the effective observance of human rights in that country. Hence, if an EU member state designates a country as safe, that designation should be recognized by other member states. However, as pointed out in the previous section, there are significant discrepancies between national lists of safe countries, which highlights that these lists are influenced not only by human rights adherence but also, as discussed above, by political considerations.

Another aspect that emerges is also the individual analysis during the international protection procedure. A concrete example of these requirements is generally mentioned by the European Court of Human Rights. In fact, in several cases, when examining extradition cases or when there is a risk of ill-treatment upon return, the ECtHR verifies the general human rights situation in the

⁹³³ Ibid.

⁹³⁴ See Recital 40 of the Directive 2013/32/EU.

⁹³⁵ Ibid, Article 36.

country of return, it examines the individual circumstances of the applicant, and whether or not that country is able and willing to protect the individual in practice.⁹³⁶ Similarly, in some cases, when national tribunals have ruled on whether a particular country can be listed as a safe country of origin, they have based their decision on the concrete human rights situation in that country. A comparable approach was confirmed by the CJEU's recent decision.⁹³⁷

The aspect of the individual analysis is therefore essential in determining whether or not a person is eligible for international protection, and if a person comes from a country considered safe there might be a risk that such analysis would not be performed. In fact, considering only the general safety of a country does not allow individual circumstances to be taken into account. This could occur for minority groups that may suffer specific discrimination in countries where the rest of the population is generally safe.⁹³⁸

For these reasons, to enable applicants for international protection from a safe country of origin to effectively challenge the presumption of safety, they must be granted sufficient time to present their case.⁹³⁹ In this context, the protective measures outlined in Articles 15 to 17 of the Directive, which are upheld during the asylum interview, should also extend to individuals from safe countries of origin.⁹⁴⁰ This stance was reinforced by the Court of Justice, which has ruled in multiple cases that during any administrative procedure, individuals must have the chance to express their perspectives concretely before a decision negatively impacting their interests is made.⁹⁴¹ Furthermore, the CJEU, in the *C.M.M.* case, affirmed that these provisions apply equally to applicants from safe countries of origin.⁹⁴²

⁹³⁶ *Vilvarajah and Others v. the United Kingdom*, App no 215 (ECtHR 30 October 1991), para. 108; *Saadi v. Italy*, App no. 37201/06, (ECtHR 28 February 2008), paras. 147-148; *Sufi and Elmi v. the United Kingdom*, App nos. 8319/07 and 11449/07 (ECtHR 28 June 2011), para. 216; *Mo.M. v. France*, App no. 18372/10, (ECtHR 18 April 2013), para. 36; *M.G. v. Bulgaria*, App no. 59297/12 (ECtHR 25 March 2014), para. 79; *Ouabour v. Belgium*, App no. 26417/10 (ECtHR 2 June 2015), para. 65.

⁹³⁷ French Conseil d'Etat, Decision Nos. 375474 and 375920, 10 October 2014, paras.14-18; Belgium, Conseil d'Etat, Decision No. 228.901, 23 October 2014; UK Supreme Court, UKSC 8, 4 March 2015, paras. 19 and 36; Case C-406/22, *Krajský soud v Brně V Ministerstvo vnitra České republiky* [2024] ECLI:EU:C:2024:841.

⁹³⁸ EuroMed Rights (n 867) 7.

⁹³⁹ Opinion of the European Union Agency for Fundamental Rights concerning an EU common list of safe countries of origin, FRA Opinion 1/2016 [SCO], Vienna, 23 March 2016, page 04.

⁹⁴⁰ *Ibid*, page 13.

⁹⁴¹ Case C-277/11, *M. M. v. Minister for Justice, Ireland, Attorney General*, [2012], ECLI:EU:C:2012:744, para. 87; Case C-166/13, *Sophie Mukarubega v. Préfet de police, Préfet de la Seine-Saint-Denis*, [2014], ECLI:EU:C:2014:2336, para. 46; Case C-249/13, *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques*, [2014] ECLI:EU:C:2014:2431, para 36.

⁹⁴² Case C-277/11, *C M. M. v. Minister for Justice, Equality and Law Reform*, [2012], ECLI:EU:C:2012:744, paras. 82-95.

However, it should be pointed out that there is no obligation under the Asylum Procedures Directive to provide free legal assistance to applicants during the first-instance asylum procedure. In fact, several countries provide legal assistance only after a negative decision has been issued.⁹⁴³ Consequently, in the absence of legal advice, the presumption of safety may be particularly difficult to prove for an asylum seeker during his or her interview for international protection. Moreover, it has been demonstrated that the application of the list of safe country used by EU Member States causes a disservice to a large number of asylum seekers during the procedure, sometimes even excluding them from it.⁹⁴⁴ A specific example is found in Articles 32 and 43 of the Asylum Procedures Directive, which allows Member States to process an application for international protection under an accelerated procedure if the applicant hails from a country deemed safe.⁹⁴⁵ As stated above, the rationale behind these Articles is that the application for asylum may be manifestly unfounded. This approach, however, could be detrimental to the rights of asylum seekers who, even if they come from safe countries, may still run the risk of persecution. In this regard, the CJEU stated that the country of origin of an applicant for international protection is an element that can be taken into account to justify an accelerated examination procedure.⁹⁴⁶ Nonetheless, applicants from safe countries of origin whose applications are processed in accelerated procedures must be able to fully exercise their rights under the Asylum Procedures Directive. In particular, such applicants must be allowed sufficient time to gather and submit the necessary material in support of their application.⁹⁴⁷

4.3.2. Human Rights Implications of the Safe Country of Origin Concept

This analysis thus reveals that if the rules on the safe country concept are not strictly enforced, there is a high risk of violating human rights. In fact, the application of this notion risks being discriminatory and dangerous for asylum seekers from so-called safe countries, compared to those coming from unsafe places.⁹⁴⁸ The potential for such discrimination was already underscored in

⁹⁴³ See for example Malta, which ensures free legal assistance only in case of appeal against a rejection.

⁹⁴⁴ Immigration Law Practitioners' Association (ILPA), *Analysis and Critique of Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, 30 April 2004.

⁹⁴⁵ See Articles 32 and 43 of the Directive 2013/32/EU.

⁹⁴⁶ Case C-175/11, *H.I.D., B.A. v Refugee Applications Commissioner, Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, [2013] para 74.

⁹⁴⁷ *Ibid*, para 73.

⁹⁴⁸ *Ibid*.

the early 1990s by the UNHCR, which noted that the implementation of the safe country concept could automatically prevent nationals from these countries from obtaining refugee status in the host countries.⁹⁴⁹ On that occasion, however, the UNHCR considered that if procedural guarantees were maintained at every stage of the procedure, the systematic use of the notion should not prejudice the asylum seeker, but on the contrary, should facilitate a faster process of applications.⁹⁵⁰ Thus, it can be argued that a list of safe countries of origin does not establish an irrefutable presumption of safety. This means that it is not only necessary to verify the country's conditions concretely and regularly, but also to carry out an individual evaluation.

On the other hand, the UNHCR also noted that clearly fraudulent applications are onerous for the countries responsible and detrimental to those asylum seekers who are in real need of protection.⁹⁵¹ Indeed, a large number of fraudulent applications contribute to congesting national systems and significantly slow down procedures for all asylum seekers. As a result, long delays affect reception capacities, by limiting Member States' flexibility in finding suitable facilities to accommodate new arrivals. In addition, due to changing migration patterns and the increase in the number of asylum seekers in recent years, many countries deal with a large backlog of applications and the SCO list helps to speed up the asylum procedure and possibly reduce administrative costs.⁹⁵² For these reasons, the use of lists of safe countries of origin would help to accelerate the processing of applications that may be manifestly unfounded. Therefore, following this approach, it might be assumed that an asylum seeker is not fleeing from a risk of persecution given the situation in the country of origin. However, as indicated above, in such cases it is up to the applicant for international protection to prove the opposite, which may sometimes be very difficult to demonstrate. Thus, such a presumption may lead the State to question the reliability of the facts alleged by the applicant. In this regard, it has been argued that to assume that applications of persons from safe countries of origin are manifestly unfounded may come down to disqualifying them outright.⁹⁵³

⁹⁴⁹ Office of the United Nations High Commissioner for Refugees, *Background Note on the Safe Country Concept and Refugee Status*, EC/SCP/68, Sub-Committee on International Protection, 26 July 1991.

⁹⁵⁰ *Ibid.*

⁹⁵¹ Executive Committee of the High Commissioner's Programme (ExCom), Conclusions on International Protection, Conclusion No. 30 (XXXIV), 20 October 1983.

⁹⁵² Claudia Engelmann (n 874) 281.

⁹⁵³ EuroMed Rights (n 870) 9.

Therefore, the concept of a safe country of origin has been criticized as discriminatory since the burden of proof, as mentioned earlier, falls exclusively on the applicant, unlike applicants from 'unsafe' countries.⁹⁵⁴ Indeed, an increased burden of proof significantly complicates the effective exercise of rights. For these reasons, it has been proposed that the list of safe countries of origin should be utilized solely to expedite the processing of such applications. However, reorganizing national procedures might be more effective in accelerating the resolution of abusive or unfounded asylum claims than merely relying on SCO lists.⁹⁵⁵

Furthermore, it is important to remember that assuming that some countries are safe and thus excluding certain nationalities from international protection may not be legitimate. In fact, this would amount to a *de facto* reservation to Article 1 of the Refugee Convention, and would thus be in violation of Article 42, which prohibits reservations to such Article, and it would be a violation of Article 3, which prohibits discrimination on the grounds of refugees' country of origin.⁹⁵⁶ such differentiation would introduce a new geographical limitation to the Refugee Convention, that is incompatible with the intent of the 1967 Protocol, which precisely removed this aspect from the Convention.⁹⁵⁷

This approach was also confirmed by the French National Consultative Committee on Human Rights, which recommended the abolition of the concept of safe countries of origin. In the Committee's view, this concept creates unequal treatment of asylum seekers and is therefore incompatible with Article 3 of the Refugee Convention, which states that States Parties must apply the provisions of the Convention without discrimination on grounds of race, religion, or country of origin.⁹⁵⁸

The risk of suffering discriminatory treatment is also linked to the risk of violating the prohibition of *refoulement*. In fact, if an asylum seeker is in a country, which considers that person's country to be safe, there is a risk that he or she will be transferred to his or her own country. Conversely, if the same person is in a country, which does not consider that country to be safe, the risk of *refoulement* is reduced. A clear example comes from the 2018 *Migrationsverket* judgment. During

⁹⁵⁴ Ibid.

⁹⁵⁵ Opinion of the European Union Agency for Fundamental Rights concerning an EU common list of safe countries of origin, FRA Opinion 1/2016 [SCO], Vienna, 23 March 2016, page 10.

⁹⁵⁶ Ibid, page 12.

⁹⁵⁷ UNHCR, *Background Note on the Safe Country Concept and Refugee Status*, EC/SCP/68, 26 July 1991.

⁹⁵⁸ Commission Nationale Consultative des Droits de l'Homme, *Avis relatif aux travaux de l'Union européenne sur l'asile et au Sommet de Laeken*, 23 November 2001.

that case, the CJEU pointed out that Sweden, in its legislation, included all asylum seekers coming from safe countries of origin in accelerated procedures. This meant, that according to Swedish legislation, an applicant could not remain in the territory pending the outcome of an appeal due to the lack of suspensive effect of appeals in accelerated procedures.⁹⁵⁹ However, the suspensive effect of an appeal against a rejected asylum application is a fundamental guarantee of the effectiveness of the right to appeal and compliance with the principle of non-refoulement. In fact, as indicated by Article 46 paragraph 5 of the Asylum Procedures Directive, an applicant cannot be expelled until the appeal has been duly examined.⁹⁶⁰ However, paragraph 6 of the same Article allows Member States to deny the suspensive effect of an appeal for cases initially considered manifestly unfounded.⁹⁶¹ However, as noted above, applications for international protection submitted by persons from safe countries of origin are often declared manifestly unfounded. This means, that concretely, people coming from a safe country of origin may not avail themselves of such remedies, and they run a serious risk of being sent back to their own country which may be not safe for them. In fact, as mentioned above, people coming from a safe country of origin have a heavier burden of proof, and they might not have the right to be assisted by a lawyer free of charge during the first stage of the procedure, who could help them to gather more reliable proof. This procedure, therefore, leads to declaring a case manifestly unfounded much more easily. Moreover, as indicated by Paragraph 6 of Article 46 of the Directive, by declaring a manifestly unfounded, EU States may not guarantee the suspensive effect of an appeal, which ensures them the possibility of not being expelled. Consequently, if the Member States adopt such practices, they clearly violate the absolute principle of non-refoulement.

Therefore, the notion of safe countries of origin should be used appropriately and national lists should be applied in such a way that they would not lead to the improper denial of access to asylum procedures, and violating human rights, specifically the principle of non-refoulement.⁹⁶²

Moreover, the risk of violating such principle also arises when countries perform only a general analysis of the country of origin, without considering the individual conditions of a person arriving from a so-called safe country. In other words, if only the general situation of the country is

⁹⁵⁹ Case C-404/17, *A v Migrationsverket*, [2018], ECLI:EU:C:2018:588.

⁹⁶⁰ Article 46, paragraph 5 of the Directive 2013/32/EU.

⁹⁶¹ *Ibid*, para 6.

⁹⁶² Office of the United Nations High Commissioner for Refugees Division of International Protection, *A Thematic Compilation of Executive Committee Conclusions*, 7th edition, June 2014, page 12.

considered, without assessing the individual circumstances of the person, there is still a risk that the transfer of that person to his or her country of origin could lead to a real risk of persecution or serious human rights violations. In fact, a person could come from a country defined as safe, but depending on his or her personal circumstances, it could be very dangerous to return to his or her country.

This approach was also confirmed by the ECtHR in the *Khlaifia* decision. In that case, the Italian government claimed that Tunisia was a safe country of origin for a group of persons who had arrived by sea from that country. The Court stated that even if a country is declared a safe country of origin, that State may not be safe for everyone and an individual assessment of the circumstances is necessary.⁹⁶³ Additionally, the Court emphasized that expelling migrants without a thorough examination of their individual situation would significantly increase the risk of violation of the principle of non-refoulement.⁹⁶⁴ The ECtHR sustained this viewpoint in the subsequent *D.L.* case, affirming that a legal declaration of a country as safe does not absolve the extraditing State from the obligation to assess individual risk.⁹⁶⁵

These concerns have also been shared by UN human rights bodies. For example, in *R.A.A. v. Denmark*, the Human Rights Committee concluded that the expulsion of an asylum seeker from Sri Lanka without an adequate individualised assessment violated Article 7 of the ICCPR.⁹⁶⁶ Similarly, in *Alzery v. Sweden*, the Committee found that the use of diplomatic assurances, in the absence of adequate safeguards, was a violation of the principle of non-refoulement.⁹⁶⁷ These cases confirm that the presumption of safety based on country lists should not prevail over the obligation to assess the actual risk on a case-by-case basis.

The UN treaty bodies and the ECHR seem broadly aligned in emphasising the need for individualised risk assessments, even in the presence of diplomatic assurances or safe-country designations. However, there may be some divergence in the application of procedural safeguards, with the ECHR potentially allowing for a more flexible approach in specific circumstances, such as the use of diplomatic assurances in cases like *Othman (Abu Qatada) v. United Kingdom*.⁹⁶⁸ This

⁹⁶³ *Khlaifia and Others v. Italy*, App no. 16483/12 (ECtHR 15 December 2016).

⁹⁶⁴ *Ibid*, para 25.

⁹⁶⁵ *D.L. v. Austria*, App no. 34999/16 (ECtHR 7 December 2017).

⁹⁶⁶ Human Rights Committee, *R.A.A. and Z.M. v Denmark* Communication No 2608/2015 (2016) UN Doc CCPR/C/118/D/2608/2015.

⁹⁶⁷ Human Rights Committee, *Mohammed Alzery v Sweden* Communication No 1416/2005 (2006) UN Doc CCPR/C/88/D/1416/2005.

⁹⁶⁸ *Othman (Abu Qatada) v. the United Kingdom* App no 8139/09 (ECtHR, 17 January 2012).

narrow difference underlines the persistent tension between state discretion and the obligation to protect against refoulement.

Although this chapter focuses mainly on the European regional system, in particular EU law and the ECHR, it is important to note that the concept of safe country is not exclusive to the EU. Other regional human rights systems, such as the Inter-American and African systems, have also addressed such principles. However, they do not operate within the same frameworks of mutual recognition and trust and shared responsibility for asylum that characterise EU law. Therefore, this analysis limits its scope to the European context, where the use of safe country lists is deeply established in a supranational legal and political structure.

Moreover, this chapter does not provide a detailed comparative analysis of national jurisprudence on safe countries of origin. Given the diversity of national approaches and the lack of harmonised standards among EU Member States, such a comparative study is beyond the intended scope. Therefore, the focus remains on supranational law and jurisprudence when assessing EU compatibility with the principle of non-refoulement.

In this context, as outlined in previous chapters, it should be recalled that the principle of non-refoulement is the cornerstone of the refugee's protection. As already mentioned in the previous chapters, Article 33 of the 1951 Refugee Convention prohibits the return of a refugee or asylum seeker to a place where there is a real risk of persecution. This principle is also reflected in the EU legislation, specifically in Articles 18 and 19 of the EU Charter of Fundamental Rights, and Article 78 TFEU. In addition, the ECtHR has included the prohibition against refoulement in Article 3 ECHR.⁹⁶⁹ According to EU law and ECtHR interpretation, the principle of non-refoulement is considered an absolute right. This means that no exceptions or derogations are allowed and it is extended not only to refugees and asylum seekers but to everyone. Consequently, Article 46(6) of the Asylum Procedures Directive, by allowing member states to deny the suspensive effect of an appeal for cases considered manifestly unfounded, could indirectly violate the principle of non-refoulement. This is because it introduces an exception to its application, which could lead to the deportation of individuals to states that, despite being designated as safe, may not be so in the context of their specific circumstances.

⁹⁶⁹ See for example *Vilvarajah and Others v. United Kingdom*, App nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, (ECtHR 30 October 1991), paras. 107; *Soering v. the United Kingdom*, App no. 14038/88, (ECtHR 7 July 1989) para. 91.

Although the specifics of SCO policies have been extensively examined for their legality, fairness, and effectiveness, conceptual criticisms of safe country of origin determinations remain.⁹⁷⁰ Organisations such as ECRE, Statewatch and Amnesty International have been extremely critical of safe country practices, highlighting a fundamental concern: the move to a generalised security assessment, although perhaps administratively convenient for member states, deviates from the fundamental principles of international refugee law, which emphasises the circumstances of the individual rather than the general conditions of his or her country of origin.⁹⁷¹ The practice of making generalised judgements based on a person's country of origin is considered overly simplistic and overlooks the potential for discrimination and persecution, potentially leading to cases of refoulement as legitimate asylum claims are rejected by inconsistent and inadequate assessment processes.⁹⁷²

Furthermore, as mentioned in the previous section, the existence of different national lists of safe countries within the EU could contribute to violations of non-refoulement. For example, if a person's country of origin is not considered safe by one EU Member State, but is considered safe by another which, under the Dublin Regulation, is responsible for examining the asylum application, the person could be returned to his or her country of origin without an individualised assessment, violating the principle of non-refoulement. In fact, even when transfers to a country designated as safe are legally justified, the practical application of the Dublin criteria increases the risk of indirectly sending people to unsafe conditions.⁹⁷³

The disparity in SCO lists between EU countries suggests that these safeguards are not uniformly respected in practice; otherwise, the lists would be identical. Thus, it's clear that the safe country of origin concept is often used to make asylum procedures quicker but at the expense of proper human rights considerations. Furthermore, as mentioned above, the variation of SCO lists across European countries indicates that the designation of a country as safe is not only influenced by human rights standards but also by political considerations, leading to the misuse of the safe country of origin concept to circumvent the strict application of fundamental rights, in particular the principle of non-refoulement.

⁹⁷⁰ Matthew Hunt (n 7) 516.

⁹⁷¹ ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status' (2006) INI/10/2006/EXT/JJ, 1-35, 26.

⁹⁷² Matthew Hunt (n 7) 516.

⁹⁷³ Sílvia Morgades-Gil (851) 86.

Therefore, from this analysis emerges that the notion of a safe country of origin could affect the procedures for examining applications for international protection by limiting the rights and the procedural guarantees to which each person in need of protection is entitled. In addition, considering the importance of the principle of non-refoulement, the use of the lists of safe country of origin should be accompanied by the necessary guarantees established by law and applied in practice.⁹⁷⁴ However, as Cathryn Costello points out, labelling countries as safe can create a cycle where claims from those countries are more likely to be denied, making it appear that those countries are indeed safe. This could overlook important asylum claims and risk refoulement.⁹⁷⁵

4.4.Navigating the Complexities of the Safe Third Country Concept

In the preceding paragraphs, it was pointed out that the concept of a safe country is generally divided between EU safe country, safe country of origin, and safe third country. As mentioned above, an EU-safe country implies that all EU member states are considered safe for asylum seekers as they are presumed to comply with EU law and fundamental rights. Safe country of origin refers to the country of nationality of asylum seekers where there should be no risk of persecution or other serious harm. Lastly, a safe third country is one outside the EU and different from the asylum seekers' country of nationality. The latter term is further used to indicate a variety of situations. Notably, it can be distinguished from the concept of European safe third countries and the first country of asylum. The European safe third countries are simply those European states, not members of the European Union, that have ratified and observe in practice the provisions of both the 1951 Refugee Convention and the ECHR and have established asylum procedures in domestic law.⁹⁷⁶ The concept of the first country of asylum is generally applied in cases where a person has already found international protection in a previous state, which continues to be accessible and effective for the person concerned.⁹⁷⁷ The general term of safe third

⁹⁷⁴ Opinion of the European Union Agency for Fundamental Rights concerning an EU common list of safe countries of origin, FRA Opinion 1/2016 [SCO], Vienna, 23 March 2016, page 4.

⁹⁷⁵ Cathryn Costello (n 916) 602.

⁹⁷⁶ Violeta Moreno-Lax, 'The Legality of the "Safe Third country" Notion Contested: Insights from the Law of Treaties' in G.S Goodwin-Gil and P. Weckel (eds), *Migration & Refugee Protection in 21st Century: International Legal Aspects*, The Hague Academy of International Law Centre for Research (2015) Martinus Nijhoff Publishers, 665-721, page 677.

⁹⁷⁷ Roberto Cortinovis, 'Asylum: The Role and Limits of the Safe Third Country Concept in EU Asylum' (2018) ReSOMA Discussion Brief, page 4.

country, on the other hand, must be applied in cases where a person could have applied for international protection in a previous state but did not do so, or in cases where protection has been sought but the status has not been determined.⁹⁷⁸

The use of these concepts, thus, can justify the decision to send asylum seekers back to another country. This implies that in both cases a country may reject a person's asylum application if he or she has already obtained protection from another country or if he or she can obtain it in a country through which he or she has previously transited.

The concept of safe third country does not derive directly from the 1951 Refugee Convention. The concept first emerged during the 1977 Diplomatic Conference on Territorial Asylum, when Denmark proposed that in case it appeared that a person already had a connection to another state, and if it was reasonable and fair, that person should be called upon to seek asylum in that state.⁹⁷⁹

However, the conference acknowledged that asylum should not be denied merely because it could have been sought elsewhere.⁹⁸⁰ Despite this approach, during the 1970s and 1980s, faced with a negative economic outlook and growing anxieties arising from increased migration, several European governments began to introduce a series of restrictive migration policies.⁹⁸¹

Systematic abuse of the right to asylum was perceived, implemented mostly by economic migrants. Therefore, this expanding phenomenon legitimised the adoption of various restrictive measures, such as the implementation of visa policies, sanctions and reinforced border controls.⁹⁸² The notion of a safe third country was one of the measures envisaged in that context, with the assumption that this principle had to be adopted to prevent the so-called asylum shopping,⁹⁸³ and to address the phenomenon of 'refugees in orbit', whereby refugees are moved from one country to another in a constant search for protection without being rejected but also without access to international protection.⁹⁸⁴ With the adoption of this concept, therefore, coming from a safe third country was a

⁹⁷⁸ Oxford University Press, 'Legal Considerations on the Return of Asylum Seekers and Refugees from Greece to Turkey as Part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the Safe Third Country and First Country of Asylum Concept' (2017) *International Journal of Refugee Law*, Vol 29, No 3, 498-508, page 500.

⁹⁷⁹ Background Note on the Safe Country Concept and Refugee Status

EC/SCP/68, United Nations High Commissioner for Refugees, July 1991.

⁹⁸⁰ Ibid.

⁹⁸¹ Roberto Cortinovis (n 977) 4.

⁹⁸² James C. Hathaway, Harmonizing for whom: The devaluation of refugee protection in the era of European economic integration (1993) *Cornell International Law Journal* 26 (3), page 726.

⁹⁸³ Violeta Moreno-Lax (n 974).

⁹⁸⁴ Gamze Ovacik, Compatibility of the Safe Third Country Concept with International Refugee Law and its Application to Turkey, (2020) *PERCEPTIONS*, Spring-Summer 2020 Volume XXV Number 1, 61-80, page 67.

ground for the inadmissibility of an asylum application, as it was possible to send asylum seekers back to those countries deemed safe through which they had passed after leaving their home countries.⁹⁸⁵

These policies initially emerged in the legal systems of Scandinavian countries. An example can be found in the October 1986 amendments to the Danish Aliens Act, where the notion of Country of First Asylum was adopted.⁹⁸⁶ Subsequently, the principle rapidly spread to other European countries where it acquired different forms and nomenclature.⁹⁸⁷ Then it expanded to other parts of the world and was also formalised in numerous bilateral and multilateral agreements.⁹⁸⁸

Within the EU, the safe country concept was introduced with the 1990 Dublin Convention, aimed at preventing forum shopping and the 'refugees in orbit' phenomenon.⁹⁸⁹ As indicated in the previous chapters, the intention of the Dublin Convention was to establish common criteria for determining the state responsible for examining applications for asylum presented in one of the member states. The system was based on the basic assumption that Member States could be considered 'safe' countries for asylum seekers and, for this reason, it was assumed that transfers from one Member State to another would not violate the principle of non-refoulement. With this mechanism, thus, Member States ensured that asylum seekers were not transferred to another Member State without a guarantee that none of those States would be responsible for examining the asylum application.⁹⁹⁰ Following this approach, the subsequent development of the safe third country notion in EU law might be interpreted as an attempt to extend the rationale behind the operation of the Dublin system to countries outside the EU.⁹⁹¹

This attempt seems to have occurred through the 1992 Resolution on a Harmonised Approach to Questions concerning Host Third Countries.⁹⁹² The EU ministers at that time responsible for

⁹⁸⁵ Ibid; Nazaré Albuquerque Abell, "The Compatibility of Readmission Agreements with the 1951 Convention Relating to the Status of Refugees," (1999) *International Journal of Refugee Law*, Vol. 11, No. 11, page 61.

⁹⁸⁶ Ibid, page 664; Morten Kjaerum, The Concept of Country of First Asylum (1992) *International Journal of Refugee Law*, 4(4), 514-530, page 514.

⁹⁸⁷ Germany introduced the concept in Article 16 when it amended its Constitution in 1993. Similarly, the United Kingdom introduced the notion of Safe Third Countries in its Asylum and Immigration Bill at the end of 1995.

⁹⁸⁸ For example, Australia adopted third country regulations for Indo-Chinese refugees in 1994 and incorporated the safe third country concept in 1999. The United States adopted the safe third country concept in 1996. Canada adopted the concept in 1989.

⁹⁸⁹ Roberto Cortinovis (n 977) 4.

⁹⁹⁰ See Recital 4 of the Dublin Convention.

⁹⁹¹ Joanne van Selms, Access to procedures: 'Safe third countries', 'Safe Countries of Origin' and 'Time Limits' (2001) UNHCR Background Paper, page 3.

⁹⁹² Resolution on a Harmonized Approach to Questions concerning Host Third Countries", London, 30 November-1 December 1992.

immigration commonly decided that the Member State to which an asylum application was submitted could examine whether or not to apply the host third country principle. In that case, the State had to initiate the necessary procedures for sending the asylum seeker to the host third country before considering whether there was another EU Member State competent to examine the asylum application under the Dublin Convention.⁹⁹³ In the event of a Dublin Transfer to the responsible EU State, that State would still have the option to send the applicant to a third country.⁹⁹⁴ Although the 1992 Resolution aimed to harmonize asylum procedures, it did not prevent the emergence of varied practices among Member States, which continued to adopt divergent approaches towards safe third countries.⁹⁹⁵

It was with the adoption of the 2005 Asylum Procedures Directive that the criteria for applying the safe third country concept were finally harmonized. This directive introduced three distinct concepts: First Country of Asylum, European Safe Third Country, and Safe Third Country.⁹⁹⁶ All three concepts were maintained in the recast version of the Asylum Procedures Directive, with each having similar procedural implications.⁹⁹⁷ Specifically, the notion of a safe third country is articulated in Article 38, which stipulates that a country can be regarded as a safe third country for a particular applicant if the competent authorities are convinced that the applicant will be treated in the third country in accordance with the following principles: “(a) *life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) there is no risk of serious harm as defined in Directive 2011/95/EU; (c) the principle of non-refoulement in accordance with the Geneva Convention is respected; (d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and (e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.*”⁹⁹⁸

In the event that a third country is considered safe, in accordance with Articles 32 and 33 of the Directive, an asylum application made in one of the Member States may be considered

⁹⁹³ Ibid, para. 3 (a).

⁹⁹⁴ Ibid, para. 3 (b) and (c).

⁹⁹⁵ Violeta Moreno-Lax (n 974) 676.

⁹⁹⁶ See Articles 26, 27 and 36 of the 2005 Directive.

⁹⁹⁷ Articles 35, 38 and 39 of Directive 2013/32 of the European Parliament and of the Council of 26 June 2013, on common procedures for granting and withdrawing international protection (recast), [2013] OJ L 180/60.

⁹⁹⁸ Article 38 of the Asylum procedures Directive.

inadmissible, unfounded and decided under an accelerated procedure.⁹⁹⁹ However, the Asylum Procedures Directive ensures that asylum seekers have the opportunity to contest the presumption of safety due to individual circumstances.¹⁰⁰⁰ This implies that the requirements for a third country to be considered safe do not only refer to the general conditions of the country concerned but also to the specific circumstances of the persons seeking international protection. This approach was also confirmed by the Slovenian Supreme Court, which stated that even though Member States may designate third countries as generally safe for asylum seekers, an applicant has the opportunity to rebut the presumption of safety based on his or her individual circumstances.¹⁰⁰¹

Following this procedure, the national legislation of the third country should carry out the examination of asylum applications in compliance with all the procedural guarantees laid down in international law. Therefore, these Countries should ensure the asylum seeker, the right to an effective remedy, and to enjoy the rights enshrined in the Geneva Convention, including economic and social rights.¹⁰⁰² If all these conditions are met, Member States may be dispensed from assessing whether the asylum seeker qualifies as a refugee since it can be reasonably assumed that another country would carry out such an examination, or, in the case of a country of first asylum, that such country would provide sufficient protection.¹⁰⁰³ Conversely, when an appeal is lodged against a decision of inadmissibility due to the applicant's country being considered safe, the asylum application has a suspensive effect in some countries.¹⁰⁰⁴ This means that until the competent authority makes a decision, the individual cannot be sent back to the country deemed safe. If the appeal is denied and the third country in question does not permit the applicant's entry, Member States are still obligated to allow access to the procedure within their territory.¹⁰⁰⁵

As indicated in Article 38(2)(b) of the Asylum Procedures Directive, the safe third country concept cannot be applied unless the Member State has laid down rules in national legislation concerning the methodology by which the competent authorities satisfy themselves that the safe third country concept can be applied generally to the refugee situation in a particular country or to a particular applicant.¹⁰⁰⁶ In line with Recital 46 of the directive, when Member States apply the safe country

⁹⁹⁹ Article 31 (7) of the Directive.

¹⁰⁰⁰ Article 38 (2) (c) of the Directive.

¹⁰⁰¹ Slovene Supreme Court, judgment 16 December 2009, I Up 63/2011. (see EDAL English summary)

¹⁰⁰² EuroMed Rights (n 867) 6.

¹⁰⁰³ See Recitals 22 and 23 of the Asylum Procedures Directive.

¹⁰⁰⁴ Oxford University Press (n 978) 500.

¹⁰⁰⁵ Article 38 (4) of the Directive.

¹⁰⁰⁶ Article 38 (2) (b).

concept on a case-by-case basis or designate countries, they should consider guidelines and operational manuals such as EUAA reports and UNHCR guidelines.¹⁰⁰⁷ Moreover, to guarantee the accurate application of the safe country concepts, Member States are expected to conduct regular reviews to acquire current information.¹⁰⁰⁸ Such information, as mentioned in Recital 48 of the directive, can be sourced from other Member States, the EUAA, UNHCR, the Council of Europe, and other pertinent international organisations.¹⁰⁰⁹ This implies that if there are significant changes in the human rights situation in a country considered safe, the EU States should carry out such reviews as early as possible and then reassess whether a country can be considered safe or not. This procedure has also been confirmed by the national jurisprudence of the Member States.¹⁰¹⁰ Specifically, the Hague Court ruled that it is not sufficient for Member States to rely solely on the fact that a third State has committed itself to the standards guaranteed by Article 38 (1) of the Directive, but that Member States must adequately investigate whether or not the third state concerned complies with its international obligations.¹⁰¹¹

While these provisions are designed to ensure that no asylum seeker who arrives in an EU country is subjected to Human Rights violations or breaches of International refugee protection in another country, States often tend to implement the safe third country criterion in a nearly automatic manner.¹⁰¹² Moreover, it's crucial to note that the Asylum Procedures Directive grants Member States a wide margin of discretion.¹⁰¹³ As a matter of fact, any connection that may exist between the asylum seeker and the third country, the methodology for establishing the safety of return, the case-by-case assessment, and the designation of lists, follow national rules.¹⁰¹⁴ For example, each EU State, in line with its national legislation, maintains the authority to transfer an asylum seeker to a third country.¹⁰¹⁵ This margin of discretion may therefore lead to variations in asylum procedures among member states, which could interpret the connection between the asylum seeker

¹⁰⁰⁷ Recital 46 of the Directive.

¹⁰⁰⁸ Recital 48 of the Directive.

¹⁰⁰⁹ Ibid.

¹⁰¹⁰ European Asylum Support Office, Judicial analysis, Asylum procedures and the principle of non-refoulement, EASO Professional Development Series for members of courts and tribunals, IARLJ-Europe, 2018, Page 120.

¹⁰¹¹ Court of The Hague (the Netherlands), judgment of 13 June 2016, AWB 16/10406, ECLI:NL:RBDHA: 2016:6624 (see EDAL English summary)

¹⁰¹² Silvia Morgades-Gil (848) 85.

¹⁰¹³ See Article 38 (2) of the Directive.

¹⁰¹⁴ See Article 38 (2) (b) of the Directive.

¹⁰¹⁵ See Article 3 (3) of the Dublin III Regulation.

and the third country differently and establish different lists, thus potentially leading to inconsistencies in the application of asylum policies.

4.4.1. The Safe Third Country Concept and its Implications on Fundamental Rights

As previously mentioned, the purpose of the safe third-country notion is based on the idea of preventing asylum seekers from transiting from one country to another and choosing where to apply for asylum.¹⁰¹⁶ Thus, since States can transfer an asylum seeker to another country before assessing the claim on its merits, the asylum application is often declared inadmissible.

This method appears to establish a sort of exclusion clause from refugee status at the stage of assessing the merits.¹⁰¹⁷ However, the practice of transferring the asylum seeker to a safe third country without examining the protection application on its merits seems to be supported by Articles 31 and 33 of the Refugee Convention,¹⁰¹⁸ and by the fact that there is no specific rule in the Refugee Convention on the allocation of responsibility for the examination of applications for international protection.¹⁰¹⁹ Following this interpretation, it is assumed that the responsibility lies with the State through which the asylum seeker has previously transited.¹⁰²⁰ This suggests that as long as the obligations under the Convention are respected, States are free to send asylum seekers to safe countries through which they have previously passed. Moreover, according to Article 33, States Parties to the Convention may not send a refugee to the frontiers of territories where his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.¹⁰²¹ This indicates that the safe third-country concept is founded on the principle of non-refoulement. In fact, it has been argued that when executing returns to safe countries, the prohibition on transferring asylum seekers is legally confined to situations that meet the criteria outlined in Article 33.¹⁰²² Consequently, if the prohibition on

¹⁰¹⁶ Nadine El-Enany, “The Safe Country Concept in European Union Asylum Law: In Safe Hands?” (2006) Cambridge Student Law Review, page 6.

¹⁰¹⁷ Violeta Moreno-Lax (n 974) 665.

¹⁰¹⁸ Gamze Ovacik (n 984) 67 and 68.

¹⁰¹⁹ Violeta Moreno-Lax (n 974) 670.

¹⁰²⁰ Ibid.

¹⁰²¹ Gamze Ovacik (n 984) 68.

¹⁰²² Ibid.

transfers is restricted only to the scenarios enumerated in that article, transfers to third countries are permissible outside of these cases.¹⁰²³

Similarly, Article 31 prevents States from imposing sanctions on refugees 'coming directly' from a territory where their life or freedom has been threatened as a result of their illegal entry into that territory. However, the prerequisite for transfer to a third country is based on the fact that if people were truly in need, they would seek protection in the geographically closest place.¹⁰²⁴ Consequently, those who choose to transit through intermediate countries in order to reach distant destinations may not be considered to be seeking protection but rather improved living conditions. Thus, it has been argued that obligations under the Refugee Convention would only arise in respect of those who have a genuine need for protection.¹⁰²⁵ As a result, such individuals may be subject to normal immigration rules and their claims may therefore be considered manifestly unfounded. In fact, since Article 31 provides for the non-penalisation of refugees arriving directly from countries where they are at risk of persecution, this obligation does not apply to refugees arriving indirectly, via other countries where they would face no risk of persecution. In other words, following this interpretation, only immediate fleeing from one's own country is covered by Article 31. Therefore, only in these cases, the merits of the application for protection should be assessed,¹⁰²⁶ as there might be an overarching obligation for asylum seekers to seek refuge at the earliest opportunity.¹⁰²⁷

The UNHCR has also commented on the safe third country concept, affirming the legality of transfers provided that the third country guarantees a certain level of protection.¹⁰²⁸ Specifically, according to the UNHCR, such a country must adhere to the 1951 Refugee Convention, its 1967 Protocol, and the fundamental human rights instruments without limitations.¹⁰²⁹ This includes safeguarding against refoulement, ensuring the provision of adequate means of subsistence, and

¹⁰²³ María-Teresa Gil-Bazo, "The Safe Third Country Concept in International Agreements on Refugee Protection Assessing State Practice," (2015) *Netherlands Quarterly of Human Rights*, Vol. 33, No. 1, page 44.

¹⁰²⁴ Paul Linden-Retek, 'Safe Third Country': A Theory of a Dangerous Concept and the Democratic Ends of International Human Rights (2021) University at Buffalo School of Law, page 6.

¹⁰²⁵ Violeta Moreno-Lax (n 974) 669.

¹⁰²⁶ Kay Hailbronner, The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western European Perspective Get access Arrow (1993) *International Journal of Refugee Law*, Volume 5, Issue 1, Page 35.

¹⁰²⁷ Gamze Ovacik (n 984) 68.

¹⁰²⁸ UN High Commissioner for Refugees (UNHCR), *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, page 3, available at: <https://www.refworld.org/docid/5acb33ad4.html> [accessed 31 March 2023].

¹⁰²⁹ Ibid.

granting access to status determination procedures equipped with adequate procedural safeguards.¹⁰³⁰ For a country to be deemed safe, the UNHCR further emphasizes that access to protection must be effective and durable,¹⁰³¹ and this can be achieved when a state is obliged to provide such access under international law and has adopted national legislation to implement such laws.¹⁰³² In addition, the UNHCR also consider the connection between the refugee and the third country, as an important element when implementing returns to safe third countries.¹⁰³³ In this regard, it was argued that such a connection must be significant enough to make it reasonable and sustainable for the asylum seeker to seek protection in that country.¹⁰³⁴ Accordingly, in order to consider the transfer to be acceptable under international and European law, and for a country to be considered safe, there should be no risk of refoulement, persecution or other serious harm to the asylum seeker. Furthermore, there should be the possibility of obtaining international protection under the 1951 Convention in the receiving state and the asylum seeker should have a meaningful connection with such state.¹⁰³⁵ Following this approach, thus, if all the conditions listed are met and asylum seekers find protection in line with international refugee law, their transfer to safe third countries should not be problematic.

However, while some legal scholars have adopted a neutral stance,¹⁰³⁶ and others have defended the legality and adequacy of the concept,¹⁰³⁷ the notion of safe third countries has faced significant criticism in the scholarly literature. There is a growing consensus that the principle of non-refoulement and other international obligations could be tangibly violated due to transfers to so-called safe third countries.¹⁰³⁸ Specifically, it has been argued that countries rely exclusively on

¹⁰³⁰ Paul Linden-Retek (n 1024) 13;

¹⁰³¹ UN High Commissioner for Refugees (UNHCR), *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, pages 10 and 11, available at: <https://www.refworld.org/policy/strategy/unhcr/2001/en/13248> [accessed 31 March 2023]

¹⁰³² Roberto Cortinovis (n 977) 5.

¹⁰³³ UN High Commissioner for Refugees (UNHCR) (n 1031).

¹⁰³⁴ Ibid.

¹⁰³⁵ Helene Lambert, “Safe Third Country in the European Union: An Evolving Concept in International Law and Implications for the UK,” (2012) *Journal of Immigration, Asylum and Nationality Law*, Vol. 26, No. 4, pages 4 and 5.

¹⁰³⁶ Hemme Battjes, *European Asylum Law and International Law* (2006) Martinus Nijhoff Publishers, page 397; Jean-Yves Carlier, “Droit d’asile et des réfugiés: de la protection aux droits” (2007) *Recueil des cours*, page 161.

¹⁰³⁷ Kay Hailbronner (n 1022) 34; Sam Blay and Andreas Zimmermann, “Recent Changes in German Refugee Law: A Critical Assessment” (1994) *The American Journal of International Law* Vol. 88, No. 2, page 373.

¹⁰³⁸ Stephen H. Legomsky, *Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection* (2003) *International Journal of Refugee Law*, page 567.

references to the standard of protection that must be guaranteed without using any mechanism for monitoring returns or any remedy in the event of non-compliance with such standards.¹⁰³⁹

It would therefore appear a lack of safeguards for the protection of asylum seekers in the third country and the absence of ensuring in practice the implementation of safe returns to third countries in a manner compatible with international refugee and human rights law.¹⁰⁴⁰ In this regard, many authors have expressed substantial discomfort with the safe third country concept and the way it has been applied by states,¹⁰⁴¹ some of whom have even rejected it as impracticable in practice.¹⁰⁴² Specifically, it has been contended that transferring refugees and others in need of protection could be deemed inequitable if the likelihood of receiving asylum or the quality of protection significantly varies.¹⁰⁴³ Furthermore, such transfers might even breach legal standards if the implementation of the third country concept fails to uphold certain criteria ensuring that the presumption of safety remains valid for each applicant, considering their unique situation.¹⁰⁴⁴

These criticisms stem from the absence of a clear legal basis in the Refugee Convention for the use of the safe third-country concept.¹⁰⁴⁵ In this regard, it has been argued that this notion is based on a misinterpretation of the Convention, which does not allow the asylum seeker to choose the state in which to apply for protection but requires the asylum seeker to apply for such protection as soon as possible.¹⁰⁴⁶ This perspective is reinforced by James Hathaway's remarks following the

¹⁰³⁹ Gamze Ovacik (n 984) 68 and 69.

¹⁰⁴⁰ Cathryn Costello, "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?" (2005) *European Journal of Migration and Law*, Vol. 7, No. 1, pages. 44 and 45.

¹⁰⁴¹ Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees," Ministerial Meeting of States Parties, 12-13 December 2001, Geneva-Switzerland, para 4.

¹⁰⁴² Executive Committee of the High Commissioner's Programme, Conclusion endorsed by the Executive Committee of the High Commissioner's Programme upon the recommendation of the Sub-Committee of the Whole on International Protection of Refugees, 1979, available at: <https://www.unhcr.org/excom/exconc/3ae68c960/refugees-asylum-country> [accessed 31 March 2023].

¹⁰⁴³ Silvia Morgades-Gil (848) 87.

¹⁰⁴⁴ Karin Landgren, 'Deflecting International Protection by Treaty: Bilateral and Multilateral Accords on Extradition, Readmission and the Inadmissibility of Asylum Requests', UNHCR New Issues in Refugee Research (1999) Working Paper No 10, page 14.

¹⁰⁴⁵ Executive Committee of the High Commissioner's Programme, Conclusion endorsed by the Executive Committee of the High Commissioner's Programme upon the recommendation of the Sub-Committee of the Whole on International Protection of Refugees, 1979, available at: <https://www.unhcr.org/excom/exconc/3ae68c960/refugees-asylum-country> [accessed 31 March 2023].

¹⁰⁴⁶ Michelle Foster, Responsibility Sharing or Shifting? "Safe" Third Countries and International Law (2008) *Refugee Canada Journal on Refuge*, Vol. 25 No. 2, page 64 and 68.

2015 refugee crisis, highlighting that neither the Refugee Convention nor any principle of international law affords refugees the liberty to choose their asylum destination.¹⁰⁴⁷

Indeed, while the Convention does not grant refugees the right to select their host state, there is also no international mandate that requires seeking protection in the first country of arrival.¹⁰⁴⁸ In this respect, the UNHCR has argued that the primary responsibility to provide protection lies with the state in which asylum is sought, and not in a transit country, and a state has an obligation to fulfil its international obligations regardless of a person's circumstances.¹⁰⁴⁹ In other words, the fact that an asylum seeker has travelled through a country and may fall under that country's jurisdiction does not relieve the state where they currently are from its responsibilities.¹⁰⁵⁰ Indeed, the fact that in the past some other State may have become responsible for the protection of the person concerned does not diminish the present responsibility of the State which currently has jurisdiction over the refugee.¹⁰⁵¹

Moreover, the practice of transferring an asylum seeker to a third country does not reflect the essence of the preamble of the Refugee Convention.¹⁰⁵² Following the abovementioned interpretation, it would seem that refugees should seek protection in countries to which they have direct access. This approach would therefore make it almost impossible for a refugee fleeing persecution to reach countries in the global North. Consequently, such persons would have to be hosted exclusively by countries close to their country of origin or residence. This means that all the world's refugees would have to remain in the countries immediately adjacent to the refugee-producing countries, with the consequence of violating the spirit of international cooperation that is supposed to be in place.

Moreover, it has been stated that the safe country concept is also used to send asylum seekers back to a country through which they have simply transited, where they have no connection, nor they have even asked for protection in that country.¹⁰⁵³ In this regard, a crucial aspect criticised by legal

¹⁰⁴⁷ James Hathaway, 'A Global Solution to a Global Refugee Crisis' (2016), *European Papers*, Vol 1, No 1, page 97.

¹⁰⁴⁸ Executive Committee of the High Commissioner's Programme, Conclusion endorsed by the Executive Committee of the High Commissioner's Programme upon the recommendation of the Sub-Committee of the Whole on International Protection of Refugees, 1979, available at: <https://www.unhcr.org/excom/exconc/3ae68c960/refugees-asylum-country> [accessed 31 March 2023].

¹⁰⁴⁹ Violeta Moreno-Lax (n 974) 694.

¹⁰⁵⁰ *Ibid.*

¹⁰⁵¹ *Ibid.*, page 695.

¹⁰⁵² Gamze Ovacik (n 984) 68.

¹⁰⁵³ Reinhard Marx, The European Union's Plan to Amend the 'First Country of Asylum' and 'Safe Third Country' Concepts (2019) *International Journal of Refugee Law*, Vol 31, No 4, 580–596, page 581.

scholars is also the lack of transparency and discrepancies in the procedure for designating a country as safe by states, as these transfers usually occur through readmission agreements concluded between states.¹⁰⁵⁴ This raises questions about the potential political motivations that lead states to identify certain countries as safe. For example, it has been argued that Bulgaria has designated Armenia and Turkey as safe countries in order to protect itself from increased migration from these two countries.¹⁰⁵⁵ Similarly, as will be analysed in the following paragraphs, the EU-Turkey Declaration is also extensively criticised. Following this view, it can be argued that the safe country concept is not only based on respect for human rights but also depends on the consent of the third countries to accept the return of asylum seekers. In this regard, it should be recalled that unlike the obligation to admit their nationals, there is no general principle in international law that obliges states to readmit third-country nationals to their territory¹⁰⁵⁶ For these reasons, thus, the formalisation of the safe third country concept also takes place through readmission agreements between countries, which are generally accompanied by financial or diplomatic incentives such as visa facilitation or development aid to ensure the cooperation of receiving countries.¹⁰⁵⁷

These readmission agreements, as will be discussed in subsequent paragraphs, often contain mere references to the 1951 Convention without establishing any mechanisms to monitor returns or remedies for non-compliance.¹⁰⁵⁸ Furthermore, it has been argued that the assessment of the security of the third country is generally carried out by the country requesting the return. This means that the state, which transfers asylum seekers, unilaterally decides whether a third country meets the requirements to be considered safe.¹⁰⁵⁹ Therefore, no matter how high the level of respect for human rights is in theory, the assessment can hardly be objective in practice, with the clear risk of violating the principle of non-refoulement.

Similarly, the obligation of non-refoulement might also be compromised through so-called diplomatic assurances where the receiving state assures the sending state that the person concerned will be treated in accordance with its human rights obligations under international law.¹⁰⁶⁰ The UNHCR and the Committee against Torture also intervened, stating that diplomatic assurances

¹⁰⁵⁴ EuroMed Rights (n 870) 7.

¹⁰⁵⁵ Ibid.

¹⁰⁵⁶ Gamze Ovacik (n 984) 69.

¹⁰⁵⁷ Ibid; Nazaré Albuquerque Abell (n 1025) 76.

¹⁰⁵⁸ Gamze Ovacik (n 984) 69.

¹⁰⁵⁹ Ibid.

¹⁰⁶⁰ UN High Commissioner for Refugees (UNHCR), UNHCR Note on Diplomatic Assurances and International Refugee Protection, August 2006.

should be carefully examined for possible abuses.¹⁰⁶¹ However, even in this case no control mechanisms are provided, and the use of diplomatic assurances by member states might be used to circumvent obligations under international law. Consequently, such policy instruments conflict with the spirit of the 1951 Convention and facilitate the possibility of human rights violations in the countries of destination.¹⁰⁶² For these reasons, the notion of a 'safe third country' poses a clear risk to the integrity of the principle of non-refoulement.

4.4.2. How the Safe Third Country Concept Undermines the Principle of Non-Refoulement

Before turning to the implications of the safe third country concept on the principle of non-refoulement, it is important to briefly address the issue of jurisdiction. This chapter does not provide a detailed analysis of the evolving debates on extraterritorial jurisdiction in international law, a complex and controversial area, particularly in the context of border control operations. While *Hirsi Jamaa et al. v. Italy* confirmed that jurisdiction can be triggered by de facto control exercised extraterritorially, especially at sea,¹⁰⁶³ subsequent developments have revealed divergent approaches between the European Court of Human Rights and UN treaty bodies regarding the threshold and scope of jurisdiction in these contexts.¹⁰⁶⁴ Recent academic work has also proposed new models, such as “contactless monitoring”, to capture indirect or remote forms of migration management that may still involve human rights obligations.¹⁰⁶⁵ Therefore, as the focus of this chapter is on the application of safe third country practices in the context of EU asylum law and their compatibility with the principle of non-refoulement, a detailed legal analysis of jurisdictional thresholds is excluded from this discussion.

¹⁰⁶¹ Committee against Torture, General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, CAT/C/GC/4, 2018, page 4.

¹⁰⁶² Ibid, page 70; Thomas Gammeltoft-Hansen, “The Externalisation of European Migration Control and the Reach of International Refugee Law,” (2011) in Elspeth Guild & Paul Minderhoud (eds.), *The First Decade of EU Migration and Asylum Law*, Nijhoff: Brill, page 294.

¹⁰⁶³ *Hirsi Jamaa And Others V. Italy*, App no. 27765/09 (ECtHR 23 February 2012).

¹⁰⁶⁴ Human Rights Committee, General Comment No 36 on Article 6: Right to life, UN Doc CCPR/C/GC/36, para 63; General Comment No 31, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 10; Fanny de Weck, *Non-Refoulement under the European Court of Human Rights and the UN Convention Against Torture* (Brill 2017).

¹⁰⁶⁵ Itamar Mann, ‘The Right to Perform Rescue at Sea: Jurisprudence and Drowning’ (2018) 64 *Netherlands International Law Review* 59; Thomas Gammeltoft-Hansen and James Hathaway, ‘Non-Refoulement in a World of Cooperative Deterrence’ (2015) 53 *Columbia Journal of Transnational Law* 235; Cathryn Costello, ‘Reflections on the Architecture of the CEAS: Responsibility, Mutual Trust and the Rule of Law’ in *EU Migration Law and the Post-Amsterdam Era* (Oxford University Press 2020).

However, the debate on possible extensions or redefinitions of extraterritorial jurisdiction is still open, particularly in contexts such as remote monitoring and indirect control.¹⁰⁶⁶ These interpretations remain largely speculative and have not yet been firmly established in case law. Therefore, this chapter is limited to those jurisdictional principles that are most clearly defined and consistently applied in existing jurisprudence, such as those affirmed in cases such as *Hirsi Jamaa v. Italy*. The aim is to focus on jurisdictional standards that are consistently recognised by the courts, rather than speculative or emerging concepts that remain the subject of academic debate.¹⁰⁶⁷ Based on the analysis conducted so far, it is clear that the safe third country concept poses a real risk of violating human rights and in particular the principle of non-refoulement. This risk would also seem to arise within the EU, in relation to the Dublin system.

As mentioned above, the transfer of persons from one Member State to another takes place according to the rules established by the Dublin Regulation, under the principle of mutual trust, which is based on the European safe country concept. However, the regulation as such does not give asylum seekers entering its territory the right to have their applications examined in the Dublin area. Indeed, a Member State may, under its national law, transfer an applicant to a third country, as long as this country is in compliance with the Refugee Convention.¹⁰⁶⁸ This indicates that within EU law, the decision to apply the 'safe third country' concept instead of the Dublin system is at the discretion of the Member States.¹⁰⁶⁹ This stance was reinforced by the Court of Justice in the *Mirza* case, which involved a Pakistani citizen who entered Hungary from Serbia in 2015 and sought international protection.¹⁰⁷⁰ Subsequently, he travelled to the Czech Republic, where he was detained by authorities while attempting to reach Austria. The Czech authorities then requested Hungary, under Article 18 of the Dublin III Regulation, to take back the individual. During the readmission process, the Czech authorities were informed by Hungary that the asylum application would be subject to a preliminary admissibility assessment, which could lead to the transfer of the applicant to Serbia without a thorough examination of his application, given Serbia's status as a safe third country under Hungarian law. Following that possibility and the applicant's refusal to be

¹⁰⁶⁶ Mariagiulia Giuffré and Violeta Moreno-Lax, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in Satvinder S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019).

¹⁰⁶⁷ Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011).

¹⁰⁶⁸ Reinhard Marx (n 1053) 585.

¹⁰⁶⁹ Ibid.

¹⁰⁷⁰ Case C-695/15 PPU *Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal* [2016] ECLI:EU:C:2016:188

transferred to Serbia, the Czech court asked the Court of Justice whether the Member States may exercise the possibility of sending an asylum seeker to a safe third country only before the Member State responsible is identified, or whether they may exercise it also after that Member State has accepted its responsibility.¹⁰⁷¹

In this regard, the CJEU started its judgment by analysing the second subparagraph of Article 18 of the Dublin III Regulation, which states that Member States shall ensure that the examination of an application for international protection is completed.¹⁰⁷² Nevertheless, the Court held that this provision merely defines certain obligations of the Member State responsible, and the obligation to ensure that the examination of the application for international protection is completed does not relate to the right to send an applicant to a safe third country.¹⁰⁷³ Thus, according to the Court, Article 18 of the Dublin III Regulation does not restrict the applicability of Article 3 of the same regulation.¹⁰⁷⁴ As a result, the Court determined that the option to transfer an applicant for international protection to a safe third country can also be exercised by a Member State after it has acknowledged its responsibility under the regulation, particularly in the context of the take-back procedure.¹⁰⁷⁵

Following the Court's ruling, it appears thus that a Member State, although competent to examine an application for international protection under Article 3 of the Dublin Regulation, may still decide to transfer an asylum seeker to a third country. The issue that arises by adopting this approach is that, like mutual trust, the regulation allows Member States to rely on other countries, in this case, non-EU countries, without, however, providing the necessary safeguards to ensure that the third country is effectively safe. Another aspect also emerges from the Court's ruling that should be emphasized is that, as mentioned above, there is no common European list of safe third countries within the EU. Thus, it may occur that a third country is considered safe by one EU Member State but not by another. Hence, following the Court's approach, if an asylum seeker has transited through a third country that is not considered safe by the EU Member States where he or she is currently present, but such EU State is not responsible for his or her application under the Dublin Regulation, there may be a risk that the EU country responsible will consider the third

¹⁰⁷¹ Ibid, para 37.

¹⁰⁷² Ibid, para 47.

¹⁰⁷³ Ibid, para 48.

¹⁰⁷⁴ Ibid, para 49.

¹⁰⁷⁵ Ibid, para 53.

country as safe. Consequently, a high probability that an asylum seeker will be transferred to a non-safe country may arise. This scenario poses a serious risk of violating the principle of non-refoulement. In fact, similarly to the Safe Country of Origin concept, the EU Member State not responsible under the Dublin Regulation might indirectly violate the obligation of non-refoulement by being aware that an asylum seeker might be sent to a third country not considered safe. Similarly, if the EU Member State responsible for examining the asylum application considers the third country to be safe, but there are no concrete guarantees that such a country respects human rights, it might directly violate the principle of non-refoulement. This concern is compounded when considering that even if the transfer to a supposedly safe country appears formally legitimate, the practical application of Dublin criteria may inadvertently heighten the likelihood of indirect refoulement to countries that are not truly safe,¹⁰⁷⁶ further complicating the integrity of the asylum process within the EU framework.

In addition, another aspect that might be highlighted is that this mechanism also seems to encourage the secondary movements which the Dublin system desperately tries to prevent. Indeed, if an asylum seeker arrives from a third country that is considered safe by the EU Member State responsible for his or her application, he or she would probably seek the opportunity to move to the EU state that considers the third country of transit to be unsafe and therefore would give him the best chance of not being transferred further. Even within the EU, therefore, the risk of violating the principle of non-refoulement is very high. In this respect, a large body of international case law has also intervened to the extent that a safe third country must respect non-refoulement in order to be considered as such.¹⁰⁷⁷ However, instances of non-refoulement violation have occurred. A notable example is Hungary, which in 2015 amended its asylum legislation to include a national list of safe third countries,¹⁰⁷⁸ later adding Serbia despite reports by ECRE of inadequate access to protection in the country due to a dysfunctional asylum system.¹⁰⁷⁹ Under Hungarian law, to avoid transfer to a third country, an applicant must demonstrate that they cannot seek asylum in Serbia

¹⁰⁷⁶ Thomas Spijkerboer, 'The Practical Effects of Schengen in Asylum Cases' (1997) in *Refugee and Asylum Law: Assessing the Scope for Judicial Protection*, 2nd Conference of the International Association of Refugee Law Judges, Nijmegen, 9–11, page 54.

¹⁰⁷⁷ *T.I. v. UK*, App. no. 43844/98, (ECtHR 7 March 2000); *K.R.S. v. UK*, App. no. 32733/08, (ECtHR 2 December 2008); *Adbolkhani and Karimnia v. Turkey*, App. no. 30471/08, (ECtHR 22 September 2009); *M.S.S. v. Belgium and Greece*, App. no. 30696/09, (ECtHR 21 January 2011).

¹⁰⁷⁸ Government Decree 191/2015 (VII. 21.) on the national list of safe countries of origin and safe third countries.

¹⁰⁷⁹ European Council on Refugees and Exiles (ECRE), Country Report: Safe third country Hungary, 2022.

due to personal circumstances.¹⁰⁸⁰ This presents a substantial challenge, as it is exceedingly difficult for an asylum seeker who has traversed an unfamiliar country to provide concrete evidence supporting such a claim.¹⁰⁸¹ Moreover, the inability to access protection in Serbia does not depend on individual circumstances but on the general lack of an asylum system.¹⁰⁸² Therefore, it would be impossible to expect an asylum seeker to prove that for individual reasons he or she cannot have access to a protection system that does not actually exist.¹⁰⁸³ Further complicating matters, Hungarian law mandates that decisions on inadmissibility be made within a maximum of 15 days,¹⁰⁸⁴ making it highly unlikely, according to ECRE, that a thorough individual case assessment can be conducted within this timeframe.¹⁰⁸⁵ Thus, Hungarian legislation not only contravenes the EU's concept of a safe country¹⁰⁸⁶ but in practice has led to the violation of non-refoulement obligations, as in recent years, most asylum seekers arriving in Hungary have been exposed to the risk of immediate removal to Serbia.¹⁰⁸⁷

In 2017, Hungary amended its asylum legislation again, stipulating that asylum applications could only be presented from a transit zone on the Serbian-Hungarian border. The intention was to confine applicants to these transit zones, allowing them to apply for asylum, but subsequently declaring them inadmissible on the basis of coming from a safe third country. However, this ground of inadmissibility seemed incompatible with existing EU law. In fact, Articles 33 and 38 of the Asylum Procedures Directive provide an exhaustive list of inadmissibility grounds, which does not include this aspect. This violation also seems to be confirmed by the European Commission's 2018 decision to launch an infringement procedure regarding these changes. In fact, according to the Commission, the introduction of a new ground of inadmissibility not provided for in EU law was a violation of the EU Asylum Procedures Directive.¹⁰⁸⁸ After the infringement case initiated by the European Commission, in 2020, the CJEU condemned Hungary stating that the

¹⁰⁸⁰ Section 51(5) Hungarian Asylum Act.

¹⁰⁸¹ European Council on Refugees and Exiles (ECRE), (n 1073).

¹⁰⁸² *Ibid.*

¹⁰⁸³ *Ibid.*

¹⁰⁸⁴ Section 47(2) Hungarian Asylum Act.

¹⁰⁸⁵ European Council on Refugees and Exiles (ECRE), (n 1073).

¹⁰⁸⁶ Recital 46 and Article 38 recast Asylum Procedures Directive; Section 2(i) Asylum Act.

¹⁰⁸⁷ European Council on Refugees and Exiles (ECRE), (n 1073).

¹⁰⁸⁸ European Commission, 'Migration and Asylum: Commission takes further steps in infringement procedures against Hungary', 19 July 2018.

transit zone practice was not in compliance with EU law.¹⁰⁸⁹ Then, at the end of May 2020, Hungary introduced the so-called embassy system, requiring applicants to submit their claims at designated embassies in Belgrade, effectively making it impossible to claim asylum on Hungarian soil. This system forced asylum seekers already present in Hungary to travel abroad to file their applications.

Following its previous decision, on June 13, 2024, the CJEU again found that Hungary violated EU law regarding access to international protection procedures, the right of applicants to remain in Hungary pending a final decision on their appeal, and the removal of illegally staying third-country nationals.¹⁰⁹⁰ The Court argued that Hungary's failure to recognize its previous judgment demonstrated a disregard for the principle of sincere cooperation and deliberate evasion of EU asylum policy, constituting a severe infringement of EU law.¹⁰⁹¹

These violations were also confirmed by the European Court of Human Rights in the *Ilias and Ahmed* judgment.¹⁰⁹² The case concerned two Bangladeshi nationals who had transited through Greece, the former Yugoslav Republic of Macedonia and Serbia before reaching Hungary. On the same day of the protection interview, the applicants' asylum applications were both rejected on the grounds that Serbia was considered a safe third country under Hungarian law. Then, after losing all levels of the proceedings, the case reached the ECtHR, where the Hungarian government, in order to defend its position, argued that the inclusion of Serbia in a list of safe third countries was based on a possibility offered by EU law and that there was no evidence of Serbia's non-compliance with the Refugee Convention and the principle of non-refoulement. However, according to the Court, the transferring State has a duty to assess the real risk that the applicant would face in the receiving third country, and if safety is not guaranteed, Article 3 ECHR entails an obligation not to transfer the person concerned to that third country.¹⁰⁹³ Furthermore, when an application is not examined on its merits, as in procedures for transfer to safe third countries, the potential risk under Article 3 remains undetermined unless a thorough legal procedure is conducted to assess such a risk, including a current ex officio evaluation of the adequacy of the asylum system

¹⁰⁸⁹ Joined cases C-924/19 and 925/19, *FMS e.a. v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság et Országos Idegenrendészeti Főigazgatóság* [2020] ECLI:EU:C:2020:367.

¹⁰⁹⁰ Case C-123/22, *European Commission v Hungary* [2024] ECLI:EU:C:2024:493.

¹⁰⁹¹ *Ibid.*

¹⁰⁹² *Ilias and Ahmed V. Hungary*, App no. 47287/15, (ECtHR 14 March 2017).

¹⁰⁹³ *Ibid.*, para 134.

of the receiving State.¹⁰⁹⁴ Furthermore, the Court held that assuming that a third country is considered safe just because it is a member of the Refugee Convention is not a sufficient condition to qualify it as safe, it is instead necessary to carry out an analysis of the relevant conditions in the country and its asylum system. However, Hungary has not provided any documents to show that the inclusion of Serbia in the list of safe third countries was made following a thorough assessment of the situation there.¹⁰⁹⁵ Instead, the Court observed that the Hungarian authorities did not conduct an individual assessment for each applicant. As a result, Hungary was found in violation of Article 3 due to the risk of refoulement.¹⁰⁹⁶ The Hungarian government appealed the judgment, and in 2019, the Grand Chamber of the ECtHR reaffirmed the violation of Article 3 concerning the applicants' risk of inhuman and degrading treatment if returned to Serbia.¹⁰⁹⁷

Similar considerations arise from the landmark decision of the ECtHR in the case of *Hirsi Jamaa and Others v. Italy*, where Italy was found to have rejected boats towards Libya. As already mentioned in the second chapter, the ECtHR rejected Italy's argument that Libya was a safe third country.¹⁰⁹⁸ Despite Libya's ratification of international human rights conventions, including the International Covenant on Civil and Political Rights and the Convention against Torture, the Court considered various factors. These included Libya's non-ratification of the Refugee Convention, the absence of a robust asylum procedure, the limited involvement of the UNHCR in Libya, and evidence of forced returns of asylum seekers and refugees. Taken together, these factors indicated a lack of adequate safeguards against arbitrary repatriation.¹⁰⁹⁹ Consequently, the ECtHR concluded that Italy violated Article 3 of the ECHR by returning intercepted migrants to Libya, as the claimants faced a risk of mistreatment in Libya and potential repatriation to Somalia and Eritrea.¹¹⁰⁰

This judgment, although rendered over a decade ago, still holds significant relevance today, as evidenced by a recent ruling from the Italian Court of Cassation in February 2024. This ruling upheld the conviction of the captain of an Italian tugboat who had rescued 101 migrants and

¹⁰⁹⁴ Ibid, paras 137 and 141.

¹⁰⁹⁵ Ibid, paras 152 and 154.

¹⁰⁹⁶ Ibid, para 164.

¹⁰⁹⁷ *Ilias and Ahmed V. Hungary*, App no. 47287/15, (ECtHR 21 November 2019).

¹⁰⁹⁸ *Hirsi Jamaa And Others V. Italy*, App no. 27765/09 (ECtHR 23 February 2012), para 65 and 97.

¹⁰⁹⁹ Ibid, para 81 and 82.

¹¹⁰⁰ Ibid, para 136 and 138.

subsequently transferred them to a Libyan patrol vessel, based on the assertion that Libya cannot be considered a safe country.¹¹⁰¹

These decisions reflect ongoing concerns about the human rights situation in Libya, which has declined dramatically over the years. Reports have consistently documented abuse and torture in Libyan detention centres, casting a shadow over Libya's commitment to human rights principles, despite signing the International Convention against Torture.¹¹⁰² Furthermore, the non-ratification of the 1951 Refugee Convention highlights a lack of formal commitment to the principle of non-refoulement. Additionally, the absence of legislation recognizing refugee status further complicates the situation for those seeking asylum.¹¹⁰³ However, it's essential to remember that the principle of non-refoulement is a norm of customary international law, obliging all states to refrain from returning individuals to places where they face the risk of serious human rights violations, regardless of Libya's non-ratification of the 1951 Refugee Convention.¹¹⁰⁴ Hence, irrespective of its non-ratification status, Libya is obligated to uphold the principle of non-refoulement, underscoring the universal applicability of this fundamental human rights safeguard. The decisions mentioned above clearly stipulate that before transferring an individual to a safe third country, a comprehensive examination is necessary to ensure that the asylum seeker will not be denied access to the asylum procedure in the third country and that there is no risk of refoulement to the third country, regardless of the third country being a signatory to the Refugee Convention.¹¹⁰⁵

This principle, as outlined by the Court in the *Ilias and Ahmed* case and *Hirsi Jamaa* case, was reiterated in the 2020 *M.K. and Others* judgment, where the ECHR identified a violation of Article 3 ECHR due to the swift transfer of a third-country national to Belarus without adequately assessing the risk of refoulement or ensuring effective safeguards against the real risk of exposure

¹¹⁰¹ Italy, Corte di Cassazione, Decision No 4557 of 1 February 2024.

¹¹⁰² Fédération Internationale des Ligues des Droits de l'Homme, 'No Way Out: Migrants and Refugees Trapped in Libya Face Crimes Against Humanity' (Informing humanitarians worldwide 24/7, 2021); US Department of State, Bureau of Democracy, Human Rights, and Labor, '2022 Country Reports on Human Rights Practices: Libya'; Amnesty International, 'Report on Libya 2022' <https://www.amnesty.org/en/location/middle-east-and-north-africa/libya/report-libya/> [accessed on 28/05/2023].

¹¹⁰³ Human Rights Watch, 'Libya Events of 2019' in World Report 2020, available at: <https://www.hrw.org/world-report/2020/country-chapters/libya> [accessed on 28/05/2023].

¹¹⁰⁴ See Guy S Goodwin-Gill, The Dynamic of International Refugee Law (2013) *International Journal of Refugee Law*, Volume 25; María-Teresa Gil-Bazo, Asylum as a General Principle of International Law Get access Arrow (2015) *International Journal of Refugee Law*, Volume 27, Issue 1, Pages 3–28.

¹¹⁰⁵ European Union Agency for Asylum (EUAA), Applying the Concept of Safe Countries in the Asylum Procedure, Publications Office of the European Union, 2022, page 21.

to inhuman and degrading treatment or torture.¹¹⁰⁶ Similarly, in *M.A. and others v. Lithuania*, the ECHR concluded that the Lithuanian authorities did not properly evaluate whether the applicants could be safely returned to Belarus, which is not a party to the European Convention, and thus should not automatically be considered a safe third country.¹¹⁰⁷

A recent example is the UK's plan to transfer asylum seekers to Rwanda, announced in April 2022 as part of the Migration and Economic Development Partnership.¹¹⁰⁸ The initiative aims to process asylum claims of people who arrived in the UK via irregular migration routes to Rwanda, based on the presumption that Rwanda is a safe third country that can provide adequate protection.¹¹⁰⁹ However, human rights organizations have expressed concern about the potential risks to asylum seekers in Rwanda, indicating that if Rwanda is unable to ensure the safety and well-being of asylum seekers, the relocation plan could violate the principle of non-refoulement.¹¹¹⁰

The cases reviewed underscore that the safe third-country practice can undermine the very foundations of the international refugee protection system.¹¹¹¹ In particular, within the EU, this practice seems to turn shared responsibility into a transfer of responsibility, suggesting that EU member states, through the concepts of mutual trust and safe third countries, have delegated the responsibility of examining asylum claims and receiving asylum seekers to non-EU countries that may not respect the human rights of asylum seekers.¹¹¹² However, it is essential to remember that under the absolute principle of non-refoulement, a state is prohibited from returning an asylum seeker to his or her country of origin or any other place where he or she faces a real risk of persecution, inhuman or degrading treatment, regardless of whether the state has considered the merits of the asylum claim.

Following the implementation of this system, in 2023, the U.K. Supreme Court, upholding the Court of Appeal's ruling, declared the government's "Rwanda Policy" illegal.¹¹¹³ The Court concluded that, based on substantial evidence indicating that Rwanda is not a safe third country, it

¹¹⁰⁶ *M.K. and Others V. Poland*, App no. 40503/17, 42902/17 and 43643/17, (ECtHR 14 December 2020).

¹¹⁰⁷ *M.A. and Others V. Lithuania*, App no. 59793/17, (ECtHR 11 March 2019).

¹¹⁰⁸ The UK-Rwanda Migration and Economic Development Partnership, House of Commons Library, 2022.

¹¹⁰⁹ *Ibid*, page 15.

¹¹¹⁰ See Human Right Watch report on Rwanda: Wave of Free Speech Prosecutions; Deutsche Welle (DW) Fact check: How safe is Rwanda for migrants?, 2022; Freedom House, Rwanda Country Report, 2023.

¹¹¹¹ Reinhard Marx (n 1049) 583; Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (2009) Oxford University Press, page 5.

¹¹¹² Jenny Poon, 'Rethinking the Common European Asylum System: Protection or Containment?' (University of Oxford (2020) Department of International Development, Refugee Studies Centre.

¹¹¹³ *R and others v Secretary of State for the Home Department* [2023] UKSC 42.

would be unlawful for the UK to send asylum seekers there. Furthermore, the judgment clarified that, due to legislative changes post-Brexit, retained EU law on asylum seekers no longer applies in the UK.¹¹¹⁴ Following the UK's policy on Rwanda, the Irish High Court ruled in March 2024 that the UK cannot be considered a safe third country for asylum seekers, further highlighting the legal and ethical complexities surrounding this practice.¹¹¹⁵

4.5. The EU-Turkey Declaration: Challenging the Principle of Non-Refoulement

Over the years, the EU and its member states have established several asylum agreements with third countries,¹¹¹⁶ and the EU-Turkey Declaration most clearly exemplifies the political motivations underlying the designation of certain countries as safe.

In 2015, due to the so-called refugee crisis, the EU faced an impasse due to the conflicting interests of its member states and their reluctance to find a common solution to this crisis.¹¹¹⁷ The increase in new arrivals has dominated the newspaper headlines, prompted a heated public debate, and begun to polarize public opinion. On the one hand, there have been demonstrations of solidarity from some countries, and on the other, numerous anti-migrant policies have emerged.¹¹¹⁸ Despite the efforts of the European Commission and the publication of the European Migration Agenda, this crisis of solidarity has led to the outright refusal by some member states to implement the relocation system approved by the EU Council in September 2015.¹¹¹⁹ In the absence of a common solution for the distribution of migrants and asylum seekers among member states, it was decided to strengthen EU cooperation with countries of origin and transit.¹¹²⁰ With some 2 million Syrian refugees at the time and its role as the main transit country for migrants to the EU via the Balkan route, Turkey was identified as the key to solving the European impasse.¹¹²¹ Therefore, on 29

¹¹¹⁴ Ibid

¹¹¹⁵ *A v Minister for Justice, Ireland and the Attorney General* [2024] IEHC 183, [2023] 104 JR, [2023] 640 JR.

¹¹¹⁶ See for instance the EU's cooperation with countries in the Western Balkans, the Italy-Libya Memorandum of Understanding, the EU's engagement with Egypt, and the recent the EU-Tunisia agreement.

¹¹¹⁷ İlke Toygür & Bianca Benvenuti, 'The European Response to the Refugee Crisis: Angela Merkel on the Move', IPC-Mercator Policy Brief, (2016), page 3.

¹¹¹⁸ International Rescue Committee, 'What is the EU-Turkey Deal?' (2022), available at: <https://www.rescue.org/eu/article/what-eu-turkey-deal> [accessed on 22/04/2023]

¹¹¹⁹ Council Decision (EU) 2015/1601, 22/IX/2015.

¹¹²⁰ Informal Meeting of Heads of States and Government, 12/XI/2015.

¹¹²¹ Meltem Müftüler-Baç, 'The Revitalization of EU-Turkey Relations: Old Wine in New Bottles?' (IPC-Mercator Policy Brief, 2015) 2.

November 2015, EU Heads of State or Government convened with Turkey to advance EU-Turkey relations and outline a new cooperation agreement to manage the migration crisis. Following a series of meetings aimed at bolstering relations between Turkey and the EU and enhancing their cooperation, on 18 March 2016, the European Council and Turkey reached an agreement to halt the flow of irregular migration from Turkey to Europe, as outlined in the so-called EU-Turkey Declaration.¹¹²² The EU-Turkey declaration specifically provided that all migrants who crossed the Aegean Sea illegally would be readmitted to Turkey, while for every Syrian brought back to Turkey from the Greek islands, another Syrian would be resettled from Turkey to the EU, in what has become known as the “one-to-one mechanism.”¹¹²³

The option to transfer asylum seekers from the EU to Turkey relied on the safe third country principle, which was explicitly incorporated into the EU-Turkey Declaration.¹¹²⁴ The basis for the Declaration can be found in the Asylum Procedures Directive, where Articles 33 and 38, as already mentioned, allow Member States to consider an asylum application inadmissible by assigning the examination of the application for international protection to a third country, provided, however, that there is a connection to the asylum seekers, and if that country is considered safe. If these conditions are met, applicants are sent back there.¹¹²⁵

Under the declaration, Turkey committed to implement measures to block new sea or land migration routes from Turkey to the EU. In return, the EU pledged to accelerate the visa liberalization process to eliminate visa requirements for Turkish citizens and to allocate an initial three billion euros, followed by another three billion, to improve the living conditions of migrant communities in Turkey.¹¹²⁶ This funding was also aimed at aligning the Turkish asylum system with the standards of the 1951 Refugee Convention and providing training for Turkish border guards.¹¹²⁷ Furthermore, the agreement included provisions to fortify a customs union, reinvigorate Turkey's EU accession discussions, and ameliorate humanitarian conditions in Syria.¹¹²⁸ Although this agreement was initially supposed to be a temporary measure to stop irregular migration to

¹¹²² European Council, 'EU-Turkey Statement' (18 March 2016) Press Release.

¹¹²³ *Ibid.*

¹¹²⁴ *Ibid.*

¹¹²⁵ See Articles 33 and 38 of the Asylum Procedures Directive.

¹¹²⁶ *Ibid.*

¹¹²⁷ Nanda Oudejans, Conny Rijken and Annick Pijnenburg, 'Protecting the EU External Borders and the Prohibition of Refoulement' (2018) 19(2) *Melbourne Journal of International Law* 614, 634.

¹¹²⁸ Legislative Train Schedule, European Parliament, EU-TURKEY STATEMENT & ACTION PLAN 03.2023 1 FOREIGN AFFAIRS - AFET, (2023) page 2.

Europe, Turkish authorities did not suspend repatriations until 2020 in light of restrictions due to the Covid-19 pandemic.¹¹²⁹ Since then, even when Greece submitted a formal readmission request for 1,450 rejected asylum seekers in January 2021, to date Turkey has not accepted any readmission.¹¹³⁰

Although the EU-Turkey Declaration was initially welcomed by European institutions as a constructive measure to deal with the so-called refugee crisis, the agreement drew significant criticism from several international organizations, which questioned Turkey's designation as a safe third country.¹¹³¹ In particular, UNHCR, numerous nongovernmental organizations and legal experts have expressed concern about the Declaration's failure to ensure effective international protection and procedural rights for asylum seekers.¹¹³²

These apprehensions stem from the EU's classification of Turkey as a safe third country, despite the geographical limitation of the 1951 Refugee Convention and its policy of denying refugee status to people coming from outside Europe.¹¹³³ In fact, all third-country nationals repatriated to Turkey under this agreement in recent years have been precluded from obtaining refugee status under the 1951 Refugee Convention, which has led to a significant debate as to whether Turkey can be considered a safe third country under Article 38 of the Asylum Procedures Directive as a result of this geographical limitation.¹¹³⁴

However, according to the EU Commission, ratification of the 1951 Refugee Convention with geographical reservations was considered irrelevant and the mere possibility of receiving protection in accordance with the Convention was deemed sufficient to classify Turkey as a safe

¹¹²⁹ Italian Institute for International Political Studies, *The Renewal of the EU-Turkey Migration Deal* (2021).

¹¹³⁰ *Ibid.*

¹¹³¹ Statewatch, 'What Merkel, Tusk and Timmermans Should Have Seen During their Visit to Turkey' (2016); ECRE, 'Desk Research on Application of a Safe Third Country and a First Country of Asylum Concepts to Turkey' (2016); Amnesty International, 'A Blueprint for Despair: Human Rights Impact of the EU-Turkey Deal' (2017); Medecins Sans Frontieres, 'One Year on from the EU-Turkey Deal: Challenging EU's Alternative Facts' (2017).

¹¹³² United Nations High Commissioner for Refugees, 'UNHCR Redefines Role in Greece as EU-Turkey Deal comes into Effect' (2016); Hallee Caron, 'Refugees, Readmission Agreements, and "Safe" Third Countries: A Recipe for Refoulement?' (2017) 12(1) *J Regional Security* 27, 29; Mauro Gatti, 'The EU-Turkey Statement: A Treaty That Violates Democracy (Part 1 of 2)' (EJIL Talk!, Blog of European Journal of International Law, 2016); Human Rights Watch, 'EU: Turkey Mass-Return Deal Threatens Rights' (2016).

¹¹³³ Aida, *Asylum Information Database, Country report: Turkey*, (2020) page 19.

¹¹³⁴ Steve Peers and Emanuela Roman, 'The EU, Turkey and the Refugee Crisis: What could possibly go wrong?' (EU Law Analysis, 2016); Daniel Thym, 'Why the EU-Turkey Deal Can Be Legal and a Step in the Right Direction' (EU and Asylum Law and Policy, 2016).

country.¹¹³⁵ This opinion was supported by the fact that, in 2013, Turkey enacted the Law on Foreigners and International Protection, which offered temporary protection to people who arrived in Turkey after being forced to leave their home country and are unable to return.¹¹³⁶

In contrast, several legal scholars and international organizations have argued that the EU-Turkey Declaration violated Article 38(1)(e) of the directive, which explicitly requires that a third country can only be considered safe if it is able to offer refugee status and protection in line with the Refugee Convention.¹¹³⁷ According to this perspective, it was legally impossible for third-country nationals to be recognized as refugees in Turkey, thus excluding non-European asylum seekers from receiving international protection under the Refugee Convention. This approach has been embraced by UNHCR, legal scholars and national judges, who have argued that a state can only transfer an asylum seeker to a country where protection equivalent to that provided by the Refugee Convention is guaranteed.¹¹³⁸ In this regard, Turkey has been accused of not providing adequate assistance to refugees, since although it is a party to the 1951 Refugee Convention and the 1967 Protocol, it offers only temporary protection rather than full refugee status.¹¹³⁹

This interpretation was later confirmed by the Court of Justice of the European Union in the *Elliniko Symvoulío* case (C-134/23), delivered in September 2024.¹¹⁴⁰ The Court ruled that Turkey did not meet the criteria of a safe third country under Article 38(1)(e) of the Asylum Procedures Directive due to its geographical limitation to the Refugee Convention, its lack of access to full refugee status and the absence of sufficient procedural guarantees. The CJEU emphasised that mere ratification of the 1951 Convention is not sufficient; effective and durable protection must be available in practice. Therefore, this decision directly challenges the legal basis of the EU-Turkey Declaration and confirms long-standing concerns raised by UNHCR and civil society.

¹¹³⁵ European Commission, Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, 85 final, Brussels, (2016) page 18.

¹¹³⁶ Aida (n 1133).

¹¹³⁷ Shannon Donnelly, 'Greece Designates Turkey As A "Safe Third Country" For Asylum Seekers' (Human Rights Pulse, 2021).

¹¹³⁸ Michelle Foster, Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State (2007) 28 Michigan Journal of International Law 233, pages 264 and 265.

¹¹³⁹ Elisa Vari, Italy-Libya Memorandum of Understanding: Italy's International Obligations (2020) Hastings International and Comparative Law Review, Vol 43, page 115.

¹¹⁴⁰ Agostina Pirrello, 'Turkey as a "Safe Third Country"? The Court of Justice's Judgment in C-134/23 *Elliniko Symvoulío*' (European Law Blog, December 2024).

Moreover, although Turkish law provides protection against refoulement, some reports suggest that Turkey applies a restrictive interpretation of the principle of non-refoulement. In particular, it has been found that asylum seekers are not granted the right to enter Turkish territory and that those who are at the Turkish border without valid travel documents can be admitted or rejected at the discretion of the Turkish government, without giving the asylum seeker an opportunity to be heard.¹¹⁴¹ This practice has been confirmed by several organizations that have documented cases where Turkey has violated the principle of non-refoulement by deporting asylum seekers to Afghanistan¹¹⁴² and by returning Syrians to the Turkish-Syrian border.¹¹⁴³ In addition, there have been reports of ill-treatment and abuse in detention facilities where there are fears of serious harm resulting from indiscriminate violence in situations of internal armed conflict with Kurdish rebels in the southeast of the country.¹¹⁴⁴

The matter was referred to the EU General Court, which, however, declared its lack of jurisdiction. The Court's justification was that the legal framework of the EU-Turkey Declaration did not follow the EU procedure for concluding treaties with third countries, as it was not ratified by the European Parliament, which led to its designation as a declaration rather than an agreement.¹¹⁴⁵

Since the implementation of the EU-Turkey Declaration, Turkey's situation has not changed significantly. The country's growing political instability, combined with deteriorating relations with the EU, has recently led even the European Commission to question Turkey's safe third country status.¹¹⁴⁶ However, it is noteworthy that while the Commission is currently examining Turkey's status, it had already attempted to include Turkey in the EU's common list of safe countries in 2015. The decision to propose Turkey as a safe country in 2015 was particularly controversial given the deteriorating human rights situation in the country at that time, including

¹¹⁴¹ Jenny Poon, 'EU-Turkey Deal: Violation of, or Consistency with, International Law?' (2016) 1(3) European Papers 1202.

¹¹⁴² Naydès Jeanty, (n 553).

¹¹⁴³ Human Rights Watch, "Turkey, Syrians Pushed Back at the Border" (2015); Amnesty International, "Turkey: Illegal mass returns of Syrian refugees expose fatal flaws in EU-Turkey deal", (2016); Mark Provera, The EU-Turkey Deal Analysis and Considerations, Jesuit Refugee Service Europe Policy Discussion Paper, (2016) page 13.

¹¹⁴⁴ Ibid, Amnesty International, "Europe's Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey", (2015), page 7; Roman, Baird and Radcliffe, "Statewatch Analysis", (2016) citing Federal Republic of Germany: Federal Office for Migration and Asylum, Information Centre Asylum and Migration Briefing Notes (2015), page 3.

¹¹⁴⁵ General Court of the European Union, Press Release 19/17, Luxembourg, 28/II/2017.

¹¹⁴⁶ European Commission, Türkiye 2022 Report, SWD(2022) 333 final.

discrimination and violations against vulnerable groups such as ethnic Kurds, journalists, and LGBTI people.¹¹⁴⁷

Turkey's inclusion in the Commission's 2015 proposal was therefore surprising, especially since at the time no EU member state had included Turkey in the list of safe countries. The motivation behind this decision was not based on national practices but was instead related to the EU's Declaration with Turkey aimed at managing refugee flows. As mentioned above, under this deal, Turkey undertook to take back refugees who reached the Greek islands irregularly from its territory. In return, the EU offered incentives such as visa liberalization for Turkish citizens and the revival of certain aspects of Turkey's EU accession negotiations.¹¹⁴⁸

This situation clearly demonstrates that political considerations, rather than an objective assessment of human rights conditions, often determine whether a country is considered safe. Therefore, in light of the evidence provided, it can be confirmed that the concept of a safe third country cannot reliably guarantee compliance with the principle of non-refoulement. Indeed, despite being designated as a safe third country under the EU-Turkey Declaration, the transfer of people to Turkey appears to violate the principle of non-refoulement.¹¹⁴⁹

4.6. Conclusion

From the analysis conducted, the safe country concept emerges in the legal and policy framework of the European Union on asylum as an important but controversial mechanism. This concept is supposed to be used to facilitate the asylum process, but in reality, it seems to circumvent the principle of non-refoulement. From the exploration of the European notions of a safe country, safe country of origin and safe third country, not only a legal aspect emerged, but also a political strategy intended to operate a balance between shared responsibility for human rights and national sovereignty.

An important aspect of this analysis was the discrepancy between EU member states' national lists of safe countries of origin, which highlights how political motivations affect the inclusion or non-

¹¹⁴⁷ Cathryn Costello (n 919) 611.

¹¹⁴⁸ Ibid.

¹¹⁴⁹ *J.B and Greece*, App no. 54796/16 (ECtHR 18 May 2017), Written Submissions On Behalf Of The Interveners, page 5.

inclusion of a country on such lists. This aspect in fact stands in contrast to an objective assessment of whether or not a particular country respects human rights.

The chapter also considered the EU-Turkey declaration, which is a clear testimony to the complex relationship between the obligation to respect fundamental rights and political interactions between states. The element that emerged from this analysis is the EU's controversial inclusion of Turkey as a safe third country, regardless of the human rights violations reported and committed by that country. Indeed, having considered Turkey as a safe third country, despite clear concerns about the human rights situation, reveals a worrisome determination to undermine the basic principles of refugee protection in the name of political expediency.

In conclusion, through an analysis of legal clauses and policy motivations, it became evident that the concepts of safe country of origin and safe third country, in their current application within the EU asylum policy framework, are unstable. However, it should be remembered that among all these aspects analysed, respect for the principle of non-refoulement should be a central point.

CONCLUSION

In concluding this analysis of the interactions between the principle of non-refoulement and the legal and policy frameworks of the European Union, this thesis conducted an in-depth examination of legal texts and jurisprudential decisions concerning mutual trust and the safe country concept. This research was thus able to reveal a scenario where the principle of non-refoulement is both supported but also paradoxically undermined. In fact, this study was conducted based on its primary objective, which was to assess how the EU's implementation of the safe country concept and the principle of mutual trust may limit the application of the principle of non-refoulement.

The first chapter focused on an analysis of the most relevant legal documents, including the 1951 Refugee Convention, the EU Charter, the ECHR and the CEAS. This study thus provided a fundamental understanding of the legal basis supporting the principle of non-refoulement. This analysis was thus essential in laying the foundation for the entire thesis, elucidating the legal contexts in which the principle of non-refoulement operates and how it is interpreted in the EU. The study of the legal texts was also relevant in setting the stage for understanding not only the theoretical but also the practical application of non-refoulement.

The second chapter focused on the principle of non-refoulement, analysing its recognition as an absolute right in both international and European Union law. The analysis provided showed how theoretically the principle of non-refoulement is considered a norm of absolute nature and applicable not only to refugees and asylum seekers but towards everyone. Consequently, regardless of some discrepancies found among the legislation examined, it is clear that the EU and its member states are bound by its correct and full application. The study of this chapter was essential to lay the groundwork and highlight the differences between the theoretical application of this principle and its concrete challenges within the EU. This chapter therefore encourages the ongoing debate on how the EU can develop more cohesive strategies to ensure that the protections offered by non-refoulement are not only mentioned in legal texts but are also implemented.

The third chapter thoroughly analysed the principle of mutual trust, tracing its evolution from the economic sphere to becoming a foundational element of AFSJ. Through a detailed examination, the chapter revealed a significant tension within the legal framework, where mutual trust, despite its importance, continues to undermine the principle of non-refoulement. Indeed, this analysis has shown how the Court of Justice is attempting to balance and ensure the application of both

principles, without considering, however, that the principle of non-refoulement is an absolute norm which is not subject to compromise. This chapter has thus contributed thoroughly to the understanding of the practical challenges that the EU faces in trying to balance internal legal consistency with its human rights commitments.

The fourth chapter analysed the safe country concept, revealing how this mechanism, while designed to simplify asylum procedures in reality can often violate the principle of non-refoulement. The detailed examination of European safe countries, safe countries of origin and safe third countries brought to light how political aspects have influenced the use of these concepts. Specifically, the UE Turkey Declaration highlighted precisely how political interests often prevail over the duty to respect fundamental rights. Through this analysis, therefore, the complexities and challenges that exist in trying to reach a balance between political objectives and human rights commitments were revealed.

This thesis has thus highlighted the intricate methods in which the principle of non-refoulement is implemented within the EU legal and policy framework. It also revealed the tensions that exist between its theoretical nature and its practical application, especially when it interfaces with mutual trust and the safe country concept.

A key contribution of this research lies in the combined analysis of the principle of mutual trust and the safe country concept. In particular, it shows how the interaction between these two mechanisms has limited the full application of the principle of non-refoulement within the European Union. By framing this as a form of legal circumvention, rather than a direct violation, this thesis offers a clearer understanding of how procedural rules can influence the implementation of absolute rights. Therefore, the EU's ability to ensure the proper application of the principle of non-refoulement, both in theory and in practice, remains a crucial challenge. The results of this research, therefore, contribute to the broader debate on how to strengthen the protection of fundamental rights in EU asylum law.

In conclusion, this thesis encourages a continuing dialogue among policymakers, legal scholars, and human rights advocates in order to achieve a fair balance between procedural mechanisms and the safeguarding of fundamental rights. Future research could focus on how European institutions, such as the European Parliament and the Court of Justice, could strengthen procedural guarantees and clarify the level of protection in light of the increasing use of externalisation and informal agreements. Furthermore, the development of jurisprudence on refoulement and the possibility of

requesting an advisory opinion from the International Court of Justice could offer important developments in improving legal accountability in asylum governance.

REFERENCES

Books:

Battjes H, *European Asylum Law and International Law* (Martinus Nijhoff Publishers 2006)

Blokker N, *International Organizations and Customary International Law* (Brill | Nijhoff 2017)

Burgers H and Danelius H, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers 1988)

Craig P and de Búrca G, *EU Law: Text, Cases, and Materials* (4th edn, Oxford University Press 2007)

De Weck F, *Non-Refoulement under the European Court of Human Rights and the UN Convention Against Torture* (Brill 2017)

Giuffré M and Moreno-Lax V, ‘The Rise of Consensual Containment: From “Contactless Control” to “Contactless Responsibility” for Forced Migration Flows’ in Satvinder S Juss (ed), *Research Handbook on International Refugee Law* (Edward Elgar Publishing 2019).

Goodwin-Gill GS, *The Dynamic of International Refugee Law* (Oxford University Press 2013)

Goodwin-Gill GS, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection* (Cambridge University Press 2003)

Goodwin-Gill GS, *Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees* (Michigan Yearbook of International Legal Studies 1982)

Goodwin-Gill GS, McAdam J and Dunlop E, *The Refugee in International Law* (4th edn, Oxford University Press 2021)

Grahl-Madsen A, *The Status of Refugees in International Law* (Vol I, Oxford University Press 1966)

Gunnel S, *Non-Expulsion and Non-Refoulement: The Prohibition Against Removal of Refugees with Special References to Articles 32 and 33 of the 1951 Convention* (Uppsala Iustus Förlag 1989)

Hathaway JC, *The Rights of Refugees under International Law* (2nd edn, Cambridge University Press 2021)

Hathaway JC and Foster M, *The Law of Refugee Status* (Cambridge University Press 2014)

Hurwitz S, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press 2009)

Janssens C, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013)

Lauterpacht E and Bethlehem D, *The Scope and Content of the Principle of Non-Refoulement: Opinion* (Cambridge University Press 2003)

McAdam J, *Complementary Protection in International Refugee Law* (Oxford University Press 2007)

Milanović M, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011).

Moreno-Lax V, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017)

Moreno-Lax V, 'Crisis as (Asylum) Governance: The Evolving Normalisation of Non-Entrée at the EU External Borders' (2024) 9(1) *European Papers* 179.

Mungianu R, *Frontex and Non-Refoulement: The International Responsibility of the EU* (Oxford University Press 2016)

Reinisch A, *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013)

Reinisch A, *Sources of International Organizations' Law: Why Custom and General Principles are Crucial* (Oxford University Press 2017)

Zimmermann A (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (2nd edn, Oxford University Press 2024)

Journal Articles:

Alegre S and Leaf M, 'Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study - The European Arrest Warrant' (2004) 10 *European Law Journal*

Allain J, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13(4) *International Journal of Refugee Law*

Alter KJ and Meunier-Aitsahalia S, 'Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision' (1994) 26 *Comparative Political Studies* 535

Anagnostaras G, 'The Common European Asylum System: Balancing Mutual Trust Against Fundamental Rights Protection' (2020) 21 German Law Journal

Ancelin J, 'Le principe de non-refoulement et l'Union européenne à l'épreuve de la crise syrienne' (2019) 49(2) *Études Internationales* 355

Billing F, 'Limiting Mutual Trust on Fundamental Rights Grounds under the European Arrest Warrant and Lessons Learned from Transfers under Dublin III' (2020) 11(2) *New Journal of European Criminal Law* 184

Blay S and Zimmermann A, 'Recent Changes in German Refugee Law: A Critical Assessment' (1994) 88 *American Journal of International Law* 366

Bribosia E and Weyembergh A, 'Confiance mutuelle et droits fondamentaux : "Back to the future"' (2016) 52(2) *Cahiers de droit européen*

Brouwer E, 'Mutual Trust and the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof' (2013) 9 *Utrecht Law Review* 135

Bruin R and Wouters K, 'Terrorism and the Non-Derogability of Non-Refoulement' (2003) 15 *International Journal of Refugee Law*

Cambien N, 'The Interaction Between Mutual Trust, Mutual Recognition and Fundamental Rights in Private International Law in Relation to the EU's Aspirations' (2017) 2(117) *European Papers*

Caron H, 'Refugees, Readmission Agreements, and "Safe" Third Countries: A Recipe for Refoulement?' (2017) 12(1) *Journal of Regional Security* 27

Costello C, 'Safe Country? Says Who?' (2016) 28(4) *International Journal of Refugee Law* 601

Costello C, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7 *European Journal of Migration and Law* 35

Costello C and Foster M, 'Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test' (2016) *Netherlands Yearbook of International Law* 2015: *Jus Cogens: Quo Vadis?* 273

de Schutter O, 'La contribution du contrôle juridictionnel à la confiance mutuelle' (2005) *La confiance mutuelle dans l'espace pénal européen*

Di Pascale A, 'El principio de non refoulement y su aplicación judicial en el marco europeo' (2018) *European Inklings (EU)* 15

Dugard J and Van den Wyngaert C, 'Reconciling Extradition with Human Rights' (1998) 92 *American Journal of International Law* 187

Efrat A, 'Assessing Mutual Trust among EU Members: Evidence from the European Arrest Warrant' (2019) 26(5) *Journal of European Public Policy* 656

El-Enany N, 'The Safe Country Concept in European Union Asylum Law: In Safe Hands?' (2006) *Cambridge Student Law Review*

Engelmann C, 'Convergence against the Odds: The Development of Safe Country of Origin Policies in EU Member States (1990–2013)' (2014) 16 *European Journal of Migration and Law* 277

Feller E, 'International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present and Future' (2001) *International Review of the Red Cross*

Foster M, 'Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State' (2007) 28 *Michigan Journal of International Law* 233

Foster M, 'Responsibility Sharing or Shifting? "Safe" Third Countries and International Law' (2008) 25(2) *Refuge*

Gammeltoft-Hansen T, 'The Externalisation of European Migration Control and the Reach of International Refugee Law' (2011) *The First Decade of EU Migration and Asylum Law*

Gammeltoft-Hansen T and Hathaway JC, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53(2) *Columbia Journal of Transnational Law* 235

Gil-Bazo MT, 'Asylum as a General Principle of International Law' (2015) 27(1) *International Journal of Refugee Law*

Gil-Bazo MT, 'The Safe Third Country Concept in International Agreements on Refugee Protection: Assessing State Practice' (2015) 33(1) *Netherlands Quarterly of Human Rights* 42

Gill-Pedro E and Groussot X, 'The Duty of Mutual Trust in EU Law and the Duty to Secure Human Rights' (2017) 35(3) *Nordic Journal of Human Rights* 258

Hathaway JC and Harvey CJ, 'Framing Refugee Protection in the New World Disorder' (2001) 34 *Cornell International Law Journal* 257

Hathaway JC, 'Harmonizing for Whom: The Devaluation of Refugee Protection in the Era of European Economic Integration' (1993) 26(3) *Cornell International Law Journal*

Hunt M, 'The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future' (2014) 26(4) *International Journal of Refugee Law* 500

Marouf FE and Anker D, 'Socioeconomic Rights and Refugee Status: Deepening the Dialogue Between Human Rights and Refugee Law' (2009) 103 *American Journal of International Law* 784

Marx R, 'The European Union's Plan to Amend the "First Country of Asylum" and "Safe Third Country" Concepts' (2019) 31(4) *International Journal of Refugee Law* 580

Molnár T, 'The Principle of Non-Refoulement Under International Law: Its Inception and Evolution in a Nutshell' (2016) 1 *Corvinus Journal of International Affairs*

Noll G, 'Seeking Asylum at Embassies: A Right to Entry under International Law' (2005) 17 *International Journal of Refugee Law* 542

Poon J, 'EU-Turkey Deal: Violation of, or Consistency with, International Law?' (2016) 1(3) *European Papers* 1202

Spijkerboer T, 'The Practical Effects of Schengen in Asylum Cases' (1997) 2nd Conference of the International Association of Refugee Law Judges, Nijmegen

Vedsted-Hansen J, 'Admissibility, Border Procedures and Safe Country Notions' (2020) *International Journal of Refugee Law*

Vicini G, 'The Dublin Regulation Between Strasbourg and Luxembourg: Reshaping Non-Refoulement in the Name of Mutual Trust?' (2015) 8(2) *European Journal of Legal Studies*

Vogelaar F, 'The Presumption of Safety Tested: The Use of Country of Origin Information in the National Designation of Safe Countries of Origin' (2021) 40 *Refugee Survey Quarterly*

Willems A, 'Mutual Trust as a Term of Art in EU Criminal Law: Revealing Its Hybrid Character' (2016) *European Journal of Legal Studies*

Willems A, 'The Court of Justice of the European Union's Mutual Trust Journey in EU Criminal Law: From a Presumption to (Room for) Rebuttal' (2019) *German Law Journal*

Reports and Official Documents:

Amnesty International, 'A Blueprint for Despair: Human Rights Impact of the EU–Turkey Deal' (2017)

Amnesty International, 'Digital Investigation Proves Poland Violated Refugees' Rights' (2021)

Amnesty International, 'Europe's Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey' (2015)

Amnesty International, 'Report on Libya 2022' (2022)

Amnesty International, 'Turkey: Illegal Mass Returns of Syrian Refugees Expose Fatal Flaws in EU–Turkey Deal' (2016)

Commission Nationale Consultative des Droits de l'Homme, 'Avis relatif aux travaux de l'Union européenne sur l'asile et au Sommet de Laeken' (2001)

Committee against Torture, 'General Comment No 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22' CAT/C/GC/4 (2018)

Council of Europe: European Court of Human Rights, 'Guide on Article 4 of Protocol No 4 to the European Convention on Human Rights – Prohibition of Collective Expulsions of Aliens' (30 April 2017)

Council of the European Union, 'Council Resolution of 30 November 1992 on Manifestly Unfounded Applications for Asylum' (1992)

Council of the European Union, 'Draft Resolution on Manifestly Unfounded Applications' (Ad Hoc Group Immigration, 1992)

Council of the European Union, 'Monitoring the Implementation of Instruments Adopted Concerning Asylum: Summary Report of the Member States' Replies to the Questionnaire Launched in 1997' (ref 8886/98) (1998)

Council of the European Union, 'Presidency Conclusions, Tampere European Council, 15–16 October 1999' (1999)

Council of the European Union, 'Report on Reform of the Common European Asylum System and Resettlement' (2019)

European Asylum Support Office (EASO), 'An Introduction to the Common European Asylum System for Courts and Tribunals: A Judicial Analysis' (2016)

European Asylum Support Office (EASO), 'Country of Origin Information Report Methodology' (2012)

European Asylum Support Office (EASO), 'Exclusion: Articles 12 and 17 Qualification Directive (2011/95/EU), A Judicial Analysis' (2016)

European Asylum Support Office (EASO), 'Judicial Analysis, Asylum Procedures and the Principle of Non-Refoulement' (2018)

European Asylum Support Office (EASO), 'Qualification for International Protection (Directive 2011/95/EU): A Judicial Analysis' (2016)

European Asylum Support Office (EASO), 'Safe Country of Origin Concept in EU+ Countries: Situational Update, Issue No 3' (2021)

European Commission, 'A Fresh Start on Migration: Building Confidence and Striking a New Balance Between Responsibility and Solidarity' (2020)

European Commission, 'Communication from the Commission to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions Under the European Agenda on Migration' COM(2016) 85 final

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A New Pact on Migration and Asylum' COM (2020) 609 final.

European Commission, 'Managing Migration Better in All Aspects: A European Agenda on Migration' (2015)

European Commission, 'Towards a Sustainable and Fair Common European Asylum System' (2016)

European Commission, 'Türkiye 2022 Report' SWD(2022) 333 final

European Council on Refugees and Exiles, 'Country Report: Safe Third Country Hungary' (2022)

European Council on Refugees and Exiles, 'Desk Research on Application of a Safe Third Country and a First Country of Asylum Concepts to Turkey' (2016)

European Council on Refugees and Exiles, 'Information Note on the Council Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status' INI/10/2006/EXT/JJ (2006)

European Council on Refugees and Exiles, Pushbacks at Europe's Borders: A Report on Practices and Responses (Report, 2024).

European Council on Refugees and Exiles, 'The Application of the EU Charter of Fundamental Rights to Asylum Procedural Law' (2014)

European Council on Refugees and Exiles, 'The EU Charter of Fundamental Rights: An Indispensable Instrument in the Field of Asylum' (2017)

European Parliament, 'Draft Report on the Proposal for a Regulation of the European Parliament and of the Council Establishing an EU Common List of Safe Countries of Origin' (2016)

European Union Agency for Fundamental Rights, 'Handbook on European Law Relating to Asylum, Borders and Immigration' (2013)

European Union Agency for Asylum (EUAA), 'Applying the Concept of Safe Countries in the Asylum Procedure' (2022)

Explanations Relating to the Charter of Fundamental Rights, 'Official Journal of the European Union' (2007/C 303/02)

Human Rights Watch, 'EU: Turkey Mass-Return Deal Threatens Rights' (2016)

Human Rights Watch, 'Libya Events of 2019' (World Report 2020)

Human Rights Watch, 'Turkey, Syrians Pushed Back at the Border' (2015)

UN High Commissioner for Refugees (UNHCR), 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol' (26 January 2007)

UN High Commissioner for Refugees (UNHCR), 'Background Note on the Safe Country Concept and Refugee Status' EC/SCP/68 (1991)

UN High Commissioner for Refugees (UNHCR), 'Global Consultations on International Protection: Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)' EC/GC/01/12 (2001)

UN High Commissioner for Refugees (UNHCR), 'Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice' (2010)

UN High Commissioner for Refugees (UNHCR), 'Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries' (2018)

UN High Commissioner for Refugees (UNHCR), Regional Overview of Pushback Practices in Europe (Report, 2024)

UN High Commissioner for Refugees (UNHCR), 'Summary Conclusions on Family Unity' (2001)

European Court of Human Rights (ECtHR) Cases

Abdolkhani and Karimnia v Turkey App no 30471/08 (ECtHR, 22 September 2009).

Ahmed v Austria App no 71/1995/577/663 (ECtHR, 17 December 1996).

Al-Moayad v Germany App no 35865/03 (ECtHR, 20 February 2007).

Auad v Bulgaria App no 46390/10 (ECtHR, 11 January 2012).

Bayatyan v Armenia App no 23459/03 (ECtHR, 7 July 2011).

Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland App no 45036/98 (ECtHR, 30 June 2005).

Chahal v United Kingdom App no 70/1995/576/662 (ECtHR, 15 November 1996).

Cruz Varas and Others v Sweden App no 15576/89 (ECtHR, 20 March 1991).

D.L. v Austria App no 34999/16 (ECtHR, 7 December 2017).

D. v United Kingdom App no 30240/96 (ECtHR, 2 May 1997).

Dougoz v Greece App no 40907/98 (ECtHR, 6 March 2001).

Drozd and Janousek v France and Spain App no 21/1991/273/344 (ECtHR, 26 June 1992).

Emesa Sugar NV v Netherlands App no 62023/00 (ECtHR, 13 January 2005).

F.G. v Sweden App no 43611/11 (ECtHR, 23 March 2016).

F. v United Kingdom App no 17341/03 (ECtHR, 22 June 2004).

Garabayev v Russia App no 38411/02 (ECtHR, 7 June 2007).

Gomes v Sweden App no 34566/04 (ECtHR, 7 February 2006).

H.L.R. v France App no 24573/94 (ECtHR, 29 April 1997).

Hirsi Jamaa and Others v Italy App no 27765/09 (ECtHR, 23 February 2012).

Ilias and Ahmed v Hungary App no 47287/15 (ECtHR, 14 March 2017).

Ireland v United Kingdom App no 5310/71 (ECtHR, 13 December 1977).

J.B. v Greece App no 54796/16 (ECtHR, 18 May 2017).

J.K. and Others v Sweden App no 59166/12 (ECtHR, 23 August 2016).

K.R.S. v United Kingdom App no 32733/08 (ECtHR, 2 December 2008).

Khlaifia and Others v Italy App no 16483/12 (ECtHR, 15 December 2016).

Loizidou v Turkey App no 40/1993/435/514 (ECtHR, 23 February 1995).

M.A. and Others v Lithuania App no 59793/17 (ECtHR, 11 March 2019).

M.H. and Others v Croatia App nos 15670/18 and 43115/18 (ECtHR, 4 April 2022).

M.K. and Others v Poland App nos 40503/17, 42902/17 and 43643/17 (ECtHR, 14 December 2020).

M.S.S. v Belgium and Greece App no 30696/09 (ECtHR, 21 January 2011).

Mizzi v Malta App no 26111/02 (ECtHR, 12 January 2006).

N. v Finland App no 38885/02 (ECtHR, 26 July 2005).

N.D. and N.T. v Spain App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020).

Othman (Abu Qatada) v. the United Kingdom App no 8139/09 (ECtHR, 17 January 2012)

Pichkur v Ukraine App no 10441/06 (ECtHR, 7 November 2013).

Pretty v United Kingdom App no 2346/02 (ECtHR, 29 July 2002).

S.H. v United Kingdom App no 19956/06 (ECtHR, 15 June 2010).

Saadi v United Kingdom App no 13229/03 (ECtHR, 29 January 2008).

Said v Netherlands App no 2345/02 (ECtHR, 5 July 2005).

Salah Sheekh v Netherlands App no 1948/04 (ECtHR, 11 January 2007).

Safaii v Austria App no 44689/09 (ECtHR, 7 May 2014).

Scozzari and Giunta v Italy App no 39221/98 (ECtHR, 13 July 2000).

Senator Lines GmbH v Austria and Others App no 56672/00 (ECtHR, 10 March 2004).

Soering v United Kingdom App no 14038/88 (ECtHR, 7 July 1989).

Sufi and Elmi v United Kingdom App nos 8319/07 and 11449/07 (ECtHR, 28 June 2011).

Tarakhel v Switzerland App no 29217/12 (ECtHR, 4 November 2014).

T.I. v United Kingdom App no 43844/98 (ECtHR, 7 March 2000).

Vallianatos and Others v Greece App nos 29381/09 and 32684/09 (ECtHR, 7 November 2013).

Varga and Others v Hungary App nos 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, 64586/13 (ECtHR, 10 June 2015).

Vilvarajah and Others v United Kingdom App nos 45/1990/236/302-306 (ECtHR, 26 September 1991).

Vociu v Romania App no 22015/10 (ECtHR, 10 June 2014).

X and Others v Austria App no 19010/07 (ECtHR, 19 February 2013).

Court of Justice of the European Union (CJEU) Cases

Case C-4/73 Nold v Commission [1974] ECR 491.

Case C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECLI:EU:C:1970:114.

Case C-13/63 Italy v Commission [1963] ECLI:EU:C:1963:20.

Case C-25/88 Wurmser and Norlaine SA [1989] ECLI:EU:C:1989:187.

Case C-29/69 Stauder v City of Ulm [1969] ECLI:EU:C:1969:52.

Case C-46/76 Bauhuis v The Netherlands [1977] ECLI:EU:C:1977:6.

Case C-76/90 Säger v Dennekemeyer [1991] EU:C:1991:331.

Case C-104/16 P Council v Front Polisario [2016] T-512/12.

Case C-106/77 Simmenthal [1978] ECR 629.

Case C-116/02 Gasser v MISAT [2003] ECR I-14693.

Case C-123/08 Dominic Wolzenburg [2009] ECLI:EU:C:2009:616.

Case C-123/22 Commission v Hungary [2024] ECLI:EU:C:2024:493.

Case C-133/06 Parliament v Council [2008] ECLI:EU:C:2008:257.

Case C-158/21 Puig Gordi and Others [2023] ECLI:EU:C:2023:57.

Case C-159/02 Turner v Grovit [2004] ECR I-3565.

Case C-162/96 Racke GmbH v Hauptzollamt Mainz [1998] ECR I-3655.

Case C-163/17 Jawo v Germany [2019] ECLI:EU:C:2019:218.

Case C-166/13 Mukarubega v Préfet de police [2014] ECLI:EU:C:2014:2336.

Case C-168/13 PPU Jeremy F. v Premier ministre [2013] ECLI:EU:C:2013:358.

Case C-175/11 H.I.D. and B.A. v Refugee Applications Commissioner and Others [2013] ECLI:EU:C:2013:45.

Case C-192/12 PPU West [2012] ECLI:EU:C:2012:404.

Case C-216/18 PPU LM (Deficiencies in judicial independence) [2018] ECLI:EU:C:2018:586.

Case C-220/18 PPU ML v Generalstaatsanwaltschaft Bremen [2018] ECLI:EU:C:2018:589.

Case C-237/15 PPU Minister for Justice and Equality v Francis Lanigan [2015] ECLI:EU:C:2015:474.

Case C-241/15 Niculaie Aurel Bob-Dogi [2016] ECLI:EU:C:2016:385.

Case C-249/13 Khaled Boudjlida v Préfet des Pyrénées-Atlantiques [2014] ECLI:EU:C:2014:2431.

Case C-261/09 Mantello [2010] EU:C:2010:683.

Case C-277/11 M.M. v Minister for Justice, Ireland and Attorney General [2012] ECLI:EU:C:2012:744.

Case C-279/09 Energiehandels- und Beratungsgesellschaft mbH v Germany [2010] I-13849.

Case C-286/90 Anklagemyndigheden v Poulse and Diva Navigation Corp [1992] ECR I-6019.

Case C-293/12 and C-594/12 Digital Rights Ireland v Minister for Communications and Others [2014] EU:C:2014:238.

Case C-303/05 Advocaten voor de Wereld VZW v Leden van de Ministerraad [2007] ECLI:EU:C:2007:261.

Case C-305/05 Ordre des barreaux francophones et germanophone and Others v Conseil des ministres [2007] ECLI:EU:C:2007:383.

Case C-366/10 Air Transport Association of America and Others v Secretary of State for Energy and Climate Change [2011] ECR I-13755.

Case C-392/22 X v Staatssecretaris van Justitie en Veiligheid [2024] ECLI:EU:C:2024:195.

Case C-394/12 Abdullahi v Bundesasylamt [2013] ECLI:EU:C:2013:813.

Case C-396/11 Ciprian Vasile Radu [2013] ECLI:EU:C:2013:39.

Case C-399/11 Melloni v Ministerio Fiscal [2013] ECLI:EU:C:2013:107.

Case C-404/17 A v Migrationsverket [2018] ECLI:EU:C:2018:588.

Case C-406/22 Krajský soud v Brně v Ministerstvo vnitra České republiky [2024] ECLI:EU:C:2024:841.

Case C-410/11 Espada Sanchez and Others [2013] 1 CMLR 55.

Case C-465/07 Elgafaji v Staatssecretaris van Justitie [2009] I-921.

Case C-491/10 PPU Joseba Andoni Aguirre Zarraga v Simone Pelz [2010] ECLI:EU:C:2010:828.

Case C-537/18 YV v Krajowa Rada Sądownictwa [2020] ECLI:EU:C:2020:136.

Case C-578/16 PPU C.K. and Others v Republika Slovenija [2017] ECLI:EU:C:2017:127.

Case C-585/18 A.K. v Krajowa Rada Sądownictwa [2020] C 27/07.

Case C-601/15 PPU J.N. v Staatssecretaris van Veiligheid en Justitie [2016] EU:C:2016:84.

Case C-617/10 Åkerberg Fransson [2013] ECLI:EU:C:2013:105.

Case C-638/16 PPU X and X v État belge [2017] EU:C:2017:173.

Case C-695/15 PPU Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal [2016] ECLI:EU:C:2016:188.

Case C-699/21 E.D.L. (Motif de refus fondé sur la maladie) [2023] ECLI:EU:C:2023:295.

Case T-115/94 Opel Austria GmbH v Council [1997] ECR II-39.

Case T-306/01 Ahmed Ali Yusuf and Al Barakaat International Foundation v Council and Commission [2005] ECR II-3533.

Case T-315/01 Yassin Abdullah Kadi v Council and Commission [2005] ECR II-3649.

International and Regional Courts (ICJ, ICTY, IACtHR, Inter-American System)

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America) [1984] ICJ Rep 392.

North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) [1969] ICJ Rep 3.

Prosecutor v Anto Furundzija (Judgment) ICTY-95-17/1-T (10 December 1998).

Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Judgment) ICTY-96-23-T & ICTY-96-23/1-T (22 February 2001).

Caso Familia Pacheco Tineo v Estado Plurinacional de Bolivia IACtHR (25 November 2013).

The Haitian Centre for Human Rights et al v United States Case 10.675, Inter-American Commission on Human Rights (13 March 1997).

Advocate General Opinions

Opinion of AG Bot, Case C-123/08 Dominic Wolzenburg [2009] ECLI:EU:C:2009:183.

Opinion of AG Bot, Case C-486/14 Criminal Proceedings against Piotr Kossowski [2015] ECLI:EU:C:2015:767.

Opinion of AG Bot, Joined Cases C-404/15 and C-659/15 Aranyosi and Căldăraru [2016] ECLI:EU:C:2016:140.

Opinion of AG Dámaso Ruiz-Jarabo Colomer, Case C-150/05 Jean Leon Van Straaten v Staat der Nederlanden and Republiek Italië [2006] ECLI:EU:C:2006:381.

Opinion of AG Sharpston, Case C-396/11 Ciprian Vasile Radu [2012] ECLI:EU:C:2012:648.

Opinion of AG Sharpston, Case C-467/04 Giuseppe Francesco Gasparini and Others [2006] ECLI:EU:C:2006:610.

Opinion of AG Trstenjak, Case C-411/10 N.S. v Secretary of State for the Home Department [2011] ECLI:EU:C:2011:748.

UN Treaty Body Communications (HRC, CAT)

Charles Chitat Ng v Canada, Communication No 469/1991, CCPR/C/49/D/469/1991 (HRC, 7 January 1994).

Keith Cox v Canada, Communication No 539/1993, CCPR/C/52/D/539/1993 (HRC, 9 December 1994).

Roger Judge v Canada, Communication No 829/1998, CCPR/C/78/D/829/1998 (HRC, 13 August 2003).

Torres v Finland, Communication No 291/1988, CCPR/C/38/D/291/1988 (HRC, 5 April 1990).

Joseph Kindler v Canada, Communication No 470/1991, CCPR/C/48/D/470/1991 (HRC, 11 November 1993).

V.X.N. and H.N. v Sweden, Communications No 130/1999 and No 131/1999, CAT/C/24/D/130/1999 and CAT/C/24/D/131/1999 (CAT, 2 September 2000).

Mutombo v Switzerland, Communication No 13/1993, CAT/C/11/D/13/1993 (CAT, 27 April 1994).

Committee Against Torture, Flor Calfunao Paillalef v Switzerland, Communication No 859/2018, CAT/C/67/D/859/2018 (CAT, 20 January 2020).

National Courts

A v Minister for Justice, Ireland and the Attorney General [2024] IEHC 183, [2023] 104 JR, [2023] 640 JR.

Belgium, Conseil d'Etat, Decision No 228901, 23 October 2014.

Corte di Cassazione, Decision No 4557 of 1 February 2024.

Court of The Hague (the Netherlands), Judgment of 13 June 2016, AWB 16/10406, ECLI:NL:RBDHA:2016:6624.

French Conseil d'Etat, Decisions Nos 375474 and 375920, 10 October 2014.

German Constitutional Court, Judgment of 30 June 2009, 2 BvE 2/08.

Irish Supreme Court, UKSC 8, 4 March 2015. (*Note: this was labelled "UK" Supreme Court in your list, but UKSC is the UK, not Ireland — if it's Irish Supreme Court, please correct me.*)

Polish Constitutional Court, 27 April 2005, Decision P 1/05.

Slovene Supreme Court, Judgment of 16 December 2009, I Up 63/2011.

Supreme Court of Cyprus, No 294/2005, 7 November 2005.

Legislation

American Convention on Human Rights (Pact of San José, Costa Rica) (adopted 22 November 1969).

Cartagena Declaration on Refugees (Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984).

Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

Commission, Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final.

Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984) 1465 UNTS 85.

Convention Concerning the Status of Refugees Coming from Germany (adopted 10 February 1938).

Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities (Dublin Convention) [1997] OJ C254.

Convention Implementing the Schengen Agreement of 14 June 1985 [2000] OJ L239.

Convention Relating to the International Status of Refugees (adopted 28 October 1933) 159 UNTS 199.

Convention Relating to the Status of Refugees (adopted 28 July 1951) 189 UNTS 137.

Council Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece [2015] OJ L248/80.

Council Directive 2001/55/EC on minimum standards for giving temporary protection [2001] OJ L212/12.

Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers [2003] OJ L31/18.

Council Directive 2004/83/EC 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 [2004] OJ L304/12.

Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ L326/13.

Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.

Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders [2006] OJ L328/59.

Council Implementing Decision (EU) 2022/382 on measures concerning the introduction of the euro in Croatia [2022] OJ L76/8.

Council Regulation (EC) 343/2003 establishing the criteria for determining the Member State responsible for examining an asylum application [2003] OJ L222/3.

Council Regulation (EC) 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters [2003] OJ L338/1.

Council Regulation (EC) 2725/2000 concerning the establishment of Eurodac [2000] OJ L316/1.
Council Regulation (EEC) 990/93 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) [1993] OJ L102/14.

Declaration Concerning Provisions of the Treaties No 17.

Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol (Ministerial Meeting, Geneva, 12–13 December 2001).

Directive 2008/115/EC on common standards and procedures for returning illegally staying third-country nationals [2008] OJ L348/98.

Directive 2011/95/EU (Qualification Directive) [2011] OJ L337/9.

Directive 2013/32/EU (Asylum Procedures Directive) [2013] OJ L180/60.

Directive 2013/33/EU (Reception Conditions Directive) [2013] OJ L180/96.

Directive 2014/41/EU regarding the European Investigation Order in criminal matters [2014] OJ L130/1.

European Commission, Amended Proposal for a Regulation Establishing a Common Procedure for International Protection (2020).

European Commission, 'Migration and Asylum: Commission Takes Further Steps in Infringement Procedures Against Hungary' (19 July 2018).

European Convention on Human Rights (adopted 4 November 1950) ETS 5.

European Convention on Human Rights, Protocol No 4 (adopted 16 September 1963) ETS 46.

European Council, 'EU–Turkey Statement' (18 March 2016).

Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17.

Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (28 July 1951).

Government Decree 191/2015 (Hungary) on the national list of safe countries of origin.

Human Rights Committee, General Comment No 2 (1982).

Hungarian Asylum Act, Section 51(5).

International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006) 2716 UNTS 3.

International Covenant on Civil and Political Rights (adopted 16 December 1966) 999 UNTS 171.

Italian Navigation Code, approved by Royal Decree No 327 of 30 March 1942.

Laeken Declaration on the Future of the European Union (European Council, 14–15 December 2001).

League of Nations Treaty Series, Vol CLXXI, No 3952.

League of Nations Treaty Series, Vol CXCII, No 4461.

Legislative Train Schedule, European Parliament (EU–Turkey Statement and Action Plan, March 2023).

Nationality, Immigration and Asylum Act 2002 (UK).

Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966).

Protocol No 11 to the ECHR (adopted 11 May 1994) ETS 155.

Protocol No 13 to the ECHR (adopted 3 May 2002) ETS 187.

Protocol No 16 to the ECHR (adopted 2 October 2013) ETS 214.

Protocol between the European Community, the Swiss Confederation and the Principality of Liechtenstein [2009] OJ L161/8.

Reasoned Proposal in Accordance with Article 7(1) TEU Regarding the Rule of Law in Poland, COM(2017) 835 final (20 December 2017).

Regulation (EU) 604/2013 (Dublin III Regulation) [2013] OJ L180/31.

Regulation (EU) 656/2014 on the surveillance of the external sea borders [2014] OJ L189/93.

Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351/1.

Regulation (EU) 2015/848 on insolvency proceedings [2015] OJ L141/19.

Regulation (EU) 2016/399 (Schengen Borders Code) [2016] OJ L77/1.

Regulation (EU) 2019/1896 on the European Border and Coast Guard [2019] OJ L295/1.

Resolution of the Council on a Roadmap for Strengthening Procedural Rights [2009] OJ C295/1.

Resolution on a Harmonised Approach to Host Third Countries (London, 30 November–1 December 1992).

Rome Statute of the International Criminal Court (adopted 17 July 1998) 2187 UNTS 3.

Statute of the International Court of Justice (adopted 26 June 1945) 33 UNTS 993.

Tampere European Council Presidency Conclusions (15–16 October 1999).

Treaty Establishing the European Economic Community (adopted 25 March 1957) 298 UNTS 11.

Treaty of Maastricht (Treaty on European Union) (adopted 7 February 1992) 31 ILM 247.

Treaty on European Union (Consolidated Version) [2012] OJ C326/13.

United Nations Charter (adopted 24 October 1945) 1 UNTS XVI.

United Nations Convention on the Law of the Sea (adopted 10 December 1982) 1833 UNTS 3.

UNGA, Declaration on Territorial Asylum (14 December 1967) A/RES/2312(XXII).

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III).