Compromising Refugeehood: Access to Asylum and *Non-Refoulement* in the European Union

Discrepancies between International and European Refugee and Human Rights Law

Stefanie Neumeier

Abstract

This paper explores the intersection of European and international refugee and human rights law. While numerous treaties incorporate the rights of forced migrants, the Refugee Convention with the 1967 Protocol represents the most important instrument in regards to refugee protection. The European Union (EU) has established its own regional refugee and human rights regime with the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union as centerpieces. Although the Court of Justice of the European Union and the European Court of Human Rights have applied more progressive interpretations of refugee and asylum law, they have at times defaulted to conservative rulings, thereby compromising refugee protection. EU legislation, specifically the CEAS with the Dublin Regulation, has qualified the access to asylum and the principle of *non-refoulement*. The restrictive European visa regime and the various control mechanisms limit the right to seek asylum, the right to leave one's country, and access to an asylum procedure. The "safe country" concept further compromises refugee protection as it homogenizes asylum seekers and decreases the quality of asylum procedures. The EU is likely to continue and expand its conservative asylum system, which will come at the expense of overall refugee security and protection.

Introduction

In the wake of World War I the international community recognized, for the first time in documented history, a responsibility to help refugees and began to construct a legal framework for their protection. Between 1921 and 1951, a number of international entities concerned with granting refugee rights and assistance emerged and ultimately paved the way for the International Refugee Organization (IRO) and the United Nations High Commissioner for Refugees (UNHCR).[1] Along with such, international refugee and human rights laws have evolved. However, refugee flows did not subside following the end of the First and Second World Wars and continue to shape the international refugee regime. With the intensification of conflict, economic instability, and environmental suffering, the number of people mobilizing and migrating will likely continue. The

[1] Karen Musalo, Jennifer Moore, and Richard A. Boswell, *Refugee Law and Policy: A Comparative and International Approach* (Durham, NC: Carolina Academic Press Law Casebook Series, 2011), 19.

UNHCR just recently estimated the number of displaced people at 65.3 million worldwide.[2]

The current migrant crisis and the mass influx of refugees not only challenged individual European states but also revealed the European Union's (EU) overall deficient asylum system. A result of this is Europe's reaffirmation and revival of deterrent refugee policies as pronounced by European Commission President Jean Claude Junker in his 2016 State of the Union address.[3] However, the securitization of migration and asylum in the EU is not a new phenomenon. Ever since the Schengen Agreement, which abolished internal border checks and enabled passport-free movement, Europe has been pressing for increasingly conservative immigration and asylum measures. The Dublin system, the visa regime, and the Common European Asylum System (CEAS) have created a regional refugee regime to harmonize procedures, but also, at least in part, to restrict access to protection.[4] Of even greater concern are Europe's recent efforts to outsource and offshore migration and asylum control, which could compromise the quality of protection and increase the risk of *refoulement*.[5] While the European jurisprudence reflects the core principles of international refugee and human rights law, its narrow interpretations of such have carved out legal routes for the continuation of restrictive asylum and refugee practices.

This paper investigates the discrepancies between international and European refugee and human rights law. EU legislation is problematic in two aspects of international refugee protection: (1) access to asylum and (2) *non-refoulement.*[6] A person's access to asylum is limited due to the EU's territorial interpretation and the continuous trend of outsourcing and offshoring migration control and protection. Furthermore, the core principle of refugee protection, non-refoulement, is compromised as a result of the "safe third country" notion.

The first section of this paper will offer a detailed discussion of international and European refugee law to illustrate the legal foundations and instruments for refugee protection and their relationship. This will be followed by an assessment of how access of asylum is restricted in the EU. The last section of the paper will address to what extent the principle of non-refoulement is threatened by the various versions of the "safe third country" concept.

International Refugee Law and Instruments of Refugee Protection

The main source for international refugee protection is the 1951 Convention Relating to the Status of Refugees (Refugee Convention)[7] and the 1967 Protocol[8]

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[2] Adrian Edwards, "Global forced displacement hits record high," The UN Refugee Agency (UNHCR), last modified June 20, 2016, http://www.unhcr.org/en-us/news/latest/2016/6/5763b65a4/global-forced-displacement-hits-record-high.html.

[3] Jean-Claude Juncker, "State of the Union 2016: Towards a Better Europe—a Europe that Protects, Empowers and Defends," (speech to European Parliament, Strasbourg, September 14, 2016).

[4] Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, "The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU," *European Journal of Migration and Law* 10, no. 4 (2008): 439–445.

[5] Refoulment refers to the practice of sending refugees or asylum seekers their country or to another country where they are likely to suffer bad treatment.

[6] Non-Refoulement is a fundamental principle of international law which prohibits states to return asylum seekers or refugees to a country in which their lives and freedoms could be endangered.

[7] UN General Assembly, *Convention Relating to the Status of Refugees*, United Nations, July 28, 1951.

eliminating temporal and geographic limitations. The key elements of the Refugee Convention are (1) the refugee definition and (2) the principle of non-refoulement. Article 1A (2) defines a refugee to be a person outside his or her country of origin with a "well-founded fear of persecution" due to his or her race, religion, nationality, social group membership, or political opinion.[9] The individual also needs to be "unable or […] unwilling" to receive protection within the country or to return.[10] Furthermore, under Article 33 all contracting states are obliged to the principle of non-refoulement which prohibits forced return of an individual to the home country, or a transfer to any country "where his life or freedom would be threatened."[11] While non-refoulement is most closely associated with refugee protection and rights, it is applicable to aliens in general. This is crucial, as it ensures protection beyond the refugee status and includes individuals whose asylum claim has failed. Non-refoulement is arguably the most important and most referred-to principle within international refugee law. While there is an ongoing debate about the legal status of the principle and whether it qualifies as *jus dispositivum*[12] or *jus cogens*[13], most recent scholarship and interpretation suggest the latter.[14] Due to their superiority and their tendency to infringe on state sovereignty, there are only few *jus cogens* norms. As the principle of non-refoulement allows for no derogation[15] and is universally accepted and followed, it has indeed acquired status of a peremptory norm.

Most countries of the international community, including the EU, have ratified the refugee treaty.[16] The discussed key elements are also reflected in other sources of international refugee and human rights law. These include the Universal Declaration of Human Rights (UDHR),[17] the International Covenant on Civil and Political Rights (ICCPR),[18] and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).[19]

The UDHR, which was adopted by the UN General Assembly in 1948, is the fundamental document of universal human rights. While it is not legally binding, its core

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[8] *Protocol Relating to the Status of Refugees*, opened for signature January 31, 1967, 606 UNTS 267 (entered into force October 4,1967).

[9] *Convention Relating to the Status of Refugees,* art. 1 A (2), July 1951, United Nations Treaty Series, vol. 189, 152.

[10] Ibid.

[11] *Convention Relating to the Status of Refugees*, art. 33, 176.

[12] This term refers to internal law adopted by consent.

[13] This refers to fundamental principles of international law from which no derogation is permitted

[14] See for example Cathryn Costello and Michelle Foster, "Non-Refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test," in *Netherlands Yearbook of International Law 2015: Jus Cogens: Quo Vadis?* ed. Maarten den Heijer and Harmen van der Wilt (The Hague: Asser Press, 2016)*;* Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd ed. (Oxford: Oxford University Press, 2007); Jean Allain, "The jus cogens Nature of Non-Refoulement," *International Journal of Refugee Law* 13 (2001): 533-558; James C. Hathaway, "What's in a Label," *European Journal of Migration and Law* 5, no. 1 (2003): 1–21.

[15] UNHCR, above n 45, 1996, Conclusion No 79(i).

[16] There are countries that have only ratified either the first or the second part of the treaty.

[17] The United Nations General Assembly, *Universal Declaration of Human Rights*, December 10, 1948, 217 A (III).

[18] The United Nations General Assembly, *International Covenant on Civil and Political Rights*, December 1966, United Nations Treaty Series, vol. 999, 171.

[19] The United Nations General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, December 10, 1984, United Nations Treaty Series, vol. 1465, 85.

principles appear throughout a number of subsequent conventions.[20] Article 14 (1) specifically addresses the "right to seek and to enjoy in other countries asylum," which refers to the access to the asylum application and procedure.[21] This serves as the basis for non-refoulement and sets limits to state sovereignty. While states usually enjoy full control over who is allowed to enter their territory, this is subordinate to the right to seek asylum. In Article 7a, the ICCPR forbids torture or cruel, inhuman, or degrading treatment or punishment.[22] This is directly related to non-refoulement, the right to seek asylum, and the refugee definition. States must refrain from expelling individuals to territories or to the frontiers of territories where they could be exposed to such circumstances. Furthermore, facing such treatment gives them the right to leave their country and to apply for asylum and receive refugee status. Similarly, Article 3a of the UNCAT prohibits the return or repatriation of an individual to a country where there are substantial grounds for believing that he or she would be tortured.[23]

When it comes to monitoring state practices and whether or not they align with international protection obligations, the office of the UNHCR is the single most important instrument. Contracting states are required to cooperate with the UNHCR and acknowledge its authority with regards to ensuring the provisions of the Refugee Convention.[24] Additionally, the Human Rights Committee is in charge of overseeing the ICCPR and is able to investigate state practices that might contradict Article 7. Under Article 22 of the UNCAT, the UN Committee of Torture is given jurisdiction to receive petitions and complaints from persons seeking international protection whose asylum claim was denied.[25] The International Court of Justice (ICJ) may be asked to settle disputes with regards to "interpretation or application" of the Refugee Convention, however, the ICJ's jurisdiction has never been invoked in such a circumstance.[26] This is also problematic because only states or the UNHCR would be able to do so as the court cannot adjudicate individual claims. However, other legal bodies such as the Court of Justice of the European Union (CJEU) or the European Court of Human Rights (ECtHR) have regional jurisdiction and confer national courts and evaluate individual asylum claims.

European Refugee Law and Instruments of Refugee Protection

Europe's refugee and human rights instruments are (1) the European Convention on Human Rights 1950 (ECHR) and (2) the Charter of Fundamental Rights of the European Union (CFR). As part of the Council of Europe system, the ECHR has been ratified by all of its members. In Article 6 (2) of the Treaty on European Union (TEU), it is established that the EU accedes to the ECHR.[27] With regards to refugee law, Article 3 does not only refer to a general prohibition of torture, degrading or inhuman

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[20] *The Convention on the Elimination of All Forms of Racial Discrimination* (ICERD 1965); the ICCPR (1966), especially art. 7, 9, and 13; the CAT (1984), especially art. 3; the CRC (1989); the *European Convention on Human Rights* (ECHR 1950), especially art. 3, 5, 8, and 13.
[21] *Universal Declaration of Human Rights*, art. 14, December 10, 1948, 217 A (III).
[22] *International Covenant on Civil and Political Rights*, art. 7a, December 16, 1966, United Nations.
[23] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art. 3a.
[24] *Convention Relating to the Status of Refugees*, art. 35.
[25] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art. 22.
[26] Hathaway, Anthony M. North, and Jason Pobjoy, "Supervising the Refugee Convention," *Journal of Refugee Studies* 26, no. 3 (September 2013): 323–324.
[27] *Consolidated Version of the Treaty on European Union*, art. 6.

treatment and punishment, but also includes non-refoulement to areas where such might occur.[28] It is to be noted that the ECHR is a human rights treaty rather than a central instrument of refugee or asylum protection. Therefore, the ECHR only provides minimum standards and limited protection of asylum seekers and refugees. However, the CFR, which is based upon the ECHR, directly addresses refugee issues. Article 4 condemns any form of ill treatment, Article 18 ensures the right to asylum, and Article 19 prohibits the return to a country where there is a risk of the inhuman or degrading treatment, punishment, torture, or the death penalty.[29] With the Lisbon Treaty the CFR became binding and requires EU institutions and member states to respect its provisions when implementing EU and national legislation.[30]

As aforementioned, the CJEU and the ECtHR are charged to ensure adherence to international and European refugee and human rights provisions. The CJEU is responsible for correct interpretation and application of the CFR.[31] National courts might request a preliminary ruling with regards to questions on asylum.[32] Furthermore, the court holds institutions as well as member states accountable for violations of EU law. While individuals and international/civil society organizations are also able to file a complaint with the court, such inquiries are rather complicated.[33] When it comes to protection of human rights and fundamental freedoms as laid out in the European Convention, the ECtHR is the main legal body to judge state violations. Though the court has shown a "dynamic style of interpretation"[34] in some areas and has safeguarded against state attempts to curtail refugee protection, it has nevertheless been reluctant to appeal unsatisfactory asylum decisions. As expressed in the rulings of *Cruz Varas*[35] and *Vilvarajah,*[36] the court believes member states to be responsible and best suited to accurately assess the risk of return and expulsion. It is not an easy task to balance human rights/refugee law and European integration. The CJEU and the ECtHR have been trying to advance both simultaneously rather than sequentially, however discrepancies and compromise are difficult to avoid.

The European legal system has played a crucial role in the establishment of the European refugee and asylum system. Besides the above discussed conventions and courts, the two main mechanisms for migration are (1) the Schengen Agreement and (2) the Common European Asylum System (CEAS) with the Dublin Regulation.

With the signing of the Schengen Agreement in 1985 and its implementation five years later, the EU realized the abolition of internal and application of external border controls. This introduced the Schengen visa regime with a "four-tier access control model"[37] that included migration control and surveillance within and outside the

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[28] *European Convention on Human Rights*, art. 3.
[29] *Charter of Fundamental Rights of the European Union*, art. 4, 18, and 19.
[30] Elspeth Guild and Violeta Moreno-Lax, *Current Challenges for International Refugee Law, with a Focus on EU Policies and EU Co-Operation with the UNHCR* (Brussels: European Union, 2013), 9, http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433711/EXPO-DROI_NT(2013)433711_EN.pdf.
[31] *Consolidated Version of the Treaty on European Union*, art. 19.
[32] *Consolidated Version of the Treaty of the Functioning of the European Union*, art. 267.
[33] Plaumann v. Commission, Case 25/62, ECR 199, (CJEU 1963).
[34] Gammeltoft-Hansen and Gammeltoft-Hansen, "The Right to Seek – Revisited," 440.
[35] Cruz Varas and Others v. Sweden, no. 46/1990/237/307 (ECtHR 1991).
[36] Vilvarajah and Others v. The United Kingdom, no. 45/1990/236/302-306 (ECtHR 1991).
[37] EU Finnish Presidency, "Council Conclusions of December 4–5, 2006," press release, 2006, https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/9199pdf.

union as well as faster deportation and expulsion mechanisms.[38] It aims to prevent unauthorized entry and enables entry bans. The centerpiece for managing asylum in the EU is the CEAS. It harmonizes European asylum procedures with the goal to ensure the same treatment in every member state. It consists of the Dublin regulation and numerous directives, which are all binding to members. The Dublin system is essential in this regard as it determines which state is responsible for an asylum application. The system foresees that asylum claims are to be lodged and evaluated in the first European country of arrival. Refugees who do not follow the Dublin provisions may be returned to the initial country that is responsible for their asylum application. This does not only entail expulsion to a different European country, but might include removal to another "safe" third country. While the CEAS has been created in accordance with international law and is intended to provide "an adequate level of protection" to individuals who "genuinely" need protection, it compromises refugee rights to free movement and the quality of protection.[39] Its main objective is not necessarily to ensure access to asylum, but to counter irregular movements and control the flow of migrants. This is reflected in the fact that the system fails to provide any legal route of entry for asylum seekers—all persons claiming to be refugees are forced to arrive illegally. How this affects access to asylum will be discussed in more detail later in this paper.

Relationship between International and European Refugee and Human Rights Law

While it is often assumed that there is a certain hierarchy in international law, this is not necessarily a helpful assessment. It is true that most regional law is informed by the principles of international law and that some hold the status of *jus cogens,* however, international law, especially in the case of refugee law, is not always an up-to-date reflection of the dynamic developments. On the other hand, European jurisprudence has been flexible enough to adjust to the many changing circumstances. It has created a progressive case law framework, which has aided a more liberal reading of overall international law. Therefore, assuming that international law is always superior and that the relationship is one-directional is not accurate.[40] In many instances, European law has helped advance the understanding of international law.

However, just as European law has offered more progressive interpretations in some areas, it has occasionally defaulted to conservative rulings that benefit member states and the European asylum regime overall, but come at the price of overall refugee protection. The next section will explore how EU legislation has compromised refugeehood, and how European case law has aided or limited refugee protection.

Discrepancies between International and European Refugee and Human Rights Law

As discussed earlier, the EU has established a uniform asylum system, which is legal under international and European law. However, this legislation only guarantees minimum standards of protection, and in some cases even limits rather than enables the security of asylum seekers. The overall access to asylum in the EU is fairly restricted and will be evaluated first. This is followed by a discussion on how the principle of non-refoulement is threatened by the practice of repatriating or returning refugees to "safe third countries."

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[38] The Hague Programme, [2005] OJ C 53/1, para. 1.7.2.
[39] Guild and Moreno-Lax, *Current Challenges for International Refugee Law*, 20.
[40] Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (The Hague: Nijhoff, 2000), 53.

Access to Asylum

Access to asylum can be broadly defined as having the right to seek asylum and access to an asylum procedure. Though the right to seek asylum appears in Article 14 of the UDHR, it has no binding legal meaning in international law. It is not mentioned in any treaty or the Refugee Convention. However, the EU has recognized this right in the 1999 Tampere Programme and incorporated it in Article 18 of the CFR out of "respect for the rules of the Geneva Convention […] and in accordance with the Treaty establishing the European Community."[41] Though such legal discourse seems to pave the way for above average refugee protection, the EU's practices suggests otherwise. The right to seek asylum is understood as a "procedural right" and the instruments of the European asylum system focus on "asylum and immigration control" and "prevent[ing] access to asylum procedures."[42] The EU relies on a very narrow interpretation of the "refugee." Only individuals outside of their home country are able to apply for asylum. There is no refugee visa or any other resettlement process available in order to gain legal access to the EU.[43] Absent a legal route, the EU's asylum system greatly qualifies the right to leave one's country and to seek asylum. Even if outside the country of origin, access to asylum depends on another country's immigration and border control due to the "undeniable sovereign right to control aliens'" entry as established in the court case *Saadi v. the United Kingdom.*[44] The EU's control mechanisms are multi-layered, which decreases the chances of seeking asylum and starting an asylum procedure. In fact, extraterritorial measures are so sophisticated that they control migration flows "at all their stages, from the moment in which the person attempts to leave his or her country of origin up to his or her arrival to the external frontiers of the country of destination concerned."[45] In this regard, the trend of outsourcing and offshoring migration control and protection in an effort to diffuse Europe's responsibility is concerning.[46]

Offshoring refers to externalizing a state's own migration authorities and outsourcing includes transferring migration responsibilities to private actors or third states.[47] The EU has invested a raft of resources in order to offshore migration control. This includes the establishment of the visa regime.[48] The EU requires visas from individuals coming from "all countries in Africa, the Caribbean and Asia as well as a number of countries in Eastern Europe, Central America and the Pacific Rim."[49] Individuals with a visa requirement are subject to additional background checks and might be denied entry at any time. Embassies and consulates are encouraged to categorize individuals into "special risk categories" such as "the unemployed, persons without regular income, etc."[50] This has negative effects on individuals wishing to claim asylum and seeking protection, as they most likely come from one of these countries and fall into one of the risk groups. In addition to offshoring, the EU tries to shift its responsibility by

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[41] *Charter of Fundamental Rights of the European Union*, art. 18.
[42] Gammeltoft-Hansen and Gammeltoft-Hansen, "The Right to Seek – Revisited," 448.
[43] Ibid., 449 and 457.
[44] Saadi v. the United Kingdom [GC], no. 13229/03, para. 65 (ECtHR 2008). The court ruled that an entry remained unauthorized until it had been formally authorized by national authorities. This includes asylum claims. During the time of authorization or even throughout the asylum procedure, aliens are allowed to be detained in suitable conditions.
[45] Guild and Moreno-Lax, *Current Challenges for International Refugee Law*, 10.
[46] Such mechanisms have multiplied in recent decades. See European Parliament Briefing Paper, 10.
[47] T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2011), 16.
[48] Ibid., 126.
[49] Gammeltoft-Hansen and Gammeltoft-Hansen, "The Right to Seek – Revisited," 448.
[50] Ibid. See also *Common Consular Instructions on Visas*, 2005/C 326/01, section V.

outsourcing migration control and protection to third countries or private actors. The EU has entered into agreements with various other countries and diffused migration and protection duties to authorities of respective states. The deployment of immigration liaison officers (ILOs) plays a central part in this practice. While ILOs supposedly only assist but do not influence third country authorities, they often exercise direct control.[51] Furthermore, the EU increasingly delegates migration control and protection to private actors. Carrier sanctions against airlines and other transport companies are highly common and successful.[52] The EU's restrictive migration regime has created a lucrative private security industry, including a large number of companies hiring security personnel and border guards to carry out deportation and control services. Privatization is therefore problematic in two ways. First, as a preventive measure it creates additional obstacles to asylum and protection. It is the "most explicit blocking mechanism for asylum flows."[53] And secondly, it misconstrues the EU's responsibility to provide protection and access to asylum.

As mentioned above, the EU maintains a very conservative, territorial reading of international law in order to justify the development of its restrictive refugee and asylum regime. The union has stressed the importance of jurisdiction when it comes to the responsibility for refugee protection. The most important principle in this regard is ensuring non-refoulement. The EU only considers individuals for protection who are (1) at the border or inside of a member state or (2) not able to seek refuge in another country.[54] Member states have been trying to argue that their overall responsibility to protect and provide services to asylum seekers is limited at the high seas, in third countries, as well as in transit zones. In the court case *Hirsi Jamaa and Others v. Italy,*[55] the legality of the Italian coastguard's decision to return a boat with potential refugees to Libya without acknowledging individuals' claim for asylum was evaluated. This practice violates international as well as European law in several accounts. Not only does it eliminate asylum as an individual right, but it also presents an account of refoulement. While Italian authorities claimed that jurisdiction is not in effect on the high seas, the ECtHR ruled otherwise and established that jurisdiction on the high seas is within the meaning of Article 1 of the ECHR. The court concluded that Italy had violated Article 3 and exposed the returned individuals to the risk of refoulement. Similarly in the court case *Amuur v. France,* French authorities argued that applicants held in the transit zone of a Paris airport had not "entered" France and therefore did not fall within the country's jurisdiction.[56] The ECtHR disagreed and decided that France was not only restricting the applicants' right to liberty under Article 5 (1), but also denying access to asylum.[57]

Overall, the EU legislation has greatly compromised access to asylum by creating an almost impenetrable control system. Furthermore, the rather narrow interpretation of jurisdiction has redirected the EU's responsibility to third or private actors, which has led to a decrease in refugee protection. The section below will expand on how the principle of non-refoulement has been qualified.

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[51] Gammeltoft-Hansen and Gammeltoft-Hansen, "The Right to Seek – Revisited," 452.
[52] Ibid., 450.
[53] J. Morrison and B. Crosland, "Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy," *New Issues in Refugee Research*, Working Paper No. 39, (Geneva: UNHCR, 2001).
[54] Guild and Moreno-Lax, *Current Challenges for International Refugee Law,* 9.
[55] Hirsi Jamaa and Others v. Italy [GC], no. 27765/09, (ECtHR 2012).
[56] Amuur v. France, no. 19776/92, paras. 52–54 (ECtHR 1996).
[57] Similar rulings include Nolan and K v. Russia, no. 2512/04 (ECtHR 2009); Riad and Idiab v. Belgium, nos. 29787/03 and 29810/03 (ECtHR 2008).

Non-Refoulement

I have introduced the principle of non-refoulement as the most important provision of international refugee law. It is universally accepted by states, including the EU, and has therefore *jus cogens* status. Under international law, both direct and indirect refoulement are prohibited. Direct refoulement refers to an individual's return to his or her country of origin where there is a risk of serious human rights abuses, punishment, torture, or even death. Indirect refoulement is the expulsion of a person to another country where he or she might be at risk for direct refoulement. The notion of the "safe third country" is closely connected to the principle of non-refoulement. The CEAS is built upon this notion and uses it in order to categorize and manage refugee flows. With it, the EU aims to accelerate asylum procedures and avoid multiple asylum applications. The safe country notion is not mentioned in the Refugee Convention and considered legal as long as it does not jeopardize the non-refoulement principle. However, EU legislation has undermined this fundamental principle in various instances because it more readily exposes failed asylum seekers and potential refugees to both indirect and direct refoulement. There are various ways of framing safe countries including "safe country of first asylum" or "safe third neighboring country."[58] However, for the sake of simplicity we can broadly distinguish between "safe third country" (STC) and "safe country of origin" (SCO).

STCs include all European member states as well as non-European countries that have been labeled safe by member states.[59] Article 38 (1) of the Procedures Directive outlines the requirements a country needs to meet in order to qualify as a STC, however, member states individually evaluate the "safety" criteria. Consequently, which countries are considered safe varies substantively from one member state to another. Individuals who have passed through a STC on their journey to Europe can be returned, as their asylum application is "unfounded" and "must be declared inadmissible."[60] This is further reinforced in Article 25 of the Procedures Directive because members "are not required to examine whether the applicant qualifies as a refugee."[61] The Dublin Regulation further reinforces the "right to send an asylum seeker to a third country."[62]

SCOs are countries that are safe or have become safe again. Not only is the risk of prosecution, punishment, or other human rights abuses minimal there, but these countries also do not produce refugees.[63] All EU member states are considered SCOs. Annex 1 of the Procedures Directive provides a list of all SCOs outside the EU.[64] Similarly to the STCs, these countries are different depending on how the security has been evaluated by individual member states. The problem is that even if certain countries are presumed safe in theory, this might not actually be the case in practice. The SCO concept is static and fails to keep apace with internal state dynamics. Nevertheless, EU

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[58] Hemme Battjes, *European Asylum Law and International Law* (Leiden: Brill Academic Publishers, 2006), 397.

[59] *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection*, art. 38 (1), OJ L 180, 29.6.2013.

[60] See summary of *Criteria for Rejecting Unfounded Applications for Asylum,* http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al33102; *Asylum Procedures: Reforming the Common European Asylum System* (Brussels: European Commission, 2016), http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/20160713/factsheet_asylum_procedures_reforming_the_common_european_asylum_system_en.pdf.

[61] *Directive 2013/32/EU of the European Parliament and of the Council*, art. 25.

[62] Dublin II Regulation, art. 3 (3).

[63] UNHCR 1991: para. 3.

[64] Annex I in conjunction with Article 37 (1), Procedures Directive.

members are able to repatriate individuals from SCOs, terminate the refugee statues, or deny an asylum claim without investigating individual circumstances.

Routine-like transfers of refugees, especially within the EU, are questionable under the international legal framework. As stated above, all EU members are considered both STCs and SCOs, meaning that they do not produce refugees and are safe to return asylum seekers to. The underlying reasoning for this is based on the concept of mutual recognition.[65] Every member state is assumed to meet all requirements and standards set out in EU law. Consequently, there is no risk associated with returning a potential refugee to the first European country, as asylum procedures and services are supposedly harmonized and the same everywhere. This reasoning has also been confirmed by the CJEU in the court case *N.S. v. Secretary of State for the Home Department.*[66] The court ruled that member states are to follow the measures laid out in the CEAS as they are in compliance with international refugee law. In this regard, mutual recognition is to be assumed in the realm of asylum and refugee policies. While the court acknowledged that human rights abuses might still occur in member states, such are individual, isolated cases and not of structural nature. However, the flaws of mutual recognition and the decreased quality of protection become clear in numerous court cases. In the court case *M.S.S. v. Belgium and Greece*, the ECtHR found Belgium responsible for violating Articles 3 and 13 of the ECHR because authorities had transferred an Afghan asylum seeker to Greece even though the living conditions clearly did not meet EU standards, and therefore exposed him to a risk of non-refoulement.[67] The applicant was first kept in a detention center with poor sanitary conditions and then forced to live on the streets. The court ruled that a Dublin transfer was not justifiable in the light of such structural grievances. At the same time, Greece violated Article 3 of the ECHR for failing to meet obligations for sufficient refugee protection under EU law. In the court case *K.R.S. v. UK*, though the circumstances were quite similar to *M.S.S. v. Belgium and Greece*, the ECtHR did not find a violation of Articles 3 and 13. Regardless of the fact that several NGO reports and a position paper from the UNHCR confirmed Greece's poor conditions and requested the transfer be stopped, the Iranian applicant was returned.

In addition to internal EU transfers as part of the CEAS and the Dublin Regulation, individuals have also been removed to non-EU safe countries. In the court case *Čonka v. Belgium*, the ECtHR found that the expulsion of a group of Roma asylum seekers violated Article 4 of the ECHR.[68] The applicants were returned to Slovakia, which at the time was a non-EU country, and therefore protection could not be automatically assumed. The collective deportations without consideration of individual circumstances compromised fundamental principles granted in EU as well as international refugee law. The court ruling of *M.E. v. Sweden*[69] is even more concerning, as it arguably might qualify as direct refoulement. The ECtHR decided that Sweden did not violate EU law by deporting a homosexual Libyan whose asylum claim had failed to his home country, notwithstanding the fact that same-sex relations are criminalized and punishable in Libya.

To summarize, both access to asylum and the principle of non-refoulement are compromised by the European asylum system. The EU has installed so many pre-entry

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[65] Mutual recognition was first established in the *Cassis de Dijon* case. See Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (C-120/78) ECR 649 (CJEU 1979). While this concept usually applies for the trade of economic goods amongst member states, it has been politicized onto the social arena.

[66] 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 (joined cases C-411/10 and C-493/10) ECR 102 (CJEU 2011).

[67] M.S.S. v. Belgium and Greece [GC], No. 30696/09 (ECtHR 2011).

[68] Čonka v. Belgium, No. 51564/99 (ECtHR 2002).

[69] M.E. v. Sweden, No. 71398/12 (ECtHR 2014).

measures and control functions that asylum seekers have no other choice than to arrive illegally at European frontiers. The trend of outsourcing and offshoring migration control and protection has limited the right to seek asylum as well as the right to leave one's country. Additionally, the non-refoulement principle is threatened by the CEAS "safe country" concept. The main problem is that it fails to review individual cases and human rights abuses of European as well as non-European states. These cases are often difficult to identify. Therefore, even if a country is labeled as a STC or SCO, there remains a risk of direct or indirect refoulement.

Conclusion

This paper investigates how European refugee and human rights law as well as corresponding legislation reflect the fundamental principles of international refugee and human rights law. While there are numerous treaties, the Refugee Convention with the 1967 Protocol is the most important instrument for refugee protection. The principle of non-refoulement is universally accepted and can be considered *jus cogens*. When it comes to European refugee and human rights law, the ECHR and the CFR have incorporated the core principles of the international protection framework. Both the CJEU and the ECtHR are responsible to adjudicate violations that threaten non-refoulement and the overall safety of refugees. EU legislation, specifically the CEAS with the Dublin Regulation, is problematic as it qualifies access to asylum and the principle of non-refoulement. The restrictive European visa regime and the various control mechanisms limit the right to seek asylum, the right to leave one's country, and access to an asylum procedure. Even more concerning is the "safe country" concept, as it results in the homogenization of asylum seekers and decreased quality of asylum procedures. Consequently, protection against refoulement is circumscribed. Unfortunately, the EU does not seem willing to change their restrictive asylum and refugee practices in the near future. While the European legal system has tried to prevent the gravest human rights abuses, it has not been able to fully ensure consistent and satisfying protection for refugees. Hence, the continuation of the conservative European asylum regime will most likely come at the expense of overall refugee security and protection.

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