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The compatibility of third country nationals clauses in readmission agreements with the principle of non-refoulement

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1. Introduction

Readmission agreements are used to facilitate the expulsion of illegally residing third country nationals to a different state. The procedures used in the implementation of readmission agreements "have been under withering criticism because they undermine the concept of the fair determination of a case."¹ This dissertation aims to assert the fundamental rights concerns associated with readmission agreements.

Global inequality is a major factor which influences international migration to the developed world. Demographic, social and economic disparities are an incentive for many to seek a better life elsewhere. Over the past two decades this development has led to a perceived migratory pressure.² Due to an advanced development level, the European Union is one of the main destination regions for international migrants. In order to decrease the migratory pressure, the European Union (EU) and its Member States attempt to prevent irregular migration.

In this fight against irregular migration, there has been an increased focus on the cooperation with states which are frequently used as transit states by irregular migrants. The conclusion of readmission agreements is one of the elements of this cooperation. This policy depends largely on the willingness of third states to cooperate with the EU on the issue of combating irregular migration. Modern readmission agreements create the obligation to not only readmit the entry of own nationals, but also the entry of third country nationals, which is a novum in international law. "Readmission agreements facilitate the expulsion of unauthorised immigrants by establishing obligations and procedures regarding readmission between the contracting parties."³ Expulsion is a controversial topic in international refugee law, as expulsion brings along the risk to expel an irregular migrant to a place where he or she may suffer persecution. In the current configuration of international refugee law, there are seekers of international protection among the population of irregular migrants. These protection seekers rely on the protection provided for by international refugee law. Expulsion therefore creates the risk of a violation of the principles of international refugee law, among which the principle of non-refoulement is the cornerstone of international protection.

The policy developments in the field of expulsion give rise to the concern that restrictive policies decrease the protection of individual rights. In 1994 the European Commission (Commission) expressed the view that restrictive policies should always have as a starting point to protect the fundamental rights of individuals.⁴ The question which immediately arises is whether this policy goal is currently being achieved in the development of the Common European Asylum System. The question which is addressed in this dissertation is therefore whether the adoption of readmission agreements is in accordance with fundamental rights obligations. The fundamental rights principle which is mostly at stake is the principle of non-refoulement.

The dissertation is structured as follows. In the first chapter European readmission policy as such is examined and described. The reasons for having a common European policy instead of having a decentralised policy in the field of asylum are evaluated. Furthermore, the competence of the European Communities (EC) to conclude

¹ C. Levy, *The Geneva Convention and the European Union: A Frayed Relationship*. In J. van Selm and others (eds.) *The Refugee Convention at Fifty: A view from Forced Migration Studies*. Lexington Books (2003). p. 137.

² See, for example, the comments of the Commissioner for Justice, Freedom and Security Franco Frattini at the opening of the Frontex headoffice, speech available via <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/194&format=HTML&aged=0&language=EN&guiLanguage=en>

³ N. Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights*. 1 (2009).

⁴ European Commission. *Communication to the Council and the European Parliament on immigration and asylum policies*. COM (94) 23, 23 February 1994. § 109.

readmission agreements with third states is analysed. After this an analysis of the content of readmission agreements is provided as well as an overview of the current state of negotiations of future readmission agreements. In the second chapter, the international fundamental rights obligations of the EU in the field of refugee protection are presented. In this section the concept of non-refoulement as a general principle of Community law is examined in relation to the concepts 'safe country of origin', 'safe third country' and 'European safe country' as provided for in the Procedures Directive.⁵ In the third chapter of this dissertation, the practice of European readmission policy, as analysed in the first chapter, is tested with regard to international fundamental rights norms, which are analysed in the second chapter. This is the core of the dissertation as this chapter seeks to answer the research question. The fourth chapter seeks to reconceptualise the principle of non-refoulement to adjust its underlying premises to be more applicable in modern times. The last chapter of this dissertation is a case study of the consequences of the readmission agreement in the periphery of the EU, in this instance the Ukraine.

⁵ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. OJ L 326, 13.12.2005, p. 13-34. (the Procedures Directive)

2. European Readmission Policy

2.1. Introduction

Readmission policy is not a new concept. Already since the beginning of the nineteenth century, states have sought to cooperate in the field of the expulsion of aliens.⁶ However, it took until the beginning of the 1990s until readmission agreements became a central policy instrument to manage migration flows resulting from the new configuration of Europe after the fall of the Iron Curtain and the developments in the free movement of persons as introduced by the Treaty of the European Union.⁷ In March 1992, the Schengen states concluded a readmission agreement with Poland, which was followed by many bilateral agreements.⁸ The readmission agreement between the Schengen states and Poland from 1992 did not include provisions on the readmission of third country nationals. However, other bilateral agreements included provisions on the readmission of foreign nationals.⁹ Internally, the contracting parties of the Schengen Treaty instituted the Dublin Convention, which functioned as a relocating mechanism within the international protection regime in which the asylum application had to be processed in state of first entry.¹⁰ At the end of the 1990s, policy makers introduced a new element in readmission agreements with third states, namely the inclusion of provisions on the readmission of third country nationals. In 1999, when the Treaty of Amsterdam came into force, the conclusion of readmission agreements became an implied competence of the European Communities.¹¹

2.2. Motivation of a common readmission policy

The main goal of having a common policy of readmission agreement is the effective management of migration flows. This can be derived from Article 79(2)(c) TFEU, in which it states that the Council should adopt measures against "illegal immigration and illegal residence, including repatriation of illegal residents." This indicates the shift from readmission agreements aimed at the readmission of own nationals and the readmission of third country nationals. In the overview of readmission agreements later in this chapter it can be read that readmission agreements are concluded with both states in the direct neighbourhood of the EU and states which are geographically further away. The readmission agreements with these two groups of states have different objectives while they often are similar in formulation. It seems that for states in the close proximity of the EU the readmission of third country nationals is more relevant than for states located further away from the EU. The reason for this is most likely an extension of a practice which has been labelled as the concept of 'safe third countries'. This refers to the expulsion of irregular migrants who are third country nationals to a third state with which the EU has concluded a readmission agreement. This will be further examined in chapter two of this dissertation. Readmission agreements create legally binding obligations for third states to readmit third country nationals while this obligation does not exist in international law. Therefore, readmission agreements have become an important instrument for the EU which seeks to return irregular migrants.

⁶ See for a historical overview, K. Hailbronner, *Readmission Agreements and the Obligation on States under Public International Law to Readmit Their Own and Foreign Nationals*. 57 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht*. (1997).

⁷ See N. Coleman, 17 (2009).

⁸ S. Colinson, *Visa Requirements, Carrier Sanctions, 'Safe Third Countries' and 'Readmission': The Development of an Asylum 'Buffer Zone' in Europe*. 21 *Transactions of the Institute of British Geographers* 85 (1996).

⁹ *Idem*. p. 86.

¹⁰ O. Ferguson Sidorenko, *The Common European Asylum System: Background, Current State of Affairs, Future Directions*. 47 (2007).

¹¹ Enshrined in the old Article 63(3)(b) EC.

The reason for making readmission policy a competence of the EU is that it is believed that the EU has more negotiating weight in the conclusion of readmission agreements. Phrased negatively, Member States were confronted with difficulties in returning illegally residing third country nationals.¹² These difficulties formed a heavy burden on the states of destination, as they were faced with lengthy proceedings to return the third country national to his country of origin. The conclusion of readmission agreements goes more efficient when operated by the EU, as in that situation the negotiating powers of the Member States are bundled and the Member States do not have to negotiate many different bilateral agreements. Furthermore, if the conclusion of readmission agreements would have stayed a competence of the Member States, it is unlikely that clauses on third country nationals would have been incorporated in the readmission agreements. The inclusion of third country nationals' clauses was a policy objective of the Council.¹³

Common readmission policy can be positioned in the core of the common European migration policy. As mentioned before, there is no obligation in public international law to accept the readmission of third country nationals. However, a readmission agreement does create this legally binding obligation. Therefore, readmission agreements become an important instrument in the return of irregular migrants and migrants which are rejected in their asylum or residence permit applications. The harmonisation in the field of the return of illegally residing third country nationals in the EU by means of the recently adopted Returns Directive¹⁴ cannot be seen outside of the wider policy area of return. In this field readmission agreements are instrumental to an efficient and well-working return of third country nationals. The Returns Directive has been criticised for a lack of respect to fundamental rights, more specifically the principle of non-refoulement.¹⁵ The concerns which are raised in this paper are comparable to this into a large extent. This will become clear in the third chapter of this dissertation.

2.3. Competence of the EC to conclude Readmission Agreements

2.3.1. Legal Basis

The competence of the EC to conclude Community Readmission Agreements with non-Member States is derived from Article 79(3) TFEU. This article reads: "The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States." Before the ratification of the Lisbon Treaty the competence of the EC to conclude readmission agreements was implied, now it is an explicit competence of the EU.

2.3.2. Exclusive or shared competence

There are two vital components in EC external powers claims: the scope of those powers, and whether or not they are exclusive of the powers of Member States. The Community competence to conclude readmission agreements was shown within the precedent section. As regards the nature of the Community's implied competence in the field, this is once again a terrain of the almost traditionally fight between the European Commission, claiming exclusivity, on one side and the Member States and the Council, partisans of the shared competence, on the other. Unfortunately, the debate has not yet had the occasion

¹² M. Schieffer, Community Readmission Agreements with Third Countries: Objectives, Substance and Current State of Negotiations. 5 European Journal of Migration Law 343 (2003).

¹³ Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State and a third country. Adopted on 30/11/1994, OJ 1996 C274/20.

¹⁴ Directive 2008/115/EC of the European Parliament and the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. OJ L 348, 16.12.2008, p. 98-107.

¹⁵ See, for example, D. Acosta, The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/15: The Returns Directive. 11 European Journal of Migration and Law. (2009).

to make the object of an authoritative opinion of the Court of Justice; therefore the positions and the arguments of the both parties, expressed almost only in internal documents, are known from few sources, such as notices published in specialty magazines or comments of some scholars directly involved in EC institutions' activity.

The Commission's position regarding exclusive Community powers to conclude readmission agreements with third countries was affirmed at the time of the entry into force of the Treaty of Amsterdam and the commentators have deduced its arguments as referring to the principle of necessity, as it was developed in Opinion 1/76, according to which there are cases where it is impossible to exercise the internal competence without first (or simultaneously) exercising the external competence. According to Pieter Jan Kuiper, scholar and senior advisor in the Commission's Legal Service, "there can be little doubt that readmission should be regarded as an exclusive Community Competence", because "any internal rules to be adopted cannot have much of an effect if there is no guarantee that expelled third country nationals illegally resident in the Community will be readmitted in the country of their nationality or of last (safe) residence".¹⁶ The same idea is taken into consideration by Peers, who pointed out that "there is an alternative means of gaining exclusive external competence", which "consists of cases where it is impossible to exercise the internal competence without first (or simultaneously) exercising the external competence". According to Peers, the "EC could not adopt rules relating to expulsion outside the EU unless third countries were legally obliged to take the relevant persons back."¹⁷

The Council and Member States arguments for a shared competence in the field, expressed at the Justice and Home Affairs Council in May 1999, according to Nils Coleman, follow the criteria determined by the Court of Justice in leading judgments on Community competence, such as the Opinion 1/94¹⁸ and ERTA¹⁹ cases.

In Opinion 1/94 the Court of Justice ruled that "*Nor does the preservation of the coherence of the internal market justify the conclusion of GATS by the Community alone. Attainment of freedom of establishment and freedom to provide services for nationals of the Member States is not inextricably linked to the treatment to be afforded in the Community to nationals of non-member countries or in non-member countries to nationals of Member States of the Community*".²⁰ In other words, the right of establishment and freedom to provide services of nationals of Member States on one side and right of the first establishment of nationals of non-member countries on the other side are two different issues that are not interdependent, as to determine the extension of the Community's implied exclusive competence from the former to the latter as an unique fashion of the attainment of the Treaty's objective regarding the freedom of providing services within the internal market.

In a way considered by Coleman analogue with the above ECJ ruling, the Council has decided that "*The Community objectives in the field of immigration policy include the repatriation of persons residing unlawfully in a Member State (Article 63(3) of the EC Treaty). Readmission agreements constitute a valuable instrument of an active expulsion policy. The Council will in suitable cases authorize the Commission to conduct negotiations with third States on readmission agreements. Community [readmission] agreements are not, generally speaking, indissolubly linked with the achievement of the Community objective of 'repatriation of illegal residents'. Whether this is so must be assessed in each individual case. This also applies to the question of whether distortions can arise for other Member States through a Member State's bilateral readmission*

¹⁶ P.J. Kuijper, The evolution of the Third Pillar from Maastricht to the European Constitution: Institutional aspects. 41 Common market law review (2004). p.617.

¹⁷ S. Peers & N. Rogers, EU immigration and asylum law: text and commentary. (2006). p. 892.

¹⁸ Opinion 1/94 (WTO Agreements) [1994] ECR I-5267.

¹⁹ Case 22/70 Commission v Council (ERTA) [1971] ECR 263.

²⁰ Opinion 1/94 (WTO Agreements) [1994] ECR I-5267, para. XV.

agreement with a third State.[...] The Community's responsibility is therefore not exclusive."²¹

At a first sight, it is somewhat difficult to see the analogy referred to by Coleman between the two situations. Whilst the Court of Justice refers to the linkage existent between two categories of relationships, the Council arguments concern the rapport between a Treaty objective and a possible instrument of its achievement. But the Council's argument is merely a little ill-formulated, the underlying assumption being that there are also two categories of relationships in connection to the repatriation policy: one within the Member State where the third-country national resides illegally, and the other outside the Community territory, where the same person has to be readmitted. These two spheres 'are not indissolubly linked' in the Council's opinion and therefore Community readmission agreements are not the most necessary and thus the most indispensable means for the achievement of the Community objective of 'repatriation of illegal residents'. Following this understanding, the Council reached the conclusion that Community competence is not exclusive, but shared with those of the Member States.

In the ERTA judgment, the Court of Justice stated that "*each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules*"²² Based on this jurisprudence, the Council finds that the few Community provisions in force at the date does not mean that 'the field is occupied' and therefore the Community's competence is exclusive.

According to Peers, a full harmonization of this policy would entail the enactment of the Community measures by nature to cover asylum procedure and substantive refugee law, subsidiary protection as well as most areas of law related to irregular immigration. There is agreement amongst scholars that such a far-reaching harmonization was not achieved.²³ Furthermore, many provisions of the old Article 63 EC actually precluded full harmonization of national law, at least as regards asylum.²⁴ Therefore, the internal harmonization will never be able to constitute an argument for the exclusive Community competence at international level in the field of the readmission policy. Another argument rejected by the Council, which strongly favours the idea of exclusivity is provided, according to Coleman, by the free movement of persons within the Schengen area. The lack of internal border controls makes easier for illegal immigrants to escape the individual Member State expulsion measures by subsequent movements to another Member State. The Council has recognized this disadvantage, but considered it an acceptable risk, without further details.²⁵

Summarizing the arguments presented by both, partisans and opponents of the Community's exclusive competence in the field of the readmission agreements, one cannot see the lack of substance of the Council's arguments: it has not demonstrated how the Treaty objective of a common readmission policy can be achieved without the concerted Community action at international level, nor has convincingly answered the argument referred to the distortions within the internal market generated by individual Member State readmission policies.

However, in practice, the Community's competence in the area of readmission is shared with those of the Member States which have continued to conclude bilateral readmission agreements with third countries, without the Commission formally intervening.²⁶ On the

²¹ Justice and Home Affairs Council meeting of 27-28 May 1999, Conclusions on 're-admission agreements – consequences of the entry into force of the Amsterdam Treaty', Press release 168 – Nr. 8654/99.

²² Case 22/70 Commission v Council (ERTA) [1971] ECR 263 para. 17.

²³ S. Peers & N. Rogers (2006). p. 892, N. Coleman, (2009). p. 78.

²⁴ S. Peers & N. Rogers (2006). p. 892.

²⁵ N. Coleman (2008). p. 79.

²⁶ M. Schieffer (2003). p.351.

other hand, despite the lack of the exclusive competence the EC is not precluded from acting externally altogether²⁷, and to this day, eleven European readmission agreements have been signed and others are in the process of negotiation.²⁸ From this point of view Peers has noticed that Member States, usually reluctant to agree to the EC exercising its non-exclusive powers, in the field of readmission they are rather 'anxious' for the EC to negotiate and conclude this agreements, particularly due to the more resources and negotiating power that Community possesses in relation to the third countries concerned.

This later aspect is also by nature to determine a better achievement by the Community of the common return policy than it could be realised by the individual Member States and thus it constitutes a proof that the requirements of the principle of subsidiarity are complied with when concluding readmission agreements at the Community level. The recent adoption of the Returns Directive, which harmonises the legislation on the repatriation of illegally residing third country nationals, is a further indication of this.²⁹

However, even when Community Readmission Agreements are in place, this tool will not always be invoked during the repatriation of an illegally residing third country national. Often informal border procedures will be used to repatriate migrants to their country of origin or a country of transit. Many countries also respect their obligation under international law to allow entry in their territory for own nationals. This furthermore challenges the necessity and indispensability of Community Readmission Agreements for the purpose of achieving the objective of 'repatriation of illegal residents'. Member States acknowledge this and continue to conclude readmission agreements with countries which do not have a readmission agreement with the European Communities. For example, Germany is currently in the process of concluding a readmission agreement with Kosovo for the repatriation of Kosovar nationals residing in Germany back to Kosovo.³⁰ This indicates once again that the conclusion of readmission agreements is a shared competence between the European Communities and the Member States. It should however be noted that Member States are not inclined to negotiate readmission agreements with countries who are already party to a Community Readmission Agreement, as Community Readmission Agreements are generally predicted to be more inclusive, especially in respect of transit migrants.

The council has communicated guidelines on the concrete way in which the Community and Member States are entitled to act within their shared competence. From the opinion of the Legal Service of the Council, and the JHA Council meeting of May 1999, Coleman has derived a number of rules governing the exercising of powers by Member States when concluding such agreements:

- The Member States collectively may not conclude readmission agreements with third countries;
- A Member State must notify the Council of its intention to negotiate a readmission agreement with a third country;
- A Member State may negotiate or conclude a readmission agreement with a third country only insofar as the Council has not (yet) adopted a negotiating mandate for a Community agreement concerning that country;
- Regarding third countries for which the Council has adopted a negotiating directive for a Community readmission agreement, a Member State may exceptionally conclude an agreement containing more detailed arrangements, if required;

²⁷ S. Peers & N. Rogers (2006), p. 892.

²⁸ See the list of currently concluded agreements in Appendix I.

²⁹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. *OJ L 348*, 24.12.2008, p. 98-107. (*the Returns Directive*)

³⁰ See, for a report of the negotiation process, for example: http://www.ini-migration.de/www/erlasse/Gespraechsprotokoll_deutsch.pdf

- A Member State may not negotiate or conclude a readmission agreement in case this might be detrimental to the implementation of a Community agreement, or to readmission negotiations concluded at the EC level.³¹

In essence these rules set limits and conditions on Member States in exercising their competence. This is mainly on the duty of loyal cooperation enshrined in Article 10 EC.

2.4. Content of Readmission Agreements

The contents of the various readmission agreements vary, as is a logical consequence of the fact that there are separate negotiating processes with each state with which a readmission agreement is negotiated. However, in practice the content of the readmission agreements is similar as a draft agreement is used at the start of the negotiating process. For this reason, it is possible to discuss the content of readmission agreements first in general before looking at particular readmission agreements with specific provisions.

In the preamble of a readmission agreement the parties of the agreement are introduced. Furthermore, the purpose of the readmission agreement, namely "to strengthen their cooperation in order to combat illegal migration more effectively" is laid out, as well as the assertion that the agreement respects international fundamental rights obligations. Article 2 of the standard draft readmission agreement determines that states are obliged to readmit their own nationals and supply them with the appropriate identification and travel documentation. Article 3(1) of the standard draft readmission agreement concerns the obligation to readmit third country nationals and provide the unauthorised immigrant with the appropriate travel documents. There are two exceptions to the obligation to readmit third country nationals as listed in Article 3(2). The first exception is unauthorised immigrants who only used the airspace of the requested state. The second exception is that the obligation to readmit a third country national does not exist when the requesting state has issued a visa or residence authorisation before or after entry in the requesting state. Coleman classifies this as remarkable as this excludes visa overstayers.³² This can however be explained by the assertion that Member States accept the risk of overstaying when issuing a visa to a third country national. The obligations for the Member States of the EU to readmit their own nationals and third country nationals are listed in Articles 4 and 5 of the standard draft readmission agreement and are similar to Articles 2 and 3. Article 17 of the standard draft readmission agreement is the so-called non-affected clause. This article establishes that the readmission agreement is subject to the obligations as put forward in other treaties and conventions. It can therefore be established that the principle of non-refoulement, which draws inspiration from various international agreements, should at all time be respected during the implementation of the readmission agreement. The next chapters of this dissertation question whether this is mere lip-service to the principle of non-refoulement or whether in practice the principle is actually respected. The remaining part of the standard draft readmission agreement focuses on the formal procedure of readmission. For the purpose of this dissertation it suffices to remark that the readmission procedure is a formalised set of procedures which need to be followed before the readmission actually takes place.

It should be remarked that the standard draft readmission agreement needs to be negotiated and that therefore the terms in the actual agreements can differ from the standard draft readmission agreement and that the agreements can differ from each other. An example of this is that in the agreement with Macau the exception is not defined as "airside transit" but as "mere transit without entering".³³ Similarly, during the

³¹ N. Coleman (2009). p. 84.

³² N. Coleman (2009). p. 95.

³³ Compare, in this regard, Article 3(2)(a) in the readmission agreement between the EU and Ukraine and the readmission agreement between the EU and Macau (OJ 2004 L 143/97, 30.4.2004).

negotiations Morocco expresses serious protest against the third country nationals' clauses in the readmission agreement with the EU, which is understandable considering the implications of this provisions on a state which is frequently used as a transit state on the migration route.

2.5. Current negotiations

There are currently 11 community readmission agreements. The agreements are listed in appendix I.³⁴ Community Readmission Agreements are until now mostly concluded with states in the close vicinity of the EU, although also with states like Hong Kong, Macau and Sri Lanka. Next to the ratified agreements as listed in the appendix, the Commission has started the negotiations to conclude readmission agreements with Pakistan, Morocco and Turkey. The Commission furthermore received the mandate to start negotiations with China and Algeria, but these negotiations have not yet formally started.

2.6. Conclusion

In this chapter the readmission policy has been described and the content of Community Readmission Agreements has been presented. Community Readmission Agreements with a clause on the readmission of third country nationals to the country of transit create an obligation under international law to readmit non-nationals. This is a new development in international law, as such an obligation cannot be found in any other international agreement. The motivation for states to saddle this obligation on themselves is questionable. This problem will be further assessed in chapter 4 of this dissertation. The next chapter focuses on the fundamental rights which are at stake in the implementation of the common readmission policy.

³⁴ See Appendix I.

3. International Fundamental Rights obligations

3.1. Introduction

In this chapter the fundamental rights which are at stake in the implementation of the common readmission policy are identified. The analysis focuses mostly on the principle of non-refoulement, although it also addresses other concerns such as the right to seek and enjoy asylum and the conditions of the reception of protection seekers. In chapter 4 of this dissertation the norms identified in this chapter are investigated in relation to Community Readmission Agreements.

3.2. Non-refoulement in international law

The principle of non-refoulement is one of the cornerstones of refugee protection in the world. The principle is the materialisation of the idea that refugees who face persecution shall not be returned to the place where they face persecution. The principle has been described in the Global Consultations on International Protection organized by the United Nations High Commissioner for Refugees as follows: *"The principle of non-refoulement embodied in Article 33 of the Refugee Convention encompasses any measure attributable to the State which could have the effect of returning an asylum seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she is at risk of persecution, including interception, rejection at the frontier or indirect refoulement"*³⁵. The principle of non-refoulement can be considered to be a principle of customary international law³⁶, making the principle binding also on states that are not party to the Refugee Convention.

The principle of non-refoulement draws its inspiration from different sources in international law. The primary source of law is Article 33(1) of the United Nations Convention Relating to the Status of Refugees (Refugee Convention). This article states: *"No contracting State shall expel ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."* A lot can be said about this definition of the principle of non-refoulement. It is for example striking that a list of causes of a threat to life or freedom is limited and does, for instance, not include gender. For this reason, and because there is no international court or tribunal which can rule on the interpretation of this Convention article, other sources of law are influential in the embarkation of the principle of non-refoulement.

One of these alternative sources of the principle of non-refoulement is the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Article 3 thereof states that *"No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."* The International Covenant on Civil and Political Rights (ICCPR) uses an even more inclusive interpretation of the principle of non-refoulement, in the sense that the persecution grounds are not limited like in the Refugee Convention and it is not limited to torture like in the CAT.

³⁵ Global Consultations on International protection, organized by the High Commissioner for Refugees. "Summary Conclusions- The principle of Non-Refoulement", (2001).

³⁶ The Office of the United Nations High Commissioner for Refugees numerous underlined in its Conclusions that non-refoulement constitutes a rule of international customary law. Therefore, according to Art. 38 of the Statute of the International Court of Justice the Court is required to apply *inter alia* international custom as evidence of a general practice accepted as law. See, for example, UNHCR, *State of the World's Refugees, 2006*, Oxford, Oxford University Press, 2006. The recognition of non-refoulement as a principle of customary international law, or for that matter as *jus cogens*, goes back to the 1980's. (D. Kennedy, *International Refugee Policy*. 8 Human Rights Quarterly (1986). p. 61.)

Article 7 of the ICCPR states that “*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*” This definition does not explicitly refer to expulsion, but implicitly prohibits the return of a person to a place where he or she shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

A similar approach can be found in the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Article 3 of the ECHR states that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” The European Court of Human Rights (ECtHR) referred to the principle of non-refoulement when it ruled that the extradition of a British citizen to the United States would be a violation of Article 3 of the ECHR. The ECtHR established in that case that the prohibition of refoulement is inherent in Article 3 of the ECHR, as extradition would be “plainly be contrary to the spirit and intendment of the Article [3].”³⁷

An important addition to the principle of non-refoulement is the assertion that states need to respect the principle in good faith. Article 31(1) of the 1969 Vienna Convention on the Law of Treaties states that: “*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*” This has significant consequences for the implementation of the principle of non-refoulement by states. States have the obligation to act in accordance with the principle of non-refoulement and do furthermore not have the discretion to limit the scope of the principle of non-refoulement by putting up administrative barriers like the assertion that the responsibility to determine the protection status lies elsewhere. The principle of non-refoulement is not dependent on the formal recognition of a protection seeker as a refugee. In the context of the ECHR, this absolute nature of non-refoulement was clearly underlined by the ECtHR in the case *Saadi v Italy*³⁸. For the Refugee Convention the exclusion clause still applies. Although issues like the entry in the host state or the formal determination of refugee status are not within the scope of the principle of non-refoulement, using instruments as readmission agreements as preventive tools to avoid state responsibility for a protection seeker is not in accordance with the principle of good faith as it is clearly intended to avoid the obligation of non-refoulement.³⁹

A specific type of refoulement, which does not involve direct refoulement, but an indirect form by expelling a protection seeker to a third country which in turn violates the principle of non-refoulement, has been labelled ‘chain refoulement’. Chain refoulement occurs when a country expels a protection seeker to a third country and that third country expels the protection seeker in turn to a state where the protection seeker faces persecution. Arguably, the responsibility of a state to not send back a protection seeker to a state which will in turn send the protection seeker to a state where he faces persecution extends to this third state. Therefore, a state has the positive obligation to make sure that the third state to which the protection seeker is expelled respects the principle of non-refoulement. In this respect, the ECtHR has held in the case *T.I. v United Kingdom* that “the indirect removal in this case to an intermediary country, which is also a contracting state, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 2 of the Convention.”⁴⁰

3.3. Non-refoulement in EU law

³⁷ ECtHR, *Soering v UK*, 07 July 1989, App. 14038/88. para. 88.

³⁸ ECtHR, *Saadi v Italy*, 28 February 2008, App. 37201/06.

³⁹ G. Goodwin-Gill, *The refugee in international law.* (1996) p. 121.

⁴⁰ ECtHR, *T.I. v UK*, 07 March 2000, App. 43844/98. para. 16.

After establishing the source and the binding nature of the principle of non-refoulement, it is necessary to analyse how the principle took root in EU law. The principle of non-refoulement can be considered as a general principle of EU law, and it has a distinct position in various directives, like the Qualification Directive and the Returns Directive. The position of non-refoulement in each of these instruments is described in this section.

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

The formal recognition of fundamental rights in EU law has been a gradual development. The original founding treaties of European integration lacked any reference to fundamental rights as the cornerstones of the constitutional traditions of the Member States. In a reaction to attempts of domestic courts to resort to national protection standards, the European Court of Justice (ECJ) concluded that fundamental rights are within its jurisdiction. The ECJ ruled that "fundamental human rights [are] enshrined in the general principles of Community law and protected by the Court".⁴¹ It took a long time before this jurisprudence was codified in legislation. Presently, fundamental rights have the status of general principles of EU law as enshrined in Article 6 TEU.⁴² However, the principle of non-refoulement is not mentioned in primary EU law.

Such a reference can nevertheless be found in the Charter of Fundamental Rights of the European Union (the Charter). Article 19(2) of the Charter provides that "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." The Charter was for a long not binding as such and was therefore not directly effective before the ECJ. However the Charter can serve as an inspiration for the general principles of EU law and, where mentioned in specific EU legislation, be applied by the ECJ. In secondary Community legislation relating to asylum the Charter is often mentioned in the preambles.⁴³ In the past, the ECJ has explicitly referred to the Charter when the Charter was mentioned in the contested legislation.⁴⁴ After the entry into force of the Lisbon Treaty, the Charter has received the status of primary law in the EU legal order. This means that the Charter can from now on be directly invoked before the ECJ.

Taken into consideration that the principle of non-refoulement, being a principle of customary international law and binding on all Member States as contracting parties to the Refugee Convention, the CAT, the ICCPR and the ECHR, as well as mentioned in the Charter, the principle has to be regarded as one of the general principles of EU law. Regrettably, the jurisprudence of the ECJ on the principle of non-refoulement and refugee law in general, is underdeveloped due to restrictions for domestic courts to refer questions for preliminary ruling to the ECJ under Article 234 TEC. After the entry into force of the Lisbon Treaty, also lower domestic courts and tribunals have acquired the authority to refer questions on the interpretation of the Title IV Directives to the ECJ. This can potentially increase the jurisprudence of the ECJ in the field of refugee law.

3.3.2. Procedures Directive

One of the main legislative initiatives on the EU level was the adoption of the directive on minimum standard on procedures in Member States for granting and withdrawing refugee status, shortly the Procedures Directive.⁴⁵ The Procedures Directive aims to harmonise status determination standards among the Member States of the EU. Next to the status of refugee, which in definition corresponds to the requirements in the Refugee

⁴¹ Case 29/69 *Stauder v. City of Ulm* [1969] ECR 419, para. 7.

⁴² See P. Craig and G. de Burca, *Human Rights in the EU*, Chapter 11 in *EU Law. Text, Cases, and Materials*, Oxford University Press (2008). pp. 379-427

⁴³ This is the case for the Procedures Directive, the Qualifications Directive and the Returns Directive.

⁴⁴ This happened for the first time in the Case C-540/03 *European Parliament v Council of the European Union*, ECR 2006 I- 05769

⁴⁵ Procedures directive, see note 5.

Convention, the Qualification Directive introduced the subsidiary protection status, a category of protection which is more inclusive than the refugee status.⁴⁶ The Procedures Directive introduced a controversial concept which aims to achieve to share the burden of protection seekers on host states by introducing a relocating mechanism, namely the safe country concept. One of the first occurrences of the safe third country concept in legislation was in Denmark in 1986. Shortly afterwards in 1993, Germany amended their constitution to include the application of the safe third country concept after being confronted with a wave of protection seekers from their eastern neighbour states.⁴⁷ This development has been characterised as a paradigm shift from an individual right to asylum with a judicial decision to a normative ascertainment of the presumption of safety of third countries with a legislative decision making scheme.⁴⁸ There are three types of the safe country concept, namely the third safe country, the super safe third country and the safe country of origin. The impact on non-refoulement of each of those types of safe countries is discussed in this section.

The first of the types of safe countries considered here is the safe third country. Article 25(2)(c) of the Procedure Directive states that Member States may find an asylum application inadmissible without a consideration of the refugee if cases when the protection seeker came from "a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 27." Article 27 of the Procedures Directive establishes, among other provisions, that a protection seeker may only be expelled to a safe third country "where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with [...] the principle of non-refoulement in accordance with the Geneva Convention is respected." Despite this directive article which obliges Member States to respect the principle of non-refoulement in the implementation of the Procedures Directives, fundamental rights commentators have been critical on the introduction of the safe third country concept in refugee law.

The origin of the safe country concept seems to come directly from Article 31(1) of the Refugee Convention, which states that "Contracting Parties shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."⁴⁹ *In this article the underlined words 'coming directly' are perceived to be very significant. The European legislator has interpreted these words as meaning that a protection seekers should apply for asylum at the first opportunity they have.*⁵⁰

It has been argued that the third safe country concept in the Procedures Directive opens the door for Member States to "shift the burden of processing asylum applications to outside of the EU"⁵¹. The safe third country concept creates the possibility for Member States to reject any asylum application from a protection seeker who passed through another state which is considered to be safe. The risk for violations of the non-refoulement principle is intuitive: how can you determine whether a person will be

⁴⁶ Article 15(c) of 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, OJ L 304, 30.9.2004, p. 12–23.

⁴⁷ S. Lavenex, *Safe third countries: extending the EU asylum and immigration policies to Central and Eastern Europe*. Central European University Press (1999). p. 136.

⁴⁸ M. Spornbauer, *The External Dimension of Europeanisation and the External Governance Approach: the Transfer of the Safe Third Country Concept Beyond the Boundaries of the European Union*. In F. Snyder (ed.) *Designing the European Union*. Bruylant (2007). p. 94.

⁴⁹ Article 31(1) Refugee Convention

⁵⁰ C. Costello, *The Asylum Procedure Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?* 7 *European Journal of Migration and Law*. (2005). p. 40.

⁵¹ S. Craig & M. Fletcher. "Deflecting refugees: A critique of the EC Asylum Procedures Directive. In *The Challenge of Asylum to Legal Systems*. In: P. Shah, *The Challenge of Asylum to Legal Systems* (2006).

subject to persecution if the application is not considered on its merits? The question which is eminent is whether the assumption of safety in a third country is always as obvious as the sending state assumes. Protection seekers should therefore always have the possibility to rebut the assumption of safety. Regrettably, the Procedures Directive does not ensure that protection seekers always have the possibility to rebut the assumption of safety, which creates a situation in which there is a risk for a violation of the principle of non-refoulement.

An even more problematic type of safe country is the so-labelled 'super safe third country'. Super safe third countries have been introduced in European legislation in Article 36(1) of the Procedures Directive, which reads: "*Member States may provide that no, or no full, examination of the asylum application and of the safety of the applicant in his/her particular circumstances as described in Chapter II, shall take place in cases where a competent authority has established, on the basis of the facts, that the applicant for asylum is seeking to enter or has entered illegally into its territory from a safe third country according to paragraph 2*" The difference with the safe third country concept is that in the super safe third country, also referred to as European safe third country, the receiving state does not have the obligation to guarantee that the protection seeker will be a victim of a violation of the principle of non-refoulement. In other words, a protection seeker may be sent to a third state without knowing what will happen to the protection seeker in that third state. Article 36(2) identifies the conditions for a country to be considered a super safe third country:

- *it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;*

- *it has in place an asylum procedure prescribed by law;*

- *it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies*

- *it has been so designated by the Council in accordance with paragraph 3.*⁵²

The problem with the super safe third country concept is that it does not allow the protection seeker to rebut the assumption of safety. The generic approach of assuming the safety for protection seekers of the countries which satisfy the above-mentioned criteria grants Member States the discretion to not consider asylum applications of all protection seekers who passed through a super safe third country. However, the principle of non-refoulement obliges states to refrain from expelling a protection seeker who faces persecution. The shift from a legally binding obligation to the discretionary power to not administer an asylum claim is the biggest concern posed by the Procedures Directive.

There are numerous states which are considered to be super safe third countries who have questionable fundamental rights records and/or asylum procedures. For example, the safety of states like Turkey and Georgia for particular groups or individuals might be questionable. Specifically the risk that a person is being sent back to a country where he or she faces persecution is a concern that has been voiced in the past. It is up to domestic courts to decide in individual cases whether the expulsion of a protection seeker to Greece under the safe third country principle is in accordance with the principle of non-refoulement. In this respect there is recent jurisprudence which is diffused on this issue. In May 2009 the British House of Lords decided that the expulsion of a protection seeker to Greece was not in violation of Article 2 and 3 ECHR because there was no actual and specific evidence that in Greece the protection seeker would face the risk of being sent to a country where she would face persecution.⁵³ In a similar case the Belgian Conseil du Contentieux des Étrangers decided that in fact the expulsion to Greece would constitute a violation of international fundamental rights norms and therefore suspended

⁵² Article 36(2) Procedures Directive. Paragraph 3 of this article was annulled by the ECJ in Case C-133/06, European Parliament v Council of the European Union [2008] ECR I-3 189.

⁵³ Regina (Nasseri) v Secretary of State for the Home Department [2009] UKHL 23; [2009] WLR (D) 148

the expulsion order.⁵⁴ This illustrates that domestic courts are struggling with the issue of chain refoulement, as described in a previous section.

The last concept which is discussed in this section is the safe country of origin concept. The safe country of origin concept institutionalises a list of safe countries of habitual residence of the protection seeker. The safe countries of origin are characterized in the Directive as non EU states, which are estimated as generally safe and free from political oppression. Article 29 of the Procedures Directive establishes that the Member States shall establish a list of safe states which shall qualify as safe countries of origin. This concept does generally not apply to transit migrants and is therefore of less relevance for the purpose of this legislation.

3.3.3. Returns Directive

Recently the Returns Directive came into force, which sets to harmonise the repatriation of illegally residing third country nationals. Article 3(3) of the Returns Directive defines specifically that an illegally residing third country national can be returned to a state with which the EU has negotiated a readmission agreement. This provision facilitates the implementation of the readmission agreements. Article 5 of the Returns Directive states that in the implementation of the Directive Member States must respect the principle of non-refoulement. It is however questionable whether these words guarantee that the principle of non-refoulement will in practice be protected, as there is no safeguard mechanism to prevent refoulement. The Returns Directive has been criticised for allowing too much discretion to Member States in implementing the directive, and therefore not achieving the goal of harmonisation.⁵⁵ The Returns Directive as such does not pose direct concerns for the principle of non-refoulement. In the first place because the party which can potentially violate the principle of non-refoulement is the state which issues an expulsion order. The Member State which need to implement the Returns Directive are already bound by other sources of law to the principle of non-refoulement as described above. However, as is analysed in Chapter 3 of this dissertation, in combination with readmission agreements and other legislative acts the risk that the principle of non-refoulement will be violated can become higher.

3.4. Right to seek and enjoy asylum

The right to seek and enjoy asylum is prominently mentioned in Article 14(1) of the Universal Declaration of Human Rights (hereinafter: 'the declaration'), which reads "Everyone has the right to seek and to enjoy in other countries asylum from persecution." Although not binding on the states party to the United Nations, the Declaration remains a cornerstone of the development of the fundamental rights discourse. Traditionally the right to seek and enjoy asylum is perceived to be the right to leave one's own country to flee for persecution. The problem with the right to seek and enjoy asylum as formulated in the Declaration is that it does not create an obligation for any state to accept a protection seeker as a refugee or even to grant access to the procedure which leads to the granting of refugee status. It can easily be argued that the right to seek asylum is meaningless if there is no state which is willing to provide for international protection. It has been argued that the right to seek and enjoy asylum should be understood as creating access to the asylum procedure⁵⁶, however the argument that Article 14(1) of the Declaration in combination with other conventions create an obligation for states to provide access to the asylum procedure is unconvincing. It remains up to the discretion of a sovereign state to determine who is granted access to

⁵⁴ Conseil du Contentieux des Étrangers Arrêt n° 25.962 du 10 avril 2009 dans l'affaire 39.959 / Ve chambre.

⁵⁵ A. Baldaccini, The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive. 11 *European Journal of Migration and Law* (2009), p. 17.

⁵⁶ T. Gammeltoft-Hansen & H. Gammeltoft-Hansen, The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU. 10 *European Journal of Migration and Law*. (2008).

their territory, as detrimental for the right to seek and enjoy asylum that might be. In terms of non-refoulement there is an argument to be made that once a protection seeker falls under the jurisdiction of a state, that state has the responsibility to make sure that a protection seeker is not sent back to a country where that person faces persecution. For irregular migrants this would mean that the physical presence in a state should entitle them to make an asylum application. The Procedures Directive does not provide this right, as a protection seeker may be returned to a safe country of transit without the consideration of the asylum claim. In this context, it may be asked whether, in the case where states aim to prevent physical entry to protection seekers, it is within the scope of the right to seek and enjoy asylum that protection seekers have the right to enter an asylum procedure even when they obtained entry in an irregular manner.⁵⁷

3.5. Reception conditions

In the Reception Conditions Directive the EU aimed to harmonise the conditions of the reception of asylum seekers in the EU. The motivation for developing harmonisation in this field was the finding that reception conditions varied greatly among the Member States. Even though it is difficult to find binding obligations for states concerning the conditions of the reception of protection seekers, the Council attempted to establish minimum standards. It is at least questionable that a certain minimum level of reception conditions is in fact a fundamental right. However, the EU does now have a directive which provides minimum standards of reception conditions across the EU. The question which is assessed in the next chapter of this dissertation is whether an EU Member State has the obligation to guarantee a minimum level of reception conditions when using a readmission agreement to deport an irregular migrant to a third state.

3.6. Conclusion

In this chapter of the dissertation the fundamental rights concerns in the implementation of the readmission agreement by the Member States have been identified. Most prominently the principle of non-refoulement was described in order to provide the basis for an analysis of the question whether the Community readmission agreements pose a risk for the respect of the principle of non-refoulement. However, also the right to seek and enjoy asylum and a minimum level of reception conditions were identified as potential fundamental rights concerns during the implementation of the readmission agreements.

⁵⁷ *idem.*, p. 447.

4. Community Readmission Agreements and fundamental rights

4.1. Introduction

In this chapter readmission agreements are scrutinised on the fundamental rights norms as analysed in the previous chapter. Although generally readmission agreements aim to facilitate the expulsion of illegally residing third country nationals, due to developments within the common European asylum system also protection seekers can be affected by a readmission agreement. For example, a Member State has the discretion to not evaluate an asylum claim when a protection seeker has travelled through a super safe third country before lodging their asylum claim in the particular Member State.⁵⁸ In cases which do not involve protection seekers there will usually be no issue of fundamental rights. These cases concern merely the authority of states derived from public international law to allow or refuse the entry of non-nationals in their territory. As has been identified in the previous chapter, protection seekers have a particular position in international law and are protected by numerous international fundamental rights agreements. Most notably, protection seekers are protected against expulsion to a state where they face persecution. States are therefore not allowed to expel (or 'refouler') a protection seeker to a state which aims to persecute the protection seeker.

4.2. Impact of Readmission Agreements on non-refoulement

Readmission agreements between the EU and a third state do not directly endanger the respect for the principle of non-refoulement. The conclusion of a readmission agreement in itself is not a violation of the principle of non-refoulement, as the only act which can potentially be in contradiction with the principle of non-refoulement is the expulsion of a protection seeker to another state. This has led Coleman to conclude that because the obligation of Member States to respect the principle of non-refoulement and other international fundamental rights norms is not altered by the conclusion of a readmission agreement, readmission agreements "[do] not involve a heightened risk of refoulement."⁵⁹ In the opinion of this author, this conclusion is erroneous for the following reasons.

It should first be admitted that indeed as such readmission agreements do not directly violate the principle of non-refoulement. Member States indeed retain the obligation to respect the principle of non-refoulement as well as other norms of international fundamental rights. However, readmission agreements facilitate the expulsion of illegally residing third country nationals, a group which potentially includes seekers of international protection. Even though states have the obligation to respect the principle of non-refoulement, sadly not all states take this obligation sufficiently seriously. Equally significant is that it cannot be held with certainty that the various safe third country concepts are fully in accordance with international fundamental rights norms.⁶⁰ In the following section of this dissertation this argument will be further deepened.

There are several instances when Member States of the EU showed a lack of respect for the principle of non-refoulement. Although states have the obligation to refrain from refoulement, in practice this obligation is not always adhered to. Due to a lack of availability of data, it is difficult to present a complete overview of cases when states expelled a protection seeker who faces persecution in the state where he or she is expelled. In the cases of *Chahal* and *Saadi* the ECtHR has held that expulsion of these individuals would amount to refoulement and would therefore be in violation of Article 3

⁵⁸ See section 2.3.2 on the Procedures Directive and the super safe third country concept.

⁵⁹ N. Coleman (2009). p. 316.

⁶⁰ Coleman disagrees with this assertion and states that the safe third country concepts in the Procedures Directive are in accordance with the Refugee Convention and the ECHR. (Coleman (2009). p. 316)

of the ECHR. These are however cases which involve suspects of terrorism, but it shows the attitude of Member States who do not acknowledge the absolute nature of the principle of non-refoulement. There are often better indicators how states (informally) show little respect for the principle of non-refoulement. It was reported that Greece deported Iraqi protection seekers back to Turkey, which was a transit state for those protection seekers.⁶¹ This was based on a bilateral readmission agreement between Greece and Turkey. As Turkey does not refrain from deporting Iraqi protection seekers back to Iraq, where they potentially face persecution,⁶² this practice is not in accordance with the principle of non-refoulement.

4.2. Safe third country principle

In the previous chapter of this dissertation, the various varieties of the safe third country concept as introduced in European law by the Procedures Directive were analysed and described. Concerns regarding the respect for the principle of non-refoulement in the implementation of the Procedures Directive were expressed. This is relevant for readmission agreements as readmission agreements facilitate the functioning of the various safe third country concepts. In public international law states do not have the obligation to allow the entry of foreign nationals in their territory. Readmission agreements create this obligation. In this sense readmission agreements increase the obligations of states to allow entry of foreign nationals in their territory. The safe third country concept would not function as it is intended to because third states would not allow the entry of a migrant who used their state as a transit state. For that reason, the conclusion of readmission agreement with third states which function as transit states is instrumental for the functioning of the safe third country concept.

4.2.1. Impact of safe third country principle on non-refoulement

As mentioned before the principle of non-refoulement is not violated when any readmission agreement between the EU and a third state is signed. Similarly, the Procedures Directive was not in contradiction with the principle of non-refoulement. The ultimate responsibility to respect the international obligation of non-refoulement lies with the Member States, who are signatories of the various international agreements as listed earlier. However, the combination of the third safe country policy and the conclusion of readmission agreements with third states increase the possibility of refoulement by the Member States. In a climate in which the principle of non-refoulement is not always adhered to, increasing the possibility of refoulement is detrimental to the principle. For that reason the conclusion that readmission agreements do not pose a refoulement risk is too hasty.

In accordance with Article 25 of the Procedures Directive a Member State may find an asylum application of a protection seeker inadmissible if that protection seeker has used a safe third country as a transit state on his asylum journey, without a consideration of the particular asylum claim itself. Normally third states would not be inclined to accept the protection seeker back in their territory, but a readmission agreement creates this obligation. For that reason protection seekers may and can be expelled to a third state without a consideration of the asylum claim. The sending state does in this respect not have the obligation to actively guarantee that the third state will not expel the protection seeker to a place where he or she faces persecution. It is not said that any Member State will make use of this possibility and expel a protection seeker without the consideration of the asylum claim. However, the Member States do have the discretion to do so. This makes a protection seeker, from whom it is not established whether the asylum claim is valid, dependant on the good will of the host state who decides whether the claim is administered or not. The previously cited example of the readmission agreement

⁶¹ See, for instance, <http://www.socialcenter.gr/?q=el/node/124>

⁶² See, for instance, <http://www.unhcr.org/45f681d911.html>

between Greece and Turkey and its subsequent implementation illustrates how readmission agreements can facilitate violations of the principle of non-refoulement.

The super safe third country practice is even more worrisome as it does not allow the protection seeker to rebut the assumption of safety in the transit state. Even though, one could question whether this possibility in the safe third country concept is not only a protection on paper which in practice is meaningless. That a protection seeker does not have the possibility to rebut the assumption of safety in his personal circumstances can lead to a situation of refoulement. Similarly to the safe third country concept, states do have the discretion to administer the actual asylum claim, but they also have the possibility to not go into the facts of the asylum claim.

The non-refoulement concern thus rises when a person is characterised as an unauthorised migrant due to having passed through a safe third country. This happens on the moment that a Member State invokes one of the safe third country clauses in the Procedures Directive. The readmission agreements as such do not establish a rejection ground in the asylum process. Coleman makes the parallel with extradition treaties, which can be in contradiction with fundamental rights treaties because they establish an obligation on the sending state. He argues that the analogue does not hold because readmission agreements do not create any obligation on the sending state, but only on the receiving state.⁶³ This assertion is correct as the discretion keeps with the Member State. However, his assertion that the lack of a guarantee that asylum claims will be examined is not a concern⁶⁴ is more problematic. It cannot be denied that the Procedures Directive grants the discretion to the Member States to not examine asylum claims in certain circumstances. When a protection seeker is expelled using these clauses, there is a real risk of refoulement, as the sending state in these cases does not know whether the protection seeker will be persecuted after expulsion.

Considering that protection seekers are a vulnerable group who are often ill-informed of legal remedies as put forward in the Procedures Directive, it is at least doubtful whether the third safe country practices are fully in accordance with fundamental rights. It is outside the scope of this dissertation to provide a comprehensive analysis of the Procedures Directive. The combination of the safe third country practice in the Procedures Directive and readmission agreements create the circumstances in which the principle of non-refoulement can be in danger. The reason while this is troublesome is that protection seekers are an extremely vulnerable group who fled their homes in search of a safe haven.

4.2.2. Impact of safe third country principle on right to seek and enjoy asylum

As was described in chapter 2 of this dissertation, the right to seek and enjoy asylum is traditionally perceived as the right to leave the territory of the (home) state. There is no legal obligation for a state to allow the entry of protection seekers in their territory. In that strict sense, readmission agreements do not create a situation in which the right to seek and enjoy asylum is violated. However, the right to seek and enjoy asylum is rendered meaningless if there is no state which is willing to administer your asylum claim. If the country you flee from is considered to be a safe third country, Member States have the discretion to not check the merits of your asylum claim. Also the principle of non-refoulement can only be invoked if a state actually allows a protection seeker in their jurisdiction.

Where there is no legal right to apply for asylum in a foreign state, protection seekers often see themselves required to use irregular means to reach the territory of a safe state. The policy of deterrence, as the European migration policy has been described⁶⁵,

⁶³ N. Coleman (2009). p. 305.

⁶⁴ N. Coleman (2009). p. 300.

⁶⁵ H. O'Nions, The erosion of the right to seek asylum. 2 Web Journal of Current Legal Issues (2006).

leads to an increase of irregular migrants, a group which includes many protection seekers who often apply for asylum after their arrival.

4.3. Readmission of third country nationals and reception conditions

There is limited public international law regarding the conditions of the reception of protection seekers. In the domain of the EU there is the Receptions Conditions Directive which seeks to harmonise reception conditions across the Union. In the implementation of the Reception Conditions Directive Member States are obliged to uphold the minimum standards as prescribed by the directive. In the implementation of Readmission Agreements, Member States do not have the obligation to guarantee that the reception conditions as prescribed by the Reception Conditions Directive are upheld. As was identified before, readmission agreements can influence protection seekers if they used an irregular path on their protection route. The conditions of reception in third states which have a readmission agreement with the EU are often not in accordance with the minimum standards as prescribed by the Reception Conditions Directive. This creates a situation in which a protection seeker, which in fact might be entitled to a refugee status, is transported from a Member States to a third state where the reception conditions are not in accordance with the minimum standards as set within the EU. This does not mean that Member States violate any fundamental right as such when a potential protection seeker is transported under a readmission agreement to a third state in terms of reception conditions. There is no legal obligation for the sending state to make sure that the host state develops adequate reception conditions and a functioning asylum procedure. Although the EU occasionally grants subsidies for the development of reception conditions and asylum systems, partly in the light of the European Neighbourhood Policy, in practice the development of reception conditions and the asylum system is often inadequate. The social and economic consequences of the effects of the European Asylum System on third states is the topic of chapter 5 of this dissertation. Although it can be established that there is no binding legal obligation on sending states to guarantee the reception conditions in the host state, it can be argued that the usually more developed Member States of the EU have the responsibility to make sure that the people who are deported are treated in a manner which is considered as humane in the Union itself. This might be not a legal obligation as such, but can arguably be considered as a moral responsibility based on a consideration of the basic interests of the human beings involved.

4.4. Conclusion

In this chapter of the dissertation the fundamental rights concerns arising from the conclusion of readmission agreements between the EU and third states have been identified. First and foremost the impact of readmission agreements on the concept of non-refoulement has been assessed. No direct incompatibility of readmission agreements with the principle of non-refoulement has been found, although serious points of concern have been raised. Especially in combination with one of the various safe third country practices, the risk of refoulement in the application of readmission agreements increases. The obligation to respect the principle of non-refoulement remains for the individual Member States, but the risk that in individual cases the principle will be violated increases as readmission agreements facilitate the functioning of the safe third country concepts.

5. The Future of the Principle of Non-Refoulement

5.1. Introduction

In the previous chapters of this dissertation the principle of non-refoulement has been identified as an important principle of international law and one of the general principles of EU law. Furthermore, it was concluded that the ratification of readmission agreements between the EU and third states in combination with the various safe third country concepts increases the actual risk of refoulement. From the development of the Common European Asylum System, which arguably can be described as the externalisation of asylum to outside the borders of the EU, it can be derived that the EU tries to avoid the application of the principle of non-refoulement. By keeping protection seekers to a large extent outside the jurisdiction of the Member States, the EU attempts to avoid having to bear the responsibility for protection seekers. In this chapter of the dissertation the limits of the principle of non-refoulement are investigated and the question is asked whether in the concept of non-refoulement requires reconceptualisation in the globalised world of today.

The central concern voiced in the previous chapter of this dissertation is that there is a lack of access to some form of an asylum procedure in the EU. Readmission agreements in combination with the safe third country doctrine limit the access to asylum procedures for protection seekers. In this manner the EU attempts to avoid the burden of providing a safe haven for those in need. The right to be protected against violations of personal dignity is a basic, first generation fundamental right. Furthermore, it is the cornerstone of a civil society based on the rule of law; a set of values upheld across the EU. It is therefore inconceivable that the Member States united in the EU develop a policy which excessively limits the access to asylum procedures for asylum seekers. In order to avoid this development, the prohibition of refoulement needs to be reconceptualised in a way which is compatible to an increasingly globalised world.

5.2. Traditional conception of non-refoulement

As elaborated in Chapter 3 of this dissertation, non-refoulement is traditionally conceived to entail the prohibition to deport a person to a place where he or she faces persecution. This conception is based on international agreements in which the principle of non-refoulement receives its legal specification. The problem with this black letter application of the principle on non-refoulement is that it seems to allow for ways in which the principle can be circumvented. This is a typical legalistic way to observe and treat a phenomenon. In the realm of political science it is inconceivable that a concept has a fixed definition and meaning which does not change over time. For example the concept of democracy has different annotations in different times and places. In the legal science frequently used concepts are understandably more clearly defined by law. However, in the field of fundamental rights, the paradigm of conceptual development is more clearly visible, also in the legal sciences.

The most clearly visible example of this is the development of fundamental rights in three stages. In the first phase, fundamental rights merely included civil and political liberties. In the second phase, a social and economic dimension was introduced in the content of fundamental rights. The third generation of fundamental rights is even more inclusive and includes, among other elements, environmental rights. This development in the conception of fundamental rights indicates that legal norms are the subject of conceptual development. In a similar fashion it is conceivable that the properties and limits of the principle of non-refoulement, which is a product of the first generation of fundamental rights, should be subjected to reconceptualisation. The reason for this is that the context in which international protection is discussed and perceived has changed radically in the

past sixty years. When just after World War II refugee protection did not have any negative connotation, the doctrine of non-refoulement was developed. During the past two decades asylum and migration in general has gained political momentum which resulted in more restrictive policies. The language of fundamental rights has in this development acquired different connotations. Where traditionally the protection of the people in need was the main focus, nowadays avoiding large number of protection seekers is considered as the goal of migration policies. "The terrain has shifted from a rights-based legal grounding of asylum to a bundle of seemingly ad hoc geopolitical practices that aim to externalize asylum."⁶⁶ Constituencies reward strict migration controls and policy makers are often more than willing to adhere to the wishes of the electorate.

For the principle of non-refoulement this development has serious consequences. States attempt to limit the amount of protection seekers arriving in their territory and therefore jurisdiction. State responsibility does not extend to protection seekers outside the jurisdiction of the state and therefore state sovereignty grants states the discretion to not accept protection seekers in their jurisdiction. As the right to seek and enjoy asylum is not perceived to entail the obligation to grant access to protection seekers, this right is often meaningless as states allow themselves the leeway to simply not grant access. In the negotiation of the ECHR there was no space for the inclusion of any article concerning the right to asylum or the right to an asylum procedure. In these circumstances a re-evaluation of the content of the principle of non-refoulement should be considered.

5.3. Towards a reconceptualisation of the principle of non-refoulement

The principle of non-refoulement could be the subject of a conceptual readjustment which could increase the applicability of the concept in the modern context. The Australian geographers Hyndman and Mountz have developed the concept of neo-refoulement, which they define as "a geographically based strategy of preventing the possibility of asylum through a new form of forced return different from non-refoulement."⁶⁷ Neo-refoulement in this sense refers to "the strategy of preventing the possibility of asylum by denying access to sovereign territory."⁶⁸ In this way they attempt to include a group of protection seekers into the scope of the principle of non-refoulement. As Hyndman and Mountz are not legal scientists, they do not provide a legal analysis of the implications of their doctrine. Instead they point at the shift from a rights based fundamental rights agenda to a national security agenda. However, from a legal point of view, it can be argued that also this new conception of refoulement is prohibited in international law.

As mentioned in chapter 2 of this dissertation, it was shown that the jus cogens nature of non-refoulement is disputed.⁶⁹ Where some legal scientists advocate the idea that non-refoulement constitutes a jus cogens norm, others dispute this assertion. In this section of the paper the question of whether non-refoulement constitutes a jus cogens legal norm is assessed in a more elaborative manner. The reason for this is that it makes a difference for the application of the principle of non-refoulement whether it is a norm as such in hierarchy above other sources of law or whether it is derived from the international agreements as presented in chapter 3 of this dissertation. Equally relevant is the status of non-refoulement as a general principle of EU law. If it can be established that non-refoulement has the fundamental status of jus cogens, it could be incompatible with this legal norm to find way to circumvent the application of the principle. The matter whether a norm is jus cogens is not relevant for the applicability of a norm, but its

⁶⁶ J. Hyndman & A. Mountz, *Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe*. 43 *Government and Opposition* (2008) p. 268.

⁶⁷ *idem.*, p. 250.

⁶⁸ *idem.*, p. 268.

⁶⁹ See para. 3.2 of this dissertation.

position of a jus cogens norm in the hierarchy of international law is an indicator of the fundamental importance of the norm.

5.3.1. *The jus cogens nature of non-refoulement*

Jus cogens norms are norms which may not be derogated from by states in international treaties. In this sense jus cogens norms exist above any other sources of law. The idea behind jus cogens norms is that certain values are in fact valid legal norms which need to be respected by all states. The existence of jus cogens norms has always been the topic of a fierce academic debate, which resulted in the codification of jus cogens in the 1969 Vienna Convention of Treaties. Article 53 and 69 of the Vienna Convention define that no state may derogate from the norms of jus cogens, as the jus cogens norms are at the heart of the international system. As such the jus cogens norms can be placed at the core of the rules which regulate international cooperation. Jus cogens norms therefore restrict the freedom and sovereignty of states. The problem with the Vienna Convention is that it does define the existence of jus cogens norms, but does not define what the jus cogens norms in fact are. For that reason it is an ongoing academic debate which legal norms can be considered as jus cogens.

It is even difficult to determine the conditions of which norms should be considered as jus cogens, as it has been identified that it is easier to give examples of jus cogens norms than a definition of the requirements of those norms.⁷⁰ Based on Article 53 of the Vienna Convention, Nieto-Navia, judge of the International Criminal Tribunals for the former Yugoslavia, has identified three requirements which a legal norm needs to fulfil in order to be included as a jus cogens norm. The first condition is that a norm needs to be a norm of general international law, as opposed to regional or particular international law.⁷¹ The second requirement is that the norm needs to be accepted and recognized by the international community of States as a whole. It does not require unanimity in the international community but merely serves as a safeguard to make sure that a few states are not able to institute jus cogens norms.⁷² The third requirement is that there may be no derogations from the norm and that the norm can only be modified by a subsequent norm of general international law of the same character. This category includes "rules of general international law created for humanitarian purposes."⁷³

The fact that the requirements of a norm to be considered jus cogens can more or less be identified does not mean that the collection of jus cogens norms can easily be identified. It has been commented that the process by which fundamental rights become jus cogens norms is not done by custom or by treaty, but as general principles which emerge in a process different than custom. Simma and Alston contends that it is not custom or state practice which leads to those general principles, but in a way "in which moral and humanitarian considerations find a more direct and spontaneous expression in legal form."⁷⁴ There is no list of fundamental rights norms which are considered to be jus cogens. In order to find out which norm is in fact jus cogens, the requirements of jus cogens can be evaluated. In some cases, there is jurisprudence in which jus cogens norms are identified. For example, the International Criminal Tribunal for Former Yugoslavia decided in the case of Prosecutor v. Furundžija that the prohibition of torture

⁷⁰ A. McNair, *The Law of Treaties*, (1961), p. 215.

⁷¹ R. Nieto-Navia, 'International Peremptory Norms (Jus Cogens) and International Humanitarian Law', in: *Man's Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese*, (International Humanitarian Law Series), The Hague: Kluwer International Law 2003. p. 10 in pdf.

⁷² *Idem.*, p. 10-11.

⁷³ A. Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 *The American Journal of International Law* (1966), p. 59. See, for an alternative opinion, A. D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens!* 6 *Connecticut Journal of International Law* 1 (1991).

⁷⁴ B. Simma & P. Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*. 12 *Australian Yearbook of International Law* (1988 – 1989). p. 82.

constitutes a jus cogens norm.⁷⁵ Legal scientists have since expressed their concern for this development.⁷⁶

Having established that there are concrete fundamental rights norms which are considered jus cogens, now it can be investigated whether the principle of non-refoulement is a jus cogens norm. Using the three requirements as put forward by Nieto-Navia, the following can be concluded about the jus cogens status of non-refoulement. Firstly non-refoulement undoubtedly is a norm of general international law. The recognition of non-refoulement is not limited to a specific region or jurisdiction and is therefore general international law. Secondly it needs to be established whether the principle of non-refoulement is accepted and recognised by the international community as a whole. The abundance of international agreements stating the importance of the principle of non-refoulement is an indication that the principle does fulfil this second criterion. The third and last requirement is that there are no possible derogations to the norm. Considering the case law of international tribunals such as the ECtHR it can be argued that this is indeed the case. However, in a time in which national security considerations receive considerable attention, there is pressure on the principle of non-refoulement. However, still it could be argued that in principle there are no derogations allowed and that states are still reluctant to act in violation of the principle of non-refoulement. Considering these conditions therefore it could be argued that in fact the principle of non-refoulement is a jus cogens norm. However, there is limited jurisprudence on the jus cogens nature of non-refoulement. A strong indication of jus cogens status of non-refoulement seems to be different Executive Committee Conclusions which state that no derogations on the principle of non-refoulement are allowed.⁷⁷ The non-derogability in itself does not mean that the norm becomes jus cogens, but it is merely an indicator of the status of the non-refoulement norm.

A both interesting and promising example of national jurisprudence on the jus cogens status of non-refoulement can be found in a long political and legal debate in Switzerland during the 1990s. A civil initiative, a legislative power conferred on Swiss citizens, proposed a constitutional amendment which violated the principle of non-refoulement.⁷⁸ The government of Switzerland advised the Swiss parliament to declare the civil initiative invalid for the reason that it was in violation of the principle of non-refoulement, which is a peremptory norm in international law; in other words, the Swiss government considered non-refoulement as jus cogens.⁷⁹ In 1999 the Swiss constitution was amended to include a provision which states that civil initiatives which are not in conformity with jus cogens norms are invalid. This example shows that in some places non-refoulement is in practice considered as a jus cogens norm.

In academia there is no consensus over the jus cogens status of non-refoulement. Some authors consider that non-refoulement has become a jus cogens norm. For example, Parker states that: "The principle of non-refoulement, usually referred to only in its refugee law application, is also part of human rights law and humanitarian law, and is acknowledged as a jus cogens norm."⁸⁰ Allain provides a detailed analysis of why he

⁷⁵ Prosecutor v. Furundžija, International Criminal Tribunal for the Former Yugoslavia, 2002, 121 International Law Reports 213 (2002)

⁷⁶ See, for example, E. De Wet, The Prohibition of Torture as an International Norm of jus cogens and Its Implications for National and Customary Law. 15 European Journal of International Law (2004).

⁷⁷ Compare the development of the Executive Committee Conclusions over the following documents: Executive Committee Conclusion No. 25, 'General Conclusion on International Protection' 1982, Committee Conclusion No. 25, 'General Conclusion on International Protection' 1989 and Committee Conclusion No. 79, 'General Conclusion on International Protection' 1996.

⁷⁸ For the text of the civil initiative see: Botschaft über die Volksinitiative 'für eine vernünftige Asylpolitik und gegen die illegale Einwanderung'. In BBI 1994 III 1489.

⁷⁹ Bundesbeschluss über die Volksinitiative 'für eine vernünftige Asylpolitik und gegen die illegale Einwanderung'. 14 March 1996, BBI 1996 I 1355.

⁸⁰ K. Parker. Jus Cogens: Compelling the Law of Human Rights. 12 Hastings International and Comparative Law Review 436 (1988).

considers the principle of non-refoulement as jus cogens.⁸¹ On the other hand other authors consider that non-refoulement is not jus cogens and warn against the implications of expanding the notion of jus cogens. For example, Goodwin-Gill argues that "Although a sound case can be made for the customary international law status of the principle of non-refoulement, its claim to be part of jus cogens is far less certain, and little is likely to be achieved by insisting on its status as such."⁸² Linderfalk furthermore argues that states will consider the expansion of jus cogens as unacceptable.⁸³

After this analysis it can be concluded that the image of jus cogens remains diffuse. It remains unsure whether the principle of non-refoulement has gathered the status of jus cogens. The previous sections have deliberately not posed the assertion that non-refoulement has acquired the status of a peremptory norm in international law. This is done because it is by no means established that this is in fact the case. However, it is also impossible to establish that in fact non-refoulement is not a jus cogens norm. The problem is that the criteria which make norms jus cogens are unclear.

5.3.2. Implications

If non-refoulement can be considered as a jus cogens norm, this could have many implications for the application of the principle in policy making. A jus cogens principle, especially one that has a humanitarian nature, is a fundamental principle underlying international law upon which civilisation is based. For that reason, it seems incompatible with a jus cogens norm to try to avoid the responsibility associated with the principle. Allain concludes that "a collection of states forming an intergovernmental organization is not exempt from the peremptory nature of non-refoulement".⁸⁴ When the EU signs and ratifies a readmission agreement with a third state there are implications for the principle of non-refoulement. The question is where in individual cases lies the responsibility of non-refoulement. In countries with which the EU seeks to establish readmission agreements, there is a real risk of chain refoulement. The responsibility for this lies, when non-refoulement is observed as a jus cogens norm, with the third state, but partly also with the state who refused to consider the asylum claim and used a readmission agreement to deport the protection seeker to a third state.

This paper has also discussed the tendency to avoid the burden protection seekers form for the receiving states. The safe third country concepts and readmission agreement are aimed to decrease the burden on the EU Member States. The question which is relevant is whether as such this development is in accordance with the spirit of the principle of non-refoulement. Traditionally the responsibility of a state only starts when a protection seeker comes within the jurisdiction of the state. Readmission agreements and the safe third country concepts even limit state responsibility in this respect. Due to the safe third country concepts in combination with readmission agreements states gain a wide margin of appreciation or discretion to investigate the merits of an asylum claim or not. This discretion is only partly valid, as the principle of non-refoulement does not allow for this discretion if there is a real risk that the state which has responsibility to administer the asylum claim under a readmission agreement will, despite the international law responsibility, deport the protection seeker to a country where he or she will face persecution.

The point which I tried to make in this section is that it matters whether non-refoulement is a jus cogens norm, as a jus cogens norm implies that there are no derogations from the norm. When it is established that non-refoulement is a jus cogens norm, this has

⁸¹ J. Allain. The jus cogens Nature of non-refoulement. 13 International Journal of Refugee Law 538-541 (2002).

⁸² G. Goodwin-Gill, *The Refugee in International Law* (1996). p. 168.

⁸³ U. Linderfalk. The Effect of jus cogens Norms: Whoever Opened Pandora's Bow, Did You Ever Think About the Consequences? 18 European Journal of International Law (2008). p. 856.

⁸⁴ J. Allain (2002). p. 541.

implications for the legislative power to design the common asylum and migration policy. If a broader conception of non-refoulement is accepted, a conception which includes chain refoulement and does not wipe away the responsibility for protection seekers who due to strict border and visa regimes, the system of granting international protection would once again become a rights based regime based on the values of fundamental rights.

5.4. Conclusion

This chapter of the dissertation has shown in what sense the principle of non-refoulement as it is defined at this present moment is not up to the task of protecting the people who face persecution. A different approach to the common asylum and migration system was proposed which is based on a wider conception of the principle of non-refoulement. The question whether non-refoulement constitutes a jus cogens norm has been assessed and the implications of this have been presented.

6. The Implications of the externalization of asylum in the Ukraine

6.1. Introduction

This dissertation has so far focussed on the compatibility of readmission agreements with fundamental rights. The last chapter of this dissertation will investigate the practical consequences of the conclusion of readmission agreements with third states. In order to achieve this, one state is selected to serve as a case study. In this paper, Ukraine is selected as a case study to show the implications of readmission agreements and the common European migration and asylum system for everyday life in non-Member States.

The Ukraine has ratified the readmission agreement with the EU in 2007, after a long and difficult negotiation process. The Ukrainian parliament was reluctant to approve the proposed agreement as it feared that the agreement did not offer significant advantages for the Ukraine. The agreement included provisions for the readmission of non-Ukrainians, which was a particularly contested provision in the agreement. After numerous rounds of negotiations and debates, the agreement was finally signed and ratified. In this chapter the negotiation process is described. Furthermore, the implications for the development of the asylum system in the Ukraine is analysed.

6.2. Negotiation phase

The negotiation of the readmission agreement between the Ukraine and the EU started on 13 June 2002, when the Commission was formally granted the authority to do so by the General Affairs Council. In August 2002 the Commission presented the first draft of the proposed agreement. The negotiation with the Ukraine started in Kiev on 18 November 2002. Fourteen subsequent meetings were necessary to find a mutually satisfactory agreement. In November 2005 the negotiations on the readmission agreement were merged with the negotiation of a visa facilitation agreement. On 10 October 2006 the Commission presented a package deal which includes both the readmission agreement and the visa facilitation agreement. Part of the deal was a two-year suspended effect of those provisions in the readmission agreement that deal with the readmission of non-Ukrainian nationals.⁸⁵

The Ukrainian government expressed their satisfaction with the negotiated agreement, however ratification depended on the formal agreement of the Ukrainian parliament. The Verkhovna Rada was not eager to accept the proposed readmission agreement as it was not convinced that the deal would be beneficial to the Ukraine. In the end the parliament did adopt the readmission agreement with the smallest possible majority of 226 out of 450 votes. On the same moment the parliament did approve the visa facilitation agreement with an overwhelming majority of 413 votes. The EU already introduced a less strict visa regime for Ukrainians awaiting the official approval of the Ukrainian parliament. Furthermore, in the hope that the Ukrainian Parliament would vote in favour of the readmission agreement, the EU granted a subsidy of 30 million Euro to set up accommodation centres for readmitted migrants.

The negotiation of this readmission agreement as described above can be described as an asymmetric negotiation process in which the Ukraine has a considerable disadvantageous negotiation position. The readmission agreement creates an obligation to readmit foreign nationals in the territory, an obligation which cannot be found anywhere else in international law. There are no direct advantages for the Ukraine to allow for the introduction of this obligation. On the other hand, for the EU readmission

⁸⁵ This transition period is not new in readmission agreements. Also the readmission agreement between the EU and Albania included a two-year suspended effect.

agreements are a valuable tool in the implementation of the common European migration and asylum system. Without the cooperation of third states the safe third country concepts would be impossible to be implemented. For that reason the EU is very eager to adopt these readmission agreements with states like the Ukraine. The Ukraine for that matter is dependant on the EU to a wide extent. Especially in the Ukrainian political context, the establishment of good diplomatic relations with the EU is vital in their foreign policy agenda. Furthermore, with the expansion of the EU in 2007, the Ukraine borders four EU Member States, which further intensifies trade relations.

The pressure on the Ukrainian government to find a consensus about the readmission agreement was therefore high. On the other hand, the greatest influx of migrants to the Ukraine comes from the Russian Federation. Until now the Ukraine has not been able to negotiate a bilateral readmission agreement with the Russian Federation. The burden on the migration system thus falls entirely on the Ukraine. After the transitional period of two years, non-Ukrainian nationals readmitted via the readmission agreement will have to be processed in the Ukrainian asylum and migration system. Until now this has never been the case, as the bilateral readmission agreements in force between the Ukraine and its neighbours do not include provisions on the readmission of third country nationals. For that reason, the pressure on the Ukrainian migration and asylum system cannot be measured at this present moment. However, as the following section shows, the Ukraine does not have an adequate migration and asylum system at the moment.

6.3. Development of the asylum system

As the Ukraine only gained independence in 1991, also the migration and asylum system is relatively young. The first Ukrainian refugee law was enacted in 1993, but implementation only followed in 1996. However, when the end of the 1990s came nearer the developments came to a standstill and were only further developed in 2002 when the Ukraine joined the Refugee Convention and the International Organization of Migration. New laws which were designed to make Ukrainian law compatible with international standards were passed in 2001 and amended in 2003 and 2005. In 2007 new legislative developments were planned but due to a political crisis this was shelved. At the moment Ukrainian law does only allow for the refugee status but does not contain any element of humanitarian protection. The implementation of the asylum laws has been characterised as "completely inadequate".⁸⁶

The centre of Ukrainian refugee law is the 2001 Law of Ukraine on Refugees (Ukrainian Refugee Law)⁸⁷. The amended version of this law provides for a level of protection which is in different aspects in conformity with internationally agreed standards. For example, the definition of the term 'refugee' is compatible with the one in the Refugee Convention and refoulement is prohibited by the law. However, the law also has shortcomings. UNHCR expressed their concern about the accelerated procedure as put forward in Articles 9 and 12 of the Ukrainian Refugee Law, which provide for an accelerated procedure of status determination without considering the merits of the protection claim.⁸⁸ Furthermore, UNHCR identified problems with regard to access to legal remedies.⁸⁹ In terms of refoulement there is another concern. Non-refoulement is prohibited in Ukrainian law by Article 3 in the Ukrainian Refugee Law. However, the law that regulates the expulsion of foreign nationals, the 1994 Law of Ukraine on the Legal

⁸⁶ Zimmer, K. Migrants and Refugees in the Buffer Zone: Asylum Policy in Ukraine [Electronic version]. MigrationOnline.cz. Available via <http://www.migrationonline.cz/e-library/?x=2080625>, retrieved on 9 september 2009.

⁸⁷ Ukrainian Law on Refugees (with 2005 amendments), 2557-III, 31 May 2005, available via <http://www.unhcr.org/refworld/docid/44a286534.html>. Accessed 2 September 2009.

⁸⁸ "UNHCR Position on the Situation of Asylum in Ukraine in the Context of Return of Asylum-Seekers", UNHCR, 5 November 2007. p. 4. Available via http://soderkoping.org.ua/files/country_news/UNHCR%20position%20on%20Ukraine.pdf. Accessed on 2 September 2009.

⁸⁹ Idem.

Status of Foreigners and Stateless People, does not contain any provision on the prohibitory status of non-refoulement.⁹⁰ Therefore, in expulsion decisions Ukrainian law does not prohibit refoulement. Taking into account that Ukrainian courts are generally reluctant to apply non-refoulement derived from international law, this is a serious concern. However, the application of Ukrainian refugee law in practice is even more worrisome.

A striking example of the bureaucracy and the lack of transparency is the regulation which determines the status of Abkhazian protection seekers in the Ukraine.⁹¹ This regulation was in force until 2005 and its continuation depended on new legislative developments. Because these developments did not take place, Abkhazian protection seekers did not have valid identity documents which stated their residence status. An Abkhazian refugee reports:

*"Of course they cancelled the temporary residence permit, which we felt in our daily lives. Not every civil servant understands the difference between the difference between cancellation and continuation... It was explained to us that our residence permit which we received before 2005, are our valid documents and the proof that we are legally in the country. They told us that we have to keep them until the moment when a new regulation would be adopted. But, unfortunately, not everybody understood this, because this document states it is only valid until 2005 and everybody says that the date has expired and we can put this document in the rubbish."*⁹²

Because of this problem the Abkhazian refugees do not have any valid documents which has consequences for important daily concerns such as health care and education.

6.4. Respect for the principle of non-refoulement

As was identified in the previous chapters of this dissertation, the combination between readmission agreements and the safe third country concept increases the risk of refoulement. In this chapter it is useful to assess to what extent the principle of non-refoulement is respected in Ukraine in practice. It is difficult to address this problem as there is a lack of data on this topic and it is not possible in this research to conduct any field research. However, reports from NGOs and the United Nations portray a gruesome image.

The United Nations Country Team for Ukraine reported the refoulement of eleven protection seekers in March 2008.⁹³ This case concerned a group of eleven Sri Lankan protection seekers. All of them requested assistance from a United Nations Refugee Agency (UNHCR) and six of them actually managed to apply for a refugee status at the competent Ukrainian authorities. However, their applications were rejected for procedural reasons and they did not have the right to appeal that decision.⁹⁴ Despite this, they were forcibly deported from the Ukraine. After a stop in Dubai the protection seekers were replaced to Colombo, Sri Lanka, the country where they sought refuge from.⁹⁵ This

⁹⁰ Ukrainian Law on Legal Status of Foreigners and Stateless People (last amended 2007), #3929-XII. 4 February 1994. Available via <http://www.unhcr.org/refworld/docid/44a275ff4.html> . Accessed 2 September 2009.

⁹¹ Governmental Regulation № 674 from 26.06.1996 about the procedure of issuing temporary residence permits for "war refugees" from Abchazia and establishing their guaranteed rights.

⁹² "Staying Here? The voices of refugees from Belarus, Moldova, Russian Federation and Ukraine" (Title translated from Russian, original title: Остаться здесь? Голоса беженцев в Беларуси, Молдове, Российской Федерации и Украине). European Council on Refugees and Exiles, 2008, p. 77. Available via http://www.ecre.org/files/ECRE_Refugee_Stories_East_Europe_RU.pdf . Accessed on 2 September 2009.

⁹³ "UN condemns refoulement of Sri Lankan asylum seekers from Ukraine", United Nations in Ukraine, 10 March 2008. Available via <http://www.un.org.ua/en/news/2008-03-10/> . Accessed on 2 September 2009.

⁹⁴ "Ukraine forcibly returns 11 Tamil asylum-seekers", Amnesty International, 7 March 2008. Available via <http://www.amnesty.org/en/news-and-updates/ukraine-forcibly-returns-11-tamil-asylum-seekers-20080307> . Accessed on 2 September 2009.

⁹⁵ "UNHCR concerned about forced return of Sri Lankans by Ukraine", UNHCR, 7 March 2008. Available via <http://www.unhcr.org/news/NEWS/47d1785c4.html> . Accessed on 2 September 2009.

constitutes a clear violation of the principle of non-refoulement and therefore illustrates the refoulement concerns with regard to Ukraine. A similar case was reported in 2006, when eleven Uzbek protection seekers were extradited to Uzbekistan even though they were facing persecution there.⁹⁶

Other indications also present the image of the fact that the principle of non-refoulement is not always protected by the Ukrainian authorities. A report of the working group on arbitrary detention of the UN Human Rights Council about their mission to the Ukraine makes mention of irregularities within the Ukrainian asylum system.⁹⁷ Specifically the report states that a public prosecutor ordered and effected the extradition of a protection seeker who had been granted the refugee status.⁹⁸

6.5. Reception conditions

The last point which deserves attention in this chapter is the reception conditions of protection seekers in Ukraine. Even though it was established in a previous chapter that the conditions of reception are not directly translatable in a fundamental right, it is important to assess whether the conditions of reception is at a level which is considered as appropriate in the EU. There have been several reports which comment on the living conditions in reception centres and the more general climate for protection seekers within the Ukrainian society.

The general level of development in Ukraine lacks behind on most of the ('old') EU Member States. It can therefore hardly be expected that the conditions for the reception of protection seekers and other migrants would equal the conditions in different European states. However, partly due to the topographic position of the Ukraine, the reception facilities are often overcrowded with irregular migrants who attempted to cross the border with one of the EU Member States. This problem is especially present in westernmost province of the Ukraine, Transcarpathia. In this province there are three detention facilities which are overcrowded and have bad living conditions. An anonymous Ukrainian source reports on the Pavshino detention facility:

"Pavshino is a real hell. The guards which guard the detention centre tell stories about the complete freedom of movement inside the centre and that asylum seekers are lying. The employees of catholic humanitarian organisation, Caritas, who have access to the territory of the detention centre, keep silent. This is understandable as the EU grants this organisation generous financial aid for preserving the detention centre. Caritas basically became the executive of the will of the EU hiding under the mask of a humanitarian organisation."⁹⁹

It was furthermore reported that protection seekers in the Ukraine are increasingly becoming the victim of racism and discrimination.¹⁰⁰ Due to problems with registration and official documents, protection seekers often have limited access to social benefits such as health care, as there are no specific funds to accommodate this.¹⁰¹

⁹⁶ "Ukraine: Uzbek Asylum Seekers Sent Back to Face Abuse". Human Rights Watch, 21 February 2006. Available via <http://www.hrw.org/en/news/2006/02/21/ukraine-uzbek-asylum-seekers-sent-back-face-abuse> . Accessed on 2 September 2009.

⁹⁷ UN Human Rights Council/ Report of the Working Group on Arbitrary Detention : addendum : mission to Ukraine. 9 February 2009. Available via <http://www.unhcr.org/refworld/docid/49a553f02.html> , retrieved on 2 September 2009.

⁹⁸ *idem.*, para. 81.

⁹⁹ "Pavshino: the detention centre for asylum seekers in Transcarpathia (Translated from Russian)"2007. Available via <http://deep-water.ru/?http://anatrerra.livejournal.com/52664.html> . Accessed on 2 September 2009.

¹⁰⁰ "Staying Here? The voices of refugees from Belarus, Moldova, Russian Federation and Ukraine" (Title translated from Russian, original title: Остаться здесь? Голоса беженцев в Беларуси, Молдове, Российской Федерации и Украине). ECRE, 2008, p. 81. Available via http://www.ecre.org/files/ECRE_Refugee_Stories_East_Europe_RU.pdf . Accessed on 2 September 2009.

¹⁰¹ R. Cholewinski, Economic and social rights of refugees and asylum seekers: right to health and education (Title translated from Russian, original title: Экономические и социальные права беженцев и лиц,

6.6. Conclusion

After analysing the theoretical fundamental rights implication of readmission agreements, this chapter investigated the implications of readmission agreements for a specific country. Although the asylum system of a state is not directly affected by the conclusion of a readmission agreement, it can be influenced tremendously. Readmission agreements with third country nationals clauses potentially place an increased burden on the asylum system of a non-EU state. The conclusion of the investigation of the asylum system in the Ukraine is that the asylum system is already under pressure and developments are slow. When the third country nationals provisions in the EU-Ukraine readmission agreement go into force, any EU Member State may expel a protection seeker to the Ukraine without a consideration of the merits of the protection claim, if the protection seeker has travelled through the Ukraine on the way to that EU Member State. This chapter has raised doubts whether the Ukrainian asylum system is able to cope with this extra burden.

7. Conclusion

In this dissertation, the practice of concluding readmission agreements in order to facilitate the expulsion of irregular migrants has been analysed. After investigating different fundamental rights obligation in relation to readmission agreements, the following conclusions may be drawn.

Firstly and most prominently, there are serious concerns that readmission agreements, be it in combination with other policy developments, are not, or partly not, in accordance with the principle of non-refoulement and the principle of the fair determination of each case. Safe third country practices, as adopted in European legislation, allow for a rejection of a protection claim on the procedural ground that the protection seekers should have requested protection in the first safe country he or she arrived in on their refugee journey. This is problematic because without a consideration of the individual protection claim it can never be determined that the protection seeker would be free from persecution in the future. Similarly, the presumption of safety of the 'safe third country' is in some circumstances disputable. As was presented in the case study of the asylum practice in the Ukraine, the principle of non-refoulement is in practice not always as guaranteed as one would hope and expect. For that reason, the application of the safe third country concept results in the risk of chain-refoulement. Readmission agreements facilitate the functioning of the safe third country context in the European context and do therefore contribute to this risk. Although in readmission agreements the concept of non-refoulement is mentioned as one of the fundamental principles underlying the agreement, there is no mechanism to guarantee that the principle of non-refoulement will be respected in the daily practice. The discretion of states to not accept the protection claim on procedural grounds is a similar worrisome element of readmission agreements and the safe third country practice. Considering that the asylum system of many of the states with which the EU negotiates readmission agreements is not at a sufficient level of development, concerns that protection seekers will not be presented with the possibility to get a fair determination of their protection claim are present and real. In the above quoted example of the Ukraine, the system of determining refugee status is still underdeveloped and so are the conditions of reception.

For those reasons I cannot agree with the conclusions of Coleman who argued that in principle readmission agreements are compatible with fundamental right norms.¹⁰² It is hasty and erroneous to isolate readmission agreements from the broader perspective of international and European refugee law. Readmission agreements cannot be analysed without considering the safe third country practice. Similarly, the safe third country practice cannot be investigated without regard to readmission agreements, as readmission agreements in their current configuration are the only source of international law which creates the obligation to admit foreign nationals in this respect. In that sense, readmission agreements and the safe third country practice are two sides of the same medal. Therefore, the two concepts need to be analysed together in order to create valid results. A mere conclusion that there are no concerns because the safe third country practice is in accordance with fundamental rights¹⁰³ is insufficient. The conclusion of readmission agreements in combination with the application of the safe third country principle increases the risk of refoulement as individual protection claims remain unprocessed. Despite this, governments joined together in the Council of the European Union decided to embrace the strategy of readmission in their policy preferences. For example, the French delegation to the Council of the European Union has recently stated that "readmission agreements must be given a more prominent status in the EU's

¹⁰² Coleman, quote conclusion.

¹⁰³ Coleman, where he says that safe third country is in accordance with fundamental rights.

external policies and in general relations with the main third countries concerned.”¹⁰⁴ In that light the French delegation calls for a swift conclusion of the readmission agreements with Turkey. This merely illustrates a policy orientation which favours the restriction of migration flows over the protection of individual refugees, as the asylum system in Turkey has been the topic of fierce criticism among international NGOs and scholars.¹⁰⁵

Secondly, I would like to point at the role of readmission agreements in the emerging new refugee and asylum regime in Europe. Koh has asserted that “one or more transnational actors provokes an interaction (or series of interactions) with another, which forces an interpretation or enunciation of the global norm applicable to the situation.”¹⁰⁶ The risk which is made transparent by this quotation is that a re-evaluation of the concept of non-refoulement in the context of readmission agreements and the safe third country practices leads to a more sober and less inclusive reading of the concept. This would effectively yield in a decreased level of protection for individual protection seekers. In this context it is good to note that law is scrutinised and evaluated by the judiciary, in the domain of the Council of Europe by the judges of the EctHR, which interprets the ECHR as “a living instrument which must be interpreted in the light of present-day conditions.”¹⁰⁷ In this respect it is the judges of the EctHR who must uphold the absolute character of Article 3 ECHR and the importance of Article 8 ECHR. The creation of readmission agreement as a tool to facilitate expulsion should be observed closely in order to maintain the respect for the principle of non-refoulement at a high level. The readmission regime can develop to a system which prevents all access of asylum procedures. Once a readmission agreement is ratified and the Directives are concluded and concluded and implemented, the implementation of the readmission policy depends on specific problems and changing needs. Sandholtz argued that “actors attempt to apply the rules to new situations with inevitable disputes and efforts to reinterpret or modify the rules.”¹⁰⁸ It is upto the legislator to apply the rules of international refugee law and the important task is for the international judiciary to firmly uphold the absolute nature of Article 3 ECHR and with that the principle of non-refoulement.

In chapter 4 of this dissertation a possible conceptual development of the principle of non-refoulement was sketched this analysis was largely based on an assessment of whether non-refoulement can be considered as a peremptory norm in international law. It was argued that if it indeed holds that non-refoulement constitutes a jus cogens norm, this has implications for the manner in which the principle should be respected. This reasoning is based on the idea that a state ought to refrain from avoiding the obligation derived from a jus cogens norm. It is unlikely that there is a political consensus to accept this broad notion of non-refoulement which would in practice limit the policy making power of the legislator. However, from a refugee protection perspective this development would be preferable over a more restrictive interpretation of non-refoulement. It is not an easy task to predict how the future legislator and judiciary will interpret the principle of non-refoulement, however, there have been indications of a fierce competence battle ahead.

Where policy makers have until now advocated a restrictive refugee policy by implementing the safe third country practice and concluding readmission agreements, domestic and international courts have occasionally stand firmly for the principles of non-

¹⁰⁴ French delegation to the Council of the European Union, Migration situation in the Mediterranean: establishing partnership with migrants’ countries of origin and of transit, enhancing Member States’ joint maritime operations and finding innovative solutions for access to asylum procedures. (11 September 2009), 13205/09.

¹⁰⁵ See, for example, Amnesty International, Turkey fails to protect asylum-seekers (2009). Available via: <http://www.amnesty.org/en/news-and-updates/report/turkey-fails-protect-asylum-seekers-20090422> .

¹⁰⁶ H. Koh, Why do nations obey international law? 106 Yale Law Review (1997). p. 2646.

¹⁰⁷ EctHR, Tyrer v. United Kingdom, 25 April 1978, App. 5856/72. para. 31.

¹⁰⁸ W. Sandholtz, International Norms and Cycles of Change. (2008).

refoulement and the right to a fair status determination. For example, “[t]he judgement of the European Court of Human Rights in *TI v United Kingdom* is the authority for the proposition that ‘responsibility allocating’ agreements concluded between states do not relieve contracting parties to the Convention of their duty to ensure that the removal of an asylum seeker from their jurisdiction will not give rise to an Art. 3 violation.”¹⁰⁹ Also domestic courts have been critical of the automatic acceptance of the safe third country principle. The actor which has been relatively silent until now is the ECJ. However, after the ratification of the Treaty of Lisbon it can be expected that the ECJ will be asked to rule on the compatibility of the safe third country principle with the general principles of EU law, as the Treaty of Lisbon increases the possibility for courts of lower instance to request preliminary rulings from the ECJ. On the long run, policy makers will have to design their policies in accordance with the jurisprudence of the courts.

As a final remark I would like to argue that it would be detrimental for the development of the asylum system in states like the Ukraine if those states would be flooded with protection seekers who did not receive a proper consideration of their protection claim yet. In the light of international solidarity, in the jargon of refugee law also commonly referred to as burden sharing¹¹⁰, it would be preferable if states with a functioning asylum system would take the responsibility to determine the status of protection seekers and refrain from using the readmission agreement for such cases. However, experience from the Dublin II regulation learns that this is probably wishful thinking.¹¹¹

¹⁰⁹ O. Lynskey, Complementing and Completing the Common European Asylum System: A legal analysis of the emerging extraterritorial elements of EU refugee protection policy. 31 *European Law Review* (2006). p. 244.

¹¹⁰ J. Van Selm, *Global Solidarity: Report of a Plenary Session*. In: J. Van Selm & others (eds.), *The Refugee Convention at Fifty: A View from Forced Migration Studies*. (2003). p. 24.

¹¹¹ Despite a UNHCR request, (some) European states continued to expel migrants to Greece under the Dublin II regulation. See the UNCHR report: UNHCR, *UNHCR position on the return of asylum seekers to Greece under the Dublin Regulation*. (2008). Available via <http://www.unhcr.org/refworld/docid/4805bde42.html>, accessed on 15 september 2009.

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Appendix I: Chronological list of all Community Readmission Agreements

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