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DISSERTATION

„The European Union’s Safe Country Concepts versus the Principle of *Non-Refoulement*“

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Introduction

As a legal counselor for asylum-seekers, the author of this paper often experienced firsthand the tragic situations of her clients (mainly Chechen women), who were removed from Austria to Slovakia according to the European Union's "Dublin" system. Often the respective asylum-seeker had left Slovakia for Austria after only a short while, having learned that his¹ chance for avoiding removal to his country of origin from Slovakia was very small. Indeed, the researched statistics revealed extremely low asylum recognition rates: at that time, in 2005, the recognition rates of refugees from the Russian Federation differed greatly between Austria and Slovakia. Whereas in Austria, asylum was granted in 83.9 % of the cases, the recognition rates for asylum in Slovakia at that time lay at 0.01 % (only one family).² These statistics provided the author evidential proof of either the breakdown of the Slovakian asylum system or intentional ignorance in the meritorious decision-making. Furthermore, in most cases no other permission to stay could be sought by the refused asylum-seeker.³ Through this evidence, it was clear to the author that there was a high risk for the individual asylum-seeker to be further removed from Slovakia to his country of origin without having had access to a serious assessment on asylum as well as on *refoulement*.

However, this statistical evidence alone as an argument against the removal of the individual concerned has always been rejected by the respective Austrian asylum offices responsible for determining the risk of *refoulement* when an asylum application is rejected. The asylum offices have always used the same counter-argumentation: the European Commission has not initiated any legal steps against Slovakia concerning its lack of implementation of the so-called Regulation on Minimum Norms. Furthermore, when the Council of the European Union (EU) passed the Dublin Regulation, Member States guaranteed that they all adhered to these requirements at that time; otherwise they would not have been in a position to pass the Regulation. Additionally, the European Court of Human Rights (ECtHR) has posed a strict standard for a violation by a removal to a State of Art 3 of the European Convention on Human Rights (ECHR). As a result of these facts, a high burden of proof regarding the safety presumption has been developed: a legal challenge to the safety presumption can only be successful when the individual concerned can bring forward a "highly substantiated claim" and "attested exceptional circumstances" to make additional investigations necessary or

¹ Please note that the male formulations "he", "him" and "his" used throughout this thesis refer to both male and female subjects, unless noted otherwise.

² See statistics on p. 50.

³ *Idem*.

unsettle the principal safety presumption. The reasons claimed by the applicant must provide evidence of a “real risk” of persecution for the individual applicant. In this sense, neither general situation reports, a statistically low recognition rate nor a possible arrest if a transfer or a procedure does not fulfill the demands of Art 13 ECHR were enough to substantiate the probability of a human rights violation. The necessity for these high demands has been argued by the danger of having the effective implementation of the Dublin Regulation undermined by a lower threshold. As the author was not able to fulfill this standard of proof of the individual risk in any of the cases she defended, the risk of *refoulement* was denied, and the asylum-seekers concerned were removed to Slovakia.

Due to these experiences, the author intends in this thesis to analyze the compatibility of the EU’s legislation on “safe country” concepts with the principle of non-*refoulement*. This thesis will not focus on meritorious procedures, but rather on the aforementioned “Dublin” and all other “safe country” procedures, which do not allow for a meritorious analysis of the flight reasons. While the “safe country of origin” (SCO) and “safe third country” (STC) concepts in theory potentially offer opportunities for the genuine and fair allocation of protection responsibility, these concepts have in practice raised serious concerns regarding respect for refugees’ rights and have hence been referred to as “the most popular of [...] restrictions imposed on asylum-seekers, and one of the most threatening to refugee rights”.⁴ As of yet, no consensus has been reached among governments, domestic courts, the United Nations High Commissioner for Refugees (UNHCR) and academics about basic questions such as the meaning of the term “safety”, which has hence been a matter of legal and political controversy. However, the debate is not limited to definitions, but also extends to under which circumstances the notion of a “safe country” is legally valid.⁵

This thesis’ point of departure is a definite positive removal decision that is issued in the course of a safe country procedure. Such a single procedure for both the asylum and the *refoulement* decision is the rule in all EU Member States (MS) except Ireland.⁶ Therefore, while the procedural distinction between the decision-making process on asylum and removal

⁴ Borchelt, Gretchen, ‘The Safe Third Country Practice in the European Union: a Misguided Approach to Asylum Law and a Violation of International Human Rights Standards’ (2002) 33 Columbia Human Rights Law Review 473.

⁵ Byrne, Rosemary and Shacknove, Andrew, ‘The Safe Country Notion in European Asylum Law’ (1996) 9 Harvard Human Rights Journal 188.

⁶ UNHCR, Observations on the Communication from the Commission to the Council and the European Parliament on Strengthened Practical Cooperation – New Structures, New Approaches: Improving the Quality of Decision Making in the Common European Asylum System [COM(2006) 67 final, 17 February 2006] available at <http://www.unhcr.org/445f0abe2.html> [accessed on 12 September 2011], p. 2.

may legally be an issue, it is not of relevance in practice in the States in focus of this thesis.⁷ In fact, the two aspects are thus two sides of the same coin: discharging the non-*refoulement* obligation requires an evaluation of the risk of harm- being also condition for a serious assessment of the asylum claim.

Chapter I presents the two anti-poles: the EU's legislation on "safe country" concepts (with example of its legislative implementation in Austria) and the principle of non-*refoulement*. Chapter II gives insight into the fact that, in its practical application, the "safe country" concepts have put the asylum-seekers concerned into precarious situations. Chapter III presents the "direct balancing approach" and the "complicity principle" as the analytical tool of the thesis. With their analytical support, procedural obligations for the protection of asylum-seekers from *refoulement* in the removal procedure are developed in Chapter IV. As the ECHR possesses the most powerful monitoring mechanism in asserting and granting human rights, this thesis bases its discussion on the protection from *refoulement* afforded by this human rights treaty and the jurisprudence of the ECtHR. The UN Convention against Torture (CAT) and the Geneva Convention relating to the Status of Refugees (GRC) will be referred to for argumentative support. Chapter V concludes by identifying incompatibilities of the EU's "safe country" concepts with the principle of non-*refoulement*, measured by the developed procedural obligations.

This study of refugees' rights and their protection by the ECHR undertaken in the thesis is a novelty in its detail. Systematic legal analyses of the human rights of refugees are generally scarce and, hence, so too are holistic approaches to the question of States' obligations to refugees. Such an analysis with a rights-based approach is necessary for States to again become aware of their legal obligations in the often emotionally charged discourse on refugees.⁸

⁷ In this sense, the European Commission on Human Rights (ECommHR) found in *Cemal Kemal Altun v. the Federal Republic of Germany* for the Austrian asylum proceedings as being a single procedure that "the Austrian Ministry for the Interior [...] found that he would risk persecution in Somalia. In the asylum proceedings, the Austrian authorities had to consider basically the same elements under Austrian law as the Commission must consider under Article 3": Application no. 10308/83, report of 5 July 1995, paras 65; emphasis added; and that "the protection by human rights treaties' *refoulement* provisions complement and overlap with the refugee protection regime" explains for the Committee against Torture the references to the GRC by the ECtHR and the Human Rights Commission: Nowak, Manfred & McArthur, Elizabeth, 'The United Nations Convention against Torture – A Commentary' (Oxford, 2008), 147.

⁸ Gil-Bazo, Maria-Teresa, 'The Practice of Mediterranean States in the Context of the European Union's Justice and Home Affairs External Dimension: The Safe Third Country Concept Revisited' (2006) 18 International Journal of Refugee Law 597.

I. Law: EU legislation v. *non-refoulement*

This chapter presents the two anti-poles of protection: the EU's legislation on "safe country" concepts (A) and the principle of *non-refoulement* (B).

A. The EU's legislation

In this section, after presenting an overview of the development of the EU's asylum policy as is relevant for understanding the legislative and political background (1), the "safe country" concepts will be presented in detail (2) and Austrian legislative implementation will be referred to as an example (3).

1. Overview of the development of the EU's asylum policy

In the early 1990s, the then European Community (later the European Union) laid out the basic structure of an integrated asylum policy with the "Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the MS of the European Community" (Dublin Convention or DC) and a series of agreements known as the London Resolutions. The London Resolutions contain three related documents: The "Resolution on a Harmonised Approach to Questions Concerning Host Third Countries" (Resolution on Host Third Countries), the "Resolution on Manifestly Unfounded Applications for Asylum" (Resolution on Manifestly Unfounded Applications) and the "Conclusions on Countries in Which There is Generally No Serious Risk of Persecution" (London Conclusions).⁹ These documents first embraced the terminology of a "safe country of origin" and "safe third country" and aimed to hinder both "forum shopping" as well as "asylum-seeker in orbit" situations, where asylum-seekers are transferred between States with no State willing to take responsibility for examining the substance of their claim.

The Treaty of Amsterdam of 1997 was the next big step in establishing a common European response and policy toward asylum-seekers and migrants.¹⁰ The treaty provided a detailed

⁹ European Council, 'Conclusions on Countries in Which There is Generally No Serious Risk of Persecution' ("London Resolution"), 30 November 1992, Doc. 10579/92.

¹⁰ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Related Acts, 1997 Official Journal, C 340, 10 November 1997.

legal basis for the harmonization of common asylum and migration policies under what was then known as the "Third Pillar" of the EU, which regulated the area of justice and home affairs. The Treaty of Amsterdam amended Art 63 of the Treaty establishing the European Community (TEC) and mandated that a number of measures be taken towards the integration of asylum policy among MS within five years of the treaty's entering into force, ending on 1 May 2004. In 1999, the European Council introduced its first multi-annual programme on the Common Area of Freedom, Security and Justice, the Tampere Programme, which focused on establishing "consistent control of external borders" and common asylum regulations.¹¹

In order to create a Common European Asylum System, as foreseen under the Tampere Programme, the EU adopted a number of measures to harmonise practices and policies among MS. The most relevant measures for the purposes of this thesis are the "Council Directive laying down minimum standards for the reception of asylum seekers" (Minimum Standards Directive)¹² and the "Council Regulation establishing the criteria and mechanisms for determining the MS responsible for examining an asylum application lodged in one of the MS by a third-country national" (Dublin Regulation or DR)¹³.

While the London Resolutions had an unclear legal status and lacked enforcement mechanisms or a legal structure for implementation,¹⁴ the "Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted" (Qualification Directive or QD) and the "Council Directive on minimum standards on procedures in MS for granting and withdrawing refugee status" (Procedures Directive or PD) are binding for EU MS.

¹¹ European Council, 'Presidency Conclusions' (15-16 October 1999), available at http://www.europarl.europa.eu/summits/tam_en.htm.

¹² Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, Official Journal L 31, 6 February 2003, pp.18-25.

¹³ Council Regulation 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Official Journal L 50, 25 February 2003, pp.1-10.

¹⁴ Guild, Elspeth, 'The Impetus to Harmonise: Asylum Policy in the European Union', in Nicholson, Frances, and Twomey, Patrick (eds.), 'Refugee Rights and Realities: Evolving International Concepts and Regimes' (Cambridge/Cambridge University Press, 1999) 313, 323.

2. The “safe country” concepts

A variety of “safe country” schemes have been instituted within the international protection regime for asylum-seekers and refugees, starting as separate national policies and ending in EU legislation. The “safe country” schemes encompass two different but related mechanisms: the “safe country of origin” and the “safe third country”.¹⁵ Within these mechanisms, asylum-seekers are denied access to substantive refugee determination procedures in a particular State on the grounds that, in the first case, they are not in danger in their country of origin or, in the second case, they already enjoyed, could or should have requested and, if qualified, would actually have been granted refugee protection in another country.¹⁶ Hence, the concept of “safe” countries is a device meant to enable States to exclude large numbers of asylum-seekers and refugee claimants without going into the specifics of their individual cases. While the “safe country of origin” concept addresses an asylum-seeker’s qualification as a refugee or as a person to be protected from *refoulement* (see further down under (B)), the “safe third country” concept concerns the safety of a State other than the country of origin of the asylum-seeker.¹⁷

According to the logic of EU legislation, the “safe country of origin” concept (a) is followed by the “safe third country” concept (b). The use of the notion of a “safe country” and its possible procedural consequences (determination and examination of safety vis-à-vis safety presumption, shift of burden of standard of proof and acceleration of procedure) are presented in the next section.

a. “Safe country of origin” concepts

The SCO concept is even more recent and more controversial than the concept of “safe third countries”. In 1990, Switzerland was the first country to adopt a SCO rule in its asylum law.¹⁸ Today, EU legislation covers both presumably safe countries as non-EU MS (aa) or as EU

¹⁵ The following analysis is concerned with the safe third country concept as a procedural tool for states to refuse responsibility for refugee status determination by transferring it to another state. This concept has to be distinguished from safe third country as a standard to determine whether sufficient protection exists in a particular country in order for states to remove individuals there for the purposes of examining their claims. In our use of the concept, states refuse to take responsibility for examining a protection claim, while in the other use states accept their responsibility to undertake refugee status determination but do not see any obligation to do so within their territory, but in transit processing centres and protection zones. Gil-Bazo 596.

¹⁶ Kjaergaard, Eva, ‘The Concept of “Safe Third Country” in Contemporary European Refugee Law’ (1994) 6 International Journal of Refugee Law 4 651.

¹⁷ Battjes, Hemme, ‘European Asylum Law and International Law’ (Leiden, 2006) 344 cf. Preamble recital (17) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Official Journal L 326, 13 December 2005, pp.13-34.

¹⁸ Costello, Cathryn, ‘The European Asylum Procedures Directive in Legal Context’ (UNHCR/Geneva, 2006) 4.

MS (bb).

aa. Non-EU Member States: Procedures Directive and Qualification Directive

While the SCO notion was first adopted at the EU level in the London Conclusions,¹⁹ the Procedures Directive is the current legal basis for this concept. When originally adopted, the SCO concept foresaw two modes for the designation of third countries as safe countries of origin. The first, set out in Art 29 PD, was a common list of safe countries of origin agreed upon by the EU's Council of Ministers, acting by a qualified majority on a proposal from the European Commission and after consultation with the European Parliament.²⁰ However, following a decision of the European Court of Justice (ECJ) in 2008, Art 29 (1) and (2) PD were annulled, as the procedure for the adoption of a common list of safe countries of origin was deemed to infringe on Community law.²¹ According to the ECJ, any future adoption of a common list of safe countries of origin must be carried out in compliance with the co-decision procedures stipulated by the TEC and reiterated in the Treaty on European Union (TEU), which establish a stronger decision-making role for the European Parliament. At the time of writing, no such common list has been adopted and, therefore, this thesis does not address Art 29 PD.

At the time of writing, the only mode for designating third countries as SCOs under the Procedures Directive is the second mode, set out in Art 30 PD. This permissive article sets out the circumstances under which MS may, at the national level, designate third countries as SCOs. Art 30 PD reads as follows:

¹⁹ The EU Immigration Ministers defined a safe country of origin in Para 1 of the Conclusions as a country "which can clearly be shown, in an objective and verifiable way, normally not to generate refugees or where it can be clearly shown, in an objective and verifiable way, that circumstances which might in the past have justified recourse to the 1951 Convention have ceased to exist."

According to Para 4 of the Conclusions Member States should consider the following factors in evaluating the risk of persecution in any country:

- "(a) Previous numbers of refugees and recognition rates;
- (b) Observance of human rights;
- (c) Democratic institutions; and
- (d) Stability."

The Conclusions provided in Para 3 indicate that a safe country of origin determination by a Member State should not be an automatic bar to all asylum applications from that State, but may be used instead as justification for directing applicants into expedited procedures with sharply curtailed legal safeguards. For the procedure, the Resolution on manifestly unfounded applications allows applications to be so deemed if the asylum-seekers came from a country 'in which in general terms no serious risk of persecution' existed.

²⁰ While it was originally foreseen that the common list would be adopted with the Directive, as an Annex thereto, it proved impossible to reach the requisite unanimous agreement on the list. Hence, the PD now foresees later adoption of a common list, which has already failed twice. One problem in agreeing the list is that, as it "is not possible to make group or geographically-specific designations, in contrast to the practice of some Member States", "Member States prefer to maintain their own more detailed context-sensitive lists, which are explicitly permitted under the Procedures Directive": Costello 13.

²¹ European Court of Justice, Judgment of the Court (Grand Chamber) of 6 May 2008, *European Parliament v. Council of the European Union*, Official Journal C 158, 21 June 2008, pp.3-4. It must be added that, as regards the future adoption of the lists of safe countries and their amendment, the Council must proceed in compliance with the procedures established by the Treaty on the Functioning of the European Union.

“1. Without prejudice to Art 29, Member States may retain or introduce legislation that allows, in accordance with Annex II, for the national designation of third countries other than those appearing on the minimum common list, as safe countries of origin for the purposes of examining applications for asylum. This may include designation of part of a country as safe where the conditions in Annex II are fulfilled in relation to that part.

2. By derogation from paragraph 1, Member States may retain legislation in force on 1 December 2005 that allows for the national designation of third countries, other than those appearing on the minimum common list, as safe countries of origin for the purposes of examining applications for asylum where they are satisfied that persons in the third countries concerned are generally neither subject to:

(a) persecution as defined in Art 9 of Directive 2 004/83/EC; nor

(b) torture or inhuman or degrading treatment or punishment.

3. Member States may also retain legislation in force on 1 December 2005 that allows for the national designation of part of a country as safe, or a country or part of a country as safe for a specified group of persons in that country, where the conditions in paragraph 2 are fulfilled in relation to that part or group.

4. In assessing whether a country is a safe country of origin in accordance with paragraphs 2 and 3, Member States shall have regard to the legal situation, the application of the law and the general political circumstances in the third country concerned.

5. The assessment of whether a country is a safe country of origin in accordance with this Art shall be based on a range of sources of information, including in particular information from other Member States, the UNHCR, the Council of Europe and other relevant international organisations.

6. Member States shall notify to the Commission the countries that are designated as safe countries of origin in accordance with this Art.”

Designation under Art 30 (1) PD is subject to Annex II PD, which stipulates the current **definition** of a “safe country of origin”:

“A country is considered as a safe country of origin where, on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Art 9 of Directive 2004/83/EC [QD], no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict.

In making this assessment, account shall be taken, inter alia, of the extent to which protection is provided against persecution or mistreatment by:

(a) the relevant laws and regulations of the country and the manner in which they are applied;

(b) observance of the rights and freedoms laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms and/or the International Covenant for Civil and Political Rights and/or the Convention against Torture, in particular the rights from which derogation cannot be made under Art 15(2) of the said European Convention;

(c) respect of the non-refoulement principle according to the Geneva Convention;

(d) provision for a system of effective remedies against violations of these rights and freedoms.“

Furthermore, according to Art 30 (2) PD, MS may retain, by derogation from para 1 and the criteria in Annex II, legislation in force on 1 December 2005 that allows for the national designation of countries as safe countries of origin, as long as they are satisfied that persons in the third countries concerned are generally subject neither to persecution as defined in Art 9 Qualification Directive, nor to torture or inhuman or degrading treatment or punishment, even if only part of the country was declared safe. If Member States derogate from Art 30 (1)

PD in assessing whether a country is a safe country of origin, they “shall have regard to the legal situation, the application of the law and the general political circumstances in the third country concerned”.²²

Under Art 23 (4) (c) (i) PD, being a citizen of a safe country of origin within the meaning of Arts 29, 30 and 31 PD may be grounds for the prioritization and/or **acceleration** of the examination of the application.

The Procedures Directive fails to set out clear requirements regarding the **determination and examination of the safety** of the particular country for the individual applicant. Art 31 PD only stipulates that:

“1. A third country designated as a safe country of origin in accordance with either Art 29 or 30 may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant for asylum only if:

(a) he/she has the nationality of that country; or

(b) he/she is a stateless person and was formerly habitually resident in that country;

and he/she has not submitted any serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances and in terms of his/her qualification as a refugee in accordance with Directive 2004/83/EC.

2. Member States shall, in accordance with paragraph 1, consider the application for asylum as unfounded where the third country is designated as safe pursuant to Art 29.

3. Member States shall lay down in national legislation further rules and modalities for the application of the safe country of origin concept.”²³

Hence, Art 31 PD merely states that the SCO concept cannot be applied to a particular applicant unless there has been an individual examination of the application.

On the **presumption of safety and the consequential shift of burden as well as standard of proof**, Art 31(1) PD articulates that the applicant has to submit “serious grounds” to prove that his country of origin is not safe “in his/her particular circumstances”. Furthermore, Recital 21 PD recognizes that the “designation of a third country as a safe country of origin [...] cannot establish an absolute guarantee of safety for nationals of that country”, and states that the assessment underlying the designation of a third country as a safe country of origin, by its nature, can only take into account “the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in the country concerned”.

²² Art 30 (4) PD.

²³ Art 31 PD, emphasis added.

Recital 19 refers to the “rebuttable presumption of the safety” of the safe country of origin. Finally, Recital 17 states that “a key consideration for the well-foundedness of an asylum application is the safety of the applicant in his/her country of origin. Where a third country can be regarded as a safe country of origin, MS should be able to designate it as safe and presume its safety for a particular applicant, unless he/she presents serious counter-indications.”

The Procedures Directive is silent on whether or how applicants can be given an effective opportunity to rebut a presumption of safety, although Art 31 (3) does require States to establish further rules and modalities in national legislation for the application of the safe country of origin concept. The Qualification Directive provides a certain degree of clarification. Art 4 QD (assessment of facts and circumstances), is applicable even to cases in which the EU MS are entitled to apply special procedures under the Procedures Directive and sets out relevant rules on the assessment of evidence as well as risk and shall be cited as fundamentally relevant:

“1. Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.

2. The elements referred to in of paragraph 1 consist of the applicant's statements and all documentation at the applicants disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.

3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;

(b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;

(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;

(d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;

(e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.”²⁴

Hence, Art 4(1) QD contains an optional provision permitting EU MS to consider it the duty of the applicant to submit all elements needed to substantiate the application for international

²⁴ Art 4 QD, emphasis added.

protection. However, this does not affect the basic duty of the EU MS to assess the relevant elements of the application. This key co-operative requirement applies in addition to the Procedures Directive's requirements that decisions be taken in an individual, objective, impartial²⁵ manner. Thus, the applicant must be afforded the opportunity to participate in the process.²⁶

When an applicant is from a nationally designated safe country of origin that was also deemed safe after an individual examination of his application, the applicant's claim is found **unfounded²⁷ or manifestly unfounded.**²⁸

bb. EU Member States: Protocol on Asylum for Nationals of Member States of the EU

The only provision of EU legislation applying to asylum-seekers who are nationals of EU MS is the Article of the "Protocol on Asylum for Nationals of Member States of the European Union" annexed to the TEC (Spanish Protocol). This Article reads as follows:

"Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters. Accordingly, any application for asylum made by a national of a Member State *may be taken into consideration or declared admissible* for processing by another Member State only in the following cases:

(a) if the Member State of which the applicant is a national proceeds, availing itself of the provisions of Art 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, to take measures derogating in its territory from its obligations under that Convention;

(b) if the procedure referred to in Art I-59(1) or (2) of the Constitution has been initiated and until the Council, or, where appropriate, the European Council, adopts a European decision in respect thereof with regard to the Member State of which the applicant is a national;

(c) if the Council has adopted a European decision in accordance with Art I-59(1) of the Constitution in respect of the Member State of which the applicant is a national or if the European Council has adopted a European decision in accordance with Art I-59(2) of the Constitution in respect of the Member State of which the applicant is a national;

(d) if a Member State should so decide unilaterally in respect of the application of a national of another Member State; in that case the Council shall be immediately informed; *the application shall be dealt with on the basis of the presumption that it is manifestly unfounded* without affecting in any way, whatever the case may be, the decision-making power of the Member State."²⁹

²⁵ Art 8 (2) (a) PD.

²⁶ Noll, Gregor, 'Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection' (The Hague/Nijhoff, 2000) 299-301.

²⁷ Art 28 (1) PD.

²⁸ Art 28 (2) PD in conjunction with Art 23 (4) (c) (i) PD.

²⁹ Emphasis added.

Thus, EU MSs are safe third countries by **definition**. This means that the **examination of safety is not to be undertaken**. The safety presumption is absolute; no possibility for the **rebuttal of safety** is given to the applicant. Only the European Council can adopt a rebutting decision, after which the deciding EU MS can declare the asylum-application admissible.

For the **acceleration of procedure**, the application shall be dealt with on the basis of the presumption that it is manifestly unfounded.

b. “Safe third country” concepts

The STC notion was first introduced into Danish legislation (and as such is often known as the “Danish clause”) and quickly gained ground due to the fear of other EU MS that they would be perceived by comparison as being soft on asylum-seekers, which could result in an increase in applications in their countries. By the end of the 1990s, virtually every Western European State had implemented a STC policy.³⁰

At the EU level, the safe third country principle emerged in the Dublin Convention³¹ and was elaborated under the term “host third country” in the London Conclusions and the Resolution on Host Third Countries. The latter established that, before assessing the strength of an asylum application, the respective EU MS must first verify the existence of a safe country of asylum outside of the EU to which the applicant may be returned. Only if no such safe country of asylum exists does the Dublin Convention apply.³² In that sense, “all substantive

³⁰ Lavenex, Sandra, ‘Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe’ (Budapest/Central European University Press, 1999) 29-42.

³¹ The Dublin Convention allowed in its Art 3 (5) any Member State, pursuant to its national laws, to “send an applicant for asylum to a third State, in compliance with the provisions of the Geneva Convention, as amended by the New York Protocol.”

³² In the Resolution on Host Third Countries, no provision for common designation of countries deemed “safe” was included – this is presumably due to the difficulty among states to find consensus on the definition. Para. 2 hence only stipulated:

“The Immigration Ministers identified the following factors to be considered when assessing safe countries of asylum (“host third countries”):

(a) In those third countries, the life or freedom of the asylum applicant must not be threatened, within the meaning of Art 33 of the Geneva Convention;

(b) The asylum applicant must not be exposed to torture or inhuman or degrading treatment in the third country;

(c) It must *either* be the case that the asylum applicant has already been granted protection in the third country or has had an opportunity, at the border or within the territory of the third country, to make contact with that country's authorities in order to seek their protection, before approaching the Member State in which he is applying for asylum, *or* that there is clear evidence of his admissibility to a third country; and

(d) The asylum applicant must be afforded effective protection in the host third country against *refoulement*, within the meaning of the Geneva Convention.”

Hence, the Resolution adopted a rather vague definition of safe third country.

According to Para 1 of the Resolution, the following procedural principles applied in safe country of asylum cases:

examinations of asylum claims and their justifications should be, in principle, preceded by the process of identifying a potential host third country."³³ Hence, priority is given to sending asylum-seekers to a "safe" non-EU MS (aa) before applying the rules on EU MS (bb).³⁴

aa. Non-EU Member States: Procedures Directive

Through EU legislation, the STC scheme has developed to encompass three forms of STC practice: first country of asylum, "pre-determined" safe third countries and STC *simpliciter*.

The **definition** of the concept of first country of asylum, i.e. the safe third country concept for any applicant who has already found a form of durable protection in another country, is stipulated in Art 26 PD:

"A country can be considered to be a first country of asylum for a particular applicant for asylum if:

(a) he/she has been recognised in that country as a refugee and he/she can still avail himself/herself of that protection; or

(b) he/she otherwise enjoys *sufficient protection* in that country, including benefiting from the principle of non-refoulement;

provided that he/she will be re-admitted to that country.

In applying the concept of first country of asylum to the particular circumstances of an applicant for asylum Member States may take into account Art 27(1)."³⁵

"Pre-determined" safe third countries are envisioned in Art 36 PD, which provides the possibility to establish a list of European safe third countries. However, also Art 36 (3) PD requiring the adoption of a common list of European safe countries by the Council was annulled by the ECJ, as the procedure was deemed to infringe on EC law.³⁶ As such, no common list of European safe third countries has been adopted and Art 36 PD cannot be applied at the time of writing.

"(a) *The formal identification of a host third country in principle precedes the substantive examination of the application for asylum and its justification;*

(b) *The principle of the host third country is to be applied to all applicants for asylum, irrespective of whether or not they may be regarded as refugees;*

(c) *Thus, if there is a host third country, the application for refugee status may not be examined and the asylum applicant may be sent to that country; and*

(d) *If the asylum applicant cannot in practice be sent to a host third country, the provisions of the Dublin Convention will apply."*

³³ European Council, 'Conclusions on Countries in Which There is Generally No Serious Risk of Persecution' ("London Resolution"), 30 November 1992, Doc. 10579/92.

³⁴ Guild 325.

³⁵ Emphasis added.

³⁶ European Court of Justice, Judgment of the Court (Grand Chamber) of 6 May 2008, *European Parliament v. Council of the European Union*, Official Journal C 158, 21 June 2008, 3-4.

The application of the STC *simpliciter* concept is stipulated in Art 27 PD as follows:

“1. Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:

- (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
- (b) the principle of non-*refoulement* in accordance with the Geneva Convention is respected;
- (c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
- (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.”

Regarding the **determination of safety**, Art 27 (2) (c) PD foresees that national legislation shall permit the applicant to challenge the presumption of safety on the grounds that he would be subject to torture, cruel, inhuman or degrading treatment or punishment.

The **examination of safety**, in the Procedures Directive is notably vague. The wording of Art 28 (1) and (2) PD indicates that MS are required to establish the fact that the STC concept applies, before an application can be declared manifestly unfounded on these grounds.³⁷ Furthermore, Art 27 (2) to (4) PD states that:

“2. The application of the safe third country concept shall be subject to rules laid down in national legislation, including:

- (a) rules requiring a connection between the person seeking asylum and the third country concerned on the basis of which it would be reasonable for that person to go to that country;
- (b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe;
- (c) *rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.*

3. When implementing a decision solely based on this Art, Member States shall:

- (a) inform the applicant accordingly; and
- (b) provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.

4. Where the third country does not permit the applicant for asylum to enter its territory, Member States shall ensure that access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II.”³⁸

³⁷ UN High Commissioner for Refugees, ‘Improving Asylum Procedures – Comparative Analysis and Recommendations for Law and Practice: Detailed Research on Key Asylum Procedures Directive Provisions’, March 2010, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=4c7b71039&query=The%20safe%20country%20of%20origin%20concept> [accessed 2 May 2011] 322.

³⁸ Emphasis added; it is implicit in Art 27 (4) PD that, if an applicant is not admitted to the third country, in accordance with Art 27 (4) PD, the applicant must be given access to an asylum procedure in the MS in question.

It should be underlined that Art 27 PD is a permissive provision, allowing but not obliging MS to apply the safe third country concept. Moreover, the concept cannot be applied unless the MS has laid down rules in national legislation regarding the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant.

On the basis of the STC presumption, the deciding EU MS may consider the application as **manifestly unfounded** in accordance with Art 28 (2) PD³⁹ or **inadmissible** in accordance with Art 25 (2) (c) PD.⁴⁰

Regarding consequential **acceleration of procedure**, Art 12 (2) (c) PD, together with Art 23 (4) (c) (ii) PD, permits the deciding EU MS to omit the personal interview. In addition, Art 36 (1), (4) and (5) PD allows EU MS to deny access to the procedure to all asylum-seekers who arrive ‘illegally’ from the- annulled- “pre-determined” safe third countries and the nationally designated safe third countries:⁴¹

“1. 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. [...]

4. The Member States concerned shall lay down in national law the modalities for implementing the provisions of paragraph 1 and the consequences of decisions pursuant to those provisions in accordance with the principle of *non-refoulement* under the Geneva Convention, including providing for exceptions from the application of this Art for humanitarian or political reasons or for reasons of public international law.

5. When implementing a decision solely based on this Art, the Member States concerned shall:

(a) inform the applicant accordingly; and

(b) provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.”⁴²

bb. EU Member States: Dublin Regulation

Besides EU MS, Iceland, Norway and Switzerland are also included in the Dublin regime. The Dublin Regulation, which replaced the Dublin Convention, differs from the Convention

³⁹ The application must be unfounded in the sense that the applicant does not qualify for refugee status pursuant to the Qualification Directive.

⁴⁰ Recital 23 PD states that “Member States should also not be obliged to assess the substance of an asylum application where the applicant, due to a connection to a third country as defined by national law, can reasonably be expected to seek protection in that third country”.

⁴¹ Art 36 (6) PD.

⁴² Emphasis added.

in “verbiage and intent”:⁴³ whereas the Dublin Convention was drafted in order to prevent confusion for the applicant and among the EU MS of the then European Community, the Dublin Regulation intends to promote a common asylum policy for the entire EU. The European Commission, in its “Regulation 1560/2003/EC of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003”, concretized the rules for the application of the Dublin Regulation.

The Dublin Regulation’s central objective is the **determination** of the EU MS responsible for the asylum application. The criteria for determining responsibility are founded on the “authorization principle”,⁴⁴ i.e. those constituting the expression of an explicit authorization take precedence over others. This results in the following order of precedence:⁴⁵ the family reunion provision;⁴⁶ the MS which granted valid residence document or visa;⁴⁷ the State into which the asylum-seeker came illegally, or if he stays illegally in a different State for six months or more, the responsibility shifts to that State;⁴⁸ and by default, where no other criterion applies, the MS where the request for asylum was first lodged will be responsible.⁴⁹ Hence, “[t]he more a Member State has consented (explicitly or tacitly) to the penetration of its territory by an asylum-seeker, the more it is responsible”.⁵⁰

Aside from these binding criteria, the so called “humanitarian clause”⁵¹ allows MS to accept responsibility voluntarily, taking into account exceptional humanitarian considerations not foreseen by the binding rules mentioned so far. Conversely, according to the “sovereignty clause” of Art 3 (2) DR, each MS in which the applicant resides can take responsibility instead of initiating a Dublin procedure with the otherwise responsible MS:

“By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining

⁴³ Junker, Barry, ‘Burden-Sharing or Burden-Shifting? Asylum and Expansion in the European Union’ (2006) 20 Georgetown Immigration Law Journal 300.

⁴⁴ Art 3.2 DC.

⁴⁵ Hurwitz, Agnes, ‘The 1990 Dublin Convention: a Comprehensive Assessment’ (1999) 11 International Journal of Refugee Law 652.

⁴⁶ Arts. 7 and 8 DR.

⁴⁷ Art. 9 DR.

⁴⁸ The “Sangatte clause” of Art 10 DR.

⁴⁹ Art 13 DR.

⁵⁰ De Lobkowicz, Wenceslas, ‘The Dublin Convention: A Useful Complement to International Humanitarian Law’ (1990) 19 European Vision 7-9.

⁵¹ Art 15 DR.

the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.”

When a transfer takes place, the requesting MS issues a reasoned decision to the third-country national.⁵² This decision must be subject to a procedure of appeal and/or judicial review.

When responsibility has been established, which according to the Regulation should happen within five months of the application at the latest, the responsible MS (possibly after the asylum-seeker has been transferred to its territory)⁵³ must examine the substance of the claim. The MS retains its responsibility until the claim has been accepted, or the refused asylum-seeker has been removed from the MS’s territory or voluntarily leaves it for more than three months.⁵⁴

Regarding the **determination of safety**, it is stated in Recital (2) DR that, in respect of “maintaining the principle of non-refoulement”, “and without affecting the responsibility criteria laid down in [the Dublin Regulation], Member States, all respecting the principle of non-refoulement, are considered as safe countries for third country nationals”. Thus, EU MSs are safe third countries by **definition**. However, the Dublin Regulation allows for rebuttal of the safety presumption. While rebuttal is not explicitly addressed in the Regulation, removal to the responsible EU MS is not obligatory due to Art 3 (2) DR. Any decision not to examine a claim on the grounds that another EU MS is responsible is hence also a decision not to take over this responsibility, which must be open to appeal before a court or tribunal.⁵⁵ The stating of conditions or requirements for taking over responsibility because the otherwise responsible MS is not safe for the purposes of the STC exception is left to domestic law.⁵⁶

In a Dublin procedure, the asylum-seeker is **denied access to substantive refugee determination procedures** and is returned to the first EU MS through which he transited.

Overall, the EU’s legislation gives the initial impression that its ultimate goal is to seal the borders of its Member States by ensuring that, first, individuals do not leave their countries of origin (visa, carrier sanctions); that if individuals still manage to leave their country, they, second, remain in their region of origin; and that if they manage to reach the EU they, third,

⁵² Art 19, Paras 1-2 DR.

⁵³ Art 19 DR.

⁵⁴ Art 16 DR.

⁵⁵ Arts 19 and 20 DR.

⁵⁶ Battjes, European Asylum Law, 420.

are either, by application of the “safe country” concept removed again to the SCO, or the non-EU STC or, as a last resort, according to the Dublin Regulation to the EU MS responsible for the border the individual was able to cross or illegally stay in for at least five months.⁵⁷

As example shall now be looked at the legislative implementation of the EU’s legislation in Austria.

3. Example: Legislative implementation in Austria

Austria ratified the ECHR in 1956. Within the domestic legal system, a constitutional bill of 1964⁵⁸ clarified the Convention's formal status as constitutional law.⁵⁹ This status has a twofold implication. First, while initially having taken the view that the ECHR was not more than a mere programmatic statement,⁶⁰ the Austrian Constitutional Court soon came to accept that the Convention grants individual, enforceable rights.⁶¹ The Convention may thus be relied upon by individuals before the courts, most notably before the Constitutional Court in complaints against administrative rulings for "violation of a constitutionally guaranteed right".⁶²

Despite its quite strict criteria of “exceptional circumstances”,⁶³ some applicants successfully complained to the Austrian Constitutional Court against the decision taken in a single safe country procedure to reject the asylum claim and allow removal. In these cases, an interpretation of Art 3 ECHR in conformity with the Constitution would have obliged the respective decision-maker to abstain from removal.⁶⁴

⁵⁷ Gil-Bazo 573.

⁵⁸ Federal Gazette no. 59/1964.

⁵⁹ Austrian Constitutional Court, case no. 5100/1965.

⁶⁰ Austrian Constitutional Court, case no. 3767/1960, 4122/1961.

⁶¹ Austrian Constitutional Court, case no. 4792/1964.

⁶² Complaint to the Constitutional Court under Article 144 of the Constitution.

⁶³ Austrian Constitutional Court, case no. 2400/07, 6 March 2008.

⁶⁴ The Dublin Regulation allows the Member States by its Art 3 (2) to take up responsibility for the applicant’s claim if a transfer to the Member State responsible for dealing with the asylum claim would constitute a violation of the principle of *non-refoulement*. Domestic legislation “requiring examination if another Member State is unsafe for a particular applicant would not run counter to Preamble recital (2) [...] that states that Member States are safe, as that recital does not state that the presumption of safety cannot be rebutted”: Austrian Constitutional Court, case no.s G 117/00, G 146/00, G 147/00, 8 March 2001. In the following, see e.g. Austrian Constitutional Court, case no. 1802/06, 26 February 2007 (omission of any investigation of the circumstances in the presumably safe country); case no. 592/09-26, 21 September 2009 (psychologically and physically severely handicapped applicant, no medical treatment available in the presumably safe country Poland). Finally, in October 2010, the Constitutional Court judged the return of vulnerable asylum seekers to Greece unconstitutional and accepted the petition of an Afghan mother with three small children that she remain in Austria. The court said that Austrian authorities must first obtain assurances from Greece that individuals requiring special protection - such as mothers with small children, sick people or unaccompanied minors - will receive adequate care, otherwise the readmission process must be discontinued. According to the ruling, due to the poor conditions for the care of asylum seekers, their return to Greece could lead to a violation of Art 3 ECHR (case no. 1441/10, 13 October 2010).

On the safe third country being a non-EU MS, namely the Russian Federation, a decision of the Asylum Court was revoked by the Constitutional Court as it justified the third-state-security only with the membership of the Russian Federation to the

Second, the Convention's rank as constitutional law makes it a yardstick for legislation and subjects ordinary laws to scrutiny by the Constitutional Court. Besides general reviews of the Asylum Law, ending sometimes in annulment of provisions violating the ECHR or the rule of law,⁶⁵ the Austrian Constitutional Court considered the following provisions on safe country procedures in its crucial ruling of 15 October 2004:⁶⁶ the Asylum Law's provisions that intended to totally exclude the suspensory effect of appeals against negative decisions on asylum and removal in a Dublin procedure were declared as being illegal under the rule of law and Arts 2, 3, and 13 ECHR because they hamper effective judicial review of negative decisions on asylum, do not allow for exceptions in individual cases and burden all applicants with the negative consequences of a potentially illegal decision. However, as to the lists of "safe third countries" and "safe countries of origin", the Constitutional Court, as on the first list, simply referred to the actual situation in the countries on the list, at the present moment, and found that both Switzerland and Liechtenstein met the prerequisites. It found that should this, in an exceptional case, prove to be otherwise, with regard to a specific asylum seeker, the Asylum Law obliges the competent authority to take notice and act accordingly. On the list of "safe countries of origin", the Constitutional Court recalled that any decision to expel an asylum seeker must be made on the basis of a reasonable and objective examination of the particular case, and that the existence of the list did not change this into a procedure of collective expulsion. The Asylum Law merely established that a "safe country of origin" was one of the grounds on which an application for asylum may be dismissed as manifestly ill-founded. The competent authorities still had to examine individually the merits of each application. Moreover, the Court found that the countries mentioned in this list (EU member states, Australia, Iceland, Canada, Liechtenstein, New Zealand, Norway, and Switzerland) were, in fact, "safe countries of origin" and that, if there were indications that this might be otherwise with regard to a specific asylum seeker, the competent authority would be obliged to investigate and act accordingly.

GCR and the ECHR and the existence of a procedure to grant the legal refugee status. The arguments of the Asylum Court that no systematic notorious violations of fundamental human rights would occur in the Russian Federation and that this state would be governed by the rule-of-law- principle were considered only assertions not based on respective investigations and not proved by concrete facts. Further, the Asylum Court neither considered the assertion of the applicant trying to disprove the third-state-security, which is sustained by precise and substantial documentation, nor examined whether the principles of the ECHR were implemented effectually; country documentation and knowledge on the situation in the Russian Federation remained unconsidered (case no. U5/08, 8 October 2008).

⁶⁵ E.g. Austrian Constitutional Court, case no. G31/98,G79/98,G82/98,G108/98, 24 June 1998. See, as well, case no. G 237/03, 15 October 2004: the provision that confines judicial review of negative asylum decisions to facts and evidence already submitted before the competent authority ("unless the appellant was not able to do so before because of trauma") prevents effective judicial review of negative decisions regarding asylum.

⁶⁶ Case no. G 237/03.

As it stands, the current procedural and legislative situation in Austria is the following: All decisions on asylum applications are made by the Federal Asylum Office (FAO) whose decisions can be appealed to the Asylum Court. If the Asylum Court instance issues a negative decision, an appeal can be made to the Supreme Administrative Court.

In a single procedure and in one decision, the FAO decides on whether to grant asylum or subsidiary protection and, if these two decisions are negative, on the question of *refoulement*.⁶⁷

The EU's "safe country" concepts were implemented in Austria in the 2005 Federal Law concerning the Granting of Asylum (Asylum Act).⁶⁸

Beyond the EU's borders, Australia, Island, Canada, Liechtenstein, New Zealand, Norway and Switzerland are considered to be safe countries of origin (SCOs) by Art 39 Para 4 of the Asylum Act; Bosnia and Herzegovina, Kosovo, Croatia, Macedonia, Montenegro and Serbia are deemed SCOs by order of the Federal Government.⁶⁹ To be deemed safe by order, the Federal Government shall primarily take account "the existence or absence of State persecution, protection from private persecution and legal protection against human rights violations".⁷⁰

All EU MSs are considered SCOs pursuant to Art 39 Para 1 of the Asylum Law. Para 2 and 3 of Art 39 of the Asylum Law provides a procedure on EU-level that has never been used:

"(2) If, upon a reasoned proposal by one third of the member States, by the European Parliament or by the Commission, it is determined by the Council, acting by a majority of four fifths of its members, that there is a clear risk of a serious breach by a member State of principles stated in article 6, paragraph (1), of the TEU, the suspensory effect of complaints against rulings on applications by asylum-seekers from that country of origin shall not be disallowed.

(3) If, after a procedure has been initiated pursuant to article 7, paragraph (1), of the TEU, a determination as referred to in article 7, paragraph (2), of the TEU is not made or all the measures imposed in connection therewith are revoked, the suspensory effect of complaints against applications by asylum-seekers from that country of origin may again be disallowed."

Within the asylum procedure, the consequence of coming from a country that is considered a

⁶⁷ With exception of the airport procedure: In procedures at an airport, no decision on expulsion shall be rendered. Rejection at the border may be enforced only after the decision of total dismissal or rejection becomes final: Art 33 Para 5 Asylum Law.

⁶⁸ Issued on 16 August 2005 Federal Law Gazette of the Republic (FLG) of Austria, FLG I No. 100/2005, amended by FLG I No.s 75/2007, 2/2008, 4/2008, 29/2009, 122/2009, 135/2009 and 38/2011.

⁶⁹ Order of the Federal Government, according to which States are to be deemed safe countries of origin, issued on 16 June 2009 Federal Law Gazette of the Republic of Austria (FLG) II No. 177/2009.

⁷⁰ Art 39 Para 5 Asylum Law.

SCO is that, upon arrival at an Austrian airport, the dismissal of an application is admissible if there is no substantiated evidence to indicate that the asylum-seeker would be granted asylum status or subsidiary protection status.⁷¹ The airport procedure is accelerated: one interview is deemed sufficient,⁷² the time-limit for filing complaints against a ruling by the FAO in procedures at an airport is seven days,⁷³ and the Asylum Court should render its decision in procedures at an airport within two weeks of the submission of the complaint.⁷⁴

In general, as an exception to the general rules, the suspensory effect of a complaint against a dismissal ruling on an application for international protection and the expulsion order issued in conjunction therewith may be disallowed by the Federal Asylum Agency.⁷⁵ Furthermore, the transmission of personal data to the country of origin for purposes of security policing and criminal justice administration is admissible.⁷⁶

Austrian legislation also covers the issue of safe third countries (STCs). Art 3 Para 1 of the Asylum Act provides that the application is to be rejected on account of safety in a third country, which is defined in Art 4 Para 2 of the Asylum Law as a country in which “a procedure for the granting of refugee status in accordance with the Geneva Convention on Refugees is available” and where “he is not exposed to danger as specified in article 8, paragraph (1), or is guaranteed via other countries (asylum procedure), and the alien is entitled to reside in that country during such procedure and has protection there against deportation to the country of origin, including via other countries, provided that the alien is exposed in the country of origin to danger as specified in article 8, paragraph (1)”.

As safety presumption, Art 3 Para 3 of the Asylum Law provides that such requirements shall refutably be met in a country if that country has ratified the GRC and has established by law an asylum procedure incorporating the principles of GRC, of the ECHR and of its Protocols No.s 6, 11 and 13.

EU MSs are presumed to be safe according to Art 5 Para 3 of the Asylum Law “unless specific reasons relating to the person of the asylum-seeker and indicating a real risk of absence of protection against persecution are satisfactorily established or are evident to the Federal Asylum Agency or to the Asylum Court”.

⁷¹ Art 33 Para 1 Asylum Law.

⁷² Art 33 Para 2 Asylum Law.

⁷³ Art 33 Para 3 Asylum Law.

⁷⁴ Art 33 Para 4 Asylum Law.

⁷⁵ Art 38 Para 1 Asylum Law.

⁷⁶ Art 57 Para 1 (1) Asylum Law.

In order to maintain current evidence of “safe countries“, the FAO maintains country records in which facts relevant to procedures pursuant to the present federal law and relating to the situation in the countries concerned are entered, together with their sources, in particular, for deciding whether a certain country is safe within the meaning of Art 39 of the Asylum Law. The facts gathered shall be “collated, scientifically reviewed on the basis of objective criteria (general analysis) and recorded in a generic manner. Records shall be rectified with respect to facts which do not or no longer correspond with reality. Any analysis based on such facts shall be corrected”.⁷⁷

If two negative decisions are made on asylum and subsidiary protection, Art 10 of the Asylum Law provides that, in conjunction, an expulsion order shall be issued. Art 10 Para 3 of the Asylum Law explicitly states that, “if execution of an expulsion order would constitute a violation of Article 3 of the European Convention on Human Rights for reasons relating to the person of the asylum- seeker and such reasons are not long-lasting, a pronouncement shall be made that the execution thereof shall be postponed for the necessary period.”

After having presented the EU’s legislation and its implementation by Austrian legislation, two policy realms that are open for political discussion, the principle of non-*refoulement* shall be presented, a fundamental principle of international law that is not up for debate.

B. The principle of non-*refoulement*

The principle of non-*refoulement* is often referred to as the cornerstone of international protection. While the opinion is not unanimously shared,⁷⁸ numerous international scholars argue that the principle of non-*refoulement* has acquired the status of *ius cogens*, also known as a peremptory norm.⁷⁹ To have attained the normative value of *ius cogens*, the norm prohibiting *refoulement* must be accepted “by the international community of States as a whole” as a norm from which “no derogation is permitted”. Hence, State practice should not

⁷⁷ Art 60 of the Asylum Law.

⁷⁸ For example, Goodwin-Gill, Guy & McAdam, Jane, ‘The Refugee in International Law’, 2nd edition, (New York/Oxford University Press, 1996), 168 n. 234.

⁷⁹ Allain, Jean, ‘The Jus Cogens Nature of Non-Refoulement’ (2001) 13 *International Journal of Refugee Law* 4 534-541.

entail forcibly repatriating refugees, and this practice must be based on the *opinion iuris* that States themselves are bound by a customary legal obligation that is binding on them as a matter of *ius cogens*.

Regarding State practice, the principle of non-*refoulement* is custom.⁸⁰ During the Cold War era, questions remained as to its customary nature, which was quickly attained following the end of the Soviet era.⁸¹ The State practice that has emerged from States' national legislation and administrative practices identifies the customary rule that return to a third State is prohibited if the refugee is not effectively protected in that country against *refoulement*.⁸² Furthermore, State practice emerging in Latin America on the basis of the 1984 Cartagena Declaration on Refugees can be seen as evidence. The Declaration recognizes "the importance and meaning [of non-*refoulement*] as a rule of *ius cogens*". Joan Fitzpatrick finds the acceptance of this position having become manifest in the fact that intergovernmental bodies as the Inter-American Commission on Human Rights and the OAS General Assembly have acknowledged the Conclusions of the Cartagena Colloquium with approval.⁸³

Any doubt as to the State practice due to the increased violations of the norm of non-*refoulement* should "be set aside as irrelevant to its legal standing".⁸⁴ Allain refers to the argumentation of the International Court of Justice (ICJ) in the *Nicaragua* case:

"In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that *instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule*. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."⁸⁵

Hence, increasing violations of the norm of non-*refoulement* do not make its status as *ius cogens* insecure, until a new norm of *ius cogens* emerges.

Regarding the necessary *opinion iuris*, the Conclusions of the UNHCR Executive Committee (ExCom) clearly reflect the consensus of States: In Conclusions No. 25, State Parties

⁸⁰ Gilbert, Geoff, 'Is Europe Living Up to its Obligations to Refugees?' (2004) 15 *European Journal of International Law* 5, 966; G.S Goodwill-Gill, G.S., 'The Refugee in International Law', 2nd ed., 1996, 345-354; Nowak 147.

⁸¹ Allain 538, fn. 19, referring to Goodwill-Gill, *The Refugee*, 166-7.

⁸² See Borchelt 476-9.

⁸³ Fitzpatrick, Joan, 'Temporary Protection of Refugees: Elements of a Formalized Regime', 94 *AJIL* 284, 2000, 284.

⁸⁴ Allain 540.

⁸⁵ Para 186, emphasis added.

determined that the principle of non-*refoulement* “was progressively acquiring the character of a peremptory rule of international law”. In 1989, the ExCom concluded that “all States” were bound to refrain from *refoulement* on the bases that such acts were “contrary to fundamental prohibitions against these practices”⁸⁶ and in 1997, that the principle of non-*refoulement* had acquired the level of a norm of *ius cogens*: “the principle of non-*refoulement* is not subject to derogation”.⁸⁷ Further, 181 States are party to the GRC and/or UN human rights treaties that explicitly or implicitly prohibit *refoulement*⁸⁸ and thereby commit themselves to respecting the principle of non-*refoulement*. State Parties bound by such treaties with relevant provisions against *refoulement* repeatedly reassert their support for the principle, as well as their regret at reported instances of non-observance. In general, States are reluctant to admit violating their non-*refoulement* obligation; as the cited paragraph of the ICJ’s *Nicaragua* case pointed out, this implies their continuing consent to be legally bound by its proscription. As Kay Hailbronner acknowledged, “States have never claimed a general right to return refugees to a country where they may face severe persecution on account of race, religion, or political opinion.”⁸⁹ Also the States not party to any of these treaties or conventions have “repeatedly both reaffirmed and demonstrated their support for basic protection principles, especially the principle of non-*refoulement*, recognizing at least implicitly its normative character”.⁹⁰

Thus, it can be concluded that the principle of non-*refoulement* has acquired the status of *ius cogens*. Given the geographical scope of this thesis and the fact that all EU MS are Parties to the GRC, it may seem unnecessary to refer to this legal fact. Goodwin-Gill stated that little

⁸⁶ Conclusions No. 55.

⁸⁷ Conclusions No. 79.

⁸⁸ Art 5 of the Universal Declaration of Human Rights, Art 5 of the American Convention on Human Rights, Art 3 ECHR. Further, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as the GRC in its Art 33, has an explicit, specific non-*refoulement* provision in Art 3. The Committee against Torture has interpreted the CAT’s non-*refoulement* provision to include a prohibition on indirect *refoulement*. This Art is drafted in a more inclusive manner than Art 33 GFC, as the prohibition of removal to torture has been termed absolute. Finally, the International Covenant on Civil and Political Rights does not contain explicit prohibitions of *refoulement*. However, as for other human rights treaties, the norm prohibiting torture and other forms of ill-treatment has been construed by their treaty-monitoring bodies to protect from removal to a state where a claimant would be exposed to respective violations, constituting, in turn a state obligation to grant extraterritorial protection. Hence, implicit prohibition is, as stated by the Human Rights Committee for the first time in its General Comment 20, Para 9, and was affirmed in a number of views, worded in the treaty, namely in Art 7. This provision bars state parties from exposing individuals to those dangers “upon return to another country by way of their extradition, expulsion or *refoulement*”: Battjes, European Asylum Law, referring in fn 39 exemplary to *Kindler v. Canada*, CCPR/C/48/D/470/1991, UN Human Rights Committee, 11 November 1993, *Charles Chitat Ng v. Canada*, CCPR/C/49/D/469/1991, UN Human Rights Committee, 7 January 1994, available at: <http://www.unhcr.org/refworld/docid/4028b5002b.html> [accessed 7 June 2011]. According to Art 4(2) ICCPR, no derogation may be made from Art 7 ICCPR. For Noll, the pivotal factor is Art 2 (1) ICCPR that provides the contextual element tilting interpretation in favour of a universalistic reading: Noll, Negotiating, 416.

⁸⁹ Borchelt 484.

⁹⁰ UN High Commissioner for Refugees, ‘Note on International Protection (submitted by the High Commissioner)’, 7 September 1994, A/AC.96/830, available at: <http://www.unhcr.org/refworld/docid/3f0a935f2.html> [accessed 30 April 2011], reprinted in (1994) 6 International Journal of Refugee Law, 679, 698.

was likely to be achieved by insisting on the *ius cogens* status of the principle of non-*refoulement*.⁹¹ However, Arts 53 and 64 of the Vienna Convention on Treaties (VCT) provide that treaties may be invalidated upon their ratification or may later be terminated if their content “conflicts with a peremptory norm of general international law”, which is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”. Peremptory norms thus limit the action and interaction of States on the international stage. When arguing against transgressions of the norm of non-*refoulement*, it can hence be gained that any action that falls within the domain of *ius cogens*, be it a unilateral, bilateral or multilateral act, is by definition prohibited as being illegal.

James Crawford, UN Special Rapporteur of the International Law Commission’s working group on “State Responsibility”, introduced the notion that compliance with a norm of *ius cogens* constitutes a circumstance that precludes the wrongfulness of an otherwise illegal act, in part with the intention to give the concept its proper standing on the international plane.⁹²

Draft Art 41 (1) and (2) on State Responsibility reads:

- „1. States and international organizations shall cooperate to bring to an end through lawful means any serious breach within the meaning of Art 40.
2. No State or international organization shall recognize as lawful a situation created by a serious breach within the meaning of Art 40, nor render aid or assistance in maintaining that situation.“

The Article also reflects the fact that a collection of States forming an intergovernmental organization, such as the EU, is not exempt from the peremptory nature of non-*refoulement*. Hence, by referring to the *ius cogens* nature of the principle of non-*refoulement*, the EU can be held accountable for actions that result in violations of the principle of non-*refoulement*.⁹³

It can be therefore defended that the principle of non-*refoulement* has the status of *ius cogens* and thereby obliges States to refrain from returning a refugee to the frontiers of territories where his life or freedom would be threatened.

However, the legal basis of the prohibition of non-*refoulement* must also be examined: While the Geneva Refugee Convention contains an explicit provision in its Art 33 (1), human rights imply the principle of non-*refoulement* as an expression of their preventive approach, in

⁹¹ Goodwill-Gill and McAdam 168, n. 234.

⁹² International Law Commission Report, 1999, A/54/10, Para 306.

⁹³ Allain 537-8.

particular to the protection from torture. Art 3 ECHR (2) and Art 3 CAT (3) will be discussed in this context.

1. Art 33 GRC

The GRC and the 1967 New York Protocol are binding for all EU MS and comprise part of the *acquis communautaire*;⁹⁴ Art 63 (1) TEC explicitly prescribes that measures on asylum adopted by the Council must be in accordance with these instruments.⁹⁵

While the Preamble of the GRC speaks of securing “the widest possible exercise” of human rights by refugees, the Contracting States are only liable for a violation of Art 33 GRC.⁹⁶ This provision sets out the prohibition of *refoulement*, obligating States to refrain from returning a refugee “in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened”.⁹⁷ According to Lauterpacht, common sense dictates a “measure of equation” between the threat which precludes *refoulement* and that which is at the core of the definition of the term “refugee” pursuant to Art 1A (2) GRC, namely, that the person concerned has a well-founded fear of being persecuted. Any other approach would lead to “discordance in the operation of the Convention”.⁹⁸ As a matter of the internal coherence of the Convention, the words “where his life or freedom would be threatened” in Art 33 (1) GRC must therefore be read to encompass territories in respect of which a refugee or asylum-seeker has a “well-founded fear of being persecuted”.⁹⁹

The guidelines of the UNHCR ExCom affirm the importance of non-*refoulement*: in Conclusions No. 6, the ExCom recalled that “the fundamental humanitarian principle of non-*refoulement* has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States.”¹⁰⁰ The ExCom also expressed its

⁹⁴ Draft List, Para I.A.b.

⁹⁵ Treaty establishing the European Community as amended by subsequent treaties. Rome, 25 March 1957, “The Council [...] shall [...] adopt measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties”.

⁹⁶ Battjes, European Asylum Law, 404.

⁹⁷ See UN High Commissioner for Refugees, ‘The Scope and Content of the Principle of Non-Refoulement (Opinion)’ [Global Consultations on International Protection/Second Track], 20 June 2001, available at: <http://www.unhcr.org/refworld/docid/3b3702b15.html> [accessed 1 May 2011] and Noll for further references: Noll, Negotiating, p. 363, footnote 1059; E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law* (2003), at 87.

⁹⁸ Lauterpacht, United Nations High Commissioner for Refugees, The Scope and Content of the principle of non-refoulement, Opinion, 20 June 2001, Para. 123, available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=3b33574d1&query=refoulement> [accessed 30 April 2011].

⁹⁹ *Ibidem*.

¹⁰⁰ UN High Commissioner for Refugees, ‘Non-Refoulement’, 12 October 1977, No. 6 (XXVIII) - 1977, available at: <http://www.unhcr.org/refworld/docid/3ae68c43ac.html> [accessed 30 April 2011].

concern that this principle of "fundamental importance," while "in practice widely observed, [...] has in certain cases been disregarded". Similarly, Conclusions No. 15 and No. 22 set out the general principle that "action whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the recognized principle of non-*refoulement*"¹⁰¹ and that "in all cases the fundamental principle of non-*refoulement* [...] must be scrupulously observed".¹⁰²

The plain language of Art 33 GRC also bans indirect *refoulement* or chain-*refoulement*.¹⁰³ Support for the intended proscription of indirect *refoulement* comes from the drafters' Ad Hoc Committee Report, which shows that Art 33 GRC refers "not only to the country of origin but also to other countries where the life or freedom of the refugee would be threatened".¹⁰⁴ Moreover, during the 1951 Conference of Plenipotentiaries, there was general agreement on the principle that no refugee should be sent to a country where he would be in danger of persecution whether it was the country from which the refugee came or *any other* country.¹⁰⁵ Further, the UNHCR ExCom Conclusions No. 58 reiterate that governments may return refugees and asylum-seekers to a *third country* only if they "are protected there against *refoulement*".

However, the protection provided by Art 33 (1) GRC is excluded if its Para (2) applies. This states:

"The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

¹⁰¹ UN High Commissioner for Refugees, 'Refugees Without an Asylum Country', 16 October 1979, No. 15 (XXX) - 1979, available at: <http://www.unhcr.org/refworld/docid/3ae68c960.html> [accessed 30 April 2011].

¹⁰² UN High Commissioner for Refugees, 'Protection of Asylum-Seekers in Situations of Large-Scale Influx', 21 October 1981, No. 22 (XXXII), available at: <http://www.unhcr.org/refworld/docid/3ae68c6e10.html> [accessed 30 April 2011].

¹⁰³ Emphasis added; also Art 3 (1) of the 1967 Declaration on Territorial Asylum (UN General Assembly, 'Declaration on Territorial Asylum', 14 December 1967, A/RES/2312(XXII), available at: <http://www.unhcr.org/refworld/docid/3b00f05a2c.html> [accessed 30 April 2011]) states that "no refugee shall be compulsory returned to *any* State where he may be subjected to persecution or from which he might be compelled to return to the country of persecution".

¹⁰⁴ Lauterpacht, Para 126.

¹⁰⁵ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Sixteenth Meeting, U.N. Doc. A/CONF.2/SR.16, (July 11, 1951), 9.

2. Art 3 ECHR

The ECHR is *a priori* more generous in its scope of protection than the GRC. First, the ECHR does not have the limitation of the GRC regarding the reason for persecution being “of race, religion, nationality, membership in a particular social group or political opinion”.¹⁰⁶ It hence does not include an alienage requirement similar to Art 1A (2) of the refugee definition, but is solely concerned with the actual risk violation of rights, regardless of the underlying motivation. Second, the protection afforded by the ECHR is not excluded by clauses, such as Art 1F GRC, which stipulates the persons to whom the GRC shall not apply. While these facts suggest that the ECHR is more generous than the GRC, a closer examination of the ECtHR’s jurisprudence reveals that this textual difference has not led in every aspect to more generous protection from *refoulement* by the ECHR.¹⁰⁷

While numerous rights have been discussed by the ECtHR in removal cases,¹⁰⁸ Art 3 ECHR is of utmost relevance. This provision stipulates that “no one shall be subjected to torture or inhuman or degrading treatment or punishment”. The prohibition under Art 3 ECHR is of an absolute nature which cannot be suspended under any circumstances. From this absolute prohibition of torture, the ECtHR has inferred the principle of non-*refoulement*.¹⁰⁹ Also in case of chain-*refoulement*, the State removing a person must be held indirectly responsible for the imminent treatment in that other State, regardless of whether that treatment is to be expected from public authorities or from non-State actors, how great the efforts of the government have been to prevent such treatment and of whether the latter State is or is not a

¹⁰⁶ Contrary to the GRC that is limited in its protection to persons under persecution in its sense, the reasons for a real risk of exposure to ill-treatment are immaterial for the application of Art 3 ECHR: See *H.L.R. v. France*, 11/1996/630/813, Council of Europe: European Court of Human Rights, 22 April 1997, available at: <http://www.unhcr.org/refworld/docid/3f3779b24.html> [accessed 22 June 2011]; *Nyanzi v. United Kingdom*, application no. 21878/06, Council of Europe: European Court of Human Rights, 8 April 2008, available at: <http://www.unhcr.org/refworld/docid/4805cd722.html> [accessed 17 July 2011]; *D. v. the United Kingdom*, 146/1996/767/964, Council of Europe: European Court of Human Rights, 2 May 1997, available at: <http://www.unhcr.org/refworld/docid/46deb3452.html> [accessed 22 June 2011], *N. v. the United Kingdom*, application no. 26565/05, Council of Europe: European Court of Human Rights, 27 May 2008.

¹⁰⁷ Boutillon, Sonia, ‘The Interpretation of Article I of the 1951 Convention Relating to the Status of Refugees by the European Union: Toward Harmonization’ (2003) 18 *Georgetown Immigration Law Journal* 1 150-1.

¹⁰⁸ The processing of asylum applications has also raised issues of return to face risks under other Articles: Art 4 (trafficking in persons and freedom from forced labour), Protocol No. 6 (abolition of the death penalty), Protocol No. 13 (in all circumstances) and Art 1 of Protocol No. 12 (general prohibition of discrimination). Art 1 Protocol 7 (Procedural safeguards relating to expulsion of aliens) has been virtually not considered by the ECtHR. While it was adopted as reaction against the exclusion of fair hearing right in cases of expulsion and extradition “in order to afford minimum guarantees” (Explanatory Report on Protocol No. 7 to the ECHR for the Protection of Human Rights and Fundamental Freedoms, p 7, § 7) it demands that the alien be lawfully resident to invoke the procedural safeguards it offers and does not apply to aliens whose leave to remain was on terms which were subsequently broken. Thus, it provides weak protection for asylum-seekers who might not qualify.

¹⁰⁹ Kälin, Walter, ‘Das Prinzip des Non-refoulement’ (Bern/Frankfurt 1982), 185.

party to the ECHR.¹¹⁰ The reasoning behind this is based on the idea that a State is violating Art 3 ECHR if its act of extradition or expulsion constitutes a crucial link in the chain of events leading to torture or inhuman treatment or punishment in the State to which the person is returned.

3. Art 3 CAT

The CAT, adopted in 1984 by the UN General Assembly, is the first international human rights treaty which not only prohibits torture in absolute terms but also contains a definition of torture and an explicit provision concerning the absolute prohibition of *refoulement* in its Art 3,¹¹¹ whose Para 1 reads as follows: "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." Compared to Art 3 ECHR, the scope of Art 3 CAT is limited to torture and does not extend to cruel, inhuman or degrading treatment. Furthermore, threats of torture at the hands of non-State actors without the consent or acquiescence of the government fall outside the scope of Art 3 CAT;¹¹² only in the exceptional circumstances of "failed States" could acts by groups exercising quasi-governmental authority fall within the definition of Art 1 CAT and thus call for the application of Art 3 CAT.¹¹³

As for Art 3 ECHR, the absolute and non-derogable nature of the prohibition of torture by Art 3 CAT extends to the prohibition of *refoulement*.¹¹⁴ The Committee against Torture (CAT Committee) has specified that the phrase "another State" refers to the State to which the individual is being expelled, returned or extradited as well as to any State to which the applicant may subsequently be expelled, returned or extradited.¹¹⁵ Hence, chain-*refoulement* is also prohibited by Art 3 CAT.

Regarding the removal of asylum-seekers, it should be mentioned that in the vast majority of individual complaints it was the reference provision that was decided by the CAT Committee. Most violations found by the Committee were not actually directed against States practicing

¹¹⁰ Van Dijk, Pieter, van Hoof, Fried, van Rijn, Arjen and Zwaak, Leo (eds.), 'Theory and Practice of the European Convention on Human Rights' (Antwerpen-Oxford/Intersentia, 2006), 429-30.

¹¹¹ See the convincing arguments in M.Raess, 'Der Schutz vor Folter im Völkerrecht' (Zürich 1989), 136 et seq.

¹¹² Nowak 165, referring to Nos. 83/1997, 130 and 131/1999, 177/2001.

¹¹³ See Nowak 166.

¹¹⁴ Nowak 148, referring to *Tapia Paez v. Sweden*, No. 39/1996; the nature of the activities a person engages in is not a relevant consideration in the taking of a decision in accordance with Article 3. Thus, in the case of *Tapia Paez v. Sweden* (where the facts were not in dispute that the author, a member of Sendero Luminoso had handed out leaflets and hand-made bombs during a demonstration in Peru in 1989), a refusal to grant the author asylum based on the exception clause of Art 1F GRC was found not to meet the requirements of Art 3 CAT: Nowak 166.

¹¹⁵ Nowak 178, referring to the *Mutumbo v. Switzerland* (No.13/1993), *Korban v. Sweden* (No.88/1997), *Z.T v. Australia* (No.153/2000).

torture themselves, but against countries of destination where the authorities had rejected asylum requests and then decided to return the asylum seeker to his country of origin.¹¹⁶ However, after the first cases in which asylum-seekers successfully invoked a violation of Art 3 CAT before the CAT Committee,¹¹⁷ the Committee, eager to avoid the impression of acting as a kind of highest asylum review board or fourth instance, reacted by declaring a considerable number of similar complaints by asylum-seekers from at that time Zaire, Nigeria, Ghana, Algeria, Georgia and Iran as inadmissible.¹¹⁸

Governments sometimes argue that non-*refoulement* complaints, such as to the CAT Committee, have been misused by asylum-seekers for the purpose of circumventing the asylum procedure.¹¹⁹ While there is indeed a certain risk that asylum-seekers whose asylum request is refused by domestic authorities may turn to international human rights treaty monitoring bodies for protection by invoking the non-*refoulement* principle, such a situation merely shows that, “in times of increasingly restrictive asylum and immigration laws in Europe and other industrialized States, the authorities are put under a heavy political pressure which leads to a substantial number of violations of the non-*refoulement* principle”.¹²⁰ In order to provide proof of this phenomenon, the following chapter will now present the disputable practice resulting from the EU’s “safe country” procedures.

¹¹⁶ Nowak 127.

¹¹⁷ Nowak 208, referring as examples to Nos. 13/1993, 15/1994, 21/1995, 34/1995, 43/1996, 41/1996, 39/1996, 101/1997.

¹¹⁸ Nowak 208, referring as examples to Nos. 17/1994, 18/1994, 22/1995, 23/1995, 24/1995, 26/1995, 30/1995, 31/1995, 32/1995, 35/1995.

¹¹⁹ Nowak 208, referring as examples to Nos. 13/1993, §9.2, 15/1994, §12.3, 34/1995, §9.6, 138/1999, §7.3.

¹²⁰ Nowak 128.

II. Reality: The EU’s “safe country” concepts

Having presented the two anti-poles for our discussion – the EU’s legislation on “safe country” concepts and the protection afforded by Art 33 GRC – the reality of the situation in practice will now be examined. Reality cannot be depicted by exclusively focusing on EU institutions and their creation of regional and international norms through the *acquis communautaire*. Rather, a look at the sub-regional interplays between asylum offices across Europe provides a greater understanding of the reality.

In order to understand the reality of the “safe country” concepts in practice, the regular asylum procedure will be depicted as worrying point of departure (A) before a general critical view on presumed safe countries will be presented (B).

A. Worrying point of departure

After the atmosphere of a typical asylum interview (1) was examined, the preliminary assumption underlying the “safe country” concept must be contravened: information available to domestic decision-makers is often not sufficient to decide on the safety of a country (2).

1. The atmosphere of asylum interviews

During the author’s work as a legal advisor to asylum-seekers,¹²¹ she gained firsthand insight into the atmosphere in asylum interviews between asylum-seekers, immigration personnel and interpreters. The atmosphere in other EU MSs described by Rycroft (the United Kingdom) and others shows that similar sociological and psychosocial dynamics prevail in asylum interviews in other EU countries:

¹²¹ Examples are cited from some cases that the author attended as legal representative or adviser. For reasons of privacy, family names have been abbreviated and only examples are cited that do not give insight in the applicant’s reasons for leaving the country.

The asylum-seeker is often asked to sit in a position that excludes him from the desk interaction between the officer, the interpreter and other personnel.¹²² The procedure starts with a question to the applicant of whether he understands the interpreter - the first tense situation often arising if he says no. Besides language problems, the applicant might experience difficulties due to the interpreter's sex, age and/or ethnic group, any of which may be locus of deep social or personal prejudice. There is no pre-emptive discussion of these potential problems, and it is extremely difficult for the applicant to raise such issues in this hierarchical atmosphere.

The interview starts with the interpreter reading out a shortened explanation of procedure and demanding that the asylum-seeker speak the truth, thus giving the asylum-seeker the impression that he is already primarily perceived as a potential liar. Some asylum office's officers ask the applicant if he is earning his own money or is financially dependent on the State, if he has integrated into society by joining a sports club or another civil society organization and if he has learnt the language of the receiving country. These questions are often highly cynical, as, e.g. in Austria, asylum-seekers are generally not allowed to work, are often accommodated in very remote regions with little or no possibility and support to integrate into Austrian society and do not receive any support to learn the language of the receiving country. However, officers often become less friendly if the applicant has nothing to produce.

The applicant is then asked to confirm his personal details - address in the home country, family in Europe and in the country of origin, details regarding the route of travel etc. At this point, sociological misunderstandings can germinate which may continue for the whole interview; in particular, knowledge about exact dates or other quantitative data is specific to the Western scientific rational discourse to which the asylum-seeker is forced to adhere.¹²³ Based on the author's observations, applicants who state themselves to be illiterate and were still asked persistently about their addresses in Austria and the country of origin.¹²⁴ The applicant is also asked to provide all documents available. On the one hand, numerous documents can make the officer angry as they mean an effort and incur translation costs; on

¹²² If the applicant is actively participating, such as in writing down names in response to questions, he can be excluded again if the officer rudely snatches the paper from him: Federal Asylum Office (Bundesasylamt, in the following FAO), *Ali A.*, 5 March 2008.

¹²³ During one interview, when the applicant was not able to provide data as precisely as demanded by the officer, the latter exclaimed aggressively: "Does he want to take the piss out of us? Is he under drugs? Is he still present?": FAO, *Achmedov A.*, 4 March 2008.

¹²⁴ FAO, *O.*, 21 February 2008.

the other hand, when no documents are provided, the applicant is often already perceived as lacking credibility. As observed by the author, when asylum-seekers promised to provide documentation at a later stage, one officer often responded “well, to order is the better word”,¹²⁵ implying that these documents were generally to be regarded with suspicion.

After covering the issues of personal information and documentation, the interview turns to the applicant’s reasons for leaving the country of origin. The asylum officer has the monopoly over the flow of conversation.¹²⁶ The applicant is often forced to answer in brief segments, which are sometimes broken up by very long pauses for interpretation and writing, only to be expected to continue perfectly and without hesitation when asked to do so. When the applicant speaks for too long or in too much detail on issues that are not perceived to be relevant, the officers often become easily irritated and sigh, exclaim,¹²⁷ raise their voices or show other signs of nervousness. By doing this they show superiority, as this behavior would not be tolerated from anyone else in the room. Superiority is also quite often shown by addressing the applicant in a degrading manner.¹²⁸

By discouraging the applicant from explaining his experience in his own way and reacting negatively to the account by not asking for clarification or eliciting important information, the deciding official “employs covert adversarial tactics to set [the asylum-seekers] up to fail”.¹²⁹ Immigration personnel (asylum officers as well as interpreters) actively influence the result of asylum information by eliciting details considered to be relevant, omitting details found to be irrelevant, editing and making mistakes. In addition, the interpreter is not always willing to disclose himself as being remunerated by the asylum office, whose officer he would be forced to correct if he misunderstood the asylum-seeker.

Most emotional interactions are omitted from the asylum record as well as the description of the mental state of the applicant, the pressure applied, or the provocation or offence issued by the officer.¹³⁰ As Rycroft describes: “interpreters are shown to change the rendition of image

¹²⁵ FAO, *B.*, 14 January 2008.

¹²⁶ The applicant was first stopped to explain the situation in Iraq, only to be yelled at the next minute for not having detailed a certain development, FAO, *Ali A.*, 5 March 2008.

¹²⁷ FAO, *Elpascha B.*, 1 April 2008; FAO, *Dzabrailova M.*, 21 October 2008; FAO, *B.*, 14 January 2008.

¹²⁸ “Sultan”, FAO, *Ali A.*, 5 March 2008; “007”, FAO, *Achmedov A.*, 3 March 2008.

¹²⁹ Rycroft, Roxana, ‘Communicative Barriers in the Asylum Account’, in Shah, Prakash (ed.), ‘The Challenge of Asylum to Legal Systems’ (London/Cavendish, 2005) 232.

¹³⁰ E.g.: Applicant: “The relatives in Chechnya also have problems”, officer in a disparaging way: “They are not all already here in Austria?”, *Dzabrailova M.*, 21 October 2008; applicant: “since then my brother started to misuse alcohol”, officer cynically: “very dramatic, yes!”, FAO, *Elpascha B.*, 1 April 2008; officer asks for documents, is very impatient and aggressive as the presented documents are not relevant, FAO, *B.*, 14 January 2008.

and character of speakers by altering the pragmatics of speech, while their actual role may vary between usurping the power of the attorney to coercing the witness. Additional interpreter-related factors affecting the proceedings reside in extralinguistic features like voice, which adds or eliminates nuances from testimony, and personality [...].¹³¹

The following observations made in British and Canadian asylum procedures also coincide with those made by the author: “any inconsistencies, omissions or untimely revealing of new material will affect the credibility of the claim, as the applicant is unfairly expected to tell their story exactly in the same way every time, instead of allowances being made for human factors like memory, emotional state, trust in those present and circumstances of story being told.”¹³² Hence, “[t]he substantive interview, purportedly the fair opportunity given to asylum-seekers to make their case, is there for the eyes of the law and the public because in reality the ‘fair’ opportunity is the scene of deployment of covert adversarial tactics, best described from a verbal interaction point of view as negative engagement with the account designed to set asylum-seekers up for failure”.¹³³

Besides unbiased asylum officers, whom the author disappointingly rarely met as legal adviser for asylum-seekers, asylum officers with the described prejudiced approach to the asylum-seeker have the legal possibilities of the “safe country” concepts that they – due to national interests – will have been instructed to apply.

2. Information for decision-makers

Deciding whether a refugee claim is well-founded has been described as “the single most complex adjudication function in contemporary Western societies.” The complexity arises out of “the need for the decision-maker to have a sufficient knowledge of the cultural, social and political environment of the country of origin, a capacity to bear the psychological weight of hearings...and of consequent decisions which may prove fatal, and an ability to deal with legal issues such as the subtle international definition of the refugee”.¹³⁴

¹³¹ Rycroft 225.

¹³² Rycroft 230-1.

¹³³ Rycroft 242-3.

¹³⁴ Costello, Cathryn, ‘The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?’ (2005) 7 *European Journal of Migration and Law*, 36, referring in fn 7 to Rousseau, Cécile, Crèpeau, François, Foxen, Patricia and Houle, France, ‘The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process of the Canadian Immigration and Refugee

Proponents of the “safe country” concept assume that current, accurate and sufficient information is available to enable asylum officials to declare a given country as safe. For accelerated procedures to achieve the desired level of administrative efficiency, a general, countrywide assessment of safety must be made.¹³⁵ The central question is “whether it is in fact possible to determine safe countries on a general basis, and what procedural safeguards are necessary to guarantee the correctness of such decisions”.¹³⁶ A study by Byrne and Shacknove came to the conclusion that the substantial majority of government officials, UNHCR personnel, NGO representatives, lawyers and academics in Western Europe and North America who were interviewed shared doubts about whether conditions in allegedly safe countries can be reliably established.¹³⁷ “many of those interviewed frequently reported the inadequacy of currently available information and expressed doubts concerning the impartiality of both foreign ministry and independent sources”.¹³⁸ Those interviewed also voiced concern as to whether the available evidence, after being filtered through foreign ministries and various levels of interior ministries, was sufficiently current by the time it reached the interviewing officers.¹³⁹

Regarding SCOs in particular, the Byrne and Shacknove study attested the same by showing that “country of origin information is often insufficient to support general conclusions about safety”.¹⁴⁰ According to Statewatch, in the negotiations on the later annulled common list of SCOs in the Procedures Directive, in-depth analyses on country conditions and consensus among States on human rights standards within the specified jurisprudence were absent to an alarming degree: None of the EU MSs’ assessments were in agreement regarding conditions of safety for any of the seven African states on the list (Benin, Botswana, Cape Verde, Ghana,

Board’, *Journal of Refugee Studies* 1 (2002), pp. 1-2 citing Showler, Peter, Chair of the Canadian Immigration and Refugee Board (2002).

¹³⁵ Byrne and Shacknove 194.

¹³⁶ Hailbronner, Kay ‘The Concept of “Safe Country” and Expeditious Asylum Procedures: A Western European Perspective’ (1993) 5 *International Journal of Refugee Law* 31-65.

¹³⁷ Byrne and Shacknove 196.

¹³⁸ *Ibidem*, fn 40: “For example, an official at the Austrian Ministry of Interior stated that the main criteria for identifying safe countries were political. The Ministry bases its determinations upon information compiled from newspapers, Ministry of Foreign Affairs profiles and some U.S. human rights reports. Information compiled by organizations such as Amnesty International was considered ‘too obscure’ to rely upon. Interview with Austrian Ministry of Interior Official No. 2 (July 1992). Several British Home Office officials identified the following factors that affect the quality and availability of Foreign Ministry information: the level of interest of individual Foreign Ministry desk officers in such issues; the willingness of Embassy personnel to gather information, especially from remote or violent areas; and the working relationship between Home and Foreign Office officials. One U.K. Home Office official referred to Amnesty International as a “suspect outfit with an axe to grind”. Joint Interview with U.K. Home Office Officials (December 1993).

¹³⁹ Byrne and Shacknove 194, fn 41: “Outdated country of origin information and the lack of time to review it by police interviewers are considered problems for the authorities in Norway. Interview with Norwegian Immigration Official (July 1992). In 1992, an Austrian lawyer pointed out that country profiles used by asylum officers had not yet been altered to reflect the end of the Cold War. She stated that officials had considerable expertise with respect to Eastern Europe, yet knew little about the countries of origin of most contemporary asylum-seekers. Interview with Austrian Lawyer (June 1992)”.

¹⁴⁰ Byrne and Shacknove 194.

Mali, Mauritius and Senegal). Furthermore, the European Commission opposed the designation of every African State on the list as a SCO.¹⁴¹ The prevailing feeling was captured by a senior Norwegian police official who said: “concerning country of origin information, I have a bad conscience”.¹⁴²

Hence, based on the author’s and others’ cited experience, it is asylum officers with an often prejudiced approach to the asylum-seeker who determine his need for refugee protection based on policy considerations or biased sources. The following section will examine where this point of departure in a “safe country” procedure leads the applicant.

B. “Safe country” concepts

As States’ application of the “safe country” concept has continued to expand, UNHCR, academics and NGOs have expressed criticism that generalized safety presumptions do not reflect reality, but rather lead to a situation where asylum-seekers are removed to a State in which they may be confronted with a situation that it would be wrong to confront them with. Until it has been clarified what is to be understood under “safe”, the author will use the term “precarious” for the contrary. For these situations, examples were researched and will be presented for SCOs (1) as well as for STCs (2). The examples aim to give the reader an impression of the complexity of the problems. While the recent examples speak for the urgency of the problem, the partly outdated examples – due to difficulties in finding recent studies – are helpful, as they allow for a clearer *ex post* diagnosis.

1. “Safe country of origin” concepts

Due to the different implications, the problems faced by the asylum-seeker from non-EU MS (a) and from EU MS (b) will be presented separately.

¹⁴¹ Statewatch, ‘EU divided over list of SCOs– Statewatch calls for the list to be scrapped’, September 2004, available at: <http://www.statewatch.org/news/2004/sep/safe-countries.pdf>.

¹⁴² Byrne and Shacknove, 194, fn 42: “Interview with Norwegian Police Official (June 1992)”.

a. Non-EU Member States

UNHCR's research revealed that "there are significant differences and divergences in the type of information used to designate a country as safe across the Member States of focus. Furthermore, there are variations with regard to which authority is responsible for making designations, as well as whether this is done through the creation of SCO lists, or exclusively on a case by case basis. Furthermore, there is evidence of inconsistent state practice in relation to arrangements for periodically reviewing the safety of designated safe countries of origin. Finally, there are significantly different procedural consequences that follow from designation as a safe country of origin".¹⁴³ UNHCR concluded that, although most States have adequately transposed Art 30 (5) PD and refer to broadly similar sources of information as part of the designation process, "the generic formulation of this article permits wide divergences in the precise sources used by states. This fact, combined with major differences in the designation criteria applied, inevitably results in inconsistency in the designation of 'safe countries of origin'. This is evident from a comparison between those States that currently have in place a national list, most significantly France, Germany and the United Kingdom.

It is only France, Germany and the United Kingdom that actually have operational national lists of designated SCOs of the six among the 12 EU Member States in focus in UNHCR's research carried in 2010 on the "safe country of origin" concept¹⁴⁴ that have national legislation in place permitting the national designation of third countries as SCOs.¹⁴⁵ At the time of UNHCR's study, France had designated 18 countries as safe, and Germany had designated the Member States of the EU, plus another two countries - Ghana and Senegal - as safe. The United Kingdom had designated 24 countries as safe. At the time of UNHCR's research, only eight countries appeared on the lists of both France and the United Kingdom. Only one country (Ghana) appeared on the list of all three States - although in the United Kingdom, Ghana was only considered a SCO for male applicants.¹⁴⁶

Four Member States do not have legislation in place that provides for the 'national designation' of SCOs, but nevertheless do have legislation in place that provides for the

¹⁴³ UN High Commissioner for Refugees, 'Improving Asylum Procedures – Comparative Analysis and Recommendations for Law and Practice: Detailed Research on Key Asylum Procedures Directive Provisions', March 2010, 351; for detailed information on every country, see 351-360.

¹⁴⁴ The study examined Belgium, Bulgaria, the Czech Republic, Finland, France, Germany, Greece, Italy, the Netherlands, Slovenia, Spain and the United Kingdom.

¹⁴⁵ Bulgaria, France, Germany, Greece, Slovenia and the United Kingdom, UNHCR, 2010, 335.

¹⁴⁶ UNHCR, 2010, 336.

application of the SCO concept in the examination of applications.¹⁴⁷ Of the Member States surveyed, only Belgium and Italy do not have legislation that permits the designation of third countries as SCOs or the application of the concept in the examination of applications.

Of the ten States that provide for the national designation of third countries as SCOs or have legislation in place which provides for the application of the SCO concept in the examination of individual applications, six have retained legislation in effect prior to 1 December 2005. This allows these States to continue designating countries as safe in conflict with the requirements under Annex II.¹⁴⁸ Only two surveyed States – Greece and the United Kingdom – permit designation of part of a country as safe or as safe for a specified group of persons.

In practice, the SCO concept is applied in Finland, France, Spain and the United Kingdom as a procedural tool to assign applications to the accelerated procedure, and in Germany to prioritize applications.

The following subsections will examine the fact that precarious conditions can indeed exist in assumed SCOs (aa) and the inability of the applicant to rebut the safety presumption (bb).

aa. Precarious conditions

Regarding the States in focus in UNHCR's research carried in 2010 that actually have operational national lists of designated SCOs, UNHCR speaks of "an absence of clear provisions for reviewing the safety of countries, including what criteria would trigger a decision to either add or remove a country from the list".¹⁴⁹ UNHCR reiterated that "it must always be recognized that decisions about 'safety' are extremely difficult, given volatile human rights situations and the inherently biasing effect of political or foreign policy considerations".¹⁵⁰

UNHCR's research study revealed significant divergence in the criteria applied by Member States in designating third countries as SCOs. Bulgaria failed to include in the definition of a SCO the requirement that there be "no torture or inhuman or degrading treatment or

¹⁴⁷ The Czech Republic, Finland, the Netherlands and Spain; *Ibidem*.

¹⁴⁸ The Czech Republic, Finland, France, Germany, the Netherlands and the United Kingdom; UNHCR, 2010, 337.

¹⁴⁹ *Ibidem*.

¹⁵⁰ UNHCR, 'Background Note on the Safe Country Concept and Refugee Status', 26 July 1991, EC/SCP/68, available at: <http://www.unhcr.org/refworld/docid/3ae68ccec.html> [accessed 13 June 2011], at 3, Para 10.

punishment”.¹⁵¹ In Spain, the criteria for a SCO are the same as the criteria for a STC, reflecting neither the mentioned requirement nor the requirement of lack of threat by reason of indiscriminate violence in situations of international or internal armed conflict.

Of those States permitted to derogate under Art 30 (2) or (3) PD,¹⁵² the extent of the incorporation of or reference to Annex II criteria contained in national legislation varies considerably. The Czech Republic has not transposed Annex II’s criteria of “respect for the principle of non refoulement or the existence of a system of effective remedies against violations of rights and freedoms” or a requirement that there is “generally and consistently” no persecution in the country concerned. While Finnish legislative provisions go beyond the criteria under Annex II, in practice parts of countries have been considered as generally safe. The German concept does not equate to Arts 6 and 9 QD, in that it does not cover all serious violations of fundamental human rights that constitute an act of persecution under the Qualification Directive. Furthermore, the requirements do not reflect certain aspects of Annex II PD, lacking an explicit requirement for a “democratic system” and an explicit reference to indiscriminate violence in situations of international or internal armed conflict or to any of the criteria set out in sub-clauses (a) to (d). While the criteria in Dutch legislation are limited to whether a country has ratified (rather than observes) the GRC, the ECHR or CAT, the authorities are obliged to assess whether the country concerned complies with the stated international treaties in practice. However, the legal criteria do not adequately reflect Art 30 (2) and (4) PD. The United Kingdom has derogated from Art 30 (1) PD and has retained criteria under national legislation in place prior to 1 December 2005 which falls short of the requirements of Annex II, namely because it does not require a consistent absence of persecution or that the application of the law in a democratic system be used as a basis for considering safety; and because there is no reference to threat by reason of indiscriminate violence in situations of international or internal armed conflict, nor a requirement that the absence of persecution can be shown.

French legislation merely states that a country is considered to be a SCO if “it makes sure that the principles of freedom, democracy and the rule of law, as well as human rights and fundamental freedoms are fulfilled”.¹⁵³

¹⁵¹ For further omissions noticed by UNHCR regarding Bulgaria, Spain, but also Greece and Slovenia see UNHCR, 2010, 340.

¹⁵² The Czech Republic, Finland, France, Germany, the Netherlands and the United Kingdom.

¹⁵³ UNHCR, 2010, 341, footnotes omitted.

In UNHCR's study, the difference between legislation on the SCO concept and its application in practice is well documented in the analyzed countries. For example, in Germany, contrary to the legal provisions, persecution from non-State agents is not taken into account as a possibility for rebutting the presumption of safety, as was witnessed in UNHCR's audit of case files.¹⁵⁴ Furthermore, requirements specified in Annex II PD were not stipulated in the law but in the overall assessment required by the case-law of the Federal Constitutional Court. Despite this requirement, German discussions in 1993 about the designation of Ghana as a SCO show that some criteria are still disputable, e.g. the relevance of the abolition of the death penalty, of a catalogue of human rights in national law or of the necessary degree of stability in a post-dictatorial state.¹⁵⁵ In France, according to the Ministry of Immigration, the elements contained in Annex II PD are taken into account in the designation of safe countries of origin. Furthermore, the effective application of laws and remedies are taken into account in its assessment.¹⁵⁶

bb. Impossibility to challenge the safety presumption

The first common problem identified in several States is that no provision is made for applicants to receive **information** on the fact that their country of origin is considered safe, until the point at which they are notified of the decision to refuse their application.¹⁵⁷ Thus, in effect, the first and only opportunity to challenge the safety presumption is during the appeal. Bulgarian legislation explicitly provides the applicant the opportunity to rebut the safety presumption, but interviewed asylum officers indicated they would not notify the applicant that they considered his country to be safe. This would *de facto* deny the applicant the opportunity to effectively rebut the safety presumption during the first instance procedure. In Spain, the asylum procedure establishes that the applicant will be notified about a decision to channel the application into the accelerated procedure. However, no information is provided on the specific grounds upon which this decision is taken. The applicant, the assisting NGO or lawyer has to contact the asylum office directly in order to obtain the information from the case file and eventually present grounds to rebut the presumption, which would be taken into account in the individual assessment of the claim. In the Netherlands, under the Dutch

¹⁵⁴ According to information provided by the determining authority (BAMF), the decision-makers have been instructed to be particularly alert to situations of non-state persecution for gender-specific reasons in Ghana – a designated safe country of origin: UNHCR, 2010, 339.

¹⁵⁵ UNHCR, 2010, 339.

¹⁵⁶ *Ibidem*.

¹⁵⁷ Bulgaria, the Czech Republic, and Slovenia, UNHCR, 2010, 354.

“intention procedure”, the applicant is notified of the intention to designate his country of origin as safe in advance of taking a decision. While this allows the applicant the opportunity to submit grounds as to why a designated country would not be safe in his particular circumstances, in the accelerated procedure the applicant only has three procedural hours in which to submit these grounds. In the United Kingdom, according to UNHCR, there is no indication that the applicant is told in advance of a positive decision on the safety presumption.

Second, in relation to the **substantive interview**, in the United Kingdom the applicant is not given any further opportunity beyond that of other applicants to submit further evidence after the interview – within 48 hours in the processes in which applicants are detained and within five working days in the non-detained procedure.¹⁵⁸ In Slovenia, the personal interview may be omitted and, in practice, is omitted in the SCO procedure as an accelerated procedure. This denial of a personal interview deprives the applicant of an effective opportunity to rebut the safety presumption.

Third, UNHCR’s research has revealed divergence among Member States with regard to the opportunity given to applicants to rebut a safety presumption in practice. The **burden of proof** was increased on the applicant, as envisaged by Art 31 (1) PD, in the Czech Republic, Greece, Slovenia and the United Kingdom. In the Czech Republic, it is unclear whether the legally established right to rebut the presumption of safety is effective in practice. Information about SCO designations and procedures is not included in the general written information provided to applicants at the start of the procedure. In Greece, there is no provision for advance notice of any decisions, and reasons for refusal are only supplied once the negative decision has been issued. Moreover, the standard phraseology included in all refusal decisions does not make reference to SCO considerations. Therefore, in practice, there is no opportunity for the applicant to rebut the presumption of safety, or seek the assistance of a lawyer in relation to this.

Under United Kingdom legislation, if the applicant comes from a designated SCO, there is a quasi-presumption that the case is clearly unfounded, leaving it entirely to the applicant to submitting serious grounds to counter this presumption. In Germany, the presumption of safety from persecution can be rebutted on the basis of the presentation of facts or evidence

¹⁵⁸ UNHCR, 2010, 355.

by the applicant. This does not amount to imposing the full burden of proof on the applicant; it is sufficient that the facts or evidence submitted by the applicant “give reason to believe” that the applicant is in danger of persecution, despite the general situation in the country. In France, the presumption that the nationally designated countries of origin are safe applies to the asylum office, which is empowered to refuse a temporary residence permit to an applicant from a listed SCO. As a consequence, the application for international protection is directed into the accelerated procedure. While there is no explicit provision of legislation placing the burden of proof entirely on the applicant, in practice, the burden of proof on the applicant appears nevertheless to be greater, and it may play a role in the credibility assessment.¹⁵⁹ In the Netherlands, national legislation requires that the applicant make a “plausible case” that the country of origin does not fulfil its international human rights treaty obligations with regard to him; as such, the burden of proof on the applicant is greater, but this does not relieve the determining authority of its duty to gather evidence. Similarly, in Finland, it is the responsibility of the applicant to rebut the presumption of safety and, therefore, in theory the burden of proof shifts to the applicant; however, in practice, the safety assessment is made in cooperation with the applicant and responsibility is thus shared.

b. EU Member States

The following subsections will again examine the fact that precarious conditions can indeed exist in assumed SCOs (aa) and the inability of the applicant to rebut the safety presumption (bb).

aa. Precarious conditions

Even today, it is evident that Roma are subjected to persecution in some EU MS on racial grounds or as members of a particular social group and are unable to avail themselves of the proper protection of the State, i.e. in Hungary with its attacks on and murder of Roma.¹⁶⁰ There is current concern regarding claims for asylum lodged in EU MSs by Roma and other

¹⁵⁹ UNHCR, 2010, 354.

¹⁶⁰ See, e.g., Spiegel, ‘Racist Crime Wave, Hungary’s Roma Bear Brunt of Downturn’, 2 December 2009: “With Hungary in the depths of economic despair, its Roma minority has become an easy target for many people’s resentments. The murder of a Roma man and his five-year-old son on Monday is the latest incident in a spiral of fear and hate”.

related groups who have been forced to flee another EU MS due to the persecution faced there.¹⁶¹

To more clearly demonstrate the issue of possible persecution in an EU MS in an *ex post* diagnosis, this section will present a case that the author defended as legal representative. This case involved a Romanian citizen, Mr. Romeo B., from whom the Austrian asylum office wanted to withdraw his recognized asylum protection after Romania's accession to the EU on 1 January 2007, which meant that Romania was subject to the "safe country" exception. Mr. B., who had been active in Romania as a leader of syndicalist strikes and was also well-known in the international media, had received asylum on 8 November 2005 due to a politically motivated conviction of five years imprisonment.

In Romania, the independence of the judiciary is severely limited by political corruption. As was found in a 2006 study by Stanford University, corrupt politicians are hierarchically still more powerful than judges and hence above the law. According to the study, "in the absence of effective deterrents and mechanisms of punishment, Romanian political elites have weak internal incentives to reduce corruption".¹⁶² In a 2007 report, Transparency International likewise criticized the corruption in the Romanian justice system as being systematic.¹⁶³ And

¹⁶¹ Mole, Nuala, 'Asylum and the European Convention on Human Rights', in Plender, Richard (ed.), 'Problems Raised by Certain Aspects of the Present Situation of Refugees from the Standpoint of the European Convention on Human Rights' (Strasbourg/Council of Europe, 2000) 74.

¹⁶² Burduja, S.I., 'Assessing corruption in Romania. An integrationist story', Stanford's Student Journal of Russian, East European and Eurasian Studies, 2006, Spring 58-9.

¹⁶³ Transparency International, 'Global Corruption Report 2007: Corruption in Judicial Systems', (2007) Cambridge: Cambridge University Press, 268: "After analysis, TI Romania concluded that implementation of reforms was deficient due to poor administrative skills and lack of will by heads of courts and prosecutors' offices. The summary report for the centre's first phase of operation revealed that courts, registries, archives and clerks' offices suffer from poor integrity and bad administration in the quality and promptness of service. This led to the conclusion that the reforms have had little impact thus far on citizens' relationship with the justice system. Pressure on judgement: [...] According to a TI Romania survey in September 2005, 78 per cent of magistrates view the justice system as independent, though not 'absolutely independent'. Judges indicated that they felt pressure on their decisions from media, members of parliament, government officials and economic interests while prosecutors said they experienced pressure from within the hierarchy, notably from chief prosecutors. Though judiciary management will pass to the supreme council, this development will be accompanied by continuing structural weaknesses, such as inadequate court staffing and magistrates' low professional standards. [...] Accountability in the judiciary: Corruption and lack of transparency in relations between court users and court personnel are also systemic. [...] Despite several attempts to standardise the system of jurisprudential interpretation, Romanian justice is inconsistent, with many unpredictable decisions and differing legal interpretations in different courts – and sometimes in the same court. A law is under consideration that will outline mechanisms to foster unitary jurisprudence, and ensure a proper balance between judges' decision-making independence and the increased predictability of their decisions. Conflicts of interest: Since 2003 a stricter set of conflict of interest provisions has prohibited magistrates from numerous compromising situations, including the hearing of cases that involve relatives up to the fourth degree. Where conflicts of interest remain, visitors to the centre cited instances of acts of a criminal nature, such as trafficking of influence, through which family or non-family relationships were used to twist rulings or motivate magistrates to make particular judgements. Of the 600 cases adopted by the counselling centre, 190 were serious enough to pursue through legal channels. The two most frequent charges were 'failure to consider evidence' and 'violation of court procedures', and many clients attributed these actions to conflicts of interest. [...] Disciplinary procedure for judges: The system for ensuring the integrity of magistrates is another issue in the fight against corruption. [W]hen Romania was expected to complete the requirements of the Justice and Internal Affairs chapter of the EU accession protocol, the pace of reform accelerated, but EU monitoring reports, increasingly frequent and more detailed, reflected the difficulties facing the justice sector. For most of the measures adopted, the Justice Ministry

finally, the European Commission concluded its report on the improvements in Romania in January 2008:

“When Romania entered the EU on 1 January 2007, a Cooperation and Verification Mechanism [...] was set up to help Romania to remedy shortcomings in the area of judicial reform and the fight against corruption and to monitor progress in these areas. [...] In its first year of EU membership Romania has continued to make efforts to remedy weaknesses that would otherwise prevent an effective application of EU laws, policies and programmes. However, in key areas such as the fight against high-level corruption, convincing results have not yet been demonstrated. The technical update which is provided in this report does not constitute an in depth assessment of progress under the benchmarks but the situation on the ground gives rise to concerns which need to be addressed before the Commission carries out a full assessment in June. Delays have occurred in implementing a coherent recruitment strategy for the judiciary [...], in the establishment of a National Integrity Agency [...] and in developing an overall strategy and implementing flagship projects to fight local corruption [...]. Romania should particularly step up its efforts in the fight against high-level corruption [...] and should strengthen its efforts to maintain the legal and institutional stability of the Romanian anti-corruption framework.”¹⁶⁴

In Mr. B’s particular case, three of his supporters and colleagues were convicted in the same court case and subsequently detained at the moment that the extradition claim was issued. Romania’s extradition claim to enforce the sentence of a politically motivated criminal proceeding also on Mr. B proves the continuity of Mr. B’s persecution, and thus the currency of his refugee claim.

bb. Impossibility to challenge the safety presumption

In the case of Mr. B., the asylum office undertook research on the general situation in Romania that was not based on publications from international organisations or NGOs, but rather solely on “media information”, which is still highly politically influenced in Romania.¹⁶⁵ For Mr. B., it was impossible to rebut the safety presumption, as the deciding

benefited from EU technical advice on the legislation most likely to reduce corruption. What remains to be done is for these measures to be applied more effectively”.

¹⁶⁴ European Commission COM (2008) 62 final ‘Interim Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism’ Brussels, 4 February 2008, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0062:EN:HTML>.

¹⁶⁵ Freedom House in its report on Romania in 2007: “In 2006, there was much discussion over the alleged role of the Romanian secret service in the country’s independent media. [...] After the CNSAS gained numerous Securitate files, these revelations fed a widespread conspiracy theory that most of the press takes part in the propaganda and disinformation structure run by the secret services in cooperation with Mafia networks built on the Russian model. [...] The issue of collaboration in Romanian media remains quite ambiguous. [...] Furthermore, Romanian media are heavily editorialized and frequently run stories without sources, publish innuendo, or stage wild campaigns on issues that would traditionally not make news in other professional media. [...] Additionally, concentration in media ownership continued to increase in Romania in 2006. [...] Basescu called a number of talk shows to argue with his critics in 2006, an unprecedented practice. Disinformation wars rage continually in the media, but the patient viewer or reader can find credible information alongside misinformation. [...] Two cases of open censorship occurred in 2006. [...] The modification of the Law on Public Television, introduced nearly a year ago, continues to move slowly through the Parliament. The law does not greatly improve the statute of the

officer was of the opinion that the accession of Romania to the EU on 1 January 2007 “is intrinsically tied to the positive judgment of the general human rights situation”.¹⁶⁶

The decision *Horvath v Secretary of State for the Home Department*¹⁶⁷ shall be presented as an example of the reluctance to protect EU citizens by granting them asylum status. In this case, the appellant claimed to have left Slovakia with his family because he was a member of the Roma community and feared persecution by skinhead groups that targeted Roma who were not protected by the Slovak police. For the sake of the efficiency of the Spanish Protocol, the House of Lords changed its jurisprudence to a degree that it has become unwilling to accept that treatment in other European states might generate a valid refugee claim.

2. “Safe third country” concepts

Again, in this section, the problems arising from the STC concept will be presented separately regarding non-EU MS (a) and EU MS (b).

a. Non-EU Member States

UNHCR’s research from 2010 revealed that in 16 EU MS, the STC concept is reflected in the law, but not (systematically) applied in practice.¹⁶⁸ Poland does not include the concept in its laws. In addition, Belgium, France and Italy do not reflect the STC concept in national legislation, nor do they apply it in practice.¹⁶⁹ In fact, only five EU MS apply the concept in law and in practice: Spain, Austria, Hungary, Portugal and the United Kingdom. Furthermore, UNHCR’s research found that in Spain, the concept is reportedly never used as the sole ground for inadmissibility or rejection; however, Spain apparently extends the use of the concept, in practice and on a case-by-case basis, to some Latin American and African

politically battered public station. If it passes, the responsibilities of the chairman of the board and director general will be separate, but the law will likely have no impact on the main problems facing public TV, the most daunting being that the Parliament continues to approve the yearly report of the president director general and also appoints the board.”, available at http://www.freedomhouse.hu/images/fdh_galleries/NIT2007final/nit-romania-web.pdf.

¹⁶⁶ English translation of “untrennbar mit einer positiven Beurteilung der allgemeinen Menschenrechtsslage verbunden”.

¹⁶⁷ [2000] 1 AC 489 (HL).

¹⁶⁸ Bulgaria, the Czech Republic, Finland, Greece, the Netherlands, Cyprus, Estonia, Ireland, Latvia, Lithuania, Luxembourg, Malta, Romania, Slovakia, Sweden and Slovenia; UNHCR, 2010, 7.

¹⁶⁹ UNHCR, 2010, 299. For more details, see 299-300.

States.¹⁷⁰ No evidence was found of the United Kingdom applying the STC concept to countries other than the USA, Switzerland or Canada. In addition, there are no publicly available statistics confirming the numbers of removals or to which countries the United Kingdom removes applicants under this concept.¹⁷¹

This result leads UNHCR in its study to conclude that, while Member States appear to support the notion, the STC concept is largely symbolic and has little practical use regarding non-EU MS.¹⁷²

Nevertheless, the fact will now be presented that precarious conditions can indeed exist in assumed STCs (aa) and the applicant can be inhibited in rebutting the safety presumption (bb).

aa. Precarious conditions

The STC concept has been applied since the early 1990s to Eastern European countries, regardless of the fact that their legislation adopted at that time did not comply with the international standards relating to the protection of refugees.¹⁷³

bb. Impossibility to challenge the safety presumption

Asylum applications falling under the STC concept may be declared manifestly unfounded in Bulgaria, Czech Republic, Finland, and the United Kingdom and inadmissible in Finland, Greece, Slovenia, Spain and the United Kingdom.¹⁷⁴ Among the EU MSs surveyed by UNHCR that have transposed the STC concept into national legislation, omission of the interview is only possible in Greece, Slovenia and the United Kingdom.¹⁷⁵

Governments of EU MSs applying the STC concept have emphasized that the practices within the State in question are more important in determining whether a country is "safe" than formal accession to the GRC or other human rights instruments. However, such statements are

¹⁷⁰ *Ibidem.*

¹⁷¹ *Ibidem.*

¹⁷² On practical use in detail, see UNHCR, 2010, 303-307.

¹⁷³ Amnesty International published the study on 60 cases of individual asylum-seekers refused on safe third country ground by the United Kingdom Home Office: Bouteillet-Paquet, Daphné. 'Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and Its Member States' (2003) 5 European Journal of Migration and Law 367.

¹⁷⁴ UNHCR, 2010, 319.

¹⁷⁵ UNHCR, 2010, 314-5.

not reflected in State practice: few EU MSs have “exhibited enthusiasm for investigating the protection conditions in countries of first asylum prior to the return of individual asylum-seekers”,¹⁷⁶ but rather “commonly rely on formal ratification of the Geneva Convention as the sole criterion justifying return”.¹⁷⁷ There are even certain governments that have returned asylum-seekers to States that have neither ratified the Geneva Convention nor complied with its provisions in practice.¹⁷⁸ This analysis coincides with the result of UNHCR’s survey on the Member States in its focus. It appears that only the law and procedure in the Netherlands provides the applicant with an effective opportunity to challenge the presumption of safety:¹⁷⁹ in the intention procedure, applied also in all other asylum procedures, the determining authority first gives the applicant its “intended decision”. This gives the applicant and his lawyer the opportunity to formulate a view on the intended decision and submit any counter-indications. The applicant is, therefore, informed in advance of the fact that the determining authority considers a country to be a safe third country and the applicant has the chance to rebut the presumption of safety. The view of the applicant and his lawyer is taken into account

¹⁷⁶ Byrne and Shacknove 201, referring in fn 58 to *Thavathevathasan v. Secretary of State for the Home Department*, [1994] Imm AR 269, 258-59 (finding that the Secretary of State has no obligation to make a direct enquiry of France, a third country in which a Sri Lankan asylum-seeker had spent five days, to establish that the claim would be substantively considered there). In Norway, a Ministry of Justice official stated that checks are rarely made to see if asylum-seekers may be *refouled* from a first asylum country. Interview with Norwegian Ministry of Justice and Police Official (May 1992). An Austrian Ministry of Interior official observed that with regard to safe third country removals it is not required that the transit State have signed or conform its practice to the 1951 Geneva Convention. Interview with Austrian Ministry of Interior Official No. 2 (July 1992). Under the Austrian safe country of asylum policy, asylum-seekers have been removed to Algeria, Iran, Russia and Turkey, based on brief transit stays and irrespective of local treatment of asylum-seekers. See Brandl, Ulrike, ‘Asylrecht und Asylpolitik in Österreich’, (1993) 8 ASYL 3, 6.

¹⁷⁷ *Ibidem*, fn 59: “For example, Art 30 (3) of the Finnish Asylum Act specifies, *inter alia*, the following special grounds for denying asylum claims: the alien concerned previously stayed in a country which has acceded to the Convention Relating to the Status of Refugees or stayed in another safe country and applied for asylum or had the opportunity to do so; or according to the Convention between Denmark, Finland, Iceland, Norway, and Sweden Concerning the Waiver of Passport Control at the Intra-Nordic Frontiers (SopS 10/58), another signatory to the Convention is obliged to readmit the alien in question Ulkomaalaislaki [Aliens Act], Feb. 22, 1991, Statutes of Finland 639/93”.

¹⁷⁸ *Ibidem*, fn 60: “The Austrian government has removed asylum-seekers to Saudi Arabia, which is not a party to the 1951 Geneva Convention or the 1967 New York Protocol and has not enacted refugee legislation or adopted policies concerning the grant of asylum”: See Achermann, Alberto, and Gattiker, Mario, ‘Safe Third Countries: European Developments’ (1995) 7 International Journal of Refugee Law 19 31. A similar attempt by the U.K. Home Office to return an asylum-seeker to Saudi Arabia was prevented on appeal. See *Secretary of State for the Home Department v. Razaq Mohd Saeid Abdu Abdel* [1992] Imm AR 152 (Immigration Appeals Tribunal rules that Home Secretary’s finding that Saudi Arabia was a safe country of asylum was not justified on the evidence). An Austrian Ministry of Justice Official stated that Austria had identified as safe countries of first asylum the Czech Republic, that had not yet ratified the Convention and other countries, such as Hungary, that had done so only with geographic reservations. Interview with Austrian Ministry of Justice Official (April 1992). The United Kingdom also attempted to remove an asylum-seeker to Hong Kong, stating that the territory was a signatory to the 1951 Convention, and that, based on assessment of its immigration policies and practices, it could be considered a safe country of asylum: Notification Letter to Asylum Seeker of Safe Third Country Removal, Immigration and Nationality Department, Home Office, August 20, 1994 (on file with the *Harvard Human Rights Journal*). Hong Kong is not a signatory to the 1951 Convention, has not enacted refugee legislation or adopted policies concerning the grant of asylum for non-Vietnamese claimants, and is not considered to be a safe country by UNHCR. The U.K. Home Office has had its decision to remove asylum-seekers to Kenya upheld by the Courts: *Arthur Kingori v. Secretary of State for the Home Department* [1994] Imm AR 539. Kenya has signed, but not ratified the 1951 Convention and has, to date, not enacted refugee legislation.”

¹⁷⁹ UNHCR, 2010, 312; for the other countries, see 312-5.

before the determining authority issues the decision.¹⁸⁰ In contrast, in the Czech Republic and the United Kingdom, the presumption of safety can only be rebutted “in theory”.¹⁸¹

b. EU Member States

Only some years after the Dublin Regulation entered into effect,¹⁸² national jurisprudence across the EU on protection grounds started to be embroiled in asylum controversies. Therefore, it will be presented in detail, that through “Dublin”, precarious conditions can indeed exist in the assumed STCs (aa) and the situation of the rebuttal of the safety presumption (bb).

aa. Precarious conditions in the “safe” third country

In the course of the enlargement of the EU, commentators have expressed doubts about whether all EU MSs can be considered STCs. These doubts arose from the fact that asylum-seekers had either no access to a substantive refugee determination procedure at all or only access to a procedure ending in *refoulement*, *chain-refoulement* or entailing inhuman conditions in accommodation, detention or regarding medical treatment.¹⁸³ Hence, the “safety” of a third country encompasses two different issues: the conditions and the asylum procedure awaiting the applicant in the respective country. In other words, precarious living or detention conditions awaiting the asylum-seeker in the third country (1) as well as deficiencies of the STC’s refugee determination procedure (2) can lead to *refoulement*.

1. Precarious living or detention conditions

While Poland,¹⁸⁴ Slovenia and especially Slovakia¹⁸⁵ are questionable in terms of living or detention conditions, the most striking example among EU MSs is Greece. In that country,

¹⁸⁰ UNHCR, 2010, 313.

¹⁸¹ UNHCR, 2010, 316.

¹⁸² The Dublin Regulation covers the 25 Member States of the European Union plus Norway and Iceland as of 1 September 2003 and Switzerland as of 12 December 2008.

¹⁸³ Very good inquiry by the European Council on Refugees and Exiles (ECRE), ‘Report of the Application of the Dublin II Regulation in Europe’, (March 2006) AD3/3/2006/EXT/MH.

¹⁸⁴ *Inhuman conditions and treatment in the asylum reception facilities and camps*: March 2006: Racist assaults, stabs with a knife: Asyl in Not, „Traumatisierter in Schubhaft“, email of 27 March 2006; June 2006: When arriving in a camp, Mr. A was forced to undress, kneel down and undress. He was put in a cell with a blanket and was told that “An animal is given hay and a kennel, you have a blanket”. For 48 hours, he had to beg for toilet and walk and received only old bread and coloured water: Email of Amnesty International Regional EU Affairs and IGO Team, 22 November 2006, sending the article Marcin Wojciechowski, “Isa, who wanted to be a human”, 11 November 2006; September 2006: Dramatically bad treatment: uneatable food, no medical treatment, attacks by skin heads, unbearable discriminations, presence of Russian security personnel of FSB: Flüchtlingsrat des Landes Brandenburg, ‘Odyssee tschetschenischer Flüchtlinge hat kein Ende Familien

living and detention conditions for asylum-seekers have been alarming for a long time. Regarding the living conditions, the European Committee for the Prevention of Torture (CPT) stated in its report on its visit in December 2006: “[W]ith respect to the centres visited, which were all opened during the last four years, the CPT was concerned to observe that its previous recommendations in this field have not been taken into account, and the conditions under which foreigners were detained could in certain cases be qualified as inhuman and degrading”.¹⁸⁶ The ECJ found on 19 April 2007 that Greece had failed to implement the Minimum Standards Directive; the Directive was subsequently transposed into Greek law in November 2007. On 15 April 2008, UNHCR advised EU MSs in a position paper to refrain from returning asylum-seekers to Greece under the Dublin Regulation until further notice. The position paper also noted that the implementation of the Minimum Standards Directive continued to present serious flaws. The paper stated: “UNHCR remains concerned about the extremely limited reception facilities for asylum-seekers as this situation is seriously compromising the full implementation of the Presidential Decree on the Reception Conditions and urges the Government of Greece to promptly issue the awaited ministerial decision that should establish the criteria for the provision of a daily financial allowance”. In addition, the Norwegian Organization for Asylum Seekers, the Norwegian Helsinki Committee, and Greek Helsinki Monitor issued a joint report in April 2008 on accommodations and social conditions awaiting Dublin Regulation returnees to Greece, finding the number of actual places available to destitute asylum-seekers to be “negligible” and the conditions of the few accommodation centres “deplorable”. They observed that “the large majority of asylum seekers remain completely without social assistance with regard to accommodation and/or other forms of

durch Sachsens Behörden getrennt, ihnen allen droht die Rückführung nach Polen’, email of 5 September 2006; Esser, Barbara and Gladysch, Barbara: ‘Die Situation tschetschenischer Asylbewerber und Flüchtlinge in Polen und Auswirkungen der EU-Verordnung Dublin II’, February 2005, 3.

No medical treatment: June 2006: Mr. A was transferred from Belgium with the information of medical doctor that he suffers from jaundice type C. The Polish border guard took away from him the remaining medicine; the Polish medical doctor saw no need for treatment. After intervention by his sister he is operated, but not put on a diet, later jaundice is diagnosed. Mr. A is released in July, but dies in October after doctors could not/did not want to help him.

¹⁸⁵ As to the living conditions and treatment in the asylum reception facilities and camps, experiences have been so bad that Chechen refugees cannot bare them anymore and prefer to return “voluntarily” to the RF or even Chechnya: In February 2006, beatings by Slovakian police were reported which amounted, according to the Austrian psychotherapist-NGO Hemayat, to “extreme degrading and almost torturous treatment” and re-traumatization; Asyl in Not, ‘Folter in der Slowakei’, email of 24 February 2006; in March 2006, an NGO reported that 80 % of the asylum-seekers fell sick due to conditions in over-crowded camp, mistreatment, and beatings, frightening by dogs. “When a suicide attempt was reported, the officers said: ‘we come when he is dead, call us then.’ Panic increased, the person was brought to hospital but received no medical treatment and was told that he ‘will beg for deportation’”: Asyl in Not, ‘Folter in der Slowakei (Teil 2)’, email of 10 March 2006; also from asylum-seekers being detained, inhuman treatment was reported: in detention in February 2006, a group of asylum-seekers was forced to lie down; policemen urinated on their heads: Asyl in Not, ‘Folter in der Slowakei’, email of 24 February 2006. Regarding medical treatment, there exist no or extremely limited psychiatric health-care facilities for torture/trauma survivors. The consequences are severely detrimental effects on the concerned individuals who have already suffered highly traumatic experiences.

¹⁸⁶ Council of Europe, ‘Report to the Government of Greece on the visit to Greece carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 August to 9 September 2005’, CPT/Inf (2006) 41.

social assistance. Greece is in practice a country where asylum seekers and refugees are almost entirely left to their own devices”.¹⁸⁷ In November 2008, Human Right Watch reported: “Asylum seekers of all nationalities who manage to obtain and maintain their red cards have little hope of receiving support from the government during the often protracted time their claims are pending. The homeless and destitute among them often lack housing accommodation and other basic forms of social assistance, in part, because Greece only has reception centre spaces for 770 of the most needy and vulnerable asylum seekers. Although three of the 10 reception centres are reserved for unaccompanied children, Human Rights Watch met unaccompanied children, among others, who were living in the streets, parks, and in abandoned buildings because of a lack of accommodations and other social services”.

With regard to detention conditions, Amnesty International had already reported in October 2005 that asylum-seekers were being detained in metal containers.¹⁸⁸ UNHCR stated in March 2006 for its campaign on “the difficulties of being an asylum-seeker in Greece” that most of the people caught entering the country illegally were arrested and placed in administrative detention usually for the maximum legal term of three months.¹⁸⁹ In its report on its visit of December 2006, the CPT summarized: “As was the case in 2001, a considerable number of persons interviewed by the delegation in the course of the visit alleged they had been ill-treated by police officers. The alleged ill-treatment consisted mostly of kicks, punches and blows with batons or various other objects, often inflicted during questioning. Certain allegations also referred to the use of excessive force at the time of arrest. In some cases the ill treatment alleged could be considered as amounting to torture”.¹⁹⁰ On 11 June 2009, the ECtHR found in *S.D. v. Greece* that the Greek detention conditions violated Art 3 ECHR on the basis that the conditions of detention to which the applicant was held, bearing in mind he was an asylum-seeker, combined with the excessive length and conditions, amounted to degrading treatment.¹⁹¹ Finally, the reports cited in the ECtHR’s judgment *M.S.S. v. Belgium and Greece*¹⁹² attest to “a systematic practice of detaining asylum seekers in Greece from a

¹⁸⁷ “A gamble with the right to asylum in Europe-Greek asylum policy and the Dublin 2 Regulation”.

¹⁸⁸ Amnesty International, ‘Greece: Out of the Spotlight: The rights of foreigners and minorities are still a grey area’, 5 October 2005, EUR 25/016/2005, available at: <http://www.unhcr.org/refworld/docid/43b149b34.html> [accessed 15 June 2011].

¹⁸⁹ UNHCR, ‘New campaign highlights the difficulties of being an asylum seeker in Greece’, 16 March 2006, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=4419605f4> [accessed 15 June 2011].

¹⁹⁰ Council of Europe, Report, 41.

¹⁹¹ The asylum-seeker was confined to a prefabricated cabin for two months without allowing him outdoors or to make a telephone call, and with no clean sheets and insufficient hygiene products, amounts to degrading treatment within the meaning of Art 3 ECHR: *S.D. v. Greece*, Application No. 53541/07, Council of Europe: European Court of Human Rights, 11 June 2009, Paras 49 to 54.

¹⁹² Council of Europe, ‘Report of the LIBE Committee delegation on its visit to Greece (Samos and Athens)’, European Parliament, 17 July 2007; Pro Asyl, ‘The truth may be bitter but must be told - The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard’, October 2007; UNHCR, ‘Asylum in the European Union. A Study of the

few days up to a few months following their arrival”.¹⁹³ This practice affects both asylum-seekers arriving in Greece for the first time and those transferred by an EU MS under the Dublin Regulation. All the centres visited by the above-mentioned bodies and organizations that produced the reports describe “a similar situation to varying degrees of gravity: overcrowding, dirt, lack of space, lack of ventilation, little or no possibility of taking a walk, no place to relax, insufficient mattresses, dirty mattresses, no free access to toilets, inadequate sanitary facilities, no privacy, limited access to care. Many of the people interviewed also complained of insults, particularly racist insults, proffered by staff and the use of physical violence by guards”.¹⁹⁴ After his mission to Greece in October 2010, the UN Special Rapporteur on Torture concluded after inspecting the detention conditions that “[t]here is a humanitarian crisis facing new arrivals into Greece, detained in overcrowded and poor conditions amounting to inhuman and degrading treatment; particularly vulnerable are pregnant women, single women with small children, and unaccompanied minors. Most have no access to legal assistance or interpretation and medical attention is extremely limited or unavailable”.¹⁹⁵

2. Deficiencies in the asylum procedure

Some asylum-seekers have had no access to a substantive refugee determination procedure, due to their difficulties after their return to the third country in having their case either reopened or examined in a fair asylum procedure.

implementation of the Qualification Directive’, November 2007; European Committee for the Prevention of Torture, following its visit to Greece from 20 to 27 February 2007, 8 February 2008; Amnesty International, ‘Greece: No place for an asylum-seeker’, 27 February 2008; European Council on Refugees and Exiles (ECRE), ‘Spotlight on Greece – EU asylum lottery under fire’, 3 April 2008; Norwegian Organisation for Asylum Seekers (NOAS), ‘A gamble with the right to asylum in Europe – Greek asylum policy and the Dublin II regulation’, 9 April 2008; UNHCR, ‘Position on the Return of Asylum-Seekers to Greece under the “Dublin Regulation”’, 15 April 2008, available at: <http://www.unhcr.org/482199802.html>; Human Rights Watch, ‘Stuck in a revolving door – Iraqis and other asylum seekers and migrants at Greece/Turkey entrance to the European Union, November 2008; Clandestino, “Undocumented migration: counting the uncountable: data and trends across Europe”, December 2008; Human Rights Watch, “Left to survive”, December 2008; - Cimade, “Droit d’asile: les gens de Dublin II, parcours juridique de demandeurs d’asile soumis à une réadmission selon le règlement Dublin II”, December 2008; Council of Europe Commissioner for Human Rights, Mr T. Hammarberg, report prepared following his visit to Greece from 8 to 10 December 2008, 4 February 2009; - Greek Council of Refugees, “The Dublin Dilemma – “Burden shifting and putting asylum seekers at risk”, 23 February 2009; - European Committee for the Prevention of Torture, report prepared following its visit to Greece from 23 to 28 September 2008, 30 June 2009; Austrian Red Cross and Caritas, “The Situation of Persons Returned by Austria to Greece under the Dublin Regulation. Report on a Joint Fact-Finding Mission to Greece (May 23rd - 28th 2009)”, August 2009; Norwegian Helsinki Committee (“NHC”), NOAS and Aitima, “Out the back door: the Dublin II Regulation and illegal deportations from Greece”, October 2009; Human Rights Watch, “Greece: Unsafe and Unwelcoming Shores”, October 2009; - UNHCR, Observations on Greece as a country of asylum, December 2009; Amnesty International, “The Dublin II Trap: transfers of Dublin Asylum Seekers to Greece”, March 2010; National Commission for Human Rights (Greece), “Detention conditions in police stations and detention areas of aliens”, April 2010; Amnesty International, “Irregular migrants and asylum-seekers routinely detained in substandard conditions”, July 2010.

¹⁹³ *M.S.S. v. Belgium and Greece*, application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: <http://www.unhcr.org/refworld/docid/4d39bc7f2.html> [accessed 16 June 2011], para 161.

¹⁹⁴ *M.S.S. v. Belgium and Greece*, para 162.

¹⁹⁵ Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the Human Rights Council, U.N. Doc. A/HRC/16/52/Add.4, 4 March 2011, Para 81.

According to a survey from March 2006, certain asylum cases were **not reopened** by the asylum office of the STC after a decision had been made in the absence of the asylum-seeker, in Belgium, France, Ireland, Italy, the Netherlands, Slovenia and Spain.¹⁹⁶ In another, older example, 52% of the asylum-seekers returned to France and 15% of those returned to the Netherlands between 26 July 1993 and early March 1995 were bounced back to the United Kingdom.¹⁹⁷ States that do not allow the re-opening of the case leave the applicant with no option but to try to file a subsequent, second asylum application. This becomes problematic when a subsequent asylum application is only permitted subject to strict criteria, such as the establishment of new facts or circumstances, as it is the situation in Belgium, Hungary, the Netherlands, Slovenia, Sweden and the United Kingdom.¹⁹⁸ In reality, most applicants do not have new circumstances since leaving the responsible STC, and thus their cases are never heard.

Research has shown that “often, the receiving ‘safe’ country had already made arrangements for the asylum-seeker’s return to the country of origin or to another unsafe country en route.”¹⁹⁹ For example, Amnesty International reported two separate cases of Colombian asylum-seekers who were returned from the United Kingdom to Spain on STC grounds without the United Kingdom’s authorities having sought assurances from Spain that the Colombians would receive a determination of the substance of their application; the Spanish authorities summarily expelled the asylum-seekers without hearing their case.²⁰⁰ In practice, this has led to some cases not being substantively examined within the EU before expulsion²⁰¹ and hence to instances of *chain-refoulement*.

Chain-refoulement also takes place through refugee determination procedures by a “safe” third country which itself has fallen short of minimum standards in crucial respects by

¹⁹⁶ ECRE 151.

¹⁹⁷ Dunstan, Richard, ‘Playing Human Pinball: the Amnesty International United Kingdom Section Report on UK Home Office “Safe Third Country” Practice’ (1995) 7 *International Journal of Refugee Law* 4 623.

¹⁹⁸ In this context it is worth noting that, while Art 32 (3) PD permits Member States to impose special procedures for subsequent applications including requirement on new facts/circumstances, Art 34 (2) states that such conditions for subsequent applications should not render access to a new procedure impossible nor result in the severe curtailment of such access.

¹⁹⁹ Council of Europe Parliamentary Assembly, ‘Restrictions on asylum in the member states of the Council of Europe and the European Union’, Doc. 8598, Committee on Migration, Refugees and Demography, 21 December 1999, para. 22; for examples, see Salignat, Claire, ‘The Stakes for Human Rights in the Dublin II Regulation: Underlying Principles and Practical Implementations’ (Raoul Wallenberg Institute/Lund, 2005), 71.

²⁰⁰ Amnesty International, ‘Passing the Buck: Deficient Home Office Practice in “Safe Third Country” Asylum Cases’ (1993), 610.

²⁰¹ Salignat, Claire, ‘The Stakes for Human Rights in the Dublin II Regulation: Underlying Principles and Practical Implementations’ (Raoul Wallenberg Institute/Lund, 2005), 151.

restricting access to asylum procedures, fair hearings and appeal possibilities.²⁰² For example, in an *ex post* analysis, the former Communist bloc countries that acceded to the EU in 2004 (Slovakia, the Czech Republic, Poland, Estonia, Latvia, Lithuania, Hungary and Slovenia) were questionable STCs for asylum-seekers to be returned to according to the Dublin Regulation. Before their accession to the EU, these countries were new democracies without experience in refugee determination procedures. Although it had signed the GRC in 1997, Lithuania expelled asylum-seekers and immigrants who had entered the country illegally, often to countries where their lives were at risk.²⁰³ In addition, serious doubts were expressed with regard to Poland and the Czech Republic due to their structural overload by taking back asylum-seekers according to readmission agreements or because of dubious legislation.²⁰⁴ In view of this situation, the then-UN High Commissioner for Refugees Ruud Lubbers publicly warned the EU Justice and Home Affairs Council on the eve of expansion in May of 2004 that the Dublin Regulation could overwhelm the asylum systems of the new border States like Slovakia and Poland. "A decade ago they had no asylum systems at all," Lubbers said, "What is going to happen if thousands of extra asylum-seekers are sent back to them from the inner EU countries?"²⁰⁵

For the year 2005, the first year of their membership to the EU, UNHCR published the following data for these selected countries:²⁰⁶

EU MS	recognition rates	
	refugee status	right to stay*
Slovakia	3	3
Greece	0.8	1.9
Czech Rep.	8.7	8.7
Hungary	11.3	22.9
Austria	42.6	49.7
Germany	62.2	73.5

²⁰² Council of Europe Meeting on Migration Issues, International Organization for Migration News, Memorandum of the Committee on Migration, Refugees and Demography of the Parliamentary Assembly of the Council of Europe, September/October 1996, 11; For examples concerning Lithuania, Greece and Italy, see Salignat, 71.

²⁰³ Abell, N.A., 'The compatibility of readmission agreements with the 1951 Convention relating to the status of refugees' (1999) 11 *International Journal of Refugee Law* 1, 67, fn 29 referring to Migration News Sheet that "has reported the comments of a Danish Immigration Service Legal Department Official who was told by Lithuanian officials that they take advantage of every opportunity to expel asylum seekers who enter the country illegally, they believe that by entering the country illegally, such asylum seekers violate Lithuanian laws and are therefore unlikely to qualify for refugee status." Migration News Sheet, October 1996, 9, available under <http://www.migrationnewssheet.eu>.

²⁰⁴ Achermann and Gattiker 36.

²⁰⁵ Healy, Alison, 'Warning by UN Commissioner on Asylum Regulations', *Irish Times*, 23 January 2004.

²⁰⁶ UNHCR, 'Asylum levels and trends in industrialized countries, 2005 overview of asylum applications lodged in Europe and non-European industrialized countries in 2005, 17 March 2006, <http://www.unhcr.org/44153f592.pdf>; UNHCR, '2005 Global refugee trends. Statistical overview of populations of refugees, asylum-seekers, internally displaced persons, stateless persons, and other persons of concern to UNHCR', 9 June 2006, available at: <http://www.unhcr.org/statistics/STATISTICS/4486ceb12.pdf> [accessed 16 June 2011].

For the three main countries of origin, the recognition rates were the following:

SERBIA AND MONTENEGRO			
EU MS	number of applications	recognition rates	
		refugee status	right to stay*
Slovenia	520	2.8	5.6
Germany	4,818	3.2	31
Hungary	243	6.5	23.4
Austria	4,409	29.5	35.3

IRAQ			
EU MS	number of applications	recognition rates	
		refugee status	right to stay*
Greece	971	0.1	0.2
Germany	1,895	29.8	51.1
Austria	221	55.3	79.1

RUSSIAN FEDERATION			
EU MS	number of applications	recognition rates	
		refugee status	right to stay*
Greece	343	0	22.2
Slovakia	1,031	0	0
Poland	5,015	15	67.8
Czech Rep.	260	31.1	31.1
Austria	4,362	83.9	91.3
Germany	1,663	93.3	95.4

* **right to stay** = refugee status + any title allowing the applicant to stay (temporarily) in the country (e.g.: Poland: “tolerated stay”)²⁰⁷

It is particularly alarming that recognition rates for asylum-seekers from a certain country or region range dramatically among EU MSs. In the case of asylum-seekers from the Russian

²⁰⁷ Glöde, Harald, ‘Polens Regierung setzt Flüchtlinge auf die Straße’, *Der Schlepper* 38, Spring 2007, citing the Office of Repatriation and Aliens, Warsaw.

Federation (mainly Chechens), high recognition rates in central EU MSs (e.g. Austria, Germany) contrast with alarmingly low recognition rates in Greece, which joined the EU in 1981, and new EU MSs, such as Slovakia. These numbers are even more dramatic since these border countries of the EU are very often responsible for asylum procedures according to the Dublin Regulation. It must be added that the increased numbers of returns can exert dangerous pressure on the already fragile asylum determination systems of the EU's border States. This pressure works as a disincentive for these States that are not capable of providing their own citizens with adequate social and medical treatment, to provide individuals seeking protection full access to fair asylum procedures. The natural consequence is that the affected States respond with unduly harsh measures of their own to "motivate" involuntarily returned refugees to move on. Another strategy seems to be followed, as could be read from the statistics, in Poland, where a high number of applicants are presumably not recognised as refugees, but receive the status 'tolerated stay', because this status provides its beneficiaries with almost no rights. Even though it does provide for a work permit, finding a job is extremely difficult in a country where 18% of the population is unemployed. In reality, many "tolerated" foreigners find themselves homeless and jobless. Some even choose to re-enter the asylum procedure, just to be able to stay in the centres, while others head west.²⁰⁸

To go more into detail: According to the official statistics of the Ministry of Interior of Slovakia, not a single asylum-seeker from the Russian Federation was granted asylum in 2005 and 2006.²⁰⁹ *Chain-refoulement*,²¹⁰ arbitrary reasons for non-recognition of refugees after their return from the requesting EU MS and alleged data exchange with the country of origin have been reported in case of asylum applications of Chechen refugees. In December 2005, circular letters from the Slovakian Foreign Ministry were reportedly added to every Chechen asylum-seeker's file: "Due to security reasons, asylum is not to be granted to Chechens".²¹¹ Hence, Chechens were seen as security risk. The reasoning given by the Slovakian authorities for non-recognition of Chechen refugees allows no possibility for Chechens to argue their

²⁰⁸ <http://www.unhcr.org/news/NEWS/43947275a.html>.

²⁰⁹ <http://www.minv.sk/mumvsvr/STAT/statistika.htm>. (accessed on 15 March 2011).

²¹⁰ Norwegian Refugee Council, Report on the Protection of Internally Displaced Persons, Asylum Seekers and Refugees from Chechnya, April 2005, p. 57; in 2006, 11 Chechens were transferred back to Slovakia and chain-refouled via Ukraine to the Russian Federation, where 8 persons are currently in prison (children in children-prisoner-camp), Chechen family who was refouled to Ukraine without any asylum procedure: interview with Mr. Banjaev; February 2007: Deportation of Chechens during pending asylum procedure to the Russian Federation where they were imprisoned and questioned by Russian translator who was voiced being proud of his good relations to the Russian military: Asyl in Not, "Schubhaft, Dublin und kein Ende", email of 16 February 2007.

²¹¹ Asyl in Not, 'UBAS: Slowakei nicht sicher!', 12 December 2005, available at: http://www.asyl-in-not.org/php/ubas_slowakei_nicht_sicher,12307,5041.html [accessed on 16 June 2011] citing expert Martin Skamla, Helsinki Committee.

individual cases: Slovakian authorities state that asylum-seekers who leave Slovakia for another EU MS have already proven that they are not looking for protection in Slovakia.

However, a 2006 report by the International Helsinki Federation for Human Rights reveals that this can lead to severe consequences for the asylum-seeker:

“While the confidentiality of personal data on asylum-seekers was legally protected, there were serious suspicions that in some cases in which the applicants had been detained before they filed their asylum claim and remained in detention pending decision, the aliens police leaked such information to authorities of the applicants’ countries of origin – and Slovak media, which used it for negative reporting – with the aim of receiving extradition requests from the countries of origin.

A Chechen asylum-seeker was deported to the Russian Federation in September while his asylum application was still being processed. He was arrested by Russian authorities at Sheremetyevo airport in Moscow upon his arrival, sent to prison in Groznyy, prosecuted, and tortured so badly that he had to be hospitalized. Two Chechen asylum-seekers were facing deportation upon the request Russian authorities at the time of this writing, while awaiting a final solution of their asylum claims.”²¹²

In the case of Greece, low recognition rates in the asylum system are also an issue of concern. UNHCR highlighted in March 2006 the multiple problems that refugees and asylum-seekers face in the country that “has one of the lowest rates for granting refugee status in the European Union”.²¹³ In 2004, for example, Greece granted overall recognition (including humanitarian status) to 0.9% of applicants; the average equivalent figure in other EU MS that year was 26.4%. In 2005, except for two cases, virtually all asylum-seekers were rejected at first instance, including medically certified torture survivors. The recognition rates remained disturbingly low in 2007 with 2.05%.²¹⁴ In 2008, Greece was, according to UNHCR statistics, in seventh place on the list of EU MSs in terms of the number of asylum applicants received, with a total of 19,880 applications lodged that year.²¹⁵ Eighty-eight per cent of the illegal foreign nationals who entered the EU in 2009 entered through Greece. In 2008, UNHCR reported a success rate at first instance (in relation to all the decisions taken) of 0.04% for refugee status under the GRC (eleven people), and 0.06% for humanitarian or subsidiary

²¹² International Helsinki Federation for Human Rights (IHF), *Human Rights in the OSCE Region: Europe, Central Asia and North America, Report 2007 (Events of 2006)* (2007).

²¹³ UN High Commissioner for Refugees, ‘New campaign highlights the difficulties of being an asylum seeker in Greece’, 16 March 2006, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&id=4419605f4> [accessed 15 June 2011].

²¹⁴ UN High Commissioner for Refugees, ‘Position on the Return of Asylum-Seekers to Greece under the “Dublin Regulation”’, 15 April 2008, available at: <http://www.unhcr.org/482199802.html>.

²¹⁵ UNHCR, ‘Asylum Levels and Trends in Industrialized Countries in 2009’, 2010.

protection (eighteen people) in Greece.²¹⁶ 12,095 appeals were lodged against unfavourable decisions. They led to 25 people being granted refugee status by virtue of the GRC. The respective success rates of appeals were 2.87% and 1.26%. By comparison, in 2008 the average success rate at first instance was 36.2% in five of the six countries that, along with Greece, receive the largest number of applications.²¹⁷

Greece also provides an alarming example of the poor quality of the asylum determination process. Although Greece acceded to the EU in 1981, it has been increasingly criticised since 1999 (sic!) due to the danger of absolute denial of access to a determination procedure through the practice of “interrupting” claims and by denying access to lodging an asylum claim.²¹⁸ A provision allowing the Ministry of Public Order to interrupt the examination of an asylum claim when the applicant “arbitrarily leaves his stated place of residence”²¹⁹ has been used in practice by the Greek authorities to “interrupt” the asylum claims of individuals who have transited illegally to other EU MSs to subsequently justify denying these individuals access to an asylum procedure once they are returned to Greece under the Dublin Regulation.²²⁰ The applicant, once back in Greece, is either met immediately with a deportation order or, if the imminent interruption decision is still to be issued, will remain for a brief period of time legally in the country until it is issued. This happens unless the asylum-seeker can prove that the arbitrary departure was due to reasons of “force majeure”. As such reasons can be rarely invoked to justify illegal departure from Greece, the decision to interrupt the asylum examination is very difficult to revoke. This decision always consists of the same reasoning: “[the asylum-seeker] arbitrarily left his place of residence and moved to [the name of the Member State in question]”. As a consequence, the asylum application is never examined substantively in any EU MS.

What is most alarming regarding this practice is that an interruption decision is subsequently issued even when Greek authorities have accepted responsibility for an asylum claim

²¹⁶ UNHCR, ‘Observations on Greece as a country of asylum’, December 2009, available at: <http://www.unhcr.org/refworld/docid/4b4b3fc82.html> [accessed 16 June 2011].

²¹⁷ France, the United Kingdom, Italy, Sweden and Germany, see UNHCR, ‘2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons’, 19 June 2009, available at: <http://www.unhcr.org/refworld/docid/4caee6552.html> [accessed 16 June 2011].

²¹⁸ See Skordas, Achilles, ‘Why Greece is Not a Safe Home Country for Refugees’ (2004) 16 *International Journal of Refugee Law* 1, referring to Skordas, Achilles, ‘The new refugee legislation in Greece’, (1999) 11 *International Journal of Refugee Law* 4 678-701, where he already expressed serious doubts as to whether Greece could be characterized as a safe host country.

²¹⁹ Article 2(8) of the Presidential Decree 61/99.

²²⁰ ECRE 151-2.

following a request by another State.²²¹ The dimensions of the problem provoked the reaction of UNHCR already in 2004. In its “Position on important aspects of refugee protection in Greece”, UNHCR stressed that interrupting the examination of asylum applications means that these applicants will never have the “chance to have their application examined in substance either by Greece or by the sending country” warning that “this [practice] often amounts to a breach of the 1951 Refugee Convention”.²²² On 15 April 2008, UNHCR expressed again concern asylum claims were deemed to be “interrupted” as a result of applicants leaving Greece before their claims had been decided:

“While a number of positive changes in the practice have been noticed in 2007, the legal framework underpinning the practice of 'interruption' continues to leave room for different interpretations and fails to guarantee that 'Dublin returnees' with 'interrupted claims' are granted access to the procedure. This situation calls into question whether 'Dublin returnees' will have access to an effective remedy as foreseen by Article 13 of the European Convention on Human Rights as well as Article 39 of the Asylum Procedures Directive. Of relevance is the decision taken by the European Commission on 31 January 2008 to refer a case to the European Court of Justice against Greece for the infringement of the Dublin Regulation based on Greece's failure to enact legislative amendments to abolish the practice of 'interruption'.”²²³

It has also been reported that lodging an asylum claim in the Greek asylum procedure has been denied to would-be applicants: In October 2005, allegations were raised by Amnesty International that people without documents were denied the possibility of lodging an asylum claim and were subsequently forced to swim across a river to Turkey.²²⁴ On 9 April 2008, the Norwegian Organisation for Asylum Seekers, the Norwegian Helsinki Committee and Greek Helsinki Monitor called on other EU MSs to apply Art 3 (2) DR and on the Greek authorities to review their asylum policy to bring into compliance with Greece's international obligations. Their report stated: “In our opinion the deficiencies in the Greek asylum process, documented through this report, entail that there is a discord between the preconditions on which the Dublin II Regulation was founded and procedural practices followed in Greece. In our opinion the Greek system does not guarantee even minimum basic legal protection for the asylum-seekers”.²²⁵ UNHCR’s position paper of 15 April 2008 also characterized the

²²¹ In 2004: After having arrived in Greece “illegally”, the refugee was, like most others who arrive in a similar manner, arrested and placed in detention. Initially no one informed him about his rights and he did not know how to apply for asylum. He was subsequently able to do so, and obtained the relevant documentation. After three months he was released and left for the United Kingdom. After detention of around six months in the United Kingdom, he was returned to Greece where he was informed that, as a result of his “unauthorized” departure, examination of his claim had been interrupted and it was not possible to pursue it any further. He was detained for another three months, then released and told to leave the country within a month: UNHCR, ‘How a man from Darfur cannot get his asylum claim heard in Europe today’, (6 December 2005), available at: <http://www.unhcr.org/news/NEWS/4395c3354.html> [accessed 16 June 2011].

²²² UNHCR 2006 5.

²²³ Footnotes omitted

²²⁴ Amnesty International 2005.

²²⁵ “A gamble with the right to asylum in Europe-Greek asylum policy and the Dublin 2 Regulation”, 43.

percentage of asylum-seekers who were granted refugee status as “disturbingly low” and criticized the quality of asylum decisions, noting in particular their short, standardized format and the absence of legal reasoning in some decisions. UNHCR advised the EU MSs to refrain from returning asylum-seekers to Greece under the Dublin Regulation until further notice. It also recommended that they make use of Art 3(2) DR and examine asylum applications themselves.

On 22 May 2008, the European Commission brought treaty violation proceedings against Greece for not adopting the laws, regulations and administrative provisions necessary to comply with the Qualification Directive.²²⁶

After his mission to Greece in October 2010, the UN Special Rapporteur on Torture concluded that “[t]he asylum procedure has collapsed and refugees are denied access to any meaningful refugee determination procedure. This puts them at a serious risk of refoulement, aggravated by the Readmission Agreement with Turkey allowing for the forcible return of aliens to Iran, Iraq and Syria”.²²⁷ The Special Rapporteur welcomed the steps taken by some EU States to halt all returns to Greece under the Dublin II Regulation and urged other States to “immediately suspend all returns under the Dublin II Regulation and to proceed with the refugee determination procedure”.²²⁸

As of January 2011, UNHCR maintains its position that transfers of asylum-seekers to Greece should not take place, due to ongoing concerns about systemic problems in the Greek asylum and reception systems, and the resulting situation of asylum-seekers, including those subject to the application of the Dublin Regulation.²²⁹

bb. Rebuttal of safety presumption

National jurisprudence on “Dublin” has been considerably diverse, allowing for the asylum applicant to rebut the safety presumption (1) or denying it to him (2).

²²⁶ Case C-220/08.

²²⁷ Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the Human Rights Council, U.N. Doc. A/HRC/16/52/Add.4, 4 March 2011, para 83.

²²⁸ *Ibidem*, Para 90b.

²²⁹ UN High Commissioner for Refugees, *Asylum Situation in Greece Including for Dublin II Transferees*, 31 January 2011, available at: <http://www.unhcr.org/refworld/docid/4d76103e2.html> [accessed 7 July 2011].

1. Possibility of rebuttal vis-à-vis the following circumstances

In the course of enlargement of the EU, national courts and administrative tribunals have expressed doubts about whether all EU MSs can be considered STCs, due to precarious conditions awaiting the asylum-seeker (a) as well as deficiencies of certain countries' refugee determination procedures (b).

a. Precarious conditions

In February 2008, Norway became the first country to suspend the return of asylum-seekers to Greece following concerns about possible breaches of their rights. Amnesty International reacted on this decision with a press release: "We consider the decision to be particularly important in light of the poor conditions in which immigration detainees are held in Greece, and the lack of legal guarantees with regard to examination of their asylum claim. We call on Member States to make use of Article 3.2 of the Dublin II Regulation allowing Member States to examine an asylum application".²³⁰ Some weeks later, a Swedish court refused the extradition of a (handicapped) Iraqi asylum-seeker to Greece, following concerns that he would not receive proper treatment in the Mediterranean country. In March of that year, a Swedish court stopped the transfer of a disabled Iraqi man to Greece, and in May, the Swedish Migration Board suspended returns of unaccompanied children to Greece, citing the Greek practice of detaining them for three weeks upon return.²³¹ In October 2010, Austria's Constitutional Court restricted the return of asylum-seekers to Greece under the DR, judging the return of vulnerable asylum seekers to Greece unconstitutional and accepted the petition of an Afghan mother with three small children that she remain in Austria.²³² The court said that Austrian authorities must first obtain assurances from Greece that individuals requiring special protection - such as mothers with small children, sick people or unaccompanied minors - will receive adequate care, otherwise the readmission process must be discontinued. According to the ruling, due to the poor conditions for the care of asylum seekers, their return to Greece could lead to a violation of Art 3 ECHR.

²³⁰ 28 February 2008 and entitled "No place for an asylum-seeker in Greece".

²³¹ The Swedish Migration Board appealed the decision, and the Migration Court of Appeals sent the case back to the lower court for a new hearing. The head of the Swedish Migration Board, Dan Eliasson, said, "We can't stop deportations to Greece simply because they have lousy conditions in their reception centres, such as dirty mattresses, poor toilets, and sometimes no living quarters whatsoever. Such things aren't grounds to stop deportations in the EU." Quoted in ----- "Sweden Halts Return of Child Asylum Seekers to Greece", TT/The Local, May 7, 2008, <http://www.thelocal.se/10406/20080311/> [accessed 11 September 2008].

²³² Application No. U1441/10 ua, 13 October 2010.

b. Deficiencies in the asylum procedure

Only British courts have decided that Dublin removals should be generally precluded when onward removal to unsafe countries is likely.²³³ In the United Kingdom, from September 1994 through December 1995, 43.6% of Home Office determinations that another EU MS constituted a STC were referred back to the Home Secretary on appeal on grounds of safety. All challenges of the STC presumption with regard to Austria were successful, as were 90.2% concerning Italy, 66.6% concerning Sweden, 50% concerning both Spain and Portugal, 44% concerning France, 43.8% concerning the Netherlands, and 25% concerning Germany”.²³⁴ Success in the appeals procedure depends on the decision maker’s opinion on the general safety of the country, and sometimes on the day of decision, as the officer may change his opinion from day to day.²³⁵

This early British “Dublin”-sceptical jurisprudence was hindered by the introduction of an irrebuttable statutory presumption that EU MS are safe for the purpose of return.²³⁶

However, again in the case of Greece, a number of national decisions to transfer the applicant there were successfully challenged in 2005 due its aforementioned practice of “interrupting decisions”.²³⁷

In late April 2008, Finland announced that it would suspend transferring migrants to Greece unless it received written assurances from Greece that they would be fairly processed.²³⁸ In Austria, the second instance ruled in October 2008 that, due to the knowledge of the situation in Greece and the need for individual assessment, it had become necessary to instigate more detailed inquiries into the problems claimed by the applicant and requested that information be provided via a statement from the Greek authorities.²³⁹

²³³ Ex p *Adan and Aitseguer*, *R v Secretary of State for the Home Dept* [2001] 2 AC 477. See further, Noll, Gregor, ‘Formalism Versus Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law’ (2001) 70 *Nordic Journal of International Law*; Nicol, QC A and Harrison, Stephanie, ‘The Law and Practice of the Application of the Dublin Convention in the United Kingdom’ (1999) 1 *European Journal of Migration and Law* 4, 465; and from the point of view of international comity, Endicott, Timothy, “‘International Meaning’: Comity in Fundamental Rights Adjudication’ (2002) 13 *International Journal of Refugee Law* 3, 280.

²³⁴ Dunstan 634-7.

²³⁵ For examples, see Dunstan 636.

²³⁶ On jurisdiction until 1999, see Nicol and Harrison 465.

²³⁷ This was the case in Austria, Finland, France, the Netherlands, Slovenia, Sweden, Italy, Norway and the United Kingdom: ECRE 166.

²³⁸ Phillips, Leigh. ‘Finland Halts Migrant Transfer to Greece after UN Criticism,’ *EU Observer*, 21 April 2008, <http://euobserver.com/9/26016> [accessed 11 September 2008].

²³⁹ S11 400985-2/2008/2E, http://www.ris2.bka.gv.at/Dokumente/AsylGH/ASYLGHT_-20081029_S11_400_985_2_2008_00/ASYLGHT_20081029_S11_400_985_2_2008_00.pdf.

2. Impossibility of rebuttal vis-à-vis the following circumstances

Some domestic jurisprudence have stuck to the Dublin Regulation's fiction; others have again reversed their position that certain EU MS are not STC and again do not allow applicants to rebut the safety presumption regarding both the precarious conditions awaiting the asylum-seeker (a) and deficiencies of the country's refugee determination procedure (b).

a. Precarious conditions in the "safe" third country

The German Constitutional Court's Decision of 14 May 1996 upheld the constitutionality of the STC concept in German law. The decision declared that the safety presumption in third countries cannot be refuted in individual cases and stated that the decision on return can be implemented immediately.²⁴⁰ It stated that the principle of "*normative Vergewisserung*" (normative assurance) and the ECtHR's jurisprudence on Art 3 ECHR meant that a legal challenge would only be successful when the individual concerned could bring forward a "highly substantiated claim" and "attested exceptional circumstances" to make additional investigations necessary or unsettle the principal safety presumption. The reasons claimed by the applicant must be evidence of a "real risk" of persecution for the individual applicant.²⁴¹ In this sense, general situation reports or a possible arrest in case of transfer were not enough to substantiate the probability of a human rights violation. The necessity for these high demands was argued by the danger of having the effective implementation of the Dublin Regulation undermined by a lower threshold.

b. Deficiencies in the asylum procedure

At present, some States do not permit challenges to be raised on protection grounds. This is the case in Germany, Greece, Hungary and Austria as well as, after the discussed change of jurisprudence by introduction of an irrebuttable safety presumption, the United Kingdom.

²⁴⁰ Abell, N.A., 'The compatibility of readmission agreements with the 1951 Convention relating to the status of refugees' (1999) 11 *International Journal of Refugee Law* 1, 73, referring in fn 58 to Marx, Reinhard and Lumpp Katharina, 'The German Constitutional Court's Decision of 14 May 1996 on the Concept of "Safe Third Countries"- A Basis for Burden-Sharing in Europe?', (1996) 8 *International Journal of Refugee Law* 3 419.

²⁴¹ Despite no general necessity to doubt the protection from persecution in an EU MS that is responsible for the asylum procedure according to Dublin II, this assumption is disproved if the applicant can accredit special reasons for a "real risk" of persecution:

www.ris.bka.gv.at/taweb-cgi/taweb?x=d&o=l&v=vwgh&db=VwGHT&t=doc4.tmpl&s={JWT/2006010949/20070123X00.

The British Government amended the UK Immigration and Asylum Act, stating that a Member State of the EU with which there are standing arrangements, such as the Dublin Convention, for determining which State is responsible for considering applications for asylum, is to be regarded as a place from which a person will not be sent to another country otherwise than in accordance with the GRC.²⁴² Besides this change of legislation, the House of Lords retreated from its “Dublin”-sceptical jurisprudence in the later decisions (*R (Yogathas) v Secretary of State for the Home Department* and *R (ex p Zeqiri) v Secretary of State for the Home Department*).²⁴³ The House of Lords stressed in these cases the importance of the “anxious scrutiny test”, but argued that courts should not interfere with a sovereign State Party to the GRC, even if that State would not perform the obligations it had solemnly undertaken. According to these later decisions, only “significant differences” should be allowed to prevent return in such cases.

In the judgment *Yogathas*, the House of Lords considered the issue of the acceptability of an expedited or summary procedure, in which procedural safeguards are compromised in order to achieve efficiency. Lord Hutton noted the “tension between the need to make use of an accelerated procedure to enable the arrangements under the Dublin Convention to operate effectively and the duty to recognize the human rights of a person who, once he is in the United Kingdom, is entitled to the protection given by [relevant human rights guarantees]”.²⁴⁴ The concerns regarding efficiency won out, but it must be added that they at least were found not to obviate the need for the court to subject the decision to transfer a refugee “to a rigorous examination.”²⁴⁵ However, in *R (ex p Zeqiri) v Secretary of State for the Home Department*, the effective operation of the Dublin Convention was the only pivotal prerogative: “While therefore I entirely accept that Mr Zeqiri’s wish to remain in the United Kingdom is an important matter to be taken into account, I do not think that it justified the courts in placing unnecessary obstacles in the way of the *administration of the Dublin Convention*”.²⁴⁶

²⁴² U.K. Immigration and Asylum Act 1999, entry into force on 2 October 2000, Section 11.

²⁴³ *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36, United Kingdom: House of Lords, 17 October 2002

²⁴⁴ *Ibidem*, p. 74. Note also language in the opinions of Lord Hutton, id. p.72 (“The European Court on occasion considers a case in considerable detail before holding that the applicant’s complaint is manifestly ill founded ...”), Lord Bingham of Cornhill, id. p.14 (“The Home Secretary must carefully consider the allegation, the grounds on which it is made and any material relied on to support it.”), and Lord Hope of Craighead, id. p.58 (balancing the use of accelerated removal procedures with refugee protections under the Geneva Conventions and the ECHR “places a special responsibility on the court in its examination of the decision making process ... The basis of the decision must surely call for the most anxious scrutiny”).

²⁴⁵ *Ibidem*.

²⁴⁶ *Regina v. Secretary of State for the Home Department, Ex parte Zeqiri*, [2002] UKHL 3, United Kingdom: House of Lords, 24 January 2002, available at: <http://www.unhcr.org/refworld/docid/403f3edd4.html> [accessed 24 June 2011] para 59.

To refer to the example presented in the introduction to this thesis, it may be added that, by the jurisprudence of the national courts of Austria, the “new” EU MSs Slovakia, the Czech Republic, Hungary and Slovenia were not considered STCs for asylum-seekers before their accession to the EU. Since their accession to the EU, the safety presumption could have been disproved, as the asylum authorities were obliged to apply the sovereignty clause, which is understood as a self-executing provision which has to be applied when constitutional rights are violated.²⁴⁷ However, since the EU enlargement on 1 May 2004, the first and second instances have never ruled that any of these new EU MSs is unsafe for the applicant with the argumentation cited in the introduction to this thesis.

For the procedure of STC in general, it must be added that its repeated application leads to “refugee in orbit”-situations. These cases are not rare. For instance, UNHCR described the situation in March 1995 of a group of more than 100 would-be asylum-seekers who were shuffled several times between Latvia, Russia, and Lithuania as none of the countries would accept responsibility for examining the asylum claims.²⁴⁸ Even within the Dublin region, orbit situations continue. For example, cases have been reported in which asylum-seekers have entered Italy, Spain, Portugal, and Greece in transit to the United Kingdom, which has returned them to these “first asylum” States, which have then returned the asylum-seekers back to the United Kingdom.²⁴⁹ Another striking example of chain-removal must also be cited: an Iraqi woman had fled from Iraq to Germany, via Turkey and Greece in 1997. Upon arrival in Germany, the border police refused the woman access to refugee status determination procedures on the grounds that Greece was considered a “safe” country and she could have applied there, despite the fact that she spent only a few hours there in transit to Germany. However, Greece does not accept asylum applications from persons who do not come directly from the country of persecution, so her travel through Turkey disqualified her from access to asylum procedures in Greece. Instead, Greece would return the woman to Turkey. Yet, Turkey applies the geographical limitation of the GRC (limiting refugee status to European applicants) and as an Iraqi, the woman was therefore ineligible for refugee status under Turkish law. Through a chain-removal back to Turkey, therefore, the woman was subjected to *refoulement* back to her country of origin and feared persecution.²⁵⁰

²⁴⁷ Higher Administrative Court to the Dublin Agreement, 99/01/0446 of 18 February 2003.

²⁴⁸ Dunstan 611.

²⁴⁹ Amnesty International 5.

²⁵⁰ Vevstad, Vigdis, ‘Refugee Protection: A European Challenge’ 148 (1998), 267-8.

“Refugee in orbit” situations are further exacerbated by the existence of readmission agreements between EU MS and non-EU MS that govern not only the readmission of a country’s own citizen but also in general the expulsion of citizens of third countries and the transit of third-country citizens through the territory of the contracting State to a destination State. The non-EU MS again have concluded similar agreements with other States that “foreshadow an endless sequence of deportations for asylum-seekers who seek refuge in a distant country”²⁵¹ and who can end up being returned to the persecuting State.²⁵² The situation has developed as foreseen by Achermann and Gattiker in 1995: there are two circles, an inner circle consisting of the Dublin Regulation signatories who acknowledge their obligation to examine asylum applications but do not conduct asylum procedure because they send the asylum-seekers to host third countries; and an outer circle of non-signatory States that accept asylum-seekers but are themselves not obliged to carry out asylum procedures. They in turn will try to send back the aliens to another country, producing “refugees in orbit”.²⁵³

Conclusion

It can be concluded that it is asylum officers with an often prejudiced approach towards the asylum-seeker and/or biased sources at hand who determine the need for refugee and *refoulement* protection with the legal possibilities of the “safe country” concepts- which they have been instructed to apply.

However, as analyzed in this chapter, precarious conditions that put the life of the individual concerned at risk can indeed exist in the assumed safe country. While a presumably safe country can *in realiter* be precarious due to the living or detention conditions awaiting the asylum-seeker there, a declared STC can, because of deficiencies of its asylum procedure, pose the risk of chain-*refoulement*. In contrast to the STC legislation for non-EU MSs, the STC procedure for EU MSs (the Dublin Regulation) is almost persistently applied. The “Dublin” system is not only questionable in terms of the factual conditions, but also regarding the individual procedure on asylum and *refoulement* awaiting the asylum-seeker in the STC. As shown by research, some asylum-seekers may be sent back to a “safe” third EU MS where they have either had no access to a substantive asylum- and hence *refoulement*- procedure, or the asylum procedure offered has not been fair, e.g. with highly restrictive recognition rates

²⁵¹ Borchelt 507.

²⁵² Achermann and Gattiker 37.

²⁵³ *Ibidem*.

for asylum-seekers from a certain region compared to other EU MSs. Therefore, when entering the EU, asylum-seekers enter the space of the Dublin Regulation's "protection lottery".

In the face of this reality, asylum-seekers have often been hindered from rebutting the safety presumption in the removal procedure. As for SCO procedures for non-EU MSs, the possibility of having a substantive interview has been reduced in some Member States and divergence was revealed with regard to the opportunity given to applicants to rebut the safety presumption. As for SCO procedures on EU MSs, the impossibility of challenging the safety presumption was exemplified by cases concerning politically active or Roma citizens of new EU MS, such as Romania and Slovakia.

As for STC procedures for non-EU MSs, the omission of the interview is possible in some Member States, and the impossibility of rebuttal commonly relies on formal ratification of the GRC as the sole criterion justifying removal. As for STC procedures for EU MSs, numerous domestic jurisprudences have adhered to the Dublin Regulation's fiction and, regarding deficiencies of the STC's asylum procedure, have not permitted challenges to be raised on protection grounds- the respective STC sometimes having become safe overnight following its accession to the EU.

Hence, in its practical application, the "safe country" concepts have led to the introduction of fast-tracked single procedures on asylum and *refoulement* that in practice cause interviewers to neglect their fact-finding responsibilities on both issues and make it more difficult for genuine refugees to demonstrate the validity of their claims.²⁵⁴ In other words: where the "safe country" concept does not serve as an absolute bar to the submission of claims by asylum-seekers from specified States by denying them an effective opportunity to have their claims on asylum and *refoulement* assessed,²⁵⁵ it may nevertheless produce damaging consequences for both issues.²⁵⁶

²⁵⁴ Byrne and Shacknove 215.

²⁵⁵ Byrne and Shacknove 219.

²⁵⁶ Byrne and Shacknove 215.

III. The “direct balancing approach” and the “complicity principle”

The previous chapters have supplied evidential proof that the application of the EU’s SCO and STC concepts have been used by EU Member States to the detriment of asylum-seekers due to a wide margin of appreciation regarding the facts of the case, the assessment of the conditions in the receiving State, and the assessment of the risks at stake,²⁵⁷ raising the same fundamental concern: the protection from *refoulement*.²⁵⁸ In this chapter, the author presents analytical tools for the further discussion of necessary safeguards to guarantee the compatibility of these “safe country” concepts with the principle of non-*refoulement*, namely the “direct balancing approach” and the “complicity principle”.

It is well-known that the “safe country” procedure is not unlawful *per se*, as there is no right to asylum guaranteed under international law. In the case of human rights law, Art 14 of the Universal Declaration of Human Rights (UDHR) provides only a right to “seek” and to “enjoy” asylum, not *per se* a right to asylum.²⁵⁹ The right to “seek” is interpreted by Battjes to be the right to request, not to receive asylum: “it is a right *vis-à-vis* the country of origin, not the requested state”.²⁶⁰ Likewise, neither the UN human rights treaties nor the ECHR contain the right to admission to a certain country.²⁶¹ According to the ECtHR’s case-law, Contracting States have the right to control the entry, residence and removal of aliens.²⁶² In addition, neither the ECHR nor its Protocols confer the right to political asylum.²⁶³ The GRC, which defines the concept of asylum and refugee status, also does not provide for a right to asylum.

²⁵⁷ Einarsen 373.

²⁵⁸ Goodwin 1996 393.

²⁵⁹ The Universal Declaration of Human Rights. 10.12.1948, United Nations Treaty Series.

²⁶⁰ Battjes, European Asylum Law, 8, referring to Grahl-Madsen, “The status of refugees in international law”, vol II, 1972, Leyden, AS.W. Sijthoff, 100-101 and 104-105.

²⁶¹ *Soering v. the United Kingdom*, application No. 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989, para 102; *Nsona v. the Netherlands*, application No. 63/1995/569/655, Council of Europe: European Court of Human Rights, 26 October 1996, para 92.

²⁶² *M.S.S. v. Belgium and Greece* 124, referring to *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 15/1983/71/107-109, Council of Europe: European Court of Human Rights, 24 April 1985, available at: <http://www.unhcr.org/refworld/docid/3ae6b6fc18.html> [accessed 17 July 2011] 67, and *Boujlifa v. France*, application no. 25404/94, Council of Europe: European Court of Human Rights, 21 October 1997 para 42.

²⁶³ Van Dijk 427; *M.S.S. v. Belgium and Greece* 124, referring to *Vilvarajah and others v. the United Kingdom*, application no. 45/1990/236/302-306, Council of Europe: European Court of Human Rights, 26 September 1991, para 102, and *Ahmed v. Austria*, application no. 71/1995/577/663, Council of Europe: European Court of Human Rights, 17 December 1996, para 38.

The principle of non-*refoulement* implies both negative and positive obligations. The negative obligation not to remove is also called “indirect” protection, because it aims to prevent Contracting States of the ECHR from putting persons under their jurisprudence in concrete danger in another State. Indirect protection creates a peculiar legal situation whereby effects of Convention rights can be related to the domestic jurisprudence of a State which is not party to the ECHR.²⁶⁴ Regarding the extent of this negative obligation, the ECtHR stated, on the one hand, in *Soering v. the United Kingdom*, that, “in so far as a measure of extradition has consequences adversely affecting the enjoyment of a Convention right, it may, assuming that the consequences are not too remote, attract the obligations of a Contracting State under the relevant Convention guarantee”.²⁶⁵ This formulation indicates the possibility, but also exceptionality of the imposition of this negative obligation by the ECHR.²⁶⁶ In the latter sense, the ECtHR clarified in *F. v. the United Kingdom* that in the context of asylum and “on a purely pragmatic basis, it cannot be required that an expelling state only returns an alien to a country which is in full and effective enforcement” of all the ECHR rights.²⁶⁷ And in 1989, the Court reiterated: “Article 1 [...] cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention”.²⁶⁸

However, positive obligations can also be derived from the principle of non-*refoulement*. According to an interpretation of the ECHR, protection from *refoulement* can be safeguarded by developing positive obligations regarding the removal procedure. As it more correctly reflects countries as contractual parties in the context of international law, this paper will use in this following analysis the synonymous term “State” instead of “country”.

The “direct balancing approach”, as an analysis tool for the discussion, encompasses two steps: one of abstract balancing (A) and one of individual balancing (B).

²⁶⁴ Ermacora, 155 and 161.

²⁶⁵ *Soering v. the United Kingdom* paras 85-6.

²⁶⁶ Noll 2000 457.

²⁶⁷ *F. v. the United Kingdom*, 17341/03, Council of Europe: European Court of Human Rights, 22 June 2004, available at: <http://www.unhcr.org/refworld/docid/414d874b4.html> [accessed 23 May 2011], p.12.

²⁶⁸ *Soering v. the United Kingdom* para 86

A. Abstract balancing: gravity

In the first step, Convention rights that could be violated upon removal must be qualified. Noll seconds Zühlke and Pastille, who suggest that all rights are principally capable of possessing non-*refoulement* properties which are limited by a “direct balancing” of the interest of the persons to be removed against those of the removing State:

“The legitimate interests of the State must be held directly against the freedoms the individual derives from every provision. [...] Foreseeable extraterritorial effects of extradition are imputed to the State and described in terms of all the Conventional freedoms, but may be justified by the interests of the State pertaining to extradition and expulsion. In other words: The Court expanded the scope of the Convention into extradition, but contained the expansion by *directly balancing* the State’s interest against those of the individual.”²⁶⁹

States’ interest in limiting of their responsibility-taking is clear here. The ECtHR’s formulation in *Soering v. the United Kingdom* supports this approach:

“[I]nherent in the whole of the Convention is a search for a *fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights*.”²⁷⁰

For clarification, the important difference between this form of direct balancing and that proposed by the dissenting judges in *Chahal v. the United Kingdom* should be underlined.²⁷¹

While Zühlke and Pastille balance in order to analyze whether an ECHR right was violated, the dissenters in *Chahal v. the United Kingdom* wanted to balance an established violation of an ECHR right against State interest. This would take place after a first balancing to establish the existence of a violation, which would be contrary to Art 15 ECHR.²⁷²

The first step of Noll’s search for non-*refoulement* properties in an ECHR right regards the question of its applicability, hence the gravity of the risked violation. If a provision has been found to be applicable, this means that it reached the respective gravity in the balancing process of the interest of the State. In such a case, the second step follows.

²⁶⁹ Zühlke and Pastille 783, emphasis added.

²⁷⁰ *Soering v. the United Kingdom* para. 89, emphasis added.

²⁷¹ Joint partly dissenting opinion of Judges Gölcüklü, Matscher, Sir John Freeland, Baka, Mifsud Bonnici, Gotcheb and Levits.

²⁷² Zühlke and Pastille 769.

B. Individual balancing: probability and predictability

In this second step, the parameters of the obligations of the respective right to impede removal are analysed.²⁷³ This step is crucial, as it brings in two important limitations taking into account the State's possibilities: the probability of the risk and its predictability. The question on the necessary probability and predictability of the risk brings in the considerations of the individual case and concerns the standard of proof (1) and burden of proof (2).

1. Standard of proof

As stated by Goodwin-Gill:

“How is the existence of a violation to be determined, but on the evidence, on the facts, and according to a particular standard of proof. And the standard? Yes, *that* is the question.”²⁷⁴

The term “standard of proof” means, in considering an applicant's responsibility to prove facts in support of his refugee claim, the threshold to be met by the claimant in persuading the decision-maker of the truth of his factual assertions.²⁷⁵ Legomsky's “complicity principle” with its “variable standard of proof” comes to the aid for the answer on the crucial question which level of standard of proof is to be met by the applicant.

The “complicity principle” focuses on Art 16 (a) of the International Law Commission's Draft Articles on State Responsibility: “A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if [...] that State does so with knowledge of the circumstances of the internationally wrongful act”.

As the discussion of a possible threat in the receiving State can only be initiated by information, the parameter of predictability is examined first: The crucial parameter in Art 16's analysis is knowledge. However, knowledge is difficult to define. In 1996, the previous version of Art 16, Art 27, was adopted in a version requiring that the aid be “rendered for the

²⁷³ Noll, *Negotiating Asylum*, 468.

²⁷⁴ Goodwin-Gill, Guy, ‘Safe Country? Says Who?’ (1992) 4 *International Journal of Refugee Law* 2, 249.

²⁷⁵ Gorlick, Brian, ‘Common burdens and standards: Legal elements in assessing claims to refugee status’ (2003) 15 *International Journal of Refugee Law* 3, 9.

commission” of the other State’s internationally wrongful act.²⁷⁶ This wording was replaced by the requirement that the assisting State act “with knowledge of the circumstances”. However, the Official Commentary to the Articles on State Responsibility interprets Art 16 in at least three places as requiring aid to be given “with a view toward facilitating” the internationally wrongful act,²⁷⁷ and suggests even in two other places that the aid must be “intended to facilitate” the violation.²⁷⁸ For Legomsky, the change in the wording suggests a deliberate decision to replace a purpose requirement with a knowledge requirement.²⁷⁹ Furthermore, the fact that the commentary is not reconcilable with the text leads for him to the assumption that the text is the relevant source.²⁸⁰ Consistency can even be possible if the term “intended” is understood in the broad sense in which Anglo-American criminal law and tort law use that term, i.e. one “intends” a consequence if one either consciously desires its occurrence or “knows” that the consequence is practically certain to result from the actor’s conduct.²⁸¹ Hence, only awareness of an internationally wrongful act is required.

This leads us to the parameters of probability and predictability: what degree of awareness is required? Awareness of a probability of 25%, 50% or 75%? Or in again unclear wording that is open to interpretation: Awareness of a high or significant probability? That the violation by the third country is reasonably foreseeable by the destination country? That, as worded in Art 3 CAT, there are “substantial grounds for believing that [the person] would be *in danger*” of the particular violation? Or, to use the terminology from *Soering v. the United Kingdom*, “substantial grounds for believing there is a *real risk*” that the third country will violate the person’s rights?²⁸² Or a “deep conviction” (“intime conviction” in French law)?²⁸³

The most convincing approach, from an argumentative as well as a practical point of view, is Legomsky’s: It draws on the literature that considers how best to determine the proper standard of proof for finding facts in civil as well as criminal courts of law.²⁸⁴ Justice Harlan of the United States Supreme Court once observed that

²⁷⁶ Legomsky, Stephen, ‘Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: the Meaning of Effective Protection’ (2003) 15 *International Journal of Refugee Law* 4, 226.

²⁷⁷ Comments 1, 3 and 5.

²⁷⁸ Comments 5 and 9.

²⁷⁹ Legomsky 621.

²⁸⁰ Legomsky 622, with argumentation for reconciliation even.

²⁸¹ *Ibidem*, citing as example in fn 227 Wayne R. Lafave, *Criminal Law* (3rd ed. 2000), Section 3.5(a); cf. American Law Institute, *Restatement II of Torts* (1965-1977), Section 8A (actors either “desires” consequence or “believes” consequence is “substantially certain” to result).

²⁸² *Soering v. the United Kingdom* para. 91.

²⁸³ Legomsky 622, fn 230, referring to Brian Gorlick 4 (observing that this standard of proof is sometimes used to determine whether applicant qualifies as refugee).

²⁸⁴ Legomsky 623-5.

“The selection of a particular standard of proof – balance of probabilities, proof beyond a reasonable doubt, etc.- influences the relative distribution of the opposing types of errors that can occur. The higher the standard of proof, the higher becomes the probability of an error in favour of the defendant, but the lower becomes the probability of an error in favour of the plaintiff or prosecution. That being the case, he said, a *rational way to select the appropriate standard of proof for any category of case would be to ask how harmful an error in either direction would be*. In a criminal case, where the legal system makes the judgment that an erroneous conviction is worse than an erroneous acquittal, for example, the standard of proof is set high.”²⁸⁵

Legomsky further refers to analogous reasoning in the law of negligence. To measure the reasonableness of an actor’s conduct, a court generally balances the social utility of the conduct against the probability and the gravity of the harm it might cause. For a given level of social utility, therefore, the more serious the potential harm, the lower the acceptable probability of its occurrence.²⁸⁶

The result of this approach is a “variable standard of proof”: The question on the necessary probability of risk can only be answered in a relative manner, because proportionality must persist between the predictability and the gravity of the respective anticipated violation.²⁸⁷

The probability of risk hence does not vary between the different protective provisions of a treaty, but between the degrees of violation of each provision in the respective case: “If the right is unusually important, then perhaps any reasonable basis for fearing that the third country will violate the right should be regarded as ‘knowledge’ for purposes of the destination country’s responsibilities.”²⁸⁸ In other words: “The level of knowledge about a risk required will vary inversely with the seriousness of the potential harm”.²⁸⁹

However, it is unclear how this variable standard of proof should be applied. A categorisation of rights and a respective application of a fixed standard for each category seem impractical. Legomsky mentions the objection that a continuum approach has the one large disadvantage that the lack of any clear principles of international law for specific standards of proof for specific rights would mean that, until such standards evolve, the decision by destination countries in which violation is “foreseeable” would be “indeterminate, unpredictable, and therefore, subject to manipulation”,²⁹⁰ the process of selecting the standards of proof would

²⁸⁵ Legomsky 623, emphasis added.

²⁸⁶ Legomsky 623, fn 232, referring to the famous opinion of Judge Learned Hand in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2nd Cir. 1947).

²⁸⁷ Einarsen, Terje, ‘The European Convention of Human Rights and the Notion of an Implied Right to de facto Asylum’, 2 *IJRL* 361, (1990), 371.

²⁸⁸ Legomsky 623.

²⁸⁹ Legomsky 624.

²⁹⁰ *Ibidem*.

leave too much power in the hands of unelected judges and other- in our case- refugee adjudicators. However, this “sea of discretion”²⁹¹ of adjudicators is a reality that has already had detrimental consequences: without much hard law or training to lead them, their discretion is endemic throughout the whole refugee determination procedure: they decide what standard of proof is necessary for the “well-founded fear” of a refugee, whether “life would be threatened” by *refoulement* (Art 33 GRC), and juggle with probabilities.²⁹² Not only the different States’ high courts have applied various wordings,²⁹³ but also within a State, differences from office to office, even from adjudicator to adjudicator are reality.

2. Burden of proof

It is well-established in the ECtHR’s case-law on Art 3 ECHR that “the fundamentally important prohibition against torture and inhuman and degrading treatment under Article 3, read in conjunction with Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention”, imposes an obligation on Contracting States not to expel a person to a country “where *substantial grounds have been shown* for believing that he would face a real risk of being subjected to treatment contrary to Article 3”.²⁹⁴ The term “*substantial grounds have been shown*” seems to have the connotation of a high burden of proof on the side of the applicant. Also on the discussion of the level of burden of proof, Legomsky’s “complicity principle” is the most convincing approach, from an argumentative as well as a practical point of view.

Conclusion

As “safe country” concepts are not unlawful *per se*, an analysis tool for the discussion of necessary safeguards to guarantee their compatibility with the principle of non-*refoulement* was presented: the “direct balancing approach” and the complicity principle’s “variable standard of proof” will provide a framework for the discussion of the protection of asylum-seekers from *refoulement* by the ECHR by developing positive obligations regarding the

²⁹¹ Legomsky 624.

²⁹² *Ibidem*.

²⁹³ *Ibidem*.

²⁹⁴ See, amongst other authorities, the judgment *Ahmed v. Austria* paras 39-40.

removal procedure, being within the EU except in Ireland combined with the asylum procedure in one single procedure.

The “direct balancing approach” encompasses two steps: The first step of abstract balancing for the search for non-*refoulement* properties in an ECHR right regards the question of its applicability, hence the gravity of the risked violation. If a provision has been found to be applicable, this means that it reached the respective gravity in the balancing process with the interest of the State. In such a case, the second step of individual balancing follows: the parameters of the obligations of the respective right to impede removal are analysed. This step is crucial, as it brings in two important limitations taking into account the State’s possibilities: the probability of the risk and its predictability. The question on the necessary probability and predictability of the risk brings in concerns on the standard of proof and burden of proof. On the discussion of their level, Legomsky’s “complicity principle” is the most convincing approach, from an argumentative as well as a practical point of view. It defends a “variable standard of proof”: The question on the necessary probability of risk can only be answered in a relative manner, because proportionality must persist between the predictability and the gravity of the respective anticipated violation. The probability of risk hence does not vary between the different protective provisions of a treaty, but between the degrees of violation of each provision in the respective case.

IV. Protection from *refoulement* by Art 3 ECHR in the removing State's single procedure: Development of positive procedural obligations by the “direct balancing approach”

This chapter will develop positive obligations regarding the removing State's single procedure on asylum and *refoulement* by critically analyzing the ECtHR's relevant jurisprudence through the lenses of the direct balancing approach. The approach's parameters of gravity, probability and predictability can be identified in the ECtHR's wordings that "substantial grounds have been shown for believing that the person concerned [...] faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment". The first element concerns the particular treatment constituting a human rights violation in the target country, i.e. gravity (A). The second element concerns a certain probability and predictability that this situation occurs, i.e. the issues of standard and burden of proof (B).

A. Gravity equals insecurity

The logic of the concept of “gravity” is that a State into which a transfer is prohibited by *refoulement* is not safe in the opinion of the ECtHR. Hence, the term “gravity” coincides with the non-existence of “safety” in the receiving state. In other words, gravity addresses the material scope of protection by the principle of non-*refoulement* and hence defines insecurity. The question is: What kind of situation in the target country prohibits the State from sending a person back to such a country?²⁹⁵ The CAT Committee, which is also critical of the concept of “safe countries”, has often asked what criteria were applied in determining whether a third country was safe.²⁹⁶

While there is no express provision relating to asylum contained in the ECHR, the jurisprudence of the Convention organs has prohibited removal of the applicant by applying numerous provisions of the ECHR indirectly, i.e. giving them non-*refoulement*-properties. In this context, Art 3 ECHR is the crucial provision to be discussed. The ECHR's other absolute

²⁹⁵ Suntinger, Walter, ‘The Principle of non-refoulement: Looking rather to Geneva than to Strasbourg?’, 9.

²⁹⁶ Nowak 156, referring to Nowak/C/SR.234, §40.

provision, Art 2 ECHR, contains a requirement of intent, as it prohibits only the intentional deprivation of life.²⁹⁷ Due to this requirement, its protective ambit has been less relevant in expulsion cases than that of Art 3 ECHR.²⁹⁸ Also the relative Arts 5, 6²⁹⁹ and 8 ECHR have not gained relevance in the context of removal cases. From those rights, it is therefore only Art 13 ECHR that will be discussed due to importance for this thesis by its procedural demands.

For this reason, only the ECtHR's jurisprudence on Art 3 ECHR and Art 13 ECHR will be analyzed. Due to its importance, Art 3 ECHR will be discussed in detail. The European Commission on Human Rights (ECommHR) has a long history of indirect protection through

²⁹⁷ *Bahaddar v. the Netherlands*, application no. 25894/94, Council of Europe: European Commission on Human Rights, 22 May 1995, para 78; *X and Y v. the Netherlands*, application no. 8978/80, Council of Europe: European Court of Human Rights, 26 March 1985.

²⁹⁸ To take the most recent example, the ECtHR concluded in *M.S.S. v. Belgium and Greece* that after having found the applicant's removal by Belgium to Greece to violate Art 3 ECHR, there was no need to examine the applicant's complaints under Art 2 ECHR (*M.S.S. v. Belgium and Greece* para 361). The ECtHR's relevant jurisprudence focuses on insecurity due to unfair trials: In expulsion cases, Art 2 ECHR became independent from Art 3 ECHR only in connection with Art 6 ECHR, established in *Bader v. Sweden*. Although the ECtHR recognized that State practice had yet to amend Art 2 ECHR so as to abolish the death penalty in all circumstances, it did acknowledge that a "deprivation of life pursuant to an 'execution of a sentence of a court'" would need to comply rigorously with the standards enshrined in Art 6 ECHR (*Bader and others v. Sweden*, application no. 13284/04, Council of Europe: European Court of Human Rights, 8 November 2005, para 42, citing *Öcalan v. Turkey*, application no. 46221/99, 12 May 2005). For the Court, it followed that an issue may arise under Art 2 (and 3) ECHR if a Contracting State "deports an alien who has suffered or risks suffering a flagrant denial of a fair trial in the receiving State, the outcome of which was or is likely to be the death penalty" (*Bader and others v. Sweden* para 42).

²⁹⁹ Art 6 ECHR is of relevance in extradition cases: Concerning the trial procedure awaiting the person in the receiving State, the Court expressly refuted the ECommHR's opinion "that the proposed extradition could not give rise to [a] responsibility"²⁹⁹ under the provision by stating since *Soering v. the United Kingdom*: "The right to a fair trial in criminal proceedings [in the SCO], as embodied in Article 6, holds a prominent place in a democratic society [...]. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a *flagrant denial of a fair trial* in the requesting country": *Soering v. the United Kingdom*, para 113; *Mamatkulov and Askarov v. Turkey*, application no.s 46827/99 and 46951/99, Council of Europe: European Court of Human Rights, 4 February 2005, para 88; *Bader v. Sweden*, para 42. This is particularly valid when there is the risk of execution: Tomic, see, *mutatis mutandis*, *Öcalan v. Turkey*, no. 46221/99, judgment of 12 March 2003, §§ 199-213) The ECtHR repeated in later cases that the obligation not to extradite applies regarding States that flagrantly abuse the most fundamental principles of fair trial: *Drozd and Janousek v. France and Spain*, *M.A.R. v. the United Kingdom*, *Hilal v. the United Kingdom*, application no. 45276/99, Council of Europe: European Court of Human Rights, 6 June 2001. In *Al-Moayad v. Germany*, the Court set out a list of factors to be considered in order to determine whether a flagrant denial of the right to fair trial could occur: "where a person is detained because of suspicions that he has been planning or has committed a criminal offence without having any access to an independent and impartial tribunal to have the legality of his or her detention reviewed and, if the suspicions do not prove to be well-founded, to obtain release. Likewise, a deliberate and systematic refusal of access to a lawyer to defend oneself, especially when the person concerned is detained in a foreign country, must be considered to amount to a flagrant denial of a fair trial": *Al-Moayad v. Germany*, application no. 35865/03, Council of Europe: European Court of Human Rights, 20 February 2007, para 101, referring to see, *a fortiori* and among many other authorities, *Papon*, cited above, § 90, see, *a fortiori* and among many other authorities, *John Murray v. the United Kingdom*, judgment of 8 February 1996, *Reports* 1996-I, pp. 53-56, §§ 59-70; and *Öcalan v. Turkey* paras 131-137, 148. In *Ismoilov v. the Russian Federation*, the applicants' extradition was ordered for the purpose of their criminal prosecution; such a close link between the impugned statements made in the context of the extradition proceedings and the criminal proceedings pending meant that Art 6 (2) ECHR was to be applied and had been violated: *Ismoilov v. the Russian Federation* paras 163-4.

However, Art 6 ECHR is, as decided by the ECtHR in *Maaouia v. France* (application no. 39652/98, Council of Europe: European Court of Human Rights, 5 October 2000) and *Mamatkulov and Askarov v. Turkey* (application no.s 46827/99 and 46951/99, Council of Europe: European Court of Human Rights, 4 February 2005), not applicable to asylum proceedings as they are seen as an act of public authorities governed by public law. While the same is true of removal proceedings, it should still be mentioned that the ECtHR only refrained in *Soering v. the United Kingdom* from an examination under Art 6 ECHR regarding removal decisions taken in the course of a negatively decided asylum procedure after determining that Art 3 ECHR was violated (see para. 113).

its implicit prohibition of *refoulement*,³⁰⁰ The ECommHR embraced this concept as early as 1962 in *X. v. the Federal Republic of Germany*, which, in the context of a removal to Egypt, determined the principle that a decision to deport, extradite or expel an individual can give rise to a question under Art 3 ECHR if the applicant might be subjected to torture or inhuman treatment or punishment in the receiving State.³⁰¹ In the *Cemal Kemal Altun v. the Federal Republic of Germany* case, the applicant, a Turkish citizen, had applied for political asylum in the Federal Republic of Germany, contending that he would be at risk of ill-treatment and torture in Turkey. The application was declared admissible by the Commission, with respect to the question whether deportation would constitute inhuman treatment within the meaning of Art 3 ECHR.³⁰²

In the first, already mentioned, landmark case concerning an asylum-seeker and Art 3 ECHR before the ECtHR, *Soering v. the United Kingdom*, the protective potential of Art 3 ECHR for asylum-seekers was unlocked. The case concerned the imminent extradition of the applicant from the United Kingdom to the United States of America, where he feared that he would be sentenced to death on the charge of capital murder and subject to the "death row phenomenon". In this case, the ECtHR also traced off the Art 3 ECHR's negative obligation of "not subjecting" for the positive obligation "securing". It ruled that extradition could violate Art 3 ECHR, although the treatment contrary to the provision would be inflicted by the receiving non-Contracting State.³⁰³ However, the Court limited the positive obligation immediately.³⁰⁴ Shortly after the judgment *Soering v. the United Kingdom*, the case of *Cruz Varas v. Sweden* came before the Court. It was the first case that concerned a refused asylum-seeker. The Court held that the principle enunciated in *Soering v. the United Kingdom* applied to decisions to expel as well as to extradite.³⁰⁵ This view was re-affirmed in the judgments *Vilvarajah and others v. the United Kingdom*³⁰⁶ and *Chahal v. the United Kingdom*. The cases will be discussed in detail later.

³⁰⁰ Alleweldt, Ralf, 'Refoulement-Verbote im Völkerrecht und im deutschen Recht unter besonderer Berücksichtigung von Artikel 3 der Europäischen Menschenrechtskonvention und Artikel 1 des Grundgesetzes' (Berlin, Springer, 1996); *Chahal v. the United Kingdom*, application no. 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, para 80.

³⁰¹ Application No. 1465/62, 5 Yearbook of the ECHR, 256-261; the case was declared inadmissible as manifestly ill-founded.

³⁰² Application no. 10308/83, Stocktaking on the ECHR, Supplement 1984 (1985), pp. 45-7; after the applicant committed suicide in a hearing of the case before the Berlin administrative Court, the Commission stroke the application off its list.

³⁰³ Zühlke and Pastille 749.

³⁰⁴ Noll, Negotiating Asylum, 397.

³⁰⁵ *Cruz Varas and others v. Sweden*, application no. 46/1990/237/307, Council of Europe: European Court of Human Rights, 20 March 1991, para 70.

³⁰⁶ *Vilvarajah and others*, para 103.

For the case of removal by a Contracting State, this means that it may “give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country”.³⁰⁷ Hence, *refoulement* occurs when two factors coincide: a relevant violation of the rights of the person concerned in the receiving State³⁰⁸ and the removal to this State.

The first step of the search for non-*refoulement* properties is unique in the case of Art 3 ECHR: Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Art 3 ECHR makes no provision for exceptions and no derogation is permissible under Art 15 ECHR- even in the event of a public emergency threatening the security of the nation.³⁰⁹ As Art 3 ECHR is absolute and there is no paragraph (2) for consideration of the State’s interests, the necessary level of gravity cannot be increased by the State’s interests in the concrete case. Hence, no balancing is undertaken between the right and the interest of the respective State. This is proven by the fact that the protection afforded by Art 3 ECHR is also not excluded by clauses, such as Art 1F GRC, or limited like Art 33 (2) GRC.³¹⁰ This was stated by the ECtHR in *Soering v. the United Kingdom*, the abovementioned case concerning the extradition of the applicant to face charges of a brutal murder allegedly committed before admission into the territory of the respondent State. The Court held in Para. 88:

³⁰⁷ M.S.S. v. Belgium and Greece, para 125, referring to *Soering v. the United Kingdom*, paras 90-91; *Vilvarajah and others v. the United Kingdom*, para 103; *Ahmed v. Austria*, para 39; H.L.R. v. France, application no. 11/1996/630/813, Council of Europe: European Court of Human Rights, 22 April 1997, para 34; *Jabari v. Turkey*, application no. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000, para 38; *Salah Sheekh v. the Netherlands*, Council of Europe: European Court of Human Rights, 11 January 2007, para 135.

³⁰⁸ Hence, the direct physical or mental effects resulting from the removal itself are not implying a violation in the receiving state and are therefore not relevant for the thesis. For a violation of Art 3 ECHR by such circumstances, the Strasbourg case law indicates the application of rather strict criteria. The Commission has held that extradition with a day after a second attempt to commit suicide did not violate Art 3 ECHR (Appl no. 25342/94, *Raidl*, D & R 82-A (1995), para 134). In the *Cruz Caras* case the Court did not consider that the applicant’s expulsion to Chile exceeded the threshold set by Art 3 ECHR, although he suffered from a post-traumatic stress disorder prior to his expulsion and his mental health deteriorated following his return to Chile (para 84, cf. also the decision of 22 October 2002, *Ammari*). And in the *Nsona* case the return of a nine-year-old child to Zaïre that took seven days, part of which was unaccompanied was not regarded as inhuman or degrading treatment (Judgment of 28 November 1996, para 99). The Strasbourg jurisprudence has thus far identified examples such as the expulsion or deportation of an ill person, or deportation arousing grave suffering: *Bulus v. Sweden*, application no. 9330/81, Council of Europe: European Commission of Human Rights, 19 January 1984, paras 57, 62. In particular cases, the anguish likely to be caused by the anticipation of impending violence may be considered as inhuman treatment: *Soering*, para. 100. This may be even the case with regard to torture victims suffering trauma when confronted with the possibility of forced return to the land in which they were tortured: *Cruz Varas and others v. Sweden*, para 83-4. Accordingly, the circumstances of expulsion may *eo ipso* constitute inhuman or degrading treatment: Hailbronner 491.

³⁰⁹ See *Ireland v. the United Kingdom*, judgment of 8 January 1978, para 163; *Chahal v. the United Kingdom*, para 79; *Selmouni v. France* [GC], application no. 25803/94, para 95; *Al-Adsani v. the United Kingdom* [GC], application no. 35763/97, para 59; and *Shamayev and others v. Georgia and Russia*, application no. 36378/02, para 335; Noll, Negotiating Asylum, 371 with further references in footnotes 1088 and 1089.

³¹⁰ “The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”

"It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, *however heinous the crime allegedly committed*. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article".³¹¹

The ECtHR clarified the issue in *Chahal v. the United Kingdom*.³¹²

In the context of Art 3 CAT as well, the absolute nature of the non-*refoulement* principle rules out any balancing of interest between the individual right not to be subjected to torture by means of removal and national security concerns.³¹³

³¹¹ Para 88, emphasis added.

³¹² The four applicants were members of the same family and Sikhs. The first applicant became involved in organising passive resistance in support of autonomy for Punjab. After detention in India, he was able to return to his place of residence in the United Kingdom, where he became a leading figure in the Sikh community. Since that time he had been arrested on several occasions and he was convicted and served concurrent sentences of six and nine months. The Home Secretary decided that Mr Chahal ought to be deported because his continued presence in the United Kingdom was not conducive to the public good for reasons of national security and other reasons of a political nature, namely the international fight against terrorism. Mr Chahal subsequently applied for political asylum; he claimed that he would be subjected to torture and persecution if returned to India. His request was refused; the United Kingdom relied on Grotius' *De Iure Belli ac Pacis* to support the proposition that asylum is to be enjoyed by people "who suffer from undeserved enmity, not those who have done something that is injurious to human society or to other men" (Para 98). The ECtHR rejected the argument, reaffirmed the absolute character of Art 3 ECHR and continued:

"The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion [...]. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 [GRC]. Paragraph 88 of the Court's [also here] above-mentioned Soering judgment, which concerned extradition to the United States, clearly and forcefully expresses the above view. It should not be inferred from the Court's remarks concerning the risk of undermining the foundations of extradition, as set out in paragraph 89 of the [also here cited above] same judgment, that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged. It follows [...] that it is not necessary for the Court to enter into a consideration of the Government's untested, but no doubt *bona fide*, allegations about the first applicant's terrorist activities and the threat posed by him to national security." (Para 80-20).

Any further debate on the issue was laid to rest in *Saadi v. Italy* in which the applicant had been prosecuted, but not convicted, in Italy for participation in international terrorism but had also been sentenced in Tunisia, in his absence, to 20 years' imprisonment for membership in a terrorist organisation. The ECtHR stated:

"As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct [...], the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3". (*Saadi v. Italy*, application no. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2000, para 127, referring to *Indelicato v. Italy*, application no. 31143/96, para 30, 18 October 2001, and *Ramirez Sanchez v. France* [GC], application no. 59450/00, paras 115-116, 4 July 2006).

The Court continued: "The Court considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not" (Para 138-9). In this sense, the ECtHR rejected the argument that the risk to the individual should be balanced against the State's interest to protect its citizens from a possible risk emanating from the applicant. This argumentation was reaffirmed on numerous occasions, the most recent of which regarded expulsion to the country of origin *A v. the Netherlands* on 20 July 2010, para 142.

³¹³ Nowak 210-1, referring to *Agiza v. Sweden*, no. 233/2003.

While no abstract balancing is made between the right and the interest of the respective State in the case of Art 3 ECHR, it is clear that a necessary level of gravity must be met for the ECtHR to apply Art 3 ECHR. According to the ECtHR's case-law, the necessary level of gravity is termed “minimum level of severity”. While it is clear that an act must reach a certain minimum level of severity to be an act of torture, the ECtHR has emphasized more often regarding inhuman or degrading treatment or punishment that “ill-treatment must attain a *minimum level of severity* if it is to fall within the scope of Article 3 [...]. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim”.³¹⁴ In order for a punishment or treatment associated with it to be “inhuman” or “degrading”, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.³¹⁵ The Court continued in *Cruz Varas and others v. Sweden*:

“What amounts to “inhuman or degrading treatment or punishment” depends on all *the circumstances of the case* (see paragraph [on minimum of severity]). Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in *the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases*.”³¹⁶

In this sense, Zühlke and Pastille noted that “Article 3 like all ‘absolute’ rights hosts a balancing process, located in the interpretation of the provision’s scope and in itself not much different from the application of express limitations. This understanding is frequently reflected in the jurisprudence of the Court”³¹⁷ and perfectly illustrated in the example used by Zühlke and Pastille: two police officers march a handcuffed and sparsely clad person over a public square. Whether or not this is degrading treatment in the sense of Art 3 ECHR depends on the circumstances – the person having committed a minor traffic offence or being a suicide assassin suspected of carrying explosives on his body. Hence, on the fringes of Art 3 ECHR,

³¹⁴ Para 83; see, among other authorities, *Price v. the United Kingdom*, application no. 33394/96, para 24; *Mouisel v. France*, application no. 67263/01, para 37; *Jalloh v. Germany* [GC], application no. 54810/00, para 67; see also *Kudla v. Poland* [GC], application no. 30210/96, para 91.

³¹⁵ See *Labita v. Italy* [GC], application no. 26772/95, para 120.

³¹⁶ *Cruz Varas and others v. Sweden*, para. 89, emphasis added.

³¹⁷ Zühlke and Pastille 783.

the concept of absoluteness is materially empty.³¹⁸ “The choice between express limitations and absoluteness does not *per se* derive from any notion of hierarchy. It is much more likely that the nature and specific historical background of each freedom accounts for the shape in which it is protected”.³¹⁹

The focus of this analysis will now turn to the examination of which of the “precarious” situations stated in the previous chapter have been ruled by the ECtHR as going beyond the threshold of Arts 3 and 13 ECHR, thus making a State “unsafe” and removal to that State thereby impermissible. It can be distinguished between, first, the factual conditions (1) and, second, the procedural conditions (2).

1. Factual conditions: Art 3 ECHR

Serious factual harm can derive from living conditions (a), from detention conditions (b) or from conditions amounting to persecution (c),

a. Living conditions

In the context of living conditions, Art 3 ECHR extends to situations where the danger emanates from the consequences to health from the effects of serious illness.³²⁰ The effect of expulsion on the medical condition of the applicant has been often considered by the jurisprudence’s ECtHR, which set the minimum level of severity extremely high for qualification for a violation of Art 3 ECHR: In *D. v. the United Kingdom*, it found that the circumstances of the case must be “exceptional”; the expulsion of D., who was already irremediably dying of AIDS, to his home country where he had no familiar or material resources, where there was no social welfare provision available to him and no treatment for AIDS, was such a case. Since this judgment, the Court has not found a proposed removal of an alien from a Contracting State to give rise to a violation of Art 3 ECHR on grounds of the applicant’s ill health. Even psychiatric patients have advanced arguments under Art 3 ECHR unsuccessfully; in *Bensaid v. the United Kingdom*, the applicant was a schizophrenic suffering from a psychotic illness and feared treatment contrary to Art 3 ECHR should he be returned to

³¹⁸ Noll, *Negotiating Asylum*, 463.

³¹⁹ *Zühlke and Pastille* 560.

³²⁰ see *H.L.R. v. France* para 40, *D. v. the United Kingdom* para 49.

Algeria. The ECtHR found that suffering to fall within Art 3 ECHR's scope, but the exceptional circumstances as in *D. v the United Kingdom* to be missing.³²¹

However, ten years later in *N. v. the United Kingdom*,³²² the ECtHR declared the circumstances to have to be "very exceptional"; it found that N's removal did not violate Art 3 ECHR, because her claim was based solely on her serious medical condition and the lack of adequate treatment available for it in Uganda. The Court stated:

"The Court observes that since *D. v. the United Kingdom* it has consistently applied the following principles. Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only *in a very exceptional case, where the humanitarian grounds against the removal are compelling*".³²³

Recently, in *M.S.S. v Belgium and Greece*, the ECtHR ruled that the living conditions in Greece, combined with the prolonged uncertainty of the applicant and the total lack of any prospects of his situation improving, attained the level of severity required to fall within the scope of Art 3 ECHR: for several months, the applicant had been "living in the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs". This treatment was humiliating, "showing a lack of respect for [the applicant's] dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation".³²⁴ Based on these facts, the ECtHR ruled that, by transferring the applicant to Greece, Belgium had knowingly exposed him to living conditions that amounted to degrading treatment and thereby violated Art 3 ECHR.³²⁵

³²¹ Application no. 44599/98, Council of Europe: European Court of Human Rights, 6 May 2001.

³²² Application no. 26565/05, Council of Europe: European Court of Human Rights, 27 May 2008.

³²³ *N. v. the United Kingdom* para. 42.

³²⁴ *M.S.S. v Belgium and Greece* paras 263-4.

³²⁵ Para 362-8.

b. Detention conditions

On detention conditions, the ECtHR has held that confining an asylum-seeker to a prefabricated cabin for two months without allowing him outdoors or to make a telephone call, and with no clean sheets and insufficient hygiene products, amounts to degrading treatment within the meaning of Art 3 ECHR.³²⁶ Similarly, a period of detention of six days, in a confined space, with no possibility of taking a walk, no leisure area, sleeping on dirty mattresses and with no free access to a toilet is unacceptable with respect to Art 3 ECHR.³²⁷ The detention of an asylum-seeker for three months on police premises pending the application of an administrative measure, with no access to any recreational activities and without proper meals has also been ruled as degrading treatment.³²⁸ Furthermore, the Court found in *A.A. v. Greece* that the detention of an applicant, who was also an asylum-seeker in Greece, for three months in an overcrowded place in appalling conditions of hygiene and cleanliness, with no leisure or catering facilities, where the dilapidated state of repair of the sanitary facilities rendered them virtually unusable and where the detainees slept in extremely filthy and crowded conditions amounted to degrading treatment prohibited by Art 3 ECHR.³²⁹

Recently, the ECtHR ruled again in *M.S.S. v. Belgium and Greece* that the detention conditions in Greece experienced by the applicant were unacceptable. UNHCR reported unacceptable detention conditions with no fresh air, no possibility of taking a walk in the open air and no toilets in the cells.³³⁰ The Court concluded that, despite the fact that he was kept in detention for a relatively short period of time, “the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it, as well as the profound effect such conditions of detention indubitably have on a person's dignity, constitute degrading treatment contrary to Article 3 of the Convention. In addition, the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum seeker”.³³¹ Thus, the ECtHR considered that Belgium had violated Art 3 ECHR by knowingly exposing the applicant to detention conditions that amounted to degrading treatment by transferring him to Greece.³³²

³²⁶ *S.D. v. Greece*, application no. 53541/07, Council of Europe: European Court of Human Rights, 11 June 2009, paras 49 to 54.

³²⁷ *S.D. v. Greece* para 51.

³²⁸ *Tabesh v. Greece*, application no. 8256/07, Council of Europe: European Court of Human Rights, 26 November 2009, para 38.

³²⁹ *A. A. v. Greece*, application no. 12186/08, Council of Europe: European Commission on Human Rights, 22 July 2010, paras 57-65.

³³⁰ *M.S.S. v. Belgium and Greece* para 213.

³³¹ *M.S.S. v. Belgium and Greece* para 233.

³³² Para 362-8.

c. Persecution

Strasbourg cases on possible persecution, i.e. in which the reasons for well-founded fear in case of removal were relevant for the violation of Art 3 ECHR, have raised a fundamental question: the relation between Art 3 ECHR and Art 1 (A) GRC. As van Dijk submits, these norms overlap insofar that if a person has a well-founded fear of being persecuted in his country of origin in the sense of Art 1 (A) GRC, his forced return to this country would violate Art 3 ECHR. For a long time, the Strasbourg case law strictly differentiated between these norms. The ECommHR has held that the question whether or not a deportation decision is covered by the GRC “is not an issue as such”³³³ and has ruled that “the risk of political persecution, as such, cannot be equated to torture, inhuman or degrading treatment”.³³⁴ The ECommHR has often stressed that the right to asylum does not figure among the ECHR rights, and that the expulsion or extradition of an individual could prove to be a breach of Art 3 ECHR only in exceptional cases or circumstances.³³⁵ This case law “implies that *refoulement* only raises an issue under Article 3 if the ensuing persecution will reach a high level of severity”.³³⁶ Consequently, *refoulement* of refugees leading to persecution that does not reach the necessary level of severity, has been held by the Commission to be compatible with Art 3 ECHR.³³⁷

As to the ECtHR, one case shall be considered in which the SCO was an EU MS. In *Iruretagoyena v France*, an ETA member feared reprisals from the Spanish police on his return. His application for a Rule 36 (now Rule 39) indication was refused and he was handed over to the Spanish police. His complaint was rejected, among other reasons, because the CPT had recently reported a decrease in the well-documented practices of the Spanish police contrary to Art 3 ECHR and hence, at the time of expulsion, did not believe that there were serious reasons for believing that he would be submitted to the ill-treatment which he subsequently suffered.³³⁸ As the safety presumption contained in the Spanish Protocol is absolute, the ECtHR has not even discussed the safety of the EU MS since its entry into force. However, this decision not to examine the safety of an EU MS had serious consequences in

³³³ *X. v. the Federal Republic of Germany*, para. 806.

³³⁴ *C. v. the Netherlands*, para. 224.

³³⁵ *X. v. the Federal Republic of Germany*, para. 806, *X. v. Denmark*, para. 153, *C. v. Federal Republic of Germany*, para. 176.

³³⁶ Van Dijk 434, referring to *X. v. the Netherlands*, Application no. 10633/83 and *C. v. the Netherlands*, para. 224.

³³⁷ Van Dijk 434, referring to *X. v. the Federal Republic of Germany*, para. 806 and *X. v. Sweden*.

³³⁸ Mole 77-8.

this case, as the applicant was subjected to ill-treatment including the administration of electric shocks.

Cases in which an EU MS was the STC are more numerous. The ECtHR found in two crucial cases that the situation had changed so considerably, that persecution could not still be assumed. In the case *Cruz Varas and others v. Sweden*, the applicants were Chilean citizens who came to Sweden in 1987 and unsuccessfully applied for asylum. The first applicant subsequently claimed that he had worked in Sweden for a radical organization which had tried to kill General Pinochet and that he ran the risk of political persecution if he returned to Chile; he also claimed to have been tortured on several occasions in Chile.

In addition to doubting the first applicant's credibility, the ECtHR decided that in any event, a democratic evolution was in process in Chile, which had led to improvements in the political situation and, indeed, to the voluntary return of refugees from Sweden and elsewhere.³³⁹ A violation of Art 3 ECHR could hence not be found.

In *Vilvarajah and others v. the United Kingdom*, the applicants were Tamils from Sri Lanka who came to the United Kingdom in 1987 and applied for political asylum. They contended that they had a genuine fear of persecution if returned to Sri Lanka where they and their families had suffered from the excesses of the Sri Lankan army against the Tamil community. Their applications were considered and rejected, and the applicants were removed to Sri Lanka. The first, second and third applicant claimed that they were arrested, detained and ill-treated (second and third applicants) by members of the Indian Peace Keeping Force. The fourth applicant claimed that he was arrested and beaten by the police. The applicants were finally allowed to return to the United Kingdom and granted exceptional leave to remain for 12 months.

For the ECtHR, it seemed clear that by February 1988, there had been an improvement in the situation in the north and east of Sri Lanka,³⁴⁰ which – together with the fact that the UNHCR voluntary repatriation programme had begun to operate at the end of December 1987 – led the Court to conclude that there had been no breach of Art 3 ECHR.

In *Chahal v. the United Kingdom*, the ECtHR found insecurity to prevail in the receiving State. When the first applicant became involved in organizing passive resistance in support of autonomy for Punjab, he was arrested by the Punjab police and was taken into detention and

³³⁹ *Vilvarajah and others v. the United Kingdom* para 80.

³⁴⁰ *Vilvarajah and others v. the United Kingdom* para 109.

held for 21 days, during which time he was, he contended, kept handcuffed in unsanitary conditions, beaten to unconsciousness, electrocuted on various parts of his body and subjected to a mock execution. He was subsequently released without charge. As already stated, his application for political asylum was refused.

The ECtHR held in its judgment that “it would appear that, despite the efforts of that Government, the NHRC [Indian National Human Rights Commission] and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem”.³⁴¹ Against this background, the Court was not persuaded that the given assurances would provide Mr Chahal with an adequate guarantee of safety. The Court further considered that the applicant's high profile (as supporter of the cause of Sikh separatism) would be more likely to increase the risk to him of harm than otherwise.³⁴² For these reasons and in particular the attested involvement of the Punjab police in killings and abductions outside their State and the allegations of serious human rights violations which continue to be leveled at members of the Indian security forces elsewhere, the Court found that it “substantiated that there is a real risk of Mr Chahal being subjected to treatment contrary to Article 3 if he is returned to India”, i.e. that such a situation makes India an insecure country for the applicant.³⁴³

The facts of the case *Saadi v. Italy* were the following: the applicant was a Tunisian national living in Italy. There, the applicant was prosecuted for participation in international terrorism and the deportation order against him was issued by virtue of a legislative decree entitled “urgent measures to combat international terrorism”. He was also sentenced in Tunisia, in his absence, to twenty years imprisonment for membership of a terrorist organization operating abroad in time of peace and for incitement to terrorism.³⁴⁴ Mr Saadi made a request for political asylum, which was rejected.

For the ECtHR, the facts spoke of numerous and regular cases of torture and ill-treatment meted out to persons accused under the 2003 Prevention of Terrorism Act. The practices reported- said to be often inflicted on persons in police custody with the aim of extorting confessions- include “hanging from the ceiling, threats of rape, administration of electric shocks, immersion of the head in water, beatings and cigarette burns, all of these being practices which undoubtedly reach the level of severity required by Art 3 ECHR”.³⁴⁵

³⁴¹ *Chahal v. the United Kingdom* para 105.

³⁴² *Chahal v. the United Kingdom* para 106.

³⁴³ *Ibidem*.

³⁴⁴ *Saadi v. Italy* para 144.

³⁴⁵ *Saadi v. Italy* para 143.

Finally, this thesis will thoroughly analyze the case *M.S.S. v. Belgium and Greece*. The applicant in this case, an Afghan national, had travelled overland to Greece and continued onward to Belgium, where he applied for asylum. By virtue of the Dublin Regulation, the Belgian authorities submitted a request for the Greek authorities to take charge of the asylum application. The applicant protested, arguing that the detention conditions were appalling and that there were deficiencies in the asylum system which could lead him to be sent back to Afghanistan without any examination of his claim. The applicant was nonetheless transferred to Greece. Upon arriving at Athens airport, the applicant was immediately placed in detention in an adjacent building, where he says the conditions were overcrowded and insalubrious. Following his release, he lived on the street, with no means of subsistence. After subsequently attempting to leave Greece with a false identity card, the applicant was arrested and again placed in the detention facility next to the airport for one week, where he alleges the police beat him. After his release, he continued to live on the street, occasionally receiving aid from local residents and the church. On renewal of his asylum-seeker card in December 2009, steps were taken to find him accommodation, but according to his submissions no housing was ever offered to him.

The reader should note that when the ECtHR considered the situation in the applicant's country of origin Afghanistan, it found that the evidence showed that "the situation in Afghanistan has posed and continues to pose *a widespread problem of insecurity and that the applicant belongs to a category of persons particularly exposed to reprisals at the hands of the anti-government forces because of the work he did as an interpreter for the international air forces*".³⁴⁶ The Court thus concluded that the applicant had an "arguable claim" under Art 3 (or 2) ECHR.³⁴⁷

The analysis of the level of gravity of the factual conditions in the receiving State that has been demanded by the ECtHR in its jurisprudence for Art 3 ECHR's prohibition of *refoulement* obliging the removing State to abstain from removal leads to the conclusion that, as to living conditions, the ECtHR declared that the circumstances of medical treatment must be "exceptional" or even "very exceptional. Furthermore the lack of accommodation, resources, access to sanitary facilities and provision of essential needs must be severe to constitute a violation of Art 3 ECHR. Detention conditions were found by the ECtHR to constitute a violation of Art 3 ECHR when confinement is long and takes place in an

³⁴⁶ *M.S.S. v. Belgium and Greece* para 296.

³⁴⁷ *M.S.S. v. Belgium and Greece* para 297.

overcrowded place in appalling conditions of hygiene and cleanliness with no leisure or catering facilities, where the dilapidated state of repair of the sanitary facilities renders them virtually unusable and where the detainees sleep in extremely filthy and crowded conditions. As to claims of persecution, the Strasbourg case law implies that *refoulement* only raises an issue under Art 3 ECHR if the ensuing persecution will reach a high level of severity. In this sense, successful were before the ECtHR allegations of continued serious human rights violations, numerous and regular cases of torture and ill-treatment as well as widespread insecurity due to the applicant being a person particularly exposed to reprisals.

2. Procedural conditions

Procedural conditions in the receiving State of relevance for the ECtHR include the implementation of death penalty (a) and deficiencies in the removal procedure in the third State (b).

a. Implementation of death penalty: Art 3 ECHR

In a number of early decisions, the ECommHR expanded the scope of Art 3 ECHR, as Zühlke puts it, “under the pressure of circumstance”,³⁴⁸ i.e. where removal would result in a “flagrant breach” of a, as Mole puts it, “qualified” ECHR right, particularly where the denial of a fair trial would result in a risk of execution.³⁴⁹ In *Amekrane v. the United Kingdom*, a Moroccan officer who fled to Gibraltar after a failed coup d’état was surrendered by the British authorities and promptly executed after a mock trial. The ECommHR found the case brought by the officer’s widow admissible on the grounds of an alleged violation of Art 3 ECHR.³⁵⁰ Here, the prohibition of inhuman punishment and degrading treatment was apparently held to include violations that would fall within Art 2 or Art 6 ECHR in any other context.

Zühlke found a similar tendency in *Brueckmann v. Germany*. Mrs. Brueckmann was sought by the East German authorities for the murder of her father. The ECommHR again found the complaint admissible as to a possible breach of Art 3 ECHR.³⁵¹ The evidently questionable

³⁴⁸ Zühlke and Pastille 560, referring to van Dijk/van Hoof, G.J.H., “Theory and Practice of the European Convention on Human Rights”, 2nd ed., 1990, 235-237.

³⁴⁹ Mole 88.

³⁵⁰ 44 *Amekrane v. United Kingdom*, Decision no. 5961/72, 16 Yb 356; the case was settled, when the British government agreed to pay compensation.

³⁵¹ 45 *Brueckmann v. Germany*, Decision no. 6242/73, 17 Yb 458; the case was struck from the docket, when Germany adapted its domestic extradition laws, enabling it to revoke the extradition order.

trial practice in the former communist State qualified as a potential breach of Art 3 ECHR, an obvious expansion of the scope traditionally associated with the provision.³⁵²

In cases of non-*refoulement*, the ECtHR has not expanded the protection of Art 3 ECHR to issues on the criminal procedure awaiting the individual concerned in the receiving State. However, the ECommHR developed the view on the death penalty in the *Kirkwood* case and in the *Soering* case that, since Art 2 ECHR expressly permits the imposition of the death penalty, removal of a person to a country where he risks the death penalty cannot, in itself, raise an issue under either Art 2 or 3 ECHR; however, this does not exclude the possibility of an issue arising under Art 3 ECHR in respect of the manner and circumstances in which the death penalty is implemented. In both cases, the respective delay during the appeal procedure, i.e. “death row phenomenon”, amounted to inhuman treatment.³⁵³

b. Third States: Deficiencies in the removal procedure

Gravity can arise from deficiencies in the removal procedure of the third, i.e. intermediary State. Such risk of chain-*refoulement* only possibly emanates from a presumably safe third State if the assessment of the risk of persecution or serious harm awaiting the individual concerned in the final State results in the affirmation of the existence of a risk. In this case, the removal procedure of the third State is only safe if it prevents this danger.

The ECtHR has only examined EU MSs as safe third States in *T.I. v. the United Kingdom*, *K.R.S. v. the United Kingdom* and *M.S.S. v. Belgium and Greece*.

The case *T.I. v. the United Kingdom* concerned a Sri Lankan national who had unsuccessfully sought asylum in Germany and had then submitted a similar application in the United Kingdom. In application of the Dublin Convention, the United Kingdom had ordered his removal to Germany.

K.R.S. v. the United Kingdom was the first case to analyze the compatibility of the Dublin procedure with the ECHR. The case concerned the removal by the United Kingdom

³⁵² Zühlke and Pastille 756.

³⁵³ *E.M. Kirkwood v. United Kingdom*, Council of Europe: European Commission on Human Rights, 12 March 1984; in the case *Soering v. the United Kingdom*, the Court found that for any prisoner condemned to death, some element of delay between imposition and execution of the sentence and the experience of severe stress in conditions necessary for strict incarceration are inevitable. In this concrete case, the Court considered that “the machinery of justice to which the applicant would be subject in the United States is in itself neither arbitrary nor unreasonable, but, rather, respects the rule of law and affords not inconsiderable procedural safeguards to the defendant in a capital trial. Facilities are available on death row for the assistance of inmates, notably through provision of psychological and psychiatric services [...]. However, in the Court’s view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant’s extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3” (para 111).

authorities, in application of the Dublin Regulation, of an Iranian asylum-seeker to Greece, through which he had passed before arriving in the United Kingdom in 2006. Relying on Art 3 ECHR, the applicant complained of the deficiencies in the asylum procedure in Greece and the risk of being sent back to Iran without the merits of his asylum application being examined. In analyzing the risk of removal to Iran by Greece, the ECtHR discussed the “Contracting States' obligations under Articles 3 and 13 of the Convention”.

Four years after *K.R.S. v. the United Kingdom*, the Court was again asked in *M.S.S. v. Belgium and Greece* to judge the alleged violation of Art 3 ECHR as well as Art 13 ECHR by the removing State for exposing the applicant to the risks arising from the deficiencies of the procedure in Greece. Before the ECtHR, the applicant alleged that by sending him back to Greece, the Belgian authorities exposed him to a risk of inhuman and degrading treatment and that he was indeed subsequently subjected to such treatment. He also complained that he was sent back to Greece in spite of the risk that the authorities there could order his expulsion to Afghanistan without examining the reasons that made him flee that country. He further contended that he had no real guarantee that his asylum application would follow its normal course in Greece, in particular because of the deficiencies in the Greek asylum system. Regarding the review procedure in Greece, the applicant complained that he had not had a remedy that met the requirements of Art 13 ECHR for his complaints under Arts 2 and 3 ECHR, and maintained, in this context, that the remedies in question were not effective within the meaning of that provision.³⁵⁴ The ECtHR decided to apply Rule 39 of the Rules of Court against Greece pending the outcome of the proceedings before the Court.

In these cases of removal due to a respective decision taken in a Dublin procedure, the Court examined a possible violation of the ECHR by the third States' single procedure, regarding its review procedure (aa) and its procedure of first instance (bb).

aa. Review procedure

In its judgments, the ECtHR has considered the issue through two lenses, namely either under Art 13 ECHR in conjunction with Art 3 ECHR (1) or under Art 3 ECHR alone (2).

³⁵⁴ *M.S.S. v. Belgium and Greece* para 336.

1. Art 13 ECHR in conjunction with Art 3 ECHR

In *M.S.S. v. Belgium and Greece*, the ECtHR stated in regard to the STC of Greece that “[i]ts primary concern is whether *effective guarantees exist in the present case to protect the applicant against arbitrary removal directly or indirectly back to his country of origin.*”³⁵⁵ It examined whether, as the Government alleged, an application to the Supreme Administrative Court for judicial review of a possible rejection of the applicant's request for asylum could be considered as a safety net protecting him against arbitrary *refoulement*.³⁵⁶ In the concrete case, lodging an appeal against an expulsion order issued following the rejection of an application for asylum does automatically suspend enforcement of the order.³⁵⁷ However, due to the ineffectiveness of the system elaborated by the Court (see under (bb) (1)) in practice, the Court considered the access to the remedy for asylum-seekers to be hindered.³⁵⁸ Lastly, the length of proceedings was evidence for the ECtHR that an appeal to the Supreme Administrative Court does not offset the lack of guarantees surrounding the examination of asylum applications on the merits.³⁵⁹ Therefore, the Court concluded by finding that “there has been a violation of Article 13 of the Convention taken in conjunction with Article 3 because of the deficiencies in the Greek authorities' examination of the applicant's asylum request and the risk he faces of being returned directly or indirectly to his country of origin [...] without having access to an effective remedy.”³⁶⁰

2. Art 3 ECHR

In its decision on *T.I. v. the United Kingdom*, the ECtHR trusted the assurances of the German Government that it would apply Section 53 (6) of the German Aliens Act which grants the authorities discretion to suspend deportation in cases when there is substantial danger to an alien's life, personal integrity or liberty, including such emanating from non-State agents.³⁶¹ Furthermore, it found “effective protection” to have been granted: “As the previous

³⁵⁵ *M.S.S. v. Belgium and Greece* para 298, emphasis added.

³⁵⁶ *M.S.S. v. Belgium and Greece*, para. 316.

³⁵⁷ *M.S.S. v. Belgium and Greece*, para 317.

³⁵⁸ *M.S.S. v. Belgium and Greece*, paras 318-9.

³⁵⁹ *M.S.S. v. Belgium and Greece*, para 320.

³⁶⁰ *M.S.S. v. Belgium and Greece*, para 321, emphasis added.

³⁶¹ “The Court notes that the apparent gap in protection resulting from the German approach to non-State agent risk is met, to at least some extent, by the application by the German authorities of section 53(6). ... It is true that the Government have not provided any example of Section 53 (6) being applied to a failed asylum seeker in a second asylum procedure. [...] While it may be that on any re-examination of the applicant's case the German authorities might still reject it, this is largely a matter of speculation and conjecture”: *T.I. v. the United Kingdom*, application no. 43844/98, Council of Europe: European Court of Human Rights, 7 March 2000.

deportation order against the applicant was made more than two years earlier, the applicant could not be removed without a fresh deportation order being made, which would be subject to review by the [German] Administrative Court, and to which the applicant could make an application for interim protection within one week. He would not be removed until the Administrative Court had ruled on that application".³⁶²

Surprisingly, the theoretical demands of Art 3 ECHR articulated in *T.I. v. the United Kingdom*, obliging the availability of an effective remedy and the suspensive effect of proceedings against a deportation order, were translated into the real opportunity applying to the Court for a Rule 39 measure in *K.R.S. v. the United Kingdom*. In this case, after a discussion of the evidence and with the safety presumption in mind, the ECtHR came to the conclusion that asylum-seekers who are returned to Greece under the Dublin Regulation will be afforded a real opportunity, on the territory of Greece, of applying to the Court for a Rule 39 measure to prevent removal in violation of Art 3 ECHR. Hence, "the applicant's complaints under Articles 3 and 13 of the Convention arising out of his possible expulsion to Iran should be the subject of a Rule 39 application lodged with the Court against Greece following his return there, and not against the United Kingdom". By accepting in fact the argument initiated by the Government of the United Kingdom that the right of appeal to the ECtHR satisfies at least the basic requirements for a judicial remedy to be effective, the ECtHR seems to take the position that each Contracting State can offer "effective procedural safeguards" by virtue of being party to the ECHR.³⁶³ Regarding the number of Rule 39 requests for interim measures as a relevant parameter for the ECtHR, the author would like to highlight the fact that the ECHR always places the primary and unconditional responsibility to comply with their Convention obligations on the Contracting States; the Court's supervision of States' observance of the Convention is, as by all international human rights bodies,³⁶⁴ only of a subsidiary nature.³⁶⁵ Vermeulen points out rightly that "reliance on eventual appeal to the Court for undoing the risk of an expulsion possibly at variance with Article 3 ECHR would shift that responsibility to the Court". Hence, the author finds this narrow parameter for gravity for an effective judicial remedy pursuant to Art 3 ECHR questionable and defends the

³⁶² *T.I. v. the United Kingdom*, under "The position of the applicant as a failed asylum-seeker if returned to Germany".

³⁶³ Battjes, European Asylum Law, 416.

³⁶⁴ Even application to international human rights bodies are no securing way: In *Paez v. Sweden* (application no. 30930/96, decision of 18 April 1996), two brothers had applied for asylum in Sweden. Both were refused on similar grounds (Art 1 (f) GRC). One brother then made an application to the ECommHR, the other to the CommAT. The ECommHR found in December 1996 that the applicant would not be at risk if returned to Peru (Decision of 28 April 1997, Communication No. 39/1996, UN doc. CAT/C/18/D/39/1996). The CommAT found in April 1997³⁶⁴ that the return of the applicant's brother would expose him to prohibited treatment and underlined the absolute nature of the protection. The Swedish Government then granted the applicant to the Strasbourg institutions a residence permit. The Court held that the case could be struck off without deciding whether or not the proposed expulsion would have been a violation of the ECHR.

³⁶⁵ *Handyside v. the United Kingdom*, application no. 5493/72, Council of Europe: European Court of Human Rights, 07 December 1976, para 48; *Aksoy v. Turkey*, para. 51.

availability of an effective remedy and the suspensive effect of proceedings against a removal decision as the only relevant parameter.³⁶⁶

In *M.S.S. v. Belgium and Greece*, the ECtHR did not discuss the risk of *refoulement* from Greece deriving from the lack of access to an effective remedy under Art 3 ECHR alone.

While the author understands that the Court had to rely primarily on Art 13 ECHR for the procedural issue of remedy, she finds it highly important to clarify that it is Art 3 ECHR alone that poses the defended direct exigencies of the availability of an effective remedy and the suspensive effect of proceedings against the removal decision of the receiving State. By refusing to examine Art 3 ECHR separately in respect to Greece but doing so in respect to the applicant's removal by Belgium to Greece, the ECtHR created not only a formal discrepancy in its judgment,³⁶⁷ but also opened itself for criticism of its argumentation. The author follows the concurring opinion of Judge Villiger in this matter: While the Court had no hesitations in previous cases in examining whether a risk of treatment contrary to Art 3 ECHR existed in the applicant's country of origin and then discussing the issue of *refoulement* under Art 13 ECHR to find violations under both provisions,³⁶⁸ its approach in *M.S.S. v. Belgium and Greece* is, as Judge Villiger called it, “innovatory” and its introduction not comprehensible.

The complaint of a violation of Art 3 ECHR lies at the basis of the case,³⁶⁹ and it would have merited *per se* to be treated on its own- *a fortiori* as this complaint was found “arguable” under Art 3 ECHR.³⁷⁰ Additionally, the judgment contains a whole page on the situation in Afghanistan³⁷¹ and numerous referrals to the dangers awaiting the applicant there.³⁷² It is therefore incomprehensible that the judgment refused to acknowledge such a complaint about Greece under Art 3 ECHR. The judgment points out on various occasions that there is a clear

³⁶⁶ Battjes, European Asylum Law, 416.

³⁶⁷ *M.S.S. v. Belgium and Greece* para 360.

³⁶⁸ See, for example, *Chahal v. the United Kingdom* and *Jabari v. Turkey*.

³⁶⁹ From the outset in the proceedings before the Court, the applicant referred to “the risks he had faced and would still face if he were sent back to [Afghanistan]” (*M.S.S. v. Belgium and Greece*, para 40).

³⁷⁰ *M.S.S. v. Belgium and Greece* para 298.

³⁷¹ See *M.S.S. v. Belgium and Greece* paras 196-7.

³⁷² For instance, it is stated in the *M.S.S. v. Belgium and Greece* judgment that: “[s]everal reports highlight the serious risk of *refoulement* as soon as the decision is taken to reject the asylum application, because an appeal to the [Greek] Supreme Administrative Court has no automatic suspensive effect” (para 194). And again, “[o]f at least equal concern to the Court are the risks of *refoulement* the applicant faces in practice before any decision is taken on the merits of his case. The applicant did escape expulsion in August 2009 ... However, he claimed that he had barely escaped a second attempt by the police to deport him to Turkey” (para 316). Moreover, “[t]hat fact, combined with the malfunctions in the notification procedure in respect of ‘persons of no known address’ reported by the European Commissioner for Human Rights and the UNHCR ... makes it very uncertain whether the applicant will be able to learn the outcome of his asylum application in time to react within the prescribed time-limit” (para 319). This risk of being expelled actually constitutes the very reason why the Court eventually finds a violation of Article 13 taken together with Article 3, namely: “because of the ... risk [which the applicant] faces of being returned directly or indirectly to his country of origin without any serious examination of the merits of his asylum application and without having access to an effective remedy” (para 322).

danger of the review proceedings in Greece malfunctioning.³⁷³ This risk of being expelled actually constitutes the very reason why the Court determined that Art 13 ECHR had been violated together with Art 3 ECHR. Had the Court found that there was a risk of treatment contrary to Art 3 ECHR in the event of the applicant's return to Afghanistan, the Court's conclusion in the operative part of the judgment would have been as in *Chahal v. the United Kingdom* that “in the event of [the respondent State's] decision to deport [the applicant] to [the particular State], there would be a violation of Article 3 of the Convention”. The effect would have been that the Court would have prolonged its measure under Rule 39 of the Rules of Court and hence prevented the Greek authorities from deporting the applicant to his home country.

The dangerous practical implication of the Court's approach for future cases is that it would leave open a “legal loophole”³⁷⁴ whereby a person, in spite of the finding by the Court of a violation only under Art 13 ECHR taken together with Art 3 ECHR, could nevertheless be deported to a country where he could be subjected to ill-treatment contrary to Art 3 ECHR, a situation amounting to a *petitio principii* to invoke Art 46 ECHR in order to prevent deportation. Such deportation would be possible because the finding that an identified violation of Art 13 ECHR would prohibit a State to deport the applicant to his home country would definitely overstretch the potential of a complaint under this provision.³⁷⁵ This loophole can only be filled by taking the honest position to declare the obligation of the availability of an effective remedy and the suspensive effect of proceedings against a removal decision on the receiving State as deriving from Art 3 ECHR alone.

For these numerous reasons, the author argues that the availability of an effective remedy and the suspensive effect of proceedings against a removal decision in the receiving third State is as such relevant for the protection from chain-*refoulement* and hence is a factor of gravity under Art 3 ECHR alone.

³⁷³ For instance, it is stated in the judgment that “[s]everal reports highlight the serious risk of *refoulement* as soon as the decision is taken to reject the asylum application, because an appeal to the [Greek] Supreme Administrative Court has no automatic suspensive effect ” (§ 194). And again, “[o]f at least equal concern to the Court are the risks of *refoulement* the applicant faces in practice before any decision is taken on the merits of his case. The applicant did escape expulsion in August 2009 ... However, he claimed that he had barely escaped a second attempt by the police to deport him to Turkey” (§ 316). Moreover, “[t]hat fact, combined with the malfunctions in the notification procedure in respect of 'persons of no known address' reported by the European Commissioner for Human Rights and the UNHCR ... makes it very uncertain whether the applicant will be able to learn the outcome of his asylum application in time to react within the prescribed time-limit” (§ 319).

³⁷⁴ Judge Villiger in his dissenting opinion.

³⁷⁵ Judge Villiger also points to the consequence for all state parties of this innovatory approach that the judgment that bases the finding of a violation solely on Article 13 of the Convention taken together with Article 3, is binding for the parties according to Article 46 of the Convention, and they are obliged to comply with it. But equally clearly, it hardly follows from the finding of a violation under Article 13 that a State is not allowed to deport the applicant to his home country. Such a finding would be overstretching the potential of a complaint under Article 13.

bb. Single procedure of first instance: Protection discrepancies

On this issue as well, the ECtHR's approach diverged, focusing either on Art 13 ECHR in conjunction with Art 3 ECHR (1) or on Art 3 ECHR alone (2).

1. Art 13 ECHR in conjunction with Art 3 ECHR

The ECtHR made a risk assessment of the asylum procedure's quality in the third State only in its discussion of a violation of Art 13 ECHR in conjunction with Art 3 ECHR; and this only occurred in *M.S.S. v. Belgium and Greece*. As shortcomings of the Greek asylum procedure, the Court noted access to the asylum procedure and in the examination of asylum applications, insufficient information for asylum seekers about the procedures to be followed, difficult access to the Attica police headquarters, no reliable system of communication between the authorities and the asylum-seekers, shortage of interpreters and lack of training of the staff responsible for conducting the individual interviews, lack of legal aid effectively depriving the asylum seekers of legal counsel, and excessively lengthy delays in receiving a decision. These shortcomings affect asylum-seekers arriving in Greece for the first time as well as those sent back there in application of the Dublin Regulation.³⁷⁶ Hence, the ECtHR observed that the Greek asylum procedure of first instance was marked "by such major structural deficiencies that in the absence of an effective remedy, at the end of the day they are not protected against arbitrary removal back to their countries of origin".³⁷⁷

Regarding the asylum decisions themselves, the Court was concerned about the findings of the different surveys carried out by UNHCR, which showed that "almost all first-instance decisions are negative and drafted in a stereotyped manner without any details of the reasons for the decisions being given. In addition, the watchdog role played by the refugee advisory committees at second instance has been removed and UNHCR no longer plays a part in the asylum procedure".³⁷⁸ The ECtHR concluded that the applicant had "no guarantee that his asylum application would be seriously examined by the Greek authorities".³⁷⁹ Therefore, the Court concluded by finding that "there has been a violation of Article 13 of the Convention taken in conjunction with Article 3 because of the deficiencies in the Greek authorities' examination of the applicant's asylum request and the risk he faces of being returned directly

³⁷⁶ *M.S.S. v. Belgium and Greece*, paras 173-188.

³⁷⁷ *M.S.S. v. Belgium and Greece*, para. 300.

³⁷⁸ *M.S.S. v. Belgium and Greece*, para 302.

³⁷⁹ *M.S.S. v. Belgium and Greece*, para 358.

or indirectly to his country of origin without any serious examination of the merits of his asylum application”.³⁸⁰

2. Art 3 ECHR

Regarding a possible violation of Art 3 ECHR, the ECtHR trusted in *T.I. v. the United Kingdom* the assurances of the third State’s government that it would grant the applicant the allowance to stay. Subsequently, a positive refugee status determination by the third State was the crucial option for the applicant for not being removed in both *K.R.S. v. the United Kingdom* and *M.S.S. v. Belgium and Greece*. In *K.R.S. v. United Kingdom*, the Court trusted the Greek asylum system based on the safety presumption. In *M.S.S. v. Belgium and Greece*, the ECtHR did not discuss the risk of *refoulement* from Greece deriving in the single procedure from the lack of any serious examination of the applicant’s asylum application under Art 3 ECHR alone.

The author wants to point out that, although there is no right to asylum guaranteed under international law and, hence, the STC procedure is not unlawful *per se*, for the EU level, Art II-78 of the EU Charter of Fundamental Rights provides for a right to asylum, but continues that it shall be “guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Constitution”.³⁸¹ Such recognition of the right to asylum is a remarkable step in international law and could mean that when expelling asylum-seekers to a third country, the EU MS must “guarantee” they have access to an asylum procedure.³⁸²

As to the question of the quality of the single procedure, the author would like to reiterate her criticism of the Court’s approach to relying primarily on Art 13 ECHR for procedural issues regarding a STC. The judgment points out on various occasions that there is a clear danger of the proceedings in Greece malfunctioning and the applicant being sent back to Afghanistan during the proceedings without a complete examination of his complaints having taken place.³⁸³ This risk of being expelled actually constitutes the very reason why the Court

³⁸⁰ *M.S.S. v. Belgium and Greece*, para 321.

³⁸¹ Charter of Fundamental Rights of the European Union. 2010/C 83/02. *Official Journal*. C 83, 30.03.2010.

³⁸² Battjes, *European Asylum Law*, 114.

³⁸³ For instance, it is stated in the judgment that “[s]everal reports highlight the serious risk of *refoulement* as soon as the decision is taken to reject the asylum application, because an appeal to the [Greek] Supreme Administrative Court has no automatic suspensive effect” (para. 194). And again, “[o]f at least equal concern to the Court are the risks of *refoulement* the applicant faces in practice before any decision is taken on the merits of his case. The applicant did escape expulsion in August 2009. [...] However, he claimed that he had barely escaped a second attempt by the police to deport him to Turkey”

eventually found a violation of Art 13 ECHR taken together with Art 3 ECHR. Hence, also on the issue of the risk of *refoulement*, it is incomprehensible that the judgment refused to acknowledge such a complaint about Greece under Art 3 ECHR alone. As for the review procedure, the Court's omission of allowing Art 3 ECHR alone to pose direct exigencies on the single procedure in the receiving State has to be criticized also in the face of the quality of the examination of the applicant's asylum application- in whose context also the *refoulement* assessment is taken.

Besides the cardinal importance of Art 3 ECHR, negative practical consequences also speak against the approach taken by the Court. This is demonstrated by the Court's statement that "[i]t is in the first place for the Greek authorities, who have responsibility for asylum matters, themselves to examine the applicant's request and the documents produced by him and assess the risks to which he would be exposed in Afghanistan. The Court's primary concern is whether effective procedural guarantees exist in the present case to protect the applicant against arbitrary removal directly or indirectly back to his country of origin".³⁸⁴ By requiring the national authorities first to examine the issue of *refoulement* before the Court can do so, the Court inappropriately applies the principle of subsidiary. Tribute has already sufficiently been paid to this principle in this case by testing the complaint expressly or implicitly with various admissibility conditions and in particular with that of the exhaustion of domestic remedies. While the principle of subsidiary plays an important part, for instance, in applying the second paragraphs of Arts 8 to 11 ECHR, its role must be more restricted in the light of a crucial provision such as Art 3 ECHR and in view of the central importance of the applicant's *refoulement* for this case. This principle cannot permit such a complaint to be "downgraded" so that it is – as in other cases³⁸⁵ – no longer independently examined.³⁸⁶

In fact, only the position to declare the obligations on the single procedure as deriving from Art 3 ECHR is doing justice to reality: when the applicant's claim not to be refouled is considered in the context of and hence depends solely on the quality of the examination of the

(para. 316). Moreover, "[t]hat fact, combined with the malfunctions in the notification procedure in respect of 'persons of no known address' reported by the European Commissioner for Human Rights and the UNHCR [...] makes it very uncertain whether the applicant will be able to learn the outcome of his asylum application in time to react within the prescribed time-limit" (para. 319).

³⁸⁴ Para. 299.

³⁸⁵ In the case of *Saadi v. Italy*, concerning deportation to Tunisia, the domestic authorities' reasons for allowing that applicant's *refoulement* concerned mainly assurances which the Tunisian Government had given to Italy – assurances which the Court in its judgment found to be insufficient. The Court was then obliged to examine itself, and in detail, the situation in Tunisia, relying *inter alia* on Reports of Amnesty International and Human Rights Watch (see *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008). These arguments had not been examined by the Italian courts. This is precisely what the Court could and should have done in the present case.

³⁸⁶ Villiger, para. 245.

applicant's asylum application, the right to an asylum procedure of a certain quality is a "side effect of the prohibition of *refoulement*".³⁸⁷

Therefore, the author believes that the Court should have identified as relevant for the protection from *refoulement* under Art 3 ECHR in a single procedure the quality of the asylum procedure. Hence, it should have separately examined the deficiencies in the Greek authorities' examination of the applicant's asylum request and the consequential risk he faced of being returned directly or indirectly to his country of origin without any serious examination of his asylum application.³⁸⁸

But which quality of asylum procedure guarantees in a single procedure the protection from and hence does justice to the principle of non-*refoulement*? Does safety only exist where the result of the asylum procedure is in conformity with the GRC, i.e. a genuine refugee's claim is declared admissible and he is granted asylum? In other words, are detrimental protection discrepancies between the removing and the receiving State a factor for gravity, making the third State unsafe and hence obliging the responsible State to abstain from removal?

The GRC provides a uniform and non-derogable definition of the term "refugee", but in practice, States have taken both more liberal and more restrictive stands. Thus, a claim that would be successful in one State might be rejected in the neighboring State. A sharp cleavage dissociates the uniformity of the procedure and divergent state practices regarding the substance of the refugee definition. In other words, the State where an applicant can claim refugee status is imposed on the claimant, but States remain free to apply their idiosyncratic interpretation of the refugee definition. In this system, the examination of the applicants claim remains within the exclusive realm of state sovereignty.

Domestic authorities have reacted to protection discrepancies with approaches reaching from particularistic to universalistic. In SC procedures, particularistic argumentations have led domestic bodies to partly absurd formalistic arguments as a response to decisive dissimilarities in the protection systems. The most radical particularistic view argues that respect of the GRC is provided for in the savings clause in Art 2 DC and, hence, no situation could compel EU MS to use Art 3 (4) DC.³⁸⁹ This position has evidently no ground in the VTC and is hence to be discarded.

³⁸⁷ Battjes, European Asylum Law, 401.

³⁸⁸ *M.S.S. v. Belgium and Greece*, para 321.

³⁸⁹ The U.K. Secretary of State argued in this sense in *R v. Secretary of State for the Home Department, Ex parte Jahangeer and others*, [1993] Imm AR 564, United Kingdom: High Court (England and Wales), 11 June 1993, available at: <http://www.unhcr.org/refworld/docid/3ae6b65e2c.html> [accessed 24 June 2011].

Particularistic views fleeing into formalism in cases where the receiving EU MS has a less protective interpretation of the GRC argue that “[w]ith reference to the legislation in [the receiving EU MS], its international obligations and its notorious conduct with regard to persons seeking asylum there, it *must be ruled out* that [the receiving EU MS] would not follow its obligations under the conventions”³⁹⁰ or state that “the fact that, compared to [the responsible EU MS], [the receiving EU MS] may judge the question of an international flight alternative differently than Sweden, and thus exclude an asylum seeker from the possibility to receive refugee status [...], does not imply that [the responsible EU MS] violates Art 33 of the Geneva Convention by sending the asylum seeker to [the receiving EU MS] for a determination of his claim”.³⁹¹

A moderate particularistic view argues that there is a permissive tolerance for deviating interpretation and, hence, no situation that could compel EU MSs to use Art 3 (4) DC. The interesting issue is that a moderate particularistic approach also needs the definition of the tolerable deviation of interpretation what only the most radical universalistic approach can offer: a unitary interpretation of the GRC and especially its Art 33 by the rules in the VTC, and hence no margin of appreciation at all.³⁹²

Thus, a universalistic approach is the only defensible way. Probably the most comprehensively argued example of a universalistic approach to date is from the British House of Lords in *Adan and Aitseguer*, a jurisprudence from which the House of Lords regrettably retreated in later decisions. It raised the question of whether a Dublin removal is legitimate when British courts consider persecution by non-State agents³⁹³ to fall within the protective scope of the refugee definition and German and French courts do not. After underscoring the relevance of the canon of interpretation enshrined in Arts 31 and 32 VTC, Lord Steyn concluded:

“[T]here can *only* be *one true interpretation of a treaty*. If there is disagreement on the meaning of the Refugee Convention, it can be resolved by the International Court of Justice: article 38. It has, however, never been asked to make such a ruling. The prospect of a reference to the International Court of Justice is remote. In practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so *it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning*.”³⁹⁴

³⁹⁰ Noll, Negotiating Asylum, 500.

³⁹¹ The responsible EU MS being Sweden, the receiving EU MS being Germany, Translation by Noll, Negotiating Asylum, 501. *Minority Bosnians* Decision, Swedish Aliens Appeals Board (AAB) exhibited incompetence regarding Sweden’s *non-refoulement* obligations within the context of the European Union, UD98/780/MP.

³⁹² Noll, Negotiating Asylum, 496-499.

³⁹³ *Adan* originated from Somalia and feared persecution at the hands of another clan than his own, while *Aitseguer* was an Algerian citizen and was threatened by the Groupe Islamique Armé – a threat which state authorities could not protect him from.

³⁹⁴ House of Lords, *Adan and Aitseguer*, Lord Steyn. The Court of Appeal argued in an analogous fashion; Court of Appeal, *Adan and Aitseguer*, para. 68. In its judgment of 23 July 1999 in the case of *R. v. Secretary of State for the Home Department ex parte Adan, Subaskaran and Aitseguer*, the Court of Appeal examined as a question of general importance whether the

Hence, supported by earlier *dicta* of the Court of Appeal in *Kerrouche*³⁹⁵ and *Iyadurai*³⁹⁶, the House of Lords rejected the existence of a “range of permissible meanings” in interpreting the GRC³⁹⁷ and considered in this case the removal of the claimants to Germany and France to contravene the law, as the German and French interpretations of Art 1(A) (2) GRC were too narrow with regard to persecution by non-State agents.³⁹⁸ By this argumentation, the House of Lords effectively defended the notion that refugee law has a determinate content even in the face of dissimilarities of interpretation within the EU and that this content has to be guaranteed. In fact, “the holistic approach of the U.K. Courts is respectful of the degree of harmonisation already attained through the 1951 Refugee Convention, and should be endorsed as a model for the future scrutiny of removals under the Dublin Convention”.³⁹⁹ Also from a political point of view, this is a very valuable result: not only would the danger of the vicious circle of restrictionism be stopped, the canon of interpretation laid down in Art 31 and 43 VTC could also be a tool for harmonization of the EU MSs’ protection systems.⁴⁰⁰ UNHCR can also be referred to in this context: “The primary responsibility to provide protection remains with the state where the claim is lodged. Transfer of responsibility for an asylum application might be envisaged in some circumstances, but only between states with comparable protection systems, on the basis of an agreement which clearly outlines their respective responsibilities”.⁴⁰¹

Hence, it has become clear that the universalistic approach is the only tenable as long as Member States interpret their international obligations towards asylum-seekers differently.

Secretary of State was entitled to return asylum-seekers to France and Germany under section 2 (2) c of the Asylum and Immigration Act 1996, as being countries which did not recognise as refugees those who feared persecution from non-State agents. Adan was a citizen of Somalia who had been refused asylum in Germany prior to her arrival in the United Kingdom; Subaskaran was a Sri Lankan national who claimed asylum in the United Kingdom on account of his ill-treatment by both the LTTE and the Sri Lankan army but whose claims had been rejected by the German authorities; and Aitseguer was a citizen of Algeria whose asylum application had been rejected by French authorities. The Court of Appeal held that the Geneva Convention extended protection to persons who feared persecution by non-State agents, where, for whatever cause, the State was unwilling or unable to offer protection itself. As the German and French authorities subscribed to the “accountability theory” – i.e. refugee status was limited to those who feared persecution emanating from State or quasi-State authorities or persecution from non-State agents where it was shown that it was tolerated or encouraged by the State, or at least that the State was unwilling to offer protection – the Secretary of State could not as a matter of law certify the claimants for return to these countries as safe third countries because these countries did not give effect to the Convention’s core values:

“If a party to the Geneva Convention were to take a position which was at a variance with the Convention’s true interpretation, and act upon it, it could not be regarded as a safe third country; not merely because the ““real risk”” test is not breached (though certainly it would be) but because in the particular case the Convention was not being applied at all.” (para 68)

The Secretary of State has petitioned the House of Lords for leave to appeal against this decision as regards Adan and Aitseguer, no separate petition being pursued in respect of Subaskaran due to the similarity of the issues.

³⁹⁵ *Kerrouche v. Secretary of State for the Home Department* [1997] Imm. A.R. 610, 615.

³⁹⁶ *Iyadurai v. Secretary of State for the Home Department* [1998] Imm. A.R. 470, 476.

³⁹⁷ House of Lords, *Adan and Aitseguer*, Lord Steyn and Lord Hobhouse of Woodborough. For a critique of the tolerance model developed in *Kerrouche* and *Iyadurai*, see Noll, 1997, pp. 503–510.

³⁹⁸ House of Lords, *Adan and Aitseguer* (all Lords rejecting the government’s appeals). Court of Appeal, *Adan and Aitseguer*, paras. 71 and 72.

³⁹⁹ Noll, Formalism versus Empiricism, 175-6.

⁴⁰⁰ For an example for non-state agents see Noll, Negotiating Asylum, 511-534.

⁴⁰¹ UNHCR, Improving Asylum Procedures, 5.

How has the ECtHR treated the issue? The Court stated in *T.I. v. the United Kingdom* that, in general, its primary concern is not to monitor the performance of Contracting States with regard to their observance of their obligations under the GRC, i.e. in this case the fact that the German authorities exclude sources of risk of ill-treatment by non-State agent from consideration of asylum claims. However, in this concrete case the Court raised the issue of protection discrepancies by considering the claim of T.I. that the asylum proceedings would not offer him effective protection since they would, in all likelihood, result in a further rejection of his claims and an order of removal. The Court noted that the German authorities would not find the applicant's probable persecution by non-State agents relevant for the purposes of asylum or protection under Art 3 ECHR. This fact was thus one of three factors – the other two being procedural reasons – that made the Court find that there was “considerable doubt that the applicant would either be granted a follow up asylum hearing or that his second claim would be granted”. Protection discrepancies have hence been declared to make a third state unsafe, i.e. to be a factor for the risk of *refoulement*.

Additionally, the author would like to recapitulate that in *M.S.S. v. Belgium and Greece*, a crucial part of the Court's reasoning for a violation of Art 13 in conjunction with Art 3 ECHR because of the deficiencies in the Greek authorities' examination of the applicant's asylum request was that almost all first-instance decisions were negative and hence, the applicant had no guarantee that his asylum application would be seriously examined by the Greek authorities. While giving the results of the asylum procedure crucial weight only regarding Art 13 ECHR, the author sees it again as a side effect of the prohibition of *refoulement*, hence of the protection under Art 3 ECHR alone that, in the third State's asylum procedure, the treatment of the admissibility and the merits of the individual case is not more restrictive than in the removing State. In this sense, Elspeth Guild and Jean Allain find that there is no need of proof by individual cases to see that, “unless asylum applications are determined in an equivalent manner across the EU and subject to a supervisory appellate structure to ensure consistency among Member States (and any other States to which asylum seekers are sent), the protection against *refoulement* may not be guaranteed”.⁴⁰² Hence, until then, the notion of STC fails to provide adequate protection against the individual's right not to be *refouled*.⁴⁰³

For these numerous reasons, the author argues that, the third State's single procedure being of a certain quality both on asylum and removal is relevant for the protection from chain-*refoulement*. Hence, a factor of gravity under Art 3 ECHR alone is the lack of such quality

⁴⁰² Guild 321.

⁴⁰³ Allain 553.

even only as to the examination of the applicant's asylum claim, having as result a more restrictive protection scope in the respective case than foreseen by the universal refugee definition.

Conclusion

It can be concluded that gravity can arise from deficiencies in the removal procedure of the third State, namely due to its review procedure or its procedure of first instance. The ECtHR has examined these questions in *T.I. v. the United Kingdom*, *K.R.S. v. the United Kingdom* and *M.S.S. v. Belgium and Greece*. While the Court comprehensively relied primarily on Art 13 ECHR in its examination of these procedural issues, the author has defended with reference to the cardinal importance of Art 3 ECHR, its prohibition also of chain-*refoulement* and with formal and manifestly logical arguments that deficiencies in the review procedure or in the single procedure of first instance must be a factor of gravity under Art 3 ECHR alone.

As to the review procedure, the author argued that the availability of an effective remedy and the suspensive effect of proceedings against a removal decision in the receiving third State is as such relevant for the protection from chain-*refoulement* and hence derive as exigencies from Art 3 ECHR alone. As to the third State's single procedure both on asylum and removal, relevant for the protection from chain-*refoulement* and hence a factor of gravity under Art 3 ECHR alone is the lack of a certain procedural quality- even only as to the examination of the applicant's asylum claim with the result of a more restrictive protection scope in the respective case than foreseen by the universal refugee definition.

While it is clear that situations of gravity oblige the responsible State not to remove the individual concerned to the unsafe State, are there also positive procedural demands arising for the removing State out of this obligation?

3. Positive procedural obligation: Rebuttal of safety presumption

This section will address whether positive procedural obligations can be developed for the removal procedure of the responsible State from the precedent defense of the factual and procedural factors of gravity amounting to a violation of Art 3 ECHR.

The author will defend that, while in general the obligation of empirical assessment of the danger of *refoulement* exists (a), the SC concept suffices this obligation with its possibility to rebut the safety presumption (b).

a. In general: Empirical assessment of the danger of chain-*refoulement*

A removing State can never act on the assumption that *pacta sunt servanda* is satisfied. As was shown in Chapter II, a violation of Art 3 ECHR in a presumed SCO, even if it is an EU MS, is not a theoretical issue. As Goodwin-Gill states: “How can we be sufficiently sure that even the most respectable and reputable of regimes has not, just this once, produced a refugee?”⁴⁰⁴ Therefore, Boutillon’s opinion that “a more subtle analysis might show that this exclusion is acceptable” and that “it seems extremely unlikely that a European national would have a valid refugee claim”⁴⁰⁵ cannot be followed.

The author defends a radical obligation: As a removing State can never act on the assumption that *pacta sunt servanda* is satisfied by absolute harmony in the application of the GRC in all Member States,⁴⁰⁶ the removing State must take an empirical approach in its single procedure on asylum and *refoulement*. Such empirical assessment is to be taken on *refoulement* because it “is inherent in the prohibitions of *refoulement* contained in international law. The decision-maker has to establish the *international meaning* of relevant prohibitions of *refoulement* to measure the indirect risk against its benchmarks”.⁴⁰⁷ Even further assessment might be necessary, such as in cases as the *Minority Bosnians* case: To know about the differences in the granting of residence permits, a decision-maker has to “embark on an empirical assessment of the claimants’ prospects for protection”,⁴⁰⁸ i.e. compare the German and Swedish practice relevant for the individual concerned.⁴⁰⁹

⁴⁰⁴ Goodwin-Gill, Safe Country, 248.

⁴⁰⁵ Boutillon 140.

⁴⁰⁶ Gilbert 973-4, referring to *Cf. R v. Secretary of State for the Home Department Ex p Adan*, [1999] 1 AC 293; and [2001] 2 AC 477.

⁴⁰⁷ Noll, Formalism versus Empiricism, 181-2.

⁴⁰⁸ Noll, Formalism versus Empiricism, 171.

⁴⁰⁹ *Ibidem*.

A result from the universalistic approach to be taken vis-à-vis protection discrepancies in the third State's asylum procedure for the protection from chain-*refoulement* is that an empirical assessment is also demanded of the compliance of the receiving State's protection scope with the universal refugee definition. If not, manifest denials of reality would win as those that were brought forward by the British Government before the ECtHR in *T.I. v. the United Kingdom*, in which Germany as receiving country would, at that time not in breach of EU law,⁴¹⁰ not grant protection in cases of persecution by non-State agents: "It would be wrong in principle for the United Kingdom to have to take on a policing function of assessing whether another Contracting State such as Germany was complying with the Convention. It would also undermine the effective working of the Dublin Convention, which was brought into operation to allocate in a fair and efficient manner State responsibility within Europe for considering asylum claims".⁴¹¹ However, in an empirical assessment the ECtHR scrutinized the direct risk of ill-treatment in Sri Lanka (which it affirmed) and the indirect risk of ill-treatment upon return to Germany.⁴¹² In fact, in the end, the ECtHR destroyed in its decision the efficiency of the Dublin Convention without using the word *refoulement*, but by taking an empirical approach: Bosnian asylum-seekers who qualify for refugee status or a complementary form of protection shall not be returned to another EU MS under the Dublin Convention, if the latter does not grant them a residence permit.⁴¹³ Hence, although the Court rejected the argument that the fact that Germany was a party to the ECHR absolved the United Kingdom from verifying the fate that awaited an asylum-seeker it was about to transfer to that State, if a residence permit does not solve the issue, only the fact that the asylum procedure in Germany apparently complied with the ECHR enabled the Court to reject the allegation that the applicant's removal to Germany would make him run a real and serious risk of treatment contrary to Art 3 ECHR.

As to domestic authorities, they have prevented removals based on a finding that a particular refugee's rights will not be protected in another State, highlighting the importance of the removing State's inquiry into particular circumstances vis-à-vis asylum-seekers. In this sense, the Michigan Guidelines state that a State is under a duty "to inform [itself] of the facts and

⁴¹⁰ Since the adoption of the Qualification Directive, all EU MS are required to recognise persecution by non-state agents as falling within the refugee definition (Art 6 (c)). However, in practice, whilst the refugee definition in the QD has led some countries that previously did not include persecution by such groups to provide protection, other countries have adopted a more restrictive approach: European Council on Refugees and Exiles (ECRE), 'The Impact of the EU Qualification Directive on International Protection', (October 2008)

⁴¹¹ *T.I. v. the United Kingdom*, under "Submissions before the Court", "The United Kingdom Government".

⁴¹² That Art 3 ECHR also applies in situations where the danger emanates from persons or groups of persons who are not public officials, was lastly stated by the ECtHR in *Salah Sheekh v. the Netherlands*, para 147 and reiterated in *N. v. the United Kingdom* paras 31-32.

⁴¹³ Noll, Formalism versus Empiricism, 170.

monitor the decisions made by a third country in order to satisfy [itself] that the third country will not send the applicant to another country otherwise than in accordance with the convention."⁴¹⁴

However, how can this obligation for an empirical assessment not be seen as being breached by a procedure as the SC procedure that foresees the absolute contrary, namely no meritorious assessment of the case by the removing State? The author holds that this obligation and the SC concepts can be reconciled by the rebuttal of the safety presumption.

b. For SC procedures: Rebuttal of safety presumption

How can it be guaranteed in a SC procedure that *refoulement* is prevented in a situation of insecurity in the “safe” State due to factual conditions or procedural protection discrepancies? It has already been established that a SC procedure is not unlawful *per se*, as there is no right to asylum guaranteed under international law. While the safety presumption is, therefore, not a prohibited concept, the author defends that it is prerogative that is rebuttable.

For the presumption of safety, ratification of the same treaties is not a sufficient basis for inter-state trust. Thus, the mere fact that a State has ratified relevant instruments of international law or assurances does not allow for absolute trust that it is indeed safe.⁴¹⁵ Regarding ratification of the ECHR, it was made clear already in *Soering v. the United Kingdom* that expulsion to a contracting State of the ECHR is not permitted generally or under easier conditions than to a State that is not a member of the ECHR.⁴¹⁶ In this sense, the ECtHR stated in *T.I. v. the United Kingdom*:

“The Court finds 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 3 of the Convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose

⁴¹⁴ *R v. Secretary of State for the Home Department, ex parte Yogathas*, [2002] UKHL 36, United Kingdom: House of Lords, 17 October 2002 p.9, 4 Eng. Rep. 800 (Eng.) (Lord Bingham of Cornhill). This is also the approach in the Australian case-law, despite its representing one of the least protective approaches to “safe third countries.” See, e.g., *Al Toubi v. MIMA* (2001) F.C.A. 1381, p 32.

⁴¹⁵ Battjes, *European Asylum Law*, 409.

⁴¹⁶ Alleweldt, Ralf, ‘Protection Against Expulsion Under Article 3 of the European Convention on Human Rights’ (1993) 4 *European Journal of International Law* 3, 372.

and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution”⁴¹⁷

In *Korban v Sweden*, the Committee against Torture opined that the third State, in this case Jordan, was unsafe even though it was party to the CAT.⁴¹⁸ In *Alan v. Switzerland* as well, the argument that the removing State would not be in violation of its non-*refoulement* obligation in returning the individual to a State that is “party to [a] Convention” was rejected.⁴¹⁹ Regarding the GRC as well, a State should not be considered safe simply because it has ratified the Geneva Convention: “The country may not implement the Refugee Convention in good faith, may apply an extremely restrictive interpretation, or may have adopted measures that cast in doubt its observance of the terms of the Refugee Convention. Nor does the fact that a country has signed the Refugee Convention offer a guarantee against *refoulement*”.⁴²⁰ Reality proves that, in many instances, “returning asylum applicants to a third host country [that is a signatory to or intends to sign the Refugee Convention] has resulted in *refoulement* to the country where they faced persecution and ultimately in their death, disappearance or persecution”.⁴²¹

On the other hand, ratification of the same treaties is not mandatory for interstate trust, i.e. the non-ratification of the GRC or human rights treaties does not justify declaring a State to be unsafe. In this sense, the ECtHR spoke in *Amuur v France* of “protection comparable” and the possibility of expulsion to Syria not being party to the GRC after “guarantees” by the Syrian authorities (a condition to be discussed later).⁴²² A State that has not assumed by treaty or agreement an obligation to provide for comparable protection can, according to a decision of the German Constitutional Court, be assumed to provide such if it co-operates with UNHCR.⁴²³ The author opposes this argumentation due to the fact that UNHCR’s role is limited to supervising only.⁴²⁴ Mere state practice, i.e. obligations being absent, or co-operation with UNHCR does not provide for a basis for interstate trust.

As to the rebuttal of the safety presumption, it is logical that while the mere fact that a State has ratified relevant instruments of international law or assurances does not allow for absolute

⁴¹⁷ See, among other authorities, also *Waite and Kennedy v. Germany*, application no. 26083/94, Council of Europe: European Court of Human Rights, 18 February 1999, para 67.

⁴¹⁸ CommAT, 16 November 1998, CAT/C/21/D/88/1997, paras. 6.5. and 7.

⁴¹⁹ Foster, Michelle, ‘Protection Elsewhere: the Legal Implications of Requiring Refugees to Seek Protection in Another State’ (2007) 28 *Michigan Journal of International Law* 2 223-286.

⁴²⁰ Borchelt, 505.

⁴²¹ Daniele Joly, ‘The Porous Dam: European Harmonization on Asylum in the Nineties’, 6 *Int'l J. Refugee L.* 159, 170 (1994) (citation omitted).

⁴²² *Amuur v France*, para. 48.

⁴²³ BVerfG 14 May 1996, BVerfGE 94, 49 (Sichere Drittstaaten), para. 111.

⁴²⁴ Battjes, European Asylum Law, 415.

trust that it is safe, the *argumentum e contrario* that the sending State is obliged to perform an individual examination of the merits to establish that the respective State is safe for the particular applicant would also be unreasonable,⁴²⁵ as it would render the fact that the State is party to the same instruments of international law irrelevant. Hence, an intermediate position should be defended: Upon an application for asylum, the removing State can refuse to examine the merits of the claim on the assumption that the receiving state is *prima facie* safe. However, under this legal situation, the applicant must have the opportunity to present evidence supporting his claim that the receiving State is not safe. If he succeeds, the safety presumption must be seen as rebutted.⁴²⁶ The ECtHR evidently also follows this argumentation as, for example, it stated:

“On the legal situation, the Court observed that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are *manifestly contrary* to the principles of the Convention”.⁴²⁷

In this sense, based on Art 3 ECHR alone, the ECtHR criticized one issue of the asylum procedure in Belgium in *M.S.S. v. Belgium and Greece*, namely that “the procedure followed by the Aliens Office in application of the Dublin Regulation left no possibility for the applicant to state the reasons militating against his transfer to Greece: The form the Aliens Office filled in contains no section for such comments”.⁴²⁸ This argumentation is a positive case-law development after the ECtHR had not even discussed the possibility of rebuttal in the case *Tomic v. the United Kingdom* after the Spanish Protocol had determined the safety of the United Kingdom as a SCO.

It can hence be established that, upon an application for asylum, the removing State can refuse to examine the merits of the claim on the assumption that a specific State, whether it be a STC or a SCO, is *prima facie* safe only if the applicant is given the opportunity to rebut the safety presumption, i.e. present counter evidence to the effect that the state is not safe.⁴²⁹ The circumstances under which rebuttal should be allowed consider the question of standard and burden of proof, a most crucial issue to be discussed in the following chapter.

⁴²⁵ Battjes, European Asylum Law, 409.

⁴²⁶ Hailbronner, Immigration and asylum law, 448.

⁴²⁷ *Saadi v. Italy*, para 147, emphasis added.

⁴²⁸ *Saadi v. Italy*, para 351.

⁴²⁹ Hailbronner, Immigration and asylum law, 448; Battjes, European Asylum Law, 412.

B. Probability and predictability *equals* standard of proof and burden of proof

In the second step of the direct balancing, it must be analyzed under which circumstances removal is impeded by the principle of non-*refoulement* as inherent in Art 3 ECHR. Abstractly, this step means balancing the interest of the removing State and the danger for the applicant in the receiving State. As this at the outset may seem inadequate for the absolute provision of Art 3 ECHR, it shall be reiterated that this means nothing more than that two important limitations are introduced to take into account the State's limited possibilities: the probability and the predictability of the risk.⁴³⁰

As already discussed, the question on probability and predictability of a risk can, in the sense of the "variable standard of proof" of Legomsky's complicity principle, only be answered in a relative manner, because proportionality must exist between the probability and predictability and the gravity of the anticipated violation. In other words: not every probability and predictability can trigger the responsibility of the removing State, not even for torture. In this sense, the wording of Art 3 (1) CAT refers to the "danger of being subjected to torture" (in French "risque d'être soumise à la torture"), and according to the Committee's first General Comment of November 1998, Art 3 CAT is confined to cases where there are "substantial grounds for believing" that the applicant would be in danger of being subjected to torture as defined in Art 1 CAT.⁴³¹ This wording replaced the original Swedish proposal for the expression "reasonable grounds to believe that he may be in danger" of being subjected to torture. In *Motumbo v. Switzerland*⁴³², its first decision on the merits, the Committee referred to circumstances as evidently being of relevance which would have the "foreseeable and necessary consequence" of exposing the subject to torture. Furthermore, in *Hayden v.*

⁴³⁰ Hence, also in this balancing process, the absoluteness of Art 3 ECHR wins out: In *Chahal v. the United Kingdom*, the Court reiterated that "in assessing whether there exists a real risk of treatment in breach of Article 3 in expulsion cases such as the present, the fact that the person is perceived as a danger to the national security of the respondent State is not a material consideration": *Chahal v. the United Kingdom* para 149. Any further debate on this issue was laid to rest in *Saadi v. the United Kingdom* when the ECtHR stated: "The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return": *Saadi v. the United Kingdom* para 138-9, emphasis added. In its *Salah Sheekh v. the Netherlands* judgment, the ECtHR clarified its demands: "Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens. The right to political asylum is not contained in either the Convention or its Protocols. However, in exercising their right to expel such aliens, Contracting States must have regard to Article 3 of the Convention which enshrines one of the fundamental values of democratic societies and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct, however undesirable or dangerous. The expulsion of an alien may give rise to an issue under this provision, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a *real risk* of being subjected to treatment contrary to Article 3 in the receiving country. In such circumstances, Article 3 implies an obligation not to expel the individual to that country": para 135, emphasis added.

⁴³¹ Nowak 156, referring to GenC1, §1.

⁴³² No.13/1993.

Sweden,⁴³³ recalling that, for the purposes of Art 3 CAT the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he is returned, the Committee pointed out that “the requirement of necessity and predictability should be interpreted in light of its general comment on the implementation of article 3 which reads: ‘Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does *not* have to meet the test of being *highly probable*’”.⁴³⁴ This concept was frequently recalled in the subsequent jurisprudence of the Committee.⁴³⁵

Through its case-law, the ECtHR has also developed certain demands on proportionality and predictability for the respective gravity of risk that must be attained to “trigger” the positive obligation to impede removal. These demands define the standard of proof and are also consequential for the burden of proof to be carried by the asylum-seeker. According to the ECtHR's settled case-law, the Court's demands on proportionality and predictability for the respective gravity of risk are the following: substantial grounds must exist for believing that there is a real risk of exposure to ill-treatment, either in the State of proposed destination or through chain-*refoulement*. On the assessment of the risk of ill-treatment of an individual upon return to his country of origin, the ECtHR noted first in *Nsona v. the Netherlands*:

“Expulsion - or removal - by a Contracting State of a non-national may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where *substantial grounds* have been shown for believing that the person concerned faced a *real risk* of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he or she was returned”.⁴³⁶

These parameters set out by the ECtHR have become continuous jurisprudence of the Court since *Soering v. the United Kingdom* also for chain-*refoulement*.⁴³⁷ It has already been well-established through case-law that the removal of an asylum-seeker by a Contracting State may give rise to an issue under Art 3 ECHR, and hence engage the responsibility of that State under the Convention, where “substantial grounds” have been shown for believing that the

⁴³³ No.101/1997.

⁴³⁴ Emphasis added.

⁴³⁵ Nowak 167, referring to Nos. 262/2005, 280/2005, 279/2005.

⁴³⁶ *Nsona v. the Netherlands*, para 92, emphasis added.

⁴³⁷ *Soering v. United Kingdom*, para 88: “the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3 (art. 3), and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a *real risk* of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country”; see further *Saadi v. Italy*; *NA. v. the United Kingdom*, application no. 25904/07, Council of Europe: European Court of Human Rights, 17 July 2008.

person concerned faces a “real risk” of being subjected to torture or inhuman or degrading treatment or punishment in the receiving State.⁴³⁸ In such circumstances, Art 3 ECHR implies an obligation not to expel the individual to that State.⁴³⁹ This coherent jurisprudence of the ECtHR clarifies the confusion raised by exceptions of the ECommHR that rarely applied a stricter “serious risk” test.⁴⁴⁰

The issues of standard of proof (1) and burden of proof (2) will now be separately analyzed.

1. Standard of proof

In the context of the standard of proof, the issues of probability and predictability are both relevant and will be discussed together under the term “knowledge”. According to the complicity principle’s variable standard of proof, the required level of knowledge about a risk varies inversely with the seriousness of the potential harm. This concept is in conformity with the GRC, according to which the degree of certainty implied by the word “knowingly” is assumed to vary inversely with the importance of the right.

As the concept of the variable standard of proof indicates that the gravity of the foreseeable ill-treatment is decisive with respect to the degree of probability and predictability applicable in different classes of cases, a relatively low level of knowledge ought to be required in the case of an alleged violation of Art 3 ECHR for the proof of a violation. In this sense, Legomsky has been quoted as arguing on the issue of the risk of a violation as grave as e.g. torture and degrading treatment existing in a third state, that, “If the right is unusually important, then perhaps any reasonable basis for fearing that the third country will violate the right should be regarded as ‘knowledge’ for purposes of the destination country’s responsibilities”.⁴⁴¹ In comparison, a higher level of probability and predictability would have to be proven if the applicant would “merely” be exposed to a certainly degrading, but yet fairly light corporal punishment in a society generally governed by the rule of law.⁴⁴²

How has the ECtHR handled the parameters of probability and predictability? The fact that the absoluteness of Art 3 ECHR has prevailed not only regarding the level of gravity but also

⁴³⁸ *M.S.S. v. Belgium and Greece*, para 365.

⁴³⁹ See *Soering v. the United Kingdom* paras 90-91; *Vilvarajah and others v. the United Kingdom* para 103; *H.L.R. v. France* para 34; *Jabari v. Turkey* para 38; *Salah Sheekh v. the Netherlands* para 135; and *Saadi v. the United Kingdom* para 152

⁴⁴⁰ E.g. *T.I. v. the United Kingdom*, para 9.

⁴⁴¹ Legomsky 623.

⁴⁴² Einarsen 371.

the level of probability can be rated positively: the Court has reiterated in its jurisprudence that the fact that the person is perceived to be a danger to the national security of the respective State is not a material consideration in its risk assessment regarding *refoulement*.⁴⁴³ It argued:

“The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return. For that reason *it would be incorrect to require a higher standard of proof*, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.”⁴⁴⁴

However, the ECtHR’s threshold for the predictability and probability necessary for a violation appears on first sight misguided: “substantial grounds” must be shown to prove that the person concerned faces a “real risk” of being subjected to torture or to inhuman or degrading treatment or punishment in the country of potential return. Such high demands on the probability and predictability for all levels of gravity of violation of Art 3 ECHR seem rather restrictive. However, what is relevant is not which terms the ECtHR has used, but how it has *in realiter* set the level in its case-by-case jurisprudence. Indeed, it is possible that the wording of the demanded level of knowledge is misleading and in its application, the approach of the ECtHR is congruent with Legomsky’s complicity principle’s variable standard of proof.

While the degree of predictability recognized by the ECtHR in the *Soering v. the United Kingdom* judgment can only be applied to similar cases where the “death row phenomenon” is involved, it is nonetheless of great interest, as it indicates the standard setting the Court has intended to follow in its risk assessments in other cases. In this case, the Court assumed at the starting point that it was not certain nor even probable that Soering would be convicted of capital murder as charged.⁴⁴⁵ However, in the particular case, a “significant” risk existed,⁴⁴⁶ since the risk could not be eliminated by reason of the wishes of the UK and the rather strong legal arguments available under US law against imposing the death penalty.⁴⁴⁷ The Court emphasized that the prosecuting authorities in Virginia had decided to seek the death penalty because they believed that the evidence of the criminal case supported such action. That being so, “it is hardly open to the Court to hold that there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the

⁴⁴³ *Saadi v. Italy* para 149.

⁴⁴⁴ *Saadi v. Italy* para. 138-9, emphasis added.

⁴⁴⁵ *Soering v. the United Kingdom* para 94: “The United Kingdom Government are justified in their assertion that no assumption can be made that Mr Soering would certainly or even probably be convicted of capital murder as charged”.

⁴⁴⁶ *Ibidem*.

⁴⁴⁷ *Soering v. the United Kingdom* para 93.

‘death row phenomenon’”.⁴⁴⁸ Thus, the sufficient degree of predictability was attained, even though explicitly no assumption could be made that Mr Soering would probably be convicted of capital murder as charged, i.e. the necessary probability of exposure to the “death row phenomenon” existed in this case.⁴⁴⁹

A cautious reading of this argumentation leads to the understanding that it seems reasonable to assume that the Court tacitly considered the risk to be quite small in this case.⁴⁵⁰ Therefore, this case confirms that if the foreseeable consequences are very serious, even the probability of a small risk can be significant and thus “real” for the Court.⁴⁵¹ Indeed, through a thorough analysis of the presented cases, the author comes to the conclusion that the ECtHR has linked the level of probability and predictability to the foreseeable consequences in each particular case and varied its demands depending on the gravity of the violation feared. In other words, the degree of probability to pass the “substantial grounds” test and the degree of predictability necessary to pass the “real risk” test may be either lower or higher, depending on the gravity of the asserted violation feared. Therefore, as lower levels of probability and predictability can also be sufficient to pass the test, the terminology for the “substantial grounds” test and “real risk” test can be wrong and misleading. Hence, the author will refer to these terms in quotation marks and look for the respective levels used in the following analysis.

The following analysis will be made separately for the ECtHR’s jurisprudence on direct *refoulement* (a) and indirect *refoulement* (b).

a. Direct *refoulement*: Factual conditions: Focus on persecution

As the jurisprudence of the ECtHR on serious factual harm deriving from living or detention conditions is scarce, the analysis of factual conditions of gravity will focus on situations of risk of persecution. On living and detention conditions, the ECtHR has almost always allowed a possible protection by Art 3 ECHR to fail in the first step due to its high demands for the necessary level of gravity not being reached. The first step has only been completed positively

⁴⁴⁸ *Soering v. the United Kingdom* para 98.

⁴⁴⁹ *Soering v. the United Kingdom* para 94.

⁴⁵⁰ See also Suintner, 14: “In the *Soering* case the Court has indicated that the degree of probability does not need to be very high”. Therefore, the author cannot follow Battjes in her criticism that the standard of proof demanded in *Soering v. the United Kingdom* was in fact higher than the “reasonable possibility” test adopted in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Geneva, January 1992; Battjes, Hemme, ‘A Balance between Fairness and Efficiency? The Directive on International Protection and the Dublin Regulation’ (2002) 4 *European Journal of Migration and Law* 2, 164; UNHCR Handbook, para. 42.

⁴⁵¹ Einarsen 371-2, referring to *Soering v. the United Kingdom* para 94.

in *M.S.S. v. Belgium and Greece*, where the Court cited the observations of the Council of Europe Commissioner for Human Rights, the CPT and UNHCR, as well as numerous reports of NGOs.⁴⁵² It also took into consideration the applicant's allegations that the police subjected him to brutality and insults during his second period of detention. As information on the conditions in Greece were freely ascertainable from these sources, the ECtHR noted that the disastrous living and detention conditions were well known before the transfer of the applicant. The Court considered that "by transferring the applicant to Greece the Belgian authorities *knowingly exposed him* to conditions of detention and living conditions that amounted to degrading treatment".⁴⁵³ Besides that the adverb "knowingly" suggests that the level of knowledge was more than satisfied, not much can be analyzed by this scarce argumentation for the standard of proof demanded by the Court.

In the removal cases concerning applicants claiming individual persecution, the ECtHR's jurisprudence has developed from focussing on general danger with high demand on the standard of proof on the individual persecution (aa) towards taking a more individual approach (bb).

aa. General danger

In cases of removal concerning applicants claiming to come from States suffering from situations of general violence, Strasbourg jurisprudence has developed the following

⁴⁵² European Committee for the Prevention of Torture, following its visit to Greece from 27 August to 9 September 2005, published on 20 December 2006; Report of the LIBE Committee delegation on its visit to Greece (Samos and Athens), European Parliament, 17 July 2007; Pro Asyl, *"The truth may be bitter but must be told - The Situation of Refugees in the Aegean and the Practices of the Greek Coast Guard"*, October 2007; UNHCR, *"Asylum in the European Union. A Study of the implementation of the Qualification Directive"*, November 2007; European Committee for the Prevention of Torture, following its visit to Greece from 20 to 27 February 2007, 8 February 2008; Amnesty International, *"Greece: No place for an asylum-seeker"*, 27 February 2008; European Council on Refugees and Exiles ("ECRE"), *"Spotlight on Greece – EU asylum lottery under fire"*, 3 April 2008; Norwegian Organisation for Asylum Seekers ("NOAS"), *"A gamble with the right to asylum in Europe – Greek asylum policy and the Dublin II regulation"*, 9 April 2008; UNHCR, *"Position on the return of asylum seekers to Greece under the Dublin Regulation"*, 15 April 2008; Human Rights Watch, *"Stuck in a revolving door – Iraqis and other asylum seekers and migrants at Greece/Turkey entrance to the European Union"*, November 2008; Clandestino, *"Undocumented migration: counting the uncountable: data and trends across Europe"*, December 2008; Human Rights Watch, *"Left to survive"*, December 2008; Cimade, *"Droit d'asile: les gens de Dublin II, parcours juridique de demandeurs d'asile soumis à une réadmission selon le règlement Dublin II"*, December 2008; Council of Europe Commissioner for Human Rights, Mr T. Hammarberg, report prepared following his visit to Greece from 8 to 10 December 2008, 4 February 2009; Greek Council of Refugees, *"The Dublin Dilemma – Burden shifting and putting asylum seekers at risk"*, 23 February 2009; European Committee for the Prevention of Torture, report prepared following its visit to Greece from 23 to 28 September 2008, 30 June 2009; Austrian Red Cross and Caritas, *"The Situation of Persons Returned by Austria to Greece under the Dublin Regulation. Report on a Joint Fact-Finding Mission to Greece (May 23rd - 28th 2009)"*, August 2009; Norwegian Helsinki Committee ("NHC"), NOAS and Aitima, *"Out the back door: the Dublin II Regulation and illegal deportations from Greece"*, October 2009; Human Rights Watch, *"Greece: Unsafe and Unwelcoming Shores"*, October 2009; UNHCR, *Observations on Greece as a country of asylum*, December 2009; Amnesty International, *"The Dublin II Trap: transfers of Dublin Asylum Seekers to Greece"*, March 2010; National Commission for Human Rights (Greece), *"Detention conditions in police stations and detention areas of aliens"*, April 2010; Amnesty International, *"Irregular migrants and asylum-seekers routinely detained in substandard conditions"*, July 2010, para 160.

⁴⁵³ *M.S.S. v. Belgium and Greece*, para. 367, emphasis added.

regarding the demands on standard of proof: The ECommHR indicated that a particular general human rights situation can possibly constitute a risk sufficient to make expulsion or extradition impermissible under Art 3 ECHR. The Commission stated that "an issue under Article 3 of the Convention [is raised] in cases where a person is extradited to a country where, due to the very nature of the regime of that country or to a particular situation in that country, basic human rights, such as are guaranteed by the Convention, might be either grossly violated or entirely suppressed".⁴⁵⁴ However, the Commission has never found such a situation to exist, not even in Iran.⁴⁵⁵

The ECtHR, on the other hand, recognized in *Vilvarajah and others v. the United Kingdom* the possibility of detention and ill-treatment of young Tamil males returning to Sri Lanka.⁴⁵⁶ However, it insisted that the applicants show that special distinguishing features existed in their cases that could or ought to have enabled the United Kingdom authorities to foresee that they would be treated in a manner incompatible with Art 3 ECHR.⁴⁵⁷ The ECtHR found no breach of Art 3 ECHR in the concrete case despite the fact that the applicants, who had been returned to Sri Lanka before the case was examined by the ECommHR and the Court, had in fact been subjected to treatment contrary to Art 3 ECHR on their return. Equally, in *Sultani v. France*, the Court took notice of the general situation of violence at that time in Afghanistan but found that this alone was not sufficient to find a violation of Art 3 ECHR.⁴⁵⁸ Moreover, in the *Thampibillai v. the Netherlands* and *Venkadajalasarma v. the Netherlands* judgments, the Court considered the improvement in the security situation in Sri Lanka and the "very real progress" in the peace process at the material time as relevant factors in its finding that there were no substantial grounds for believing that the applicants would be exposed to a real risk of ill-treatment contrary to Art 3 ECHR.⁴⁵⁹

This jurisprudential development of the Court was open to criticism: Van Dijk found the "substantial grounds" test to be applied by the Court in this case in "a rather restrictive

⁴⁵⁴ see, e.g. *X.v. Germany*, Decision of 26 March 1963, Appl.no.1802/62, Yearbook of the Commission on Human Rights 6, 463, 480; *B. v. France*, Appl.no.11722/85, Decision of 22 January 1987, Decisions and Reports 51 (1987), 165, 177.

⁴⁵⁵ *R. v. Denmark*, Decision of 14 October 1991, Appl.no.16381/91, (unpublished).

⁴⁵⁶ In *Vilvarajah and others v. the United Kingdom* as well, after a summary of the findings of the Commissioner for Human Rights' report and the observations by the applicants and the Government as well as UNHCR, the Court again attached importance to the knowledge and experience of the United Kingdom authorities in dealing with large numbers of asylum-seekers from Sri Lanka, many of whom were granted leave to stay, and to the fact that the personal circumstances of each applicant had been carefully considered by the Secretary of State in the light of a substantial body of material concerning the current situation in Sri Lanka and the position of the Tamil community within it. In the light of these considerations, the Court found that the necessary substantial grounds had not been established and Art 3 ECHR hence had not been breached (paras 109-110, 114-116).

⁴⁵⁷ *Vilvarajah and others v. United Kingdom* paras 111-112.

⁴⁵⁸ *Sultani v. France* para 67.

⁴⁵⁹ *Thampibillai v. the Netherlands*, application no. 61350/00, Council of Europe: European Court of Human Rights, 17 February 2004, paras 64 and 65; *Venkadajalasarma v. the Netherlands*, application no. 58510/00, Council of Europe: European Court of Human Rights, 9 July 2002, paras 66-67.

way”:⁴⁶⁰ the crux of the judgment was that the ECtHR found special distinguishing features to be absent and that there was therefore only a general risk – “a mere possibility” – that the asylum-seekers would be treated in a manner inconsistent with Art 3 ECHR upon their return. The author follows Van Dijk’s opinion that it is “difficult to understand why the Court held that these facts were not sufficient as special distinguishing features justifying the conclusion that there was indeed a real risk of treatment” contrary to Art 3 ECHR after the deportation to Sri Lanka. In fact, after the applicants had been removed to Sri Lanka in February 1988, appeals were instituted on their behalf; in March 1989 the Adjudicator concluded that the applicants had had a well-founded fear of persecution, and that they were entitled to political asylum and should be returned to the United Kingdom; in fact, they were allowed to return. The Adjudicator largely believed the accounts given by the applicants of their personal situations.⁴⁶¹ Neither the Government nor the ECtHR contested these findings. Van Dijk diagnoses that the Court “applied a standard of assessment that was even more restrictive than the already very strict test in refugee law that the asylum-seeker has to show that he is ‘singled out for persecution’. Such a restrictive approach would seem to be incompatible with the Court’s position that its examination of a risk of ill-treatment in breach of Article 3 must be a rigorous one in view of the absolute character of this provision”.⁴⁶² Indeed, this unsatisfactory reasoning by the Court seems to suggest that if, because of a general situation, the possibility of ill-treatment is generally high, individuals must still face an even higher risk of ill-treatment in order to be protected by Art 3 ECHR. Hence, a general situation of violence does not normally in itself entail a violation of Art 3 ECHR in the event of a removal.⁴⁶³ Indeed, the Court has rarely found a violation of Art 3 ECHR on that ground alone. For example, in *Müslim v. Turkey*, where the Court considered the removal of an Iraqi national of Turkmen origin to Iraq, it found the mere possibility of ill-treatment because of the unstable situation in that country at the material time would not in itself amount to a breach of Art 3 ECHR.⁴⁶⁴ This application of the standard of proof was considered so high that it seemed to render the protection from *refoulement* “somewhat illusory”.⁴⁶⁵ The only exception of this level of standard of proof was made in the most extreme cases of general violence which would expose an individual to ill-treatment of a sufficient level of intensity to entail a breach of Art 3 ECHR simply by virtue of being returned there.

⁴⁶⁰ Van Dijk, 435.

⁴⁶¹ Paras. 9-66.

⁴⁶² Van Dijk, 435-6.

⁴⁶³ See *H.L.R. v. France* para 41.

⁴⁶⁴ *Müslim v. Turkey* para 70.

⁴⁶⁵ Einarsen 373.

However, the situation has improved as the ECommHR, and mainly the ECtHR, have leaned towards a more individual approach, also for applicants from States with a poor human rights record.

bb. Individual danger

Happily, both European organs have taken a more individual approach in later judgments. First, in a situation of general violence, the ECtHR has also indicated membership of a specifically “targeted” group – a concept also known to the GRC – as valid proof for relevant danger. In a second development, purely individual persecution became more relevant. This has rendered possible the assumption that “returning a person to his country of origin where he has a well-founded fear of being persecuted *ipso facto* violates Art 3 ECHR”.⁴⁶⁶

As to membership of a specifically “targeted” group, the ECtHR stated in its assessment of the risk of ill-treatment in *Chahal v. the United Kingdom*, that “it would appear that, despite the efforts of that Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem”.⁴⁶⁷ Against this background, the Court, despite the Government's comments relating to the material, attached weight to some of the most striking allegations contained in those reports, particularly with regard to extrajudicial killings⁴⁶⁸ and was not persuaded that the assurances would provide Mr Chahal with an adequate guarantee of safety. However, such a guarantee was found to be crucial due to the personal situation of the applicant: Chahal had a high profile as a leading figure supporting the cause of Sikh separatism. Therefore, in particular the attested involvement of the Punjab police in killings and abductions outside their State and the allegations of serious human rights violations which continue to be leveled at members of the Indian security forces elsewhere, the Court found it “substantiated that there is a real risk of Mr Chahal being subjected to treatment contrary to Article 3 if he is returned to India”.⁴⁶⁹ Hence, while particular weight was accorded to the general situation in this judgment, especially the (non-)observance of human rights,⁴⁷⁰ also the very individual personal situation of the applicant as being member of a vulnerable group was of relevance for the standard of proof to be satisfied

⁴⁶⁶ Van Dijk, 436.

⁴⁶⁷ *Chahal v. the United Kingdom* para 105.

⁴⁶⁸ *Chahal v. the United Kingdom* para 99.

⁴⁶⁹ *Chahal v. the United Kingdom* para 106.

⁴⁷⁰ Van Dijk, 437.

for a positive risk assessment. The ECtHR clarified its position on membership in a specifically “targeted” group in its *Salah Sheekh v. the Netherlands* judgment:

“[T]he applicant cannot be required to establish the existence of further special distinguishing features concerning him personally in order to show that he was, and continues to be, personally at risk. ... in the present case, the Court considers, on the basis of the applicant's account and the information about the situation in the “relatively unsafe” areas of Somalia in so far as members of the Ashraf minority are concerned, that it is foreseeable that on his return the applicant would be exposed to treatment in breach of Article 3.”⁴⁷¹

Highly important, the ECtHR continued:

“It might render the protection offered by that provision illusory if, in addition to the fact of his belonging to the Ashraf – which the Government has not disputed –, the applicant were required to show the existence of further special distinguishing features.”⁴⁷²

The Court added in *N.A. v. the United Kingdom*:

“Exceptionally, however, in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court has considered that the protection of Article 3 of the Convention enters into play when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned. In those circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3.”⁴⁷³

Hence, in the circumstances that the applicant could substantiate the claim of membership of a vulnerable group through relevant documentation as well as the treatment he would likely experience as a result, the ECtHR has confirmed on several occasions that it will not insist that the applicant prove the existence of further special distinguishing features if doing so would render illusory the protection offered by Art 3 ECHR. In this sense, the ECtHR found in *N. v. Sweden*⁴⁷⁴ that, while the Court was aware of reports of serious human rights violations in Afghanistan, these alone did not demonstrate that there would be a violation of the Convention if N. were to return to that State. In examining N.’s personal situation, however, the Court noted that women were at a particularly heightened risk of ill-treatment in Afghanistan if they were perceived as not conforming to the gender roles ascribed to them by society, tradition or the legal system there. Consequently, the Court found that if N. were deported to Afghanistan, Sweden would be in violation of Art 3 ECHR.

The Commission had rarely applied concepts related to the refugee definition in earlier case law on individual persecution until it found it necessary in *Cemal Kemal Altun v. the Federal*

⁴⁷¹ *Salah Sheekh v. the Netherlands* para 148, emphasis added.

⁴⁷² *Ibidem*.

⁴⁷³ *N.A. v the United Kingdom* para 116, referring to *Saadi v. Italy* para 132.

⁴⁷⁴ *N v. Sweden*, Application no. 23505/09, Council of Europe: European Court of Human Rights, 20 July 2010.

Republic of Germany to determine whether “there would be a certain risk of prosecution for political reasons which could lead to an unjustified or disproportionate sentence being passed on the applicant and as a result inhuman treatment”.⁴⁷⁵ This criterion is often applied in refugee cases.⁴⁷⁶ Further, an explicit reference to the concept of refugee can be found in the Commission’s report concerning a Somali national, Ahmed, whose refugee status was forfeited by the Austrian authorities on the ground that he was convicted for particularly serious crimes within the meaning of Art 33 (2) GRC.⁴⁷⁷ The ECommHR “attached particular weight to the fact that the applicant was granted asylum in May 1992”⁴⁷⁸ and continued for the Austrian asylum proceedings as being a single procedure that “the Austrian Ministry for the Interior [...] found that he would risk persecution in Somalia. *In the asylum proceedings, the Austrian authorities had to consider basically the same elements under Austrian law as the Commission must consider under Article 3*”.⁴⁷⁹ As the situation in Somalia had not changed fundamentally since the time when the applicant was granted asylum, the ECommHR concluded that he would still risk persecution, if returned to Somalia, and found that substantial grounds had been shown for believing that the applicant would then face a real risk of being subjected to treatment in breach of Art 3 ECHR.⁴⁸⁰ The ECtHR followed the same reasoning and conclusion. In *Jabari v. Turkey* as well, the ECtHR attached great weight to the finding of UNHCR that the applicant qualified as a refugee and, as a consequence, concluded that expulsion would give rise to a violation of Art 3 ECHR.⁴⁸¹

Hailbronner found that the Strasbourg jurisprudence on the absolute character of Art 3 ECHR frequently raised “difficult problems of distinguishing between the danger of political persecution and the danger of inhuman or degrading treatment”⁴⁸² and that no distinction would be possible, particularly in the light of this jurisprudence. The author, however, holds the opinion that the ECtHR has not put an effort into a distinction between the danger of political persecution and the danger of inhuman or degrading treatment in these cases in which it has found both dangers as possibly coinciding. The author follows Van Dijk’s thesis that the removal of an individual to a country where he has a well-founded fear of being persecuted in principle always amounts to a violation of Art 3 ECHR.⁴⁸³ This does not contradict our findings from the last chapter that persecution in the sense of Art 1 (A) GRC

⁴⁷⁵ Para 203, c.f. also *A. v. Switzerland*, para 257.

⁴⁷⁶ Van Dijk, 436, referring to UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1988, paras. 57, 85 and 169.

⁴⁷⁷ Van Dijk, 436.

⁴⁷⁸ Report of 5 July 1995, paras. 65; emphasis added.

⁴⁷⁹ *Idem*.

⁴⁸⁰ Paras. 66 and 70.

⁴⁸¹ Paras. 18 and 41-2.

⁴⁸² Hailbronner, Immigration and asylum law, 496.

⁴⁸³ Van Dijk, 438.

does not always attain the minimum level of severity required to fall within the scope of Art 3 ECHR. As Van Dijk clarifies, such a counter-argument misunderstands such thesis which “does not equate ‘persecution’ with ‘treatment prohibited by Article 3’, but posits that the deportation of a person to a country where he has a *well-founded fear* of being persecuted will in general amount to a *real risk* of being exposed to ill-treatment in the sense of Article 3”. In other words: It may be true that not every act of persecution can be qualified as torture or inhuman or degrading treatment or punishment, but it is plausible to assume that when a *well-founded fear* has been established that a person, if returned to his country, will suffer from such an act of persecution, there is a *real risk* that he will be subjected to harsh treatment that falls within the scope of Art 3 ECHR.⁴⁸⁴ The conclusion is that a person who has a well-founded fear of persecution within the meaning of Art 1 (A) GRC can also claim that he may not be returned to his country of origin because that would expose him to a real risk of being subjected to treatment prohibited by Art 3 ECHR. Such a claim under Art 3 ECHR has even a wider scope of protection than Art 1 GRC with its exclusion clause in Para (F) and than Art 33 (1) GRC due to its exception clause in Para (2) and due to its precondition of existence of state authority and persecution grounds.

The ECtHR’s jurisprudence has developed a risk assessment that has led to a similar scope of protection as provided by the CAT Committee. For its risk assessment, the CAT Committee takes into account both the general situation in the receiving State, above all the possible existence of a consistent pattern of gross, flagrant or mass violations of human rights as indicated in Art 3 (2) CAT, as well as the particular situation of the applicant.⁴⁸⁵ For this double test with its objective and subjective part, the Committee developed a particular formula in *Mutombo v. Switzerland*⁴⁸⁶ (the first case decided on the merits and in which the Committee found a violation of Art 3 CAT) which it has followed in all subsequent decisions:

“The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return. It follows that the existence of a *consistent pattern of gross, flagrant or mass violations of human rights* in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be *personally at risk*. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his specific

⁴⁸⁴ Van Dijk, 438.

⁴⁸⁵ Nowak 206-7.

⁴⁸⁶ No.13/1993.

circumstances”.⁴⁸⁷

On the basis of this formula, the Committee usually first examines the general situation in the country and afterwards the particular risks for the individual applicant.⁴⁸⁸ Only in relatively few cases of systematic torture in the receiving State did the Committee arrive at the conclusion that the applicant was not personally at risk of torture.⁴⁸⁹ On the other hand, it is not rare for the Committee to find a violation of Art 3 CAT on the basis of a personal risk assessment in the absence of a consistent pattern of torture or other gross or mass human rights violations in the receiving State.⁴⁹⁰

As to references to refugee law, the Committee, for instance, in 1998 noted in *Hayden v. Sweden* the serious human rights situation in Turkey and pointed to reports from ‘reliable sources’ that persons suspected of having links with the PKK were frequently tortured in the course of interrogations by law enforcement officers, and agreed with reports of the UNHCR that no place of refuge was available for such persons within the entire country.⁴⁹¹

b. Indirect *refoulement* via a presumably safe third State

A risk only possibly emanates from a presumably safe third State if the assessment of the risk of persecution or serious harm awaiting the individual concerned in the final State results in the affirmation of the existence of a risk. Hence, the assessment of the risk emanating from the third State includes two assessments: one of the danger of persecution or serious harm in the final State (aa) and one of the procedural deficiencies in the refugee determination procedure of the third State that fail to prevent the danger (bb).

As to the chronology of the assessments, the ECtHR considered in *T.I. v. the United Kingdom* that “the materials presented by the applicant at this stage give rise to concerns as to the risks faced by the applicant, should he be returned to Sri Lanka”.⁴⁹² The fact that the ECtHR first considered the “alleged risk of ill treatment in Sri Lanka”, concluding that “concerns as to the risk” exist, and, only second, addressed the effectiveness of Germany’s protection from

⁴⁸⁷ No.13/1993, §9.3, emphasis added.

⁴⁸⁸ E.g., in *Elmiv. Australia* (No.120/1998) where the Committee noted that the State party did not dispute that there existed a consistent pattern of gross, flagrant and mass violations of human rights, the decisive factor in finding a violation of Art 3 CAT was two additional arguments supporting the author’s claim that he would personally be at risk if returned to *Somalia*.

⁴⁸⁹ Cf., e.g., Nos.177/2001 (Somalia), 199/2002 (Egypt).

⁴⁹⁰ Cf., e.g., No.63/1997 (Spain).

⁴⁹¹ Nowak 186-7.

⁴⁹² *T.I. v. the United Kingdom*, under “Alleged risk of ill-treatment in Sri Lanka”.

refoulement as well as the German safeguards in the circumstances of the concrete case, led some authors to the conclusion that this reasoning implies an obligation to examine the merits of the claim.⁴⁹³ Battjes took the contrary position: T.I. *prima facie* rebutted interstate trust, as she calls it, because he provided strong evidence before the ECtHR and alleged that this evidence would not be granted due importance in the German removal proceedings.⁴⁹⁴ In Battjes' sense, the ECtHR acted in *K.R.S. v. the United Kingdom* where interstate trust was not *prima facie* rebutted and, hence, the ECtHR, in analyzing the risk of transfer to Iran by Greece, did not examine the merits of the claim, i.e. torture in Iran, for which reason the application on Art 3 ECHR was declared inadmissible.

However, in *M.S.S. v Belgium and Greece*, the ECtHR changed the sequence of analysis: the ECtHR again considered the situation in the applicant's country of origin, Afghanistan. As the evidence was that "the situation in Afghanistan has posed and continues to pose *a widespread problem of insecurity and that the applicant belongs to a category of persons particularly exposed* to reprisals at the hands of the anti-government forces because of the work he did as an interpreter for the international air forces",⁴⁹⁵ the Court concluded that the applicant had an "arguable claim" under Art 3 (or 2) ECHR.⁴⁹⁶ It was only then that the Court discussed the rebuttal of the safety presumption regarding the Greek asylum procedure, i.e. whether, in spite of the *K.R.S. v. the United Kingdom* case-law, "the Belgian authorities should have regarded as rebutted the presumption that the Greek authorities would respect their international obligations in asylum matters".⁴⁹⁷

In theory, both sequences of risk assessment used by the ECtHR are defensible: Either that, as in *T.I. v. the United Kingdom* and *K.R.S. v. the United Kingdom*, interstate trust on the removal procedure has to be *prima facie* rebutted as condition for the merits of the claim to be examined; or that, as in *M.S.S. v Belgium and Greece*, the claim of a violation of Art 3 ECHR in case of return to the final State has to be found "arguable" for the ECtHR before it will discuss the rebuttal of the safety presumption regarding the removal procedure. This issue will now be discussed on the basis of *M.S.S. v Belgium and Greece* because, first, it is the most recent of the cases. Second, it was the only case until now in which the safety presumption of a receiving "Dublin" State was rebutted, i.e. the whole direct balancing was undertaken.

⁴⁹³ Noll, Formalism versus Empiricism, 161.

⁴⁹⁴ Battjes, European Asylum Law, 411.

⁴⁹⁵ *M.S.S. v. Belgium and Greece* para 296, emphasis added.

⁴⁹⁶ *M.S.S. v. Belgium and Greece* para 297.

⁴⁹⁷ *M.S.S. v Belgium and Greece* para 345.

Third, the analysis in this case follows the well-established jurisprudence on Art 13 ECHR in conjunction with Art 3 ECHR in the case that the person concerned claims that there exist substantial grounds for fearing a real risk of treatment contrary to Art 3 ECHR; in this jurisprudence, the Court clarifies whether the applicant has an arguable claim under Art 3 ECHR⁴⁹⁸ before it addresses the relevant parameters for the effectiveness of a remedy.

aa. Persecution in the final State

The author hails the reduction of the Court's analysis to the existence of an "arguable claim" and hence does not follow Noll in his demands that the decision-maker must assess the *direct risk* for the claimant in the country of origin "by a full-fledged material assessment". In fact, the assessment of the existence of an "arguable claim" demands a relatively low level of knowledge in line with the variable standard of proof and hence provides more protection: more cases will fall under "arguable claim" than under the stricter test of "direct risk". Furthermore, such assessment is more workable for the asylum officer in the removal procedure, as the examination of the harm feared in the country of origin is required only as far as necessary to be able to properly assess the safety of the third State.⁴⁹⁹

This approach is in conformity with the respective decision-making on Art 3 CAT of the Committee against Torture which, when assessing the compatibility of removal to a third State with Art 3 CAT, has proceeded in two steps: First, it assessed the risk of whether the applicant would be submitted to torture in his country of origin.⁵⁰⁰ If substantial grounds for assuming that risk existed, the risk of removal to that country of origin from the third state was assessed.⁵⁰¹ It is not entirely clear which standard of risk applies to expulsion by the third to the first State. In *Avedes Hamayak Korban v. Sweden*, the Committee spoke of "substantial grounds for believing" that the applicant "would be subjected to torture", apparently a more lenient standard than the usual "foreseeable, personal and real risk"; but in a later view, the Committee applied as standard that it should be "foreseeable that he may subsequently be expelled" from the third State.⁵⁰²

⁴⁹⁸ *M.S.S. v Belgium and Greece* para. 294.

⁴⁹⁹ Battjes, *European Asylum Law*, 412.

⁵⁰⁰ *Avedes Hamayak Korban v. Sweden*, CAT/C/21/D/088/1997, UN Committee Against Torture (CAT), 16 November 1998, available at: <http://www.unhcr.org/refworld/docid/3f588ede.html> [accessed 1 July 2011] para 6.4; *Z.T. v. Australia*, CAT/C/31/D/142/2000, UN CommAT, 19 November 2003, available at: <http://www.unhcr.org/refworld/docid/404887eb3.html> [accessed 1 July 2011], para 6.1.

⁵⁰¹ *Avedes Hamayak Korban v. Sweden* para 6.5; *Z.T. v Australia*, para 6.4.

⁵⁰² *Ibidem*.

As for the asylum procedure, the GRC also allows for an assessment of the existence of an “arguable claim”, namely by the “presumption doctrine”. The initial question is under which circumstances an asylum-seeker is entitled to a full examination of his request. Some authors defend the position that State Parties to the GRC generally are under no obligation to consider requests for recognition of status. They find the only obligation in respect to Art 33 GRC being not to remove him to a country of persecution. Other authors are of the opinion that a State in which a person appeals to the GRC will first of all have to determine if the alien can appeal to the GRC- in other words, if he is a refugee in the sense of Art 1 GRC.⁵⁰³ These commentators tend to see in the prohibition of *refoulement* more the duty of the state rather than a right for the asylum-seeker⁵⁰⁴ and by such practice a conflict between the safe country concepts and important obligations under the GRC: Under the GRC, each signatory has the obligation to make its own judgment regarding recognition or refusal of an asylum application and maintain the proper procedures to assure that, in refusing the applicant's request to remain, it is not returning him to danger. Thus, the attempt of safe third country concepts to identify a single "responsible" State for an asylum applicant conflicts with each Member State's obligation under the GRC requirements.⁵⁰⁵ Both positions are reconciled in the “presumption doctrine”: they agree on the observance of the principle of non-*refoulement* without exception. However, if a State abstains from refugee status determination, the refugee status of the asylum seeker must be presumed.⁵⁰⁶ The fact that the presumption of the refugee status is conditioned by whether or not the claim is argued is acceptable as long as the level of probability and predictability demanded for this argumentation is considerably low. This is the case in the assessment of the existence of an “arguable claim”.

Therefore, if the claim of feared harm in the final State is assessed to be “arguable”, the case of the applicant is *prima facie* found to fall under the protection from *refoulement*. In the contrary case, the applicant is not found to require protection.

This is now the crucial question: Has the concrete standard of proof of the level of probability and predictability of danger in the final State demanded by the ECtHR in the relevant cases been acceptably low?

⁵⁰³ Fernhout, Roel, ‘Status Determination and the Safe third country principle’, in J.Y. Carlier and D. Van Heule (eds.), *Europe and refugees: A challenge?*, Kluwer Law International, The Hague, 1997, 188.

⁵⁰⁴ See, reflecting on the principle of first country of asylum, Goodwin-Gill, *The Refugee*, 82; Louis Henkin, ‘An Agenda for the Next Century: The Myth and Mantra of State Sovereignty’, 35 *Va. J. Int'l L.* 115, 117-18 (1994).

⁵⁰⁵ Coman, Gabriela, ‘European Union Policy on Asylum and its Inherent Human Rights Violations’ (1998) 64 *Brooklyn Law Review* 1217-1240, 1235.

⁵⁰⁶ Fernhout 189.

As the safety presumption on the STC Greece was not *prima facie* rebutted in *K.R.S. v. the United Kingdom* (see hence under (bb)), the merits of the claim, i.e. persecution in the final State, were only discussed in *T.I. v. the United Kingdom* *M.S.S. v. Belgium and Greece*. In *T.I. v. the United Kingdom*, the evidence adduced by the applicant and provided by Amnesty International, the United Nations Special Rapporteur on extra-judicial, summary or arbitrary executions and the United States Department of State was elaborate and hence gave “rise to concerns as to the risks faced by the applicant, should he be returned to Sri Lanka”.⁵⁰⁷

In *M.S.S. v. Belgium and Greece*, the Court’s assessment was the following: When ascertaining whether the applicant can “arguably assert” that his removal to Afghanistan would infringe Art 2 or 3 ECHR, the Court only referred to the copies of certificates showing that the applicant had worked as an interpreter, general information about the current situation in Afghanistan and to the Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan published by the UNHCR. For the Court, “this information was *prima facie* evidence that the situation in Afghanistan has posed and continues to pose a widespread problem of insecurity and that the applicant belongs to a category of persons particularly exposed to reprisals at the hands of the anti-government forces because of the work he did as an interpreter for the international air forces”.⁵⁰⁸

The author finds the Court’s positive assessment in *T.I. v. the United Kingdom* and *M.S.S. v. Belgium and Greece* sufficiently simple to do justice to the prerogative of a low demand on probability and predictability: easily accessible documentation from the applicant and general reports of international organizations and NGOs fulfilled the Court’s demands on the standard of proof to assess the harm feared in the final States to be “arguable” and, hence, made it necessary for the Court to address the danger of *refoulement* to this State from the STC.

If the claimant has been found to have an “arguable” claim regarding the risk in the final State and, hence, to *prima facie* fall under the scope of international norms protecting from *refoulement*, the decision-maker must then assess the risk for the claimant of indirect *refoulement* via the third State.

For this assessment of indirect risk, it became clear in the last chapter that the presumption of its non-existence, i.e. the presumption of safety must be rebuttable. It will now be examined whether the proof demanded by the ECtHR also has a sufficiently low level of probability and predictability for the assessment of the chain-*refoulement* to the presumably STC.

⁵⁰⁷ *T.I. v. the United Kingdom*, under “Alleged risk of ill-treatment in Sri Lanka”.

⁵⁰⁸ *M.S.S. v. Belgium and Greece*, paras 294-6.

bb. Procedural deficiencies in the presumably safe third State's removal procedure

The ECtHR has ruled that indirect removal to a final State via an intermediary State, which is also a Contracting Party, does not negate the responsibility of the removing State “not to expel a person to a country where *substantial grounds* have been shown for believing that he would face a *real risk* of being subjected to treatment contrary to Article 3”.⁵⁰⁹ Therefore, the Court has stated in well-established case-law the same wording for the standard of proof also for the assessment of the risk emanating from a presumably STC. The ECtHR formulated its position on the usage of this terminology as to the standard of proof for procedural deficiencies in EU MSs as STCs in *T.I. v. the United Kingdom*, from which it diverged in *K.R.S. v. the United Kingdom* and in *M.S.S. v. Belgium and Greece*.

Regarding Art 3 ECHR, the ECtHR had already clarified in *T.I. v. the United Kingdom* that removing States are not absolved from any responsibility, but have to ensure that “the intermediary country's asylum procedure affords *sufficient guarantees* to avoid an asylum seeker being removed, directly or indirectly, to his country of origin without any evaluation of the risks” he faces from the standpoint of Art 3 ECHR alone.⁵¹⁰ This statement proves that the ECtHR sees as another parameter for gravity a certain lack of quality of the removal procedure of first instance. After ruling that the presented materials gave rise to concerns as to the risks faced by the applicant, should he be returned to Sri Lanka, the ECtHR discussed the real risk of transfer to Sri Lanka by Germany, i.e. the position of the applicant as a failed asylum-seeker if returned to Germany, because the applicant's removal to Germany “is [...] one link in a possible chain of events which might result in his return to Sri Lanka where it is alleged that he would face the *real risk* of such treatment”.⁵¹¹ The assurances given by Germany, in the Court's opinion, negated the risk arising from the asylum procedure awaiting the applicant in Germany. However, this risk would have been seen as considerable: “there is *considerable doubt* that the applicant would either be granted a follow up *asylum* hearing or that his second claim would be *granted*”.⁵¹² Still, the Court seemingly defended the safety presumption in comments that deal with the asylum procedure in Germany in a very detailed manner: On the applicant's claim that the asylum proceedings would not offer him effective protection since they would, in all likelihood, result in a further rejection of his claims and an order of removal, the Court noted, first, that the strict limitations on the admission of a new

⁵⁰⁹ *T.I. v. the United Kingdom*; *M.S.S. v. Belgium and Greece* para 342, emphasis added.

⁵¹⁰ *M.S.S. v. Belgium and Greece* para 342 on *T.I. v. the United Kingdom*.

⁵¹¹ *T.I. v. the United Kingdom*, under “The responsibility of the United Kingdom”.

⁵¹² *T.I. v. the United Kingdom*, under “The position of the applicant as a failed asylum-seeker if returned to Germany”.

application would appear to exclude the medical evidence now provided before the Court as well as letters provided by members of the applicant's family to substantiate his account. Second, the Court noted that even assuming that a fresh asylum hearing was granted, the previous decision of the Bavarian Administrative Court that the applicant lacked credibility would be given significant weight in a further consideration of his claims. And third, the German authorities would not find the applicant's possible persecution by non-State agents to be relevant for the purposes of asylum or protection under Art 3 ECHR. In the end, diplomatic assurances and safety presumption won out against evidence, as the ECtHR found due to the allowance to stay that there was "*no basis on which the Court could assume in this case that Germany would fail to fulfil its obligations under Article 3 of the Convention to provide the applicant with protection against removal to Sri Lanka if he put forward substantial grounds that he faces a risk of torture and ill-treatment in that country. To the extent therefore that there is the possibility of such a removal, it has not been shown in the circumstances of this case to be sufficiently concrete or determinate*".⁵¹³

The Court concluded that "it is not established that there is a *real risk* that Germany would expel the applicant to Sri Lanka in breach of Article 3 of the Convention".⁵¹⁴ Hence, while the ECtHR signalled in *T.I. v. the United Kingdom* its general preparedness to scrutinize future claims related to the Dublin Convention and protection discrepancies, it was not clear after the decision if, as Battjes put it, this was possible with a standard of proof for rebuttal lower than the "real risk"-test for the question of direct *refoulement*⁵¹⁵- and that hence the procedural position of the applicant was not adversely affected, but in accordance with international law.⁵¹⁶

The author does not find it sensible to introduce another test on the standard of proof for rebuttal of safety presumption besides the test on the assessment of the risk of *refoulement* by the third State. Rather, the author sees the safety presumption only as one factor in the risk assessment next to evidence and assurances. Therefore, the author suggests rephrasing the question for the further analysis: What weight can be given to the safety presumption in the assessment of the risk of *refoulement* by the third State not to heighten the standard of proof for its rebuttal unacceptably?

In fact, reality overtook the Court's presumption of Germany being safe for Sri Lankan refugees for *T.I. v. the United Kingdom*: Some two weeks after the decision of the ECtHR,

⁵¹³ *Ibidem*, emphasis added

⁵¹⁴ *Ibidem*.

⁵¹⁵ Battjes, European Asylum Law, 412.

⁵¹⁶ Battjes, European Asylum Law, 352-3.

another asylum-seeker was removed from the United Kingdom to Germany. Despite the assurances given to the ECtHR by the Government of Germany in *T.I. v. the United Kingdom*, this applicant was permitted neither to submit a fresh claim nor to access the discretionary procedure and was sent onward by the border guards to his own State, where he was arrested and subsequently ill-treated. Concern has thus been expressed that the decision in *T.I. v. the United Kingdom* did not meet the ECHR's requirement that the rights guaranteed must be "practical and effective, not theoretical and illusory".⁵¹⁷ The author shares this opinion, referring to the ECtHR's wording that, "to the extent [...] that there is the possibility of such a removal, it has not been shown in the circumstances of this case to be sufficiently concrete or determinate".⁵¹⁸ The author finds such an assessment to be evidence of very high prerogatives on the level of standard of proof: the applicant brought forward all the aforementioned arguments on the risk arising from the asylum procedure awaiting him in Germany. While these arguments raised "considerable doubt" for the Court on a possibility to stay, diplomatic assurances and the safety presumption won out in the end against this evidence. The ECtHR summarised under its term "real risk" that such did not exist as there was "*no basis on which the Court could assume*" in this case that Germany would refoule the applicant to Sri Lanka if he put forward substantial grounds that he faces a risk of torture and ill-treatment in that country. The author deplores that assurances and the safety presumption had been given the decisive weight despite considerable hints of concerns.

In *K.R.S. v. the United Kingdom* as well, the Court trusted Germany's assurances, assuming that Greece would comply with the obligations imposed on it by the Minimum Standards Directives. The author sees one reason for the negative risk assessment in *K.R.S. v. the United Kingdom* in the fact that, due to the contrary sequence of analysis in *M.S.S. v. Belgium and Greece*, the Court did not examine the merits of the claim, i.e. torture in Iran. To have identified an "arguable claim" under Art 3 (or 2) ECHR due to the dangers awaiting the applicant in Iran would possibly have increased the ECtHR's impetus to discuss the rebuttal of the safety presumption regarding the Greek asylum procedure more cautiously, i.e. set the level for the standard of proof against the safety presumption and assurances so low as to let the evidence win. As to this evidence- illustrated in Chapter II-, the author cannot comprehend why the ECtHR not already for December 2008 (the time being critical in its decision *K.R.S. v. the United Kingdom*), but only for June 2009 came in its judgment *M.S.S. v. Belgium and Greece* to the conclusion that there was a "real risk" that the asylum procedure

⁵¹⁷ *Artico v. Italy*, para 123.

⁵¹⁸ *Ibidem*, emphasis added

awaiting applicants in Greece was unsafe. In the view of the author, the relevant parameters for the risk assessment were fulfilled at a lesser, but in any case sufficient level to confirm the existence of the risk already in *K.R.S. v. the United Kingdom*. This evidence will be referred to in the course of the following analysis of the judgment *M.S.S. v. Belgium and Greece*.

In *M.S.S. v. Belgium and Greece*, the Court concluded its discussion of the rebuttal of the safety presumption regarding the Greek refugee determination procedure by stating that the applicant's transfer by Belgium to Greece gave rise to a violation of Article 3 ECHR because, at the time of the applicant's removal, the Belgian authorities knew or ought to have known that he had no guarantee that his asylum application would be seriously examined by the Greek authorities. What evidence was necessary for the applicant to be successful? What can be identified as the most relevant parameters in the following detailed analysis of the ECtHR's risk assessment? What is the level demanded of them to be able to counter the safety presumption?

As having been relevant for the ECtHR to rebut the safety presumption, the parameters of statistical evidence on recognition rates (1) and of reports by international organizations, NGOs and state organizations (2) will be discussed.

1. Statistics on recognition rates

The first evidence taken into account by the ECtHR was the extremely low rate of asylum or subsidiary protection granted by the Greek authorities compared with other European Union Member States. The statistics presented by the Court were the following:

“For 2008, the UNHCR reports a success rate at first instance (proportion of positive decisions in relation to all the decisions taken) of 0.04% for refugee status under the Geneva Convention (eleven people), and 0.06% for humanitarian or subsidiary protection (eighteen people).⁵¹⁹ 12,095 appeals were lodged against unfavourable decisions. They led to 25 people being granted refugee status by virtue of the Geneva Convention and 11 for humanitarian reasons or subsidiary protection. Where appeals were concerned, the respective success rates were 2.87% and 1.26%. By comparison, in 2008 the average success rate at first instance was 36.2% in five of the six countries which, along with Greece, receive the largest number of applications (France, the United Kingdom, Italy, Sweden and Germany).⁵²⁰

Until 2009, 95% of asylum applications went through Attica police headquarters. Since the processing of asylum applications was decentralised out to police headquarters all over the

⁵¹⁹ UN High Commissioner for Refugees, ‘Observations on Greece as a country of asylum’, December 2009, available at: <http://www.unhcr.org/refworld/docid/4b4b3fc82.html> [accessed 16 June 2011].

⁵²⁰ UN High Commissioner for Refugees, ‘2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons’, 19 June 2009, available at: <http://www.unhcr.org/refworld/docid/4caee6552.html> [accessed 16 June 2011].

country, about 79% of the applications have been handled by Attica police headquarters.”⁵²¹

The ECtHR noted that “the importance to be attached to statistics varies, of course, according to the circumstances, but in the Court's view they tend here to strengthen the applicant's argument concerning his loss of faith in the asylum procedure”.⁵²² The author holds that only a stronger position does justice to reality: In the dissenting part of his opinion, Judge Sajó took the position that “[a]n asylum system with a rate of recognition not exceeding 1 percent is suspect *per se* in terms of the fairness of the procedure; the Government failed to provide any justification for this apparent statistical aberration”.

Giving such considerable weight to statistics, even information about past events, is defensible for our case considering asylum-seekers: The fear which is the subject of an asylum claim relates to *sur place* or a future possibility and therefore is not capable of being demonstrated in the present. In this sense, the author already described in the introduction to this thesis that for the (mainly Chechen) she defended, she had no individual evidence on the danger of chain-*refoulement* from Austria via Slovakia to the Russian Federation, but only generally available evidence to present. The respective asylum-seeker had normally left Slovakia for Austria after a short stay, having only the information that his chance for asylum in Slovakia was very small. For the author, the statistics revealing extremely low asylum recognition rates provided evidential proof for either the breakdown of the asylum system or intentional ignorance in the meritorious decision-making. At that time, in 2005, the recognition rates of refugees from the Russian Federation were differed greatly among the following EU MSs:

EU MS	number of applications	recognition rates	
		refugee status	right to stay
Slovakia	1,031	0,01%	0%
Austria	4,362	83.9%	91.3%
Germany	1,663	93.3%	95.4%

Through this evidence, it was clear to the author that there was a high risk for the individual asylum-seeker to be chain-*refouled* from Slovakia to his country of origin without a fair refugee determination procedure.

⁵²¹ *M.S.S. v. Belgium and Greece* paras 125-127.

⁵²² *M.S.S. v. Belgium and Greece* para. 313.

After these experiences, the author defends the seemingly radical position taken by Judge Sajó in the dissenting part of his opinion that “[t]he well-documented insufficiencies of the Greek asylum system (including the extremely low likelihood of success in the applications – 1% in Greece against more than 60 % in Malta) turn such a system into a degrading one”.⁵²³ This position is also taken in the Michigan Guidelines, which state that, in such a case of an insufficient asylum system, the sending State is “disentitled from effecting any further transfers to that state under a protection elsewhere policy unless and until there is clear evidence that the breach has ceased”.⁵²⁴ The quality of degrading treatment is argued by Judge Sajó as follows: “Asylum seekers who remain in the asylum procedure for more than two years have a significantly higher risk of psychiatric disorders, compared to those who just arrived in the country. This risk is higher than the risk of adverse life events in the country of origin.”⁵²⁵ Hence, there is a responsibility of the State under Art 3 ECHR in situations as this where there is a high likelihood that a medical condition could result from the passivity of the State in a procedure that is decisive for the fate of people living in dependency.

The author also sees cases with less dramatic statistics on recognition rates to be a sufficient factor for a positive risk assessment. Such an approach has not been obviated by the ECtHR, which stated in *M.S.S. v. Belgium and Greece* that “the importance to be attached to statistics varies, of course, according to the circumstances, but in the Court's view they tend here to strengthen the applicant's argument concerning his loss of faith in the asylum procedure”.⁵²⁶ Moreover, the Court also used statistics with less stark results in *T.I. v. the United Kingdom* to counter the applicant's arguments concerning the high burden of proof placed on asylum-seekers in Germany: the record of Germany in granting “large numbers” of asylum claims “gives an indication that the threshold being applied in practice is not excessively high”.

2. Reports

In the successive assessment in *M.S.S. v. Belgium and Greece*, the Court observed to a considerable part the general situation of asylum-seekers in Greece. It stated first of all that, since it adopted its *K.R.S. v. the United Kingdom* decision in 2008, numerous reports and materials have been added to the information available to it. The authors of these documents

⁵²³ *M.S.S. v. Belgium and Greece*, partly concurring and partly dissenting opinion of Judge Sajó, II.

⁵²⁴ Michigan Guidelines, p. 14.

⁵²⁵ *M.S.S. v. Belgium and Greece*, partly concurring and partly dissenting opinion of Judge Sajó, II.

⁵²⁶ *M.S.S. v. Belgium and Greece* para 313.

are UNHCR and the Council of Europe Commissioner for Human Rights, international NGOs like Amnesty International, Human Rights Watch, Pro-Asyl and the European Council on Refugees and Exiles, as well as NGOs present in Greece such as Greek Helsinki Monitor and the Greek National Commission for Human Rights. The relevant documents, based on field surveys, all agree as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedure and the practice of direct or indirect *refoulement* on an individual or a collective basis.⁵²⁷ The Court also attached critical importance to the letter sent by UNHCR in April 2009 to the Belgian Minister in charge of immigration, unequivocally pleading for the suspension of transfers to Greece.⁵²⁸ It was also relevant for the Court that, since December 2008, the European asylum system itself “has entered a reform phase and that, in the light of the lessons learnt from the application of the texts adopted during the first phase, the European Commission has made proposals aimed at substantially strengthening the protection of the fundamental rights of asylum seekers and implementing a temporary suspension of transfers under the Dublin Regulation to avoid asylum seekers being sent back to Member States unable to offer them a sufficient level of protection of their fundamental rights”.⁵²⁹ The Court concluded its analysis of the obstacles facing asylum-seekers in Greece with the diagnosis that “applications lodged there at this point in time are illusory”,⁵³⁰ the applicant had “no guarantee that his asylum application would be seriously examined by the Greek authorities”.⁵³¹ In view of the mentioned deficiencies, the Court found that the applicant's transfer by Belgium to Greece gave rise to a violation of Art 3 ECHR.⁵³²

For its assessment on the Greek asylum procedure, the ECtHR noted the following parameters as relevant: On the one hand, Greek legislation, based on Community law standards in terms of asylum procedure, contained a number of guarantees designed to protect asylum-seekers from removal back to the countries from which they had fled without any examination of the merits of their fears as well as the Government's assurances that the applicant's application for asylum would be examined in conformity with the law.⁵³³

On the other hand, however, the Court observed that “for a number of years”,⁵³⁴ it has been “repeatedly and consistently revealed” in the aforementioned reports that Greece's legislation is not being applied in practice and that in general, the asylum procedure is marked by such

⁵²⁷ *M.S.S. v. Belgium and Greece* para 347-8.

⁵²⁸ *M.S.S. v. Belgium and Greece* para 349.

⁵²⁹ *M.S.S. v. Belgium and Greece* para 350.

⁵³⁰ *Ibidem*.

⁵³¹ *M.S.S. v. Belgium and Greece* para 358.

⁵³² *M.S.S. v. Belgium and Greece* para 360.

⁵³³ *M.S.S. v. Belgium and Greece* para 299.

⁵³⁴ *M.S.S. v. Belgium and Greece* para. 300.

major structural deficiencies that asylum seekers have very little chance of having their applications and their complaints under the Convention seriously examined by the Greek authorities, and that in the absence of an effective remedy, they are not protected against arbitrary removal back to their countries of origin.⁵³⁵ On the decisions themselves, the Court was concerned about the findings of the different surveys carried out by UNHCR, which showed that almost all first-instance decisions were negative and drafted in a stereotyped manner without any details of the reasons for the decisions being given.⁵³⁶

Furthermore, the ECtHR assessed other factors of even more general nature, i.e. the policy of returns to Afghanistan organised on a voluntary basis. The Court was not convinced by the Greek Government's explanations, but referred again to the general fact that forced returns by Greece to high-risk countries have regularly been denounced by the third-party interveners and several of the reports consulted by the Court. Also in *K.R.S. v. the United Kingdom*, the author would have found this risk to exist as UNHCR already advised the EU MSs in its Position Paper of 15 April 2008 to refrain from returning asylum-seekers to Greece under the Dublin Regulation until further notice also due to the described practice of “interrupted” asylum claims- which evidently leads to forced return also to high-risk countries.

While the risk assessment and its parameters on the demanded standard of proof as detailed in *M.S.S. v. Belgium and Greece* are a positive development in the case-law of the ECtHR, the author fears that the Court only accepted the rebuttal of the safety presumption because it saw in the *ex post*-analysis that the contrary result would be evidently wrong. This feeling is drawn from the mentioned facts that the Court, first, also took into consideration numerous reports and other information which had become available only in the second half of 2009 and in 2010 despite executed removal of the applicant⁵³⁷ and, second, not only lifted the interim measures in the numerous cases in which Rule 39 had been applied prior to the decision *M.S.S. v. Belgium and Greece*, but also consistently declined granting interim measures to stop the return of Afghan asylum-seekers to Greece in the period until August 2009.

⁵³⁵ *Ibidem*.

⁵³⁶ *M.S.S. v. Belgium and Greece* para. 302.

⁵³⁷ Since the nature of the Contracting States' responsibility under Art 3 ECHR in removal cases lies in the act of exposing an individual to the risk of ill-treatment, the material date for the assessment of risk is the time of the proposed removal (*Chahal*, 85, M.S.S., 133.). When the Court examines the case when the applicant has not yet been extradited or deported, the relevant time for the ECtHR will be that of the proceedings before it (M.S.S., para. 133, referring to *Chahal*, cited above, §§ 85 and 86, and *Venkatajalarasarma v. the Netherlands*, no. 58510/00, § 63, 17 February 2004). In this sense, the Court added in *Cruz Varas and others v. Sweden* that it is not precluded “from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or the well-foundedness or otherwise of an applicant's fears” (*Cruz Varas and Others v. Sweden* para 76).

Conclusion

The ECtHR has never increased the demands on the standard of proof in cases where the individual concerned was perceived to be a danger to the national security and, hence, has allowed the absoluteness of Art 3 ECHR prevail also regarding the level of probability and predictability. On first sight, the necessary threshold appeared misguided: “substantial grounds” must be shown to prove that the person concerned faces a “real risk” of being subjected to torture or to inhuman or degrading treatment or punishment in the country of potential return. However, the analysis of the Court’s jurisprudence demonstrated that, as lower levels of proof have also sufficed to pass the test, this strict terminology is misleading.

In fact, in assessing the risk of direct *refoulement* due to the factual conditions in the receiving state amounting to persecution, the ECtHR’s jurisprudence has developed from focusing on the general danger, with high demands on the standard of proof of individual persecution that rendered the protection from *refoulement* illusory, towards a more individual approach amounting to the assumption that returning a person to his country of origin where he has a well-founded fear of being persecuted *ipso facto* violates Art 3 ECHR. Hence, the European organs’ jurisprudence on the standard of proof has made the danger of inhuman or degrading treatment in the sense of Art 3 ECHR frequently difficult to distinguish from the danger of political persecution. This, in the opinion of the author, is with good cause: The removal of an individual to a country where he has a well-founded fear of being persecuted in principle always amounts to a violation of Art 3 ECHR. In other words, a person who has a well-founded fear of persecution within the meaning of Art 1 (A) GRC can also claim that he may not be returned to his country of origin because that would expose him to a real risk of being subjected to treatment prohibited by Art 3 ECHR.

In assessing the risk of indirect *refoulement* via a presumably STC, the ECtHR’s jurisprudence has decided in *M.S.S. v Belgium and Greece* to follow the chronology to assess, first, positively the risk of persecution or serious harm awaiting the individual concerned in the final State and, second, the risk emanating from the procedural deficiencies in the refugee determination procedure of the third State that fail to prevent that danger.

As to the first step on persecution in the final State, the reduction of the Court’s analysis in *T.I. v. the United Kingdom* and *M.S.S. v. Belgium and Greece* to the existence of an “arguable claim” is a positive development. This approach, demanding a relatively low level of knowledge in line with the variable standard of proof and hence providing considerable

protection in the case of an alleged violation of Art 3 ECHR, is in conformity with the respective decision-making on Art 3 CAT of the Committee against Torture and also the GRC by its “presumption doctrine”. Also in the concrete execution of the term “arguable claim”, the Court’s positive assessment was sufficiently simple to do justice to the prerogative of a low demand on standard of proof: documentation easily accessible for the applicant and general reports of international organizations and NGOs fulfilled the Court’s demands on the standard of proof to assess the harm feared in the final State as “arguable”.

As to the successive assessment of the risk for the claimant of chain-*refoulement* via the third State, the crucial question is the execution of the terms “substantial grounds“ and “real risk“ for the standard of proof for procedural deficiencies in the presumably safe third State, i.e. the evidence needed to be submitted to rebut the safety presumption and counter possible assurances. The Court’s assessment in *T.I. v. the United Kingdom* was evidence of very high prerogatives on the level of standard of proof: the applicant brought forward numerous well-developed, detailed arguments on the risk arising from the asylum procedure awaiting him in Germany, but this evidence did not prove the possibility of removal to be “sufficiently concrete or determinate”. The “considerable doubt” that was raised was overpowered by diplomatic assurances and the safety presumption- a deplorable result.

The Court also trusted Germany’s assurances in *K.R.S. v. the United Kingdom*. The author sees one reason for the negative risk assessment in the fact that, due to the contrary sequence of analysis in *M.S.S. v. Belgium and Greece*, the Court did not examine the merits of the claim, i.e. torture in Iran. To have identified an “arguable claim” under Art 3 (or 2) ECHR due to the dangers awaiting the applicant in Iran would possibly have increased the ECtHR’s impetus to discuss the rebuttal of the safety presumption regarding the Greek asylum procedure more cautiously, i.e. set the level for the standard of proof against the safety presumption and assurances so low as to let the evidence win. As to the evidence illustrated in Chapter II, the author cannot comprehend why the ECtHR did not come to the conclusion that there was a “real risk” that the asylum procedure awaiting applicants in Greece was unsafe until its judgment *M.S.S. v. Belgium and Greece* in June 2009 and not already in December 2008 (as seen in the decision *K.R.S. v. the United Kingdom*). Hence, the level of standard of proof was, in the view of the author, also set too high in this judgment.

In *M.S.S. v. Belgium and Greece*, the ECtHR found two kinds of evidence strong enough to rebut the safety presumption. First, it was the statistical evidence on extremely low rate of asylum or subsidiary protection granted by the Greek authorities compared with other European Union Member States, strengthening the applicant's argument concerning his loss of

faith in the asylum procedure. Second, all reports by international organizations, NGOs and state organizations agreed as to the practical difficulties involved in the application of the Dublin system in Greece, the deficiencies of the asylum procedure and the practice of direct or indirect *refoulement* on an individual or a collective basis.

2. Burden of proof

Burden of proof is not about the plenitude of claims and arguments, but about the issue of which party must adduce sufficient evidence. The question of the evidence that must be produced in order to determine the real risk or danger of torture or ill-treatment forms the crux of the examination of the non-*refoulement* principle and, as a consequence, for the effective protection of persons from becoming victims of severe human rights violations.⁵³⁸ While both in cases of future and past events, the situations at hand are never completely cognitively accessible, the “evidentiary” problem concerning future events is “far more radical” than concerning past events.⁵³⁹

The ECtHR has formulated its demands on the burden of proof as being grounded in the applicant and has used the term “substantial grounds” that “have [to be] shown” for believing that the applicant would face *refoulement*.⁵⁴⁰ This wording is inspired by Art 3 CAT which speaks of “substantial grounds for believing”. Comparing these formulations, one sees that the expression used by the European organs adds a further element to that of Art 3 CAT: By stating that substantial grounds “have been shown” the European organs seem to indicate a significant burden of proof on the side of the applicant.⁵⁴¹ Cases such as *Y. v the Netherlands* gave rise to the fear that the level of burden of proof is very high. In this case, the ECommHR noted that the applicant first had not shown any case where a person had been convicted and subjected to the death penalty in Malaysia following his conviction for the same offence

⁵³⁸ Suntinger, 16.

⁵³⁹ Concurring opinion in *Saadi v the United Kingdom*, Judge Zupančič, continuing: “From time immemorial the legal process has dealt with these problems and has invented a way of resolving situations despite this cognitive insufficiency. I refer to the use of presumptions in Roman law where the magistrate (*praetor*) was required to make a decision about the past event although the evidence adduced was insufficient. The formula concerning presumptions, therefore, referred to situations of doubt and it required the decision-maker to assume a particular position when in doubt, as indicated by the legally mandated presumption. In other words, this enabled the system to reach a *res judicata* level even without being able to ascertain the whole truth.”

⁵⁴⁰ See, amongst other authorities, *Ahmed v. Austria* paras 39-40, emphasis added.

⁵⁴¹ Suntinger, 16; see also the French wording “*motifs sérieux et avérés de croire*” used by the Court as opposed to “*motifs sérieux de croire*” of Article 3 CAT.

elsewhere, and second did not give precise information about the specific conditions of the detention which he risked undergoing upon his return. Hence, the applicant had “*not sufficiently demonstrated* that upon his return to Malaysia he will be prosecuted and eventually sentenced to the death penalty for transporting money to Malaysia”.⁵⁴² The applicant’s claim hence failed.

But how has the Court in fact handled the issue of burden of proof? To identify the differences of the ECtHR’s jurisprudence between States being not presumed to be safe (“regular States”) (a) and presumably safe States (b), this issue will be discussed along these lines.

a. Regular States: Factual conditions

The burden of proof regarding regular States is an issue in the case of direct *refoulement* (aa), and in the first step of indirect *refoulement*, amounting to persecution in the final State (bb).

aa. Direct refoulement

According to the ECtHR’s jurisprudence, it is the applicant who must adduce evidence in removal cases to prove the existence of “substantial grounds”.⁵⁴³ Only where such evidence is adduced, it is the role of the Government to dispel any doubts about it.⁵⁴⁴ Academics find that the practice of the Strasbourg organs confirms the fear that the burden of proof is primarily on the side of the applicant.⁵⁴⁵ Most of them agree that they have been quite restrictive in their approach to the evidentiary requirements.⁵⁴⁶ As for the Commission, the diagnosis was also found to be valid that the ECtHR’s case-law “shows that an applicant will have to advance rather strong arguments”.⁵⁴⁷

The author’s analysis of the Court’s finding of the affirmation of the “substantial grounds” for a relevant risk awaiting the applicant in a regular receiving State shows that no relevant evidence was adduced by the applicant in *Soering v. the United Kingdom*⁵⁴⁸ and *Chahal v. the*

⁵⁴² *Y. v the Netherlands*, 212; emphasis added.

⁵⁴³ See *N. v. Finland*, 38885/02, Council of Europe: European Court of Human Rights, 23 September 2003, para 167.

⁵⁴⁴ *Saadi v. Italy*, para 129.

⁵⁴⁵ Suntinger, 16.

⁵⁴⁶ See Einarsen, 373, Van Dijk, 237; M. Villiger, *Handbuch der Europäischen Menschenrechtskonvention*, Zürich 1993, 185.

⁵⁴⁷ Suntinger, 17, referring to Van Dijk, 237.

⁵⁴⁸ *Soering v. the United Kingdom* para 98; The ECtHR referred in its factual inquiry to the “*foreseeable consequences*” of the submissions of the different involved authorities, the most relevant being that the Commonwealth’s Attorney has himself determined to seek and to persist in seeking the death penalty. The Court concluded that it was not able to hold that there were no substantial grounds for believing that the applicant faced the real risk of being sentenced to death and hence experiencing the “death row phenomenon”.

*United Kingdom*⁵⁴⁹. Also in *Saadi v. Italy*,⁵⁵⁰ although the applicant produced a document on the assertion that an individual had been savagely tortured and held in the cells of the Ministry of the Interior in Tunis for twenty-four days, it was reports mentioning cases of torture and ill-treatment that were found reliable by the Court. This analysis leads the author to conclude and argue that the ECHR can and must be interpreted as primarily demanding the State to provide the relevant available facts of the respective case.

Not only in these concrete applications in practice, but also in its general considerations, the ECtHR has itself confirmed such approach by stating that, “[s]ince the nature of the Contracting States’ responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those *facts which were known or ought to have been known to the Contracting State at the time of the expulsion*”.⁵⁵¹ Hence, regarding “the fundamentally important prohibition against torture and inhuman and degrading treatment under Article 3, read in conjunction with Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention”,⁵⁵² it must be defended in the context of Art 3 ECHR that not the applicant does carry the whole burden of convincing the Court of the existence of the “substantial grounds”,⁵⁵³ but the Contracting States have a general “duty to know the relevant facts in so far as it is possible”.⁵⁵⁴

Art 3 CAT confirms the responsibility of the State in discerning the conditions faced by the applicant. Para 1 of Art 3 CAT requires only that substantial grounds “exist” and not that these grounds have been “shown” as the European organs demand, which emphasizes the important role of the authorities in the determination and indicates a lower threshold concerning the evidentiary requirements for the individual.⁵⁵⁵ This active role of the State is confirmed by Para 2, which stresses that “the competent authorities take into account all

⁵⁴⁹ the ECtHR was persuaded by the evidence by the number of aforementioned diverse objective sources, against which the State’s assurances did an adequate guarantee of safety.

⁵⁵⁰ *Saadi v. Italy*, para 147; the documents the ECtHR referred to the most were the Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism, the reports on Tunisia by Human Rights Watch, Amnesty International and the US State Department as well as information on the activities of the International Committee of the Red Cross. The applicant himself produced a document from the *Association internationale de soutien aux prisonniers politiques* concerning the case of a young man named Hichem Ben Said Ben Frej who was alleged to have leapt from the window of a police station shortly before he was due to be interrogated; it was asserted that Mr Frej had been savagely tortured and held in the cells of the Ministry of the Interior in Tunis for twenty-four days. Similar allegations are to be found in statements by local organisations for the defence of prisoners’ and women’s rights and in numerous press cuttings.⁵⁵⁰ The reports that mentioned the decisive cases of torture and ill-treatment were those of Amnesty International and Human Rights Watch as well as the report of the US State Department. As the Court did not doubt reliability of these sources, it attached no relevance to the Tunisian authorities’ assurances.

⁵⁵¹ *M.S.S. v. Belgium and Greece*, para 233, emphasis added.

⁵⁵² See, amongst other authorities, *Ahmed v. Austria* paras 39-40, emphasis added.

⁵⁵³ *Soering v. the United Kingdom* para 91.

⁵⁵⁴ *Cruz Varas and others v. Sweden*, para, 76; the Court is not precluded, however, from having regard to information which comes to light subsequent to the expulsion. This may be of value in confirming or refuting the appreciation that has been made by the Contracting Party or whether an applicant’s fears were well-founded.

⁵⁵⁵ *Suntinger*, 18.

relevant considerations". Furthermore, it is expressly stated that a consistent pattern of human rights violations has to be taken into account in the evaluation of the evidence.

Facts that need to be proven by the applicant in a removal case should be limited to those concerning the background and personal experiences of the applicant which purportedly give rise to fear of *refoulement*. In this sense, the Committee against Torture was of the view in *A.S. v. Sweden*⁵⁵⁶ that the applicant had, by submitting as names of persons, their positions, dates, addresses, names of police stations etc., had given sufficient details regarding her *singhe* or *mutah* marriage and alleged arrest that could have been or, to a certain extent had been, verified by the State Party's immigration authorities, to shift the burden of proof to the State Party.

This low burden of proof on the side of the applicant has also proven to be highly important for the sensitive interplay between credibility and the benefit of the doubt: A supposed lack of evidence adduced by the applicant in support of his statement can lead the deciding authority to the opinion that the applicant even lacks credibility. Lack of credibility is the most frequent reason for refusing asylum claims. However, it is not always due to a dearth of information provided by the applicant, but can also result from mishandling evidence or from a breach of procedure: some contradictions and inconsistencies on the part of the applicant are explained at a later stage, but the explanation is rejected because of its timing, or could have been explained had the questions been asked.⁵⁵⁷ Other refusals based on lack of credibility are the clear result of dramatically wrong argumentation by the officer: for example, one official found it logical to declare the applicant not credible because, as he had left his country, he had not had any of the problems that he theoretically would have encountered had he stayed. Therefore, the applicant could not prove that these problems would have been occurred if he had stayed in his country.⁵⁵⁸

Among the individuals threatened with removal, the demand that the burden of proof be considerably reduced for the applicant to information on his background and relevant personal experiences is even truer for asylum-seekers: It would not be acceptable that "an applicant must furnish *prima facie* evidence of his or her allegations as to the danger of ill-treatment".⁵⁵⁹

⁵⁵⁶ No.149/1999.

⁵⁵⁷ Rousseau 43.

⁵⁵⁸ FAO, Elpascha Bijsultanov, 1.4 February 2008.

⁵⁵⁹ Einarsen referring to Hailbronner, 'Non-refoulement and "humanitarian refugees": Customary International Law or Wishful Legal Thinking?', in Martin D.A. (ed.), *The New asylum Seekers: Refugee Law in the 1980s*, 1988, 141.

The author's experience coincides with Einarsen's diagnosis that the required evidence "is often difficult to fulfill, even in the case of a *bona fide* refugee. The individual may simply not be in a position to obtain and submit the necessary documentation as to why deportation might result in a real risk of ill-treatment; it is not often that the authorities put forward in writing their determination to persecute the applicant upon return".⁵⁶⁰ Within the asylum procedure, evidence or proof of persecution is crucial. However, evidentiary questions are an aspect of refugee law that has been "largely ignored in the academic literature".⁵⁶¹ There is presently an absence of consensus amongst States on common standards for assessing evidence in asylum procedures. States with different legal traditions and histories have shown a reluctance to open the discussion on how the rules and standards on evidentiary questions are dealt with. Some commentators have argued that the task is simply too difficult, which may speak more to obstacles in reaching political agreement than to articulating common rules and standards.⁵⁶² The UNHCR Handbook acknowledges that evidentiary requirements should not be applied too strictly "in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds him or herself."⁵⁶³ Although the burden of proof is discharged by the applicant through providing evidence, in the end the only available evidence may be an applicant's oral testimony.⁵⁶⁴

The decision of the Committee against Torture in *A.S. v. Sweden* is particularly instructive on the issue of burden of proof of asylum-seekers.⁵⁶⁵ The State Party had questioned the applicant's credibility primarily because of her failure to submit verifiable information. It referred to international standards, i.e. the UNHCR Handbook, according to which an asylum-seeker has an obligation to make an effort to support his or her statements by any available evidence and to give satisfactory explanation for any lack of evidence. The State Party claimed that the applicant had not fulfilled her obligation to submit the verifiable information that would enable her to enjoy the benefit of the doubt. In a key passage of the decision, the Committee commented as follows:

"[T]he state party [...] questions the author's credibility primarily based on her failure to submit controllable information and the reference in this context to international standards, i.e. UNHCR's Handbook, according to which an asylum seeker has an obligation to make an effort to support his (or her) statements by any available evidence and give a satisfactory explanation for any lack of evidence. The Committee draws the attention of the parties to its General Comment on the implementation of article 3 of the Convention in the context of article 22, adopted on 21

⁵⁶⁰ In such a case, the burden of proof may be shifted: *Soering v. the United Kingdom* para 98.

⁵⁶¹ Gorlick, 2.

⁵⁶² Gorlick, 17.

⁵⁶³ UNHCR Handbook, para 197.

⁵⁶⁴ Gorlick 362.

⁵⁶⁵ *A.S. (name withheld) v. Sweden*, Communication No. 149/1999, U.N. Doc. CAT/C/25/D/149/1999 (2001).

November 1997, according to which the burden to present an arguable case is on the author of a communication. The Committee notes *the state party's position that the author has not fulfilled her obligation to submit the controllable information that would enable her to enjoy the benefit of the doubt. However, the Committee is of the view that the author has submitted sufficient details regarding her sighe or mutah marriage and the alleged arrest, such as names of persons, their positions, dates, addresses, name of police station etc, that could have, and to a certain extent have been, verified by the [...] immigration authorities, to shift the burden of proof.* In this context the Committee is of the view that the state party has not made sufficient efforts to determine whether there are substantial grounds for believing that the author would be in danger of being subjected to torture”.⁵⁶⁶

As to the interplay between credibility and the benefit of the doubt for asylum-seekers, the ECtHR acknowledged in *V. Matsiukhina and A. Matsiukhin v. Sweden* that, “due to the special situation in which asylum seekers often find themselves, it is *frequently* necessary to give them the benefit of the doubt when it comes to assessing the credibility of their *statements* and the *documents submitted in support thereof*”.⁵⁶⁷ The author finds the ECtHR’s formulation of its position to be confusing. If benefit of the doubt were given even for the assessment of the applicant’s credibility, no check at all on the coherency and plausibility of the applicant’s assertion would take place. This is, however, the minimum possible check on the applicant’s assertion without which an assessment of the applicant’s credibility would be reduced to nothing. The only plausible interpretation of the ECtHR’s standpoint is that it was merely formulated in a slightly unclear manner and should be understood as in an older report of the ECommHR, *Bahaddar v. the Netherlands*. In this case, the Commission gave the applicant the benefit of the doubt *after* it had considered his account to be credible and on the whole consistent.⁵⁶⁸ Such understanding of the Court brings its position in line with the position of UNHCR. The UNHCR Handbook provides the following guidance on when it is warranted to grant a refugee applicant the benefit of the doubt:

“It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his [or her] statements by documentary or other proof, and cases in which an applicant can provide evidence of all his [or her] statements will be the exception rather than the rule [...] Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant’s account appears credible, he [or she] should, unless there are good reasons to the contrary, be given the benefit of the doubt.”⁵⁶⁹

“After the applicant has made a genuine effort to substantiate his [or her] story there may still be a lack of evidence for some of his [or her] statements. As explained above [...], it is hardly possible for a refugee to ‘prove’ every part of his [or her] case, and indeed, if this were a

⁵⁶⁶ *A. v. Australia* (560/1993), ICCPR, A/52/40 vol. II (3 April 1997) 125 (CCPR/C/59/D/560/1993) at paras 9.1-9.6.

⁵⁶⁷ *V. Matsiukhina and A. Matsiukhin v Sweden*, application no. 31260/04, Council of Europe: European Court of Human Rights, 21 June 2005, emphasis added.

⁵⁶⁸ Report of 13 September 1996, paras. 93-102. The Court did not decide on the merits of the case, because it found that the local remedies had not been exhausted: judgment of 19 February 1988.

⁵⁶⁹ UNHCR Handbook, para.196.

requirement the majority of refugees would not be recognised. It is therefore frequently necessary to give the applicant the benefit of the doubt. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts."⁵⁷⁰

Hence, UNHCR takes the position that the benefit of the doubt should only be given after all available evidence has been obtained and checked and the examiner is satisfied with the applicant's general credibility. In this sense, the ECtHR held in *Said v. the Netherlands* that in light of more or less credible statements of the asylum-seeker in the context of general information concerning the situation in Eritrea, his expulsion would amount to a violation of Art 3 ECHR.⁵⁷¹

As the CAT Committee made clear, complete accuracy is seldom to be expected from victims of torture. Contradictions and inaccuracies in the story are not material and do not raise doubts about the general veracity of the author's claims.⁵⁷² In this sense, while the onus is on the asylum-seeker who fears torture if he or she was repatriated to prove that he or she had been ill-treated, the Committee has made clear that the criteria should be fairly flexible given that asylum seekers are usually 'penniless, traumatized and in strange surroundings'.⁵⁷³ Byrne and Shacknove summarized what the author has also perceived: "Persons who have experienced torture, sexual violence, the execution or disappearance of family members, or communal violence are unlikely to be identified in an accelerated procedure. Far from having manifestly unfounded claims, such persons are likely to be among those most at risk of persecution upon return. Persons who have experienced trauma may suffer from memory loss, especially surrounding the traumatic event. They may hesitate in their speech, be aggressive, withdrawn or anxious, or offer confused testimony. These difficulties can lead to an incomplete factual record, and can give rise to doubts about credibility. In this respect, the behavior of manifestly unfounded applicants and persons with the strongest claims can be identical".⁵⁷⁴

It can hence be summarised that, in view of the particular nature of the refugee situation and the possible vulnerability of the applicant, the decision-maker should carry the duty to ascertain and evaluate all the relevant general facts. The asylum-seeker carries the burden of proof to produce all evidence available to him, which only includes evidence on his

⁵⁷⁰ UNHCR Handbook, paras 203-4.

⁵⁷¹ Judgment of 5 Jul 2005, paras. 50-2.

⁵⁷² Nowak 191, referring to Nos.21/1995, 41/1996, 101/1997.

⁵⁷³ Nowak 154, referring to CAT/C/SR.504,§37.

⁵⁷⁴ Byrne and Shacknove 220, footnotes omitted.

background and personal experiences that purportedly give rise to the fear of *refoulement*. After all available evidence has been obtained and checked and the examiner is satisfied with the applicant's general credibility, the decision-maker confronts the applicant's assertion with the findings on the human rights situation in the State concerned.

In general, where the situation in a State is poor and the personal characteristics of the applicant suggest that he might be at risk of being subjected to torture or ill-treatment, such risk should be assumed. At that point, the benefit of the doubt leads to a so-called "shift of burden of proof", i.e. the burden is on the removing State to inform itself about the case-specific relevant facts as much as possible.

Decreasing an asylum-seeker's burden of proof to a "not particularly great"⁵⁷⁵ level, as described by the CAT Committee, is in compliance with the complicity principle's position of inverse demands on the standard and burden of proof in the face of the seriousness of the potential harm. While the language of the ECtHR can be understood in this sense on direct *refoulement*, its jurisprudence must now be discussed on the first step of indirect *refoulement*, i.e. persecution in the final State.

bb. Indirect refoulement via a presumably safe third State: Persecution in the final State

In *T.I. v. the United Kingdom*, the applicant gave explicit information and provided two medical reports to the Court, which strongly supported his claims that he had been tortured. He also provided photographs of scars of his injuries on his arm, leg and head. The ECtHR found almost none of the applicant's evidence relevant enough to take into consideration.

After the Court did not address the situation in the country of origin (Iran) in *K.R.S. v. the United Kingdom*, it considered the applicant's evidence in *M.S.S. v. Belgium and Greece*, being copies of certificates showing that he had worked as an interpreter, in support of his fears concerning Afghanistan. The ECtHR also had access to general information about the current situation in Afghanistan and to the Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan published by UNHCR and which was regularly updated. For the Court, "this information was *prima facie* evidence that the situation in Afghanistan has posed and continues to pose a widespread problem of insecurity and that the applicant belongs to a category of persons particularly exposed to reprisals at the hands of the anti-government forces because of the work he did as an interpreter for the international

⁵⁷⁵ Nowak 193.

air forces”.⁵⁷⁶

Thus, also in cases of persecution or serious harm endangering the individual concerned via a “safe” EU State, the ECtHR has primarily attached greater importance to the information contained in reliable reports and has merely seen the applicant's specific allegations as corroborative evidence. Hence, asylum-seekers have been assigned a very low burden of proof on the danger expected in the final State. The author highly welcomes the Court’s approach, as it is compatible with the complicity principle’s position of inverse demands on standard and burden of proof based on the seriousness of the potential harm.

However, it is not clear if compliance can be reached if the human rights situation in the receiving State is not obviously poor, in which case the burden may still rest on the applicant to show that he is in danger. This question will be discussed in the following section.

bb. Presumably safe States

If the human rights situation in the receiving State – in this case a presumably SCO or STC – is not obviously poor, the logical consequence was verbalized that the burden of proof may still rest on the applicant to show that he is in danger.

How has the ECtHR approached the issue of burden of proof in the three “Dublin” cases? In *T.I. v. the United Kingdom*, the ECtHR found, regarding the safety presumption, that the applicant was only able to raise “*considerable doubt*” that he “would either be granted a follow up *asylum* hearing or that his second claim would be *granted*”.⁵⁷⁷ This is remarkable, as the applicant provided strong evidence before the ECtHR and alleged that this evidence would not be granted due importance in the German removal proceedings.⁵⁷⁸ Interestingly, the applicant’s arguments concerning the high burden of proof placed on asylum-seekers in Germany were countered not only by the argument that the record of Germany in granting large numbers of asylum claims “gives an indication that the threshold being applied in practice is not excessively high,” but also by the fact that “this matter was considered by the English Court of Appeal and rejected”.⁵⁷⁹ The Court was hence not persuaded that this argument “has been substantiated as preventing meritorious claims in practice”.

In *K.R.S. v. the United Kingdom* as well, the ECtHR found almost nothing of the applicant’s

⁵⁷⁶ *M.S.S. v. Belgium and Greece*, para 294-6.

⁵⁷⁷ Emphasis added.

⁵⁷⁸ Battjes, *European Asylum Law*, 411.

⁵⁷⁹ Battjes, *European Asylum Law*, 264.

claim relevant enough to take into consideration. Rather, the Court considered reports of UNHCR, as well as Amnesty International, the Norwegian Organisation for Asylum Seekers and other NGOs, which in fact can be assumed to be more thorough than is possible for an asylum-seeker to produce. However, even the evidence in those reports was not sufficient to shift the burden of proof to the United Kingdom; rather, the ECtHR continued to rely on the safety presumption.

Finally, in respect to the assessment of the indirect *refoulement* through removals to Greece by the Belgian authorities as examined in *M.S.S. v. Belgium and Greece*, the Court found that, “[i]n addition to the fact that formal proof of this could not be adduced *in abstracto* and before the risk had materialized, the Belgian authorities should have taken the general situation into account and not taken the risk of removing [the applicant] back”.⁵⁸⁰ This “general situation *was known* to the Belgian authorities and that the applicant *should not be expected to bear the entire burden of proof*”.⁵⁸¹ Before its finding that the applicant's transfer by Belgium to Greece gave rise to a violation of Art 3 ECHR, the Court countered the Government's argument that “the applicant had not sufficiently individualised, before the Belgian authorities, the risk of having no access to the asylum procedure and being sent back by the Greek authorities”.⁵⁸² The Court clarified again that “it was *in fact up to the Belgian authorities*, faced with the situation described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, to first *verify* how the Greek authorities applied their legislation on asylum in practice”.⁵⁸³ Had they done this, they would have seen that the risks the applicant faced were real and individual enough to fall within the scope of Art 3 ECHR. The Court added: “The fact that a large number of asylum seekers in Greece find themselves in the same situation as the applicant does not make the risk concerned any less individual where it is sufficiently real and probable”.⁵⁸⁴ The ECtHR concluded that “at the time of the applicant's removal the Belgian authorities knew or ought to have known that he *had no guarantee that his asylum application would be seriously examined by the Greek authorities*”⁵⁸⁵ and that hence “the applicant's transfer by Belgium to Greece gave rise to a violation of Article 3 of the Convention”.⁵⁸⁶

⁵⁸⁰ *M.S.S. v. Belgium and Greece* para 234.

⁵⁸¹ *M.S.S. v. Belgium and Greece* para 352, emphasis added.

⁵⁸² *M.S.S. v. Belgium and Greece* para 359.

⁵⁸³ *Ibidem*. emphasis added.

⁵⁸⁴ *Ibidem* para 359, referring, *mutatis mutandis*, to *Saadi v. Italy* para 132.

⁵⁸⁵ *M.S.S. v. Belgium and Greece* para 358, emphasis added.

⁵⁸⁶ *M.S.S. v. Belgium and Greece* para 360.

The author supports the decision of the Court in *M.S.S. v. Belgium and Greece* to accept the proof provided by the applicant, which included a description of the general situation through the aforementioned statistics on recognition rates and the reports on concrete circumstances awaiting the applicant. In this case, the burden of proof was thus shifted to Belgium and, as Belgium failed to fulfill it, the safety presumption was rebutted. This fact that no proof on the individual case was demanded by the Court for a shift of burden of proof regarding a State with presumably good human rights record represents a crucial change since *Y. v. the Netherlands*, where the ECommHR had demanded from the applicant to give precise information about the specific conditions of the detention which he himself risked undergoing upon his return.

Thus, general information provided by statistics has been proven to have the power to shift the burden of proof. This is demonstrated by *T.I. v. the United Kingdom*, in which the Court relied on numbers in its evidence assessment to counter the applicant's arguments concerning the high burden of proof placed on asylum-seekers in Germany. In this case, the Court argued that Germany's record in granting large numbers of asylum claims "gives an indication that the threshold being applied in practice is not excessively high". The author already argued in the case of *M.S.S. v. Belgium and Greece* that statistical proof cannot only, as the Court stated, strengthen the applicant's argument concerning his loss of faith in the asylum procedure, but that such an asylum system with a rate of recognition not exceeding 1 percent is suspect *per se* in terms of the fairness of the procedure. As Judge Sajó defended in the dissenting part of his opinion, such statistics must lead to a shift of burden of proof, i.e. for the Government of Belgium to be obliged to provide "justification for this apparent statistical aberration".

Indeed, for the ECtHR, it was the general information provided in reports that led to the shift of burden of proof in this case. However, it seems plausible that the Court only accepted this solution due to the pressing, radical circumstances in the case that had continued to deteriorate. In particular, the following argumentation of the ECtHR leads to the suspicion: The Court considered that "the Belgian authorities should have taken the general situation into account",⁵⁸⁷ "it was in fact up to the Belgian authorities, *faced with the situation* described above, not merely to assume that the applicant would be treated in conformity with the Convention standards but, on the contrary, *to first verify* how the Greek authorities applied

⁵⁸⁷ *M.S.S. v. Belgium and Greece* para 324.

their legislation on asylum in practice”.⁵⁸⁸ In the author’s opinion, the ECtHR also proves here that it misuses the safety presumption as circular argument: “faced with the situation” in Greece, the Belgian authorities should have had to “first verify” the Greek practice: however, in order to be aware of what situation to the applicant faced, Greek practice must be verified. Even more worrying, the Court has not developed any criteria for determining when the burden of proof should be shifted. Even academics such as Battjes unconsciously used such circular arguments when stating that a State can rely on safety presumption arrangements “to a certain extent- to the extent that its inter-state trust in the STC is justified”,⁵⁸⁹ but tried to introduce criteria when formulating that the approach of “interstate trust as a rebuttable presumption” demands and allows for an individual assessment, “if *proper grounds are adduced that this is necessary*”.⁵⁹⁰

Conclusion

The ECtHR has formulated its demands on the burden of proof as being with the applicant and has stated that “substantial grounds” must be shown for believing that the applicant would face *refoulement*. While many academics have feared that the burden of proof lies primarily on the side of the applicant, the author concludes after an analysis of the Court’s jurisprudence that it has itself reinforced the argument that the ECHR can and must be interpreted as primarily demanding the State to provide the relevant available facts of the respective case.

This means for the concrete situation of the single procedure that the decision-maker carries the duty to ascertain and evaluate all the relevant general facts. The asylum-seeker carries the burden of proof to produce all evidence available to him, which only includes evidence on his background and personal experiences that purportedly give rise to the fear of *refoulement*. This low burden of proof has proven even more important in single procedures regarding the particular nature of the refugee situation, the possible vulnerability of the applicant as well as the danger of refusals based on lack of credibility resulting from mishandling the evidence.

After all available evidence has been obtained and checked and the examiner is satisfied with the applicant’s general credibility, the decision-maker confronts the applicant’s assertion with the findings on the human rights situation in the State concerned. In general, where the

⁵⁸⁸ *M.S.S. v. Belgium and Greece* para 359, emphasis added.

⁵⁸⁹ *Ibidem*.

⁵⁹⁰ Battjes, *European Asylum Law*, 410, emphasis added.

situation in a State is poor and the personal characteristics of the applicant suggest that he might be at risk of being subjected to torture or ill-treatment, such risk should be assumed. At that point, benefit of the doubt leads to a so-called “shift of burden of proof”, i.e. the burden is mainly on the removing State to inform itself about the case-specific relevant facts as much as possible.

Such a decrease of the asylum-seeker’s burden of proof complies with the complicity principle’s position of inverse demands on the standard and burden of proof in the face of the seriousness of the potential harm, and the language of the ECtHR can be understood in this sense on regular States. However, it is unclear if compliance can be reached if the human rights situation in the receiving State – in this case a presumably SCO and STC – is not obviously poor: The logical consequence was verbalized that the burden of proof may still rest on the applicant to show that he is in danger.

The ECtHR approached the issue of burden of proof in its relevant jurisprudence critically: In *T.I. v. the United Kingdom*, the Court was not persuaded that the argument had “been substantiated as preventing meritorious claims in practice”, despite strong evidence provided by the applicant. In *K.R.S. v. the United Kingdom* as well, the ECtHR found almost nothing of the applicant’s claim relevant enough to take into consideration and did not find the evidence by reputable reports sufficient to shift the burden of proof to the United Kingdom. After having trusted the safety presumption in these two cases, the Court was satisfied in *M.S.S. v. Belgium and Greece* with the proof provided by the applicant, which included a description of the general situation by the aforementioned statistics on recognition rates and the reports on concrete, but general circumstances awaiting the applicant. Through this evidence, the burden of proof was shifted to Belgium and, as Belgium failed to fulfil it, the safety presumption was rebutted.

3. Balancing: Positive obligations on the removing State’s single procedure

In the face of the reality of danger of over-weighting the safety presumption in national jurisprudence and in Strasbourg jurisprudence as described in Chapter II and in this Chapter, the issue is now addressed which positive procedural obligations can be derived from the principle of non-*refoulement* and hence Art 3 ECHR alone for the removing State’s single procedure on asylum and removal from the discussion of the variable standard of proof and

the analysis of the ECtHR's jurisprudence. Beyond a considerably low standard of proof (a) and burden of proof (b), demands are posed such as access to an individual interview (c) and on the quality of the procedure (d).

a. Considerably low standard of proof

As the concept of the variable standard of proof indicates that the gravity of the foreseeable ill-treatment is decisive with respect to the degree of probability and predictability applicable in different classes of cases, a relatively low level of knowledge ought to be required in the case of an alleged violation of Art 3 ECHR for the proof of a violation. On this level of standard of proof, the ECtHR's jurisprudence does not allow for generalizations, but brings certain clarifications and enables some conclusions to be drawn from the identified concerns. First, the absoluteness of Art 3 ECHR prohibits any increase of the demands on the standard of proof in cases of removal in which the individual concerned being perceived to be a danger to the national security.

For the removing State's single procedure on asylum and removal, the ECtHR clarified that, as to direct *refoulement*, a person who has a well-founded fear of persecution within the meaning of Art 1 (A) GRC can also claim that he may not be returned to his country of origin because that would expose him to a real risk of being subjected to treatment prohibited by Art 3 ECHR. In the case of indirect *refoulement*, only national procedures are in line with the variable standard of proof and hence provide considerable protection in the case of an alleged violation of Art 3 ECHR that keep the level demanded for knowledge relatively low for both assessments of risk: of persecution in the final State as well as procedural deficiencies in the third State's single procedure.

The ECtHR has clarified that this low standard of proof can be satisfied, concerning persecution in the final State, with easily accessible documentation from the applicant and general reports of international organisations and NGOs. However, concerning procedural deficiencies in the third State's single procedure, to keep the standard of proof, also for rebuttal of the safety presumption, sufficiently low, it must, contrary to the ECtHR's high prerogatives in *T.I. v. the United Kingdom*, be viewed as being fulfilled by fair consideration of statistical evidence on the considerable low rates of asylum or subsidiary protection granted by the presumably STC compared with other States, and general reports by international organizations and NGOs. In other words, it would be too much to require the applicant to demonstrate *in concreto* the irreparable nature of the damage done by the alleged potential

violation, and the safety presumption should be rebuttable by the sole evidence of statistics and reports on the general situation in the third State. In this sense, the ECtHR analyzed the concrete single procedure of the removing State in *M.S.S. v. Belgium and Greece*. The Belgian Government confirmed that the constant case-law of the Aliens Appeals Board required the applicants to demonstrate the “concrete risk” they faced.⁵⁹¹ In this case, the UNHCR intervened as a third party, stating that “the constant case-law effectively doomed to failure any application for the suspension or review of an order to leave the country issued in application of the Dublin Regulation, as the individuals concerned were unable to provide concrete proof both that they faced an individual risk” and that it was impossible for them to secure protection in the receiving country. In adopting that approach, the Belgian courts automatically relied on the Dublin Regulation and failed to assume their higher obligations under the Convention and the international law on refugees.⁵⁹² The ECtHR has clarified in this judgment that if the safety presumption cannot be rebutted in the removing State’s procedure by the sole evidence of reports on the general situation in the respective receiving presumably safe State, the standard of proof on the applicant is increased to an extent as to hinder the examination on the merits of the alleged risk of a violation. Therefore, general assumptions alone are insufficient to establish the international law responsibility of a State beyond reasonable doubt, but they must definitely be sufficient to rebut a safety presumption.

It can be concluded that Art 3 ECHR imposes the positive obligation on the removing State to assess the risk of *refoulement* in its single procedure, also in the case of an existing safety presumption, with a standard of proof that is considerably low, i.e. being fulfilled by general information by reports or statistical data.

b. Considerably low burden of proof

The ECtHR has, despite formulating its demands on the burden of proof as being with the applicant and using the term “substantial grounds”, reinforced in its jurisprudence the argument that the ECHR can and must be interpreted as primarily demanding the State to provide the relevant available facts of the respective case.

This means for the concrete situation of the single procedure that the decision-maker carries the duty to ascertain and evaluate all the relevant general facts. The asylum-seeker carries the

⁵⁹¹ *M.S.S. v. Belgium and Greece* para. 383.

⁵⁹² *M.S.S. v. Belgium and Greece* para. 384.

burden of proof to produce all evidence available to him, which only includes evidence on his background and personal experiences that purportedly give rise to the fear of *refoulement*.

After all available evidence has been obtained and checked and the examiner is satisfied with the applicant's general credibility, the decision-maker confronts the applicant's assertion with the findings on the human rights situation in the State concerned. In general, where the situation in a State is poor and the personal characteristics of the applicant suggest that he might be at risk of being subjected to torture or ill-treatment, such risk should be assumed. At that point, benefit of the doubt leads to a so-called "shift of burden of proof", i.e. the burden is mainly on the removing State to inform itself about the case-specific relevant facts as much as possible. Such a decrease of the asylum-seeker's burden of proof complies with the complicity principle's position of inverse demands on the standard and burden of proof in the face of the seriousness of the potential harm, and the language of the ECtHR can be understood in this sense on regular States.

However, concerning procedural deficiencies in the third State's single procedure, to keep the burden of proof sufficiently low, it must be viewed as being fulfilled by an applicant if including a description of the general situation by the statistics on recognition rates and the reports on the concrete, but general circumstances awaiting the applicant. Through this evidence, the burden of proof must be shifted to the removing State.

As to the level of burden of proof in the removing State's procedure regarding the risk of indirect *refoulement* due to procedural deficiencies a STC's single procedure, hence for the rebuttal of a safety presumption, *M.S.S. v. Belgium and Greece* is illuminative. The applicant submitted on the issue of burden of proof in the Belgian review procedure what also the author could have done in the cases referred to in the introduction to this thesis: At the time of the applicant's removal, his request for a stay of execution lodged under the extremely urgent procedure had no chance of succeeding because the constant case-law of certain divisions of the Aliens Appeals Board "systematically" upheld the safety presumption by finding that there was no virtually irreparable damage since it was to be presumed that Greece would fulfill its international obligations in asylum matters, and that presumption could not be rebutted based on reports on the general situation in Greece, without the risk to the person being demonstrated *in concreto*. Only a handful of judgments to the contrary had been delivered, but in a completely unforeseeable manner and with no explanation of the reasons.⁵⁹³ The applicant further stated that this increase in the burden of proof even in cases where "the individuals concerned demonstrated that they belonged to a vulnerable group who

⁵⁹³ *M.S.S. v. Belgium and Greece* para. 374.

were systematically subjected in Greece to treatment contrary to Article 3” made appeals to the Aliens Appeals Board “totally ineffective”.⁵⁹⁴

The Belgian judgments discussed in the Court’s reasoning confirmed that the examination of the complaints under Art 3 ECHR carried out by certain divisions of the Aliens Appeals Board at the time of the applicant’s expulsion was not thorough: “They limited their examination to verifying whether the persons concerned had produced concrete proof of the irreparable nature of the damage that might result from the alleged potential violation of Article 3, thereby *increasing the burden of proof to such an extent as to hinder the examination on the merits of the alleged risk of a violation*. Furthermore, even if the individuals concerned did attempt to add more material to their files along these lines after their interviews with the Aliens Office, the Aliens Appeals Board did not always take that material into account”.⁵⁹⁵ The persons concerned were thus prevented from establishing the arguable nature of their complaints under Art 3 ECHR.

The ECtHR has furthermore clarified in *M.S.S. v. Belgium and Greece* that if in the safe country procedure of the removing State the safety presumption cannot be rebutted by the sole evidence of reports on the general situation in the respective receiving presumably safe State, the burden of proof on the applicant is increased to an extent as to hinder the examination on the merits of the alleged risk of a violation.

Therefore, the applicant’s burden of proof, which entails producing all evidence available to him on his background and personal experiences that purportedly give rise to the fear of *refoulement*, must not be increased, vis-à-vis a safety presumption in a safe country procedure, to go beyond providing general information by statistics on recognition rates and reports on the general circumstances that raise suspicion *per se* in terms of the fairness of the procedure in the presumably safe State. Having submitted such proof, the burden of proof must shift to the removing State, i.e. the decision-maker- which means that the safety presumption is rebutted.

This clarification has been proven necessary as the safe country notion has in fact caused interviewing officers to heighten the burden of proof and exaggerate doubts about an applicant’s credibility.⁵⁹⁶

Such a decrease of the asylum-seeker’s burden of proof complies with the complicity principle’s position of inverse demands on the standard and burden of proof in the face of the

⁵⁹⁴ *M.S.S. v. Belgium and Greece* para 380.

⁵⁹⁵ *M.S.S. v. Belgium and Greece* para. 389, emphasis added.

⁵⁹⁶ For example, an Austrian Ministry of Interior official stated that in a safe country case he would begin by asking: “You come from a safe country, why the hell are you coming here?” Byrne and Shakhnov, note 127, referring to Interview with Ministry of Interior Official (June 1992).

seriousness of the potential harm. Only such an approach ensures that the safety presumption also remains *in realiter*, as Legomsky puts it, a “rebuttable evidentiary presumption”.⁵⁹⁷ He understands under this term that the safe country concept’s various modalities can “be read as mere statements of the established perceptions that these countries are generally safe, without affecting the burden of proof resting on applicants”.⁵⁹⁸ Hence, “[t]he destination country may shift to the applicant the burden of identifying any particular Convention provisions that he or she believe the third country will violate, as well as the burden of producing some evidence of the prospective violations, but once those burdens are met, the government of the destination country retains the ultimate burden of proving that the third country will not violate those provisions”.⁵⁹⁹

The GRC also allows only for such an approach through the already discussed “presumption doctrine”: If on the one hand a State abstains from status determination, the refugee status of the asylum seeker must, on the other hand, be presumed.⁶⁰⁰ The fact that the presumption of the refugee status is conditioned by the validity of the claim is acceptable as long as the burden demanded for this claim is not increased in comparison to the demands in the asylum procedure. In this sense, UNHCR’s Handbook criticises that “in some jurisdictions, recent case law suggests that the claimant may also be required to prove that return is unsafe”.⁶⁰¹ However, UNHCR has further stated that, since the State in which a person seeks refugee protection has the primary responsibility for considering the claim, that country has the burden of proving that it would be safe to transfer responsibility to a third country.⁶⁰² In contrast to this clear wording, UNHCR has been soft and unrealistic in its reaction to the EU’s installations of safe country concepts.⁶⁰³ It only noted its concern that “currently states may place the burden of proof entirely on the applicant, sometimes in the context of an accelerated

⁵⁹⁷ Legomsky 672 and 674.

⁵⁹⁸ Battjes, *European Asylum Law*, 346.

⁵⁹⁹ Legomsky 674.

⁶⁰⁰ Fernhout 189.

⁶⁰¹ UNHCR Handbook, para. 196, referring *e.g.*, *Huseyin Dursun v. Secretary of State for the Home Department* [1993] Imm AR 169 (U.K. Court of Appeal holding that the burden falls on an asylum applicant to show that a transit country would not accept him).

⁶⁰² UNHCR, ‘Observations on the European Commission’s proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status’, P 36, available at <http://www.unhcr.org/protect/PROTECTION/43662adf0.pdf>.

⁶⁰³ On SCO procedures, for example, UNHCR stated in 2010:

“UNHCR does not oppose the notion of SCO as long as it is used as a procedural tool to prioritise and/or accelerate examination of an application in very carefully circumscribed situations. It is critical for UNHCR that such situations guarantee that:

- each application is examined fully and individually on its merits in accordance with certain procedural safeguards;
- each applicant is given an effective opportunity to rebut the presumption of safety of the country of origin in his or her individual circumstances;
- the burden of proof on the applicant is not increased, and
- applicants have the right to an effective remedy in the case of a negative decision“: UNHCR, *Improving Asylum Procedures*, 331.

procedure”.⁶⁰⁴ Only in 2010 UNHCR stipulated on SCO procedures that “the burden of proof on the applicant is not increased”.⁶⁰⁵

It can be concluded that a complaint under Art 3 ECHR imposes the positive obligation on the removing State to assess in its single procedure the risk of *refoulement* with a burden of proof on the side of the applicant that is quite low, i.e. limited to his background and personal experiences that purportedly give rise to their fear of *refoulement*. Also in the case of an existing safety presumption, the burden of proof must not go beyond providing general information by statistics on recognition rates and reports on the general circumstances that raise suspicion *per se* in terms of the fairness of the procedure in the presumably safe State.

c. Individual interview

Byrne and Shacknove declare it as “*unlikely* that country of origin information will be sufficiently specific or objective to enable immigration officials to assess the likelihood that persecution will not occur without conducting an individual interview”.⁶⁰⁶ Such risk is unacceptable to take in cases in which a violation of Art 3 ECHR by the removal is claimed. UNHCR shares this concern, especially in the context of accelerated procedures like safe country procedures, and specifically recommends that Member States applying the safe third country concept “should ensure that the applicant [...] is always given the possibility of an interview in which to challenge the application of the concept”.⁶⁰⁷ The ExCom Conclusions No. 30 of 1981 demand, among other issues, that the acceleration of these claims be accompanied by procedural guarantees of a complete personal interview by a fully qualified official and interpreter. And the CAT Committee recommended for asylum procedures on asylum applications based on Art 3 CAT that they should provide for a more thorough risk assessment, including systematically holding individual interviews to better assess the personal risk to the applicant, and by providing free interpretation services.¹

d. Quality: Rigorous scrutiny

It may again be reiterated, that, while the procedural distinction between the decision-making process on asylum and removal may legally be an issue, it is not of relevance in practice in the

⁶⁰⁴ UNHCR, Improving Asylum Procedures, 366.

⁶⁰⁵ UNHCR, Improving Asylum Procedures, 328.

⁶⁰⁶ Byrne and Shacknove, 218.

⁶⁰⁷ UNHCR, Improving Asylum Procedures, 318.

States in focus of this thesis, having installed a single procedure. As to the procedural quality of this single procedure, the two aspects are thus two sides of the same coin: discharging the non-*refoulement* obligation requires an evaluation of the risk of harm- being also condition for a serious assessment of the asylum claim.

As already described in Chapter II, questions about basic fairness of procedures were raised when sitting in asylum interviews of first instance. Regardless of official policy, if the word passes through the bureaucratic hierarchy that a given country is safe, interviewers are less likely to actively engage an asylum-seeker in order to understand his personal history. In this sense, the unprofessional conduct of the British immigration officers' work was harshly criticized by Lord Bridge in *Bugdaycay v Secretary of State for the Home Department*⁶⁰⁸ who was critical of the original asylum interview conducted by an immigration officer with no knowledge of the country of origin: "a detailed examination of the way in which the application made by the appellant for asylum was dealt with by the immigration authorities gives cause for grave concern".⁶⁰⁹ Regarding the subsequent decision-making, the author's experience was congruent with Robert's diagnosis: it is of indifferent quality, poorly reasoned, inadequately engages with the evidence of the applicant and frequently discloses factual inaccuracies about conditions in the applicant's country.⁶¹⁰ On the Home Office's lamentable conduct, the UK's Immigration Appeal Tribunal noted that, if it took the charitable view that it was no more than institutional incompetence, "it is hard to imagine any other department of state in this country where such incompetence would be tolerated". However, the Home Office's failings were so severe that it "begins to go beyond mere institutional incompetence, into the realm of an institutional culture of disregard for adjudicators, who are the primary judicial authority [...] for making sure that immigration powers are efficiently, as well as fairly, exercised".⁶¹¹

To what extent has the ECtHR articulated itself on demands of quality? It has done so in *Cruz Varas and others v. Sweden* and *Vilvaraja and others v. the United Kingdom*. In *Cruz Varas and others v. Sweden*, the Court stated that "the Swedish authorities had particular knowledge and experience in evaluating claims of the present nature by virtue of the large number of Chilean asylum-seekers who had arrived in Sweden since 1973". In *Vilvarajah and others v. the United Kingdom*, the Court mentioned the knowledge and experience that the United

⁶⁰⁸ [1987] AC 514 (HL).

⁶⁰⁹ *Bugdaycay v. Secretary of State for the Home Department* pp 526-7.

⁶¹⁰ Thomas, Robert, 'Asylum Appeals: The Challenge of Asylum to the British Legal System', in Shah, Prakash (Ed.), 'The Challenge of Asylum to Legal Systems' (London/Cavendish, 2005), 208.

⁶¹¹ *Secretary of State for the Home Department v Razi* (01TH01836), paras. 16-7.

Kingdom authorities had in dealing with large numbers of asylum seekers from Sri Lanka, many of whom were granted leave to stay, and the fact that the personal circumstances of each applicant had been carefully considered by the Secretary of State. Further, the Court stated in *M.S.S. v. Belgium and Greece* that, according to its established case-law, “any complaint that expulsion to another country will expose an individual to treatment prohibited by Article 3 of the Convention requires *close and rigorous scrutiny* and that, subject to a certain margin of appreciation left to the States, conformity with Article 13 requires that the competent body must be able to examine the substance of the complaint and afford proper reparation”.⁶¹² In this sense, the ECtHR had been struck in *Abdolkhani and Karimnia v. Turkey* by the “totally passive” attitude of the Turkish authorities regarding the applicants’ serious allegations of a risk of ill-treatment if returned to Iraq or Iran. The lack of response by the national authorities amounted to a lack of the “rigorous scrutiny” required by Art 13 ECHR.⁶¹³

The author defends that it is Art 3 ECHR that requires a meaningful assessment of the applicant's claim of the existence of a real risk.⁶¹⁴ To guarantee a meaningful assessment, i.e. that Art 3 ECHR’s non-*refoulement* obligation is not violated upon removal, fact-finding in the asylum procedure must attain a certain accuracy and quality. Also another absolute provision, namely Art 2 ECHR, was referred to to formulate the obligation to maintain a high standard of rigorous scrutiny in the administrative procedure. In *Bugdaycay v. Secretary of State for the Home Department*,⁶¹⁵ the importance of procedural fairness and fundamental rights deriving from Art 2 ECHR was emphasized when Lord Bridge noted: “the most fundamental of all human rights is the individual’s right to life, and when an administrative decision under challenge is said to be [...] one which may put the applicant’s life at risk, the basis of the decision must surely call for the *most anxious scrutiny*”.⁶¹⁶ This judgment recognized that “where fundamental rights are at risk (in this instance the right to life), the courts, in judicial review proceedings, should examine the decision-making process very closely to ensure that there is no unfairness to the individual”.⁶¹⁷ The ECtHR itself noted in *Vilvarajah and others v. the United Kingdom*, the Court on Art 13 ECHR: “The Court’s

⁶¹² *M.S.S. v. Belgium and Greece*, para. 387, emphasis added.

⁶¹³ *Abdolkhani and Karimnia v. Turkey*, para 113: “The Court is struck by the fact that both the administrative and judicial authorities remained totally passive regarding the applicants’ serious allegations of a risk of ill-treatment if returned to Iraq or Iran. It considers that the lack of any response by the national authorities regarding the applicants’ allegations amounted to a lack of the “rigorous scrutiny” that is required by Article 13 of the Convention.”

⁶¹⁴ *Jabari v. Turkey* para 40.

⁶¹⁵ [1987] AC 514, , 531; [1987] Imm AR 250, 267.

⁶¹⁶ *Bugdaycay v Secretary of State for the Home Department* para 531, emphasis added.

⁶¹⁷ Harvey, Colin, ‘Judging Asylum’, in Shah, Prakash (Ed.) ‘The Challenge of Asylum to Legal Systems’ (London/Cavendish, 2005), 188.

examination of the existence of a risk of ill-treatment in breach of Article 3 [...] at the relevant time must necessarily be a *rigorous* one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe”.⁶¹⁸ In this sense, the CAT Committee has established that, generally, a certain number of material and procedural guarantees must be provided in domestic law in relation to removal. For instance, difficulties in registering requests for asylum and the summary nature of legal proceedings have been listed by the Committee as obstacles to the implementation of Art 3 CAT.⁶¹⁹ In fact, Art 3 CAT implies the establishment of a *competent administrative body* in that field.⁶²⁰ States Parties should regulate procedures for dealing with and deciding on applications for asylum and refugee status which envisage the opportunity for the applicants to attend formal hearings and to make such submissions as may be relevant to the right which they invoke, including pertinent evidence, with protection of the characteristics of due process of law.⁶²¹

It should be mentioned that, according to Legomsky, Art 33 GRC also poses procedural demands: “The Convention does not *expressly* prohibit [...] any [...] specific procedure, but [if a] procedure is so unfair and unreliable, the act of establishing it assures that an unacceptable high number of refugees will be returned erroneously to their persecutors. Thus, it is submitted, the establishment of an unfair refugee status determination procedure is itself a violation of Art 33”;⁶²² regarding international law in general, Battjes stated that it “is neutral on the organization of procedures, as long as they do not affect the effectiveness of protection from *refoulement* and allow for a meaningful and rigorous scrutiny of claims”.⁶²³

Within the context of the quality of the asylum procedure, the term “administrative justice” needs to be addressed. This term is defined by Mashaw as “those qualities of a decision-process that provide arguments for the acceptability of its decisions”.⁶²⁴ For the necessary qualities of the decision-process, the author refers to Robert, who lists the “underlying values of asylum adjudication” as follows: accuracy, fairness, consistency as well as timeliness and finality of decision-making.⁶²⁵

⁶¹⁸ *Vilvarajah and others v. the United Kingdom*, para 108.

⁶¹⁹ Nowak 152, referring to 5 CAT/C/SR.59,§40. 76 CAT/C/SR.320,§23.

⁶²⁰ Nowak 154, referring to CAT/C/SR.162,§70;CAT/C/SR.251,§10;CAT/C/SR.293,§17.

⁶²¹ Nowak 154, referring to CAT/C/SR.377,§25;CAT/C/SR.371,§25.

⁶²² Legomsky 655.

⁶²³ Battjes, *European Asylum Law*, 304.

⁶²⁴ Mashaw, *JL, Bureaucratic Justice: Managing Social Security Disability Claims*, 1983, New Haven: Yale UP, pp 24-5.

⁶²⁵ Thomas 206-22.

Accuracy concerns the “degree to which the substantive outcome of a decision corresponds, through correct application of the relevant rules, with the true facts of an individual’s circumstances”.⁶²⁶ There are clearly inherent limitations to the substantive ideal of this most important value of any adjudicatory system. While asylum law itself seems superficially simple, the difficulty is that asylum adjudication conceals “a mass of detailed, difficult and very problematic factual and legal issues”.⁶²⁷ They must be solved objectively.

As to the factual issues, UNHCR states in its Handbook that, “[a]lthough the legal burden is on the asylum-seeker, a basic tenet of refugee status determination holds that the responsibility for establishing the factual record is *shared jointly by the asylum-seeker and the interviewing officer*”.⁶²⁸ Hence, the asylum office’s factual recording must be correct for a fair share of the burden of proof. This issue must not be underestimated. While there is no problem with lack of information, there is a problem with verified information. What counts in every case is the weight of the information. Provided that it is available, verified and public information on a country’s situation should gain authority. Finally, the decision-maker must personally interpret whether the applicant is credible. Cultural, social and linguistic distances between the decision-maker and the applicant as well as diversity of the clientele can lead to communication problems that make the decision on the credibility of the personal history an intellectual and interpersonal challenge.

High intellectual competence is demanded in legal issues, because, as already stated, discretion is vital throughout the whole decision-making process in an area where the law is vague on terms such as “reasonable degree” of likelihood of persecution or “ill-treatment”, “proportionality” of removal etc. Even more importantly, adequate training of the responsible personnel is obligatory. According to the CAT Committee, States Parties have a positive obligation to ensure that public officials have been made aware of their obligations and received special *training* or instructions on their Art 3 CAT-related obligations.⁶²⁹ Additionally, the judiciary dealing with the question of asylum-seekers should also have appropriate instructions and recommendations which would ensure that the CAT was fully implemented in practice.⁶³⁰ Further, it may be stated that the Committee was concerned about the summary nature of so-called priority procedures in administrative holding centres or at the

⁶²⁶ Thomas 206-7, referring to Sainsbury, R, Administrative justice: Discretion and procedure in social security decision-making, in Hawkins, H, (ed), The Uses of Discretion, 1992, Oxford: OUP, p. 302.

⁶²⁷ Blake CG, ‘Judicial review, second tier tribunals and legality’ in Partington m (ed), ‘The Leggatt Review of Tribunals: Academic Seminar Papers’, 2001, Bristol: University of Bristol, Faculty of Law, p 68.

⁶²⁸ UNHCR Handbook, para. 19, emphasis added.

⁶²⁹ Nowak 153, referring to CAT/C/SR.12, § 37; CAT/C/SR.10, § 24; CAT/C/SR.13, § 25; CAT/C/SR.126, § 37; CAT/C/SR.197, § 23.

⁶³⁰ Nowak 153, referring to CAT/C/ECU/CO/3,§20.

borders, which did not enable an assessment of the risks covered by Art 3 CAT; rather, each case should be dealt with individually.

The term “fairness” seems quite broad and vague. It has to do with resistance to errors: “While errors will always occur in an administrative system, no system can be considered fair if the probability of error is too high.”⁶³¹ Fair procedures are likely to promote accurate decision-making and guarantee that individuals are treated in accordance with the value of dignity. In *R (Anufrijeva) v Secretary of State for the Home Department*⁶³² the House of Lords held that “[f]airness is the guiding principle of our public law”.⁶³³ In a climate of hostility towards asylum-seekers, the stress on the fairness of procedures is valuable.

Consistency is highly difficult to achieve, but it is gravely necessary. In the context of asylum procedures taken under EU-legislation, consistency will only be possible by the work of the EU Asylum Support Office.

While all these qualities should be self-evident characteristics of asylum procedures, they must survive under pressure of compressed time limits exerted by governments in light of the political imperatives of asylum policy.⁶³⁴ For the complexity of the cases and difficulties of fact-finding, adjudicators operate within a highly pressurized time frame. But in fact, timeliness and finality of decision-making are further procedural demands that are of important value to the asylum-seeker himself. These difficulties lead us to the question if the second balancing of the direct balancing approach leads to a reduction of the developed demands.

States have, explicitly or implicitly, declared non-admission policies as the introduction of safe country procedures a legitimate aim, sometimes based on the argument of non-compliance with formal immigration control requirements. The author could now defend that the positive obligation to implement the developed high-quality single procedure is demanded by the principle of non-*refoulement* inherent in Art 3 ECHR and, as Art 3 ECHR is absolute, not open to balancing with states’ interest. Still, the author wants to open up for this discussion to corroborate her findings.

The author wants to refer to the argumentation of Justice Harlan of the United States Supreme

⁶³¹ Costello, Asylum Procedures Directive, 35.

⁶³² [2004] 1 AC 604 (HL).

⁶³³ *R v. Secretary of State for the Home Department, Ex parte Jahangeer and others* paras 27-30.

⁶³⁴ Thomas 207.

Court on the determination of the proper standard of proof for finding facts in civil and criminal courts of law. Justice Harlan advocates selecting “the appropriate standard of proof for any category of case would be to ask how harmful an error in either direction would be”. This question is also valid for the appropriate burden of proof and the quality of the asylum procedure. As to the possibility of *refoulement*, Byrne and Shacknove agree by holding that it is “highly likely” that governments return *bona fide* refugees to circumstances of persecution in violation of Art 33 GRC when individual applicants are denied the opportunity to distinguish their claims from those deemed *prima facie* ineligible for refugee status because of group characteristics.⁶³⁵ Without permitting the applicants to present their claims and rebut *in realiter*, i.e. by a fair burden of proof, immigration officers cannot assure that the return of any particular asylum-seeker is reasonably *unlikely* to result in persecution. Such probability of danger is too high for cases of claims of *refoulement*. Potential consequences of removal decisions are drastic,⁶³⁶ and hence the costs to the individual concerned with wrong removal decisions in the context of an asylum procedure are potentially extremely high. In other words: “The serious consequences of the return decision make accuracy vital”.⁶³⁷ No deviation from the developed demands is acceptable with the argument of the state’s interest in reducing financial and organizational resources. As to the argument of immigration control, mechanisms restricting admissibility to the asylum procedure of a given state are considered as striking an inadequate balance between immigration control and refugee protection, in so far as they refer asylum-seekers to another state’s jurisprudence merely because of non-compliance with formal immigration control requirements.⁶³⁸ Regarding accelerated procedures, Judge Zupančič rightly articulated in his concurring opinion in *Saadi v. the United Kingdom*: “The aim of the procedure is not some kind of truth finding. The aim is simply to create a delay without irremediable consequences and hence to create conditions in which truth finding may yet happen”.⁶³⁹

⁶³⁵ Byrne and Shacknove 218.

⁶³⁶ Legomsky 670, Marx 404-45.

⁶³⁷ Legomsky 587.

⁶³⁸ As example should be cited the government counsel’s argumentation in the case *Adan and Aitseguer*: “For the Secretary of State to be required to assess the details of the judgments of the appellate courts of other EU States, and form a judgment on whether they are consistent with the 1951 Convention, with that judgment subject to reassessment by the courts of this country by way of judicial review, would impose a complex and time-consuming task that is inconsistent with, and would substantially frustrate, the objective of the 1996 Act to implement the principles in the Dublin Convention and speedily return asylum seekers to other EU States for the merits of their claims to be considered”: Vedsted, 14.

⁶³⁹ Para. 234.

CONCLUSION

In this chapter, positive obligations regarding the removing State's single procedure on asylum and *refoulement* were developed by analyzing the ECtHR's relevant jurisprudence through the lenses of the direct balancing approach.

As to absolute balancing on gravity, the author defended that factors of gravity under Art 3 ECHR alone are, first, the lack of availability of an effective remedy and suspensive effect of proceedings against a removal decision in the receiving third State and, second, the lack of a certain quality of the third State's single procedure, having in the respective case as result a more restrictive protection scope than foreseen by the universal refugee definition.

As positive procedural obligation, it was developed that, upon an application for asylum, the removing State can refuse to examine the merits of the claim on the assumption that a specific State, whether it be a STC or a SCO, is *prima facie* safe only if the applicant is given the opportunity to rebut the safety presumption, i.e. present counter evidence to the effect that the state is not safe.

The circumstances under which rebuttal should be allowed consider the question of standard and burden of proof, a most crucial issue that was discussed in the step of individual balancing. As to standard of proof, the ECtHR has never increased the demands on the standard of proof in cases where the individual concerned was perceived to be a danger to the national security and, hence, has allowed the absoluteness of Art 3 ECHR prevail also regarding the level of probability and predictability. On first sight, the necessary threshold for the standard of proof appeared misguided: "substantial grounds" must be shown to prove that the person concerned faces a "real risk" of being subjected to torture or to inhuman or degrading treatment or punishment in the country of potential return.

However, in assessing the risk of direct *refoulement* due to the factual conditions in the receiving state amounting to persecution the analysis of the Court's jurisprudence demonstrated that it has developed the same standard of proof for the well-founded fear of persecution within the meaning of Art 1 (A) GRC as for the claim to be exposed to *refoulement* in case of removal.

In assessing the risk of indirect *refoulement* via a presumably STC, the reduction of the Court's analysis to the existence of an "arguable claim" on the first step on persecution in the final State is seen as a positive development, also its execution doing justice to the prerogative of a low demand on standard of proof: documentation easily accessible for the applicant and general reports of international organizations and NGOs fulfill the Court's demands on the

standard of proof. As to the successive assessment of the risk for the claimant of chain-*refoulement* via the third State, the author welcomed that in *M.S.S. v. Belgium and Greece*, the ECtHR found statistical evidence on extremely low rate of asylum or subsidiary protection and reports by international organizations, NGOs and state organizations strong enough to rebut the safety presumption.

Regarding the burden of proof, an analysis of the Court's jurisprudence lets us conclude that it has itself reinforced the argument that the ECHR can and must be interpreted as primarily demanding the State to provide the relevant available facts of the respective case.

The following positive procedural obligations deriving from Art 3 ECHR for the removing State's single procedure on asylum and *refoulement* were developed in this step of individual balancing: First, the risk of *refoulement* is to be assessed, also in the case of an existing safety presumption, with a standard of proof that is considerably low, i.e. being fulfilled by general information by reports or statistical data. Second, also the burden of proof on the side of the applicant is to be kept considerably low, i.e. limited to his background and personal experiences that purportedly give rise to his fear of *refoulement*; also in the case of an existing safety presumption, the burden of proof must not go beyond providing general information by statistics on recognition rates and reports on the general circumstances that raise suspicion *per se* in terms of the fairness of the procedure in the presumably safe State. Third, a serious assessment necessitates an individual interview. Finally, the single procedure has to attain a certain quality, circumscribed by "rigorous scrutiny" and encompassing accuracy, fairness and consistency.

V. Conclusion:
In the current world of protection discrepancies:
EU-legislation on safe country concepts
in breach of
the principle of non-*refoulement*

The conclusion of this thesis on the compatibility of the EU's safe country procedures with the principle of non-*refoulement* is that Art 3 ECHR's non-*refoulement* properties alone impose in case of a complaint under Art 3 ECHR on the removing state the positive obligations to only refuse to examine the merits of the claim on the assumption that the receiving State- may it be a STC or a SCO- is *prima facie* safe if the applicant is given the opportunity to rebut the safety presumption, i.e. present counter evidence to the effect that the state is not safe. This and the further developed positive obligations to assess the risk deriving from the presumably safe State with a considerably low standard of proof, a very low the burden of proof on the applicant and with close and rigorous scrutiny by an individual interview and a high-quality procedure stand as long as the safe country concept is applied in a situation of protection discrepancies. If not, it can happen, as regarding Greece, that an erroneous presumption of safety remains institutionalized for 20 years to the detriment of the asylum-seekers concerned.

The thesis' result is only valid: "Presumptions are intended to reduce complexity. Grossly counterfactual presumptions do the opposite".⁶⁴⁰ In view of the States' idiosyncrasy, the resulting danger can not be underestimated: They find that, "unless asylum applications are determined in an equivalent manner across the EU and subject to a supervisory appellate structure to ensure consistency among Member States (and any other States to which asylum seekers are sent), the protection against *refoulement* may not be guaranteed".⁶⁴¹ Hence, until then, the SCO and STC notions fail "to provide adequate protection against the cornerstone of the GRC: an individual's right not to be refouled".⁶⁴²

Therefore, until the time of equivalent protection- which naturally endorses interpretations of protective instruments which do not fall short of an international interpretation- in the removing and the "safe" State, the EU MSs as parties to the ECHR have the obligation vis-à-

⁶⁴⁰ Noll, Formalism versus Empiricism, 182.

⁶⁴¹ Guild 321.

⁶⁴² Allain 553.

vis the asylum-seekers either to apply the EU's safe country concepts not at all or to apply them in implementing the positive obligations developed in this thesis.

As to the latter solution to implement the formulated obligations, this is possible where the EU legislation has left the EU MSs the respective flexibility.⁶⁴³ Interestingly, it is the Dublin Regulation on which not only in chapter II most critical remarks were focused that it poses no problem for EU MS to perform the developed positive obligations: it allows the Member State by its Art 3 (2) to take up responsibility for the applicant's claim if a transfer to the Member State responsible for dealing with the asylum claim would constitute a violation of the principle of non-*refoulement*. Domestic legislation "requiring examination if another Member State is unsafe for a particular applicant would not run counter to Preamble recital (2) [...] that states that Member States are safe, as that recital does not state that the presumption of safety cannot be rebutted".⁶⁴⁴ As for the other EU-legislation, most of the critical provisions are permissive, allowing, but not obliging MS to apply the safe third country concept: The Qualification Directive and the Procedures Directive merely determine "minimum standards",⁶⁴⁵ and the Procedures Directive contains mainly permissive provisions as it seeks to assuage various political agendas of the EU MS by leaving the majority of procedures and designation of "safe" countries up to State discretion.⁶⁴⁶ Nevertheless, as all relevant instruments of EU legislation constitute a core component of the *asylum acquis* and are hence "politically binding",⁶⁴⁷ also the dangers emanating from the only standard setting provisions will be discussed (A). Very rarely, Community law leaves EU MSs no discretion (B).

A. EU-legislation's permissive provisions

The following sections will discuss the dubious legal setting on non-EU SCOs (1) and non-EU STCs (2).

⁶⁴³ Battjes 167-8.

⁶⁴⁴ Battjes, 420; This Community law obligation to take up responsibility pursuant to Art 3 (2) DC to prevent violations of Art 3 ECHR first had been outlined explicitly by the Austrian Constitutional Court in 2001 in a landmark-ruling (Verfassungsgerichtshof (VfGH) 08.03.2001, G 117/00, G 146/00, G 147/00).

⁶⁴⁵ Arts 63 (1)(b), (c), (d) and (2) TEC characterize Community instruments on asylum only as "minimum standards", which should, according to Art 63 (1) TEC, be applied in accordance with relevant international law.

⁶⁴⁶ Panezi, Maria, 'Legislative Development: The 2005 Asylum Procedures Directive: Developing the European Asylum Law' (2007) 13 *Columbia Journal of European Law* 506.

⁶⁴⁷ Versted 26.

1. Non-EU safe countries of origin: Discrimination

On the text on the SCO concept, criticism will be voiced on provisions concerning gravity (a), standard of proof (b) and burden of proof (c).

a. Gravity: Deficient definition of “safety”

As Paras (1) and (2) of Art 29 PD were annulled by the ECJ, the only mode for designating countries as SCOs at the time of writing is set out in Art 30 PD. The author shares the opinion of UNHCR that for this designation, the definition of a “safe country of origin” stipulated in Annex II PD is broadly adequate in theory. Non EU MS SCO: gravity: However, it should be mentioned that UNHCR researched that, in practice, there has been considerable divergence among the surveyed EU MSs that apply the safe country of origin concept as to which countries have been considered to be safe countries of origin.

According to Art 30 (2) PD, Member States may retain legislation in force on 1 December 2005 that allows for the national designation of third countries as safe countries of origin, but under less strict conditions than Annex II PD, i.e. as long as the EU MSs are satisfied that persons in the third countries concerned are generally subject neither to persecution as defined in Art 9 QD, nor to torture or inhuman or degrading treatment or punishment. This paper holds that these conditions are not sufficient for the necessary definition of “safety” despite the additional obligation for the MSs in their assessment to “have regard to the legal situation, the application of the law and the general political circumstances in the third country concerned”;⁶⁴⁸ in this sense, also UNHCR has voiced its reservations about this allowance for EU MSs to retain legislation on national designations.⁶⁴⁹ It should be added that the exceptions made for pre-existing national lists undermine the uniform approach required to achieve the objective of a Common European Asylum System.⁶⁵⁰

Art 30 (3) PD, which allows Member States to retain legislation designating part of a country as safe for a specified group of persons in that country under the less strict conditions of Para

⁶⁴⁸ Art 30 (4) PD.

⁶⁴⁹ UNHCR, ‘UNHCR’s Observations on the European Commission’s Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection (Brussels, 12 September 2001, COM (2001) 510 final, 2001/0207 (CNS))’, 1 November 2001, 225.

⁶⁵⁰ *Ibidem*, 332.

(2), is evidently in danger of breaching the GRC.⁶⁵¹ Such a concept of a presumed safe part of a country is alien to the GRC and not in conformity to the internal flight alternative, for which it is only one element of examination.⁶⁵²

b. Standard of proof: Ambiguity

On the shift of standard of proof to counter the presumption of safety, Art 31 (1) PD articulates on the one hand that the applicant has to submit “serious grounds” to prove that his country of origin is not safe “in his/her particular circumstances”. Recital 21 PD recognizes that the “designation of a third country as a safe country of origin [...] cannot establish an absolute guarantee of safety for nationals of that country”. Recital 19 refers to the “rebuttable presumption of the safety” of the SCO. On the other hand, Recital 17 PD states that “a key consideration for the well-foundedness of an asylum application is the safety of the applicant in his/her country of origin. Where a third country can be regarded as a safe country of origin, Member States should be able to designate it as safe and presume its safety for a particular applicant, unless he/she presents *serious counter-indications*”.⁶⁵³ Hence, the Recitals display considerable ambiguity on this point. In addition, the Procedures Directive itself is silent on whether or how applicants can be given an effective opportunity to rebut a presumption of safety; Art 31 (3) PD only requires States to establish further rules and modalities in national legislation for the application of the safe country of origin concept.

c. Burden of proof: Dangerous textual tendency

While in Art 31 PD, the need for an individual examination is explicitly confirmed, the provision appears to place at the same time the burden of proof on the applicant to demonstrate that his country is not a safe country of origin in his particular circumstances. That’s why UNHCR recommended that, even where Member States have transposed Art 31 (1) PD, express guidance should be provided to decision-makers concerning the shared duty to establish the facts.⁶⁵⁴

⁶⁵¹ *Ibidem*, 335.

⁶⁵² UNHCR, ‘Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees’, 23 July 2003, HCR/GIP/03/04, 8.

⁶⁵³ Emphasis added.

⁶⁵⁴ UNHCR, *Improving Asylum Procedures*, 41.

Among the general provisions of the PD on the examination procedure of first instance, Art 23 (4) PD lists conditions that seek to address the credibility of the asylum claimant. Most of interest is Art 23 PD (4) (g) that provides:

“Member States may also provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be prioritized or accelerated if [...] the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having been the object of persecution referred to in Directive 2004/83/EC“.

This provision of the PD guides national practice in the reverse direction from the observations of the CommAT⁶⁵⁵ as well as national practical manuals for determination authorities that increasingly acknowledge such features as symptomatic of victims of torture, or significant cross cultural barriers.⁶⁵⁶ As such criteria clearly address the credibility of an asylum claimant in expedited procedures, they should be viewed critically: as UNHCR has consistently held, credibility assessment is sufficiently complex as to be inappropriate for consideration in expedited procedures.⁶⁵⁷ Also according to UNHCR, it is inappropriate to question the credibility of the applicant through expedited procedures. Other sides have also criticized the provision due to the substantial risk carried in accelerated or prioritized procedures for inaccurate assessments in certain circumstances.⁶⁵⁸

It can be summarized that, while the Procedures Directive’s provisions relevant for the SCO procedure on non-EU MSs are permissive articles, they are susceptible to having unsafe countries on the list because the definition of “safety” is deficient. While the text remains ambiguous on the standard of proof, the provision on the demanded level of burden of proof can be easily read as placing the burden of proof on the applicant and hence includes a textual dangerous tendency.

⁶⁵⁵ “[T]he Committee considers that complete accuracy is seldom to be expected by victims of torture, especially when the victim suffers from post-traumatic stress syndrome; it also notes that the principle of strict accuracy does not necessarily apply when the inconsistencies are of a material nature.”, *Haydin v Sweden*, 01/1997, 16 Dec 1998, para 6.7, *Tala v Sweden*, 43/1996, 15 Nov 1996, para. 10.3; *Alan v Switzerland*, 21/1995, 21 Jan 1995, para. 11.3.

⁶⁵⁶ Byrne 82, referring as example in fn 36 to Immigration and Refugee Board (Canada) Refugee Protection Division, Assessment of Credibility in Claims for Protection, June 28 2002; Immigration Officer Academy (USA), Asylum Officer Basic Training course, 6 Dec 2002, Chapter IV-V.

⁶⁵⁷ Byrne 81-2.

⁶⁵⁸ Panezi 506-7.

2. Non-EU safe third countries

Criticism will be voiced on the provisions regarding gravity (a) and exigencies on the removing state's asylum procedure (b).

a. Gravity

The provisions on gravity lack a comprehensive definition of "safety" (aa), and do not clarify the circumstances in which rebuttal of the safety presumption is to be granted (bb).

aa. Deficient definition of "safety"

As Art 36 (3) PD requiring the adoption of a common list by the Council was annulled by the ECJ, the relevant provision is Art 27 PD at the time of writing. Regarding the determination of safety, Art 27 (2) (c) PD foresees that national legislation shall permit the applicant to challenge the presumption of safety on the ground that he would be subject to torture, cruel, inhuman or degrading treatment or punishment. However, the provision does not ensure the possibility to rebut the presumption on the basis of a fear of persecution on 1951 Convention grounds, and other individual risks which would found an entitlement to protection such as, for instance, the fact that the third state would apply more restrictive criteria in determining the claimant's status than the State where the application has been presented or the fact that the third state would not assess whether there is a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.⁶⁵⁹

The minimalism of the PD suggests it was deliberately drawn up to allow as many States as possible to be deemed safe third countries rather than giving the safety of the applicant for refugee status the higher priority. UNHCR anticipated these concerns and recommended that "any Member State which provides for the national designation of countries considered to be generally safe should have a clear, transparent and accountable process for such national designation".⁶⁶⁰

⁶⁵⁹ UNHCR, Improving Asylum Procedures, 301.

⁶⁶⁰ UNHCR, Improving Asylum Procedures, 16.

bb. No clarification of possibility to rebut safety presumption

Also on the examination of safety of the third country, the Procedures Directive is notably vague. However, the PD does not explicitly permit the applicant to challenge the application of the STC concept on the ground that the criteria stated in Art 27 (2) (a) PD are not fulfilled and it would not be reasonable for him to go to the third country.⁶⁶¹

b. Exigencies on the removing state's asylum procedure: Possibility to omit the individual interview

An interview of the applicant would let the applicant put into practice his right pursuant to Art 27 (c) PD to raise grounds to challenge the application of the concept.⁶⁶² However, Art 12 (2) (c), together with Art 23 (4) (c) (ii) PD, permits the EU MSs to omit the personal interview on the grounds that the determining authority considers that there is a safe third country for the applicant. In addition, Art 36 (1), (4) and (5) PD allows EU MS to deny access to the procedure to all asylum-seekers who arrive “illegally” from the nationally designated third countries:⁶⁶³

“1. 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. [...]

4. The Member States concerned shall lay down in national law the modalities for implementing the provisions of paragraph 1 and the consequences of decisions pursuant to those provisions in accordance with the principle of non-*refoulement* under the Geneva Convention, including providing for exceptions from the application of this Art for humanitarian or political reasons or for reasons of public international law.

5. When implementing a decision solely based on this Article, the Member States concerned shall:

(a) inform the applicant accordingly; and

(b) provide him/her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.”⁶⁶⁴

⁶⁶¹ UNHCR, Improving Asylum Procedures, 302

⁶⁶² UNHCR, Improving Asylum Procedures, 317.

⁶⁶³ Art 36 (6) PD.

⁶⁶⁴ Emphasis added.

If applied, UNHCR predicted that the provisions' "sweeping exemption" from individual process would send people back to countries that "might nonetheless not be safe for particular individuals".⁶⁶⁵ On Art 36 PD concretely, the Standing Committee of Experts on International Immigration, Refugee and Criminal Law observed that, in allowing Member States to expel applicants without any prior examination, the Directive does not secure compliance with Art 3 ECHR.⁶⁶⁶

It can be summarized that, while the Procedures Directive's provisions relevant for the STC procedure on non-EU MSs are permissive articles, they are, regarding gravity susceptible to having unsafe countries on the list as the definition of "safety" is deficient. Further, the provisions do not clearly establish the possibility to rebut the safety presumption for the case of Art 27 (2) (a) PD. On the procedural exigency of an individual interview, it must be criticized that the PD allows for its omission.

B. EU-legislation's mandatory provisions: EU MSs as SCOs: Denial of rebuttal of safety presumption: Discrimination

The Spanish Protocol leaves no flexibility to the sending EU MSs. By its declaratory definition, EU MSs are stated to be safe countries of origin. Furthermore, no examination of the presumed safety is foreseen: The safety assumption is absolute.

It must be highlighted that the Spanish Protocol is a unique instrument within the framework of European integration, as it places by the denial of rebuttal of safety presumption the citizens of the EU MSs in a less favourable position than citizens of third countries to whom only the Qualifications Directive applies. By establishing this geographical limitation, EU MSs have obliged themselves to in principle exclude EU nationals from their asylum procedure without granting the individual applicant any opportunity to demonstrate persecution in his particular case.⁶⁶⁷ This exclusion of EU nationals is quite ironic in view of the historical development of the refugee system: the GRC itself provided for an opt-out provision, whereby States could limit the scope of application of the Convention to refugees

⁶⁶⁵ UNHCR, 'Note on key issues of concern to UNHCR on the draft Asylum Procedures Directive', available at http://www.ecre.org/press/UNHCR_concern_directive.pdf [hereinafter Asylum Procedures Directive].

⁶⁶⁶ Statewatch Observatory 2005, available at <http://www.statewatch.org/asylum/obserasy-lum.htm>.

⁶⁶⁷ Bank, Roland, 'The Emergent EU Policy on Asylum and Refugees' (1999) 68 *Nordic Journal of International Law* 1 26.

from Europe;⁶⁶⁸ it is only with the New York Protocol that this geographical limitation was phased out.⁶⁶⁹ Boutillon's suggested as solution for this textual discrimination: "the reason for the exclusion may find its root, not in the political assumption that the E.U. cannot generate refugees, but rather in the basic principle of freedom of movement within the E.U. Because most of the E.U. is a unified zone for the movement of persons and goods, a potential refugee from one E.U. country may freely move and re-establish in another country of the Union".⁶⁷⁰ This suggestion is not acceptable as it contradicts common knowledge that, in practice, the free movement within the EU is conditioned and hence possibly inhibited by the bureaucratic and financial efforts it involves.

Therefore, the fact that EU nationals are excluded from the outset from the remit of the GRC is a discrimination that amounts to a violation of Art 3 GRC. Also UNHCR opposes the SCO notion in such cases in which its application *a priori* precludes a whole group of asylum-seekers from access to an eligibility procedure. Such notion is not only be inconsistent with Art 3 GRC, but also:

- “(a) be a reservation to Art 1A(2) of the 1951 Convention and thus violate Art 42 which prohibits such reservations;
- (b) introduce a new geographical limitation to the 1951 Convention, incompatible with the universal intent of the 1967 New York Protocol;
- ...
- (d) be inconsistent with the individual nature of refugee status determination under Art 1 of the 1951 Convention; and
- (e) be likely to result in *refoulement*, a violation of Art 33 of the Convention.”⁶⁷¹

As this geographical limitation in question affects nations as a whole, the denial of status constitutes a geographic limitation on Art 1 GRC in violation of Art 42 GRC.⁶⁷² The limitation raises also claims of discriminatory treatment prohibited by human rights provisions as Art 26 ICCPR and Art 14 ECHR as being discrimination on the grounds of nationality.⁶⁷³

⁶⁶⁸ Art 1B(1)(a) GRC.

⁶⁶⁹ Art 1(3) GRC.

⁶⁷⁰ Boutillon 140.

⁶⁷¹ UNHCR, 'Background Note on the Safe Country Concept and Refugee Status', 26 July 1991, EC/SCP/68, available at: <http://www.unhcr.org/refworld/docid/3ae68ccec.html> [accessed 13 June 2011]

⁶⁷² *Ibidem*.

⁶⁷³ Bank 1; for a separate analysis, see Noll, Negotiating Asylum, chapter 12.3; Gilbert, Is Europe Living Up, 975.

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Abbreviations

CAT	UN Convention against Torture
CPT	European Committee for the Prevention of Torture
DC	Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the MS of the European Community (“Dublin Convention”)
DR	Council Regulation establishing the criteria and mechanisms for determining the MS responsible for examining an asylum application lodged in one of the MS by a third-country national (“Dublin Regulation”)
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECommHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ExCom	Executive Committee
GRC	Geneva Refugee Convention relating to the Status of Refugees
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
MS	Member State
PD	Council Directive on minimum standards on procedures in MS for granting and withdrawing refugee status
QD	Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
SCO	Safe country of origin
STC	Safe third country
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees
VCT	Vienna Convention on Treaties

Attachments

Abstract

The intent of this thesis is to analyze the compatibility of the EU's legislation on "safe country" concepts with the principle of non-*refoulement*. Chapter I presents the two anti-poles: the EU's legislation on the "safe country of origin" (SCO) and "safe third country" (STC) concepts and the principle of non-*refoulement* as reflected in Art 33 GRC, Art 3 ECHR and Art 3 CAT- having acquired the status of *ius cogens*. Chapter II gives insight into the worrying reality: it is asylum officers with an often prejudiced approach towards the asylum-seeker and/or biased sources at hand who determine the need for refugee and *refoulement* protection with the legal possibilities of the "safe country" concepts. However, while a presumably safe country can *in realiter* be precarious due to the living or detention conditions awaiting the asylum-seeker there, a declared STC can, because of deficiencies of its asylum procedure, pose the risk of chain-*refoulement*.

Chapter III presents the "direct balancing approach" and the "complicity principle" as the framework for the further discussion. The "direct balancing approach" encompasses two steps: The first step of abstract balancing for the search for non-*refoulement* properties in an ECHR right regards the question of its applicability, hence the gravity of the risked violation. The second step of individual balancing brings in two important limitations taking into account the State's possibilities: the probability of the risk and its predictability, concerning the standard of proof and burden of proof. On the discussion of their level, Legomsky's "complicity principle". It defends a "variable standard of proof": The question on the necessary probability of risk can only be answered in a relative manner, because proportionality must persist between the predictability and the gravity of the respective anticipated violation.

In Chapter IV, positive obligations regarding the removing State's single procedure on asylum and *refoulement* are developed by analyzing the ECtHR's relevant jurisdiction. As to absolute balancing on gravity, the author defends that factors of gravity under Art 3 ECHR alone are, first, the lack of availability of an effective remedy and suspensive effect of proceedings against a removal decision in the receiving third State and, second, the lack of a certain quality of the third State's single procedure, having in the respective case as result a more restrictive protection scope than foreseen by the universal refugee definition.

As positive procedural obligation, it is developed that, upon an application for asylum, the removing State can refuse to examine the merits of the claim on the assumption that a specific State, whether it be a STC or a SCO, is *prima facie* safe only if the applicant is given the opportunity to rebut the safety presumption, i.e. present counter evidence to the effect that the state is not safe.

The circumstances under which rebuttal should be allowed consider the question of standard and burden of proof, a most crucial issue that was discussed in the step of individual balancing. As to standard of proof, in assessing the risk of direct *refoulement* due to the factual conditions in the receiving state amounting to persecution the analysis of the Court's jurisprudence demonstrated that it has developed the same standard of proof for the well-founded fear of persecution within the meaning of Art 1 (A) GRC as for the claim to be exposed to *refoulement* in case of removal.

In assessing the risk of indirect *refoulement* via a presumably STC, the reduction of the Court's analysis to the existence of an "arguable claim" on the first step on persecution in the final State is seen as a positive development, also its execution doing justice to the prerogative of a low demand on standard of proof: documentation easily accessible for the applicant and general reports of international organizations and NGOs fulfill the Court's demands on the standard of proof. As to the successive assessment of the risk for the claimant of chain-*refoulement* via the third State, the author welcomed that in *M.S.S. v. Belgium and Greece*, the ECtHR found statistical evidence on extremely low rate of asylum or subsidiary protection and reports by international organizations, NGOs and state organizations strong enough to rebut the safety presumption.

Regarding the burden of proof, an analysis of the Court's jurisprudence lets us conclude that it has itself reinforced the argument that the ECHR can and must be interpreted as primarily demanding the State to provide the relevant available facts of the respective case.

The following positive procedural obligations deriving from Art 3 ECHR for the removing State's single procedure on asylum and *refoulement* were developed in this step of individual balancing: First, the risk of *refoulement* is to be assessed, also in the case of an existing safety presumption, with a standard of proof that is considerably low, i.e. being fulfilled by general information by reports or statistical data. Second, also the burden of proof on the side of the applicant is to be kept considerably low, i.e. limited to his background and personal experiences that purportedly give rise to his fear of *refoulement*; also in the case of an existing safety presumption, the burden of proof must not go beyond providing general information by statistics on recognition rates and reports on the general circumstances that raise suspicion *per se* in terms of the fairness of the procedure in the presumably safe State. Third, a serious

assessment necessitates an individual interview. Finally, the single procedure has to attain a certain quality, circumscribed by “rigorous scrutiny” and encompassing accuracy, fairness and consistency.

In Chapter V, it is concluded that, until the time of equivalent protection- which naturally endorses interpretations of protective instruments which do not fall short of an international interpretation- in the removing and the “safe” State, the EU MSs as parties to the ECHR have the obligation vis-à-vis the asylum-seekers either to apply the EU’s safe country concepts not at all or to apply them in implementing the positive obligations developed in this thesis. While permissive provisions of EU legislation allow for such approach, the Spanish Protocol leaves no flexibility to the sending EU MSs and places by the denial of rebuttal of safety presumption the citizens of the EU MSs in a less favourable position than citizens of third countries. Such legislation amounts to a discrimination and a violation of Art 3 GRC.

Zusammenfassung

Das Ziel dieser Dissertation ist es, die Vereinbarkeit der durch EU-Gesetzgebung eingeführten Konzepte der “sicheren Staaten” mit dem Prinzip des *Non-refoulement* zu analysieren. Das erste Kapitel präsentiert die beiden Antipoden: die EU-Gesetzgebung zum “sicheren Herkunftsland” und zum “sicheren Drittstaat” als auch das Prinzip der *Non-refoulement* nach Art 33 der Genfer Flüchtlingskonvention (GFK), Art 3 der Europäischen Menschenrechtskonvention (EMRK) und Art 3 der UNO-Konvention gegen die Folter. Das zweite Kapitel gibt Einblick in die besorgniserregende Realität innerhalb der EU dass oft Beamte mit einer- besonders im Rahmen dieser beschleunigten Verfahrensvoreingenommenen Haltung gegenüber Asylwerbern und/oder einseitigen Quellen zur Entscheidungsfindung sind, die- außer in Irland- in einem zusammengelegten Verfahren über die Gewährung von Asyl und Schutz vor *Refoulement* entscheiden. Die “sicheren Staaten” sind jedoch entweder wegen der dortigen Lebens- oder Haftbedingungen oder- im Falle der “sicheren Drittstaaten”- aufgrund der Unzulänglichkeit der Asyl- und *Refoulement*-Verfahren derart prekär, dass Gefahr von *Refoulement* besteht.

Das dritte Kapitel präsentiert den “direct balancing approach” und das “complicity principle” als Analysemethode für die weitere Diskussion. Der “direct balancing approach” umfasst zwei Schritte: Der erste des abstrakten Abwägens betrifft die Frage der Umstände, die als Verletzung von Art 3 EMRK zu werten sind, d.h. die notwendige Schwere der Verletzung. Der zweite Schritt des individuellen Abwägens bringt zwei wichtige Limitierungen ins Spiel: the Wahrscheinlichkeit des Risiko und seine Vorhersehbarkeit, d.h. den Beweisstandard und die Beweislast. Der Frage ihres Ausmaßes nähert sich die Dissertation mit Legomsky’s “complicity principle”, der einen “variablen Beweisstandard” einführt: Die Frage nach dem notwendigen Ausmaß an Wahrscheinlichkeit des Risikoeintritts kann nur relativ beantwortet werden, weil Verhältnismäßigkiet zwischen Vorhersehbarkeit und Schwere der Verletzung bestehen muss.

Im vierten Kapitel werden anhand der vorgestellten Analysemethoden für die Diskussion über den Schutz vor *Refoulement* durch die EMRK positive Verpflichtungen für das Abschiebeverfahren herausgearbeitet. Hinsichtlich des abstrakten Abwägens verteidigt die Autorin den Standpunkt, dass auch als Verletzung von Art 3 EMRK von relevanter Schwere anzusehen ist, wenn es im “sicheren Drittland” im erstinstanzlichen Verfahren an Qualität und in der Folge der GFK entsprechenden Gewährung von Asyl oder im Rechtsmittelverfahren an effizienten Rechtsmitteln oder einer aufschiebenden Wirkung mangelt. Als positive

Verpflichtung für das Verfahren des abschiebenden Staates ergibt sich, dass ein Staat die inhaltliche Prüfung eines Asylantrages in der Annahme der Abschiebung des Antragstellers in ein "sicheres Land" nur verweigern kann, wenn dem Asylwerber im Rahmen dieses beschleunigten Verfahrens die Möglichkeit eingeräumt wird, diese Annahme zu widerlegen. Die Umstände, unter denen diese Widerlegung ermöcht wird, betreffen die Fragen von Beweisstandard und Beweislast und damit den zweiten Schritt der individuellen Abwägung. Bezüglich des Beweisstandards ergibt die Analyse der Rechtsprechung des EGMR, dass der Gerichtshof bei der Risikoeinschätzung des direkten *Refoulements* aufgrund der faktischen Umstände von Verfolgung im Aufnahmeland denselben Beweisstandard für die wohlbegründete Angst vor Verfolgung iSv Art 1 (A) GFK setzt wie für das Risiko des *Refoulement* im Falle der Abschiebung. Bei der Risikoeinschätzung des indirekten *Refoulements* über ein angeblich sicheres Drittland wird die Reduktion der Analyse des EGMR auf die Existenz eines "arguable claim" über den ersten Schritt der Verfolgung im Zielland als positive Entwicklung gesehen, die auch der Anforderung des "variablen Beweisstandard" eines niedrigen Beweisstandard gerecht wird: für den Antragsteller leicht zugängliche Dokumentation und generelle Berichte internationaler Organisationen und NGOs erfüllen den geforderten Beweisstandard. Auch beim zweiten Schritt der Risikoeinschätzung des Ketten-*Refoulements* aufgrund der den Antragsteller erwartenden Verfahren im angeblich sicheren Drittland fand der EGMR in *M.S.S. v. Belgium and Greece* statistische Daten über eine extrem niedrige Anerkennungsrate bei Asyl oder subsidiärem Schutz und Berichte internationaler Organisationen und NGOs ausreichenden Beweis zur Widerlegung der Annahme der Sicherheit des Drittlandes.

Bezüglich der Beweislast ergibt die Analyse der Rechtsprechung des EGMR, dass er dahingehend verstanden werden kann und muss, primär den ausweisenden Staat zu verpflichten, die für den entsprechenden Fall relevante Umstände zu erheben.

Aus dem zweiten Schritt der individuellen Abwägung ergeben sich folgende positive Verpflichtungen für das Verfahren des abschiebenden Staates: Erstens ist, auch im Falle der Annahme der Sicherheit eines Landes, für die Risikoeinschätzung der Beweisstandard niedrig zu halten, d.h. durch allgemeine Informationen durch Berichte oder statistische Daten erfüllt zu sehen. Zweitens ist aufseiten des Antragstellers auch die Beweislast niedrig zu halten, d.h. auf seinen Hintergrund und persönlichen Erfahrungen, die seine Angst vor *Refoulement* begründen, zu reduzieren; auch im Falle der Annahme der Sicherheit eines Drittlandes darf die Beweislast nicht über die Zuverfügungstellung genereller Informationen über Statistik von Anerkennungsraten und Berichte über die allgemeinen Umstände, die *per se* Verdacht über die Fairness des Verfahrens erwecken, hinausgehen. Drittens bedarf eine seriöse

Risikoeinschätzung eines individuellen Interviews. Schließlich muss das Abschiebverfahren eine gewisse Qualität aufweisen, die mit “rigorous scrutiny” umschrieben wird und Sorgfalt, Fairness und Folgerichtigkeit umfasst.

Im fünften Kapitel wird zusammengefasst dass bis zu der Zeit eines einheitlichen Schutzes im ausweisenden und im „sicheren“ Land die EU-Mitgliedsstaaten aufgrund der EMRK verpflichtet sind, die Konzepte der “sicheren Staaten” nicht oder unter Erfüllung der in dieser Arbeit entwickelten positiven Verpflichtungen anzuwenden.

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Koordinatorin der Kommissionen II und III des MRB: Besuch der Dienststellen der Sicherheitsexekutive und Beobachtung der Ausübung von Befehls- und Zwangsgewalt, insbesondere bei Abschiebungen, Schwerpunktaktionen und Demonstrationen, unter dem Gesichtspunkt der Wahrung der Menschenrechte; Berichtlegung an den MRB, der Empfehlungen mit allfälligen Verbesserungsvorschlägen an die Bundesministerin für Inneres richtet oder eine Arbeitsgruppe mit der umfassenden Aufarbeitung der Thematik beauftragt

NGO Caritas, Flüchtlingsabteilung, Eisenstadt (Jän-Dez 2008)

Rechtsberaterin: Rechtsberatung und -vertretung von AsylwerberInnen; Berufungen an den Unabhängigen Bundesasylsenat/Asylgerichtshof; Beschwerden gegen Schubhaft, Aufenthalts- bzw. Rückkehrverbot verhängende Bescheide

Danish Refugee Council, Sri Lanka (Vanni (LTTE-kontrolliertes Gebiet), Trincomalee und Vavuniya/Mannar) (16. Aug-11. Nov 2007)

Emergency Protection Officer: Identifizierung bestehender Schutzlücken zur Verbesserung der Zusammenarbeit mit anderen humanitären Organisationen; Verbesserung der Qualität und Effizienz des Protection Monitoring; Unterstützung bei der Implementierung von DRC's Individual Protection Assistance; im Vanni: Initiierung eines umfassenden IDP Assessment

Delegation der Europäischen Kommission zu den Vereinten Nationen, New York (Okt-Dez 2006)

Menschenrechtsexpertin zum Sozialen, Humanitären und Kulturellen Komitee (Drittes Komitee) der UNO Generalversammlung: EU Koordinierungstreffen und informellen Konsultationen zwischen UNO-Delegationen zu Resolutionsentwürfen, Berichterstattung, Evaluierung dieser Verhandlungen

Delegation der Europäischen Kommission zu den Vereinten Nationen, Genf (Sep 2006)

Mitglied der Delegation zur 2. Sitzung des Menschenrechtsrates (MRR): EU Koordinierungstreffen und informellen Konsultationen zwischen UNO-Delegationen zu Resolutionsentwürfen und die zukünftigen Arbeitsmethoden des MRR, Berichterstattung, Evaluierung dieser Verhandlungen

Ministerium für auswärtige Angelegenheiten, Menschenrechtsabteilung, Genf (Mär-Apr 2006)

Mitglied der österreichischen Delegation zur 62. Sitzung der UNO-Menschenrechtskommission (MRK): Unterstützung bei den komplexen Verhandlungsprozessen betreffend die Übertragung der Agenden der bisherigen MRK and den neu zu errichtenden MRR

NGO Caritas Österreich, Abteilung für Flüchtlinge und Migration, Wien (Feb 2006)

Assistentin für “Netzwerk Asylanwalt” ((ehrenamtlich): Rechtliche Beratung von Flüchtlingen im Erstaufnahmezentrum Traiskirchen; Recherche aktueller Rechtsprechung und relevanter Dokumente für die website des Netzwerks; Website-Administration

OSZE-Wahlbeobachtungsmission, Aserbaidshan (4.-8. Nov 2005)

Short Term Officer: Beobachtung der parlamentarischen Wahl

UNO-Flüchtlingskommissariat (UNHCR), Legal/Protection Unit, Wien (Sep-Nov 2005)

Praktikantin (ehrenamtlich): Bearbeitung individueller Anfragen von Flüchtlingen; Analyse der im Rahmen des “Flughafenverfahrens” eingebrachten Fälle; Vor-Evaluierung von Entscheidungen für ein Monitoring Projekt zwischen UNHCR und dem Bundesasylamt; Recherche relevanter aktueller nationaler und internationaler Rechtsprechung und österr. Gesetzgebung

Ministerium für auswärtige Angelegenheiten, Menschenrechtsabteilung, Genf (Mär-Apr 2005)

Mitglied der österr. Delegation zur 61. Sitzung der UNO-Menschenrechtskommission: Verhandlungen; Berichterstattung; Vertretung der österr. Position zu Resolutionen anderer Staaten; Lobbying für die von Österreich eingebrachten Resolutionen

NGO International Helsinki Federation for Human Rights, Wien (Sep 2004-Mär 2005)

Praktikantin (ehrenamtlich): Verfassen des Kapitels über Österreich für International Helsinki Föderation für Menschenrechte (Ed.), “Human Rights in the OSCE Region: Europe, Central Asia and North America, Report 2005 (Events of 2004)”

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Rechtsberaterin (ehrenamtlich): Rechtsberatung und -vertretung, Berufungen an den Unabhängigen Bundesasylsenat

Menschenrechtskammer für Bosnien- Herzegowina, Sarajevo (Aug 2001)

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Ludwig-Boltzmann-Institut für Menschenrechte, Wien (Sep 2000-Okt 2001)

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Danish Refugee Council, Kopenhagen (9.- 11. Jun 2006, 27.-29. Jun 2007)

Emergency Roster Protection Trainings

Human Rights and International Legal Discourse (Universitäten von Antwerpen, Brüssel, Gent and Löwen), Brüssel (16.-17. Mär 2007)

Internationale Konferenz zu “Accountability for Human Rights Violations by International Organizations”

European Training- and Research Centre for Human Rights and Democracy, Graz (Aug 2004)

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