The Right to Asylum in International Law: One Step forward, two Steps back?

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The so-called refugee and migration crisis from 2015 onwards has shed new light on the status of the right to asylum and the non-refoulement principle. A survey of recent state practice shows that there is still not generally accepted universal individual right to asylum. On the contrary, the international community as a whole and the EU in particular are increasingly reluctant to accept refugees on their territory. While the prohibition of extraditions, expulsions, or deportations of individuals to countries where they face a serious risk of mistreatment remains untouched, Europe cooperates with transit countries to prevent potential asylum seekers from reaching its borders in the first place.

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I. The Definition of a Refugee

Political and legal debates during the 2015 refugee and migration crisis[1] have revolved around numerous key concepts of international refugee law. A plethora of misunderstandings require us to being our survey with the very definition of refugees.

At first sight, the answer to this question is a comparatively simple affair: the generally accepted definition of a refugee is enshrined in Article 1 of the *1951 Refugee Convention*[2] (along with its 1967 protocol[3] which lifted the temporal and geographic limitations of the Refugee Convention) which speaks of

> any person who […] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

This definition can be broken down into four main characteristics:

1. A refugee is someone who is outside of his or her home country,
2. because of a 'well-founded fear' of persecution
3. on the basis of his or her race/ethnicity, religion, nationality, membership in a social group or political opinion and he or she can thus
4. not be reasonably expected to return to this country.

A few clarifications on a number of emotionally debated topics are due at this point.

First, the list of reasons for fleeing is exhaustive. Push factors such as poverty, climatic conditions, a country's security situation, or even armed conflicts are thus (by themselves) not a ground for asylum. Absent persecution, foreigners are considered as belonging to the broader groups of migrants only, no matter how understandable their individual reasons for leaving their home country may be. Relatedly, international law does not know the concept of 'war refugees.' The legal definition of refugees focuses on the individual asylum seeker rather than on the general conditions affecting ethnic, social, political, or religious groups or possibly the whole

[1] It deserves to be mentioned that, while this term has been generally adopted to describe the large number of asylum seekers reaching Europe in 2015 and 2016, it does not come without problems. In particular, it shall not suggest that refugees themselves are to be blamed.

[2] *Convention Relating to the Status of Refugees*, 28 July 1951, entry into force 22 April 1954, 189 UNTS 137

[3] *Protocol relating to the Status of Refugees*, 31 January 1967, entry into force 4 October 1967, 606 UNTS 267.

population. At the same time, however, armed conflicts may obviously increase the risk and likelihood of persecution for one of the reasons contained in the definition of refugees.

Second, refugee status is not affected by crossing through or even taking permanent residence in one or several safe countries. Only the situation in the country of origin is decisive. Refugee status is only lost upon acquiring the nationality of a (safe) country. In this regard, states are generally called upon to ensure swift integration and assimilation of those who were granted asylum since they can be reasonable expected to stay for an extended period of time and start or continue their family life, take up employment, and build social ties.[4]

Third, the individual asylum procedure in the country where protection is sought is of *declaratory*, not constitutive character.[5] In other words, refugee status is independent of judicial or administrative proceedings. From the perspective of international law, one becomes a refugee as soon and as long as the factual preconditions of the refugee definition are fulfilled – even if states decline to grant this status.

Fourth, states and their courts have wide discretion in asylum proceedings. While some interpret the terms of the 1951 Refugee Convention in a broad sense, *eg* as including persons who are persecuted because of their sexual orientation under the notion of a 'social group',[6] others are highly restrictive. Inside of Europe, one should furthermore not forget that the right to fair trial under Article 6 of the European Convention on Human Rights (ECHR) does not apply to asylum proceedings – as the European Court of Human Rights held in *Maaouia v France*, 'decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him'[7] – a legal loophole to accelerate asylum proceedings. Nevertheless, certain minimum standards of the rule of law obviously have to be upheld.[8] Equally important, the right to an effective remedy under Article 13 ECHR and the prohibition of collective expulsions are also applicable in asylum proceedings.[9]

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[4] See *eg* the *Global compact on refugees*, UNGAOR, 73rd session, Supplement No. 12 (A/73/12 (Part II)), paras 85 and 97 *et seq*.

[5] See the Preamble to the EU's Qualification Directive, para 21: 'The recognition of refugee status is a declaratory act.'

[6] United States Court of Appeals for the Ninth Circuit, *Nasser Mustapha Karouni v Alberto Gonzales*, Attorney General, No 02-72651, 7 March 2005, para 2854; on the contentious issue of homosexuality as a ground for persecution see J Weßels, 'Sexual Orientation in Refugee Status Determination' *Refugees Studies Centre Working Paper Series No. 73* (April 2011), available at http://www.refworld.org/pdfid/4ebb93182.pdf.

[7] *Maaouia v France*, 5 October 2000, Application no 39652/98, para 40. *Cf* the situation concerning the CCPR, which also applies in connection with asylum proceedings, however;

[8] *Abdolkhani and Karimnia v Turkey*, Application no 30471/08, 22 September 2009; *M.S.S. v Belgium and Greece* [GC], 30696/09, para 301.

[9] *N.D. and N.T. v Spain*, Applications nos 8675/15 and 8697/15, 3 October 2017.

Interestingly enough, the ECHR is more restrictive than other treaties and legal orders: after all, the right to a fair trial enshrined in the Covenant on Civil and Political Rights (CCPR) and the EU Charter of Fundamental Rights (CFREU) also applies to asylum and immigration proceedings.[10] Furthermore, Article 47 CFREU offers more protection than Article 13 ECHR as it explicitly requires review by a tribunal and not only an administrative authority.

II. Is there a Right to Asylum?

A. Defining the Right to Asylum

The leeway for restrictive policies concerning asylum applications is broadened by the unclear status of the right to asylum,[11] *ie* a state's right of a state to grant asylum and the corresponding individual right to be granted asylum.

The first dimension of this right derives from the basic principles of sovereignty: states are free to control who may enter and reside in their territory.[12] In turn, the home country of refugees may not complain if its level of human rights protection is assessed by the receiving state[13] or if it 'loses' some of its nationals since they may ultimately not only settle in a foreign country but even acquire a new nationality.[14] On the contrary: in the past, some scholars went as far as arguing that states causing refugee flows (so-called refugee-generating policies) could be held responsible by the receiving states and asked to pay compensation:[15] already in 1939 and in light of the Nazi persecution of Jews and other minorities, Jennings argued that

> there seems to be good ground for stating that the willful flooding of other states with refugees constitutes not merely an inequitable act, but an actual illegality, and *a fortiori* where the refugees are compelled to enter the country of refuge in a destitute condition. […] Whether this result be actually intended or not, as soon as the persecution of a

[10] See *eg Olga Dranichnikov v Australia*, CCPR/C/88/D/1291/2004, UN Human Rights Committee, 16 January 2007, paras 6.8 and 7.1f. Explanations relating to the Charter of Fundamental Rights, *OJ C 303, 14.12.2007, p. 17–3*.

[11] See already F Morgenstern, 'The Right of Asylum' (1949) 26 *British Yearbook of International Law* 327.

[12] *Ibid*. See also the *Colombian-Peruvian asylum case*, Judgment of November 20th 1950, ICJ Reports 1950, 266, 274; S P Sinha, 'An Anthropocentric View of Asylum in International Law' (1971) 10 *Columbia Journal of Transnational Law* 78, 88; on the general control over territory and peoples see R Jennings, A Watts (eds), *Oppenheim's International Law. Vol. I: Peace* (9th ed, OUP 1992) 382 and 940.

[13] R Alleweldt, 'Preamble to the 1951 Convention' in A Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press) 225.

[14] A Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell International 1980), 26.

[15] R Hofmann, 'Refugee-Generating Policies and the Law of State Responsibility' (1985) 45 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 694; H R Garry, 'The Right to Compensation and Refugee Flows: A 'Preventive Mechanism' in International Law?' (1998) 10 *International Journal of Refugee Law* 97; L T Lee, 'The Right to Compensation: Refugees and Countries of Asylum' (1986) 80 *The American Journal of International Law* 566.

> minority does in fact result in a refugee movement which causes embarrassment to other states, the matter clearly becomes one of international concern.[16]

The individual dimension of the right to asylum needs to be further subdivided into two sub-aspects: on the one hand, the home country must not prevent its nationals from leaving (see *eg* Article 12(2) CCPR or Protocol No 4 to the ECHR).

On the other hand, the right to leave theoretically requires a corresponding right to be admitted to a different country. Receiving states would thus be obliged to admit and protect refugees, a restriction of the aforementioned sovereign right to exercise territorial control. Needless to say, the existence of such an obligation remains contested until this very day. The following sections will focus on this aspect of the right to asylum.

B. The Universal Declaration of Human Rights

According to Article 14 of the 1948 *Universal Declaration of Human Rights* (UDHR) '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution.'[17] This formulation arguably amounts to a *right to asylum*: refugees are allowed to enter foreign states which have to process their asylum requests and, if there is a well-founded fear of persecution, grant some form of protection for as long as necessary.[18]

However, Article 14 UDHR needs to be read with due caution. One must not forget that, while many of the UDHR's Articles have indeed evolved into customary international law, this does not necessarily hold true for all provisions and probably not the right to asylum (more on the customary character of the right to asylum later).[19]

Second, and relatedly, states have always disagreed on the formulation and precise meaning of the right to asylum. As the drafting history shows, the original wording 'and be granted, in other countries, asylum from persecution' was deliberately replaced with the more ambiguous expression 'and to enjoy' in the final text.[20] Oddly enough, this formulation was understood as a

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[16] R Y Jennings, 'Some International Law Aspects of the Refugee Question' (1939) 20 *British Yearbook of International Law* 98, 111f.

[17] UNGA Res 217 (III), *International Bill of Rights*, 10 December 1948.

[18] T Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 37, 48. See also R Plender and N Mole, 'Beyond the Geneva Convention: constructing a de facto right of asylum from international human rights instruments' in F Nicholson and P Twomey (eds), *Refugee Rights and Realities. Evolving International Concepts and Regimes* (Cambridge University Press 1999) 81, 82.

[19] H Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 *Georgia Journal of International Law & Comparative Law* 287, 346.

[20] G S Goodwin-Gill, J McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007), 359f.

sovereign prerogative (the first of the two meanings outlined above) that had to be respected by all other states, and not as an individual (*ie* human) right.[21]

Also, a French suggestion to assign the UN a role in enforcing such a right was rejected since '[t]he majority of states were not prepared to grant the individual a true right of asylum enforceable against the state of potential refuge. They could, therefore, not admit the power of an international organization to 'secure' asylum for refugees.'[22]

In sum, the resolution's drafters did not want to impose an obligation upon states. Surprisingly enough, Article 14 UDHR did not introduce a human right but merely emphasized the pre-existing sovereign right of a state to admit and allow foreign nationals on its territory. One of the harshest and most well-known critics of this historically – even more so from today's perspective – absurd result was Hersch Lauterpacht, who described Article 14 as one of those provisions that

> are couched in language which is calculated to mislead and which is vividly reminiscent of international instruments in which an ingenious and deceptive form of words serves the purpose of concealing the determination of states to retain full freedom of action.[23]

He furthermore lamented that 'there was no intention to assume even a moral obligation to grant asylum'[24] and that the right to seek asylum is not accompanied by a parallel right to receive asylum. Obviously disillusioned by the fact that not even the horrors of the Second World War led to a shift in the understanding of sovereignty towards increased protection of individuals fleeing persecution, Lauterpacht certainly did not attempt to hide his discomfort when he argued that

> it would have been more consistent with the dignity of the Declaration if these considerations had resulted in the elimination of the question of asylum from the Declaration. As it happened, a formula was accepted which is artificial to the point of flippancy.[25]

C. The Refugee Convention

Contrary to a common misconception, the 1951 Refugee Convention (and its 1967 Protocol) does not mention the right to asylum at all. Instead, it contains a prohibition to penalize illegal entries from neighboring countries – potentially also other countries, at least if refugees have

[21] *Ibid*, 360 *et seq*.
[22] Morgenstern (n 11), 356.
[23] H Lauterpacht, 'The Universal Declaration of Human Rights' (1948) 25 *British Yearbook of International Law* 354, 373.
[24] *Ibid*.
[25] *Ibid*, 374.

come directly from their country of origin[26] – and the non-refoulement principle: refugees must not be extradited, expelled, or deported to countries where they could be persecuted (more on this obligation in section III).

In addition, the 1951 Refugee Convention contains provisions on the status, rights, and obligations of refugees: in particular a prohibition of discrimination because of race, religion, or the country of origin,[27] the freedom of religion,[28] general minimum standards for the treatment of refugees in connection with the acquisition of property,[29] the right of association,[30] access to courts,[31] the right to work,[32] welfare,[33] the freedom of movement,[34] or the swift facilitation of their assimilation and naturalization.[35]

D. The Covenant on Civil and Political Rights

The lack of a binding (contractual) and unequivocal individual right to asylum was already recognized in 1947 and throughout the debates accompanying the drafting process of the human rights covenants.[36] In 1951, Yugoslavia for instance proposed a far-reaching individual right to asylum for those fleeing not only from persecution on the grounds of race, nationality, or religion but also for 'political or scientific convictions […] activities in the struggle for national or political liberation' and 'efforts in support of the realization of the principles of the Charter of the United Nations.'[37] Similar proposals was submitted jointly by Chile, Uruguay, and Yugoslavia and also by the Soviet Union in the following year.[38]

Ultimately, however, these attempts to establish an individual right to asylum in the CCPR or the Covenant on Economic, Social and Cultural Rights (CESCR) proved futile. The idea of

[26] G S Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection' paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations, October 2001, available at https://www.unhcr.org/3bcfdf164.pdf.

[27] Article 3; it has *eg* been argued that Donald Trump had violated this provision when imposing his "Muslim Ban", see this interview with J C Hathaway http://verfassungsblog.de/a-terrible-signal-that-international-law-can-be-flaunted-without-consequence/.

[28] Article 4.

[29] Article 13.

[30] Article 15.

[31] Article 16.

[32] Chapter III.

[33] Chapter IV.

[34] Article 26.

[35] Article 34.

[36] Goodwin-Gill, McAdam (n 20), 361.

[37] Cited in R Boed, 'The State of the Right of Asylum in International Law' (1994) 5 *Duke Journal of Comparative & International Law* 1, 10.

[38] Goodwin-Gill, McAdam (n 20), 361.

obliging states to open 'their territory to an unascertainable number of persons who might qualify for asylum under any one of the heads that had been proposed' was found 'impracticable and undesirable' since they were 'unwilling to surrender their prerogative of deciding in each instance which aliens they would admit to their territory.'[39]

E. Customary International Law

While there is no individual right to asylum in international (human rights) treaties, the other sources of international law, first and foremost customary international law, are also relevant when assessing this question. After all, a number of Latin American or European states – Germany arguably being the most-well known example – have included constitutional provisions to this extent[40] and state practice (along with that of the European Union) in general has evolved to a considerable extent ever since the end of the Cold War. Some scholars thus indeed endorse such a right as a rule of customary international law or as a general principle.[41]

It is nevertheless generally assumed that states have still not accepted such a far-reaching restriction of their territorial sovereignty. The majority of writers argue that there only exists *a right to seek asylum* but not a corresponding duty of states to *grant* asylum.[42] As Goodwin-Gill and McAdam summarize it,

> state practice nevertheless permits only one conclusion: the individual still has no right to be granted asylum. The right itself is in the form of a discretionary power—the state has discretion whether to exercise its right, as to whom it will favour, and, consistently with its obligations generally under international law, as to the form and content of the asylum to be granted. Save in so far as treaty or other rules confine its discretion, for example, by requiring the extradition of war criminals, the state remains free to grant asylum to refugees as defined by international law or to any other person or group it deems fit. It is likewise free to prescribe the conditions under which asylum is to be

[39] UN Commission on Human Rights, Report of the 8th Session (1952), UN doc. E/2256, para. 203, cited in *ibid*.
[40] M-T Gil-Bazo, Asylum as a General Principle of International Law' (2015) 27/1 *International Journal of Refugee Law* 3; H Lambert, F Messineo, P Tiedemann, 'Comparative Perspectives of Constitutional Asylum in France, Italy, and Germany: Requiescat in Pace?' (2008) 27/3 *Refugee Survey Quarterly* 16. See also M-T Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be granted Asylum in the Union's Law' (2008) 27/3 *Refugee Survey Quarterly* 33.
[41] W T Woerster, 'The Contemporary International Law Status of the Right to Receive Asylum' (2014) 26/4 *International Journal of Refugee Law* 477; M-T Gil-Bazo (n 40).
[42] Kay Hailbronner, Jana Gogolin (*Max Planck Encyclopedia of Public International Law*), para 33; Boed (n 37); Goodwin-Gill, McAdam (n 20), 358; Hathaway, albeit only implicitly (n), 300; E Lauterpacht and D Bethlehem, 'The scope and content of the principle of non-refoulement: Opinion' in E Feller, V Türk, F Nicholson (eds), *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 87, 91f; W Kälin, M Caroni, L Heim, 'Article 33, para. 1' in A Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2001) 1326.

> enjoyed. It may thus accord the refugee the right to permanent or temporary residence, it may permit or decline the right to work, or confine refugees to camps, dependent on international assistance pending some future solution, such as repatriation or resettlement.[43]

This finding has been further corroborated by the UN General Assembly's *New York Declaration for Refugees and Migrants* from 2016, where the UN members re-stated the current legal status of the right to asylum by merely reaffirming

> that everyone has the right to leave any country, including his or her own, and to return to his or her country. We recall at the same time that each state has a sovereign right to determine whom to admit to its territory, subject to that state's international obligations.

Along with the 'respect for the institution of asylum and the right to seek asylum' and 'respect for and adherence to the fundamental principle of non-refoulement in accordance with international refugee law.'[44]

Such statements on the legal status of the right to asylum may seem inconsistent at first: what sense does a right to seek asylum make if states are still free to accept or reject asylum seekers at will?

Upon closer inspection, this result is mitigated by the obligation upon states to refrain from extraditing, expelling, or deporting refugees and asylum seekers to countries where they could be prosecuted or mistreated (the *non-refoulement principle*). The asylum procedure is thus not only necessary to establish whether an individual indeed qualifies as a refugee but also to prevent unlawful transfers to his or her home country. States can be obliged to admit refugees to their territory without having to grant them asylum (more on the difference between the non-refoulement principle and refugee status in section III.).

The reluctance to address or mention the right to asylum and focus on the non-refoulement principle instead was also reflected amid recent debates on migrant smuggling off Libya's coast. The Secretary-General, in his report from 7 September 2017, *eg* appealed to states (and their general obligations under human rights law)

> to manage their borders in a protection-sensitive way, not to refuse entry to those seeking asylum and those who are in need of protection under international human rights

[43] Goodwin-Gill, McAdam (n 20), 414.
[44] *New York Declaration for Refugees and Migrants*, UNGA Res 71/1 (2016), 19 September 2016, UN Doc A/RES/71/1, paras 42 and 67.

> and refugee law, not to send any person back to a place where they might face persecution, torture, arbitrary detention and other human rights violations, to increase resettlement quotas and other pathways to protection, to grant international protection to those fleeing persecution, armed conflict or violence, as well as to grant appropriate forms of protection to migrants in vulnerable situations. All measures to counter smuggling and trafficking have to be carried out in full respect of international human rights law.[45]

Referring to this report, the Security Council adopted a resolution submitted by all EU members with 15 votes in favor[46] that merely referred to the basic human rights of refugees and refugee law without further specifying these obligations or mentioning the right to asylum:

> [the Security Council underscores] that this resolution is intended to disrupt the organized criminal enterprises engaged in migrant smuggling and human trafficking and prevent loss of life and is not intended to undermine the human rights of individuals or prevent them from seeking protection under international human rights law and international refugee law;
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> [The Security Council emphasizes] that all migrants, including asylum seekers, should be treated with humanity and dignity and that their rights should be fully respected, and urges all states in this regard to comply with their obligations under international law, including international human rights law and international refugee law, as applicable;[47]

These and similar developments bear witness of a delicate balancing act. On the one hand, the EU and its member states – formally, at least – try to adhere to their core principles, among them the rights of refugees. On the other hand, migration movements are being curbed both directly, *ie* through their own organs and *indirectly*, *ie* by relying on transit countries to prevent refugees from reaching the European border in the first place.[48]

F. The European Convention on Human Rights

On a regional level, the ECHR and its protocols also do not mention a right of asylum. Some of its provisions, however, are also relevant in this regard: most importantly, and as it will be

[45] Report of the Secretary-General pursuant to Security Council resolution 2312 (2016), 7 September 2017, UN Doc S/2017/761, para 54.
[46] The resolution was adopted at the UNCS's 8061st meeting on 5 October 2017. See also the Secretary General's report on Libya mentioned in the preamble where he did not mention the right to asylum but merely appealed to member states.
[47] UNSC Resolution 2380 (2017), 5 October 2017, S/RES/2380 (2017).
[48] See, *eg*, Daria Davitti, 'Biopolitical Borders and the State of Exception in the European Migration 'Crisis'' (2019) 29/4 *European Journal of International Law* 1173.

discussed below, the prohibition of torture, inhumane or degrading treatment or punishment imposes an obligation to refrain from extraditing, expelling, or deporting individuals to countries where they could be mistreated. The right to an effective remedy also applies to asylum proceedings.[49] Lastly, the prohibition of collective expulsions in Article 4 Protocol No 4 arguably also entails a twofold obligation not only to admit large groups of asylum seekers but also to refrain from expulsions without identifying their identity.[50]

G. Article 18 Charter of Fundamental Rights of the European Union

Europe seems go a step further than other countries or regions. In contrast to the CCPR, the Covenant on Economic Social and Cultural Rights and the ECHR, the CFREU includes the right to asylum in its Article 18:

> The right to asylum 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 Treaty establishing the European Community.

Den Heijer described Article 18 as 'revolutionary' for recognizing the right to asylum as a fundamental right: it 'sets a moral compass for any current and future Union activity in the field of asylum and that of Member States when acting in the scope of Union asylum law.'[51] Proposals have been put forward by European Commission and the European Parliament. While the former has suggested to implement a 'corrective allocation mechanism' in conformity with the existing Dublin III rules (in particular Article 13, according to which the first country where asylum is sought is responsible for this claim),[52] the European Parliament has even called for an extensive revision of this approach.[53] Article 18 also sets the tone for further EU ambitions

[49] *G.R. v the Netherlands*, Application no 22251/07, 10 January 2012, paras 49, 50 On a side note, the European Court of Human Right held 'that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6 § 1 of the Convention.' *Maaouia v France*, 5 October 2000 (n 7), para 40. See also the *Decision as to the Admissibility of Omeredo v Austria*, Application no 8969/10.

[50] See A Pijnenburg, 'Is N.D. and N.T. v. Spain the new Hirsi?', *EJIL:Talk!*, 17 October 2017, available at https://www.ejiltalk.org/is-n-d-and-n-t-v-spain-the-new-hirsi/.

[51] M Den Heijer, 'Article 18' in S Peers, T Hervey, J Kenner, and A Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (Hart Publishing 2014) 519, para 18.53.

[52] '… the Commission proposes to streamline and supplement the current rules with a corrective allocation mechanism. This mechanism would be triggered automatically were a Member State to be faced with disproportionate numbers of asylum-seekers. If a Member State decided not to accept the allocation of asylum-seekers from a Member State under pressure, a 'solidarity contribution' of €250 000 per applicant would have to be made instead.' See http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS_BRI(2016)586639_EN.pdf.

[53] The European Parliament '… 33. Observes that the operation of the Dublin III Regulation has raised many questions linked to fairness and solidarity in the allocation of the Member State responsible for examining an application for international protection; notes that the current system does not take into sufficient consideration the particular migratory pressure faced by Member States situated at the Union's external borders; believes that

to harmonize the criteria when assessing asylum claims, common asylum procedures, or a fair allocation quota between the member states.[54]

a) An individual right to asylum?

The extent of this provision nevertheless remains unclear. The Court of Justice of the European Union (CJEU) has not (yet) ruled on its substantial character.[55] Article 18 CFREU is, in any case, not an absolute but a qualified right. The Austrian Constitutional Court for instance interprets this provision as having merely declaratory value not going beyond the obligations contained in the 1951 Refugee Convention and the 1967 Protocol.[56]

Scholars seems to be divided on this issue. Goodwin-Gill and McAdam put emphasis on the Charter's text itself to show that it 'seeks only to consolidate existing fundamental EU rights rather than elaborate or amend them.'[57] First, the Preamble '*reaffirms* the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States.'[58] along with EU law. Second, Article 51(2) CFREU makes it clear that '[t]his Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.'

Seen in this light, Article 18 CFREU only re-states the generally-accepted individual right to seek asylum and the corresponding obligation, also entailed in Article 19 of the Charter, to refrain from extraditions, deportations, or expulsions to countries where he or she could be mistreated.[59] Seen in the context of EU legislation Article 18 CFREU 'first and foremost consolidates the achievements of the common policy on asylum.'[60]

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the Member States need to accept the on-going difficulties with the Dublin logic, and that the Union should develop options for solidarity both among Member States and the migrants concerned;
34. Points out that the pressure placed on the system – as established by the Dublin Regulation – by the rising number of migrants arriving in the Union has shown that, as implemented, the system has largely failed to achieve its two primary goals of establishing objective and fair criteria for allocation of responsibility and of providing swift access to international protection; reiterates its reservations regarding the criterion whereby currently it is the Member State of first entry that is determined to be responsible for the examination of a claim for international protection, and considers that this criterion should be revised;', see http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0102+0+DOC+XML+V0//EN&language=EN.

[54] Den Heijer (n 51).

[55] *Ibid*, para 18.30. mentions two occasions (*NS and others* and *Halaf*) upon which the CJEU declined the necessity to rule on the substantive content of Article 18 after this issue was raised during the proceedings. See also the discussion of the recent case *X and X versus État Belge* in the next sub-section.

[56] See https://www.vfgh.gv.at/cms/vfgh-kongress/downloads/landesberichte/LB_Autriche_DE.pdf.

[57] Goodwin-Gill, McAdam (n 20), 367.

[58] Own emphasis.

[59] Goowdin-Gill, McAdam (n 20), 368.

[60] Den Heijer (n 51), para 18.52.

The opposing view, championed by Gil-Bazo, refers to the drafting history of the Charter of Fundamental Rights of the European Union and the Constitutional tradition in several EU member states (Spain, Italy, France, Bulgaria, Hungary, and Germany) to establish a right to seek and also receive asylum.[61] In addition, she argues that the EU's Qualification Directive[62] stipulation that a country '*shall* grant refugee status' if a person 'qualifies as a refugee' (Article 13) implicitly and effectively also amounts to a right to asylum:[63] '[T]he name that this protection status may receive is irrelevant, as long as it includes – at a minimum – the right to enter, the right to stay, the right not to be forcibly removed and the recognition of the fundamental rights of the individual.'[64]

b) A right to seek and receive humanitarian visas?

Traditionally, asylum was not only associated with protection abroad but also in embassies located in the home country. Aside from individuals taking refuge inside of diplomatic premises the refugee and migration crisis has also revived discussions on the possibility to seek and process asylum applications abroad.[65]

In the EU, this this question was dealt with in the case of *X and X v Belgium*[66] which concerned two orthodox Syrian Christians who applied for humanitarian visas in the Belgian embassy in Lebanon with the intention to subsequently apply for asylum in Belgium. If such visas fell under the EU's Visa Code, they argued, the CFREU and its Article 18 would be applicable. States could thus be obliged to guarantee the right to asylum and issue visas on humanitarian grounds in order to avoid a violation of Article 3 ECHR. Belgium then referred this question to the Court of Justice of the European Union for a preliminary ruling.

The case gained a lot of attention after Advocate General Mengozzi stated that EU law significantly reduced the level of discretion whenever there was a risk of ill-treatment in the sense of

[61] M-T Gil-Bazo (n 40; Woerster (n 41).
[62] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, p. 9–26.
[63] María-Teresa Gil-Bazo, 'Refugee status, subsidiary protection, and the right to be granted asylum under EC law', *New Issues in Refugee Research no 136*, Nov 2006, available at http://www.unhcr.org/455993882.pdf, 8. See also, albeit somewhat more cautious on this issue by merely linking Article 18 to the Qualifications Directive, the European Union Agency for Fundamental Rights' and the European Court of Human Rights' *Handbook on European law relating to asylum, borders and immigration* (Publications Office of the European Union 2016), 45.
[64] Gil-Bazo (n 63), 8.
[65] Gregor Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 17/3 *International Journal of Refugee Law* 542.
[66] *X and X v État Belge*, C-638/16 PPU, Judgment of 7 March 2017.

Article 3 ECHR and 4 CFREU. He thus rejected the interpretation to read the Visa Code as merely *enabling* and not *obliging* EU Member states to issue visas on humanitarian grounds.[67] Needless to say, EU Member states and the general public were alarmed that the Court of Justice of the European Union (CJEU) could introduce a right to seek and receive asylum in embassies abroad through the jurisprudential backdoor and essentially against their will.

In its much-anticipated judgment, however, the CJEU denied the applicability of the Visa Code on humanitarian visas by virtue of its Article 1 and the lack of EU legislature in this regard.[68] It thus also refrained from applying and interpreting Article 18 of the CFREU. Lastly, the CJEU put the above-mentioned concerns to rest when holding that a different finding

> would be tantamount to allowing third-country nationals to lodge applications for visas on the basis of the Visa Code in order to obtain international protection in the Member State of their choice, which would undermine the general structure of the system established by [the Dublin III regulation].[69]

III. The Non-Refoulement Principle

A. The Non-Refoulement Principle in the 1951 Refugee Convention

Despite the absence of a fully-developed universal individual right to asylum in the 1951 Refugee Convention, states are not entirely free to regulate the entry to and stay within their territory as they please. Article 33 of the Refugee Convention prohibits the expulsion or other forms of returning refugees to countries where their 'life or freedom would be threatened on account of … race, religion, nationality, membership of a particular social group or political opinion.' States can thus be prevented from closing their borders or deport, extradite, or expulse to countries where the respective refugee could be persecuted.

This principle nevertheless stops short of establishing a de facto right of individuals to be admitted and take residence in *any* country. First, states can decide to transfer refugees to other safe countries. It would also be lawful, as it has sometimes been suggested, to establish and directly administer camps on foreign territory. Refugees would thus fall under the human rights regime and jurisdiction of the respective state even although they are outside of its territory.[70]

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[67] See Advocate General Mengozzi's Opinion in Case C-638/16 PPU *X and X v État Belge*, available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-02/cp170011en.pdf.
[68] *X and X v État Belge* (n 66), paras 45 and 46.
[69] *Ibid*, para 48.
[70] Human Rights Committee General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13 26 May 2004, para 10. As to the ECHR see the ECtHR's *Guide on Article 1 of the European Convention on Human Rights*, available at https://www.echr.coe.int/Documents/Guide_Art_1_ENG.pdf.

States directly accessible from the home country of refugees – *ie* neighboring or other states reachable without having to pass through one or several states, *eg* via sea routes – are the primary addressees of the non-refoulement principle. Other states have to ensure that the country through which a refugee travelled to seek asylum (and where he or she will thus stay, for the time being at least, if the asylum application is rejected or not even considered) is safe. Furthermore, they have to ensure that he or she will not end up in an unsafe country after a having gone down a chain of deportations.[71]

Most importantly, Article 33 is not absolute. Under the 1951 Refugee Convention, some persons may not be worthy of the protection guaranteed by the non-refoulement principle. Para 2 explicitly excludes refugees who pose a danger to the security or the community of the receiving state.[72]

The first part of this provision refers to crimes such as terrorism, sabotage, treason, espionage, or sabotage. Individuals lawfully convicted for such acts by a final judgment cannot claim unconditional protection. At the very least, however, a proportionality assessment is required. A high standard of likelihood or even proof that these acts have occurred or are about to occur is necessarily, while the risk stemming from such acts also has to be weighed against the impact on the affected individual.[73] The second part is applicable in cases of prosecutions for crimes such as homicide, rape, child molesting, wounding, arson, drugs trafficking, and armed robbery.[74] Here, a final conviction is necessary, coupled with a similar proportionality assessment as in cases falling under the first part of Article 33(2).[75]

B. The Non-Refoulement Principle in Human Rights Law

The non-refoulement principle is not only found in the 1951 Refugee Convention. While most human rights treaties do not explicitly enshrine the non-refoulement principle, they generally prohibit torture, inhuman, or degrading treatment. These provisions effectively amount to far-

[71] See *eg* the ICRC's Note on migration and the principle of non-refoulement, available at https://www.icrc.org/en/download/file/69679/irrc-904-19.pdf.
[72] '2. 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.'
[73] P Wennholz and A Zimmermann, 'Article 33, para. 2' in A Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press) 1396, 1415 *et seq*.
[74] *Ibid*, 1420. These crimes also reflect the practice of Austrian Courts and tribunals on §§ 6 and 7 of the Austrian Federal Act Concerning the Granting of Asylum, see https://www.ris.bka.gv.at/Dokumente/Erv/ERV_2005_1_100/ERV_2005_1_100.pdf; one example for this jurisprudence can be found at https://www.ris.bka.gv.at/Dokumente/Ubas/UBAST_20061106_200_207_27_V_13_06_00/UBAST_20061106_200_207_27_V_13_06_00.html).
[75] Wennholz and Zimmermann (n 73).

reaching prohibitions on expulsions, extraditions, or deportations of refugees and other individuals to dangerous and risky countries. The next sub-sections will thus elaborate on the UN Convention against Torture, the CCPR, and the ECHR and how they relate to asylum seekers.

a) The UN Convention Against Torture

Article 3 (1) of the *UN Convention Against Torture* (UNCAT) stipulates that

> [n]o 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.

This provision is, like the prohibition of torture as such, absolute. Neither the security of the state nor the behavior of the individual can serve as a justification for all types of obligatory departures to such countries.[76]

The legal effect of Article 3 UNCAT is nevertheless limited in comparison with other human rights treaties for two reasons.[77] First, mere inhuman or degrading treatment or punishment fall outside of its scope. Second, it only applies to cases of torture as defined in Article 1 UNCAT. Acts of torture committed by non-state (armed) groups or private actors in general are thus not included.

b) The Covenant on Civil and Political Rights

The CCPR and the ECHR do not mention the non-refoulement principle explicitly. The Human Rights Committee (HRC) and the European Court of Human Rights have nevertheless made it clear that the prohibitions on torture, inhuman, or degrading treatment or punishment included in Article 7 CCPR and Article 3 ECHR also apply to deportations, expulsions, or extraditions.

General Comment 31 from 29 March 2004 makes it clear that

> the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 [the right to life] and 7 [the prohibition of torture or cruel, inhuman or degrading treatment or punishment] of the Covenant, either

[76] David Weissbrodt and Isabel Hortreiter, 'The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties' (1999) 5 *Buffalo Human Rights Law Review* 1.

[77] See M Nowak, E McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press 2008), 129 *et seq*.

> in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[78]

Thus, when dealing with deportations, the HRC has found actual or possible violations of these obligations on numerous occasions, including skepticism concerning diplomatic assurances regarding the treatment of the affected individuals.[79]

c) The European Convention on Human Rights

The case-law of the European Court of Human Rights has repeatedly emphasized that Article 3 ECHR restricts the sovereign right of states to control their borders and the possibility to deport, expel, or extradite individuals. This jurisprudence it is not a novelty. Already in 1961 the European Commission of Human Rights (which dealt with individual applications until Protocol 11 entered into force and enabled individuals to submit their applications directly to the European Court of Human Rights) decided that the deportation of a foreigner might, in exceptional circumstances, require states to determine whether there could be or had been inhuman treatment.[80] Some three years later, in *X against Austria and Yugoslavia*,[81] it held that this obligation was equally applicable with respect to extraditions when stating that

> […] although extradition and the right of asylum are not, as such, among the matters governed by the [ECHR] […] the Contracting states have nevertheless accepted to restrict the free exercise of their powers under general international law, including the power to control and exit of aliens, to the extent and within the limits of the obligations which they have assumed under the [ECHR].

These decisions nevertheless seemingly only had a limited impact and did not trigger a public outcry or public debates: After all, they only concerned a comparatively small number of individual dissidents.[82]

The situation started to change during the mid and late 1980s. Already back then Hailbronner observed (on the basis of official statistics by the German Federal states) 'that rejected asylum-

[78] Human Rights Committee, General Comment 31, *Nature of the General Legal Obligation on States Parties to the Covenant*, adopted 29 March 2004, available at http://www.unhcr.org/4963237716.pdf.
[79] See the cases mentioned in S Joseph and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd edn, Oxford University Press 2013), 262 *et seq*.
[80] *X against The Federal Republic of Germany*, Application No 1465/62, Decision of 6 October 1962 (1962) 5 *Yearbook of the European Convention on Human Rights* 256, 260.
[81] *X against Austria and Yugoslavia*, Application No 2143/64, Decision of 30 June 1964 (1964) 7 *Yearbook of the European Convention on Human Rights* 314, 328-329.
[82] See T Einarsen, 'The European Convention on Human Rights and the Notion of an Implied Right to de facto Asylum' (1990) 2/3 *International Journal of Refugee Law* 361, 365-366.

seekers, as far as they are not tolerated on humanitarian grounds, go into hiding or simply disappear in not insignificant numbers.'[83] Echoing current concerns, he warned that, if the then-European Community failed to agree on a common refugee and immigration policy, the right to asylum 'could become a substitute for a right of residence not legally achievable in any other way.'[84]

At that time, the European Court of Human Rights rendered its most decisive judgment on Article 3 and its impact on the freedom of states to extradite individuals – the *Soering* case.[85] Jens Soering was a German national studying in the US who had allegedly been incited by his girlfriend to kill her parents. After the couple subsequently fled to the UK the US requested extradition. Facing the risk of being subjected to the death penalty, Soering argued that the time spent on death row would constitute degrading treatment. The European Court of Human Rights agreed with this argument and made it clear that, in such situations, states are not only responsible for their own actions but also that of third states. Mr Soering was thus extradited only after the US had given diplomatic assurances to refrain from imposing the death penalty.[86]

> […] 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 (art. 3)*. […] In sum, 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.[87]

In *Cruz Varas and others v Sweden*, decided in March 1991, the European Court of Human Rights applied this rationale on expulsions of asylum seekers if 'substantial grounds have been

[83] K Hailbronner, 'The Right to Asylum and the Future of Asylum Procedures in the European Community' (1990) 2/3 *International Journal of Refugee Law* 341, 342.
[84] *Ibid*.
[85] *Soering v the United Kingdom*, Application no 14038/88, 7 July 1989. Other courts outside of Europe and the European Convention on Human Rights have also held that extraditions to countries still imposing the death penalty would be lawful, albeit on different grounds. In the case of *Tsebe et al v The Minister of South Africa and ors*, the South Gauteng High Court held that the right to life prevented the extradition of the applicant to Botswana, *Tsebe and Society for the Abolition of the Death Penalty in South Africa and Society for the Abolition of the Death Penalty in South Africa (intervening) v The Minister of Home Affairs and ors*, Judgment, 27682/10, ILDC 1782 (ZA 2011), 22nd September 2011, South Africa; Gauteng; Johannesburg; South Gauteng High Court [GPJ-HC]; see also the Supreme Court of Canada, *U.S. v. Burns* [2001] 1 S.C.R. 283, para 65.
[86] See R B Lillich, 'The Soering Case' (1991) 8571 *The American Journal of International Law* 128; S Breitenmoser and G E Wilms, 'Human Rights v. Extradition: The *Soering* Case' (1990) 11 *Michigan Journal of International Law* 845.
[87] Soering (n 85), paras 88 and 91 [own emphasis].

shown for believing in the existence of a real risk of treatment contrary to Article 3 (art. 3).'[88] The European Court of Human Rights has upheld and further clarified the extent and precise meaning of this obligation in numerous cases.

To begin with, it repeatedly emphasized the absolute character of Article 3 – neither national security interests nor the respective individual's character, past behavior, or criminal convictions play a role. As it was held in *Chahal*,

> [t]he prohibition provided by Article 3 (art. 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 (art. 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 (art. 3) is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees. […] there is no '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.'[89]

To put it in drastic terms: Not even actual or potential terrorists, rapists, or murderers can be deported if there is a serious risk of ill-treatment in the sense of Article 3 ECHR in the destination country.

In addition, the European Court of Human Rights does generally not distinguish between torture, inhuman, or degrading treatment. For example, in *Ahmed* it ruled that Austria could not deport the applicant 'for as long as he faces a serious risk of being subjected there to torture *or* inhuman *or* degrading treatment.'[90]

These terms are, however, not synonymous but refer to acts of different levels of intensity and negative impact on the affected individual. While torture is also inhumane and degrading, inhuman treatment is different from torture merely because it does not include purposes such as

[88] *Case of Cruz Varas and others v Sweden*, Application no 15576/89, 20 March 1991, para 75. In light of the improved political situation in Chile after the end of Pinochet's rule the European Court of Human Rights nevertheless did not find a violation of Article 3 (para 82). See also *Vilvarajah and Others v The United Kingdom*, Applications No 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, Judgment of 30 October 1991, paras 103-104.

[89] *Chahal v the United* Kingdom, Application no 22414/93, 15 November 1996, paras 80-81.

[90] *Ahmed v Austria*, Application no 25964/94, 17 December 1996, para 47.

extracting information or concessions. Inhuman treatment is nevertheless also degrading. Degrading treatment, then, focuses less on the physical or psychological pain but the intent to humiliate the victim.[91] A serious risk of the latter, which is the somewhat least harmful of the three types, is sufficient.

A rare example where the European Court of Human Rights determined that an act (only) constituted degrading treatment is the *Tyrer* case. It concerned the Isle of Man authorities' punishment method of 'birching', *ie* whipping of the buttocks of children and younger adults until the age of 17 in presence of a police officer, a doctor, and a parent (if the offender requested it). Mr Tyrer, then 15, reportedly was sore for about a week and a half.[92]

Lastly, Article 3 ECHR, as the ECHR in general, not only applies to individuals already present inside the territory of states but whenever the individuals are under factual control of states authorities. The European Court of Human Rights has thus also not only applied the non-refoulement principle to transit zones at airports[93] but also to pushbacks on the High Sea, *ie* the Mediterranean route – as it was held in Hirsi,[94] Italy could not simply search for migrant boats and take them back to Libya. On the one hand, Libya is not a member to the 1951 Refugee Convention and does not grant refugee status or another type of protection. On the other hand, there existed a risk of being arbitrarily repatriated to other unsafe countries (Eritrea and Somalia).

In sum, states are severely restricted when exercising their right 'to control the entry, residence and expulsion of aliens.'[95] One can even go as far as arguing that Article 3, along with Articles 8 (the right to private and family life) and 13 ECHR (the right to an effective remedy), ultimately amounts to a factual right to asylum.[96]

IV. Conclusion: A *de facto* Right to Asylum?

There is (still?) no universally accepted right to be granted asylum. States have merely recognized a right to *seek* asylum without a corresponding obligation to *grant* asylum. They are seemingly still not ready to accept such a far-reaching restriction of the sovereign right to control their territory. The current refugee and migration crisis has – similar to the persecution of

[91] See Commission on Human Rights, 'Civil and Political Rights, Including the Questions of Torture and Detention: Torture and Other Cruel, Inhuman or Degrading Treatment, Report on the Special Rapporteur on the Question of Torture, Manfred Nowak' (23 December 2005), UN Doc E/CN.4/2006/6, paras 34-41.
[92] *Tyrer v The United Kingdom*, Application no 5856/72, 25 April 1978, paras 10-12.
[93] *Amuur v France*, Application no 19776/92, 25 June 1996.
[94] *Hirsi Jamaa and others v Italy*, Application no 27765/09, 23 February 2012.
[95] *Moustaquim v Belgium*, Application no 12313/86, 18 February 1991, para 43.
[96] Einarsen (n 82).

Jews in Germany and elsewhere as well as the expulsions during and after the Second World War – not led to a fundamental change in this regard.

The principle of *non-refoulement* is and remains universally accepted: Refugees must not be forced to turn back at the border and thus ultimately return to the country where they are being persecuted. This obligation comes close to a (*de facto*) right to asylum.

Nevertheless, one should not forget the essential differences between these two concepts.

The non-refoulement principle predominantly applies to neighboring states. Countries farther away have more leeway when trying to prevent refugees from entering or staying in their territory, provided that they have found safety elsewhere and will not ultimately be transferred back to their home country.

Countries in general may also deport or expel them to other safe countries. Some have *eg* suggested to establish refugee camps run by the EU or EU countries outside of EU territories on the basis of an agreement with the respective state. Such a step could, in theory at least, be in conformity with international law: since the European Convention on Human Rights would be applicable, the EU and its member states would have to guarantee that no one would be subjected to torture, inhuman or degrading treatment – neither by EU officials themselves nor by any other private persons or organs of other states.

One decisive difference lies in the simple observation that refugees enjoy certain rights under the 1951 Refugee Convention which do not extend to persons 'tolerated' on the territory of a state because of the non-refoulement principle (or because deportations are temporally impossible for administrative reasons such as a lack of cooperation by the home country). The right to asylum goes beyond merely providing safety. States have to guarantee certain rights and should, ideally speaking, also foster integration and even naturalization. Tolerated persons, in turn, are expected to return to their home country as soon as the risk of persecution or mistreatment no longer exists.

In light of recent trends, a few words on the EU and its legislation concerning refugees seem warranted. At first sight, it seems as if the wording of Article 18 of its Charter of Fundamental Rights clearly enshrines an individual right to asylum. In addition, Article 13 of the 2011 Qualifications Directive stipulates that member states shall grant refugee status to those fulfilling the necessary preconditions. Yet, it seems questionable whether states have indeed accepted such a potentially far-reaching obligation.

While it may be argued that these two provisions indeed require states to grant asylum to all refugees entering their territory – if they are responsible to process their claims, however –, others say that Article 18 merely consolidates the EU's legal framework on asylum matters

while Article 13 of the Qualifications Directive only amounts to a plea without legal consequences. In this sense, states would only be 'called upon' to grant refugee status. In addition, Article 13 does not refer to an obligation to recognize someone as a refugee in the sense of the Refugee Convention (along with the corresponding rights). Similar, but not identical concepts. The devil is in the details.

With all that being said, one should not forget the practical aspect of such deliberations. Even if one came to the conclusion that the EU guarantees an individual right to asylum, however, the recent trend to 'outsource' the dirty work of preventing asylum seekers from reaching Europe's border to oppressive transit countries or even militias (as in Libya) bears witness of its member states' decreased readiness to put words into deeds.