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Does the European Union Differentiate Among Human Rights?
The Example of Persons Seeking Protection in the European Union
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Summary:
One of the most significant challenges the European Union faces today in the field of human rights is the issue of refugees from outside the EU. The EU is adherent to a number of relevant international treaties and most importantly has the Charter of Fundamental Rights as a primary Union law. Nevertheless, the requirements that have to be complied with are interpreted differently throughout the Union. Recent events also demonstrate that the relevant EU authorities are most of the times in favour of refusing refugees. These restrictions are said to apply for the benefit of EU citizens. Does it mean then that EU citizens deserve a higher level of protection of their right to mental and physical integrity than third-country nationals? The following paper attempts to give an answer to this and other questions by elaborating on the relevant legal background in the Union and examining the most recent events of this kind.

Keywords: EU Refugee Law, EU Immigration Policy, Asylum System of the EU, Human Rights.

Dělá Evropská unie rozdíl mezi lidskými právy?
Příklad osob hledajících ochranu v Evropské unii
Anna Krisztian (anna.krisztian@gmail.com)

Abstrakt:
Jednou z nejvýznamnějších výzev, kterým v současné době čelí Evropská unie na poli lidských práv, je problém uprchlíků ze zemí mimo EU. Ta je vázána mnoha příslušnými mezinárodními smlouvami a hlavně má Chartu základních práv jako primární unijní právo. Požadavky, kterým musí být vyhověno, se nicméně interpretují v jednotlivých státech Unie rozdílně. Nedávné události také ukazují, že odpovídající orgány EU se většinou kloní k odmítání uprchlíků, což je interpretováno jako výhoda pro občany EU. Znamená to tedy, že občané EU si zaslouží vyšší úroveň ochrany práva k mentální a fyzické integritě než občané třetích zemí? Následující příspěvek se pokouší odpovědět na tuto a další otázky tím, že zpracovává příslušný právní rámec EU a zkoumá nejnovější události, k nimž došlo v této problematice.

JEL: K00

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Introduction

In 2010 around 20.1 million non-EU citizens lived on the territory of the European Union, constituting roughly 4 percent of its total population. A year before, alone, more than 770,000 persons acquired an EU-citizenship. As the European Commission's Annual Report on Immigration and Asylum of 2010 states, "the contribution of immigrants to the EU economies has been substantial" (COM(2011) 291 final: 2). It is important to note, however, that European economies not only took advantage of the immigrant workforce in the past. As the Europe 2020 Strategy also foresees, third-country nationals' share will be inevitable for sustaining economic recovery and maintaining Europe's welfare systems. (COM(2011) 291 final: 2) That is, legal immigration should be fostered in order to ensure a sound European economic system. Two straightforward examples for this effort are the Blue Card Directive (Council Directive 2009/50/EC) and the proposal for the Single Permit (COM(2007) 638 final). As it is obvious from these very basic facts, the issue of immigration is a significant one in economic terms, that is, its subjects are more than welcome in the Union. Nevertheless, and in spite of this claim, this paper does not deal with the economic impacts of the inflow of third-country nationals, but takes a critical viewpoint on the legal matters of it. More precisely, the following paper examines the problem of illegally entering and staying third-country nationals in the European Union regarding their most fundamental rights, and attempts to give an answer to the question posed in the title, that is, if the European Union, the most advanced cooperation form of nations of our times, differentiates among human rights. Accordingly, my hypothesis is that the EU's immigration policy and asylum system are such that in certain cases they violate the most basic human rights of persons seeking protection in the EU from threats in their own countries, claiming that it is in the very interest of its (the EU's) population. The problem rephrased therefore is whether the EU curtails the rights of certain non-EU citizens in defence of the rights of its own citizens.

For the sake of drawing a conclusion, the following methodology will be applied. First, the relationship between human rights and the rights of asylum-seekers is going to be analysed in detail. Second, the international legal framework, with emphasis on the European Union's relevant legislation, will be discussed. In this respect, the linked principles of refugee law (among others the principle of *non-refoulement*, that of the safe third country, and the first country of asylum) will be placed in a European context.[1] The provision of universal and inalienable human rights by EU organs is going to be assessed throughout the three stages of seeking and (not) finding asylum: the entering of the European Union, a shorter or longer stay on its territory including potential detention, and

[1] Please note that related EU directives will be evoked in the relevant chapters of this essay.

finally the rejection of the application of asylum. Regarding the consideration of granting asylum, the topics of mass influx of displaced persons (as an event constituting an emergency situation) will be examined in detail given its alarming character with regards to human rights considerations.

There are a few issues though that may be considered relevant but are not going to be discussed here given the constraints of this paper. These are the following: Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings (being only indirectly connected to the topic since victims of trafficking in human beings do not voluntarily leave their home country, while asylum-seekers more or less do it on a kind of voluntary basis), Directive 2009/52/EC of the European Parliament and of the Council of 30 June 2009 on sanctions against employers of illegally staying third-country nationals (since this directive is not relevant to the violation of human rights of persons seeking protection by EU institutions), Council Directive 2003/109/EC of 25 November 2003 on the status of third-country nationals who are long-term residents (same reason), and Council Directive 2009/50/EC of 25 May 2009 on the highly qualified employment of third-country nationals (which is not an issue of international protection in this respect).

Last but not least, a statement has to be made concerning the research question of this paper. In spite of its critical approach, this paper is not meant to convey a general negative opinion of the European Union. In contrast, it makes an effort to highlight the possible weaknesses of the asylum system of the EU in matters of the universality of human rights, in order to contribute to its development in a very modest way. That is to say that the achievements of the European Union are hereby acknowledged. As far as the country-specific examples are considered, it should be noted that it does not aim at placing the blame on certain Member States, but at illustrating the problem with cases that – though they occur on the territory of a certain country – are common ones at the Community level. Therefore my opinion is that the solution and its implementation should also come about at the level of the European Union.

1. Legal Background

According to Manfred Nowak, former UN Special Rapporteur on torture, human rights are "legal claims whereby human beings are empowered to live in accordance with the principles of freedom, equality and human dignity" (Nowak 2003: 2). The essence of human rights can be and has been summarised in many ways by experts of the field, nevertheless the above definition is applied in this essay, since it expresses the most important aspects of possible human rights violations in international protection matters very clearly. Naturally, not all

rights of persons are considered human rights, only the fundamental ones that every person shall enjoy. The question therefore arises: how are the rights of asylum-seekers related to human rights? To start with, the most significant values of human rights should be taken into consideration. That is, their indivisibility, interdependence and universality. These inalienable rights are such that cannot be taken away from a person – not even in cases of emergency. That is, these basic rights are to be respected in the event of protection-seeking too[2]. So in what way does a foreign country get involved in national law matters? It is rather simple: since refugees by definition lack the protection of their country of origin, either because of the lack of will or ability of their home country, diplomatic intervention in their interest is not likely to occur abroad. Therefore, international organisations need to undertake this task under their own auspices – generally, the UNHCR – which will represent the interests of the refugee. This is an essential aspect of international refugee protection (Hathaway 2005: 193). At the EU's level, these obligations mean that when a person seeks protection at the border of the Union, the EU is required to provide this person with the opportunity to file an asylum claim, and consider the claim objectively and individually. Of course, during this procedure, the fundamental rights of the person shall not be violated. That is, as Council Directive 2003/9/EC points out "a dignified standard of living and comparable living conditions in all Member States" should be ensured (Council Directive 2003/9/EC Recital (7)). Nevertheless, responsible authorities not always comply with this directive, and blame it on the limits of capacities and resources. To legitimise some of these statements, the Council has adopted a directive on the minimum standards for giving temporary protection in the event of mass influx of displaced persons and on the measures promoting a balance of efforts between Member States (Council Directive 2001/55/EC). This directive somewhat limits the obligation of EU authorities to ensure the protection of fundamental rights of asylum-seekers. Several other examples of this kind could be mentioned; however, at this point my aim only was to lighten the relationship between human rights and the rights of asylum-seekers, which is the fundament of the problem this paper examines.

Once the relation of human rights to the rights of refugees seeking protection in the EU has been discussed, a closer look should be taken on the international legal framework the EU is surrounded by. Today's European Union is adherent to a number of international treaties and bound by internal legislation in the field of human rights. The most basic documents in this regard are the following. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on

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[2] Human dignity, as the EU Network of Independent Experts on Fundamental Rights interprets it, is not bound with other rights, for instance the right to freedom and integrity (EU Network of Independent Experts on Fundamental Rights 2006: 25).

Economic, Social and Political Rights. Then, the European Convention on Human Rights and Fundamental Freedoms, has, according to Hailbronner, gained particular importance in procedural matters, especially regarding the Asylum Policy Directive, in spite of the fact that the ECHR does not contain a provision of the examination of asylum claims. Nevertheless, the European Court of Human Rights interpreted Article 3 in a way that prohibits the refoulement by the relevant authorities of persons facing a serious risk of being tortured or treated in an inhumane or a degrading way in his/her country of origin. Moreover, Article 13 "grants a right to an effective remedy before a national authority to everyone whose rights and freedoms as set forth in this Convention are violated" (Hailbronner 2010: 16). Then, the Charter of Fundamental Rights of the European Union, which became part of primary Union law at the level of treaty law with the entry into force of the Lisbon Treaty binding EU legislators and Member States in their implementation of EU law (Hailbronner 2010: 18), and thus being the most important treaty in this respect, reinforces the European Union's commitment to the fundamental values of human rights the Universal Declaration stated, as "the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity," and the "enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations" (Preamble of the named Charter). In the case of asylum-seekers, the most relevant articles of the Charter are Article 3: Right to the integrity of the person, and Article 6: Right to liberty and security implicitly; Article 18: Right to asylum and Article 19: Protection in the event of removal, expulsion or extradition explicitly. Article 18 guarantees the right to asylum "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." However, according to Hailbronner, it is doubtful if this provision creates an individual right to asylum, since it is necessary to distinguish between a refugee's claim to asylum (which right is thereby guaranteed) and the obligation to grant asylum, which the Charter does not provide (Hailbronner 2010: 19). Concerning the Article on the protection in the event of removal, expulsion or extradition, Article 19(2) is of special significance, since it eventually deals with the principle of *non-refoulement*. According to this principle, no one may be expelled to a state where there is a serious risk of the persons' suffering from torture, inhumane or degrading treatment or punishment (including death penalty). This principle is a universally accepted one; still it is subject to varying interpretations even within the European Union when it comes to its application in practice. The UNHCR suggested a solution to this problem in its initial phase, which is as follows. "Every refugee is, initially, also an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of *non-refoulement* would not provide effective protection for refugees, because applicant might be rejected at border or otherwise returned to persecution on the grounds that their

claim had not been established" (UNCHR "Note on International Protection," UN Doc.A/AC.96/815 (1993), at par. 11 via Hathaway 2005: 159). Nevertheless, not only treaty law should be considered in the field of human rights and refugee law, but the case law of the Court of Justice of the European Union and that of the European Court of Human Rights too. Also, the activities of the European Commission and the High Commissioner for Human Rights are noteworthy. (The institutional framework as such is not dealt with in this paper.)

Turning to refugee law specifically, the two primary sources of the universal rights of refugees today are the general standards of international human rights law, and the 1951 Geneva Convention and 1967 Protocol Relating to the Status of Refugees (Hathaway 2005: 154). The latter is not, however often considered to be, an amendment to the former. It is rather a treaty that "incorporates the Refugee Convention's rights regime by reference, and extends those protections to all refugees by prospectively eliminating the Convention's temporal and geographical limitations […]" (Hathaway 2005: 111). It is commonly believed that in the international human rights regime – concerning the rights of refugees – only Articles 31, 32 and 33, that is, the principles of *non-refoulement*, non-expulsion and non-penalisation have received any attention.

Migration policy in the European Union is a relatively new policy area, since at the European level it happened first in 1999 that an agreement on the creation of a common migration policy was reached. In order to discuss the contemporary policy, a great leap has to be taken forward in time. In 2009 the Council of the European Union adopted the so-called Stockholm Programme for the time interval 2010–2014 (Official Journal of the European Union 2010/C 115/01), which should provide the grounds for a forward-looking and comprehensive European migration policy, to be based on solidarity and responsibility. An important issue to point out is the subject of the document: "Stockholm Programme – An open and secure Europe serving and protecting the citizens." That is, first, Europe should be safe from external threats, second, be able to protect its citizens from such threats, which is an indirect reference to, among others, illegal immigration, which is highlighted at several points in the document, emphasising that illegal immigration is connected with cross-border crime and terrorism. In my opinion this is not the case in general, since many displaced persons who should be recognised as refugees under Article 1 of 1951 Geneva Convention on the Status of Refugees (to which treaty the EU is adherent to) are not granted international protection, therefore their only way to escape persecution in their home countries is to enter the European Union illegally. Once a person enters the EU illegally, he/she will automatically be considered a threat to the security of the EU, even though regulations in force make it clear, that no one shall be punished for the sole reason of entering the Union illegally. Still, these persons are held in detention centres where they often face hardships in trying to file a claim for asylum, or are discouraged to do

so by competent authorities (the following chapter deals with this issue in detail). These persons' arrest and detention is made lawful by the European Convention on Human Rights, namely by Article 5(1)(f) in case the person tries to enter a country unauthorised, or in case an action is being taken against the person with a view to deportation or extradition. However, not only the European Convention on Human Rights does not grant a right of aliens to enter another country and reside there, but nor does the Charter of Fundamental Rights of the European Union (EU Network of Independent Experts on Fundamental Rights 2006: 73). Nevertheless, both treaties provide room for the international protection of recognised refugees. The problem herein is the differentiation between persons entitled to protection and other, illegally entering aliens[3]. These kinds of procedures are therefore exposed to actual political considerations, which is a clear threat to the respecting of human rights of non-EU citizens. This observation is supported by the above mentioned Networks' comment on this issue: "Although these aliens constitute one of the largest groups of detainees in present day Europe, only relatively few cases have been brought to the European Court of Human Rights in relation to Article 5(1)(f)" (EU Network of Independent Experts on Fundamental Rights 2006: 73).

Another important aspect of the Stockholm Programme is the provision for an external dimension of asylum. This field of European asylum policy is a positive development compared to earlier years, since it recognises the need of cooperation with countries with great numbers of refugee population. This way it becomes possible to facilitate the improvement of conditions in the countries of origin, which would definitely be a relief to the EU's capacities. However, the rightfulness of this kind of cooperation with countries of origin where asylum-seekers are refugees of their government is doubtful, since in such cases the interest of refugees is definitely not to remain on the territory of their own countries, even if the government is willing to cooperate in holding its nationals back. At this point, however, it should be emphasised that no political asylum-seekers are taken into consideration in this respect. It is well-known that according to certain concepts, political asylum-seekers are not included within the group of persons who are entitled to *non-refoulement*. Given the constraints of this paper, the varying interpretations of this question are not discussed here. The essence of my argumentation lies simply in the fact, that the facilitation of non-leaving their own country may not be in the best interest of the refugees concerned. Turning back to the EU's immigration policy, security still remains the most important aspect of it, which is clear from the political priority stated

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[3] As the UNHCR observes, "it frequently occurs that the necessary distinction is not made either in law or in administrative practice between asylum-seekers and ordinary aliens seeking to enter the territory. The absence of such a distinction may, and in many cases does, lead to asylum-seekers being punished and detained for illegal entry in the same manner as illegal aliens" (via Hathaway 2005: 370).

in the Stockholm Programme, which is "to ensure respect for fundamental freedoms and integrity while guaranteeing security in Europe" (Council of the EU 17024/09: 3). A similar idea is the so-called EU Global Approach to Migration which makes the EU's migration policy an integral part of the EU's external policy by creating the balance between the promotion of mobility and legal migration; the optimisation of the link between migration and development; and the controlling of illegal immigration (Council of the EU 17024/09: 60). An important aspect of the Global Approach is the continuation of Resettlement Programmes, which are going to be analysed in detail later in this paper. Nevertheless, in spite of the above illustrated approaches and efforts, and despite the fact that the entry into force of the Lisbon Treaty was supposed to simplify the process, the European Commission observed in its Annual Report on Immigration and Asylum that "legislative progress was slow and difficult in the field of asylum in 2010" (COM(2011) 291 final: 5).

Having examined the framework of regulations concerning human rights and the rights of asylum-seekers within the European Union in general, the analysis should be focused on selected features and challenges of finding refuge in the Community. First, the main idea is to distinguish among the rights gained by refugees according to their level of attachment to the asylum state. The following discussion is based on Hathaway's classification. Every refugee has a few core rights, and can acquire additional entitlements depending on the nature and duration of his/her attachment to the host state. The refugee is entitled to the most basic set of rights as soon as he/she comes under the given state's *de iure* or de facto jurisdiction. These rights generally include the freedom of religion, freedom from penalisation for illegal entry, and the right to be subject to only necessary and justifiable constraints on freedom of movement (Refugee Convention Articles 4, 27, 31(1), 31(2)). The second step applies when the refugee is physically present in the state's territory, then when he/she is lawfully present[4] within the state's territory. His/her rights include at this stage the right to be protected from expulsion, enjoy a more generous guarantee of internal freedom of movement, and engage in self-employment. The fourth set of rights is gained by lawfully staying in state territory. Rights at this stage include the freedom of association, the right to engage in wage-earning employment, access to public housing, intellectual property rights, and entitlement to travel documentation. (The relevant Refugee Convention Articles are Articles 14, 15, 17, 19, 21, 23, 24, 28). Finally a few entitlements can only be acquired upon the satisfaction of a durable residency requirement. These rights include the entitlement to benefit from legal aid systems, and to receive national treatment in regard to the posting of security for costs in a court proceeding. Following from this classification, the nature of the refugee's attachment to the

[4] Lawful presence means that the displaced person has already applied for asylum but has not received a decision on it yet (i.e. was not rejected either).

asylum state must be defined before a given right can be claimed by him/her. It is also noteworthy that this system of attachment to the host state is incremental, that is, "the rights once acquired are retained for the duration of the refugee status" (Hathaway 2005: 154–156, 174–190).

The next step in taking a closer look at the main concerns of finding refuge in the European Union is to examine the necessities of asylum-seekers during the legal procedure deciding on their entitlement to gain asylum in the given Member State. Firstly, persons in general are allowed to enter and stay in the territory of a country until and unless they are found not to be Convention refugees. Regarding the refugee, the source of insecurity in this respect is that the decision if a person is a Convention refugee or not is subject to varying interpretations by authorities. Just to mention a rather straightforward example, the principle of a safe third country is measure that can be abused (even by the relevant institutions of the European Union) with the aim of artificially decreasing the number of non-EU citizens for whom the EU would otherwise be responsible for granting international protection. Nevertheless, EU law has it that no one should be detained or otherwise penalised for the sole reason of seeking protection in the Union. Moreover, as soon as an asylum-seeker arrives at the EU's external border or in the territory of a Member State, the Union is responsible for granting the fundamental rights of refugees, and for satisfying the most basic needs of the persons involved. That is, the person has to be informed about their rights during the procedure, its expected duration; refugees have to be "assured protection of their family life" (Article 14(2)(a) of Council Directive 2003/9/EC), the possibility to communicate with relatives, legal advisers and representatives of the UNHCR and other international organisations and NGOs recognised by the state (Article 14(2)(b) of Council Directive 2003/9/EC), and their freedom of thought and religion must be respected, meaning that the basic human dignity of the person has to be protected and promoted. Member States have to "ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence" (Article 13(2) of Council Directive 2003/9/EC), in economic terms also, as well as housing, and education for children. As a matter of course, the applicant needs to be provided "with a document issued in his or her own name certifying his or her status as an asylum seeker or testifying that he or she is allowed to stay in the territory of the Member State while his or her application is pending or being examined" (Article 6(1) of Council Directive 2003/9/EC). Finally, third-country nationals seeking protection have to have access to effective remedy against a negative decision on their application for asylum (Article 21 of Council Directive 2003/9/EC). In this respect it is important to highlight the "aliens generally standard," which is laid down by Article 7(1) of the Refugee Convention. According to this article, there is a prohibition of discrimination between and among refugees. However, as Hathaway points out, "despite its [the provision's] value to counter some types of differential treatment, non-discrimination law has not yet evolved to the point that refugees and other non-

citizens can safely assume that it will provide a sufficient answer to the failure to grant them rights on par with citizens" (Hathaway 2005: 238). As the following chapter illustrates through the example of refugees arriving at the EU's border at Greece, this is a real challenge, since the differentiation among the rights of protection-seekers by the Member State's authorities is more than striking.

2. Practical Implications of In Force Regulations in the European Union

2.1 Entering the Territory of the European Union

The statement of the European Commission on the entry of non-EU citizens into the European Community published in its 2010 Annual Report on Immigration and Asylum summarises the core of the problem discussed very well. The statement sounds: "the channel which a third country national enters the EU will have a direct effect on the rights he or she enjoys" (COM(2011) 291 final: 1). Before going into details on the legal paradox of this issue, let us consider a few basic data that helps placing the topic into context. In 2009, 2 million first residence permits were granted to third-country nationals; 24% for enumerated activities, 27% for family reasons, 22% for study, and 27% for various other reasons (for instance protection-related reasons, residence without the right to work). The most dominant countries of origin – considering the number its nationals asking for asylum – were Afghanistan, Russia, Serbia excluding Kosovo, Iraq and Somalia (COM(2011) 291 final: 5). The countries named are noteworthy. Even though they are not considered to be economically very developed, they are even better known for their political instability. Consequently it is reasonable to assume that most of the persons fleeing these countries are refugees, and leave for the European Union in search for international protection. Still, much less refugees actually file a claim for asylum. In 2009, the number of asylum applications was 266,400, in 2010 it was merely 257,815. That is, in contrast to the previous assumption, not all persons looking for protection eventually do so in the legal sense of the word. One of the reasons may be the fact that refugees in detention centres on the territory of the EU (in our example illustrated below; in Greece) are held under such inhumane and degrading conditions that they wish to leave those facilities as soon as possible. As is often the case, local authorities inform them that in case of filing a claim for asylum, the procedure will get longer, therefore the detainees have to remain on the premises for an even longer time than otherwise.

Even though the fact if the entry to EU territory was legal or illegal is determinant, it has been agreed at the international level that any unauthorised refugee (whether already in the territory of a Member State or seeking entry to it) would benefit from the protection guaranteed by the Refugee Convention. Nevertheless, these refugees would not enjoy immediately all the rights of the "regularly admitted" refugees (those who were pre-authorised to enter), but

would acquire additional rights as soon as their legal status of refugee is consolidated (Hathaway 2005: 157). This is of crucial importance, given the argumentation in the previous chapter, that is, since third-country nationals entering the Community illegally may be in even more urgent need for protection than those whose entry was pre-authorised. A similar concern is expressed by Hailbronner. According to his reasoning, strict external border controls "can be particularly harsh on persons seeking international protection" (Hailbronner 2010: 106). It is essential that third-country nationals reaching the border of a Member State are provided with the opportunity to seek international protection in the European Union, consequently their application must be examined objectively and individually in order to make sure that no one is returned to a country where there is a high risk of being persecuted (which is basically the prohibition of *refoulement* that is considered to be a rule of *ius cogens*) (Hailbronner 2010: 106). The special measures that should be applied in case of illegal entry into the EU are laid down mainly in Regulation (EC) No. 562/2006. Regarding the necessity of treating displaced persons with special care under international legal standards of protection, respecting the principle of *non-refoulement*, Recital (20) and Article 3(b) are noteworthy. According to the latter one, the regulation should be applied to any person without prejudice to the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*. Article 4(3) deals with the penalisation of unauthorised crossings of the external border at places other than border crossing points or at times other than fixed opening hours. According to Hailbronner's interpretation, this imposition of penalties is without prejudice to the prohibition of such criminal penalties for refugees under Article 31 of the Refugee Convention for the sole reason of their illegal presence or entry, provided that they show good cause and that they present themselves to the authorities without delay (Hailbronner 2010: 106). It is possible to derogate from the provisions of Article 5(1) which lays down the basic requirements of allowing a third-country national into the territory of the EU on grounds of international obligations or on humanitarian reasons, as stated in Article 5(4)(c). However, if entry conditions stated in Article 5(1) are not satisfied, and a derogation according to Article 5(4)(c) is not possible, the person concerned should be refused to enter the territory of a Member State, without prejudice to the applications of special provisions concerning the right to asylum and to international protection (Hailbronner 2010: 107). As far as the treatment of asylum seekers at external borders is concerned, the Schengen Handbook (C(2006) 5186 final) gives a detailed description on the methods of the obligatory assessment of all applications for international protection (which can be ensured either by assessing the claim right at the border, or sending the asylum-seeker to the Member State concerned, which, coupled with the principle of *non-refoulement*, leads to the de facto obligation of the state to allow entry into its territory), including that any behaviour or expression of fear when return to country of origin is mentioned shall be considered as an application for international protection. As soon as the asylum-seeker enters the territory of

the EU, Article 7(1) of the Directive 2005/85 provides him or her with the right to remain within the territory of that state during the examination of his application, however, not during a possible appeals procedure.

Nevertheless, states often find ways to prohibit the entry or to turn down the application for asylum of third-country nationals. It is not only the above mentioned problem of abusing the principle of a safe third country. The following argumentation of Hathaway sheds light to another source of inefficiency. According to him, the duty of *non-refoulement* is not the same as the right to asylum from persecution, since it is only a measure against refugees being pushed backed to their country of origin, and it does not establish explicitly the duty of states to receive refugees. Consequently states may deny entry as long as there is no real chance that their refusal will end up in the return of the refugee to a country where he/she faces the risk of persecution (Hathaway 2005: 301). A striking example of this consideration on behalf of the Member States is the measures taken against boats loaded with refugees from North-Africa trying to land on EU territory, where they are physically not let to approach the mainland (in case of Italy for example). Taking advantage of all these more or less legalised considerations (which are in the end derogation from EU law and ideology), Member States prevent refugees from entering their territory. This way they will not be responsible for examining the case of displaced persons and for offering protection according to their international commitments, and still not violate the principle of *non-refoulement*, and do not even have to apply the safe third-country principle to their own benefit. Meanwhile refugees staying on overloaded boats without any kind of satisfaction of their necessities die in the high seas, since they cannot turn back to their country of origin and gain no access to the European Union, either.[5]

Nevertheless, these kinds of physical protection of the external borders of the EU are still less common than the adoption of more or less invisible, so-called *non-entrée* policies[6]. The mechanisms of these legal norms are such that prevent refugees from reaching the point where they would be able to file their application for asylum. A classic form of *non-entrée* policies is the visa requirement. It goes without saying that in most of the cases, refugees are not able to fulfil the visa requirements imposed on them. Another mechanism of *non-entrée* is the "deportation chain" which is the result of the combination of the

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5 Reaching out of state territory for example to high seas with the consideration of preventing asylum-seekers from entering a Member State's territory is a legally unjustifiable act, since even though Article 33(1) in consistency with Article 33(2) of the Refugee Convention enables states to reject refugees on national security grounds where the person's presence or actions constitute a threat to the host state's most basic interests, asylum-seekers not yet in the territory of the state can hardly be considered to belong to this group of persons (Hathaway 2005: 336).

6 "*Non-entrée* is a term coined to describe the array of legalized policies adopted by states to stymie access by refugees to their territories" (Hathaway 2005: 291).

principles of first country of asylum and that of the safe third country. The principle of first country of arrival is one of the major achievements of the Dublin II Regulation, which replaces the provisions of the 1990 Dublin Convention. The Dublin II Regulation deals with determining the Member State responsible for the examination of the application for asylum as soon as possible, and the possibility of preventing the abuse of the asylum system by multiple applications. The principle of first country of arrival is therefore of relevance, since it provides the Member States with the opportunity to reject the jurisdiction over the given asylum case given that the refugee entered the EU at the border of another country, that is, the responsibility to examine the application shifts to that country, according to EU legislation in force. The first country of arrival then often considers the refugee to have come from a safe third country, so it turns down the application supported by the reasoning that there is apparently no risk the displaced person would face if he/she was returned to his/her country of origin. Hathaway considers the safe third country as a separate form of *non-entrée* policies (Hathaway 2005: 296). Connected to the safe country of origin rule, as it has been discussed earlier, refugees are often assumed not to be refugees according to Article 1 of the 1951 Geneva Convention, which considerably shortens the process for Member States. It is important to note, however, that in certain cases, the failure to recognise someone as a refugee is not a result of an intentional act, but that of the differing interpretations among Member States. In my opinion the EU still has not reached a consensus on definitions and classifications in certain fields, such as refugee law[7]. Nevertheless, this measure can also be considered as a *non-entrée* policy. As Hathaway points out, *non-entrée* policies have reached new heights in recent years, as states are now prepared to declare parts of their territory to be outside their state's territory (i.e. its jurisdiction), and so to avoid being responsible for offering protection to displaced persons to be found there. A representative example is the creation of "international zones" in airports, where neither domestic, nor international law is said to apply. According to Hathaway, states like France expelled persons in masses from such zones without any examination of their cases (Hathaway 2005: 298). He also lists a few more possible forms of *non-entrée* policies: blunt push backs from a state's territory (for instance as part of a generalised border closure), mass removal policies, removal by non-state agents tolerated or acting with the encouragement of states, and forced returns under the pretext of "voluntary" repatriation (Hathaway 2005: 299–300).

Though the qualified duty of Member States during the mass influx of displaced persons is not a form of *non-entrée* policy in the strict sense of the word, it should

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[7] This observation of mine is indirectly reflected by the opinion of Human Rights Watch, stating that though "the EU is moving towards a common European asylum system with a harmonized refugee definition and procedures […], implementation still lags behind formal harmonization" (Human Rights Watch 2011: 16).

be discussed in relation to it. In 2001, the Council adopted Directive 2001/55/EC on the minimum standards for giving temporary protection in the event of mass influx of displaced persons and on measures promoting balance of efforts between Member States in receiving such persons[8]. This directive is of exceptional importance since it justifies that in "emergency situations" such as in cases of mass inflow of irregular migrants, certain derogations can be made from the minimum standards of receiving asylum-seekers in ordinary conditions. Though the document foresees that the principle of *non-refoulement* may be violated only in truly exceptional cases, for instance when the most basic national interests of the host state are endangered, the provision that it can be derogated from when the Members State may not expect any assistance from other Member States in a reasonable timeframe is alarming. The fact that good faith is required on behalf of the country of destination is not an effective measure of discouraging states to take advantage of it, either. The directive provides for a temporary protection of refugees that is one year under ordinary circumstances, and can be subject to prolongation (up to two years, or in very extreme cases, beyond two years). As other relevant regulations, this one too encourages Member States to act in accordance with averting the risk of secondary movements. Persons receiving protection shall gain residence permit for the whole duration of their stay (Article 8(1)), and formalities must be reduced to a minimum given the urgency of the situation (Article 8(3)). Family unity should be preserved (Article 15), and appropriate accommodation and the necessary assistance in terms of social welfare and means of subsistence are to be granted (Article 13), however, the directive provides room for excluding certain persons from these entitlements (Recital 22). Chapter V of the directive deals with the "Return and measures after temporary protection has ended."Articles 20 and 22 of Chapter V highlight the obligation on behalf of the Member States to respect human dignity in cases of voluntary return and enforced return of persons who no longer enjoy protection on the territory of the EU. Chapter 2.3 of this paper deals with repatriation of refugees in detail.

2.2 Temporary and Permanent Residence of Refugees in the European Union

The following chapter discusses questions of the second and third stages of the application process regarding refugees, that is, the problem of short term residence on the territory of the EU while awaiting access to the filing of claims or the decision on the application handed in before; and briefly the possibilities of refugees after they have been granted asylum. In 2009, the number of illegally staying nationals on EU territory was roughly 570,000. At the same year, around

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[8] "'Mass influx' means arrival in the Community of a large number of displaced persons, who come from a specific country or geographical area, whether their arrival in the Community was spontaneous or aided, for example through an evacuation programme" (Article 2(d) of Council Directive 2001/55/EC).

253,000 displaced persons were returned by Member States. In 2010, 55,095 asylum-seekers received a protection status in the EU at first instance. As the EU Commission put it, "protection was therefore granted in 25% of decisions taken in first-instance procedures" (COM(2011) 291 final: 5). This is not a significant percentage, but human rights violations not only occur in the context of repatriation, but also during detention. Shortly, the fundamental rights of persons waiting for the end of a procedure will be introduced, in order to see what kind of violations are typical during detention.

Persons seeking protection who have entered the territory of a Member State have the right to remain therein during the examination of the application, but not during an appeal procedure (Article 7(1) of Council Directive 2005/85). It has been discussed before, but needs to be referred back to at this point, that the distinction between asylum-seekers and ordinary aliens is not always done properly, often leading to refugees being punished and detained for illegal entry in the same way as illegal aliens. Even though no one shall be punished for the sole reason of entering the territory of the EU illegally (if this act was of grounded fear), such persons can be restricted in their freedom of movement (so-called provisional detention). Hathaway very clearly summarises the rights that shall be granted for persons awaiting international protection: the right to physical security (right to life, freedom from torture, cruel, inhumane or degrading treatment), right to the necessities of life (freedom from deprivation, access to food and shelter, access to healthcare), property rights (movable and immovable property rights, tax equity), family unity, freedom of thought, conscience, religion; the right to education, the right to documentation of identity and status, and the right to judicial and administrative assistance. These fundamental rights of asylum-seekers are derived from the 1951 Geneva Convention and its 1967 Protocol, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Political Rights, among relevant EU legislation of course. As the following example attempts to illustrate, the respect of these fundamental rights of persons in need for international protection is not unambiguous.

In 2010 around 63% of all illegal border-crossings into the EU happened at the Greek-Turkish border (COM(2011) 291 final: 7), but this number was much higher in other years. That is why the Commission deliberately foresaw the reinforcement of the external borders, especially at its southern maritime and eastern land borders (COM(2011) 291 final: 9). This step aims at fighting illegal immigration and cross-border crime. This communication also highlights that the European Union has faced critical situations at its borders when confronted with mass inflows of irregular immigrants. Recent experiences of this kind led to the foundation of Frontex, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU, by Council Regulation (EC) No 2007/2004 Oct 26 2004. As the document points out, Frontex is neither a policy-making nor an enforcement body, but

a platform for cooperation between EU Member States on issues of border enforcement. Operations are always meant to be led by the host state, while the research, surveillance and coordination part is undertaken by Frontex. Nevertheless, as Human Rights Watch observed, the organisation "quickly developed into a powerful actor that plays a key role in enforcing EU immigration," despite the fact that "FRONTEX has insisted it is less 'actor' than 'coordinator'" (Human Rights Watch 2011: 11). Anyhow, it is noteworthy that Frontex had a budget of € 6.2 million in 2004, while this number increased to € 88 million by the year 2010. The urgent situation at the EU's border contributed to the creation of RABIT, the Rapid Border Intervention Teams, under the auspices of Frontex. "The basic idea of Rapid Border Intervention Teams was to create such a mechanism that could allow, in case of urgent and exceptional migratory pressure, rapid deployment of border guards on a European level" (Frontex Press Kit 2010: 1). The organisation – being an EU organisation – is bound by relevant Union law, the Charter of Fundamental Rights of the EU and international law including the Geneva Convention. Still, as Human Rights Watch put it, "there is a legal paradox at the heart of FRONTEX's legal existence" (Human Rights Watch 2011: 13). Though a code of conduct exists that tries to keep the organisation's acts in track, the consequence of non-compliance is not dealt with, leaving an accountability gap behind. Also, Frontex was not created in the spirit of protecting fundamental rights of asylum-seekers, but on the contrary. As a consequence of observed violations, an agreement was signed between Frontex and the Fundamental Rights Agency in 2010. The Fundamental Rights Agency was entrusted with a mandate to support Frontex by consulting in human rights matters, and provide guidelines on respecting them during deportations, so to contribute to the proper handling of fundamental rights of refugees by the organisation. Even though the Fundamental Rights Officer was given similar responsibilities, it has no authorisation to take enforcement action when human rights violations occur during Frontex operations. Still, the Frontex Fundamental Rights Strategy was created in March 2011 for the sake of promoting a concerted action respecting the rights of refugees. Nevertheless, Human Rights Watch, Amnesty International[9] and a number of other NGOs observed serious violations of fundamental rights regarding the barring of entry into the EU, detentions and deportations. A few features of these violations are going to be illustrated as follows, in order to get a general picture on the scope of the problem. These observations were taken in detention centres in Greece (the Member State most affected by illegal immigration at land borders). Even though the application procedure for asylum should be transparent in the EU, detainees often face

[9] See for example Amnesty International's Public Statements titled "Greece must urgently remedy deplorable detention conditions" and "The European Court of Human Rights vindicates the rights of asylum-seekers in the EU;" and its briefing on Greek asylum law titled "Greece – Briefing on the draft law of asylum, migration-related detention and returns of third country nationals."

hardships when trying to file an asylum claim to responsible local authorities. Refugees seeking protection held in detention centres also expressed fear that in case an application for asylum is handed in, the duration of the detention will increase incredibly, under conditions that were almost unbearable for persons. Detainees are often ill-informed regarding their rights and possibilities. One especially striking example is the message that it is impossible to receive refugee status in Greece. As it has been discussed before, the "aliens generally" principle forbids discrimination among refugees. Still this is the case in Greece, where the state signed bilateral treaties with certain countries prohibiting the deportation of its citizens from the territory of Greece. In this way the nationality of refugees seemed to determine the length of the detention. Detainees who could not be deported were normally released in short period of time (i.e. a few days) with an order to leave the country in 30 days, while those person theoretically not forbidden to be deported had to face much longer detention (even months) in police custody (Nowak 2011: par. 39). Regarding deportations, the ever-emerging problem was that the home country of the refugee was not willing to cooperate in the deportation. According to the Turkey-Greece readmission agreement (in force since 2002) for example, Turkish nationals can be directly deported back to Turkey, if the Turkish government recognises them as its own nationals. Though the facilitation of repatriation by the country of origin may be advantageous, in most of the cases it causes inconvenience to the person who was trying to flee the country. Human Rights Watch also observes that even though readmission procedures are clearly laid down (in this case Greece would be in charge of the readmission), there is no system on the EU's part that aims at determining if a person is in need for international protection that would run parallel to the determination of the nationality of the person (with the end result of the facilitation of readmission) (Human Rights Watch 2011: 44). Consequently, "Greece recognized less than 1 percent of asylum claims, treating most refugees as illegal migrants liable to detention and deportation rather than giving them the required international protection" (Human Rights Watch 2009: 17). The same report points out that asylum-seekers are often trapped in a bureaucratic maze, since it is typical of the Greek authorities to issue a document ordering the refugee to leave the country within 30 days rather than initiating a proper deportation proceeding that includes the right to an appeal before a court or a tribunal. These acts on behalf of the local authorities and institutions at the EU level show that the idea is to prevent refugees from entering EU territory (physical defence or *non-entrée* policies), discourage them from or simply make the application process impossible (by lengthening the detention period or misleading protection-seekers), reject the jurisdiction over the case (by not recognising the person as refugee under the Geneva Convention, by applying the first country of asylum or the principle of safe third country), and facilitate the deportation of refugees (paying special attention not to go against the principle of *non-refoulement* in the strict sense of the word). Clearly, the interests of the European Union often collide with that of illegal

immigrants, and the result is often the violation of human rights of persons in need for international protection by the stronger party.

To mention a positive counterexample to the above discussion, the resettlement programmes of the EU should be mentioned (see the Commission's Communication COM(2009) 447 final). Nevertheless, serious attention is not given to this topic in this paper, since the capacities granted by resettlement programmes are so limited that they can mean a solution only to a very small percentage of all asylum-seekers. In 2009 for example 7,147 refugees from third countries were resettled on the territory of the European Union (COM(2011) 291 final: 5). Resettlement has to be clearly distinguished from other rights of solution. Resettlement means "the relocation of refugees who are recognised by UNHCR as being in need of international protection, from the country of asylum […] to another country where they receive permanent protection" (SEC(2009) 1127 final: 5). Ten of the European Union's Member States take part in resettlement programmes providing annual places for resettlement, however, the status refugees gain differ in the countries considered. The most significant difference between the legal procedure in case of resettlement and the regular asylum procedure is that the legal determination of that the person in question is refugee takes place before the refugee is efficiently transferred (SEC(2009) 1127 final: 6). However, the document itself highlights a few doubtful points regarding resettlement programmes in the EU. For instance that the internal role of the EU regarding resettlement is not sufficient, that too few member states participate in them, that there is a lack of strategic use of resettlement as an EU external policy instrument, and insufficient exchange of information and lack of coordination. Nevertheless, it can be reasonably assumed that resettlement programmes generally have a positive effect on irregular immigration.

2.3 Deportation from the Territory of the European Union

The Stockholm Programme claims regarding the common European asylum system that an effective and sustainable return policy is an essential element of an efficient and well-organised migration system at EU level. The document orders Member States to intensify their efforts to return illegally residing third-country nationals, in full respect for the principle of *non-refoulement* and for the fundamental rights and dignity of the displaced person. Whenever possible, voluntary return should be preferred, while the inevitable need for enforced returns in certain cases is acknowledged (Council of the EU 17024/09: 66). Hathaway draws our attention to the fact that asylum-seekers may also suffer removal because of practical weaknesses of the domestic asylum system (such as in Austria, where inexpert guards often play a decisive role in the consideration of applications), not to mention voluntary repatriation which is often used to camouflage the withdrawal of protection from refugees (Hathaway 2005: 287). Needless to say, that once a refugee has been rejected asylum, he/she will most

probably find himself/herself in a vicious circle looking for a state which is willing to authorise entry.

The most influential international treaty of refugee law, the 1951 Geneva Convention on the Status of Refugees establishes rights of solution too, which are intended to help asylum-seekers put an end to their refugee status. The first such right of solution is repatriation. Repatriation is not promoted by the formulation of the treaty, since the common ground regarding this issue was that it can only be a result of voluntary decision of the person concerned, or that if the asylum state's decision that the ground for international protection has ceased to exist (Hathaway 2005: 95). The second right of solution is resettlement, which has been discussed earlier in detail. Naturalisation, on the other hand, that is, the local integration in the country of first asylum, has not yet been analysed as a possible solution. Naturalisation basically refers to the act of gaining citizenship in a country of which the refugee was not a national before. The procedure usually includes that the person in question swears to respect the law of the host state and impose no danger to its fundamental establishments. The fourth right to solution the Geneva Convention mentions is the voluntary reestablishment, which was dealt with at many points of this essay. As it is obvious from the above mentioned examples, voluntary repatriation is a preferred method in theory, but in practice it is often a forced return, not respecting the fundamental rights of refugees and the principle of *non-refoulement*.

Conclusion

The research question of this paper was whether the European Union, the most developed form of cooperation between nations of our times differentiates among human rights on the ground that its citizens need to be protected against non-EU citizens, which is often the claim in matters of human rights violations of third-country nationals by the Community. The paper examined the international legal framework of refugee law and the relevant internal regulations of the EU in order to get an overview of the rights persons seeking international protection shall enjoy. Afterwards the practical implications of this legislation were analysed in detail, focusing the discussion on the three stages of asylum-seeking in the EU: entering the territory of the EU, being resident in the EU as refugee, and deportation to the country of origin from the Community. It has been observed that even though the European Union is obliged by international law to receive refugees and consider their application for asylum, it is often the case that Member States undertake measures to prevent refugees from reaching the point where they can file their claim (these either take the form of physical protection of the external borders of the EU, done by Frontex, or so-called *non-entrée* policies, which are soft law measures). Even if the asylum-seeker reaches the point of application, he/she cannot take it for granted that his/her claim will be given a due consideration. Namely, Member States tend to reject jurisdiction

over the case by refusing to recognise the displaced person as a refugee under Article 1 of the 1951 Geneva Convention on the Status of Refugees, or by applying the principle of first country of asylum or that of the safe country of origin. In cases the jurisdiction is not questionable, local authorities try to discourage detainees on occasion from filing an asylum claim, for instance by providing them with false information, or stating that if a claim is lodged, the duration of detention in police custody will lengthen considerably. Even though EU law has it that voluntary repatriation should be the preferred solution, deportations are often enforced upon refugees. Moreover, the cooperation with the country of origin may be in certain cases very harmful to the persons concerned, despite the aim of such measures which is to benefit refugees. As a matter of course, EU institutions are too bound by the principle of *non-refoulement*, that is, displaced persons shall not be enforced to return back to a country where they face a serious risk of being persecuted or detained or punished in an inhumane or degrading manner. This principle is respected by the Union in most of the cases, however, it is typical that certain circumstances are taken advantage of, which do not constitute a breach with this principle. The paper also discussed briefly the rights of solution suggested by the Refugee Convention.

There was one country-specific example that was analysed in detail: the detention centres in Greece. Chapter 2.2 shed light on the violation of very fundamental rights of asylum-seekers by EU and local authorities. The reason why this specific example was taken is the fact that Greece is the most affected country by irregular immigration; therefore the problems highlighted refer to common deficiencies within the EU, not the responsibility of the Greek authorities exclusively. Nevertheless, this example has proven that human rights relevant in refugee law can be and are curtailed in certain cases by the European Union, which points out the weaknesses of the current immigration policy and asylum system. In other words, the European Union does make a difference among human rights of EU and non-EU citizens, in defence of the former group.

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