DIPLOMOVÁ PRÁCE


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A PREFACE

‘There must be at least one country in the world willing and able to provide protection and quality, durable asylum to each and every refugee.’

Looking into the realm of refugee protection in Europe, it is possible to track significant changes in recent years. The European Community has entered this field as an autonomous, yet powerful, player and has commenced with the reshaping of some of the basic tenets of asylum law according to its own conception and vision. Some of the changes have been praised and welcomed, while others have met with vigorous criticism. The Community has shown that it no longer considers matters of asylum marginal but has instead decided to build a Common European Asylum System, the aim of which should be the approximation of national measures on refugee protection. To this end, several secondary acts, mostly in the form of directives, were adopted and some of them will be the subject of this study (in particular, the Procedures Directive and the Qualification Directive). In addition, after years of criticism for lack of democracy and insufficient human rights protection, the Charter of Fundamental Rights of the European Union has emerged. As will be shown, this document can shake considerably the usual perception of rights and entitlements of protection seekers.

The aim of this paper is not to offer a comprehensive analysis of the CEAS nor the PD as a whole; my purpose here is more modest and is focused on one sole Article instead – inadmissible applications pursuant to Article 25 PD. But still, it is to a certain extent ambitious and raises a challenging claim. To wit, this paper argues that by virtue of the Charter read in conjunction with the QD the individual right to asylum has been established. Quite surprisingly, this right has remained dormant so far. However, accepting this submission can have significant implications for the protection of asylum seekers. The key idea behind this proposal is that a refugee has a right to have his or her status recognised and be granted the secondary rights connected with it. Consequently, it

1 UNHCR Background paper no. 3. Inter-State agreements for the re-admission of third country nationals, including asylum seekers, and for the determination of the State responsible for examining the substance of an asylum claim, May 2001, p. 5.
seems that this right is *prima facie* violated by the incorporation of the concept of inadmissible applications which entails that a refugee status determination procedure may be refused. In addition, declaring an application inadmissible hides within itself the potential for violation of the well-established right to be protected against *refoulement*.

Therefore, this thesis aims to examine whether a Member State may hold an application inadmissible for the reasons stated in Article 25 of the PD and if so, under which conditions. More specifically, the individual provisions of Article 25 are tested against both the right to asylum and the principle of *non-refoulement*. The importance of the outcome of this analysis lies in the fact that the time limit for implementation of the PD has not lapsed yet and therefore, the knowledge whether the provisions of Article 25 are lawful is crucial for the Member States in order to meet their commitments imposed by both international and primary European law.

This paper will proceed as follows: the core of the study is divided in two Parts. Part I, providing the reader with the necessary background information, will serve as a catalyst for the subsequent analysis of inadmissible applications in Part II.

Given the manifold particularities of Community law, it is opportune to resolve several preliminary questions at the outset and, thus, they will be addressed in the individual Chapters of Part I. The aim of the first Chapter is to clarify the legal basis for the obligations of the Community in the field of asylum law. Neither the Community nor the Union has acceded to either of the international treaties relevant for asylum. Does it follow that they are not bound to international asylum law at all? The first section of Chapter 1 is determined to tackle this ostensible problem. The second section is focused on Community law itself. Having shed light on the basis for the obligations, the first Part goes on to identify their scope (Chapter 2). Firstly, some of the relevant implications of the principle of *non-refoulement* will be elucidated. Secondly, the question will be asked whether an individual right to asylum exists. It will be shown that the answer differs under international and European law.

After providing all the relevant background information that would be convenient to bear in mind for the remainder of the paper, an analysis of Article 25 PD may

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2 The time limit for transposition expires by 1 December 2007, see Article 43 PD.
commence (Part II). The individual provisions of this Article will be subjected to close scrutiny in order to reveal whether they are in accordance with the obligations of the Community that have been identified in Part I.

Additionally, each Part is followed by some closing remarks. Finally, an overall assessment of the present subject matter, which will highlight the main arguments and conclusions submitted throughout the paper, will be provided.

Much has been written about some of the grounds for inadmissibility (e.g. the concept of safe third countries), while others have received scant attention in scholarly writing. This apparent disproportionality is caused by the fact that the latter are relatively uncontroversial, whereas the former raise numerous questions. In order to comprehensively assess all related problems and implications, this relative disproportionate attention could not have been avoided in this paper either. However, in reality, they are approached with the same careful examination.

Although some of the grounds for inadmissibility may involve political implications and the protection of refugees no doubt includes social dimensions, the method chosen for the present study is pure legal analysis. Furthermore, the purpose of this paper is to analyse the provisions of the PD and other relevant legislation in their current legal status; therefore, they are seen from a historical perspective by and large. Although tracing back the development of a particular legal concept may be interesting and important for certain purposes, it would not help to answer the questions asked in this paper: Are the provisions on inadmissible applications valid? Are they in accordance with international obligations and with primary European law? However, the method of historical interpretation is not excluded absolutely and is used where relevant.

The approach taken here is rather similar to the view of a constitutional judge. As will be argued, both the right to asylum and the right to be protected against refoulement have been attributed constitutional tenets by virtue of the Charter and general principles of Community law. Therefore, in line with the rules for limitations foreseen in the Charter itself, the analysis will not end with a conclusion as to whether there was an infringement of the right or not, but it will be further examined whether this prima facie violation could be justified. All the conclusions are additionally tested against the fact that the PD provides only for ‘minimum standards’.
Acknowledgements

I would like to express many thanks to Professor Dalibor Jilek, under whose expert supervision this thesis has gradually emerged, for inducting me into the mysteries of asylum law and for his subsequent guidance.

I am deeply indebted to Professor Dirk Vanheule for his kind interest and for providing me with fruitful comments and incentives to this thesis; especially during my study in Ghent, Belgium.

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The course ‘The Rights of Refugees under International Law’ held at the University of Oxford on 19-20 May 2007 brought stimulating incentives for the present paper; therefore, I would like to express many thanks to Professor James C. Hathaway for the illuminating discourse on refugee rights.

Additionally, I would like to thank the staff at the UNHCR Representation in Prague, especially Marcela Skalková, for their warm attitude and for giving me the opportunity to take an internship at their office which enabled me to get acquainted with the practical side of asylum law.

Last but not least, my thanks goes to John D. K. Studd for diligent revision of the language.

It goes without saying that the views expressed in this paper are not necessarily shared by the above-mentioned experts and the responsibility for any shortcomings lies solely on me.
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<tr>
<td>1951 Convention</td>
<td>Convention Relating to the Status of Refugees (1951)</td>
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<td>CAT</td>
<td>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)</td>
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<td>CATCtee</td>
<td>Committee Against Torture</td>
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<td>CEAS</td>
<td>Common European Asylum System</td>
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<td>CEE</td>
<td>Constitution for Europe</td>
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<td>Charter</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<td>CMLRev</td>
<td>Common Market Law Review</td>
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<td>DR</td>
<td>Dublin Regulation</td>
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<td>EBLRev</td>
<td>European Business Law Review</td>
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<td>EC</td>
<td>European Community</td>
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<td>ECHR</td>
<td>European Court of Human Rights</td>
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<td>ECHR</td>
<td>European Convention for the Protection of Human Rights and Fundamentals Freedoms (1950)</td>
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<td>ECOSOC</td>
<td>Economic and Social Committee of the European Union</td>
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<td>EJML</td>
<td>European Journal of Migration and Law</td>
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<tr>
<td>EPL</td>
<td>European Public Law</td>
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<td>EU</td>
<td>European Union</td>
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<td>EXCOM</td>
<td>Executive Committee of High Commissioner’s Programme</td>
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<td>FCA</td>
<td>First country of asylum</td>
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<td>FRD</td>
<td>Family Reunification Directive</td>
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<td>HRCtee</td>
<td>Human Rights Committee</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights (1966)</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>IJRL</td>
<td>International Journal of Refugee Law</td>
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JHA  Justice and Home Affairs
QD   Qualification Directive
RSD  Refugee status determination
RS Directive  Reception Standards Directive
STC  Safe third country
TEC  Treaty Establishing the European Community
TEU  Treaty on European Union
TPD  Temporary Protection Directive
UDHR Universal Declaration of Human Rights (1948)
UN   United Nations
UNGA United Nations General Assembly
UNHCR United Nations High Commissioner for Refugees
Virg. JIL  Virginia Journal of International Law
E. PART I

BACKGROUND REMARKS TO THE OBLIGATIONS OF THE COMMUNITY IN ASYLUM LAW
Introductory remarks to Part I

Before turning to the details of inadmissible applications, a number of preliminary observations are warranted. This Part is composed of two main Chapters that address the issue of the legal basis behind Community obligations in the field of asylum and the scope of these obligations respectively. There is certainly no shortage of articles and ECJ case law devoted to the legal position of the Community/Union with respect to international law, as well as to fundamental rules regulating Community law itself. Therefore, my sole purpose here is to highlight the most important features, the absence of which would condemn any attempt to analyse the issue at stake to inevitable failure.

To this end, Chapter 1 is dedicated to the basis for obligations of the Community in the field of asylum. In other words, it presents the rules of law in light of which a directive’s legality may be reviewed. More specifically, it endeavours to answer the question of whether the Community is at all bound by international law (Subchapter 1.1) and, additionally, to clarify the basis and modalities of the European asylum law itself (Subchapter 1.2).

Furthermore, Chapter 2 delimitates the scope of the obligations which are imposed on the Community by international law and to which it has bound itself by virtue of its own acquis. The core concern of refugees is usually twofold: they seek the guarantee (1) not to be returned to the country of persecution, and (2) to be allowed to stay in the country of asylum. Therefore, Subchapter 2.1 throws light on the relevant aspects of the principle of non-refoulement (i.e. protection against forced return). In addition, Subchapter 2.2 undertakes the task to search for a right to asylum (i.e. durable protection) in both international and European law. Most importantly, this paper raises the claim that under Community law an individual right to asylum, with all its implications, has recently come into being.
Chapter 1

The basis for obligations and related issues

1.1 Is international asylum law binding for the Community?

The specific position of the EU/EC in international law implies a specific relationship between European acquis and international law. Community law is not only a new legal order but also a novel one in the sense that it has no historical precedent or indeed contemporary equivalent. Therefore, the present Subchapter identifies the legal avenues through which international asylum law can work within the Community legal order. In other words, the question will be asked to what extent the Community is obliged to comply with the norms of international asylum law. Generally, international law may have an effect within the Community legal order in various ways – (1) by virtue of treaty obligations, (2) as customary law, (3) as a source of inspiration for the general principles of Community law, or by virtue of reference in (4) primary or (5) secondary law. I shall address each of these sources respectively with the aim to unveil the incumbent obligations imposed by international law that are relevant for the scrutiny of the legality of the PD and more specifically the inadmissible applications.

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3 The EC has legal personality by virtue of Art. 281 TEC. Consequently, it has the capacity to exercise rights and enter into obligations under international law which brings inseparably also the responsibility for their breach. The position of the EU is not so clear. Although the CJE confers legal capacity also upon the EU, currently there is no explicit basis in the TEU for such a conclusion; however, it has been suggested that also at present it may be deduced from a number of factors that the EU ‘must be regarded as having legal personality under international law.’ See, LENAERTS, K. Constitutional law of the European Union. London: Sweet and Maxwell, 2005, pp. 816–7; Cf. HOFFMEISTER, F. Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies. CMLRev, 2007, Vol. 44, pp. 41-68.

Therefore, I will hereinafter use only the term Community or alternatively EC for the purpose of this paper. This choice is motivated also by the fact that matters on asylum have been placed under the first (communitarian) Pillar of the EU.


1.1.1 European asylum acquis and international treaties

As a subject of international law, the Community is bound by treaties to which it has acceded. However, at present and for the foreseeable future, the Community is party to none of the international treaties relevant for asylum. It should be noted that in future this situation may change considerably since both the CfE and the 14th Protocol to the ECHR envisage the accession by the EU to the ECHR. Moreover, after the entry into force of the CfE, ‘accession to the ECHR will not only be a possibility […] but also an obligation.’

Furthermore, the Community can take over rights and obligations, flowing from treaties to which the Member States are Party, by substitution. However, the conditions for substitution are not fulfilled by either of the international treaties on asylum.

Consequently, the Community is not bound to apply international asylum treaty law, at least not directly.

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6 Pursuant to the 1951 Convention (Art. 39(2)), 1967 Protocol (V), ECHR (Art. 59(1)), ICCPR (Art. 48(1)), and CAT (Art. 29) only States may become parties to these instruments.


8 ‘The European Union may accede to this Convention.’ A new Art. 59(2)ECHR proposed by Art. 17 of the 14th Protocol to the ECHR, not in force yet.

9 The ECJ pointed out that accession to the ECHR would ‘entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into distinct international institutional system as well as the integration of all its provisions into the Community legal order.’ ECJ, Opinion 2/94, para. 34, referred to in BATTJES, H. European Asylum Law and International Law. Leiden/Boston: Martinus Nijhoff Publishers, 2006, n. 61, p. 127.


11 As to the possibility to challenge Community acts before the Strasbourg Court see ECHR: Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland (Bosphorus Airways) [GC], No. 45036/98, 30 June 2005.

12 Firstly, ‘[t]he transfer of power on asylum measures is far from complete […] Article 63(1) TEC is […] not indicative of the will of the Member States to impose upon the Community the obligations they have under international asylum law, for example, to make sure the principle of non-refoulement is respected throughout the European Union.’ And secondly, ‘there is no indication whatsoever that the third states party to the relevant instruments of international law accepted substitution of the Member States’ obligations to the Community.’ Ibid, pp. 79-80.
1.1.2. European asylum acquis and international customary law

The second possible source of international obligations is customary law. The ECJ has reaffirmed on several occasions that international customary law does work within the Community legal order.\(^\text{13}\) As will be shown, with respect to the field of asylum we can find only one relevant rule of international customary law, namely the principle of non-refoulement.\(^\text{14}\) Admittedly, the customary character is not unanimously accepted by States;\(^\text{15}\) moreover, its scope and content are said to be indeterminate and somewhat more vague in comparison with the obligation laid down in the relevant treaties.\(^\text{16}\)

1.1.3. General principles of Community law

The general principles of Community law have already gained considerable attention in academic writing;\(^\text{17}\) therefore, they shall only be briefly touched upon at this point in order to assess their potential as a standard for review of the Community acts. Generally, ‘principles incorporate a minimum substantive content and guide the judicial enquiry on that basis. They provide strong arguments for a certain solution, they may even raise a presumption, but rarely do they dictate results in themselves.’\(^\text{18}\) However, within the Community legal order the general principles have specific features and implications.\(^\text{19}\)


\(^{14}\) See Chapter 2.1 The principle of non-refoulement, p. 36.

\(^{15}\) See further below, 2.1.1 The principle of non-refoulement under international law - Legal character at p. 37.


\(^{19}\) For comparison with general principles of international law as applied by the ICJ see TRIDIMAS, T. The General Principles of EU Law. Oxford: Oxford University Press, 2006; or HERDEGEN, M. The Origins and Development of the General Principles of Community Law. In BERNITZ, U., NERGELIUS, J.
A legal basis is provided by Article 220 TEC. This provision, which recognises ‘the law’ as a source of Community law, has enabled the ECJ to have recourse to general principles of law in interpreting and applying Community law. The general principles ‘are unwritten principles extrapolated by the Court from the laws of the Member States by a process similar to that of the development of the common law by the English Court. Several principles, especially within the realm of human rights, are moreover derived from the Charter and international treaties.

‘The Community legal order is based on a system of hierarchy of rules under which rules of a lower tier derive their validity from, and are bound to respect, the rules of the higher tiers.’ The general principles enjoy the top position in this hierarchy; they rank alongside the TEC and TEU as primary law. Indeed, they are accorded constitutional status and therefore they are binding for the Community institutions when adopting legislation. It follows from this that measures which are at odds with them are an ‘infringement of this Treaty or of any rule of law relating to its application’ within the meaning of the second paragraph of Article 230 TEC and may be annulled by the ECJ.

Although the general principles derive mainly from the laws of the Member States, they acquire in the ECJ case law, by a process of ‘creative appropriation’, independent normative value. Their function is not exhausted by filling the lacunae of law. In fact they form an integral part of the ECJ methodology and as a source of rights and obligations they pose significant limitations on the policy-making power of the


20 ‘The Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed.’ (emphasis added) See also the CJE Art. I-129(1).


23 Ibid, p. 51.

24 Ibid, pp. 6 and 51.


Community institutions. Put another way, the general principles perform within the Community legal order a threefold function: they operate as (1) aids to interpretation, (2) as grounds for review, and (3) as rules of law breach of which may give rise to tortious liability.

Human rights as general principles of Community law

'The application of general principles has gradually expanded both with regard to the areas where they apply and with regard to the requirements that they impose.' Indeed, no area of Community law has remained immune from their application. In the field of asylum, fundamental human rights are of particular importance.

Their protection in the Community legal order has been almost entirely the product of case law. The ECJ started testing Community acts to fundamental rights in the 1970’s although there was no explicit reference in the primary law to the protection of such rights. Since that time remarkable developments in the jurisprudence of the ECJ can be seen with respect to the protection and increased resonance of fundamental

28 Ibid, p. 29.
29 Other general principles which were recognised by ECJ are, inter alia, (a) the right to judicial protection; (b) the principle of equal treatment or non-discrimination; (c) the principle of proportionality; (d) the principle of legal certainty; (e) the principle of the protection of legitimate expectations; (f) the right to defence; (g) ne bis in idem; (h) the right to receive information; (i) vested rights. TRIDIMAS, T. The General Principles of EU Law. Oxford: Oxford University Press, 2006, p. 6; and SCHERMERS, H.G.: Human Rights as General Principles of Law. In BERNITZ, U., NERGELIUS, J.(eds.) General Principles of European Community Law: Reports from a Conference in Malmö, 27-28 August 1999. The Hague, 2000, pp. 62-63.
32 Ibid, p. 298.
However, an explicit recognition of fundamental rights as general principles had not been provided until the Treaty of Amsterdam. Article 6 TEU of the consolidated version reads in its entirety:

‘The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.’

It follows from this provision that the general principles may be derived either from the ECHR or from the constitutional traditions common to the Member States. Notably, the reference is made explicitly only to the ECHR; however, the scope of adjudication is broader since Article 6(2) only partially codifies the Court’s case law. Even before the entry into force of the provision, the ECJ occasionally invoked other treaties than the ECHR and still feels free to do so. Although the 1951 Convention and the CAT have so far never been adduced as sources of fundamental rights before the Luxembourg Courts, nothing hinders their application since all Member States are bound by them.

Indeed, the ECJ is consistent in recognising that

‘fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied

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35 Emphasis added.
36 BATTJES, H. European Asylum Law and International Law. Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 84; See also e.g. - Case C-540/03, Judgement of the Court (Grand Chamber) of 27 June 2006, European Parliament v Council of the European Union, para 37: ‘The Court has already had occasion to point out that the International Covenant on Civil and Political Rights is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law’ In this judgement the ECJ further referred to Case 374/87, Orkem v. Commission [1989] ECR 3283, para. 31; Joined Cases C-297/88 and C-197/89 Dzodzi [1990] ECR, para, 68; and Case C-249/96 Grant [1998] ECR, para. 44.
by *international instruments for the protection of human rights* on which the Member
States have collaborated or to which they are signatories.\(^{38}\)

It has been suggested that the second source for general principles – the
constitutional traditions of the Member States – is also relevant in the field of asylum.
‘Where a Member State considers a particular right so important as to incorporate it in its
constitution, that right forms part of a European legal heritage.’\(^{39}\) H. Battjes found that in
the year 2002, from the then fifteen Member States, ten explicitly recognised a right to
territorial asylum, and at least five of them laid down this right in their constitution.\(^{40}\)
Furthermore, he suggests that the explicit recognition of the right to asylum in Article 18
of the Charter may be read as a ‘reaffirmation’ of this tradition.\(^{41}\)

**Charte of Fundamental rights as a source of general principles**

Although the current status of the Charter does not accord it full legal force, this
situation will change when (or if) the CfE, which incorporates the Charter in Part II,
enters into force. Moreover, the CfE reaffirms that fundamental rights as guaranteed by
the ECHR and resulting from the constitutional traditions common to the Member States
constitute ‘general principles of the Union’s law’\(^{42}\).

Nevertheless, the Charter may currently have a legal effect in two ways: first, through Article 6(2) TEU as a source for general principles,\(^{43}\) or second, by virtue of

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\(^{41}\) Ibid. The implications of this consideration will be examined in more details below; see 2.2.3 The right to asylum in Community law at p.56.

\(^{42}\) CfE, Art. I-9(3).

\(^{43}\) However, it is not clear whether all provisions of the Charter can be successfully invoked on this basis, especially the position of those rights which have no backing in international law or constitutional traditions
Remarkably, the latter was, inter alia, recently recognised in the judgement European Parliament v. Council of the European Union, where the former filed an action for annulment of certain provisions of the Family Reunification Directive:

‘While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter.’

It is worth pointing out that a similar reference to the Charter is made in most of the Community legislation on asylum, including the Preambles of the PD and QD. By virtue of these references the Charter serves as an indirect standard of review.

To conclude, all relevant international instruments for the protection of human rights (including all relevant international asylum law), as well as the Charter, can serve as sources of inspiration for general principles of Community law and thus as a yardstick for review of the PD. The function of fundamental rights as general principles is not limited to interpretation, but extends also to the function as principles of validation of the relevant Community law. Although rights from the field of immigration and asylum have not been explicitly elevated to fundamental status so far, there is no reason that would hinder it in future. As T. Tridimas concludes on this issue, there are no a priori excluded areas.
1.1.4. International law within the Community legal order by virtue of direct reference in the primary law

Another form in which international law may have effect within the Community legal order is direct reference in the primary law. For the assessment of the PD the relevant provision is Article 63 TEC, which reads as follows:

‘The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:
1. measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties.
... (c) minimum standards with respect to the qualification of nationals of third countries as refugees;
(d) minimum standards on procedures in Member States for granting or withdrawing refugee status;
...
3. measures on immigration policy within the following areas:
(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion;
...
[penultimate clause] Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.’ 51

H. Battjes has observed that these explicit requirements of ‘accordance’ and ‘compatibility’ with international asylum law have no precedents in other provisions of either the TEC or TEU.52 However, they are of significant importance. Thus, it follows from the requirement of Article 63(1) TEC which demands that measures should be ‘in

51 Emphasis added.
accordance’ with the relevant treaty law that international asylum law is a source of law within the community legal order.\textsuperscript{53} Similarly, the requirement of ‘compatibility’ with international agreements in the penultimate clause is relevant, \textit{inter alia}, for rules on safe third countries as these are based on Article 63(3)(a).\textsuperscript{54}

Although both the general principles and Article 63 TEC invite a testing against international asylum law, the application of the same rule is subject to different standards. Where the relevant treaties serve as a ‘source of legal knowledge’ for identifying general principles of Community law, international law serves as an \textit{indirect standard of decision}.\textsuperscript{55} But at the same time, the same rules serve pursuant to Article 63 TEC as a \textit{direct standard of decision}.\textsuperscript{56}

\textbf{1.1.5. International law within the Community legal order by virtue of direct reference in the secondary law}

When the instruments of secondary law refer to instruments of international asylum law as a standard of decision, these references make international law a $\textit{direct standard}$ of review, in much the same way as Article 63(1) TEC does.\textsuperscript{57} The PD makes direct reference to the 1951 Convention \textit{inter alia} in Article 27 on STC, which is one of the most important provisions for the present analysis. Likewise, this Article refers to international law, which ensures the right to freedom from torture and cruel, inhuman or degrading treatment.

\textbf{1.1.6 Concluding remarks with respect to this subsection}

All the relevant international instruments, namely the 1951 Convention, ECHR, ICCPR and CAT, may be invoked when assessing the Community law in general and the


The implications of Article 63 are elaborated upon below in more details, see 1.2.1 Legal basis at p. 24.

\textsuperscript{54} Ibid, p. 98. On this issue see below Assessment of Article 25(2)(c) at p. 78.


\textsuperscript{56} Ibid, (emphasis added).

\textsuperscript{57} Ibid, p. 105.
PD in particular. Although it is not possible to apply either of them directly as treaties, there are several other ways of application that in fact have the same result. By virtue of Article 63 TEC, which requires ‘accordance’ and ‘compatibility’ with international law, the relevant treaties set a direct standard for review. Moreover, under Article 6(2) TEU and according to the jurisprudence of the ECJ, international law also works indirectly, through the general principles of Community law. Although the latter construction may seem to allow for some discretion, compliance with general principles in fact entails accordance with the rules of international law. Furthermore, the reference in the PD and other secondary legislation confirms them as the direct standard for decision. Additionally, the obligation to respect the prohibition of non-refoulement is also arguably anchored in customary law.

To sum up, the Community is bound to comply with all the requirements of international asylum law when adopting secondary law. Chapter 2 reveals which of these obligations are relevant for the assessment of the inadmissible applications as laid down in the PD.

\[58\] Ibid, p. 104.
1.2 Basis for the obligations ex Community law

The purpose of this Subchapter is not to provide an exhaustive elaboration on rules governing Community law. It will merely sketch some of the basic tenets that have to be brought to mind when assessing provisions of a directive. I will deal with the following issues seriatim – firstly, the legal basis for the relevant provisions of the PD and QD will be identified; secondly, these Directives will be set in the context of the CEAS; thirdly, the effect of harmonisation by means of minimum standards will be analysed; and the final section will draw the attention to the difference of interpretation rules for Community legislation in contrast to the well-known rules for interpretation of international law laid down in the Vienna Convention.

1.2.1 Legal basis

At the outset it is necessary to define the legal basis of the provisions that shall be scrutinized since ‘[i]t is [...] one of the essential features of the rule on the attribution of powers in the Community that the adoption of binding acts such as Directives must find its legal basis in one or more provisions of the Treaty.’ 59 According to the primary law ‘[t]he Community shall act within the limits of the powers conferred upon it by [the TEC] and of the objectives assigned to it therein.’ 60 It follows, that the legal basis for any secondary act of Community law can and must be found in the primary law. Measures concerning asylum are provided for in Title IV TEC (Articles 61 to 69). More specifically, for the present analysis, Article 63 is the most relevant. The legal basis for standards on procedures, and thus in principle, for the provisions of the PD can be found in Article 63(1)(d).

‘The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:

60 TEC, Article 5.
1. measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:

[…] 
(d) minimum standards on procedures in Member States for granting or withdrawing refugee status.’

‘In principle’, for this does not hold true for the STC arrangements (Article 27 PD). At this point, it is necessary to emphasise the distinction between the STC arrangements regarding the assessment of the safety of a third country and procedures when an application is declared inadmissible on the basis of this concept. While the former found their basis in Article 63(3)(a), the latter are well included in ‘standards on procedures’, thus Article 63(1)(d).

Additionally, the QD will be invoked in the present paper where relevant; its legal basis is provided by points (1)(c), 2(a) and 3(a) of Article 63 TEC. The first paragraph lays down in point (c) the basis for standards for the refugee status determination. Arguably, it may be assumed that measures on ‘qualification as a refugee’ can also encompass legislation on the grounds for removal as meant in Article 33 1951 Convention. The second paragraph point (a) addresses temporary and subsidiary

61 TEC, Article 63(3), measures on immigration policy within the following areas:
‘[a] conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion’. Although, this provision mentions measures on ‘immigration’, arguably, it is applicable also to measures on asylum. BATTJES, H. European Asylum Law and International Law. Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 145-146.

62 See, Ibid, pp. 150-1. Although this Article is not expressly referred to in the Preamble of the PD, H. Battjes submits that ‘[c]riteria for assessing the safety of a third country do not concern the mode or form of the handling of a request for protection, but rather its very content, and concern the alien’s right to a residence permit.’ Ibid, p. 151.

63 See QD, Preamble, introductory consideration.

64 TEC, Article 63(1)(c): ‘The Council [...] shall [...] adopt: 1. measures on asylum, [...] within the following areas: (c) minimum standards with respect to the qualification of nationals of third countries as refugees’.

protection; these issues fall, however, outside the scope of the present study. Finally, paragraph 3(a) provides the basis for secondary rights.66

1.2.2 Common European Asylum System

The European Council has agreed at a special meeting in Tampere in 1999 to work towards establishing a Common European Asylum System which is intended to be a constituent part of the creation of an area of freedom, security and justice in the EU.67 The objectives set out in Tampere68 sketched those contours of the CEAS which are currently being formed in asylum directives and other secondary legislation; namely the Qualification Directive, Procedures Directive, Reception Standards Directive and Dublin Regulation.69 It has to be emphasised that these instruments create an interrelated system;70 therefore, it is warranted to look on them as on one package deal. Indeed, they are sometimes referred to as an organised body of law, the ‘heart’ of which is represented by the QD71 for its core importance to the CEAS and the ‘backbone’ by the PD since ‘it

66 TEC, Article 63(3)(a): ‘The Council […] shall […] adopt: […] 3. measures on immigration policy within the following areas: (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion.’


68 Tampere Conclusion No. 14, ‘This System should include, in the short term, [1] a clear and workable determination of the State responsible for the examination of an asylum application, [2] common standards for a fair and efficient asylum procedure, [3] common minimum conditions of reception of asylum seekers, and [4] the approximation of rules on the recognition and content of the refugee status. It should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection…’

69 These instruments in return refer in their Preambles to the CEAS thus affirming their interrelationship as parts of one system.


links most of its limbs'. 72 For the present analysis the QD, PD and their relationship will be the most relevant.

The CEAS is based on the full and inclusive application of the 1951 Convention, as amended by the 1967 Protocol. This consideration is further explained as affirming the principle of non-refoulement, i.e. ensuring that nobody is sent back to persecution. 73 Furthermore, the European Council reaffirmed in Tampere the importance the EU and Member States attach to absolute respect of the right to seek asylum. 74

Additionally, the PD and QD further specify their objectives as follows: (1) laying down standards on the subject matter they address; 75 and (2) limitation of the secondary movements of applicants for asylum between Member States through the approximation of rules. 76 In the latter case they are flanking measures aimed at ensuring the freedom of movement. 77 However, although the central aim of the creation of an area of freedom, security and justice is obviously freedom of movement, 78 measures on asylum are not reduced to instruments of the internal market; on the contrary, they also serve to safeguard rights of third country nationals. 79

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73 Tampere Conclusion No. 13, cf. PD Preamble, recital 2, QD Preamble, recital (2).
74 Tampere Conclusion No. 13.
75 PD, Preamble, recital 5, ‘The main objective of this Directive is to introduce a minimum framework in the Community on procedures for granting and withdrawing refugee status.’
76 PD, Preamble, recital 5, ‘The main objective of this Directive is to introduce a minimum framework in the Community on procedures for granting and withdrawing refugee status.’
77 QD, Preamble, recital 6, ‘The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.’
78 PD, Preamble, recital 6; QD, Preamble, recital (7).
80 Cf. Art. 61(1)(a) TEC.
81 BATTJES, H. European Asylum Law and International Law. Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 142-3, ‘Asylum and immigration measures serve to create an area of freedom, which encompasses next to freedom of movement of persons, the safeguarding of rights of third country nationals. It follows that Title IV empowers the Community to take measures on asylum and immigration in accordance with Article 63 that merely serve the protection of rights of third country nationals.’ Ibid, p. 143.
1.2.3 Harmonisation by means of minimum standards

‘The harmonisation process stems from the evolution of a certain variety within homogeneity.’ Generally, the concept of harmonisation may be defined as ‘approximation of domestic law by means of Community law standards.’ This process is carried out by directives which, due to their common core of rules and generated principles, enable that the harmonised laws are compatible with national legal traditions, legal techniques, doctrinal theories and ideological divergence. It should be observed that ‘standards’ are characterised by a higher degree of openness and flexibility than norms. That is to say, they allow for exemptions and enable the Member States to maintain more favourable rules. It follows that the choice to use directives as the means for harmonisation in the field of asylum was not incidental.

The intensity (or level of completeness) of harmonisation defines the margin of discretion left to the Member States in the implementation of harmonisation measures. The spectrum of intensity ranges from total to minimum harmonisation. The relevant

See also Art. 61(b) TEC and Preambles to the QD and PD, recitals 1 ‘[…] an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.’


84 Ibid, p. 21.

85 Cf. Article 249 TEC, ‘A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.’


provisions (Articles 63(1)(c),(d) and 63(3)(a)) restrict the competence of the Community to minimum harmonisation. In this type of harmonisation, minimum rules are set at the Community level, but Member States are entitled to impose, individually or jointly, more stringent requirements. Put differently, we can speak of minimum harmonisation as where, ‘the applicable Community legislation sets a floor, the Treaty itself sets a ceiling and the Member States are free to pursue discretion between these two parameters.’ Minimum standards, thus, ‘leave the Member States the freedom to introduce or maintain alternative domestic standards.’ On the other hand, this freedom is not unlimited, Member States may derogate from these standards in one direction only – only in a manner more favourable to the addressee. The PD states in its Preamble,

‘It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who ask for international protection from a Member State.’

The favourable deviation is, however, not the only requirement imposed by primary law where minimum harmonisation is foreseen. Secondly, national legislation

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88 Pursuant to the second last clause of Article 63 measures based on point (3)(a) are also minimum standards. BATTJES, H. European Asylum Law and International Law. Leiden/Boston: Martinus Nijhoff Publishers, 2006, n. 33, p. 215.


94 PD, Preamble, recital (7).
may not undermine the unity of Community law\textsuperscript{95} and finally, national standards must comply with the Treaty.\textsuperscript{96} The provisions of primary law which are the most relevant for the analysis of the legality of inadmissible applications are Articles 6(2) TEU and 63 TEC, which require respect for international asylum law.

Additionally, considering the effects of such a harmonisation it is necessary to emphasise that ‘minimum’ harmonisation does not mean ‘minimalist’.\textsuperscript{97} To wit, this concept ‘addresses the division of powers between the Community and the Member States, not the specific content of Community measures.’\textsuperscript{98} Indeed, the case \textit{UK v. Council\textsuperscript{99}} is illustrative on this issue. ‘The Court held that minimum harmonisation does not limit Community action to the lowest common denominator, or even to the lowest level of protection established by the various Member States.’\textsuperscript{100} It follows that a Directive may set a very high level of protection.\textsuperscript{101} In any case, however, it must be ensured that more protective measures fall within the scope of the Directive and are compatible with the relevant Treaty provisions.\textsuperscript{102}

To sum up, it is not required that measures ex Article 63 set a particular minimum.\textsuperscript{103} This conclusion has three remarkable consequences.

Firstly, when read in conjunction with the reference to international law, Community acts do not violate the Treaty if they do not, or do not fully, address some

\textsuperscript{96} See, Ibid, pp. 161-4.
obligations required by international asylum law.\footnote{104} This conclusion is particularly important for the present analysis since it ostensibly excludes the invalidity of the provisions of inadmissible applications for breach of the Treaty.

Secondly, where Community legislation sets minimum standards, it cannot be invalid for its incompatibility with international law since it does not require Member States to act in breach of international law.\footnote{105} As indicated above, it stems from the very definition of minimum standards that they leave the Member States latitude to introduce or maintain more favourable and protective provisions which will allow them to satisfy their international obligations (provided that other requirements mentioned above are fulfilled – they do not endanger the unity of Community law and comply with the Treaty). Furthermore, it has been argued that 'the impossibility to successfully challenge the validity of minimum standards for incompatibility with international law in no way affects the protection under international asylum law required within the Community legal order.'\footnote{106} ‘The characterisation [by the relevant Articles] of Community instruments on asylum as “minimum standards” simply means that those instruments should be interpreted in a way that makes their application in accordance with relevant international law possible.’\footnote{107} If it turned out that Community acts based on Article 63 TEC inhibited Member States to comply with their international obligations, the acts would be at variance with Article 63 TEC for not providing minimum standards.\footnote{108}

Thirdly, the concept of minimum standards precludes the Community to adopt measures based on Articles \textit{inter alia} 63(1)(c),(d) and (3)(a) which would impose the

\footnote{104} Ibid. ‘[T]he characterisation as “minimum standards” does not imply that Community standards should minimally secure accordance with international asylum law’ Ibid, p. 166.\footnote{105} Ibid, p. 167 with reference to the Opinion 2/91 by the ECI, para 18.

\footnote{106} Cf. a critical opinion of E. Guild, ‘If the Member States meeting in the Council can only agree on common measures to protect asylum seekers which do not even satisfy the floor of basic treatment already binding on them through ECHR, their loud declarations in support of international human rights standards and the protection of refugees will appear rather hypocritical.’ GUILD, E. Jurisprudence of the European Court of Human Rights: Lessons for the EU Asylum Policy. In URBANO DE SOUSA, C. S., DE BRUYCKER, P. (eds.) \textit{The Emergence of a European Asylum Policy/L’émergence d’une politique européenne d’asile}, Bruxelles: Bruylant, 2004, pp. 341-342.

\footnote{107} Ibid.

\footnote{108} Ibid.
obligation to refuse the benefits enshrined in these provisions.\textsuperscript{109} For measures that would require refusal of reception conditions, recognition of refugee status, etc. would not allow for more favourable measures which obviously the granting of these benefits is.\textsuperscript{110} Consequently, these provisions would not be minimum standards. Put another way, ‘Community minimum standards cannot entail an obligation to take a negative decision, and Community legislation must be interpreted accordingly.’\textsuperscript{111} Therefore, can the provisions on inadmissible applications, i.e. on refusal to provide refugee status determination, survive in light of this consideration?

All three implications represent serious challenges for the inadmissible applications and they will be further elaborated upon in Part II.

\textit{1.2.4 Interpretation}

The jurisdiction to interpret Community acts (primary as well as secondary legislation) has been entrusted to the ECJ;\textsuperscript{112} therefore, when interpreting Community law the Court’s approach shall be followed.\textsuperscript{113} It is important to note that interpretative rules laid down in the Vienna Convention\textsuperscript{114} are explicitly invoked by the ECJ only when interpreting treaties under international law.\textsuperscript{115} When interpreting primary or secondary law, the Court does not apply them; to the contrary, it rather deviates from them in some

\textsuperscript{109} Ibid, p. 164.

\textsuperscript{110} Ibid.


\textsuperscript{112} See Articles 234, 240 TEC and particularly with respect to Title IV Article 68(3) TEC: ‘The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this title or of acts of the institutions of the Community based on this title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata.’


\textsuperscript{114} Articles 31-33 of the Vienna Convention.

important aspects.\textsuperscript{116} In contrast to the rules that are clearly laid down in the Vienna Convention, interpretation by the ECJ is rather praetorian. Although the ECJ bases its interpretation on the means that are stated in the Vienna Convention (wording, context and purpose), it applies them in a way that ‘leads to results unlikely to be achieved when strictly adhering to the Vienna Convention rules’.\textsuperscript{117} More specifically, interpretation to wording and context\textsuperscript{118} is rather supplementary; on the other hand, the Court’s propensity for teleological interpretation is well-known.\textsuperscript{119} Hence, the purpose of the whole document is to guide the interpretation.\textsuperscript{120} Furthermore, when interpreting Directives, the Court occasionally refers to preparatory works as supplementary means.\textsuperscript{121} In addition, the case \textit{Gaston Schul}\textsuperscript{122} indicates that when there are doubts about the meaning of a provision of secondary Community law, preference shall be given to the interpretation rendering that provision compatible with the Treaty.\textsuperscript{123}

It should be further highlighted that specific rules govern the interpretation of the Charter. They can be found in two sources, (1) the Charter itself contains in its second part ‘General provisions’ governing the interpretation and application (Articles 51-54

\textsuperscript{116} Ibid, p. 42. ‘Agreements reached or instruments adopted in connection with the conclusion of the Treaty or the adoption of Community legislation, subsequent agreements on interpretation and subsequent state practice (Articles 31(2)(a) and (b) and (3)(a) and (b) VTC) are denied any role.’ Ibid, p. 46.


\textsuperscript{117} Ibid, p. 42. Moreover, agreements and instruments made by the contracting parties relating to a treaty (Art. 31(2) Vienna Convention) are not accorded significant value. Similarly, the ECJ categorically excluded subsequent state practice and later agreement on interpretation of the Treaty as means for interpretation. See Ibid, pp. 42-45.

\textsuperscript{118} The context includes the Preamble of a particular document as well as other documents explicitly referred to. Ibid, p. 46.

\textsuperscript{119} Ibid, pp. 42-43.

\textsuperscript{120} Ibid, p. 43.

\textsuperscript{121} Preparatory works may be relevant only for interpretation of secondary law since the travaux preparatoires of the Treaties has never been published. Ibid, p. 44.

\textsuperscript{122} Case 15/81 Schul v. Inspecteur der Invoerrechten en Accijnzen [1982], E.C.R 1409.

Charter, 111-114 CIE), and (2) the interpretative guidance is further provided by ‘the Text of the explanations’.

Firstly, the Charter rights which have their counterparts in the ECHR must be interpreted and applied identically as regards their ‘meaning and scope’, including authorised limitations; moreover, they must reflect the case law of the ECHR as well. Therefore, wider derogations than permitted under ECHR may not be applied. Indeed, it would contravene Member States’ obligations under this treaty. In the field of asylum this holds true for Article 4 Charter, which corresponds to Article 3 ECHR.

Secondly, paragraph 2 specifies that where a right results from the Treaties it is subject to the conditions and limits laid down by them. No Charter right relating to the field of asylum has its basis in the Treaties.

And finally and most importantly, those rights that do not correspond to any right in the Charter nor are based on the Treaties are subjected to the general limitation clause of Article 52(1), which requires that any limitation must satisfy the requirements of legality, proportionality and necessity. These conditions must be kept in mind when

124 TEXT OF THE EXPLANATION included in the Draft Charter of Fundamental Rights of the European Union, Text of the explanations relating to the complete text of the Charter as set out in CHARTER 4487/00 CONVENT 50, CHARTE 4473/00, CONVENT 49, Brussels, 11 October 2000. (hereinafter only ‘Text of the explanations’)

Although this document states that these explanations ‘have no legal value and are simply intended to clarify the provisions of the Charter’, the CIE in both the Preamble and Article 112(7) acknowledges their value by stating that the Charter shall be interpreted by the courts of the Union and of the Member States ‘with due regard’ to them. BATTJES, H. European Asylum Law and International Law. Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 108.

125 Cf also Article 53 Charter and the Text of the explanations.

126 Cf also Article 53 Charter and the Text of the explanations.


128 Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. The reference to general interests recognised by the Union covers both the objectives mentioned in Article 2 and other interests protected by specific Treaty provisions such as Articles 30 or 39(3) of the EC Treaty, see Text of the explanations.
assessing accordance with the right to asylum that has been newly introduced in the Charter.

In addition, Article 53 stipulates that

‘Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.’

In other words, this provision is intended to maintain the level of protection which is currently guaranteed under European, international and national law.
Chapter 2

The Scope of the obligations

2.1 The principle of non-refoulement

The principle of non-refoulement, i.e. the right of a refugee to be protected against forced return, is said to be the fundamental buttress of refugee law.\textsuperscript{129} This term is derived from the French words refouler/refoulement, which in the context of immigration and refugee law mean ‘summary re-conduction to the frontier of those discovered to have entered illegally and summary refusal of admission of those without valid papers’.\textsuperscript{130} As will become clear below, refoulement is prohibited in the case where the return would cause the threat of violation of certain fundamental rights.

Declaring an application inadmissible, i.e. returning/expelling an asylum seeker to the country of origin or a third country without providing the refugee status determination, hides inside the potential for violation of the prohibition of refoulement. The principle of non-refoulement is, indeed, a complex issue. While many its aspects are important, I will ignore these here, bearing in mind the purpose and extent of this paper, and focus solely on those elements which are relevant for the scrutiny of inadmissible applications. Therefore, my purpose here is to identify the extent to which the Community and the Member States are bound to respect this principle. Firstly, the issue of the legal character of this principle will be addressed. In other words, it will be examined whether it is possible to be absolved from the responsibility for refoulement. Secondly, it will be assessed whether refoulement is also prohibited to third ‘intermediary’ countries. Finally, the question will be asked whether the principle of non-refoulement requires that RSD is carried out in each individual case when removal is considered. As these issues have been the subject of numerous debates, and seeing as it is not the core purpose of this paper to scrutinize the principle of non-refoulement, the following just briefly presents these issues without doing justice to the various facets of

\textsuperscript{129} E.g. EXCOM, Conclusion No. 65 (XLII) 1991, para (b); 68 (XLIII) 1992, para (f), 87 (L) 1999, para (j).
the discourse. This section will proceed in two parts. The first will be devoted to non-refoulement as it is enshrined in international law since it was proved above that the Community is bound by international law while adopting secondary acts, and the second will assess how it is anchored in Community law itself.

2.1.1 The principle of non-refoulement under international law

Legal character

The principle of non-refoulement, at the universal level, is governed in particular by the 1951 Convention. Article 33 defines this principle in its first indent as follows:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The 1951 Convention is not the only instrument of international law in which this principle is anchored. At the universal level, refoulement is explicitly prohibited by Article 3 CAT. Furthermore, implicitly this ban is enshrined in Article 7 ICCPR. Additionally, several regional instruments can be mentioned - Article 22(8) American Convention, Article II OAU Convention and for the present purposes the most relevant Article 3 in conjunction with Article 1 ECHR. This enumeration clearly indicates that the principle of non-refoulement is firmly based in international treaty law.

Not less important is the fact that this principle is generally, although admittedly not unanimously, accepted to be part of international customary law and, therefore, is

131 See also HRCtee: General comment No. 20, 10.03.1992, para. 9.
134 Although prohibition of refoulement is not explicitly mentioned, it follows beyond the shadow of doubt from the constant case law of the ECHR that this Article is applicable in cases of return, expulsion, deportation or extradition to a country where an individual would be exposed to ill-treatment prohibited by this provision. See e.g. T.I. v. United Kingdom, No. 43844/98, 7.3.2000, Chahal v. United Kingdom, No. 22414/93, 15.11.1996, Ahmed v. Austria, No. 25964/94, 17.12.1996, Soering v United Kingdom, No. 14038/88, 7.7.1989.
135 The absolute nature of the torture prohibition in cases of removal of persons which pose threat to national security has been recently questioned on several occasions. See e.g. Suresh v Canada (Minister of Citizenship and Immigration) 2002 SCC 1. File No.: 27790, 11.01.2002, and cf. with Conclusions and
binding for all States regardless whether they are Contracting Parties to the abovementioned documents or not.\footnote{136} However, the answer to the question as to whether the principle of non-refoulement has already reached the status of \textit{jus cogens} is even more ambiguous. Imperative (peremptory) norms of general international law emerge in the course of time through general consensus of the international community regarding their character.\footnote{138} Therefore, it is often impossible to determine the exact moment when a certain norm has exceeded the threshold necessary for entry into the club of cogent norms of international law. At the level of academic discussions, some voices have been raised to plead for the recognition in the case of the principle of non-refoulement (in the

\begin{quote}
\textit{Recommendations of the Committee against Torture: Canada, CAT/C/XXV/Concl.4, odst. 6(a), and HRCtee Mansour Ahani v. Canada, 2002, para 10.10 where the HRCtee clearly rejected Canada’s balancing test in the context of deportation proceedings. See further European Commission’s Working Document, \textit{The Relationship between safeguarding internal security and complying with international protection obligations and instruments, COM (2001) 743 final, 5.12.2001, in particular sections 2.3.1. a 2.4 where the Community indicated that the ECHR should reconsider its categorical approach to the ban of removal to torture with reference to the changed security situation. And most recently, see the pending case \textit{Ramzy v. the Netherlands} (Application No. 25424/05). On the requirements for customary law and nature of non-refoulement see also HATHAWAY, J.C.: \textit{The Rights of Refugees under International Law}. Cambridge: Cambridge University Press, 2005, pp. 24-31 and 307-342.}
\end{quote}


\footnote{137} Although all Member States are Contracting Parties to all instruments prohibiting refoulement, this implication is still relevant since the Community is not.

\footnote{138} Vienna Convention, Article 53, ‘a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’ \textit{Jus cogens} is not […] a source of law. It is rather a hierarchical designation that attaches to laws that have come into existence by the usual modes of international lawmaking. […] \textit{Jus cogens} is best understood as a means of giving greater enforceability to norms that have already acquired the status of universal law by operation of general principles or custom (including custom interacting with treaty).’ HATHAWAY, J.C.: \textit{The Rights of Refugees under International Law.} Cambridge: Cambridge University Press, 2005, p. 28-29.
meaning of the 1951 Convention). However, such a conception would suffer from serious deficiencies. Firstly, looking at State practice up to now, it is hardly possible to draw such a categorical conclusion since it is not self-evident that when States respect this principle they do so because they consider it a non-derogable obligation. Furthermore, besides this absence of the necessary *opinio juris* another argument can be voiced – Article 33 of the 1951 Convention itself is not worded in absolute terms and contains a limitation. This is a point rightly insisted upon by H. Battjes who rejects the conclusion that this limitation does not hinder the peremptory character since the principle of proportionality should be observed when applying it and argues that exactly this proportionality principle is one of the elements which prevent recognition of Article 33 as *jus cogens* with reference to the draft Articles on States Responsibility.

On the other hand, one could raise the objection that the numerous instruments which include this principle load the dice in favour of *jus cogens* status. At this point it is, however, necessary to emphasise that where this obligation is of an absolute character, it regards solely prohibition of torture. Consequently, a plausible claim may be raised that

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139 E.g. J. Allain derives the character of the principle of non-refoulement as *jus cogens* from the EXCOM Conclusions. ALLAIN, J. The *jus cogens* Nature of non-refoulement. *JURL*, 2002, Vol. 13, No. 4. Similarly, however in a more cautious manner, E. Lauterpacht and D. Bethlehem do not exclude this conclusion, either. LAUTERPACHT, E., BETHLEHEM, D. The scope and content of the principle of non-refoulement: Opinion. In FELLER, E., TURK, V., NICHOLSON, F. Refugee Protection in International Law. Cambridge: Cambridge University Press, 2003, para 195. Yet, this claims sits uneasily with the non-binding character of EXCOM Conclusions; moreover, it is doubtful whether these Conclusions represent general consensus of the international community. See ibid, para 214 to the contrary.

140 Article 33(2) of the 1951 Convention ‘The benefit of the present provision may not, however, be claimed by a refugee whom ...’


142 The soundness of the conclusion that prohibition of torture is of absolute nature can be derived from several sources:

1. from the treaties themselves which express the absolute character – Article 3 in conjunction with Article 15(2) ECHR; Article 3 in conjunction with Articles 2(2) and 15 CAT; Article 7 in conjunction with Article 4(2) ICCPR, the non-derogability of the latter was affirmed by the HRCtee in General comment No. 20, 10.03.1992, para. 3;

the prohibition of torture has reached the status of *jus cogens* because of its recognised absoluteness and that the prohibition of *refoulement* in those cases shares its status.\(^{143}\)

Although torture and persecution can overlap in a considerable number of cases, it is necessary to keep in mind that these are two different categories.\(^{144}\) In other words, *non-refoulement* is a categorical order only in cases where after *refoulement* a real threat of torture exists. To qualify the obligation of *non-refoulement* with respect to all forms of persecution as *jus cogens* ‘might be a powerful weapon to guarantee protection of individuals and their human rights’, as suggested by R. Bruin and K. Wouters;\(^{145}\) however, this pragmatic approach cannot substitute the developmental process of a peremptory norm. Therefore, this qualification has remained still rather ‘wishful thinking’\(^{146}\).

The places to which *refoulement* is prohibited

International law prohibits *refoulement* to places where the threat of violation of certain fundamental rights of an individual exists. The nature of the threat and scope of

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4. This conclusion is additionally supported by State practice – the majority of States (if not all) officially prohibited use of torture as part of administrative practices and when one of them is accused of torture it regularly denies this fact and pin the blame on entities beyond its control.

The prohibition of removal to States where there is a substantial risk of torture or ill-treatment is an essential aspect of that prohibition, see below fn. 149 at p. 41.

\(^{143}\) Cf HRCtee, General Comment No. 29, para 11, ‘The enumeration of non-derogable provisions in article 4 is related to, but not identical with, the question whether certain human rights obligations bear the nature of peremptory norms of international law. The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (e.g., articles 6 and 7).’ (emphasis added)

\(^{144}\) To illustrate this point one can mention e.g. the case of persecution on cumulative grounds when ‘mere’ discriminatory acts (which obviously do not reach the threshold of torture), if considered together, can be tantamount to persecution, see Articles 53 and 55 *UNHCR Handbook*.


the fundamental rights differ according to a particular instrument invoked; however, their precise delimitation is not material for the present analysis. Nor is the standard of proof relevant. Therefore, I will focus merely on the element of the place to which *refoulement* is prohibited.

To begin with, the wording of Article 33 of the 1951 Convention refers to the frontier of ‘territories’, in the plural form. This is important evidence that *refoulement* is prohibited to the frontiers of any territory in which individuals would be at risk of ill-treatment, regardless of whether those territories are their country of origin.\(^{147}\)

Furthermore, the ECtHR, CATCtee, and HRCtee have interpreted the relevant provisions as encompassing not only direct prohibition of torture but also removal\(^{148}\) of individuals to any State where they will be at risk of the prohibited treatment.\(^{149}\) This indicates that


\(^{148}\) The formal description of the act carried out by the State where asylum was sought (i.e. expulsion, deportation, return, rejection, etc.) is not material for the prohibition of *refoulement*. ‘As the words “in any manner whatsoever” indicate, the evident intent was to prohibit any act of removal or rejection that would place the person concerned at risk.’ LAUTERPACHT, E., BETHLEHEM, D. The scope and content of the principle of non-refoulement: Opinion. In FELLER, E., TURK, V., NICHOLSON, F. *Refugee Protection in International Law*. Cambridge: Cambridge University Press, 2003. Therefore, for the sake of clearness and briefness, I will refer hereinafter only to ‘removal’.

\(^{149}\) E.g. *T v the United Kingdom*, ‘It is [...] well-established in [the ECtHR’s] case-law that the fundamentally important prohibition against torture and inhuman and degrading treatment under Article 3, read in conjunction with Article 1 of the Convention [...] imposes an obligation on Contracting States not to expel a person to a country where substantial grounds have been shown for believing that he would face a real risk of being subjected to treatment contrary to Article 3.’ See further ECtHR: *Chahal v United Kingdom*, No. 22414/93 [1996] ECtHR 54, 15.11.1996; *Ahmed v Austria*, No. 25964/94 [1996] ECtHR 63, 17.12.1996, paras 39-40.

HRCtee: *General comment No. 20*, 1992, para. 9, ‘In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.’

HRCtee: *General Comment No. 31*, 2004, para 12, ‘Moreover, 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 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.’ (emphasis added)

CATCtee: *General Comment No. 1*, 1996, para 2, ‘the Committee is of the view that the phrase “another State” in article 3 refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited.’ (emphasis added)
the responsibility for refoulement can be triggered not only by direct removal of a refugee to a country from which such ill-treatment emanates (i.e. return to the country of origin or habitual residence) but to a third country as well. Consequently, the removing State bears responsibility (resp. joint responsibility) if the third\textsuperscript{150} country subsequently sends the refugee further in contradiction with the principle of non-refoulement. In this case we are talking about responsibility for indirect refoulement. To illustrate this point, the case TI \textit{v United Kingdom} can be mentioned:

‘The Court finds that the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention.’

It follows from this that indirect removal to an intermediary country, which is not a Contracting State to the ECHR, \textit{a fortiori} does not absolve the expelling State from responsibility.

Furthermore, States cannot even abdicate their responsibility when a specific formal agreement on distribution of responsibility for handling asylum applications among them exists.\textsuperscript{151} If the principle of non-refoulement were violated, all these States would be held responsible.\textsuperscript{152}

\textbf{150} Or fourth, or any other; see further below Chapter 3 - Assessment of Article 25(2)(c), at p.78.

\textbf{151} In the present context the following agreement is of particular relevance: \textit{Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanism for determining the Members State responsible for examining an asylum application lodged in one of the Member States by a third-country national. OJ L 050, 25 February 2003, pp. 1-10. (hereinafter „Dublin Regulation“ or DR).}

\textbf{152} The judgement \textit{T.I. v United Kingdom} can be quoted once again: ‘The expelling State cannot ‘rely automatically in that context on the arrangements made in the Dublin Convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or mutatis mutandis international agreements, to pursue cooperation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved
Does the principle of *refoulement* require individual assessment?

An individual becomes a refugee as soon as he or she satisfies the conditions laid down in Article 1A(2) of the 1951 Convention;\footnote{UNHCR Handbook, para. 28, ‘A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.’} therefore, the obligation to respect the principle of *non-refoulement* necessarily arises before a formal decision on the recognition of refugee status.\footnote{This interpretation was endorsed e.g. by EXCOM in its Conclusion No. 6 (1977), para. (c).}

In order to know whether a person is a refugee, and therefore entitled to be protected from *refoulement*, the examination of an asylum claim on its merits is necessary.\footnote{Save in situations where the exclusion clauses are applied before the assessment on the merits. Neither the 1951 Convention nor the European Directives on asylum explicitly stipulate the order of examination of the inclusive and exclusive clauses; nonetheless, taking into account the effectiveness and economy of the proceedings, it can be reasonably assumed that States will engage in the assessment of admissibility of the claim prior to assessing whether the person is covered by Article 12 QD. Moreover, in case a Member State would apply the exclusion clause at first and concluded that the person concerned falls within its scope and therefore is not a refugee, it would not afterwards assess the admissibility of the asylum claim since the person would fall out from the scope of the asylum Directives.} However, as will be proved below,\footnote{See 2.2 The right to asylum/refugee status at p. 48.} no instrument of international law imposes on States the obligation to carry out a refugee status determination procedure. Consequently, a State may abstain from the RSD provided it will observe the principle of *non-refoulement* and treat the applicant as if he or she was a refugee.\footnote{BATTJES, H. *European Asylum Law and International Law*. Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 398; Similarly, FERNHOUT, R. Status determination and safe third country principle. In CARLIER, J.Y., VANHEULE, D. (eds.) *Europe and Refugees: A Challenge? L’Europe et les réfugiés: un défi?* The Hague: Kluwer Law International, 1997, p. 189.} Thus, no asylum seeker should be sent to a third country without a reliable assessment in his or her case of the available guarantees, e.g. that the person will enjoy effective protection against *refoulement*, will be re-admitted, will have the possibility to seek and enjoy asylum (i.e. will have access to a RSD), and will be treated in accordance with accepted international
Moreover, as observed in the course of the preceding remarks, in the case of a real risk of torture the prohibition of *refoulement* is absolute; however, it can hardly be proved without a material assessment of the claim whether the ill-treatment feared is akin to torture. Therefore, in order to satisfy their international obligations, States should act *as if* the threat was tantamount to torture when they consider removal without providing RSD.

### 2.1.2 The principle of non-refoulement under Community law

Recently, the European *acquis* has joined the array of instruments ensuring prohibition of *refoulement* through the QD and the Charter. Thus, it has reaffirmed its overarching importance.

Turning to the terms of the QD, we find out that it ‘merely’ refers to existing international obligations of Member States. Article 21(1) reads as follows:

> ‘Member States shall respect the principle of non-refoulement in accordance with their international obligations.’

Additionally, the Preamble to the QD reaffirms this principle as set out in the 1951 Convention and thus emphasises the assurance that nobody is sent back to persecution. The priority of the 1951 Convention is similarly acknowledged in Article 20(1). Furthermore, the Preamble states that the implementation of the QD ‘should be evaluated at regular intervals, taking into consideration in particular the evolution of the

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158 These safeguards will be addressed further below. Cf. EXCOM Conclusion No. 85 (XLIX), 1998, para (aa) which “[s]tresses that, as regards the return to a third country of an asylum-seeker whose claim has yet to be determined from the territory of the country where the claim has been submitted, including pursuant to bilateral or multilateral readmission agreements, it should be established that the third country will treat the asylum-seeker (asylum-seekers) in accordance with accepted international standards, will ensure effective protection against refoulement, and will provide the asylum-seeker (asylum-seekers) with the possibility to seek and enjoy asylum’.

159 QD, Preamble, recital (2).

160 ‘This Chapter shall be without prejudice to the rights laid down in the Geneva Convention.’
international obligations of Member States regarding non-refoulement. The respect for international treaties follows additionally from the legal basis of the QD, which is Art. 63 TEC and, therefore, accordance with international obligations must be ensured. Moreover, the exceptions to the prohibition of refoulement in the second indent of Article 21 may be applied only where not prohibited by the international obligations.

The objective of the respective Directive is, inter alia, to establish minimum standards for the content of the protection granted. The non-refoulement principle is no doubt contained in this protection; therefore, in light of the preceding observations on the character and effect of minimum standards, Member States may not undermine their obligations under international law.

Turning next to examine the meaning of the principle of non-refoulement as expressed in the Charter, we find out that the protection against refoulement is twofold. Firstly, Article 19(2) of the Charter expressly prohibits refoulement in the following terms:

‘No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.’

Surprisingly, there is no remark on prohibition from removal to persecution in the meaning of the 1951 Convention. Indeed, according to the Explanations this paragraph is intended to incorporate case law from the ECtHR regarding Article 3 of the ECHR. However, it has been suggested in academic writing that protection ex Article 33 of the

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162 QD, Preamble, recital (36).
163 See above 1.2.1 Legal basis at p. 24.
164 QD, Article 1; Preamble, recital (37); cf. also Explanatory memorandum to the QD on Article 1.
165 It is interesting to note that the standard of proof ‘serious risk’ as well as the scope of the harm that threatens is different from the above examined international instruments. However, their analysis falls out of the scope if this paper; therefore, the reader is kindly referred to e.g. BATTJES, H. European Asylum Law and International Law. Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 114-5.
166 Draft Charter of Fundamental Rights of the European Union - Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50. (hereinafter only ‘Text of the explanations’).
1951 Convention is provided for by Article 18 of the Charter. Arguably, the right to asylum does incorporate protection from *refoulement*; this point will be explored in more detail below. Moreover, as it was demonstrated above the protection against *refoulement* in the sense of the 1951 Convention is provided for in the QD.

Additionally, prohibition of torture and inhuman or degrading treatment or punishment is also stipulated in Article 4 Charter. By virtue of Article 52(3) Charter, it has the same meaning and the same scope as the ECHR Article 3; arguably, as interpreted by the ECtHR in its case law as well.

Furthermore, H. Battjes suggests that the prohibition of *refoulement* is fit for recognition as part of the general principles of Community law, although this issue has not been adjudicated upon by the ECJ so far.

To sum up, it is evident that all the conclusions regarding the principle of non-*refoulement* at the international level made in the earlier discussion apply *mutatis mutandis* when interpreting and applying Community law and no difference with respect to the relevant aspects of the non-*refoulement* principle (legal character, place to which *refoulement* is prohibited and the issue of individual assessment) is enshrined.

2.1.3 Concluding remarks with respect to the principle of non-*refoulement*

The above discussion of the non-*refoulement* principle was not intended to provide a comprehensive account of any of the issues involved. It merely touched upon those elements which provide the necessary background for the subsequent assessment of the provisions on inadmissible applications under PD.

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168 The right in Article 4 is the right guaranteed by Article 3 of the ECHR, which has the same wording.

169 Text fo the Explanations on Article 52.


171 Obligations under CAT and ICCPR are relevant as well as they represent ‘international obligation[s] common to the Member States’. Ibid, p. 116.

172 Cf. fn. 135 at p. 37.

173 The assessment of an application for international protection is to be carried out on an individual basis Article 4(3) QD.
Drawing these ideas together, it was proved that protection from *refoulement* is firmly embedded in international law as well as in Community law. Notwithstanding some ongoing debates on the precise legal character, it can be concluded that the Community as well as Member States are undoubtedly prohibited to take any action which would have as a consequence the exposure of an individual to ill-treatment specified by international law or Community law. This applies not only for return to the country of origin but with equal strength to any kind of removal of the alien to a third country. This conclusion will be particularly relevant for the scrutiny of criteria for the STC and FCA concepts. Furthermore, it was submitted that States are in principle obliged to carry out the RSD procedure in each individual case; however, they may abstain from providing it provided they treat the alien *as if* he or she was a refugee. Therefore, this conclusion suggests that declaring an application inadmissible as such is not at variance with the principle of *non-refoulement*. Whether this also holds true for the particular provisions laid down in the PD will be scrutinized in Part II of this paper.
2.2 The right to asylum/refugee status

In contrast to the principle of non-refoulement, which is firmly embedded in both international and European law, as has been shown above, the existence of the right to asylum or, alternatively, the right to refugee status (the right to seek asylum) is somewhat more ambiguous and has been questioned frequently. Nonetheless, the answer to the question as to whether such a right exists is crucial for the assessment of inadmissible applications. If we accept that this right does exist, it seems at first glance that the incorporation of the concept of inadmissible applications violates this obligation. Therefore, the driving force of this Subchapter will be to endeavour to find out whether the individual right to asylum/refugee status exists. To this end, as in the case of non-refoulement, two different systems of law will be subjected to close scrutiny – international law and European law.

Prior to the search for this right, one more basic question will have to be answered. To wit, a conclusion as to whether a right to asylum/refugee status exists or not will differ according to the starting premise of what asylum and refugee status actually are.

A precise definition of the term ‘asylum’ is absent in international law as well as in European law and definitions applied in academic writing vary. Bearing in mind that this paper analyses European law, I am inclined to a definition that seems to be the most applicable in this context. Accepting the definition suggested by H. Battjes, the term ‘asylum’ applied in this paper shall mean ‘protection offered to an alien on account of a threat abroad, by a state within its territory or by the Community [at least hypothetically] within the Union.’ Furthermore, ‘protection’ can be considered in two ways (1) in a narrow sense, it means protection from human rights violations abroad; (2) in a broad

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sense, it also includes permission to stay in the requested State under dignified conditions.\textsuperscript{175}

Similarly, the term refugee status may be understood in two ways.\textsuperscript{176} Firstly, one can take an individual approach and render this term as \textit{personal status} (like the status of a person in his family or as a citizen) that one has irrespective of a formal recognition. Consequently, it can only be declaratory. Indeed, the QD\textsuperscript{177} as well as the UNHCR Handbook acknowledge the declaratory nature of refugee status.\textsuperscript{178} Moreover, this reading is firmly supported in the doctrine. Secondly, one can also take a broader approach and consider refugee status as the combination of rights and titles that a refugee has in a State (i.e. right to stay, employment, education, etc.). Here, recognition of (individual) refugee status is required to know if the person can benefit from the rights of refugee status or rather a ‘refugee statute’ – a set of objective rights.\textsuperscript{179} It follows from this that there must be access to a recognition process (or the duty of the States to examine refugee status) when the knowledge about whether a person is a refugee or not is necessary to acquire for the Member States to know if they must respect refugee’s core rights that play irrespective of an admittance to legal residence in a State (e.g. non-refoulement must always be respected, as has been demonstrated above). However, do States \textit{always} have to ascertain whether a person is a refugee before they remove him or her?

\subsection*{2.2.1 Right to asylum under international law}

In the quest for a normative basis of the right to asylum, a brief outline on this issue will be provided by examining the subsequent sources of law: treaty law, soft law, and customary law.

Firstly, the focus of the inquiry will be directed towards the law of the treaties. Surprisingly, the fundamental instrument on refugee law – the 1951 Convention – has


\textsuperscript{176} I am indebted to Professor Vanheule for this reflection.

\textsuperscript{177} QD, Preamble, recital (14).\textsuperscript{178} UNHCR Handbook, para 28.

\textsuperscript{179} It follows from the above that the term asylum in the broad sense and term ‘refugee statute’ coincides with respect to their content.
remained silent on this issue.\textsuperscript{180} Indeed, the only reference to the word ‘asylum’ can be found in the 4\textsuperscript{th} recital to the Preamble;\textsuperscript{181} however, the wording of this provision is not very helpful for answering the question at stake. More significantly, at the level of the law of the treaties with universal scope there is no instrument establishing the individual right to asylum.\textsuperscript{182} By contrast, on the regional level the situation is different. A right to asylum can be found in Article 22(7) of the American Convention on Human Rights\textsuperscript{183} and in Article 12(3) of the African Charter on Human and People’s Rights.\textsuperscript{184} However, no similar right is anchored in any of the European binding documents of regional international law. Although it has been submitted that, notwithstanding the absence of any explicit provision on asylum, an implied right to \textit{de facto} asylum may be derived from the ECHR,\textsuperscript{185} the Strasbourg Court clearly does not support this consideration.\textsuperscript{186}

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\textsuperscript{180} A brief look on the \textit{travaux préparatoires} reveals divergent opinions, see e.g. UN doc. A/CONF.2/SR.13, ii. In the opinion of the French delegate ‘the right of asylum was implicit in the Convention, even if it was not explicitly proclaimed therein, for the very existence of refugees depended on it.’ On the other hand, the UK delegation stressed that in their view ‘[t]he right of asylum […] was only a right, belonging to the State, to grant or refuse asylum, not a right belonging to the individual and entitling him to insist on its being extended to him.’

\textsuperscript{181} 1951 Convention, Preamble, recital (4): ‘Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation.’

\textsuperscript{182} ‘The Covenant does not recognise the right of aliens to enter or reside in the territory of a State Party […] however, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry and residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.’ HRCtee, General Comment No. 15, 1986, para 5.

\textsuperscript{183} American Convention on Human Rights, Article 22(7), ‘\textit{Every person has the right to seek and be granted asylum} in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offences or related common crimes.’ (emphasis added)

\textsuperscript{184} African (Banjul) Charter on Human and People’s Rights, 27 June 1981; Article 12 (3), ‘\textit{Every individual shall have the right, when persecuted, to seek and obtain asylum} in other countries in accordance with the law of those countries and international conventions.’ (emphasis added)

\textsuperscript{185} (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950; This conclusion has been based on the argument that the discretion concerning negative decisions in asylum or deportation cases may be restricted by, inter alia, Articles 3, 8 and 13 of ECHR and as a result asylum seekers may not be removed from the territory of Contracting States in certain cases. It has been suggested that these Articles – taken together – may be capable of emerging into a \textit{de facto} right to asylum: (1) Art. 3 as an implied right to freedom from exposure to ill-treatment in the receiving State; (2) respect for family life (Art. 8) as an implied right to residence for family members; and (3) the right to an effective remedy (Art. 13) as an implied right to suspended deportation or temporary \textit{de facto} asylum. EINARSEN, T. The European Convention on Human Rights and the Notion of an Implied Right to \textit{de facto} asylum. \textit{IJRL}, 1990, Vol. 2, No. 3, pp. 361-389.
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When we shift the inquiry to the level of soft law, Article 14 UDHR\(^{186}\) is of *prima facie* relevance. Albeit the UDHR was drafted and adopted as a non-binding declaration and therefore Article 14 does not possess compulsory force *per se*,\(^{188}\) this instrument has had a profound effect.\(^{189}\) However, regardless of considerations as to whether it is binding or not, the wording chosen does not establish the individual right to asylum anyway. Indeed, the proposal to substitute the words ‘to be granted’ for ‘to enjoy’ met with vigorous opposition.\(^{187}\) There was no political will to establish such a right at the time of the drafting. Moreover, there was no intention among States to assume even a moral obligation on that matter.\(^{189}\) Contemporary opinions emphasised that it was the sovereign right of every State to grant asylum to refugees within its territory.\(^{192}\) Similarly, State sovereignty to grant asylum was reiterated in the 1967 Declaration on Territorial Asylum.\(^{190}\) Likewise, the 1993 Vienna Declaration on Human Rights and Programme of Action, which reaffirmed the right to seek and enjoy asylum, did not include an individual right to asylum.\(^{194}\) On the other hand, EXCOM has reaffirmed in its

\(^{186}\) [I]t must be noted that the right to political asylum is not contained in either the Convention or its Protocols.’ ECtHR, *Chahal v. United Kingdom*, 15 November 1996, para 73. See also the *Vilvarajah and Others v. the United Kingdom* judgment of 30 October 1991, para. 102.

\(^{187}\) UDHR, Article 14(1) ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution.’


\(^{193}\) Declaration on Territorial Asylum, adopted by UN General Assembly resolution 2312 (XXII) of 14 December 1967, Article 1(1). However, the margin of discretion was limited by Article 3(1) which reads as follows ‘[n]o person referred to in article 1, paragraph 1 [entitled to invoke Article 14 of the UDHR], shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution’.

Conclusion No. 82 that ‘the institution of asylum [...] derives directly from the right to seek and enjoy asylum set out in Article 14 (1) of [UDHR]’.

Finally, on the level of customary law, there seems to be no overall convergence on this issue. On the one hand, some authors do not concede that the right to asylum has reached the level of customary law. For instance, K. Hailbronner argues that ‘[n]either a homogeneous state practice nor a corresponding opinio juris can be made out. This explains why the terms of Article 14 UDHR are missing in the list of customary human rights norms that doctrinal writers have compiled.’ Similarly, The Committee on the Enforcement of Human Rights Law of the International Law Association states that despite widespread acceptance of the 1951 Convention, the right set forth in Article 14 UDHR has not been identified by commentators or States ‘as falling within customary international law’. On the other hand, some authors submit that the right to asylum, as enshrined in the UDHR, is implicit within the 1951 Convention and is ‘an important emerging norm of customary international law’.

To conclude, although attempts to define an individual right to asylum under international law have been made, they have not received support. K. Hailbronner attributes the failure of these attempts to establish a concrete obligation to admit refugees to the European territory to political and ideological factors. To wit, formal recognition

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195 EXCOM, Conclusion No. 82 (XLVIII), 1997, on ‘Safeguarding Asylum’, para. (b).
198 CHOWDHURY, S.R. A Response to Refugee Problems in Post Cold War Era: Some Existing and Emerging Norms of International Law. IJRL, 1995, Vol. 7, No. 1, p. 105; Chowdhury further argues that ‘[a]fter 46 years of wide acceptance and reiteration of the Universal Declaration, it is difficult to resist a conclusion that the relevant principles, including the right to seek and enjoy asylum, have now normative effect and are binding principles of customary international law.’ Ibid, p. 106.
199 See e.g. HAILBRONNER, K. The Right to Asylum and the Future of Asylum Procedures in the European Community. IJRL, 1990, Vol. 2, No. 3, p. 347 and 359 noting an attempt by Germany in 1977 to define an individual right of asylum under international law. However, Member States refused to adopt the German concept.
of an individual right to asylum might lead to restriction of sovereign rights of a State to control immigration and to decide which aliens may be admitted in its territory. Recently, these arguments revolving around the State sovereignty as the ultimate right of States to patrol their borders has gained renewed vigour due to today’s climate of heightened security concerns. Moreover, this concept of an individual right to asylum, which is linked with legal remedies and right of residence during the asylum procedure, is viewed as unsuitable for processing large numbers of asylum-seekers. Consequently, State practice generally shows considerable reluctance on any attempt to restrict the sovereign rights with respect to the control of migration. This notwithstanding, it will be shown below that this perception of the right to asylum within the Community has changed in recent years.

To sum up, the right to asylum under international law is rather a right of the State to grant asylum than a right of an individual to be granted asylum.

2.2.2 Right to seek refugee status under international law

In spite of the above-mentioned conclusion that there is no right to be ‘granted’ asylum under international law, some commentators assert that there may exist a right to apply for it. They suggest the existence of the individual right to seek refugee status or, in other words, the right to have one’s status recognised. However, is the State always obliged to consider an application for recognition of refugee status made within its jurisdiction? The endeavour to find an answer to this question will be the driving force behind the following analysis.

There are two seemingly incompatible approaches to this issue. According to some authors, States are generally under no obligation to consider applications for recognition of refugee status and their only obligation, derived from the 1951 Convention vis-à-vis asylum seekers who are seeking admission to their territory as refugees, is the

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203 In the meaning of Contracting Parties to the 1951 Convention.
respect of Article 33. While others – in line with several UNHCR notes and papers – underline the individual responsibility of each Contracting Party to the 1951 Convention. They argue that the observance of the obligation to protect refugees requires that a State in whose jurisdiction a person appeals to the 1951 Convention will first of all have to determine if the alien can appeal to the 1951 Convention. To this end, the refugee status determination procedure is seen as a \textit{conditio sine qua non}. According to these authors, a divergent approach would in effect render the 1951 Convention meaningless.

This right is frequently derived from Article 1 \textsuperscript{208} in conjunction with Article 33 \textsuperscript{210} of the 1951 Convention. \textsuperscript{211} Given that refugee status is of a declaratory nature, \textsuperscript{212} the right


\textsuperscript{207} Cf. HAILBRONNER, K. The Directive on Minimum Standards on Procedures for Granting and Withdrawing Refugee Status. In JULIEN-LAFERRIERE, F (ed.) \textit{The European Immigration and Asylum Policy: Critical Assessment Five Years After Amsterdam Treaty}. Bruxelles: Bruylant, 2005, p. 287. ‘[T]he Convention does not oblige states to provide access to an asylum procedure, either in its own territory or elsewhere. Nevertheless, it is clearly \textit{recognized in practice} that a state cannot give effect to its obligations under the Geneva Convention without providing access to a fair and effective determination procedure.’ (emphasis added)


\textsuperscript{211} 1951 Convention, Article 1A ‘[f]or the purposes of the present Convention, the term “refugee” shall apply to any person who, (2) [..] 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…’
to seek refugee status implies the inclusion of some additional quality. Indeed, with regard to the protection of refugees as one of the 1951 Convention’s objectives, the right can be considered as implying an individual right to initiate asylum proceedings. Admittedly, States are not under the obligation to legally admit a refugee.

Furthermore, Art. 13(2) UDHR\textsuperscript{213} as reconfirmed in Art. 12(2) ICCPR\textsuperscript{214} has been invoked in this context. Although they do not include a right ‘to enter any country’ it has been argued that ‘it would make a nonsense of the 1951 Convention if this was not intended, at least for the purposes of refugee status determination, especially where an individual has reached a country’s territory.’\textsuperscript{215}

Drawing these ideas together, both approaches agree on the absolute observance of the non-refoulement principle; however, the one side argues that under certain circumstances compliance with the obligation can be ensured even without status determination. Therefore, R. Fernhout suggests shifting the focus of the debate to an analysis of these circumstances and finds a possible solution in a reconciliation of these approaches in a ‘presumption doctrine’ which states that

\begin{quote}
‘when a state abstains from status determination, the refugee status of the asylum seeker will be presumed. Without status determination the removing state has to treat the asylum
\end{quote}

\textsuperscript{210} 1951 Convention, Article 33(1) ‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’

\textsuperscript{211} See e.g. EDWARDS, A. Human Rights, Refugees, and The Right ‘To Enjoy’ Asylum. IRLR, 2005, Vol. 17, p. 301. ‘Articles 1 and 33 read together place a duty on States parties to grant, at a minimum, access to asylum procedures for the purpose of refugee status determination. Access to asylum procedures is also debatably an implied right under the 1951 Convention (although such procedures are not necessary to accord refugee protection), and is an accepted part of State practice.’ Similarly, FERNHOUT, R. Status determination and safe third country principle. In CARLIER, J.Y., VANHEULE, D. (eds.) Europe and Refugees: A Challenge? L’Europe et les réfugiés: un défi? The Hague, 1997, p. 197. ‘A state in whose jurisdiction an asylum request has been submitted is, in principle, under the obligation to consider it substantively before removal to a third country.’


\textsuperscript{213} UDHR, Article 13(2), ‘Everyone has the right to leave any country, including his own, and to return to his country.’ (emphasis added)

\textsuperscript{214} ICCPR, Article 12(2) ‘Everyone shall be free to leave any country, including his own.’

seeker as a refugee and has to secure that the removal to the third country will not amount to *refoulement* in any manner whatsoever.\textsuperscript{216}

Similarly, H. Battjes argues that ‘the state may do without examination as long as it treats the alien *as if* he were entitled to protection.’\textsuperscript{217} This protection entails not only the prohibition of *refoulement* but arguably includes those rights of the 1951 Convention which are to be granted to refugees up to the third level of attachment (i.e. the ‘lawfully present’ stage) of the incremental system of rights.\textsuperscript{218}

2.2.3 The right to asylum in Community law

The previous Subchapter has submitted that under international law there neither exist the right to be granted asylum nor the right to the RSD procedure. This Subchapter examines whether a divergent conclusion can be reached when interpreting Community law and it argues that it can. This claim is raised on the basis of the Charter, which enshrines explicitly the ‘right to asylum’, read in conjunction with the QD, which informs its content.\textsuperscript{219}

Article 18 Charter enunciates that

> ‘[t]he 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.’\textsuperscript{220} 

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\textsuperscript{218} See HATHAWAY, J.C.: *The Rights of Refugees under International Law*. Cambridge: Cambridge University Press, 2005, p. 185. This conclusion is derived from the fact that the 1951 Convention ‘does not authorize governments to withhold rights from persons who are in fact refugees because status assessment has not taken place. A general or situation-specific decision by a state party not to verify refugee status therefore amounts to an implied authorization for Convention refugees to seek protection without the necessity of undergoing a formal examination of their claims. In such cases, lawful presence is presumptively coextensive with physical presence.’ Ibid.

\textsuperscript{219} I am indebted to Professor D. Vanheule for the incentive to examine the existence of this right.

\textsuperscript{220} Emphasis added.
It is interesting to note that this right has no precedent in any other binding instrument of international law, as has been shown above. The wording is very clear; it indicates the existence of ‘the right to asylum’. However, neither the Charter itself nor the Text of the explanations provides a clue for the discovery of its precise meaning and scope. One may, therefore, argue that this right is empty in fact. A careful analysis of the European asylum law as a whole, accompanied by the use of the rules of interpretation for Community law, however, suggests that this conclusion would be erroneous. A number of arguments provide justification for the conclusion that a right to asylum (with considerable implications for asylum seekers) has been established.

To begin with, bearing in mind the rules of interpretation of Community law, the object of the Charter is of primary importance. It follows clearly from the Preamble that the aim of the Charter is to reaffirm fundamental rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the TEU, the Community Treaties, the ECHR, the Social Charters adopted by the Community and by the Council of Europe and the case law of the ECJ and of the ECtHR. As it follows from the foregoing, the relevant international treaties mentioned in this recital do not contain a right to asylum. However, the reverse holds true as regards the constitutional traditions of the Member States. It has been demonstrated above that the right to asylum forms part of the domestic legislation, in some cases even of a constitutional nature, of a significant number of Member States.221 It follows from this that the right to asylum belongs to the general principles of Community law, the reaffirmation of which is provided precisely by the Charter. Consequently, the right to asylum enjoys twofold recognition: (1) as a general principle of Community law, and (2) as a right emanating from the Charter.222

Additionally, according to the Preamble, the Charter not only reaffirms the existing rights but explicitly states that it recognises the rights that are enshrined in it, thus, it indicates that besides the ‘reaffirmed’ rights there are also ‘new’ rights that are now recognised, such as the right to asylum. ‘New’ in the sense that they have not been

221 See the arguments under the heading Human rights as general principles of Community law at pp. 17-19.
222 Recall that the Charter is not only a source which informs of general principles of Community law but serves as a standard for review of an act of secondary law in case the latter explicitly refers to the Charter.
explicitly recognised in international human rights treaties so far. Furthermore, the Charter emphasises the necessity to strengthen the protection of the rights it encompasses by making those rights more visible.

What is more, inclusion of the right to asylum in the catalogue of fundamental rights corroborates the conclusion that it is a right of an individual since fundamental rights are inevitably connected with human beings.\textsuperscript{223} Therefore, consideration that the right to asylum is merely a prerogative of the State is no longer sustainable. The Community has sent a clear message through incorporating this right into the Charter.

Still, the question remains, what is the scope of this right? It has been alluded above that Article 18 Charter arguably incorporates protection from \textit{refoulement}. However, is that all this provision can offer to a refugee? It is necessary to point out that asylum and \textit{non-refoulement} are two different concepts which do not necessarily need to be applied simultaneously to all cases.\textsuperscript{224} Therefore, it is reasonable to assume that in the case that only the \textit{non-refoulement} principle had been meant, it would have been stated explicitly and not hidden beyond a different concept. Moreover, as demonstrated above, the Charter includes two other provisions that ensure protection from \textit{refoulement}. Consequently, incorporation of the provision, which would entail nothing more than \textit{non-refoulement},\textsuperscript{223} would be superfluous.

Therefore, it is appropriate to look elsewhere within the realm of the CEAS for indications regarding the content. Examination of the CEAS legislation proves, indeed, not to be a vain exercise since the QD expresses ‘full respect for the right to asylum’.

\begin{quote}
‘In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.\textsuperscript{226}’
\end{quote}

\textsuperscript{223} Although some fundamental rights can be classified as collective rights (e.g. right to self-determination, Article 1 ICCPR), their addressees are always humans, not States.


\textsuperscript{225} Cf. Ibid. ‘Asylum is a much broader concept that non-refoulement.’

\textsuperscript{226} QD, Preamble, recital (10), (emphasis added); Cf. with the wording of this recital in the Proposal which explicitly refers to Article 18 of the Charter, ‘[i]n particular this Directive seeks to ensure full respect for human dignity, the right to asylum of applicants for asylum and their accompanying family members, and the protection in the event of removal, expulsion or extradition, promoting the application of Articles 1, 18 and 19 of the Charter.'
Hence, it is convenient to analyse the QD in any quest for the discovery of the content of the right to asylum. ‘Asylum is linked to refugee status although the latter does not necessarily imply the first.’ Much will also depend on the precise delimitation of both. It has been submitted above that the term ‘asylum’ indicates protection offered to a refugee on account of a threat abroad, by a State within its territory (or in the context of European law it may contain, at least hypothetically for the time being, protection offered by the Community as well). The heart of asylum lies in the protection granted to a foreign national. Therefore, the focal point should be the content of the protection the Community has undertaken to grant.

The concept of asylum includes admission and lasting protection against the persecutory country. In other words, the core of asylum has two limbs: (1) the right to reside and (2) the right to durable protection. As to the former, it follows from the previous Subchapter that, under the 1951 Convention, States are not obliged to grant permanent resident status; however, when comparing with the QD, it becomes apparent that the Community has decided to undertake such an obligation. The QD explicitly stipulates that

‘[a]s soon as possible after their status has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least three years and renewable unless compelling reasons of national security or public order otherwise require, and without prejudice to Article 21(3).’

This provision clearly ensures the right to reside within the EU to the refugee; his or her status shall be renewed unless there are ‘compelling reasons of national security or public order’ or the person ceases to be a refugee in accordance with Article 11 QD.

228 Recall the definitions adopted for the purposes of the present study, see 2.2 The right to asylum/refugee status at p. 48.
231 QD, Article 24(1).
232 Cf. QD, Article 14.
Admittedly, the latter ground for derogation can, due to its ambiguity, pose as a source of uncertainty to an extent.

The second limb (the right to durable protection or durable solution) is somewhat more indeterminate and, hence, requires closer qualification. Article 13 of the QD obliges Member States to ‘grant refugee status’ to those who qualify as refugees.\textsuperscript{233} One immediate objection offers itself: refugee status is not asylum and therefore these terms should not be mixed together. However, as illuminated above, the term refugee status may be read either in a narrow sense (as personal status) or in a broad sense (as a set of objective rights). Arguably, the latter reading is more convenient here since the refugee status as such is a matter of fact and cannot be ‘granted’, whereas objective rights, which together create the ‘refugee statute’, fit well within the obligation ‘to grant’. The Explanatory memorandum uses the wording ‘to grant refugee status’ several times as well.\textsuperscript{234} Therefore, it can reasonably be assumed that it was neither negligence nor a mistake to employ the words ‘granted’. Consequently, the drafters, even if somehow cautiously, indicated that the term refugee status encompasses something more than in international law, i.e. something that can be granted.\textsuperscript{235} Therefore, I suggest reading this provision as a commitment of the Community to grant ‘refugee statute’ – a set of objective rights which coincides with the content of asylum. This reading is further corroborated by the rules of interpretation which prioritise the object of the act to the wording. Indeed, it clearly follows from the preambular text that the QD aims ‘to ensure full respect for [...] the right to asylum’.

\textsuperscript{233} QD, Article 13, ‘Member States shall grant refugee status to a third country national a stateless person, who qualifies as a refugee in accordance with Chapters II and III.’ (emphasis added) Cf. The wording of Article 5 of the Proposal to the QD (the predecessor of Article 13 QD) which almost literally reiterates the wording of Article 1A(2) of the 1951 Convention; however, with a remarkable difference the words ‘the term “refugee” shall apply to any person who...’ are substituted with ‘Refugee status shall be granted to any third country national who...’; thus, this difference brings clearly an obligation instead of a mere definition of a refugee.

\textsuperscript{234} E.g. the explanation to Article 2(d) states ‘Refugee status means the status granted by a Member State to a third country national or stateless person who is a refugee and is admitted as such to the territory of this Member State...’, or to Article 11(2)(a).

\textsuperscript{235} Cf. the Tampere Conclusions which with regard to the CEAS agreed that it "should include the approximation of rules on the recognition and content of the refugee status."
Moreover, the ECOSOC in the Opinion on the Proposal to PD explicitly stated the following:

‘The Committee would recall that asylum is a fundamental right and as such, is owed by the country where the application for asylum is lodged: it is not an option left to the good will of, or an ad hoc appraisal by, that country.’

Similarly, the right to asylum was supported in the following provision:

‘The present opinion proposes a number of additions which the Committee believes should be taken on board, in order to:

[...]

promote a climate of shared responsibility and commitment on the part of the Member States and civil society tradition of protecting human rights, of which the present in 
upholding the right of asylum.’

Hence, the preparatory works as a supplementary source of interpretation corroborate the consideration suggested above. Therefore, it is clear that the idea of elevating the right to asylum to the level of fundamental rights was not unknown to the drafters and consultative bodies of the CEAS directives.

To sum up, I argue that by virtue of the Charter read in conjunction with the QD an individual right to asylum has been established within the Community legal order for those who meet the criteria for qualification as refugees.

Raising this claim begs an inevitable question: what does the asylum seekers actually gain by virtue of this right? The array of entitlements is indeed not modest. Generally, it covers the rights enshrined in Chapter VII of the QD; most importantly,

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237 Ibid, point 4.2.

238 This is without prejudice to the entitlements of a refugee from the 1951 Convention; see Explanatory memorandum to the Proposal to the QD to the than Article 18: ‘the content of refugee status as laid down in this Proposal for a Directive cannot be interpreted as limiting in any sense the rights set out in Articles 3-34 of the Geneva Convention.’
the protection against refoulement and the right to a renewable residence permit. Therefore, both limbs of the concept of asylum are, indeed, satisfied.

What is more, it inherently contains the right to the RSD procedure. As proved above, this right does not exist under international law; States may do without RSD as long as they do not send (directly as well as indirectly) a refugee to persecution. Put differently, sending a refugee to a safe third country in itself does not breach any rule of international law. However, by virtue of the right to asylum the situation is considerably different. The RSD is a sine qua non to get to know if an alien can benefit from the rights of the ‘refugee statute’ which he or she is entitled to. Here, Member States no longer can meet their commitments by the ‘presumption doctrine.’ 239 The rights contained in the refugee statute are interlinked with the corresponding positive obligations of the Member States. 240 They cannot be satisfied outside the EU since beyond the EU borders the right to asylum does not exist.241 Moreover, the QD states that the ‘refugee statute’ shall be granted to refugees without any further qualification such as lawfully present or lawfully staying; therefore, the duty to assess an asylum claim is triggered as soon as a refugee comes under the jurisdiction of one of the Member States. To be sure, that is not to say that Member States are obliged to grant asylum to every alien who comes under their jurisdiction. The commitment has been undertaken merely vis-à-vis refugees and that is precisely the argument which corroborates the consideration that the right to asylum includes the right to RSD. There must be access to a recognition process (in other words, the right to have one’s status assessed and recognised with the corresponding duty of the Member State to examine refugee status eligibility) when the knowledge about whether a person is a refugee or not is necessary to acquire for the Member States to know if they must respect a refugee’s core rights. Therefore, the answer to the question asked at the

239 See fn. 216 at p. 56 and the accompanying text.
240 See EXPLANATORY MEMORANDUM to the Proposal to the QD under 5. AN OVERVIEW OF THE STANDARDS IN THE PROPOSAL (e) ‘A fifth set of rules lays down the minimum obligations that Member States shall have towards those to whom they grant international protection. These obligations include the duration and content of the status flowing from recognition as a refugee.’ The words ‘fifth sets of rules’ in this quotation refer to the than Chapter V of the Proposal which contained rules governing the refugee status, in the QD the structure is slightly different.
241 Admittedly, some States may have anchored a similar right in their national legal orders. However, the content is likely to be very different from the European one.
outset of this Subchapter: ‘Do States always have to examine whether a person is a refugee before they remove him/her?’ is clearly in the affirmative within the Community.

With regard to asylum in international law, G. Goodwin-Gill points out that the argument of obligation fails on account of the vagueness of the institution and unenforceability at the instance of the individual.242 Indeed, in order to be effective and to have a value for the addressee, every right must have clear content and must be enforceable before a court. Both these shortcomings of the concept of asylum in international law are, however, healed in European asylum law. As to the former, it was proved above that the right to asylum has very clear contours and content and, as to the latter, the ECJ can no doubt fulfil the function of an enforcing body. Therefore, protection from the violation of this right is fully ensured.

Nonetheless, one more remark is crucial. Although human rights generally enjoy prima facie equal position, in fact they may be limited either by some kind of a legitimate aim or by rights of others. The former limitation may be inherent in the provision itself or the act or instrument may include a general limitation clause. Therefore, it remains to examine whether the Community law imposes any limitations on the right to asylum or whether it is an absolute right. At this point, we have to turn back to the Charter as to the ‘constitutional’ basis of this right and to its rules for interpretation in particular.

Limitations inherent in a provision itself are rare in the Charter. Indeed, even if a particular right corresponds to the right from the ECHR that contains a limitation, it is worded in the Charter in absolute terms. However, as explained above, this absoluteness is only ostensible; these rights must be interpreted and applied in line with the ECHR and the case law of the Strasbourg Court. Nevertheless, the right to asylum ex Article 18 does not contain any inherent limitation, nor can a limitation be inferred from the ECHR or the Treaties since the instant right is not based on either of them. Therefore, in this case the general limitation clause anchored in Article 52(1) shall be applied. Applying this provision on the right at stake, we can trace the following conditions for limitations: any limitation on the exercise of the right to asylum must (1) be provided by law, (2) must respect the essence of this right, and (3) must be subjected to the principle of

proportionality which entails that the limitations may be made (3a) only if they are necessary and (3b) only if they meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Consequently, these conditions for limitations of the right to asylum must be born in mind when the individual provisions of inadmissible applications will be scrutinised. If an infringement of the right is discovered, it will be necessary to further examine whether it may be justified according to the above-mentioned conditions for limitations.

2.2.4 Conclusion to the right to asylum

This Subchapter has assessed two different legal orders – international law and European law – in order to find out whether a refugee has a right to be granted asylum since this consideration is crucial for the assessment of validity of the provisions on inadmissible applications. By means of a comparative analysis of these two legal orders a significant difference has been revealed. Whereas under international law the right to asylum is merely a prerogative of States, which is left to their margin of discretion, under European law the right to asylum is an individual right that can be enforced before the courts.

This argument is made taking into account the following considerations:

- The right to asylum was incorporated into the Charter and thus elevated to the level of fundamental rights of individuals.
- The QD states that those who meet the criteria for qualification as refugees shall be granted refugee status.
- Refugee status shall be read in a broad sense as a set of objective rights (‘a refugee statute’).
- The content of refugee status coincides with the content of asylum and includes:
  - Protection from refoulement;
  - Right to a residence permit;

\[^{243}\text{The reference to general interests recognised by the Union covers both the objectives mentioned in Article 2 and other interests protected by specific Treaty provisions such as Articles 30 or 39(3) of the EC Treaty.}^{2}\text{Text of the explanations to the Charter on Article 52(1).}\]
Other secondary rights enshrined in Chapter VII of the QD;
Right to the RSD procedure.

The right to asylum is subjected to the general limitation clause pursuant to Article 52(1) Charter.

To conclude, it has been argued that the Community law (the Charter in conjunction with the Qualification Directive) has established for the first time the individual right to asylum with a clear corresponding duty on the part of the Member States to grant residence permits and other secondary rights to refugees and to ensure access to a recognition process.
**Concluding remarks to Part I**

With an eye to the analysis of the inadmissible applications in the next Part, the aim of Part I was to elucidate some important and relevant aspects of the working and scope of European asylum law. The first Chapter revealed that, notwithstanding the fact that neither the EC nor the EU is a Contracting Party of any of the relevant international instruments on asylum, they are bound by international law. Several avenues through which international law can work within the Community legal order were identified. Furthermore, Chapter 1 in the second section focused on the basic tenets of the European asylum law itself. After identifying Article 63 TEC as the legal basis for the measures on asylum and pointing to the systematic nature of the CEAS, the implications of the ‘minimum standards’ were clarified. Their crucial importance to further analysis provides justification for their brief repetition. (1) Community acts do not violate the Treaty if they do not, or do not fully, address some obligations required by international asylum law. (2) Where Community legislation sets minimum standards, it cannot be invalid for incompatibility with international asylum law since it does not require Member States to act in breach of international law. (3) The concept of minimum standards precludes the Community to adopt measures which would impose the obligation to refuse the benefits enshrined in the particular provision. Additionally, the rules for interpretation of Community law developed by the ECJ, which are applied throughout this paper as well, were presented.

My purpose in Chapter 2 of Part I was to delimit the scope of the obligations that are imposed on the Community by international law as well as by primary Community law when adopting secondary acts. Firstly, the opening section of Chapter 2 pointed out the importance the Community has ascribed to the principle of non-refoulement. With regard to the obligation to respect this principle imposed by international asylum as well as human rights law, the Community made the prohibition of *refoulement* the cornerstone of the CEAS and thus of its asylum policy. This consideration begs the question whether the provisions on inadmissible applications ex Article 25 PD are in accordance with this obligation.
Secondly, the core finding of the second Chapter was the claim that a newborn right to asylum has been established under European asylum law. This Chapter argued that in contrast to international law, European law encompasses an individual right to asylum, which is connected with the entitlement for residence permit, and other secondary rights. Arguably, this right includes entitlement to the RSD procedure as well. This conclusion gives rise to the question whether an application may be declared as inadmissible at all. To wit, refusing to provide RSD and declaring an application inadmissible *prima facie* violate the right to asylum. Of course, this claim deserves to be confronted with serious challenges. To that end, Part II will provide for the necessary arguments for each individual provision of Article 25 PD *seriatim*.

To sum up, the right to be protected against *refoulement* and the right to asylum will be the core fundamental rights against which the provisions on inadmissible applications under the PD will be tested in Part II.
PART II

ASSESSMENT OF INADMISSIBLE APPLICATIONS UNDER ARTICLE 25 PD
Introductory remarks to Part II

The first Part was aimed at illuminating the rules and principles that are peculiar to European asylum law; it now remains for them to be applied to the individual grounds for inadmissibility. The heading ‘Inadmissible applications’ under Article 25 PD contains two indents. The first one alludes to the Dublin Regulation; however, when this instrument is applied, the possibility to not examine the asylum claim follows from the DR, not from the PD. Likewise, the DR encompasses its own procedural rules and hence, the PD is not applied to the Dublin cases until they come to the stage of assessing the merits. Therefore, notwithstanding the fact that a Dublin decision may be classified as a kind of an inadmissibility ground, the issue falls out of the scope of this paper, the aim of which is to examine inadmissible applications pursuant to the PD.

The second indent of Article 25 includes seven grounds by virtue of which an application may be declared as inadmissible. They may be listed in the following categories:

1. ‘the exception of the safe third country’ as regulated in Article 26 or 27 PD applies;
2. the applicant lodged an “identical” application after a final decision, or is a “dependant” of another applicant, and contested in making his own application part of the latter’s, and presented no facts justifying a separate application;
3. the applicant enjoys refugee status in another Member State or “equivalent” protection in the Member State where he applied, or has applied for such equivalent protection.

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246 Here the meaning of the STC is used in a broad sense as including the situation where a third state has granted protection (the concept of ‘first country of asylum’; Article 26 PD) as well as where the refugee merely travelled through a safe country (the concept of a ‘safe third country; Article 27 PD), (remark by the present author).
247 PD, Articles 25(2)(b) and (c).
248 PD, Articles 25(2)(f) and (g), both these grounds fall within the category of ‘subsequent applications’.
249 PD, Article 25(2)(a).
Each of these grounds is internally complex and raises numerous questions. In order to discover the answers to at least some of them, these provisions will be subjected to close scrutiny in the following Chapters and will be tested against the right to be protected against *refoulement* on the one hand, and the right to asylum on the other. In the earlier discussion, the point was made that both of these rights have been attributed the tenets of fundamental human rights. It has been submitted that when a substantial assessment of an asylum claim is denied, the applicant has to be treated as a refugee and moreover, the absence of knowledge of the concrete risk the applicant would be exposed to justifies the use of the highest standard of protection, i.e. protection as if the risk feared was tantamount to torture. Thus, the question at stake is whether the right to be protected against *refoulement* is violated or not. No further justification may heal the possible breach. By contrast, the right to asylum is subjected to the limitation clause of Article 52(1) Charter and hence, if an infringement with this right is discovered, it will further be analysed whether there are reasons that can be marshalled to justify the *prima facie* violation of this right.

In addition, a careful perusal of the PD reveals that different types of procedures may be applied to the same cases. Some grounds for inadmissibility overlap with grounds for (manifestly) unfoundedness\textsuperscript{252} or preliminary procedure.\textsuperscript{253} They will be referred to only as far as they are relevant for the present purposes; their comprehensive assessment will not be provided in the present study.

\textsuperscript{250} PD, Article 25(2)(d).
\textsuperscript{251} PD, Article 25(2)(e).
\textsuperscript{252} PD, Article 23(4) - STC concept, subsequent applications.
\textsuperscript{253} PD, Article 32 - subsequent applications.
Chapter 1

Assessment of Article 25(2)(a)

Member States may consider an application for asylum as inadmissible pursuant to this Article if: (a) another Member State has granted refugee status.

To begin with, the first provision to be assessed is point (2)(a) of Article 25 PD, which allows the Member States to reject an application for asylum in the case that the applicant has already been ‘refugee status’ in another Member State. As mentioned above the wording of the European asylum legislation is inaccurate when it speaks elsewhere about the ‘granting’ of refugee status. Needless to remind that refugee status (in the narrow sense) may only be recognised since an alien becomes a refugee as soon as the conditions in the 1951 Convention are met. Arguably, the meaning of the term employed here is asylum or the ‘refugee statute’ (refugee status in the broad sense) for residence permit and other secondary rights may well be ‘granted’. Hence, the provision should be read in the way that Member States may consider an application for asylum as inadmissible if another Member State has granted protection in the form of asylum as envisaged by the QD. The protection here is not only meant in the negative sense as protection from refoulement but encompasses also a set of objective rights that ensures dignified living within the EU.

The key idea behind this ground for inadmissibility is the fact that if asylum has already been granted, an alien can no longer claim to be a victim of alleged persecution and a person having well-founded fear. To be sure, that is not to say that the individual ceases to be a refugee when asylum is granted. However, having been granted asylum, the refugee is no longer in need of another form of international protection. His or her well-founded fear of persecution in case of return to the country of origin may still persist, but on the other hand the refugee presumably does not have a well-founded fear of persecution in the country of first asylum. If the refugee is entitled to reside in that country, the level of fear in said country (as a country of habitual residence) is now the yardstick for the assessment as to whether a Member State (or the Community) owes this person protection. If the level of fear is below being well-founded, the commitment of the
Member State to grant asylum is not activated. However, this assertion is contingent upon several conditions. Firstly, the protection provided in the country of asylum must be durable in order to satisfy the obligation imposed by the principle of non-refoulement. This condition seems to be met in this case since refugees are granted residence permits pursuant to the QD.\textsuperscript{254} Secondly, protection in the country of asylum must be effective. In other words, the country must be safe for the particular applicant. Given the human rights standards and enforcement mechanisms within the Community, it can be reasonably presumed that such a protection is provided by the Member States. Nonetheless, in order to be sure that the refugee’s core rights are not violated, this assumption should be open to rebuttal. The refugee should be given the opportunity to prove that the country of asylum is no longer safe for him or her because he or she (1) either fears persecution directly in that country or (2) there is a threat that he or she will be refouled (directly or indirectly) to the country of persecution. As pointed out authoritatively by the EXCOM,

\begin{quote}
\textsuperscript{255} '[i]t is recognized that there may be exceptional cases in which a refugee may justifiably claim that he has reason to fear persecution or that his physical safety or freedom are endangered in a country where he previously found protection. Such cases should be given favourable consideration by the authorities of the State,'\textsuperscript{255}
\end{quote}

Furthermore, it should be noted that with regard to the common minimum standards that are enshrined in the QD, the scope of the protection granted should be basically the same in all Member States and, in the long term (in the second phase of the building of the CEAS), it is foreseen that the status (and thus the protection) will even become uniform.\textsuperscript{256} Nonetheless, even if there were at present some differences, the right to asylum cannot be read as including a right of the refugee to a higher standard than is provided in another Member State. In other words, Community law guarantees a right to asylum, not a right to asylum from the State preferred by the protection seeker. Indeed, it

\textsuperscript{254} Of course, asylum may be withdrawn or ceased if the conditions in the QD or 1951 Convention are fulfilled. However the wording chosen, ‘has granted’ (in opposition to ‘granted’), indicates that the protection continues to exist.

\textsuperscript{255} UNHCR, EXCOM Conclusion No. 58 (XL) (1989) on the Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They had Already Found Protection.

\textsuperscript{256} See, Tampere Conclusion No. 15.
would be unjustified to oblige Member States to carry out a new examination procedure where such protection has been provided which equals the standard they can offer themselves. Likewise, the obligation of the Community as a whole to guarantee the right to asylum has been satisfied when one of the Member States has granted asylum.

To conclude, neither the right to asylum nor the right to be protected from *refoulement* are adversely touched with this provision. However, the refugee should be entitled to prove to the contrary. The obligations to which the Community has bound itself are satisfied and an application for asylum that is lodged after the person has been granted asylum in another Member State can be legally and legitimately declared as inadmissible provided the above-mentioned guarantees are fulfilled.
Chapter 2
Assessment of Article 25(2)(b)

Member States may consider an application for asylum as inadmissible pursuant to this Article if: [...] (b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 26;

At first glance, the second ground for inadmissibility looks similar as the previous one – the applicant has been granted protection in another State. However, two significant differences refute this consideration: (1) the protection has been granted in a non-Member State, and (2) pursuant to Article 26 PD it is enough that the protection is ‘sufficient’. 257

The concept of a first country of asylum has been used to tackle the problem of refugees ‘who move in an irregular manner from countries in which they have already found protection, in order to seek asylum or permanent resettlement elsewhere.’ 258

Remarkably, the PD defines a country of first asylum more extensively than this concept used to be understood. 259 According to this provision, the notion of a FCA shall entail not only the country where the applicant has been recognised as a refugee and can avail himself or herself of that protection (point (a) of Article 26) but also a country where the applicant for asylum enjoys ‘sufficient protection’ (point (b)). 260 It is opportune to assess these situations separately.

257 PD, Article 26, ‘A country can be considered to be a first country of asylum for a particular applicant for asylum if:

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

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

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

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

258 UNHCR, EXCOM Conclusion No. 58 (XL), 1989.

259 It is not the purpose of the present analysis to retrace the whole evolution of the FCA concept; therefore, the reader is kindly referred to the bibliography mentioned in fn. 270 at p. 79 which relates to the STC concept as well since they were often considered together.

260 Cf. PD, Preamble, recital (22), ‘[...] In particular, Member States should not be obliged to assess the substance of an asylum application where a first country of asylum has granted the applicant refugee status or otherwise sufficient protection and the applicant will be readmitted to this country.’ (emphasis added)
Turning to the terms of point (a), we can find two noteworthy requirements that must be fulfilled in order to apply this concept. Firstly, the applicant has been recognised in that country as a refugee and, secondly, he or she has been granted protection and can still avail himself or herself of it. Thus, the term ‘protection’ here seems to contain the rights which the refugee incrementally acquires by virtue of Articles 2 to 34 of the 1951 Convention since this is generally the protection granted to recognised refugees under international law. The content of those Articles, the degree of contingency on another reference group as well as the necessary level of attachment differs from the rights guaranteed by the QD. However, it would lead to an unreasonable result if merely this difference would trigger a new asylum procedure within the EU. As stated above, the commitment of the Community to grant asylum is activated only vis-à-vis persons in need of international protection. Therefore, if the applicant (a) has been recognised as a refugee, (b) has been granted protection within the meaning of the 1951 Convention, (c) will be readmitted to that country, and (d) can still avail himself or herself of that protection, no obligation of the Community arises to carry out a RSD.

Nonetheless, since Article 26 does not set any criteria for assessment of safety for the particular applicant, the applicant should have the opportunity to challenge the assumption of available protection. This holds true with even more strength than in the previous case where the first country of asylum was a Member State (inadmissibility ground pursuant to Article 25(2)(a)). There may be situations where the FCA ceases to be safe for the applicant and the refugee may justifiably claim to have a well-founded fear of persecution or that his or her physical safety or freedom are endangered. Such claims should be given favourable consideration.

The second situation, when the asylum applicant may be removed to a third State on the ground that he has been granted ‘sufficient protection’, is far more problematic. In fact, it is closer to the STC exception, which will be addressed in the next Chapter, since it is not known whether the RSD has been carried out or not. All that is required is that

262 The requirement of readmitance is rightly insisted upon by Article 26.
263 UNHCR, EXCOM Conclusion No. 58 (XL), 1989, para (g).
this ‘sufficient protection’ ensures observance of the principle of non-refoulement. Thus, at least the right to be protected against refoulement seems to be guaranteed. However, more explicit safeguards (e.g. at least those required by the STC concept)\textsuperscript{264} would be warranted.

Still, the right to asylum is seriously undermined. The replacement of the protection guaranteed with merely ‘sufficient’ protection is at odds with the essence of the right to asylum. Moreover, it appears to undermine even international standards demanded for protection on third States. Indeed, the construction of Article 26 implies that the protection foreseen in point (b) may fall short of the standards required under point (a); thus, it seems to allow an amount of discretion that is inconsistent with international law.\textsuperscript{265} As observed by C. Costello, ‘international law is generally said to require “effective protection” in the third country.’\textsuperscript{266} The notion of effective protection has been recently addressed, for instance, by the European Commission, which defined its scope as including at a minimum the following conditions:

- ‘Physical security;
- A guarantee against refoulement;
- Access to UNHCR asylum procedures or national procedures with sufficient safeguards, where this is required to access effective protection or durable solutions; and
- Social and economic well-being, including as a minimum access to primary healthcare and primary education, and access to the labour market or to means of subsistence sufficient to maintain an adequate standard of living.’\textsuperscript{267}

\textsuperscript{264} Article 26 PD states that ‘[i]n applying the concept of first country of asylum to the particular circumstances of an applicant for asylum Member States may take into account Article 27(1).’ (emphasis added) Hence, the application of the requirements of Article 27 is merely facultative. Admittedly, even they are not altogether perfect as will be shown in the next Chapter.


The requirement of mere sufficiency is likely to allow for protection to fall below this threshold. Neither the preparatory works nor other subsequent commentaries offer justification for such an infringement of the right.

To sum up, although both types of the FCA envisaged by Article 26 are conditioned by readmittance, thus providing at least some guarantee for the asylum seekers, they have not avoided certain shortcomings. In the case where a country has recognised an asylum applicant as a refugee and granted him or her protection, it would be appropriate to state explicitly that the applicant must have a right to rebut the consideration that this country is still safe for him or her. With regard to the latter case, where a country which granted sufficient protection is deemed as a FCA, this ground for inadmissibility contravenes the right to asylum under European law and arguably also falls short of the international standards requiring ‘effective protection’.
Chapter 3
Assessment of Article 25(2)(c)

Member States may consider an application for asylum as inadmissible pursuant to this Article if: [...] (c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 27;

Probably the most controversial ground for inadmissibility – the STC concept – has been introduced in point (c) of Article 25(2) with additional reference to Article 27 PD where the criteria under which a non-Member State may be considered as a ‘safe third country’ are stipulated.

The STC concept is one of the strategic responses of European immigration and asylum policy to migratory movements of persons seeking international protection. By contrast to the FCA concept explained in the previous Chapter, the STC concept regards protection seekers whose claim has not yet been considered on the merits by any State. It applies to persons who have not travelled from the country of persecution directly to the country where they have lodged their asylum application but who have passed through one or more countries that are generally considered to be safe. It is expected under this concept that they should have requested protection there; however, they failed to do so. The third country deemed as ‘safe’ is then requested to take back the asylum seeker and provide protection. In other words, the basic element of this concept is to deny an asylum seeker access to substantial RSD procedure on the grounds that he or she could reasonably have been expected to find protection in another country.268 It follows from this that the formal identification of a STC precedes the examination of an asylum application on its merits, thus this procedure can be classified as a kind of a pre-screening procedure.

In comparison with the long history and tradition of refugee law, the practice of returning asylum seekers to STCs is a relatively recent phenomenon, emerging on the European continent in the 1980s. The origins of this concept tend to be frequently connected with the establishment of the internal market within the European

Communities which lifted border controls and thus added to fears amongst Western European governments that asylum seekers will choose certain countries rather than others in their search for asylum (the so-called phenomenon of ‘asylum-shopping’).\textsuperscript{269} However, retracing back the whole development would far exceed the scope and purpose of this paper and moreover, comprehensive studies on this issue already exist.\textsuperscript{270} The purpose of the present Chapter is to assess the STC concept in its current contours, which were modelled by the PD.

This Chapter will proceed in two parts: firstly, it will be considered whether this concept is in accordance with the right to be protected against \textit{refoulement}. To this end, the requirements and safeguards of Article 27 will be assessed. Additionally, in order to provide a complete picture, the consequences of readmission agreements, which are the instrumental tools for implementation of the STC concept, will be examined. Secondly, accordance with the right to asylum will be assessed since the denial of the RSD poses a serious threat to this right.

\textit{THE STC CONCEPT AND NON-REFOULEMENT}

Member States may apply the STC concept only when the criteria of Article 27 PD for assessment of the safety of the third country concerned are satisfied. Points (a) and (b) of the first indent ensure that the prohibition of \textit{refoulement} in the sense of the 1951


Convention is respected. Protection against refoulement pursuant to other human rights treaties is guaranteed through point (c). Remarkably, these provision do not require the third country to be Party to the relevant asylum treaties, rather they set material standards. Put another way, mere ratification of those instruments is not sufficient for the qualification as a STC, the material standard, i.e. the result, must be achieved. Additionally, it is necessary to reiterate that this provision has its basis in Article 63(3)(a) TEC, which provides for only minimum standards. Therefore, even if these requirements were below the international standard, the PD itself could not be at variance with international law since it leaves the Member States latitude to adopt such safeguards that allow them to satisfy their commitments. Consequently, it seems at first glance that the obligations imposed by international law are satisfied. But the protection against refoulement is a complex issue that raises additional questions.

Firstly, is it sufficient that a country is generally considered as safe, i.e. for all applicants who have travelled through this country, or is it required that the safety be assessed in each individual case? This question accompanied the academic discourse on non-binding documents and practice the early 1990s and it still does. In the Subchapter on the principle of non-refoulement, it was concluded that it is, in principle, necessary to provide a RSD in order to know whether a person is a refugee and therefore entitled to be protected from refoulement; however, it is not forbidden by international law to abstain from this procedure provided that the State will observe the principle of non-

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271 ‘Member States may apply the safe third country concept only where [...] (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; (b) the principle of non-refoulement in accordance with the Geneva Convention is respected;’

272 ‘(c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected;’


274 Ibid.

275 See 2.1.3 Concluding remarks with respect to the principle of non-refoulement at p. 46.
refoulement and treat the applicant as if he or she was a refugee. Thus, the requirement to carry out the RSD is not absolute provided that the prohibition of refoulement is scrupulously respected. However the individual assessment of safety is highly warranted in order to be sure that the non-refoulement is not violated. Hence, at a minimum, the conclusion that a third country is safe should be open to rebuttal.

The PD seems to be inclined to individual assessment. The Preamble states that

‘Member States should also not be obliged to assess the substance of an asylum application where the applicant, due to a connection to a third country as defined by national law, can reasonably be expected to seek protection in that third country. Member States should only proceed on this basis where this particular applicant would be safe in the third country concerned.’

Likewise, the second indent of Article 27 indicates that the safety shall be assessed in each individual case:

‘The application of the safe third country concept shall be subject to rules laid down in national legislation, including: [...] (c) rules in accordance with international law, allowing an individual examination of whether the third country concerned is safe for a particular applicant which, as a minimum, shall permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment.’

This provision sheds even more light on point (b) of the same indent, the wording of which is rather ambiguous:

‘The application of the safe third country concept shall be subject to rules laid down in national legislation, including: [...] (b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe.’

278 PD, Preamble, recital (23).
It has been suggested that in order to keep the consistency of these provisions, the term ‘generally safe’ should be read as indicating safety only ‘in general’, thus allowing for rebuttal of the assumption of safety in a particular case.279

To sum up, the requirement that the risk of *refoulement* is assessed in each individual case seems to be satisfied, albeit more explicit wording would be warranted.

Secondly, not only direct *refoulement* in a third country, the safety of which is assessed according to Article 27, but also indirect *refoulement* in any subsequent country is prohibited. Here, the PD poses as a more serious source for misgivings and uncertainty since it does not explicitly require that the RSD is carried out in the third State and allows for subsequent removal.

Remarkably, Article 27(1)(d) merely speaks about a ‘possibility’ to request that one’s status be assessed. This entails that in the country concerned the possibility to apply for asylum must generally exist; however, this does not mean that the particular refugee will have the *opportunity* to ask for it.280 Since outside the Community no obligation to provide RSD exists (save in cases where stipulated in domestic law), the refugee can be further removed to a fourth country or subsequently to a fifth, sixth, etc. This practice leaves the refugee with only a blurred chance that his or her status will be assessed and he or she will be granted protection. It is difficult to foresee where this process will end. Indeed, it is not excluded that it will stop at the gate of the country of persecution, or even beyond. It is clearly impossible to predict the conduct of the subsequent countries; *a fortiori* when it is not known which countries these will be. Consequently, this practice considerably increases the risk of indirect *refoulement*.

This issue is furthermore complicated by readmission agreements. These are instrumental tools which enable the realisation of the STC concept into practice; therefore, it is pertinent to briefly touch upon this issue at this point.

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280 Ibid, p. 422.
Readmission agreements

Generally, a readmission agreement is understood as an international agreement stipulating the procedures for the return and readmission of individuals (with the exception of extradition). They represent one of the traditional instruments used by States to control migratory flows and, in particular, they are aimed at preventing and curbing illegal immigration. In the course of time their personal scope was extended to cover non-citizens and thus asylum seekers as well.\(^\text{281}\) This is one of the main reproaches which have been frequently raised against their use with respect to the STC concept. In fact, a readmission agreement is a precondition for return to a STC.\(^\text{282}\) Put another way, these agreements are an essential tool to make the STC concept lawful and applicable in practice since there is no obligation to readmit non-nationals under international law.\(^\text{283}\) Therefore, the readmittance of a third country national must be based on an agreement between the requesting and requested country. However, the mere existence of such an agreement is not sufficient to satisfy the obligations imposed by international law; their quality (i.e. their content and the safeguards for asylum seekers in particular) is relevant as well.

\(^{281}\) The content of the readmission agreement went through remarkable development. During the time their personal scope was extended and embraced also third country nationals who had merely transited through the requested State. Consequently, they facilitated removals of asylum seekers. Similarly, the basis for the obligation of readmission has dropped the requirement of illegal crossing of the common border between the contracting States but embraced the obligation to readmission when a person entered the requesting State lawfully. LAVENEX, S. Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe. Budapest: Central European University Press, 1999, pp. 79-81.

Under the terms of current readmission agreements, there is a reciprocal obligation of the contracting parties to readmit persons who do not meet the conditions for entry or stay on the territory of the requesting Member State, provided that the requesting State can establish or prove, that the person has the nationality of the requested State or have passed through its territory (legally as well as illegally) or have been granted permission to stay there.


Currently, the so-called third generation of readmission agreements is being negotiated and concluded. The TEC, providing for legal basis in Articles 63(3)(b) and Article 300, has conferred on the Community the mandate to conclude multilateral agreements on readmission. New target countries declared were Albania, Algeria, China, Hong Kong, Macao, Morocco, Pakistan, Russia, Sri Lanka, Turkey and Ukraine. The choice of these countries proved to be highly controversial since most of them may well be refugee producing and their compliance with international refugee protection and human rights standards is obviously dubious. Moreover, many of them lack effective asylum procedures and sufficient resources to provide durable protection. The JHA Council, at its meeting in April 2002, identified six concrete selection criteria:

(1) ‘the migration pressure exerted by a third-country;


The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt [...] (3) measures on immigration policy within the following areas: [...] (b) illegal immigration and illegal residence, including repatriation of illegal residents.’ It has been submitted that the term ‘repatriation’ was intended to have a broad meaning and, therefore, also includes the ‘readmission’. This interpretation has been confirmed by the Tampere Conclusions which explicitly states that ‘the Amsterdam Treaty conferred powers on the Community in the field of readmission.’ SCHIEFFER, M. Community Readmission Agreements with Third Countries – Objectives, Substance and Current State of Negotiations. EJML, 2003, Vol. 5, p. 349.


For country of origin information see e.g. http://www.ecoi.net.
Remarkably, the observance of human rights is not taken into account as a decisive factor in the determination of target countries.\(^{290}\)

Thus, the risk of violation of the *non-refoulement* principle posed by readmission agreements is twofold: (1) in relation to readmission agreements between the Community and third countries with dubious human right records and (2) in relation to readmission agreements between the STC and further countries.

As to the former, readmission agreements concluded between the Community and the above-mentioned third countries shall be trumped by the prohibition of *refoulement* and may not be used if, in the case of a particular asylum applicant, the risk exists that he or she will be subjected to prohibited treatment.

As to the latter, Member States should consider the risk of chain *refoulement* even if the third country appears to be *prima facie* safe for the particular applicant. It is common practice that these third States have concluded readmission agreements with other countries as well. Indeed, in order not get in the so called ‘readmission trap’, these


\(^{290}\) Albeit the EP raised its voice in call for human rights impact assessment, an appropriate monitoring mechanism and acknowledgement of the monitoring role of UNHCR, especially in relation to returned or rejected asylum seekers; this call have not recieved affirmative response. See BOUTEILLET-PAQUET, D. Passing the Buck: A critical Analysis of the Readmission Policy Implemented by the European Union and Its Member States. *EJML*, 2003, Vol. 5p.371.

countries enhance their effort to conclude further readmission agreements with neighbouring countries, other transit states and even countries of origin.\textsuperscript{291} The outcome is a chain of readmission agreements that shift the asylum applicant from one country to another, creating the ‘refugee in orbit’ phenomenon and risk of chain \textit{refoulement}. It is not excluded that at the end of the day only the persecutory countries will remain surrounded by a ‘buffer zone’ where the whole burden of refugees will be centred. In the worse case, the readmission agreements will be concluded even with the countries of persecution. And indeed, this is, alas, not so unrealistic even with respect to the Community looking at the current target countries.

To sum up, the safeguards in the PD could be severely undermined if not scrupulously adhered to in practice. Therefore, States may not rely on general readmission agreements and ‘show a willful blindness’\textsuperscript{292} to the inadequate safeguards of some third States; they must assess in each individual case whether the asylum seeker is at risk of any prohibited ill-treatment. Moreover, it is necessary to reiterate that the responsibility of the first country, where the asylum claim was lodged, still prevails.

Additionally, one more observation, with respect to primary European law, is warranted. As mentioned above, the Charter largely refers to international law; thus, the above considerations apply accordingly. But still, it provides an additional requirement – the ground precluding removal where there is risk of the death penalty. This issue is not explicitly mirrored in Article 27 PD. Therefore, in order not to breach the duty imposed by primary Community law, Member States are advised to add this condition when implementing this Directive in national law.

\textit{THE STC AND THE RIGHT TO ASYLUM}

It has been submitted above that the right to asylum within the meaning of Community law includes the right to have one’s refugee status assessed and recognised. The application of the STC concept clearly violates this entitlement since it denies the refugee this right for purely formal reasons – travelling through another country. The


knowledge as to whether an asylum seeker is indeed a refugee can be revealed only through the outcome of the RSD procedure; this is, however, denied in this case and the asylum seeker is sent to a non-Member State deemed as safe. This treatment of an asylum seeker inevitably begs the question whether the Community may absolve itself from its commitment to grant asylum to persons who fulfil the criteria for qualification as refugees. There is an obvious infringement with the right to asylum ex Community law. However, we have to further ask whether this infringement can be justified and hence, the Article 52(1) Charter serves here as the pertinent yardstick.

Firstly, any limitation on the exercise of the right to asylum must be provided by law, this requirement is satisfied since the PD no doubt belongs to the ‘law’ of the Community. Secondly, this provision prohibits derogation from the rights enshrined in the Charter in the case that the essence of the right would be adversely affected. Here, a reason for concern arises. Access to the European asylum procedure is denied and the applicant is sent back to a STC. This is tantamount to a clear violation of this right since the refugee would be denied the whole set of rights the Community has undertaken to guarantee. What is more, it is not ensured that the refugee’s claim will be assessed at all. Albeit, the requirement of readmittance to the STC suggests, to a certain extent, this guarantee, it is clearly not sufficient since there is no requirement that the RSD be carried out in the third country. As shown above, Article 27(1)(d) merely speaks about the ‘possibility’ not the ‘opportunity’ to request to have one’s refugee status assessed. The third or subsequent State is under no obligation to provide the RSD; it follows that this practice clearly violates the essence of the right to asylum.

Thirdly, any limitation must be subjected to the principle of proportionality, which entails that the limitation may be made only if it is necessary and only if it meets the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. The legitimacy of the STC concept is said to be based on the assumption that refugees who have left the country of persecution have an obligation to apply for asylum in the first safe country they have been able to reach293 and if they fail to do so, it is assumed that they are ‘not fleeing danger but rather shopping around the world

for a new and easily accessible place to ask for refugee status.”
Thus, this consideration begs the question whether a refugee is indeed obliged to apply for asylum in the first country he or she reaches. Furthermore, it is often argued that the basis for the STC is provided by the sovereign right of a State to control migration. Both these issues will be addressed in more detail in the following.

DUTY TO APPLY FOR ASYLUM IN THE FIRST COUNTRY AS A LEGITIMATE AIM FOR THE STC CONCEPT?

The starting point for an analysis of this question is Article 31 of the 1951 Convention. This Article is said to imply such a requirement with particular reference to the words ‘coming directly’ in its first paragraph and by using the argument a contrario. Article 31(1) reads as follows:

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

Seeking to verify this hypothesis, the central issues arising out of Article 31(1) shall be reviewed in the following. Since the ordinary wording is ambiguous (in particular the terms ‘coming directly’ and ‘show good cause’ need some more qualification) and the object and purpose of the treaty do not help much in this case either, recourse shall be had to the travaux préparatoires of the 1951 Convention as supplementary means of interpretation. The summary records from the Conference of Plenipotentiaries held in Geneva in 1951 bear witness to long discussions on the precise


296 1951 Convention, Article 31 (1) (emphasis added)

297 Article 32 of the 1969 Vienna Convention. The present author is well aware of the non-retroactivity of the 1969 Vienna Convention (Article 4); nevertheless, this Convention will be used as a guideline revealing the customary rules for interpretation of treaties since it is well known that it was the intention of the drafters to codify the customary law regarding treaties.
wording of this Article.\textsuperscript{299} The drafting history clearly shows that this provision was not intended to deny access to international protection for asylum seekers. On the contrary, the primary purpose was to protect refugees against penalties for unlawful crossing of the border since ‘persecution was itself good cause for illegal entry’.\textsuperscript{299} Thus, the intention was the guarantee of a certain right for persons in need of international protection and therefore it should not be interpreted to their disadvantage. Moreover, it clearly reveals that the intention was not to oblige an asylum seeker to apply for asylum in the first country of arrival, rather to prevent those who have already been granted asylum from illegal subsequent movements.\textsuperscript{300}

This interpretation has also found support in academic writing.\textsuperscript{301} For instance, G. Goodwin-Gill concluded that ‘[a]lthough States may and do agree on the allocation of responsibility to determine claims, at the present stage of legal development, no duty is imposed on the asylum seeker travelling irregularly or with false travel documents to lodge an asylum application at any particular stage of the flight from danger.’\textsuperscript{302} Similarly, J. Hathaway is also clear on this issue stating that

\begin{itemize}
\item \textsuperscript{300} Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records: UN doc. A/CONF.2/SR.14.
\item \textsuperscript{301} See Ibid, Summary records: UN doc. A/CONF.2/SR.13, the commentary of the French delegate.
\item \textsuperscript{302} See e.g. UNHCR: Commentary on the Refugee Convention, Articles 2-11, 13-37 (Written by Professor Atle Grahl-Madsen in 1963; re-published by the Department of International Protection in October 1997). \url{http://www.unhcr.org/publ/PUBL/3d4ab5fb9.pdf}, [accessed 29.09.2006]
\end{itemize}

A. Grahl-Madsen makes an interesting observation from the linguistic perspective noting that ‘whereas the word “direct” was used in certain of the proposed texts, the final text contains the word “directly”. Now “direct” and “directly” are two different adverbs in English; the former meaning “straight, not crooked or round about”, whilst the latter means “in a direct manner; at once, without delay; presently, in no long time”. It would hardly be justified to put too much emphasis on these linguistic points. But on the basis of the discussion which took place at the Conference, and more particularly: the statements quoted above, it seems permissible to reflect that the drafters’ choice of word was not entirely incidental. The adverb “direct” with its more limited range of meanings would not have been able to convey the intentions of the Conference.’ p. 104.

\begin{itemize}
\end{itemize}
There is no requirement in the Convention that a refugee seek protection in the country nearest her home, or even in the first state to which she flees. Nor is it requisite that a claimant travel directly from her country of first asylum to the state in which she intends to seek durable solution.\textsuperscript{303}

To sum up, refugees shall not be required to have come directly from their country of origin. The primary intention of the drafters of the 1951 Convention with respect to Article 31 was to lay down a principle of immunity from penalties for refugees who cross the border illegally for a ‘good cause’. In the light of the above mentioned facts, the hypothesis that Article 31 leaves space for interpretation that an asylum seeker is obliged to apply for asylum in the adjacent country must be rejected and excluded from the normative base underlying the STC concept. A divergent approach would obviously be too extensive in its interpretation, with no real foundation in the original intentions of the drafters and contrary to the purpose of the given provision.

\textit{A SOVEREIGN RIGHT TO CONTROL MIGRATION AS A LEGITIMATE AIM FOR THE STC CONCEPT?}

Excluding the obligation on the part of the refugee to apply for asylum in the first safe country, another possible objective that could justify infringement with the right to asylum shall be examined. Among the arguments raised by the Member States in favour of this policy, it may frequently be heard that it underlines the States’ sovereign right under international law to decide who should enter and stay within their territories and that the forced return of migrants serves in fact to maintain the integrity of asylum seekers and regular immigration programmes.\textsuperscript{304} This aim pursued seems to be more firmly based and it must be admitted that States do enjoy sovereign right to control migration. However, it is necessary to emphasise that immigration and asylum are two distinct phenomena that must be treated differently in order to appropriately respond to the peculiarities of the latter (vulnerability, special needs, need to cross illegally,...). Experience with the STC concept has proven itself incapable of tackling the suggested


\textsuperscript{304} KRUSE, I. EU Readmission Policy and Its Effects on Transit Countries – The Case of Albania, EJML, 2006, Vol. 8, p. 118.
objective. To the contrary, given the lack of legal channels of immigration that were even more restricted due to the strengthening of border controls, protection seekers often resort to smugglers and mafia services; the STC have not proved to minimize these practices.\textsuperscript{305} Therefore, it can be concluded that employing the STC concept to pursue the objective of migration control is neither a necessary nor a suitable means.

To sum up, it has been proven above that declaring an application as inadmissible on the ground of the application of the STC concept seriously threatens the right to be protected against \textit{refoulement}. Even if all safeguards of the PD are adhered to and the safety of the third country is assessed in each individual case, the risk of chain \textit{refoulement} is not completely excluded. It is not ensured that the refugee will ever have a chance to be granted durable protection, which is at variance with both the right to be protected against \textit{refoulement} and the right to asylum. What is more, the latter is not only threatened but clearly violated when the RSD is denied and the applicant sent to a third country, even if this country was ‘safe’.

Chapter 4

Assessment of Article 25(2)(d)

Member States may consider an application for asylum as inadmissible pursuant to this Article if: [...] (d) the applicant is allowed to remain in the Member State concerned on some other grounds and as result of this he/she has been granted a status equivalent to the rights and benefits of the refugee status by virtue of Directive 2004/83/EC;

The fourth ground for inadmissibility that will come under scrutiny will be the situation when an alien has been granted some kind of protection (other than asylum) in the Member State where he or she has lodged his or her asylum application. At first sight, it may seem correct to refuse the RSD when the person has already been granted protection. At a closer look, however, several crucial questions become apparent. What is the meaning and scope of the term ‘equivalent status’? Does the provision truly require an identical set of rights and benefits? Can ‘equivalent status’ replace the commitment to grant asylum? Moreover, if the answer to the latter question was affirmative, does such an equivalent status exist at all? The following hopes to clarify these core issues in order to assess whether this inadmissibility ground is in accordance with the obligations imposed on Member States by international and European asylum law.

To begin with, does the provision require the status to be ‘identical’ or is it enough that it be merely ‘similar’? As argued above, there exists a right to have one’s refugee status recognised and to be granted a residence permit and other secondary rights if the outcome of the RSD is positive. Arguably, in order to satisfy the commitment to grant asylum in the meaning of a set of objective rights, the first reading is correct. Granting some kind of ‘equivalent’ status cannot absolve the Member States from the commitment they have undertaken. Doing so would be tantamount to a circumvention of the Community law and would be at variance with the right to asylum. Admittedly, the right to be protected against refoulement would probably not be adversely affected since, to be worthy of this label, ‘equivalent status’ is likely to encompass such protection at a minimum.

Furthermore, it is necessary to add two more observations. Firstly, the provision of Article 25(2)(d) obviously assumes that the rights connected with refugee status in the
QD are up to the standards in international law.\textsuperscript{306} However, careful perusal, and comparison, of the QD and 1951 Convention reveals that the scope of rights is not the same. Moreover, this holds true in both directions – on the one hand the QD guarantees more rights and some of them with stronger commitments,\textsuperscript{307} but on the other, the QD does not address the full range of 1951 Convention benefits.\textsuperscript{308} Nonetheless, the benefits of the 1951 Convention have not lost their relevance with the adoption of the QD.\textsuperscript{309} To wit, some of them play their role irrespective of a formal recognition of the refugee. However, if the refugee is denied the RSD and is given an ‘equivalent status’ instead, the Member State will not be able to know whether it must respect these entitlements. Secondly, it should be pointed out that the benefits of the FRD are applicable only to recognised refugees and hence, persons enjoying some ‘equivalent status’ cannot invoke them.\textsuperscript{310} Consequently, application of this ground for inadmissibility would entail denial of those benefits.\textsuperscript{311}

Therefore, only if the status is literally identical, would the refugee’s core rights not be violated and the essence of the right to asylum preserved.\textsuperscript{312} Let us now consider the various forms of status that may be taken under consideration.


\textsuperscript{307} Cf. e.g. Articles 27 and 31 QD with Articles 21 and 22 of the 1951 Convention; see also 2.2 The right to asylum/refugee status at p. 48.

\textsuperscript{308} ‘Directive refugees are entitled to all Convention benefits’ BATTJES, H. European Asylum Law and International Law. Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 474; As the QD sets only minimum standards they are ‘by definition “without prejudice” to the Member States’ obligations under international law.’ Ibid, p. 474. Cf. Article 20(1) QD. ‘This Chapter shall be without prejudice to the rights laid down in the Geneva Convention.’


\textsuperscript{310} Ibid, p. 333; cf. Art. 3(2) FRD.

\textsuperscript{311} See Ibid, p. 333.

\textsuperscript{312} Cf. Art. 52(1) Charter, ‘Any limitation on the exercise of the rights and freedoms recognised by this Charter must [...] respect the essence of those rights and freedoms.’
The European law offers four kinds of protection status: (1) refugee status; (2) subsidiary protection status; (3) temporary protection status; and (4) applicant status. The first and the last ones are a priori excluded from the present assessment since such a comparison would obviously be illogical. In the case of the former, comparison of refugee status with refugee status would be tautological. To the contrary, this status serves as the yardstick for the present analysis. Similarly, it would not be reasonable to assume that the status of an applicant was meant in this provision since the applicant status is a transitional stage which shall be ended once the refugee status is recognised or denied by a final decision. Moreover, it would truly be beyond all rules of logic and fairness to declare an application inadmissible for the reason that someone is an applicant and enjoys the rights and benefits connected with this status.

Thus, the first form of protection that can be considered is subsidiary protection. A comprehensive analysis of subsidiary protection would exceed the realm of the present study; therefore, it suffices here to point out some relevant issues. Although most of the provisions of Chapter VII of the QD, which delimit the content of international protection granted by the Community, shall apply to both refugees and persons eligible for subsidiary protection, the individual Articles may indicate otherwise. And indeed, they do so in a considerable number of cases. Most remarkably, the right to a residence permit has less durable character in the case of subsidiary protection status. Similarly, other

313 In addition, two other specific categories of refugees in European asylum law may be distinguished: (a) refugee status ex Article 14(6) QD (status of persons who qualify as refugees, but may be expelled under Art. 33(2) 1951 Convention); and (b) refugee status ex Article 24(1) QD (status of persons excluded because of national security or public order). Both these categories are refugees ex 1951 Convention; however, they are not entitled to the same benefits as beneficiaries of the refugee status and enjoy a separate set of rights. Most importantly, the former are excluded from the protection against refoulement ex 1951 Convention (nonetheless, the protection by virtue of other human rights instruments and arguably also by virtue of Article 21(1) QD is preserved). The latter are refused residence permit ex Art. 24(1) and consequently cannot claim benefits from FRD either. See, BATTJES, H. European Asylum Law and International Law. Leiden/Boston: Martinus Nijhoff Publishers, 2006, pp. 486-490. Their status is by definition not equivalent to the refugee status; therefore, they fall outside the scope of the present analysis.


315 The content of the refugee status was elucidated in 2.2 The right to asylum/refugee status at p. 48.

316 See Article 20(2) QD.

317 See Article 24 QD.
provisions indicate limitations or lower status.\textsuperscript{318} Moreover, Article 3(2) FRD explicitly
excludes subsidiary protection beneficiaries from its scope. Consequently, subsidiary
protection status cannot be considered as equivalent, and \textit{a fortiori} as identical, with
refugee status since each of them guarantee another set of objective rights. Does it entail
that a subsidiary protection beneficiary is excluded from the scope of Art. 25(2)(d) and
may claim refugee status? The answer is not unambiguous. The architecture of the CEAS
and QD in particular is built on the premise that refugee status enjoys priority and when a
person asks for protection in the Community, it shall be assessed first whether he or she is
a refugee provided that the alien does not explicitly express the wish to ask for another
form of protection. Therefore, in principle subsidiary protection is granted only after the
RSD has been carried out.\textsuperscript{319} It follows from this that it can be reasonably assumed that a
subsidiary beneficiary is not a refugee. Therefore, no obligation to provide a new RSD
arises and an application may be declared inadmissible in this case. However, in the case
that only a separate subsidiary protection determination procedure has been carried out
without examining whether a person is a refugee or not, he or she should be allowed to
apply subsequently for asylum in case the circumstances of his or her case warrant it.
Moreover, another case where the RSD shall be carried out, regardless whether the
person concerned is a subsidiary beneficiary or not, is the situation of a refugee \textit{sur place}.
This fact then triggers his entitlement to refugee status benefits.

Secondly, another kind of protection status that can be taken into consideration is
temporary protection status. As in the case of subsidiary protection, my purpose here is
not to provide an in-depth study on this topic and therefore only the most relevant
features of temporary protection will be touched upon in order to compare it with the
refugee statute. The aim of temporary protection is to provide protection to a mass influx
of protection seekers and, as the very title indicates, the character of the protection
offered is ‘temporary’.\textsuperscript{320} Moreover, not being incorporated within the CEAS,\textsuperscript{321} it

\textsuperscript{318} In fact all the provision of Chapter VII, save the following Articles 21(1); 22; 27; 30, 31, 32, and 34 QD.
\textsuperscript{319} The fact whether this is done in one single procedure or in two separate ones does not play a role for the
present analysis.
\textsuperscript{320} Temporary protection beneficiaries are entitled for ‘residence permits for the entire duration of the
protection’; however, at least for one year. See Articles 4(1) TPD, 8(1) TPD
\textsuperscript{321} See 1.2.2 Common European Asylum System at p. 26.
includes its own substantive as well as procedural rules and the set of rights differs from
the refugee statute. Nevertheless, a temporary protection beneficiary may well be a
refugee at the same time and therefore, may not be denied access to RSD and all the
rights he or she is entitled to. Most importantly, the TPD itself confirms this conclusion
stating that ‘temporary protection should be compatible with the Member States’
obligations as regards refugees. In particular, [temporary protection] must not prejudge
the recognition of refugee status pursuant to the [1951 Convention]. Furthermore, it
follows from Article 63(2) that the beneficiaries of temporary protection may be refugees.
In other words, an applicant may not be denied access to RSD for the reason that he or
she is a temporary protection beneficiary.

In addition, another status may be implicitly found in the realm of the European
asylum law; namely, ‘a dependant status’ of a family member of a Directive refugee.
These persons are entitled to almost the same set of rights as beneficiaries of the refugee
statute, however, this status cannot be interpreted as the ‘equivalent status’ pursuant to
the provision at stake, either. Art. 23(2)QD states that family members should not
“individually qualify” for refugee status. As argued by H. Battjes, ‘this is not a condition,
but rather a procedural rule: it imposes an order of applications.’ Therefore, if a family
member of a refugee status beneficiary submits an application for asylum, Member States
may not qualify him or her as a family member but as an applicant for asylum and as a
consequence, they may not dismiss his or her claim as inadmissible because he or she
enjoys ‘equivalent’ protection to refugee status.

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322 Furthermore, temporary protection beneficiaries may not invoke the RS Directive pursuant to Article
3(3) RS Directive.
323 Within the meaning of the 1951 Convention.
324 Cf. TPD, Preamble, recital (10).
325 BATTJES, H. European Asylum Law and International Law. Leiden/Boston: Martinus Nijhoff
Publishers, 2006, pp. 478-9. The dependant status is established by Article 23(2) QD.
326 Including the right to residence permit; however they cannot claim Article 21 – protection from
refoulement as Article 23(2) refers to Articles 24 to 34 QD, not to Article 21 QD.
327 BATTJES, H. European Asylum Law and International Law. Leiden/Boston: Martinus Nijhoff
328 Ibid.
Hence, having found no ‘equivalent’ status in the Community law,329 we should look further elsewhere to complete this task. Two other forms of protection present themselves. Namely, the refugee protection granted by virtue of the UNHCR mandate or some kind of national status. As regards the first alternative, the UNHCR in practice does not use its mandate to grant asylum within the EU since the refugee protection mechanisms are more or less working well. The latter seems to be no viable option, either. It would be superfluous to maintain some kind of other status that would be identical with refugee status ex QD and in the case this status would not be identical but actually lesser, the right to asylum would be violated.

Drawing these ideas together, there seems to be no ‘equivalent’ to refugee status which would guarantee the level of protection the Community has undertaken to guarantee and grant. Consequently, regarding any of the statutes discussed above as ‘equivalent’ for the purposes of this provision would lower the level of protection guaranteed and would obviously be a serious restriction on this fundamental right. Therefore, it remains to be assessed whether derogation from this right might be justified.

The Charter states that ‘[a]ny limitation on the exercise of the rights and freedoms recognised by this Charter must [...] respect the essence of those rights and freedoms.’330 The essence of the right to asylum is to provide protection to those who are victims of illtreatment in their home country. One might argue that the protection is guaranteed and thus the essence not touched when ‘equivalent’ status is granted. However, as was submitted above, only if the level of protection equals the protection of the refugee statute, is the essence of the right to asylum not detrimentally affected. In particular, the benefits of the FRD are an essential right of a refugee that would be denied by any other kind of status. Additionally, the second clause of this Charter provision requires that ‘[s]ubject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.’ Neither the Explanatory

329 ‘In terms of secondary rights, the refugee status occupies a prime position over all other statuses.’ Ibid, p. 513.
330 Charter, Article 52(1).
memorandum nor other preparatory works to the PD indicate any legitimate objective of general interest or the necessity to protect the rights and freedom of others that would justify such a limitation of the right to asylum. Indeed, there is no justifiable reason to replace refugee status with some kind of ‘equivalent status’ in the case of a refugee.

To conclude, even though it may be agreed that the provision is in line with the principle of non-refoulement since the equivalent status arguably encompasses at a minimum such a protection, the right to asylum that shall be guaranteed by the Community is violated. The application of this ground for inadmissibility would entail an infringement of this right and such an infringement would not survive the proportionality test required by the Charter. Consequently, Member States may not apply this provision when the applicant can claim refugee status for it would be at variance with the right to asylum, and/or the benefits from FRD, and in addition it would entail the denial of some of the 1951 Convention benefits.
Chapter 5

Assessment of Article 25(2)(e)

Member States may consider an application for asylum as inadmissible pursuant to this Article if: [...] (e) the applicant is allowed to remain in the territory of the Member State concerned on some other grounds which protect him/her against refoulement pending the outcome of a procedure for the determination of status pursuant to point (d).

As the ground for inadmissibility embedded in point 2(e) refers to point 2(d), the present analysis will largely draw on the findings made in the previous Chapter.

Having concluded that the right to asylum would be seriously curtailed by replacing asylum with some other ‘equivalent status’, this consideration a fortiori applies in the case that the RSD should be refused on the ground that the applicant is allowed to remain in the Member State pending the outcome of a procedure for determination of such a status. What is more, this ground merely requires that the applicant be ‘allowed to remain’; this leave is far from the protection that the ‘refugee statute’ ensures. Not only would the right to asylum be violated for the reasons stated above, but also the protection against refoulement would not be sufficiently ensured since the right to remain in this case applies only for the period until a final decision about the ‘equivalent status’ is made. If the outcome were negative, the protection would cease; however, the person concerned may still be a refugee. Moreover, declaring the application for asylum inadmissible would deprive the applicant of the benefits for unrecognised refugees from the 1951 Convention as well as all benefits connected with the ‘applicant status’ ex Community law,331 which are provided in the RS Directive.332

332 RS Directive, cf. also PD, Preamble, recital (13), ‘In the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1 of the Geneva Convention, every applicant should, subject to certain exceptions, have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his/her case and sufficient procedural guarantees to pursue his/her case throughout all stages of the procedure. Moreover, the procedure in which an application for asylum is examined should normally provide an applicant at least with the right to stay pending a decision by the determining authority, access to the services of an interpreter for submitting his/her case if interviewed by the authorities, the opportunity to communicate with a representative of the United Nations High Commissioner for Refugees (UNHCR) or
In conclusion, a person may not be denied access to RSD on the ground that the outcome of another status determination is pending. In order to respect the right to asylum, a person must be given the opportunity to have his or her refugee status recognised. In addition, by the same token as in the previous case (Art. 25(2)(d)), there is no reasonable justification for derogation from this right.
Chapter 6
Assessment of Article 25(2)(f)

Member States may consider an application for asylum as inadmissible pursuant to this Article if: [...] (f) the applicant has lodged an identical application after a final decision.\textsuperscript{333}

Turning to the terms of Article 25(2)(f), the sixth ground for inadmissibility will be put under scrutiny. According to this provision Member States are allowed to dismiss an application for asylum as inadmissible in the case of a repeated application. In other words, in the case the applicant has lodged an identical application after the decision of a previous RSD had become final. As will be shown below, the key point of this provision is the term ‘identical’.

Generally, the obligation of the Member State to provide RSD (and thus to provide access to the right to asylum) is consummated once the procedure has ended with a final decision. The obligation imposed by the right to asylum includes the commitment to grant the ‘refugee statute’ to refugees. However, if it was not proven in the previous procedure that a person is a refugee, no such obligation arises. Moreover, the requirement to initiate a new procedure in this case would undermine the authority of decision-making and the trust in the rule of law. However, this consideration is contingent upon two conditions: it presupposes (1) an effective remedy to the first instance decision, and (2) the absence of new facts that would warrant a new examination of the claim.

To begin with, the question will be asked whether the decision on an asylum application may be successfully challenged under European asylum law.\textsuperscript{334} As it emerges clearly from the preambular paragraph to the PD, a right to an effective remedy in the field of asylum enjoys the position of a general principle of Community law.\textsuperscript{335}

\textsuperscript{333} This includes application submitted after decision at first instance has been taken but the appeal procedure has not yet come to an end. For rules governing new submission before a final decision see Art. 32(1) PD. See BATTJES, H. European Asylum Law and International Law. Leiden/Boston: Martinus Nijhoff Publishers, 2006, n. 257 and p. 338.

\textsuperscript{334} Other instruments (e.g. ECHR or ICCPR) could be certainly invoked as well; however, for the present purposes it is necessary to find out whether the Community itself ensures effective remedy.

\textsuperscript{335} Recall the implications of general principles 1.1.3. General principles of Community law at p.15.
‘It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of refugee status are subject to an effective remedy before a court or tribunal within the meaning of Article 234 of the Treaty. The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole.\(^{336}\)

Moreover, this right is further reaffirmed in the Charter, which stipulates in Article 47 the following,

‘Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.’

The Explanation text to the Charter discloses that this provision has been inspired by Article 13 ECHR and emphasises that in Community law the protection is more extensive since it guarantees the right to an effective remedy before a court.\(^{337}\) Furthermore, the appeal procedure is regulated in detail under the PD and by virtue of Article 39 all negative decisions on an application shall be open to a remedy.

To sum up, the guarantees of an effective remedy are not only in line with international standards, they even exceed them since international law requires a remedy only in the case of an ‘arguable claim’, and not necessarily before a court.\(^{338}\) Therefore, the first condition for declaring an identical application for asylum inadmissible is satisfied.

As to the second condition, Article 25(2)(f) speaks about ‘identical’ application. Does this entail absolute sameness? Arguably, it does. I am inclined to subscribe to the view of H. Battjes that this term should be taken literally. In other words, ‘only if the subsequent application is based on exactly the same grounds as the previous one, may it

\(^{336}\) PD, Preamble, recital 27.


This conclusion finds ample support in recital 15 to Preamble of the PD read *a contrario*; this preambular paragraph clearly shows that presenting new evidence or arguments may warrant a new and full examination procedure.

What is, however, less clear, is the meaning and implications of ‘new’ facts. The first problem arising here is whether the facts must be ‘newly emerged’, i.e. whether it is required that they were non-existent during the previous RSD. The Preamble does not seem to advocate this view. It demands that new grounds be ‘presented’ not recently ‘arisen’. Hence, the grounds stated in the subsequent application should be “new” only in the sense that they were not assessed in the previous procedure. Reading the attribute ‘new’ in this sense is, moreover, quite in accordance with relevant international law. Equally, such an interpretation is in line with the right to asylum and it enhances the protection against *refoulement*.

It follows from this that Member States may declare an application inadmissible if the applicant does not indicate any new facts supporting his or her claim. However, the following conditions shall be satisfied.

Firstly, it should not be required that the facts submitted in the subsequent application, taken alone, be capable of substantiating the claim. In other words, “[a]ny relevant fact or circumstance submitted in the repeated application may, in combination with the previously stated facts and circumstances, substantiate the claim for protection.” The circumstance that some relevant evidence has not been stated in a previous procedure should not affect its relevance for the assessment of the applicant’s


340 Cf. PD, Preamble, recital (15), ‘Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In these cases, Member States should have a choice of procedure involving exceptions to the guarantees normally enjoyed by the applicant.’


344 Ibid.
fear or risk and may well be the last stone that will make the mosaic of the well-foundedness complete. Taking isolated incidents out of context may be misleading; therefore the cumulative effect of the applicant’s experience shall be taken into account. Furthermore, it should be kept in mind that there is no requirement to present a fully-fledged claim in order to trigger the asylum procedure. In addition, ‘the requirement of evidence should [...] not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself.’ Arguably, this authoritative guidance of the Handbook may and should be applied in cases of subsequent applications as well.

Secondly, the requirement of new facts may not ‘result in raising the burden or standard of proof applicable under Article 1A(2) read in conjunction with 33 [1951 Convention] or the other prohibitions of refoulement.’ Put differently, the standard of proof may not be exceeded beyond the threshold of well-founded fear or real risk and the burden of proof may not be placed solely on the applicant. In contrast with Article 32(4) PD (preliminary procedure), which stipulates that new facts should ‘significantly add to the likelihood’ in order to trigger a normal procedure, the present provision does not impose such a requirement. Therefore, it may be deduced that the normal standard of proof applies. Furthermore, it is interesting to note that in the context of Community law it is more appropriate to speak about ‘burden of assertion’ since ‘Article 4 QD merely demands that the applicant deliver a sufficient amount of information to trigger the

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345 Ibid, p. 337.
346 UNHCR Handbook, para 201.
347 Ibid, para 197.
348 BATTJES, H. European Asylum Law and International Law. Leiden/Boston: Martinus Nijhoff Publishers, 2006, p. 337; Cf. NOLL, G. Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive. *EPL*, 2006, p. 311, ‘The Member States’ investigative burden results from the rule of non-refoulement, and from a logical standpoint, it is not affected by the point in time at which the application is made. Therefore, the burden of proof cannot be reassigned in cases where application is filed at a ‘late’ point in time.’
349 Cf. UNHCR Handbook, para 196 and Art. 4.5 QD. ‘On the face of it, placing the ‘burden of proof’ on the applicant would suggest that the claim is rejected, if the applicant is unable to present evidence reaching the standard of proof. This is not the way refugee determination procedures should work in practice.’ NOLL, G. Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive. *EPL*, 2006, p. 301, fn. 17.
350 Ibid, p. 298;
procedure, which can be described as a “burden of assertion”

With regard to Article 4 QD, UNHCR has emphasised that ‘a late submission should not increase the standard of proof for the asylum applicant’. Arguably, the same holds true for facts not submitted until the subsequent application.

Thirdly, no ‘sanctions’ shall be imposed for belated statements, e.g. a negative impact on credibility. The case law of the ECtHR on this matter is illustrative and was echoed in scholarly writing as well. As pointed out by Battjes, in the case Hilal, the Strasbourg Court did not take belated statements into consideration when addressing the applicant’s credibility; to the contrary, the Court applied the usual criterion for assessing whether the applicant ran a real risk of being subjected to ill-treatment upon removal.

In conclusion, the explanations given above have shown that Member States may declare a subsequent application inadmissible provided the following two conditions are fulfilled: (1) an effective remedy for the previous application was available, and (2) there are no new facts which would warrant a new RSD. While the former condition can be, with regard to European law presumed, the latter must be examined in each individual case. Moreover, extreme care shall be taken in assessing these facts in order to unveil any new evidence or argument that may trigger a new asylum procedure. If such new facts are present, the Member States’ obligation to provide the RSD is revived. A divergent approach might result in removal contrary to the prohibitions of refoulement and would be a clear violation of the right to asylum as well. In addition, several conditions related to

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351 Ibid, p. 301, fn. 17; ‘To be sure, ‘substantiate’ is not a legal term of art. Had the EC legislator intended to give a binding rule for a standard of proof, then the requirement would have been classified on a scale in a clear manner. If one interprets the term ‘to substantiate’ as a standard of proof, then the rule would perhaps approach the level of criminal law. In the context of asylum law, such a requirement on evidence would be completely unreasonable20, and it would not find support in case law or doctrine.’ Ibid, p. 302. ‘Moreover, The formulation of the various rules on non-refoulement as prohibitions placed on states disallows construction of the burden of proof so that only the applicant bears it. Article 33 of the 1951 Refugee Convention is structured so that a state investigation of the consequences of refoulement precedes any claim of ‘the benefit’ emanating from Article 33 (1) via the applicant.’ Ibid, p. 302, fn. 20.


353 ECtHR Hilal, 6 March 2001, Rep. 2001-II.

to the new evidence and arguments must be satisfied, (1) the new facts need not suffice to substantiate the asylum claim, (2) the threshold for standard of proof and burden of assertion may not be raised, and (3) the belated statements shall not adversely affect the applicant’s credibility.
Chapter 7

Assessment of Article 25(2)(g)

Member States may consider an application for asylum as inadmissible pursuant to this Article if: [...] (g) a dependant of the applicant lodges an application, after he/she has in accordance with Article 6(3) consented to have his/her case be part of an application made on his/her behalf, and there are no facts relating to the dependant’s situation, which justify a separate application.

At this point, the last ground for inadmissibility remains to be examined to accomplish the research laid out at the outset. To a certain extent, this ground has a similar basis as the foregoing provision – it is a kind of subsequent applications. Nevertheless, the main difference lies in the fact that in the present case a final decision has not yet been taken. More specifically, this provision deals with the situation when an asylum seeker had consented to have his/her application processed together with his/her partner or parent, but subsequently decided to submit his/her own application. It should be noted that Article 6(3) PD, \[355\] which enables the filing of an application on behalf of one’s dependant, speaks about consent merely in the case of an adult dependant. Arguably, the underlying reason is the lack of legal capacity of the minors. Consequently, the provision of Article 25(2)(g) should apply only to adult dependants as well.

As the underlying argument of this paper suggests, a refugee has a right to have his/her claim assessed and be granted all the benefits connected with a positive outcome. Denial of a separate examination is likely to violate this right. In addition, a breach of the principle of non-refoulement is not excluded, either. The provision of Article 25(2)(g) allows for derogation where there are facts that justify a separate application. This possibility not to apply this ground for inadmissibility seemingly heals the threat of a breach of the refugee’s core rights. Seemingly, for it is indeterminate what the threshold to trigger this derogation is. As put by H. Battjes, ‘these provisions do not secure

\[355\] See, PD, Article 6(3), ‘Member States may provide that an application may be made by an applicant on behalf of his/her dependants. In such cases Member States shall ensure that dependant adults consent to the lodging of the application on their behalf, failing which they shall have an opportunity to make an application on their own behalf.

Consent shall be requested at the time the application is lodged or, at the latest, when the personal interview with the dependant adult is conducted.’
compliance with international law as they do not state when such facts “justify” the separate application.\textsuperscript{356} Remarkably, this provision speaks merely about ‘facts which justify’, not about ‘new’ facts.\textsuperscript{357} Albeit it seems to be more appropriate to read it literally (without the requirement of novelty), the preambular text of the PD, which was alluded to in the foregoing Chapter, poses as a source for uncertainty and misgiving in this respect. Hence, in order to be in line with international law, all relevant facts concerning the dependant’s individual circumstances or the general situation in the country of origin should be assessed, regardless of whether these facts were also assessed in the common examination.\textsuperscript{358} However, the Community law by virtue of the right to asylum sets the bar of protection even higher and precludes the denial of a subsequent separate application.

Having submitted that the application of this provision would adversely touch the core rights of a refugee, we should further examine whether there is a justification for such an infringement. One may suggest that the principle of effectiveness of the procedure provides a legitimate aim to reject a subsequent application. Indeed, allowing an asylum seeker to lodge a subsequent application after he/she had consented that his/her claim should be assessed together with his/her partner or parent, may seem to be an excess of the right to the RSD since access to the RSD has been provided. Moreover, the applicant has consented with this kind of assessment. These are strong arguments. But still, they are not as incontestable as they may seem.

There may be good grounds to ask for a separate examination. To illustrate this point one can mention an instance where the dependant is indeed a refugee but his or her claim is assessed in a common procedure with another applicant whose grounds for protection are not so convincing. The assessor may well be tempted to dismiss the claim as a whole overlooking the particularities of the dependant’s case. Such a person would


\textsuperscript{357} Cf. Article 23(4)(o) which requires that ‘relevant new elements’ be raised and to the contrary Article 32(7) which does not suggest such a requirement and is therefore similar to the present provision of Article 25(2)(g).

be subsequently exposed to the risk of *refoulement*. It follows that the denial of a separate examination can, indeed, bring severe repercussions for the refugee.

Furthermore, the mere consent with a common examination should not entail the loss of the right to an individual assessment. Considering that the requirement of consent in Article 6(3) PD was obviously employed for the protection of the dependant asylum seeker, its withdrawal should not be interpreted to his or her disadvantage. The loss of the right to an individual assessment would be a disproportionate sanction. This assertion is furthermore corroborated with the demand of Article 6(3) PD that in the case the dependant asylum seeker does not consent, he/she shall have the opportunity to lodge a separate application. There is obviously no reasonable ground to deny him/her this right when the need appears to carry out a separate examination. Furthermore, it should not be forgotten that a dependant will often fall within the category of vulnerable persons who deserve especially favourable treatment. Consequently, the seemingly legitimate aim of effectiveness of the procedure is trumped by the need to provide protection of refugees.

To conclude, this ground for inadmissibility sits uneasily with a prominent feature of the right to asylum, namely, the right to an individual assessment of one’s claim. In order to satisfy the commitment to guarantee the right to asylum and the right to be protected against *refoulement*, Member States may not apply this ground for inadmissibility.

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359 This is clearly noticeable in the *Explanatory memorandum to the Proposal of the PD*, see commentary to than Art. 5(3) of *Amended proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status*, COM(2002) 326 final/2, Brussels, 03.07.2002.
Concluding remarks to Part II

The foregoing Chapters analysed the grounds for inadmissibility individually; this approach was warranted since the individual provisions address a very divergent array of reasons for denial of the RSD. It now remains to bring these stones of a mosaic of inadmissibility together and formulate a conclusion. As the relevant Articles have already been set out in some detail, the matter can be addressed briefly. In the light of the preceding remarks, the ‘European grounds for inadmissibility’ may be divided in three groups according to the concerns they raise:

The first group includes grounds that pose no, or at least minor, problems and can be implemented in national law without fear of a breach of international or primary European law. Alas, only three grounds, out of the seven, fall within this category and their inclusion here is only conditional – (I) Article 25(2)(a) incorporating a situation where another Member State has granted asylum, and (II) Article 25(2)(b) point (a), the FCA concept. Neither the right to asylum nor the right to be protected from *refoulement* are adversely affected with these provisions; however, the refugee should be entitled to prove the contrary. Therefore, it would be appropriate to complement the wording of both of the provisions with explicit reference that there must exist the opportunity to rebut the safety and availability of protection for a particular applicant. (III) Article 25(2)(f), which allows the declaration of a repeated application as inadmissible, may be applied provided the following two conditions are fulfilled: (1) an effective remedy for the previous application was available, and (2) there are no new facts which would warrant a new RSD. In addition, Member States are advised to take extreme care in assessing these facts in order to unveil any new evidence or arguments that may trigger a new asylum procedure. A divergent approach might result in removal contrary to the prohibitions of *refoulement* and would be a clear violation of the right to asylum as well.

The second group gathers together grounds that are in compliance with the principle of *non-refoulement* but which violates the right to asylum. This group contains (I) Article 25(2)(b) point (b) which provides for a variant of the FCA concept and states that merely ‘sufficient protection’ granted in a third State justifies the denial of a RSD. This ground for inadmissibility not only undermines the right to asylum under
Community law but also suggests that the protection may fall short of standards required by international law. (II) Article 25(2)(d) according to which an applicant has been granted ‘equivalent status’ in the Member State where he or she asks for asylum. This provision arguably encompasses, at a minimum, protection against *refoulement*, but the right to asylum is obviously violated and in addition it entails denial of benefits from the FRD as well as some rights of the 1951 Convention.

And finally, the third category encompasses grounds that not only violate the right to asylum but also seriously threaten the right to be protected against *refoulement*. (I) Here, the STC concept (Article 25(2)(c)) serves as a clear example. This ground for inadmissibility entails not only denial of the right to asylum by sending an asylum applicant to a third country deemed as safe, but in addition allows for chain *refoulement* by not requiring that the asylum claim is examined in the third State. (II) Furthermore, Article 25(2)(e) falls equally within this category since the denial of access to RSD on the ground that the outcome of another status determination is pending not only violates the right to asylum of a refugee but does not provide durable protection against *refoulement*, either. (III) Finally, Article 25(2)(g) - denial of a separate examination of the dependant - is likely to violate the right to asylum and in addition, it does not exclude the breach of the principle of non-*refoulement*, either.

To sum up, the present analysis has revealed that some of the provisions of Article 25 PD do not comply with the right to asylum under Community law and some do not even comply with the prohibition of *refoulement*. Nonetheless, before drawing a rash conclusion that Article 25 is invalid for breach of primary as well as international law, we have to come back to the implications of minimum standards. It has been submitted that the use of this type of harmonisation brings three significant consequences and it is appropriate at this point to deal with the above-suggested challenges they pose.

The first issue to be assessed is compliance with primary European law, which demands compliance with international asylum law. The TEC requires, in Article 63, ‘accordance’ and ‘compatibility’ with the 1951 Convention; further references to the observance of international law are provided by the Charter in Articles 4, 18 and 19. The present analysis discovered that the standards of international law are not always fully satisfied; however, by virtue of minimum standards these deficiencies do not violate the
primary law since the Directive does not impose the obligation to set a particular minimum.

Similarly, the second challenge is posed by the comparison of the standards of the instant Directive with international law. It follows from the preceding remarks that some points of Article 25 secure observance of the non-refoulement principle only to a limited extent. However, even this shortcoming is healed by the second implication of minimum standards - Community acts providing for minimum standards cannot be invalid for incompatibility with international asylum law since they do not require Member States to act in breach of international law. Member States are free to introduce or maintain more favourable and protective provisions that will allow them to satisfy their international obligations.

Thirdly, the concept of minimum standards precludes the Community to adopt measures which would impose the obligation to refuse the benefits enshrined in these provisions. The concept of inadmissible application entails that recognition of refugee status is denied; nevertheless, Article 25 employs the wording that Member States ‘may’ declare an application inadmissible for the reasons enshrined in this provision. In other words, it does not oblige Member States to refuse an application as inadmissible; it only allows them to do so. Hence, the provision meets the criteria for minimum standards since it does not require the denial of the RSD.

In sum, the introduction of merely minimum standards appears to be a very wise move by the drafters and not incidental since it heals almost all shortcomings the provisions on inadmissibility contain. Nonetheless, the present analysis still has not been a vain exercise as it aimed at highlighting the dangers the implementation of the grounds for inadmissibility in the current form may pose. Thus, it is recommended to the Member States not to introduce into their domestic legislation those grounds for inadmissibility which are at variance with either European or international law. The Directive cannot be invalid because of the minimum standards; however, the national legislation can. After implementation, Member States cannot hide behind the shield of minimum standards any more.
The aim of this thesis was to examine whether declaring an asylum application inadmissible for the reasons stated in Article 25 of the PD complies with internationally recognised standards of asylum law as well as with primary European law. The outcome of this analysis was intended as a recommendation to Member States indicating which of these grounds may be implemented into their national legal orders and which would entail non-compliance with their commitments. And indeed, the present study discovered that some of the grounds pose serious misgivings. Yet, two additional concluding observations may be made. Firstly, as pointed out by E. Guild, it seems to be rather hypocritical when the Member States on the one hand loudly express support for human rights and on the other hand are not able to agree on measures that at a minimum reflect their international obligations. Moreover, one may ask about the sense of enacting certain provisions in a Directive which cannot be implemented into national law without the risk of a breach of international and/or primary European law. Secondly, it appears to be equally hypocritical and rather illogical to elevate a right to the level of a fundamental right and then, perhaps shrunk from the consequences, try to circumvent it through secondary legislation. However, as the architecture of European law is hierarchical, the measures of the lower tiers must comply with the higher ones and not the other way around. Therefore, the right to asylum may not be undermined by any act of secondary legislation, and a fortiori not by domestic laws.

In addition, besides the analysis of the grounds for inadmissibility, this paper raised a courageous claim – it suggested that an individual right to asylum has recently been born in the Community legal order. This right has been derived from the Charter read in conjunction with the QD and, as it has been argued, it represents significant implications for the entitlements of asylum seekers. Indeed, it loads the dice against the States’ discretion and raises the bar for justifying infringements. Hence, the quotation

which opened this paper, that ‘[t]here must be at least one country in the world willing and able to provide protection and quality, durable asylum to each and every refugee’\textsuperscript{361} shall no longer be only wishful thinking, at least within the European context. Nonetheless, the present author is well aware that this conclusion will not be welcomed by all stakeholders, especially the States fighting for their sovereign rights, which are likely to be reluctant to accept this proposal. Therefore, if the arguments offered have not satisfied the sceptics, they are kindly invited to pick up the gauntlet.

\textsuperscript{361} UNHCR Background paper no. 3: Inter-State agreements for the re-admission of third country nationals, including asylum seekers, and for the determination of the State responsible for examining the substance of an asylum claim, May 2001, p. 5.
**Summary in the Czech language/ Shrnutí**


Jádro této práce je rozděleno do dvou částí. První z nich poskytuje čtenáři nezbytné základní informace o fungování evropského práva v oblasti asylu a slouží tak jako jakýsi katalyzátor umožňující následnou analýzu samotných „nepřípustných žádostí“, které je věnována část druhá.

Vzhledem k četným zvláštnostem evropského práva, je nutné hned z počátku zodpovědět několik předběžných otázek. Jejich zodpovězení je proto předmětem jednotlivých kapitol první části. Evropská unie ani Evropské společenství nejsou smluvními stranami ani jedné z relevantních mezinárodních smluv dotýkajících se ochrany uprchlíků. Znamená to tedy, že evropské instituce nejsou vázány mezinárodním právem při přijímání sekundárních aktů v oblasti asylu? Kapitola 1 odhaluje, že tomu tak

362 Tato lhůta končí 1. prosince 2007, viz. čl. 43 Procedurální směrnice.
není a že i přes absenci přístoupení Společenství či Unie k těmto smlouvám, existuje několik jiných cest, které zavazují evropské instituce mezinárodní právo dodržovat. Druhá část této kapitoly je pak zaměřena na evropské právo jako takové a vysvětluje jeho zvláštnosti spojené se Společným evropským asylovým systémem, harmonizaci pomocí minimálních standardů a specifickým přístupem Evropského soudního dvora k interpretaci evropského práva.

Druhá kapitola vymezuje rozsah závazků Společenství v oblasti asylu, které mu ukládá na jedné straně mezinárodní právo a na straně druhé samotné evropské accuis. Zájem žadatele o asyl se obvykle rozpadá na dvě části: hledá záruku, že 1) nebude vrácen do země, kde mu hrozí pronásledování a 2) že mu bude dovoleno zůstat v zemi asylu. Proto je Kapitola 2 rozdělena do dvou částí, které se postupně zabývají právem na ochranu před refoulement a právem na asyl. Tato dvě základní práva žadatele o asyl jsou pak základním měřítkem pro posuzování důvodů pro nepřípustnost v druhé části této práce. Je třeba zdůraznit, že tato kapitola přináší odvážný návrh – obhajuje závěr, že spojením Listiny základních práv Evropské Unie, která v čl. 18 zakotví „ právo na asyl“, a Kvalifikační směrnice, která mu dodává obsah, vzniklo individuální právo uprchlíka na asyl. Přestože toto právo můžeme nalézt v ústavách některých států, na poli mezinárodního práva nebylo nikdy uznáno. Podrobná analýza Společného evropského asylového systému však ukazuje, že se Společenství rozhodlo tomuto závazku podvolit, byť překvapivě, tento nárok nebyl doposud vznesen ani ze strany oprávněných ani v akademických kruzích. Právo na asyl přitom přináší zcela klíčová oprávnění pro žadatele o asyl – nejen právo na ochranu před refoulement, ale také právo na posouzení žádosti a udělení sekundárních práv spojených se statusem uprchlíka. Prohlášení žádosti za nepřípustnou, tedy odečtení jejího posouzení z čistě formálních důvodů, se proto zdá prima facie porušením tohoto práva. Stejně tak tento postup v sobě skrývá potenciál pro porušení principu non-refoulement. Zda-li tomu tak opravdu je, je předmětem analýzy v části II.

Druhá část této práce proto podrobuje zkoumání každý z jednotlivých bodů pro nepřípustnost, které nabízí Procedurální směrnice, a posuzuje jejich soulad s právem být chráněn před refoulement a právem na asyl. V závěrečných poznámkách k druhé části
jsou pak tyto střípy mozaiky nepřípustnosti sebrány dohromady a je formulován závěr, který odhaluje že jednotlivá ustanovení čl. 25 můžeme rozdělit do tří skupin.

Důvody pro nepřípustnost obsažené v první z nich mohou být bez větších problémů či obav z nesplnění závazků transponovány do vnitrostátního práva. Do této skupiny patří čl. 25(2)(a) udělení azylu v jiném členském státě a čl. 25(2)(b) bod (a) koncept první země azylu, kdy byl azyl udělen v nečlenském státě. Je však doporučeno, aby oba dva důvody byly doprovázeny možností předpoklad dostupné ochrany vyvrátit. Za určitých podmínek je možné do této kategorie zařadit také čl. 25(2)(f) – opakované žádosti.

Druhá skupina obsahuje důvody, které jsou sice v souladu s principem non-refoulement, avšak porušují právo na azyl. Zde nalezneme čl. 25(2)(b) bod (b) – variantu konceptu první země azylu, kdy je však vyžadováno pouze poskytnutí „dostatečné ochrany“ v třetí zemi. Tento bod navic přísně riziko snížení mezinárodního standardu ochrany, který vyžaduje, aby ochrana byla „účinná“ a nikoli jen „dostatečná“. Můžeme zde zařadit také čl. 25(2)(d), podle nějž může být žádost prohlášena za nepřípustnou, jestliže by žadatel o azyl udělen „ekvivalentní“ status v členském státě, v němž byla podána žádost o azyl.

Třetí skupina zahrnuje důvody, které nejen porušují právo na azyl, ale vážně ohrožují také zákaz refoulement. Zde je jasným příkladem koncept bezpečné třetí země, čl. 25(2)(c), který zcela zjevně popírá právo na azyl z čistě formálních důvodů a navíc umožňuje tzv. řetězové refoulement, neboť nevyžaduje záruku, že žádost o azyl bude v dané třetí zemi posouzena. Po bok tohoto důvodu se dále řadí čl. 25(2)(e), který umožňuje odmítnout posouzení žádosti z důvodu, že žadatel smí dočasně setrvat na území daného členského státu, a to do doby než bude rozhodnuto o přiznání či nepřiznání „ekvivalentního“ statusu, jež je zminěn v písmenu (d) čl. 25(2). Jako poslední, do této skupiny spadá čl. 25(2)(g), který odpírá posouzení žádosti osobě závislé na jiném žadateli o azyl, která dříve souhlasila se společným projednáním žádosti, nyní však podává žádost samostatně.

Tato analýza tak odhalila, že některé z důvodů pro nepřípustnost předvidané procedurální směrnici představují porušení mezinárodního a/nebo primárního evropského práva. Předtím však, než učiníme unáhlený závěr o neplatnosti těchto ustanovení, je třeba
vzit v úvahu důsledky minimálních standardů, které jsou podrobně rozebrány v první kapitole první části. Harmonizace pomocí pouze minimálních standardů se ukázala však jako moudrý tah evropských orgánů, neboť většina výše zmíněných nedostatků je jimi zhojena – členské státy nejsou totiž nuceny tyto důvody do svého práva převést. Na druhou stranu je třeba říci, že je to tah zároveň poněkud pokrytecký. Můžeme se totiž ptát po smyslu daných ustanovení, jestliže nemohou být aplikována v praxi bez rizika porušení mezinárodního nebo samotného primárního evropského práva. Stejně tak můžeme pochybovat o upřímnosti podpory členských států lidským právům, když nejsou schopny se shodnout ani na nejmenším společném základě, který by dosahoval jejích mezinárodních závazků. Rozpaky rovněž vzbuzují snahy omezit pomocí sekundárního práva (Procedurální směrnice) nově zrozené individuální právo na azyl, které bylo pozvednuto na úroveň základních práv. Tento postup se jeví s ohledem na hierarchické uspořádání evropského práva jako nepřípustný. Na druhé straně tyto snahy nejsou zcela překvapivé, neboť toto právo omezuje prostor pro uvážení států a přináší požadavek odůvodnění zásahu do tohoto práva, a tak se nelze divit jisté váhavosti či neochotě. Argumenty nastíněné v této práci však hovoří zcela jasně, a pokud skeptiky nepřesvědčily, pak jsou srdečně zváni, aby zvedli hozenou rukavici.
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M OFICIÁLNÍ ZADÁNÍ

Tzv. procedurální směrnice Rady EU (2005/85/ES) zavádí společné minimální standardy v oblasti asylového řízení. Rozsah standardů je prakticky nejnižší možný a váže se svým normovým obsahem hlavně k právům žadatele o azyl na pohovor, na právní pomoc či tlumočení, ale také k otázkám nepřípustných žádostí, jakož i k stěžejním procesním pojmům (bezpečná třetí země, bezpečná země původu apod.). Standardy jako takové nepředstavují prameny evropského práva, nýbrž nejbližší mají k pravidlům nebo normám. Váží se ovšem na rozdíl od pravidel také k tomu co jest, tedy k hledání společných jmenovatelů v procesní praxi členských států ve vztahu k nepřípustným žádostem. Na straně druhé pružně určují, co by mělo být členskými státy podle směrnice EU sledováno a představují tak vektory pro zákonodárnou i soudní praxi ve věci nepřípustných žádostí. V tomto smyslu je standard spojen s pružností i otevřeností. Proto musí diplomová práce slučovat analýzu dosavadní procesní praxe členů EU s rozborem předvidaných případů nepřípustných žádostí podle procedurální směrnice. Rozhodně se nelze vyhnout kromě komparativního přístupu i evolutivnímu pohledu, kdy je výčet nepřípustných žádostí zvyšován.

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