EUROPE: HELL OR PARADISE? AN OVERVIEW OF EUROPEAN LAW AND CASE LAW

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The request for asylum and the concession of the status of refugee bring into question political, and humanitarian issues on migration, which in turn, brings about a dysfunctionality of the amount of solidarity between the member states. Creating a European regime wasn't sufficient, by itself, to correct such dysfunctionalities since it allows for a differentiated approach. In the present article, we'll look at the legal and historical framing of this question, resorting to the analyses of case-law from both the European Court of Justice and the European Court of Human Rights as well as existing EU laws on the topic. Previous studies have come to show the failure of the adopted measures in the EU, and several amendments have been made to the in force legislation. New diplomas have been developed in order to find new solutions to a prevailing problem. The dream to reach a safe haven where they would be safe – and not sorry – has collapsed, for some of them, having reached the borders of Europe and being prevented from crossing.

Key words: EU; Migration Crisis; EU Law; Refugees; International Law.

1 INTRODUCTION

In the early 20th century, Dante Alighieri, in his "Divine Comedy" placed upon the gates of Hell, a sign. In that sign it could be read: "*All hope abandon*, *ye who enter here*". Over a century later, those might as well be the words the refugees face in the borders of the European Union – and all Europe.

Departing from various countries, an incredibly high number of refugees brave hundreds, if not thousands of kilometres to get to the European borders. According to the United Nations High Commissioner for Refugees the crisis has reached its peak in the second half of 2015, and first of 2016 (UNHCR, 2018).

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Out of all refugees entering Europe through the Mediterranean route in the first trimester of 2016, more than half were women and children (UNHCR 2016).

Shaken by war, famine and misery, these refugees look at Europe as a pass for freedom, security and liberty. The threat that looms over them, forces the abandonment of their countries of origin and the facing, either by sea or land, of the dangers from the well-known "Refugees' Routes": the Mediterranean route, the Puglia and Calabria routes, the circular Albanian route – Greece, the Western Balkan route, and finally the Oriental Mediterranean Route (IOM 2018).[2]

Such an affluence of refugees, coinciding with an increase in number and fatalities of terrorist attacks in European soil, came to cause an extended, although not very successful, debate between member states regarding their immigration policies and encouraging the necessary humanitarian answers in the political field on immigration. The terror and panic that was spread amongst the population (Crone 2017, 6) and the political discourse overshadowed the European answer, forcing some member states to better guard their borders, or even, in the case of the United Kingdom, having served as grounds for a public referendum that came to result in the on-going negotiations for the UK to leave the EU, now known as Brexit.

It is in the context of economical unbalance, that the question of the refugees raises the largest cautions (Duarte 2017, 48). The European Council recognized, in the European Pact on immigration and asylum, signed on the 24 of September 2008, the existence of disparities regarding the concession of individual protection given to individuals and the several differences that this protection might assume. Therefore, the European Council requested new initiatives were promoted in order to adopt a Common European System of Asylum, following what had already been developed under the Tampere, The Hague and most of all, Stockholm programmes.

2 THE PROTECTION OF THE RIGHTS OF REFUGEES

The first time the civilized world saw the need to, by means of International Law and its legal entities, create an effective protection for the rights of refugees took place in the early XX century. In the period preceding World War I, right at the closing moments of the Russian civil war (1917–1921), the request for assistance by the International Red Cross Committee to the League of Nations, led to the first big step towards the development of legal grounds that would promote and enable the protection of refugees. Facing the migratory crisis of over a million refugees, hailing particularly from the Soviet Union, the League of Nations needed to find a concrete solution for this reality (Cutts 2000, 15). To that end, Fridtjof Nansen was appointed as the first High Commissioner for Refugees. Nansen was tasked with defining the legal statute of Russian refugees, determining the conditions of employment access for refugees in the countries that offered asylum and also delimiting the conditions for repatriation (ibid., 16). The Greco-Turkish war that took place from 1919 to 1922 only worsened the migratory crisis that was being felt in Europe. Once again, the work of

[2] The IOM estimates that more than 186,000 migrants arrived to Europe in 2017 via Mediterranean routes. Approximately 92% of migrants reached European countries by sea (172,362), and the remaining 8% arrived using various land routes.

Nansen – largely developed on the field of war – would mark International Law. In the words of Cutts (ibid., 15–22), Nansen set the structural foundations of what came to be the Council of the United Nations for Human Rights. His historical importance is owed, not only to the legacy on the plan of protection for rights of refugees, but also to the fact that we performed under the authority of an international organization with a universal breadth, notwithstanding the predominately societal scope – unlike a community scope – of that organization. In retrospective, that is the main contribution that we can take from this brief historical reference: the protection for the rights of refugees was present from the very beginning, in the League of Nations, the very first international organization with a universal scope.

In early 1933 the British had already pre-war policy to protect the Jews. Regarding all negotiations little was done to prevent the slaughter of thousands of Jewish people that did not find any relief in the measures therein foreseen (London 1989, 27). In 1938, after the commencement of the II World War, the Parliament debated the question of Jewish refugees fleeing Nazi Germany. Regardless of it having taken place, no measures were taken in order to assure their protection, having some of the rights that had been granted in the 33-38 period under the pre-war policy, been withdrawn (ibid., 29). Also in 1938, and under the initiative of President Roosevelt, an international conference on the refugee problem was held in Evian, France (ibid., 31). All the meetings, ideas, and negotiations came to fail the Jewish people, as, in the outbreak of war, in 1939, no specific measures had been taken. In the aftermath of World War II, facing the horrors and crimes against humanity committed throughout the conflict, the question of refuges became relevant again at the core of International Law, and particularly at the international organizations that were constituted during that period. Having such atrocities been committed under the global inertia of other EU countries, it comes with no surprise that, in order to prevent a repetition of such shameful event, in 1948 the protection for the rights of refugees is enshrined in the Universal Declaration of Human Rights (UDHR) of 1948, in the scope of the United Nations (UN).

While the aforementioned declaration (UDHR) doesn't have, in itself, any legally binding force (Porter 1995, 150), it incorporates provisions understood as mandatory, either by international custom – a source of law – or by considering that some of those provisions are of a *ius cogens* nature (ibid., 151–153).

Of utter relevance, to the present paper is the fact that, in the convention itself, in Article 14 paragraph 1, it is stated, "*Everyone has the right to seek and to enjoy in other countries asylum from persecution*". Relatedly, Article 13 paragraph 2 states that "*Everyone has the right to leave any country, including his own, and to return to his country*". The International Covenant on Civil and Political Rights (ICCPR) proves itself to be quite similar with the UDHR on this aspect. Since the ICCPR is also an international treaty with binding force to the member states – the Covenant determines in its Article 12 that every individual "*shall be free to leave any country, including his own*" (2nd paragraph) and that "*Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence*" (1st paragraph), while equally, "*No one shall be arbitrarily deprived of the right to enter his own country*" (4th paragraph). This last provision is especially important, having earned particular relevance at United Nations Human Rights Committee, which concluded that, in that which concerns refugees, this provision encompasses the right to a voluntary repatriation, closing off, although implicitly, the prohibition of forced

migration and the mass expulsion of population to other countries. The UDHR can also be seen as an extension to the UN Charter as Article I of the Charter states clearly that one of the main purposes of the U.N. involves "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." (ibid., 150).

Still at the universal scope, it's possible to find provisions of Conventional International Law concerning the protection of the rights of refugees, which are concurrent to the UDHR. In truth, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949 prohibits in its Article 44 about the question of refugees, their treatment as foreign enemies by any detaining forces (Pictet 1952, 263). This means that the refugees (denominated as "friendly enemies") enjoy, in the scope of this convention, from a different status than those of foreign enemies (which, in opposition, are called "real enemies"). The 1951 Convention Relating to the Status of Refugees came to be even more determining. Adopted on 28th of July, and entering into force on 22 April 1954, is grounded in Article 14 of the UDHR, this convention expresses a large and important international consensus in what concerns the most fundamental aspects of the status of refugees, and came to consolidate previous international instruments relating to refugees. Under this convention, refugees benefit from a treatment as favourable as the one offered to foreign citizens in general, and sometimes even the same as the treatment offered by the signatory States to their own nationals. Its' main object isn't limited to the recognition of the social and humanitarian issues so characteristic of the refugee crisis, but also states that refugees' crisis usually represents the potential for tensions between States, thus being necessary to appeal to international solidarity, specifically the principle of cooperation, aiming to alleviate the burden between States. The *non-refoulement principle*, prohibiting expulsion and repulse – is a central aspect in the protection of the rights of refugees, being part of their status. According to this principle, no signatory State of the Convention can expel or repeal a refugee to any territory where his life or liberty may be threatened (Allain 2001, 536–539; see also Kakosimou 2017, 168 and Duarte 2017, 52). Regardless of it broader protection, the Convention fails on the definition of the concept of refugee therein contained (McFadyen 2012, 17–20) as it grants a very precise historical delimitation and the added possibility for States to interpret the legal provision. The main issue raised by this determination of the concept, or lack thereof, is quite clear: being up to the States the application and enforcement of the provisions in the Convention, the possibility to restrict the concept of refugee becomes real, therefore limiting the very reach of the status in its subjective scope (Kneebone et al 2014).

This lack of precision remains present as not even the Protocol of New York, dated 31st of January 1967, an addition to the Convention Relative to the Status of Refugees, concluded in Geneva on 28th of July 1951 has come to clarify or overcome the imprecision contained in the previous definition, merely suppressing the geographical and temporal references in the definition from the Convention (Cameron et al 2015, 1217).

The Statute of the Office of the United Nations High Commissioner for Refugees is another instrument that aligns with the ratio of intensification and precision of the legal content in the status of refugees. The United Nations High Commissioner for Refugees (UNHCF) is a subsidiary organ of the General Assembly of the UN, created through Resolution 319 (IV) of the General Assembly of the UN on December 1949. Some member states didn't agree,

however, on the political implications that would arise from such an independent organism, therefore impeding its performance, which saw its duties start only in 1951 (UNHCR 2005). At its origin, the UNHCF was created in order to assist refugees by ensuring primarily that everyone can exercise their right to seek asylum, to seek for security and protection in another State, and finally to exercise the right for voluntary repatriation, as stated in Chapter I, paragraph 1 of the Statute of UNHCR. Other conventions will not be mentioned, as they don't directly relate to the Rights of refugees but rather to Human Rights in general.

3 THE RIGHTS OF REFUGEES IN THE EUROPEAN CONTEXT

The Council of Europe came to create the Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights. It was opened for signature in Rome on 4 November 1950 and came into force in 1953. It was the first instrument to give effect to certain of the rights stated in the Universal Declaration of Human Rights and make them binding. As an International Organization with a regional scope, the Council of Europe was constituted *(...) in the interests of economic and social progress, there is a need for a closer unity between all like-minded countries of Europe*".

It intervenes mostly at the level of the protections offered by the Rule of Law and the promotion for the legal cooperation on the most diverse topics, such as the creation of certain organisms. This is the case of the European Convention. In fact, not mentioning the expression "refugee", Article 3 establishes that "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*"

The case-law of the European Court of Human Rights (ECHR) regarding the application of Article 3 of the European Convention was first established in 1989 in *Soering v. United Kingdom*[3] that concerns Articles 3, 6 and 13 of the European Convention on Human Rights. After committing a series of homicides, Jens Soering, a German citizen living in the United States, came back to Europe where he would be arrested by the British authorities for *Cheque fraud*. At the same time the Bedford Circuit Court in the state of Virginia, accused Soering of a crime which could be punishable with the death penalty, and requested the British authorities his extradition. Soering appealed against this by invoking Article 3 of the European Convention. He argued that if he were found guilty of murder and sentenced to death, that he would experience 'death row-phenomenon' which would lead to the violation of his Convention rights. The European Commission of Human Rights admitted Soering's reasoning, since if extradited he could face torture, inhuman or degrading treatment. The ECHR concluded that "*(...) the applicant's extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3 (art. 3)"*. The Soering case raises the issue of *non-refoulement*, which engages State responsibility by the act of removal of an individual to a State where he or she will be exposed to a certain degree of risk of having her or his Human Rights violated (Greenman 2015, 272).

[3] ECHR, *Soering v United Kingdom*, Judgment, Merits, and Just Satisfaction, 07/07/1989 App No 14038/88, A/161.

The existence of a real risk of inhumane or degrading treatment is justification for the application of Article 3, decided the ECHR. Even more, in what concerns applicants of asylum their expulsion may result in the liability of the signatory State. This solution is to be applied when it can be proved that the State possessed information, which could lead to a conclusion that, if expelled, the applicant would be exposed to a risk of treatment in breach of Article 3 of the European Convention, and the State still kept that decision. The ECHR case-law confirms this decision in *Chahal v. The United Kingdom,*[4] when it states that: "*It is well-established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to expel the person in question to that country*", also in *Cruz Varas And Others v Sweden*[5] the Court states that "*As has been noted on previous occasions the Convention must be interpreted in the light of its special character as a treaty for the protection of individual human beings and its safeguards must be construed in a manner which makes them practical and effective"*, and it does so, by, again citing its earlier jurisprudence, set forth in Soering.

Soering case has been consistently cited (i.e. *Hari Dhima v Immigration Appeal Tribunal; Ahsan Ullah, Thi Lien Do v Special Adjudicator, Secretary of State for the Home Department; Mohammadi v Advocate General Scotland; Regina v Special Adjudicator ex parte Ullah; Regina v Secretary of State for the Home Department; Lough and others v First Secretary of State Bankside Developments Ltd; Government of the United States of America v Barnette and Montgomery (No 2); McElhinney v Ireland; Al-Adsani v United Kingdom; Fogarty v United Kingdom; MAK and RK v The United Kingdom*, *inter alia*).

Article 3 of the European Convention has, also, been called to defend the principle of *non-refoulement*, with the ECHR stating that this Article is compatible with Article 33 of the Convention Relating to the Status of Refugees of 1951, which prohibits the expulsion or the *refoulement* of refugees to other territories when their life or liberty are threatened by reason of race, religion, nationality, social group or political opinions. Vast is the ECHR case-law that confirms this comprehension, in which the following stand out: *Ireland v. The United Kingdom*[6] – where the application of Article 3 of the European Convention depends on the verification of a minimum level of seriousness, relating to the case specifics'; the *Greek case*[7] – in which the European Commission on Human Rights described the concepts of torture, punishment and inhuman or degrading treatments; and *Selmouni v. France*[8] – where the ECHR established what it considers to be the minimum level to be able to qualify a certain treatment as torture.

More recently in case *X v. Sweden,*[9] X, a Moroccan national applied for asylum in Sweden after an expulsion request from the Swedish Security Service on the grounds of national security was accepted by the Swedish Migration Agency.

[4] ECHR, *Chahal v. The United Kingdom,* 15/11/1996, Appl. No. 22414/93.
[5] ECHR, *Cruz Varas and others v. Sweden*, 20/03/1981, Appl. No(s) 46/1990/237/307.
[6] ECHR, *Ireland v. The United Kingdom, 18/01/1978* Appl. No. 5310/71.
[7] ECHR, *Greek Case*, 05/11/1969, Appl. No(s). 3321/67, 3322/67, 3323/67, 3344/67.
[8] ECHR, *Case of Selmouni v. France*, 28/07/1999, Appl. No. 25803/9.
[9] ECHR, *X v. Sweden,* 09/01/2018, Appl. No. 36417/16.

The asylum request was rejected and the expulsion order was confirmed by the Migration Court of Appeal. In his application, X, claimed that, having been considered a terrorist he would risk torture and at least ten years' imprisonment in Morocco, which would be a clear violation of Article 3 of the ECHR. Recalling its own jurisprudence, the ECHR, ruled that even facing the risk of terrorist activities the applicant's expulsion to Morocco would involve a violation of Article 3 ECHR *"It is well established that expulsion by a Contracting State may give rise to an issue under Article 3 and hence engage the responsibility of that State under the Convention where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such circumstances, Article 3 implies an obligation not to deport the person in question to that country. Article 3 is absolute and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion".*

4 THE REFUGEES IN EUROPEAN UNION LAW

In order to manage the present crisis, which is both humanitarian and political in its nature, the EU's Asylum Policy has been called to action, although there are some issues in the Communities' performance. Since 1999, the EU has been working to create a Common European Asylum System (CEAS) and improve the current legislative framework. From the beginning and up 2005, harmonization of the common minimum standards for asylum was developed by the means of several different legislative acts. In 2001, the Temporary Protection Directive allowed for a common EU response to a mass influx of displaced persons unable to return to their country of origin. The Family Reunification Directive also applies to refugees (Duarte 2017, 61).

The EU's asylum policy as we now know finds its legal grounds on the provisions of Articles 67 paragraph 2 and 78 of the Treaty on the Functioning of the European Union (TFEU), in its final version, written in the Lisbon Treaty (Mitsilegas 2014, 183), and Article 18 of the Charter of Fundamental Rights of the European Union. Under the terms of the previous Articles in the TFEU, the EU aims to develop a common policy in the matters of asylum (Goudappel and Raulus 2011), establishing subsidiary and temporary protection destined to grant an adequate status to the asylum applicant, thus observing the principle of non-refoulment (Fry 2005, 100).

The harmonization of asylum proceedings to be applied by member states is also one of the proposed objectives by the EU, as can be seen in the Green Paper on the Common European Asylum System, which has fallen under the criticism of merely imposing a common minimum (UNHCR 2007), instead of proceeding to a full uniformization of the community policy regarding asylum proceedings, creating a single and equal regulation to be to be applied by all member states.

Notwithstanding, the terminology of the various subsections of paragraph 2 of Article 78 TFEU, contains the expressions "*uniform*" and "*common*", which suggest a differentiated treatment with grounds on the specific subject matter of those subsections (Duarte 2017, 61). In fact – not wanting to diminish the importance of subsections *a)* and *b)* of paragraph 2 of Article 78 TFEU, relating to the status of asylum and subsidiary protection – the wording in this Article leaves quite clear the idea that the EU wishes to develop a "*(…) common policy on asylum, subsidiary protection and temporary protection*" (1st paragraph), and

for that end "*(…) the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system (…)*" (2nd paragraph).

The right of asylum contained in the Charter on Fundamental Rights of the European Union is equal in content to the Convention Relative to the Status of Refugees of 1951 and its' 1967 Protocol, as well as the Treaty on the European Union and the Treaty on the Functioning of the European Union, therefore relaying once more the problem to the same conditions we've been analysing so far, with the identified issues unchanged (ibid.).

5 BRIEF CONSIDERATIONS ABOUT EUROPEAN UNION LAW ON ASYLUM AND PROTECTION

As we have seen above, several steps have been taken towards ensuring a bigger degree of protection to asylum seekers, starting with the Treaty of Amsterdam and with several new adjustments, and amendments being made. The matters relating to asylum have been, throughout the ages, subjected to a positive evolution. The biggest contributions to that end are owed to the Treaties of Amsterdam and Nice, changes continue with the Treaty of Lisbon.

The Treaty of Amsterdam came to grant competences to the Council on the subject of asylum and refugees (Piris and Maganza 1998, S37), which would later propel the development of a specific European regime on it. As for the Treaty of Nice, it was foreseen that, within 5 years of it coming into force, the Council would have adopted specific measures for certain sectors, one of which was the appreciation of asylum requests on the basis of Articles 67(2) and 78 of the Treaty on the Functioning of the European Union and Article 18 of the EU Charter of Fundamental Rights. The point was to adopt criteria that would determine which member state was responsible for reviewing a request for asylum by nationals from third States and to adopt a set of basic rules relative to the acceptance of asylum applicants and the necessary proceedings to the concession of the status of refugee, having minimum criteria been set forth in the Treaty of Amsterdam (Kaunert and Leonard 2012, 3). The treaty of Nice was the target of severe criticism, having been said by Romano Prodi that it *"… was characterised by the efforts of many to defend their immediate interests, to the detriment of a long-term vision"* and *"… unnecessary…"*. The treaty of Lisbon as it came to grant the EU the competence to adopt, legislative instruments for a uniform status of asylum, a uniform status of subsidiary protection, a common system of temporary protection, common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status, criteria and mechanisms for the determination of the member state responsible for considering an application for protection, standards for reception conditions, and partnership and co-operation with third countries for the purpose of managing inflows of people applying for protection in accordance with Article 78 of the TFUE (ibid., 1400). It came to set common measures, rather than minimum measures set forth in both Amsterdam and Nice Treaties. Still, The Treaty did not make any changes to the decision-making procedure within the EU.

Resulting from the guidance therein foreseen in Treaty of Nice, the Council of the European Union (2001), issued a Directive *on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on*

measures promoting a balance of efforts between member states in receiving such persons and bearing the consequences thereof – Directive 2001/55/EC of the Council. This Directive's scope was limited to the enumeration of a series of minimum standards for requirements to be fulfilled by asylum applicants from third States, stateless persons or any person in need of international protection during a massive influx of displaced persons in order to ensure a balance of efforts between the member states.

Not less decisive was Directive 2004/83/EC of the Council of 29 of April 2004, which established a set of minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, known as the " Qualification Directive". The 2004 Qualification Directive was introduced as part of the framework for a Common European Asylum System and aims to harmonize the criteria by which member states define who qualifies as a refugee or is, otherwise in need of international protection. Under this Directive, the concept of refugee is defined by subsection c) or Article 2, which generally follows the definition from the Convention on the Status of Refugees of 1951. Regarding the internal protection of asylum seekers, Article 8 of the Directive, determines that it is up to the member states to appreciate the request for international protection, with the possibility that they might find it not to be necessary. "*(...) if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.*" In fact, according to this Directive, member states should consider the general conditions of that region and country as well as the personal situation of the applicant. Notwithstanding the Council's efforts, it is quite noticeable the still standing resistance to the adoption of uniform policies.

As for Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011, also known as Recast or *"New Asylum Qualification Directive"* a set of rules were established relating to the conditions which nationals from third States or stateless persons should fulfil in order to benefit from international protection, creating thus a uniform legal status for refugees as well as the beneficiaries from subsidiary protection it brought certain improvements in defining people in need of protection and the content of such protection (Bačić 2012). Under this Directive, several amendments took place, for instance, in Article 2 subsection (j), we find an extended definition of the family with the deletion of the requirement that minor children of the beneficiary of international protection are dependent; in Article 7 is present the definition of actors of protection is clarified and there is a requirement for such protection to be effective and of a non-temporary nature; The internal protection concept is further aligned with the case law of the European Court of Human Rights and the possibility to apply this concept notwithstanding technical obstacles to return has been removed is set forth in Article 8; in Article 9 number 3 are the causal link' requirement between acts of persecution and the 1951 Refugee Convention grounds is amended to clarify that this link is fulfilled also where there is a connection between the acts of persecution and the absence of protection against such acts; also in in Article 10, number 1, subsection d) there is a new explicit obligation for States to take into consideration gender related aspects, including gender identity for the purposes of defining membership of a particular social group; The cessation provisions for refugee status and subsidiary protection incorporate an exception to cessation in relation to compelling reasons arising out of previous

persecution can be found in in Article 11 number 3 and Article 16 number 3. Subsection. In its turn, Article 14, numbers 4 and 6 is quite controversial as it has been said to be incompatible with Article 1C of the Refugee Convention that contains an exhaustive list of reasons for cessation of refugee status and, the provisions permitting revocation of, ending of or refusal to renew refugee status under Article 14 (4) of the Qualification Directive do not in reality implement Article 33 (2) of the Refugee Convention but instead enlarge the list of reasons for cessation of refugee status under the Article 1C of the Refugee Convention. By doing so, the Directive is found in breach of the member states' commitments to the Refugee Convention. It has also been said to be contrary to Article 1F of the Refugee Convention as it sets out an exhaustive list of reasons for excluding a person from a definition of a refugee because of the abhorrent acts he or she has committed, as can be read that *"the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nation.* It, accordingly to Lambert (2006, 178) *"is contrary to the Refugee Convention because it is based on a misreading of the purpose of Article 33 (2) in the Refugee Convention. Article 33(2) provides that a refugee whom there are reasonable grounds for regarding as a danger to the security or the community of the country in which he or she took refuge may not claim the benefit of the principle of non-refoulement; it does not provide that such a person may not benefit from the provisions of the Refugee Convention at large. Article 33(2) is not an exclusion clause."* In Chapter VII, are detailed the rights for beneficiaries of refugee status and subsidiary protection are approximated with the exception of the duration of residence permits and access to social welfare; member states are no longer permitted to reduce the content of rights granted to international protection beneficiaries on the grounds that such status was obtained due to activities engaged in for the sole or main purpose of creating the necessary conditions for being recognized as a person eligible for refugee status or subsidiary protection, as it was possible in the previous Directive, according to its Articles 20 number 6 and 7; Article 23 number two increased the right of family members of subsidiary protection beneficiaries are entitled to the same content of rights granted under Chapter VII in accordance with national procedures and in so far as compatible with the personal legal status of the family member; and also in Article 26 number 2, we can find a an improved provision on access to employment requiring member states to ensure that beneficiaries of international protection have access to training courses for upgrading skills and counselling services afforded by employment offices under equivalent conditions as nationals (ECRE 2013, 3–5).

It is important to mention that this Directive was created, unlike the first, after the entry into force of the Treaty of Functioning of the European Union (TFUE) (UNHCR 2012, 2–3). However, its provisions may not yet be sufficient to establish "common procedures" for the granting or withdrawing of a *"uniform status [...] valid throughout the Union"*.

As for the concept of refugee, it follows the already existent concept arising from the Convention Relative to the Status of Refugees (1951) and Directive 2004/83/EC, endeavouring for a more confined concept. It excels in the verification of a series of requisites for the individual appreciation of each

applicant's case, with the goal of granting the status of refugee, or in alternative the status of subsidiary protection, establishing a set of standards relating to the way in which a request for international protection is to be reviewed and the conditions which the nationals of third States and stateless persons need to meet to benefit from such protection, while equally focusing on the uniformized legal status of refugees and the beneficiaries of subsidiary protection. It does so by invoking subsections a) and b) of Article 78 of the TFEU with the goal of creating and developing a common asylum policy including European asylum system.

Right in the first Articles of the Directive, it comes to define, in Article 2, the concept of international protection, encompassing in it the status of refugee and the status of subsidiary protection (subparagraph a.).

The procedure for granting the status of refugee is commenced by presenting request for international protection that is to be examined by the member state where such request was submitted, under Article 4. It is up to the member state to request all documents deemed necessary for such application and the presentation of the reasons for seeking international protection. Under Article 4 paragraph 3, member states should be mindful of any relevant facts from the country of origin at that time, including the legislation, regulation and the way they're applied; the relevant declarations and the documentation presented by the applicant, involving information if the applicant has suffered or is at risk of suffering serious persecution; the situation and personal circumstances of the applicant, such as factors relating to his personal history, gender and age are to be taken into consideration, in order to examine, based on the personal situation of the applicant if the acts he was or may be exposed to could be considered persecution or serious harm; if the activities carried out by the applicant since leaving his or her country of origin had the sole end of creating the necessary conditions to apply for international protection, analysis in deemed in order to examine if those activities would expose the applicant to persecution or serious harm if he returned to that country; and still, if it was reasonable to predict that the applicant could rely on the protection of another country where he could claim citizenship. Paragraph 5 of Article 4 adds the following: if the member states demand that the applicant justifies his request for international protection and if the individual provides information found not be truthful, the elements could fail to be confirmed in the following cases: when it is evident the effort of the applicant to justify his request; when the applicant has provided relevant elements for the granting of essential protection and his explanation is satisfactory in the case of lack of documentation; when the declarations of the applicant have been considered as coherent and plausible; when the applicant has presented his request for protection as soon as possible; and when the general credibility of the applicant has been proven. For the examination of the requests for international protection, Article 5 of the Directive encompasses the events that occurred after the request and that may influence on the justified fear of persecution of the real risk that the applicant may suffer serious harm. The objective of the article isn't to exclude neither the member states consideration nor the concrete circumstances occurring at the applicant's country of origin. The usefulness of this provision is found in the fact that it effectively accounts for relevant external elements, which may influence the asylum request (Duarte 2017, 68). In turn, Article 6 defines the actors of persecution or of serious harm determining that these could be States, parties or organizations controlling the State or a substantial part of the territory of the State, and non-State actors, if it

can be demonstrated that the actors mentioned in points a) and b) including international organizations, are unable or unwilling to provide protection against persecution or serious harm. In the present Directive, the member states may after examining the request of the applicant, decide that the individual doesn't need international protection, when it can't be proved that in a specific part of his country or origin, a justified fear of persecution or serious harm exists, and also when it's possible for the applicant to obtain protection in another part of his country of origin. One big problem with the procedure is connected with the language of the application as no support is granted for the filling of the papers that are not written, in the majority of times, in a language that the refugee applicant understands (Perkowska and Jurgielewicz 2013, 120).

Therefore, we refer to the internal protection under Article 8 paragraph 1 which establishes the consideration that member states may refuse to grant international protection of an applicant if the requisites above are verified. However, if on one hand this provision gives the States almost an analytical and interpretative arbitrary power, on the other hand, we find remarkable the duty enshrined under paragraph 2 which establishes that upon the examination of the request, the States should consider the general conditions of the country of origin of the applicant and regarding the applicant himself, this way obtaining precise and up to date information, which could come from the Office of the United Nations High Commissioner for Refugees and from the European Agency for Asylum (UNHCR 2012). This orientation is quite clear when it states under paragraph 1 that "(...) *Member States may determine* (...)" and under paragraph 2 that "(...) *Member States shall* (...)", which is relevant regarding the interpretation and relying on the consideration that if Member States consider that there is a margin of internal protection in the country of origin in order to deny granting international protection, then it is mandatory that they verify the existence of certain conditions regarding the country or the relevant part of that country and the applicant, nearly imposing a duty to give a fair statement of reasons for the decision, which in any event reduces the member states wide margin of discretion and interpretation. Chapter III relates to the conditions to be met by the applicant for international protection, regarding the granting of the refugee status. Thus, we must account for the definition of refugee in the amended by the Directive, which under Article 2 subparagraph d) defines refugee as: "*third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or owing to such fear, is unwilling to avail himself or herself of the protection of that country, or stateless person, who, being outside of the country of habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it*", and is complemented by Article 9 of the same diploma, where acts of persecution are addressed, it can be read that these acts must be sufficiently serious by its nature or repetition as to constitute a severe violation of basic rights, in particular the rights from which derogation cannot be made under Article 15 number 2 of the European Convention on Human Rights and Fundamental Freedoms; and the acts that constitute an accumulation of various measures, including violations of Human Rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in the previous point.

The "*Reasons for persecution*" are established in Article 10, as its provision states that member states should consider that the concept of race includes

considerations of colour, descent or membership of a particular ethnic group; that the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from formal worship in private or in public, either alone or in community with others and other religious acts or expressions of view or forms of personal or communal conduct based on or mandated; that nationality isn't only confined to citizenship or lack thereof but shall in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity; and that a particular social share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is fundamental to identity or conscience that a person should not be forced to renounce it and still the consideration that a group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society; finally the reasons for persecution encompass also the concept of political opinion, which is the holding of an opinion, thought or belief on a matter related to the potential actors of persecution.

On the subject of the procedure for granting and withdrawal of international protection, Directive 2013/32/EU of 26 of July 2013, which revoked previous Directive 2005/85/EC, fits the purpose of establishing common procedures for granting and withdrawing international protection pursuant to the recast Qualification Directive (ECRE 2014, 3). Specifically concerning international protection, this Directive aims to create faster, more efficient and fairer procedures in compliance with EU law. It was established, on the other hand, that member states should create specific mechanisms to aid applicant in requesting for international protection, with the obligation that the initial analysis for each request should never last over 6 months after the request for the status of international protection. The review proceedings can include several special forms of procedure, such as accelerated proceedings or request proceedings at the border (ibid., 4).

This Directive establishes a set of rules for the reception of applicants for international protection these rules are to be applied to every national of a third state, stateless persons who apply for international protection in the territory of a member state. The main objective of this Directive is the creation of a *de facto* protection for asylum seekers, to be implemented by member states during the review proceedings pending the decision to grant asylum and to establish the common procedures for granting and withdrawing international protection (ibid.).

The Recast Directive, on its Chapter II, regarding "*Basic Principles and Guarantees"* confers, Article 6 paragraphs 1 and 5, a series of prerogatives to the applicants of international protection, with the most relevant being the sped up registration of the requests; the possibility for the request to be made for other individuals who the applicant may be responsible for and minors, accordingly to Article 7 paragraphs 2, 3 and 4; information and counselling at border crossing points or detention centres for third country nationals or stateless persons who wish to apply for international protection, Article 8 paragraph 1; the right to remain in the member state pending the examination of the application accordingly to Article 9 paragraph 1, the guarantee that applications shall be assessed even if they have not been made as soon as possible, as in mentioned in Article 10 paragraph 1; the guarantee that the status of refugee is examined first and if not granted, the assessment for the status of subsidiary protection shall be examined is set forth in the same article, in paragraph 2; the

guaranties relative to the procedure of assessment for requests follow, in paragraph 3; the guarantee that decisions regarding the requests for international protection are to be given in writing as is stated in Article 11 paragraph 1; there is, accordingly to Article 11 paragraph the possibility to challenge negative decisions; the right to benefit from an interpreter in order present their requests comes in Article 12 paragraph 1, being entitled to be informed of every step of the procedure; the right for a personal interview before the decision is now foreseen in Article 14 and the right to have legal assistance and representation in all steps of the procedure for assessment of the request, including the procedure relative to challenging the decision is set forth by Articles 19 to 23. Through the deletion of old Article 24 of the 2005 Asylum Procedures Directive, the recast Asylum Procedures Directive now no longer allows for derogations from the basic principles and guarantees as laid down in Chapter II in the context of border procedures or procedures dealing with subsequent asylum applications. As a result, regardless of the type of procedure used to process asylum applications, the same set of basic guarantees with regard to the personal interview, access to legal assistance and interpretation and guarantees for asylum seekers in need of special procedural guarantees and unaccompanied children (ibid., 34).

In what concerns the proceedings for granting the status of international protection, Chapter III of the Directive determines that the decision must be taken within 6 months from the request however; Article 31 paragraphs 3 and 4 allow member states to extend that deadline. While Article 31 sets as a principle that the examination of an asylum application must be concluded within 6 months of the lodging of the application, it also provides for a possibility for member states to extend such time limits for another 9 months or even 12 months. An extension of 9 months is possible in case (a) complex issues of fact and/or law are involved; (b) it is difficult to conclude the procedure within 6 months because a large number of third-country nationals or stateless persons apply simultaneously or (c) where the delay can clearly be attributed to the failure of the applicant to comply with its "cooperation" duties under Article 13. This can be further extended with another 3 months, by way of exception and in duly justified circumstances, *"where necessary to ensure an adequate and complete examination"*. However, under no circumstances may the examination take any longer than 21 months from the lodging of the application (ibid., 34–35). The case for inadmissible applications follows Article 33, as it establishes an exhaustive list of criteria on the basis of which an application for international protection may be considered as inadmissible, excluding the use of any other admissibility grounds in national law.

Regarding procedural rules, under Article 40 and 42, the procedure for granting the status of refugee starts with a preliminary examination in order to verify the elements contained in the request for international protection of the applicant, it is up for the member state and their national law to define the specific terms of this examination. Lastly, Article 46 determines that applicants enjoy the guarantee to a judicial review if faced with a negative decision under the following grounds: the application is considered to be unfounded in relation to refugee status or subsidiary protection status; when the decision was taken at a border crossing or transit zone, through the application criteria defined in national law; in case of a refusal to reopen the examination of an application after its discontinuation; Likewise, applicants have the right for a judicial review from the refusals to reopen request assessments for international protection under the terms of Article 27 and 28 of the Directive and in the cases

where a decision of withdrawal of such protection has been made. As for the granting of the status of refugee and its accessory points are still subject to the provisions contained in Directive 2011/95/EU. With regard to Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, together with the Recast Dublin Regulation (below), the recast EURODAC Regulation and the recast Asylum Procedures Directive (above), constituted the final step in the second phase of harmonisation of asylum law in the EU member states, and replaces Council Directive 2003/9/EC (Roure 2009, 3–5). It increases the level of and access to reception conditions for applicants for international protection during the examination of their application in many respects (ECRE 2015). Unfortunately, its lack of transposition came to limit its applicability; hence, the authors only refer to it, not studying the directive in detail.

Dublin III Regulation,[10] substitutes the previous Council Regulation (known as Dublin II Regulation (EC) 343/2003) which establishes "*the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person"*. It grants applicants a better protection until the status of refugee is granted to them and is considered to be the cornerstone of the EU's Common European Asylum System, or CEAS (Dragan 2017, 84). The criteria for determining the member state responsible for examining requests are divided in criteria of family, recent possession of a visa or residency permit in EU member state, but also the means with which the applicant entered the European territory. The Regulation creates a system of better border control, allowing simultaneously for more security and ensure compliance with the Dublin III Regulation, taking steps to avoid "*asylum-shopping*", and at the same time, it determined the creation of the European Union's biometric database containing the fingerprints of every asylum applicant and citizens of third States to be compared with the member states own systems, and the EURODAC, allowing for member states to detect an asylum seeker or a third State citizen remaining illegally on European territory, and if previous asylum requests, in the same, or any other member state had taken place. The main issue with this diploma is the fact that, in practice, it does not offer an efficient framework for burden sharing between member states (ibid., 85).

Concerned with the refugee crisis in Europe, the Decision (EU) 2015/1523 of 14 of September 2015 proceeded to relocate applicants for international protection who were in refugee camps in Greece and Italy. The decision only applied to applicants that had requested international protection in Italy or Greece and if in relation to those applicants these States would've been responsible for examining the request, under the criteria of determination established in Chapter III of the Regulation (EU) 604/2013. The relocation aimed at distributing 40000 individuals between the other member states who would, in cooperation with the European Agency for Asylum, adopt the necessary measures for direct cooperation and exchange of information with other entities, this Temporary EU Relocation System for the redistribution of asylum-seekers between EU member states was very controversial (Carrera, Gros and Guild 2015). The Decision imposes a strict procedure of collaboration, cooperation and exchange of information with aims for the approval and

[10] Regulation 604/2013 of 26 June 2013.

relocation of refugees. The Decision is no longer in force, as its date of validity was the 17th of December 2017.

6 CONCLUSIONS

Throughout the years the concept of *refugee* has experienced severe changes. This mutation is deeply related to the changes in society itself, as well as the deeper care for the human person, and human dignity. There will never be a final concept for defining what a refugee is. Concluding that the lack of definition is one of the problems does not come as a surprise to the authors, that found, throughout this work, a multiplicity of definitions, concepts, and statutes that go around the concept of refugees but fail to provide one definition that will take into consideration all the peculiarities of this "state of being".

After going through all the EU legislation on the matter, we came to conclude that, notwithstanding the growing intensity and worry regarding international protection, encompassing the granting of the status of refugee and subsidiary protection, the member states have a relatively wide margin of action to apply the provisions contained in the analysed directives. The directives themselves have been amended and improved in order to provide wider protection, but failing to do so. The diversity of legislation, as well as the margin it provides to the member states, whilst applying it, leads to a serious of restrictive interpretations of what is therein foreseen. The member states " find excuses" in the need for safeguarding their population, as well as economic and political reasons in order to limit the access of migrants – to be refugees – to enter and stay in their territory. The EU solidarity is broken when faced with economic, financial, and safety concerns arising from the population in general, and member states representatives in particular. The incorrect transposition, as well as lack of transposition of the directives only makes it more difficult for the refugees to have the necessary protection.

The mechanisms that would ensure the accomplishment of these solidarity principles are the decisive power of the EU, and its decision making process, as well as the creation of legislation to be enforced in all member states, regardless of their opposition. Even though the EU has always searched for harmonisation, and that it is to be achieved by the means of the legislation therein created, the truth is that the non-binding effect of some of its diplomas, as well as the lack of transpositions of some others, as is the case of Directive 2001/95/EU, fails to reflect a unified and systematic coherence in terms of performance, as we've seen, since besides the interpretative and appraising wide discretion, it allows for *asylum shopping*. The fragility of the Union's policies in the matter of international protection lies in this particular aspect.

All other, and more recent legislative acts have failed to provide further protection, failing to ensure the accomplishment of those principles enshrined in the Declaration of Human Rights, The European Convention and the Charter. All those who are stopped at the borders of Europe see themselves, once again, deprived of their rights, as human beings, because, unwillingly, they became refugees. They are, again, left to their own chance. The dream of reaching Europe in search of a safe haven makes the borders of Europe their new hell.

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