Securing Refugee's Rights in EU: a study on the current legal instruments under European Union Law

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TABLE OF CONTENTS

List of Abbreviations

CEAS	Common European Asylum System
EU	European Union
ECRE	European Council on Refugees and Exiles
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EMP	Euro- Mediterranean Partnership
FRONTEX	European Agency for the Management of Operational Cooperation on the External Borders
IBM	Integrated Border Management
RABIT	Rapid Border Intervention Teams
SIVE	Sistema Integrado de Vigilancia del Estrecho
TFEU	Treaty on the Functioning of the European Union
TEC	Treaty Establishing the European Community
UNHCR	United Nations High Commissioner for Refugees

Introduction

The refugees population in Europe consists of more than 1.6 million[1] out of the 15.4 worldwide. The media has, on several occasions, brought up the issue of recognised refugees on EU territory that have been rejected and forced to live in harsh conditions.

At the international level, the legal status of a refugee is established in the 1951 Geneva Convention Relating to the Status of Refugees. This has been ratified by all EU Member States and thus binding on them. Besides the duty of the Member States to implement the Convention, the EU has also undertaken actions to guarantee refugees' rights. Thus, besides the obligations under the Convention, Member States have certain obligations towards refugees deriving from the EU treaties and directives.

In view of the facts above, the present dissertation aims to answer the question whether the current legal instruments within the European Union framework can contribute to a comprehensive system for the protection of refugees' human rights. In order to address this issue, it will be necessary to clarify the following queries: (a) Which are the current legal instruments and the legal basis for refugees protection? (b)What do these instruments set out? (c) What is the degree of compliance by EU Member States to their obligations in granting refugees human rights? (d)What are the main hindrances to their implementation? (e) Concerning the fundamental principle of *non-refoulement*, does it apply to EU Member States even beyond their territories?

The human rights that will be examined are: the right to be protected from *refoulement*, the right to health care and the right of family reunification.

The initial assumption is that owing to the fact that Member States obligations are not well defined in EU legal instruments of primary and secondary law, there is an incoherent implementation of these refugees rights.

The present paper will focus on the specific target group of refugees as defined in the 1951 Geneva Convention. The target group of migrants will not be covered. Even if often in public debates the difference between refugees and migrants is confused, the term "migrants" refers to a different category of people and it constitutes a much broader target group.[2] Neither will the target group of asylum seekers be examined.

The research will be divided into three sections. The first section will provide a brief overview of

[1]United Nations High Commissioner for Refugees, *2010 Global Trends,* available at http://www.unhcr.org/4dfa11499.html. The estimation refers to refugees recognized in the territories of EU Member States plus Switzerland and Norway.

[2]*The 1990 United Nations Convention on the Protection of the Rights of all Migrants Workers and Members of their family* provides the following definition of Migrants Workers : "(...) a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national". Moreover, while refugees are forced to flee from their country, migrants consciously make a decision to leave for economic and/or other reasons.

the 1951 Geneva Convention relating to the status of refugees, in view of the fact that the EU legal instruments covered in the present dissertation have also their legal basis on this international Convention. The second section will focus on the general features of the EU system for the protection of refugees, including the juridical traits of EU primary and secondary law. In the third section, the three refugee rights which are object of study in this dissertation will be analyzed, trying to point out for each right: which are the EU current legal instruments granting the right and what they set out. This will be accompanied by a discussion of the Member States' degree of compliance and, in case of non-fulfilment, what are the hindrances to their implementation

Concerning the methodology used, international legal instruments along with EU primary and secondary law will constitute the basis of the analysis. Academic literature and case law and some will be employed to analyse the compliance degree. Lastly, Italian national legislation will be examined when dealing with Italy's compliance to the principle of *non-refoulement.*

I. Overview of the International Refugee Law System

Before examining the European Union legal framework, which is the main object of this dissertation, it is useful to have a brief overview of the international legal system for the protection of refugees. First, this chapter is aimed to contextualise the EU regional legal framework for the protection of refugee rights. As a matter of fact, the European Union body of law that guarantees refugees' rights is based on the 1951 Convention relating to the status of Refugees. This has been ratified by all EU Member States. Secondly, this part is meant to familiarize the reader with both the international law regime for the protection of refugees in general and its main deriving notions that also applies to the protection of this category of persons in European Union. Therefore, this chapter will briefly examine the most important notions for refugees protection set out at the international level, namely the definition of "refugee" and the core principle of *non-refoulement.*

1. The 1951 Geneva Convention Relating to the Status of Refugees

One of the first concerns of the United Nations, soon after its establishment in 1945, was the issue of the refugees displaced by the Second World War.[3] The first action undertaken in this way was the creation of a temporary agency, namely the International Refugee Organization, established by the General Assembly resolution of 15 December 1946.[4] Its functions were to help refugees and displaced persons either to go back to their countries of nationality or residence, or to find new places to live.[5]

Later in December 1949 the General Assembly decided to establish a High Commissioner's Office for Refugees. Consequently the General Assembly requested the UN Economic and Social Council (hereafter ECOSOC) to prepare a structure for the future High Commissioner's Office, and to make recommendations concerning the definition of the status of refugee.[6] Consequently, the ECOSOC appointed the *Ad Hoc Committee on Statelessness and Related Problems* with the mandate to "consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and if they consider such a course desirable, draft the text of such convention".[7] The Ad Hoc Committee created a draft Convention Relating to the Status of Refugees. This constituted the basis of a Conference of Plenipotentiaries

[3] A. Kotzeva, L. Murray, R. Tam QC, *Asylum and Human Rights Appeals Handbook*, (Oxford, 2008) p. 5.
[4] *Financial provisions (Article 10 and annex II) of the Draft Constitution of the International Refugee Organization*, A/RES/83(I), UN GAOR, 67th plenary meeting (1946) p. 164.
[5] A. Kotzeva, L. Murray, R. Tam QC, *supra* note 1.
[6] Ibidem, p. 6.
[7] ECOSOC Resolution 248 (IX) of 8 August 1949.

convened by the General Assembly in July 1951.[8] During the Conference the Convention Relating to the Status of Refugees was adopted on the 28th July 1951.[9]

At this time, the 1951 Geneva Convention constitutes the major legal instrument at the international level for the refugees' protection. This Convention has been defined by some academics[10] as the *Magna Charta Libertatum of refugees*, an historical attempt to set out an international common code for the recognition and protection of refugee's rights.[11] In December 2001, Contracting States to the Convention adopted a Declaration where they recognized the "importance of the 1951 Convention, as the primary refugee protection instrument which [...] sets out rights, including human rights, and minimum standards of treatment that apply to persons falling within its scope".[12] Its importance is also due to the fact that it establishes the definition of "refugee". Highly linked to the juridical status of refugees is the core principle of *non- refoulement.* The next paragraphs will briefly explain these two cornerstones of refugees protection.

2. The definition of "Refugee"

The 1951 Convention relating to the Status of Refugees provides that "refugee" is any person that:

> "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".[13]

The terms "well founded fear of being persecuted" constitute the key phrase of the definition. The use of the word "fear" implies that the definition involves a subjective element of the person applying for refugee status. Therefore, the determination of refugees status will require an assessment of the applicant's statements.[14]

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[8] E. Feller, V. Turk and F. Nicholson, *Refugee Protection in International Law*, UNHCR (Cambridge, 2003) p. 99.
[9] Ibidem.
[10] Ferrari, op, cit., pag 68.
[11] E. Benedetti, op. cit., p. 71.
[12] Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of refugees, UN doc. HCR/MMPS/2001/09 (16 Jan. 2002), at Preamble para. 2 and 4.
[13] Art. 1 (A) (2) of the 1951 Convention Relating to the Status of Refugee.
[14] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (1992) available at http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf para. 37 (Hereafter UNHCR Handbook). Nevertheless, as stated in the UNHCR Handbook, while evaluating this subjective element, the personality of the applicant must be also taken into account, since "psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable. One person may make an impulsive decision to escape; another may carefully plan his departure" (para. 40).

Concerning the adjective "well founded", its significance is particularly related to asylum seekers, since in most asylum cases the main issue is whether the individual's fear of persecution is well founded.[15] This terms entail that not only the subjective element must be taken into account but also an objective situation.[16]

Regarding the term "persecution", there is no universal accepted definition of it.[17] Article 33 of the 1951 Convention provides several grounds on which to assess whether there has been persecution. From this provision it can be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group constitutes persecution.[18]

3. The principle of *non- refoulement*

The principle of *non-refoulement* constitutes the backbone of refugee protection.[19] It rules the right not to be sent back to a country in which the refugee's life or liberty would be threatened. This right has been set out for the first time in the 1951 Convention. Article 33[20] establishes the explicit prohibition of *refoulement* for refugees whose life or freedom would be threatened in the refugee's country or in the host country.[21]

However, this principle has been also expressed in other Conventions and Agreements. Article 3 of the Convention against the Torture powerfully define prohibition on *refoulement*.[22] Moreover, the European Court of Human Rights in accordance with the prohibition on torture established by article 3 of the European Convention on Human Rights has also developed this prohibition.[23] Here, the object of the prohibition of *refoulement* is the prevention of human rights violations. For this reason the prohibition is not intended for past rights but is prospective in scope.[24]

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[15] A. Kotzeva, L. Murray, R. Tam QC, *supra* note 1, p. 15.
[16] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, (1992)* para. 38; available at http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf (hereinafter UNHCR Handbook).
[17] Ibidem, para 51.
[18] Art. 33(1) of 1951 Geneva Convention provides that: "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".
[19] K. Wouters, *International Legal Standards for the Protection from Refoulement*,(Leiden 2009), p.33.
[20] This provisions provides that: "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".
[21] K. Wouters, op. cit., p.33.
[22] Guy S. Goodwin-Gill, *The Refugee in International Law*, (2008) p. 208.
[23] K. Wouters (2009), op.cit., p. 25.
[24] Ibidem.

3.1 Conditions and exceptions for the protection from refoulement

As formulated in the 1951 Convention, protection from *refoulement* can be granted if the life or freedom of the refugee is threatened by reasons of race, religion, nationality, membership of a particular social group or political opinion. Consequently, even for a person which has the requirements to be qualified as a refugee, his fear of being persecuted must be one of those mentioned in article 33 (1).[25]

There are other exceptions to the protection provided by article 33(1). As a matter of fact, this cannot be claimed by "refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country".[26] In this field, the protection afforded in the European Law regime is much wider. As it will be analyzed later, third foreign nationals that are not covered by the protection offered by the 1951 may still rely on Article 3 of the European Convention on Human Rights.

3.2 State obligations

Regarding the content of state obligations deriving from the prohibition on *refoulement,* two categories have emerged. Depending on the situation of the refugee, State may bear negative or positive obligations.[27] Negative obligations are those which correspond to the duty to respect. Accordingly, the State is required to refrain from acting .[28] As far as the *non-refoulement* principle is concerned, negative obligations include prohibition on expulsion, deportation, extradition, rejection and in general the forced removal of a refugee.[29] Conversely, positive obligations correspond to the obligation of respect and fulfil.[30] From the prohibition of *non-refoulement* Sates are obliged to take action to prevent the refugee from returning to the frontiers of territories in which his life might be at risk.[31] The obligations include the obligation to admit, the obligation on refugee at sea, the obligation to grant a residence permit, temporary protection in situations of mass influx.

The prohibition of *non-refoulement* in the 1951 Convention has an absolute character. State parties to the Convention are not allowed to make reservation to the prohibition of *refoulement*. Article 42(1) establishes that at the time of signature, ratification or accession a State can make

[25] UNHCR Handbook, para 66.
[26] Article 33(2) 1951 Convention.
[27] K. Wouters (2009), op. cit., p. 133.
[28] C. Krause, M. Scheinin, *International Protection of Human Rights: A textbook,* (Åbo, 2009), p. 28.
[29] K. Wouters (2009), op. cit., p. 133.
[30] C. Krause, M. Scheinin, *International Protection of Human Rights: A textbook,* (Åbo, 2009), p. 28.
[31] K. Wouters, p. 133.

reservation to the provision of the Convention, but with exception of articles 1, 3, 4, 16(1), 33 and 36 to 46. This has been reiterated by the 1967 Protocol. [32]

3.3 Principle of non-refoulement as international customary law

The issue whether the principle of *non-refoulement* is established under customary international law is still debated. In the Encyclopedia of Public International Law it has been expressed that "the principle of *non-refoulement* of refugees is now widely recognised as a general principle of international law".[33] In addition, in the declaration of December 2001 adopted by Contracting States to the 1951 Convention, the importance of this principle has been emphasized by noting that: "the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law". In view of the fact that the prohibition of *refoulement* derives from several treaties, it must be clarified weather treaty practice can be used as source of customary international law.[34] In the *Nicaragua* case, the ICJ recognized that the prohibition on the threat or use of force established by article 2 (4) of the UN Charter was also valid as a principle of customary law, even concerning States that were parties to the Convention.[35] Although the customary principle was embodied in a multicultural convention, this didn't mean that it ceased to exist as a principle of customary law, even as regards States parties to the Convention.[36] Accordingly, it is well established that treaties principles can exist next to customary principle of related content.[37] Cornerstone of International Law is that Custom is founded on two basic elements: the actual behaviour of states and the psychological or subjective belief that such behaviour is law (*opinio iuris*).[38] As far as the state practice is concerned, there is near universal participation by States to treaties embodying the principle of *non-refoulement*.[39] Moreover, it can be stated that, following the methodology of the ICJ, "support for the existence of a rule of custom of similar content can be deduced from such practice".[40] In addition, one important element is the

[32] Article VII (1) of the 1967 Protocol provides that: " at the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16 (1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies".

[33] Max Planch Insitute for Comparative Public Law and International Law, Encyclopedia of Public International Law, (Amsterdam, New York, 1985), vol.8 p. 456.

[34] E. Feller, V. Turk and F. Nicholson, *Refugee Protection in International Law*, UNHCR (Cambridge, 2003), p. 141.

[35] Ibidem.

[36] Ibidem.

[37] Ibidem.

[38] M.N. Shaw, *International Law*, Sixth Edition, (2008 Cambridge), p. 74.

[39] Some of the main Convention providing this principle are the 1951 Convention relating to the status of refugee, the 1969 OAU Convention governing the specific aspects of refugee problems in Africa and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[40] Ibidem.

practice of States to incorporate treaties including the prohibition of *refoulement* into their legal order. Concerning the *opinio iuris* element, even though there are more controversies, it can be inferred that there is a majority of States convinced that this principle is binding. Essentially, the content of the customary principle of *non- refoulement* is that this principle binds all states and it forbids *refoulement* to any territory where the refugee would be at risk. The only exceptions to whom it is subjected are reasons of public safety and national security.[41]

4.The Geneva Convention and regional systems of protection

As aforementioned, the 1951 Geneva Convention Relating to the Status of Refugees still represents the major international legal instrument for the protection of refugees. However, the Geneva Convention is not the only legal instrument for the protection of refugees. Several regional organizations adopted Conventions or Declarations setting out more specific provisions.[42]

This is a result of the fact that after 1951 events that took place at international level showed that the Geneva Convention was not sufficient to effectively deal with international migration on its own. In 1951, the international political circumstances were featured by the contraposition between the Communist bloc and Western countries. World was bipolar, split between the Eastern bloc around the Soviet Union and the Western block around the United States of America. In this context, the majority of the refugees were fleeing the Eastern bloc towards the West for in trying to escape either political prosecution or the hardship of communist . As the international reality complicated towards the end of the Cold War and after it, migration ceased to be unidirectional. Most refugees became part of mass exodus caused by civil wars, famine and religious or political persecutions in various regions of the world.

As far as the EU is concerned, there isn't any specific Convention which specifically regulates the protection of refugees. Nevertheless, as it will be examined in the next chapters, within the European Union's legal framework several provisions relating to the protection of refugees rights can be found. Most of them are established in EU directives and function within the larger framework of the Geneva Convention.

[41]E. Feller, V. Turk and F. Nicholson, op. cit., p. 150.

[42] Concerning the African continent, the African Union adopted in 1969 The *OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*. With regard to the American continent, there is the *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama,* Although these instruments maintain the main concepts established in the Geneva Convention, these are adapted to the case produced by regional social phenomenon. *(* Benedetti, op. cit., p. 67).

II European Union Law and Refugees Protection

1. Overview on the European Union system for the protection of refugees.

The purpose of the present chapter is to point out some of the most significant features that can be noticed while examining the current EU legal instruments for the protection of refugees. These aspects will be presented while providing a brief historical overview of the main conferences and political turning points of the European Union that affected its stance in the issue at hand. Highlighting these features will be useful to understand which were the original intentions of the EU in adopting supplementary legal instruments for the protection of refugees, as well as which is the general degree of protection afforded by the EU. Most importantly, a description of the legal basis for refugees protection will be provided since it is relevant to answer the first query of this dissertation.[43] Last but not least, given the fact that the majority of the EU's legal documents for the protection of refugees are directives, the juridical status aspects of EU directives will be assessed. This study will be useful to answer the research questions concerning respectively the degree of compliance by EU Member States to their obligations and the hindrances to the implementation of refugee rights.[44] From the latter it derives the need to understand also how refugees may rely on their rights in national courts and the possible other ways to implement these rights.

1.1 History and context for the emerging of a refugee system of protection.

By looking at the process that brought the EU to the adoption of legal instruments concerning refugees, two aspects can be noticed. First of all, the original concern wasn't the protection of this category. In its place there were the aim to regulate the burden sharing among EU Member States in case of refugees mass influx and, once the recognition of refugees status had been implemented, the control of their movement on European territory. These concerns resulted from the new policies adopted concerning borders management. With the creation of a Single Market and the adoption of the Shengen Conventions of 1985 and 1990 several important changes took place as regards to the control of the entrance of third country nationals in the EU territory. Among the most notable (as well as most relevant for the present dissertation) measures adopted with the Schengen Conventions there is the abolition of controls at the internal borders and their relocation at external borders. In

[43] This is sub-research question (a) presented in the introduction as: " Which are the current legal instruments and the legal basis for refugees protection? "

[44] These correspond to the sub-research question presented in the introduction as "(b) What to these instruments set out? (c) What is the degree of compliance by EU Member States to their obligations in granting refugees human right?".

addition, the Schengen Conventions introduced the establishment of a common definition on the conditions for the crossing of external borders and procedures for controlling persons at these borders; definition of specific provisions on the responsibility of member states to examine asylum applications lodged by refugees. As a result, these measures had impact on national policies concerning the reception of refugees and their right to seek asylum. Regarding this right, refugees could be encouraged to exercise it in more than one Member State due to the absence of borders controls and harmonized policies.[45] Consequently, several instruments have been adopted in order to regulate this issue.[46]

Secondly, more protection is granted for asylum seekers. The *acquis communautaire* does not mainly concentrate on the protection of refugees. It rather focuses on protection and reception of asylum seekers. This began with the adoption of the Amsterdam Treaty in 1997 and the Tampere Council in 1999. In October 1999, the European Council held a special meeting in Tampere, aiming to the creation of an area of freedom security and justice within the European Union.[47] At the end of the summit the "Tampere Milestones", a document comprising the final conclusion of the summit, was adopted. Besides other issues, the creation of a common asylum and migration policy was dealt. In this context, the idea to create a Common European Asylum System (hereafter CEAS) was formulated for the first time.[48] The final decision was to construct the CEAS in two different stages.[49] The first stage, to be completed before 1 May 2004,[50] was aimed at the adoption of instruments establishing minimum standards for all Member States, particularly with regard to a common asylum procedure and an uniform asylum status.[51] The second stage was to consist of restricting the discretion offered to Member States in undertaking actions in this field. As a result from what was expected from the first stage, the Tampere summit was followed by the formulation of draft directives and regulations by the Council. Those instruments were developed from the subjects listed in article 63 of Treaty establishing the European Community (TEC). The majority of the directives deriving from CEAS regards asylum seekers rather than refugees[52].

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[45] P. Boeles p. 316.

[46] The Dublin Regulation which entered into force in 2003, deals with the same issue of the 1990 Dublin Convention.[46] Since the Regulation has replaced the latter, it has been known also as Dublin II.[46] It establishes how to determine which Member State is responsible for examining an asylum application lodged by third country nationals in the territory of a Member State. Its legal basis lays on article 63 (1) (a) TEC.

[47] P.J. van Krieken, *The Asylum Acquis Handbook*, (The Hague, 2000), p. 29.

[48] In the "Tampere Milestones", document comprising the final conclusion of the summit, part A, which deals with the "Common EU Asylum and Migration Policy, was divided into the following five chapters: I "Partnership with countries of origin", II " A common European Asylum System", III " Fair treatment of third country nationals", Management of migration flows". (Krieken, 2000).

[49] P. Boeles, op.cit., (2009), p. 317.

[50] Article 63 TEC.

[51] Ibidem.

[52] Among these there are the Dublin Regulation, the Reception Condition Directive, the Procedure Directive and the Temporary Protection Directive.

It can be noted that in the phase launched from Tampere as well as in the adoption of the subsequent EU directives, the attention prevails on the implementation of measures concerning asylum seekers rather than refugees. However, the system also provides EU legal instruments concerning refugees. In the next section, it will be provided a brief study of the legal basis for the protection of this category of persons.

1.2 Legal basis for refugees protection.

Member States obligations to grant refugees rights can be detected both in European Union primary and secondary law. EU primary law includes principally the founding treaties. The most relevant EU treaty for the protection of refugees is the Treaty establishing the European Community (TEC).[53] As previously stated, Article 63 TEC constitutes the legal basis for the CEAS. The provision rules the adoption of a number of measures regarding refugees. The Council has to implement, within a period of five years after the entry into force of the Treaty of Amsterdam measures in accordance with the 1951 Geneva Convention and other relevant treaties in the following fields:

> "(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".[54]

Furthermore, the Charter of Fundamental Rights of the European Union (CFR) also represents a primary law source within the EU legal framework. This Charter constituted a mere political commitment carrying no binding legal effect until 2003-2004 Intergovernmental Conference where the charter was "adapted" in order to make it legally binding. The new character of the charter was confirmed at the European Council of 2007. This has been confirmed by the Treaty of Lisbon which stipulates at Article 1(8) that:

"The Union recognises the rights, freedom and principle set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg on 12 December 2007, which shall have the same legal value as the Treaties".

[53] The original name was the "Treaty establishing the European Economic Community" adopted in 1957 and then renamed under the 1992 Treaty of Maastricht as "Treaty establishing the European Community". The 1957 treaty has been amended again by the 2009 Treaty of Lisbon and renamed as "Treaty on the Functioning of the European Union".

[54] Article 63 TEC para. (c) (d). Conversely, the previous paragraph of the same chapter concern asylum seekers. These provide the implementation of measures within the following areas: (a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States; (b) minimum standards on the reception of asylum seekers in Member States;

EU secondary law dealing with refugees protection includes several Directives. The majority of these directives derive from what article 63(c) (d) sets out. As established by this provision, the Council must abide by the 1951 Geneva Convention and other relevant treaties when adopting acts of secondary law concerning the fields listed.[55] The most relevant directive in this respect is the so-called Qualification Directive.[56] The adoption of the Directive constituted a remarkable development in the field of Refugee Law for two reasons. Firstly, the Directive is the first EU binding instrument to cover categories of people who need international protection but who are not embraced by the 1951 Convention. Secondly, it is the first legal instrument binding on EU Member States that deals with refugee protection under the same umbrella.[57] Chapter VII provides the rights to whom both refugees and beneficiaries of subsidiary protection status are entitled. As it will be analyzed later, the Qualification Directive doesn't provide to beneficiaries of subsidiary protection the same level of rights accorded to refugees. The provisions discussed in this chapter don't limit in any manner the rights granted by the 1951 Convention.[58] However, the Directive doesn't cover all of the refugee rights provided by the Convention[59] but it includes a number of rights that surpass the Convention's standard.[60]This legal instrument covers all the rights that will be dealt in the present dissertation.[61]

Among the secondary law acts relevant for the protection of refugees there is also the Temporary Protection Directive.[62] The Temporary Protection Directive was the first legal instrument adopted in accordance to the legislative Tampere Programme.[63] Its scope of application consist of the general category of "displaced persons". This includes also persons holding the status of refugees. The aim of its adoption was that of managing large numbers of displaced persons entering the

[55] Fischer A., - Lescano, Löhr T., Tohidipur T., "Border Control at Sea: Requirements under International Human Rights and Refugee Law", *International Journal of Refugee Law*, Vol. 21, Issue 2, (2009) p. 256-296.
[56] Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
[57] H. Storey, "EU Refugee Qualification Directive: a Brave New World?", *International Journal of Refugee Law*, Vol.20, Issue 1 (2008) p. 5.
[58] Articles 3-34 of the 1951 Geneva Convention.
[59] H. Storey, op. cit., (2008), p.23.
[60] P. Boeles, op. cit., (2009), p. 344.
[61] This thesis, as previously stated in the introduction, will focus on the following rights: protection from *refoulement* (article 21), right to family reunification (article 23), employment (article 26), education (article 27), health care (article 29), accommodation (article 31). This is only a selection of rights granted by the Qualification Directive. It also sets out: information on rights and obligations (article 22), right to have resident permit and travel documents (articles 24 - 25), freedom of movement within the Member State(article 32), Access to integration facilities (article 33) and repatriation assistance (article 34).
[62] Directive 55/2001/EC of 20 July 2001, 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.
[63] The Temporary Protection Directive, which entered into force on 20 July 2001, was to be implemented by Member States before 1 January 2003. The United Kingdom took part in it while Ireland and Denmark decided not to participate. Nevertheless, On 3rd October 2003 Ireland opted in.

European Union from areas affected by arms conflict or endemic violence.[64] As a result, the directive serves two main goals: to provide protection to displaced persons who are unable to return to their country of origin and to ensure burden sharing among Member States.[65] The character of the temporary protection mechanism is exceptional. In order to be activated, the Council has to adopt a decision to establish the existence of a mass influx of displaced persons.[66] Chapter III of the Directive provides a series of rights that member states are obliged to grant to the temporary protection's beneficiaries.

Likewise the Qualification Directive, the Temporary Protection Directive covers almost all the rights that will be dealt in the present dissertation.

Furthermore, there are two legal instruments that deal with specific refugees rights and category of refugees. First, there is the Family Reunification Directive.[67] Article 3(3) establishes that the scope of application is confined to family members of third-country nationals who doesn't hold Union citizenship. Adding to that, the directive contains special provisions for refugees. These are included in chapter V. The application of this chapter can be confined by Member States to the family reunification of "refugees whose family relationship predates their entry".[68]

1.3 European Union directives: juridical effect and justiciability.

Since almost all the refugees rights granted within the EU legal framework are established through directives, it might be useful to have a brief overview of some of their most relevant aspects for the present research.

EU directives bind only Member States to which the acts are addressed to. Moreover, as established by the European Court of Justice (ECJ) in *Publico Ministero v. Ratti* directives must be clear precise and unconditional.[69] The most relevant aspect of EU directive useful for the present research, is the fact that these legal instruments establish obligation of result on Member States. The Treaty establishing the European Community rules as it follows:

> "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".[70]

[64] P. Boeles, op.cit., (2009), p. 355.
[65] The preamble at paragraph 8 provides that it is "necessary to establish minimum standards for giving temporary protection in the event of a mass influx of displaced persons and to take measures to promote a balance of efforts between the Member States in receiving and bearing the consequences of receiving such persons".
[66] Article 5(1) of the Temporary Protection Directive provides that: "the existence of a mass influx of displaced persons shall be established by a Council Decision adopted by a qualified majority on a proposal from the Commission, which shall also examine any request by a Member State that it submit a proposal to the Council".
[67] Directive 2003/86/EC of 22 September 2003, on the right to family reunification.
[68] Article 9 (2) Family Reunification Directive.
[69] *Pubblico Ministero v Ratti* [1979] ECR 1629.
[70] Article 249TEC.

This element shows that directives are instruments meant to contribute to the harmonization of Member States' laws.[71] The harmonization of laws has a precise meaning in the context of EU law. It constitutes the procedure by which EU Member States modified their national laws in accordance with EU law, in order to produce uniformity.[72]

As far as the juridical effect is concerned, EU directives must be transposed into national legislation. The transposition takes place through the adoption of national acts by Member States' parliaments and governments. These measures have to be binding, clear and precise in order to provide guarantees of transparency and legal certainty. This is fundamental especially when an EU directive tends to grant rights to individuals so that these could be able to be fully aware of their rights and rely on them before national courts.[73]

EU directives may have a direct effect.[74] This means that a provision can create rights which individuals may rely on before their domestic courts. Directly effective law represent an provision of EU law "that is not directly applicable but that grants individual rights against the state with immediate effect even before its implementation into domestic legislation".[75] This happens under certain conditions. Firstly, as acknowledged in *Van Gend en Loos v Netherlands* a directive may have direct effect when it sets out negative obligations, namely to do not keep a certain behaviour. In these circumstances the obligation is immediately, unconditionally and absolutely binding.[76] As a result, the interested individual can invoke the Member State's obligation even though, this is contained in a national act that doesn't have direct effect *ipso jure.* Secondly, when it confirms an obligation that has been already established in Treaties provisions which can produce direct effects.

Thirdly, when the time limit for its implementation is expired and under the following circumstances: when the directive sets out obligations of clear and precise content so that there isn't any margin of discretion left to Member States; when the directive has unconditional aspect so that they don't need the adoption of further national acts; when the directive establishes rights in favour of individuals and the content is easily recognisable. Only under these conditions, the directive can be directly applied from the national court to the Member State that has not adopted by the time limit the provided measures or has not properly incorporate the directive into the national legal system.

[71] Article 94 TEC.
[72] J. Law - E. A. Martin, " A Dictionary of law" (Oxford university press, Seventh Edition), p. 258.
[73] L. Moccia, *Unione Europea, una guida per argomenti,* p. 199.
[74] L. Moccia, op. cit, p. 203.
[75] J. Law - E. A. Martin, op. cit., p. 170.
[76] *Van Gend en Loos v Netherlands* Case 26/62 [1963] ECR 1; [1963] CMLR 105.

One more important condition for a directive to be directly effective is the temporal space. As acknowledged by the ECJ in *Publico Ministero v. Ratti*, a directive can be only effective when the date for the implementation has past.

Moreover, EU directives only have "vertical" direct effect. This mean that the provisions contained in the directive has effect between citizen and the Member State.[77] In *Van Duyn v. Home Office* the ECJ held that the binding effect of a directive would be undermined if the individuals concerned were prevented from relying on them before national courts. The plaintiff in this case was a Dutch national, Yvonne van Duyn, to whom the British government denied an entry permit due to her affiliation to the Church of Scientology. The claimant sued the British government relying on article 48 TEC, and Article 3 of Directive 64/221,[78] which allowed free movement of workers in the EU. This was the first case referred from a British Court to the ECJ. More specifically, the second question asked whether Council directive 64/221 was "directly applicable so as to confer on individual rights enforceable by them in the Courts of a Member State". [79] The Court regarded the obligation set out by the Directive as directly effective conferring enforceable individual rights, which national courts must protect. This was also due to the fact that the obligation was not subject to any exception and did not require any intervention from the Community or Member State.

As regard to the justiciability of rights set out in EU directives, there are two possible procedures. The first one derives from the above-examined vertical effect of directives. Thus, individuals may rely on their rights established by a directive, before Member States national courts. The second one involves the European Court of Justice (hereafter the ECJ) and may take place in case of "actions for failure to fulfil obligations". The failure may derive from legal instruments or acts and can result from the conduct of a positive behaviour, such as the adoption of an acts within the National legal framework that doesn't comply with EU law or negative behaviour, for instance the omission to transpose an EU directive. The proceedings for failure to fulfil an obligation allow the ECJ to control Member State compliance with European Union Law. These might be brought by either the EU Commission or by a Member State. As envisaged by article 258 TFEU, when the Commission initiates the proceedings, it has to deliver a reasoned opinion on the matter to the Member State concerned. Only on the condition that the Member State does not comply with the opinion, the Commission can bring the matter before the ECJ.

[77] J. Law - E. A. Martin, op. cit., p. 170.
[78] Council Directive 64/221 of 25 February 1964, on the Co-ordination of special measures concerning the ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.
[79] Judgment on the case is available at http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61974J0041:EN:NOT#I2; last reviewed on 9th November 2011.

When the proceedings are brought by a Member State, this has to first bring the matter before the Commission. Only after the delivering of a reasoned opinion from the Commission to the Member State concerned, the claimant Member State may then bring the matter before the ECJ.[80]If the Court finds that the Member State concerned has breach an obligation under EU law, it will deliver its first judgment. This will set out the measures to be adopted by the Member State.[81] If the Commission considers that the Member State has not undertaken the measures decided by the Court, it can bring the matter before the ECJ for a second time.[82] If the Court acknowledges that the Member State has not conformed to the first judgment, it may impose a penalty payment.
In case of a Member State fails to inform on the status of a EU directive's transposition the TFUE provides that:

> "When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances". [83]

The function of proceedings for failure to fulfil obligations is extremely important to control the compliance of Member States to their obligations. As it has been pointed out, the EU provide a system of control that can be initiate by both the Commission and Member States. These actions that can be brought to the ECJ are some of the devices that will be employed in the following paragraphs to point out the level of compliance to Member States obligations for the protections of refugees rights set out in directives.

To conclude, given the juridical nature of EU directives and what is established in the TEC, refugees may rely on their rights only in national courts. Proceedings for failure to fulfil obligations are undertaken by the ECJ have the only purpose to take measure against infringements as to the reception of the directive into the national legal framework of Member States. This can be initiated by both the EU Commission or a Member State against another. This shows that, as far as EU policies towards refugees are concerned, although EU directives can establish clear and precise Member States obligations for the protection of refugees rights, their original intents can be diminished by the current existing methods of justiciability.

[80] Article 259 TFEU.
[81] Article 260 (1) TFEU.
[82] Article 260 (2) TFEU.
[83] Article 260 (3) TFEU.

III Refugees Rights under European Union Law

1. Protection from *refoulement*

This section deals with the refugees protection from *refoulement* within the European Union legal system. As already examined in the first chapter of the present dissertation, the principle of *non-refoulement* is one of the cornerstone for the protection of refugees. This is set out at Article 33(1) of the Geneva Convention.[84] Article 63(1) TEC establishes that EU secondary law must be concordant with the Refugee Convention and other relevant international treaties. This entails that States are bound to adopt directives and regulations in accordance with these treaties and, consequently to respect the refugee's right of being protected from *refoulement.*

In this section, after providing an overview on the content of EU provisions referring to the refugee's right to be protected from being returned, the compliance of Member States along with the main EU agency for the control of borders managing will be dealt. The need for such analysis is due to the fact that in order to understand whether the current EU legal framework for the protection of refugees takes into account *non-refoulement*, and thus, whether it is comprehensive or not, it is necessary to examine the general degree of compliance by Member States. This is also because the supposed noncompliance could be caused by lacks into the EU legal framework. Last but not least, the applicability of *non-refoulement* beyond EU territory will be examined.

1.1 EU legal instrument establishing protection from refoulement

1.1.1 The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union (hereafter CFR) at Article 19(2) refers to *non-refoulement* by stipulating as it follows:

> "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".

After the entry into force of the Treaty of Lisbon in 2009, the CFR gained the same legal status of other EU treaties.[85] Therefore, two are the relevant aspects to be pointed out. Firstly, the obligation is clearly defined. Since this legal document is a Charter establishing fundamental rights, no additional specification should be needed. As a result, no problematic issue arise as to the wording used in this article. However, the implementation of this right should be put into practice through

[84] See pages 9-10 of the present dissertation.
[85] L. Moccia, op. cit., p.190.

secondary EU law. Secondly, since treaties are directly applicable, the obligation to do not removed, expelled and extradite persons that face serious risk of death penalty and torture, directly binds Member States.

1.1.2 Qualification Directive and Temporary Protection Directive

Council Directive 2004/83/EC stipulates at Article 21(1):

> " Member States shall respect the principle of *non-refoulement* in accordance with their obligations".
>
> Temporary Protection Directive lays down as it follows:
>
> "(...) Member States shall apply temporary protection with due respect for human rights and fundamental freedoms and their bligations *regarding non-refoulement*".

The way in which these provisions are formulated shows that they must be interpreted in accordance to the international law obligations as regards to *non-refoulement* that bind EU Member States. However, the directive provides no further specific obligations. This is an indication of the fact that, since these legal instruments are EU directive, they can only establish obligation of results. Consequently, the wording used in this provision might be deemed as a mere attempt of harmonization of Member States' laws. The Member States obligations are not clearly defined.

1.2 Member States practice and compliance to non-refoulement

1.2.1 Italy: practice and compliance to *non-refoulement.*

In this paragraph, the practice of Italy as regard to the principle of *non-refoulement* will be dealt. The need for such analysis lays into the fact that, in order to understand whether the current EU legal framework on refugees takes into account this fundamental principle, it is useful to have an example of an EU Member State's practice in this regard.

In the last decade, there has been a growing concern on the phenomenon of irregular migration, especially among Southern European Countries. This concern has been emphasized after the terrorist attack of 9/11 and the Madrid bombing of 11 March 2003. After these events, transits to the EU from mostly the South as well as other parts of the globe, has been frequently linked to terrorism.[86] This growing fear influenced the EU borders management.[87] In terms of refugee's protection from *refoulement,* this has led to a general attitude to prevent the arrival of third country

[86] IIS (International Institute for Strategic Studies) (2004) Strategic Survey 2003/4 (London: IISS).
[87] It has been stated that this has the objective "to build a common immigration policy which *fight against* the sort of mobility negatively qualified as *illegal*" (S. Carrera, op., cit.).

nationals, without taking into account that, among these people, persons entitled to the status of refugees, as set out by the Qualification Directive, might be included.

According to Lutterbeck,[88] this attitude of Southern European Countries has led to two main trends: a border militarization and the intensification of law enforcement activities across the Mediterranean Sea. Regarding the first, this consists also of joint operational activities carried out by EU Member States and managed by Frontex.[89] Nevertheless, paramilitary police and military security forces have been employed to prevent irregular migration at national level back in the 1990's.[90] This phenomenon concerns particularly both Italy and Spain. In Italy, an important role has been played by the *Guardia di Finanza*.[91] In the last twenty years the *Guardia di Finanza*, also due to its large fleet, has constituted the main agency to prevent the transit of would-be- refugees in Italy from sea borders.[92] The operations undertaken were most based on the deployment of boats and aircraft and sometimes also actual warships. In Spain, the same role has been played by the *Guardia Civil*.[93] However, the methods employed were stronger and more complex in comparison with those of the *Guardia di Finanza*. Besides the deployment of boats and aeroplanes, the *Guardia Civil* allocated the so-called *Sistema Integrado de Vigilancia del Estrecho* (hereafter SIVE), deemed the most sophisticated technological coast control system.[94] This system involves the deployment along the country's Mediterranean coast of fixed and mobile radars infrared sensors.[95]

Concerning the second phenomenon, namely the intensification of law enforcement activities across the Mediterranean sea, it has to be pointed out that this is also one of the reasons of the increment of irregular migration flows to the EU. The introduction by the Italian and Spanish governments of visa requirements for Maghrebi third country nationals play an important role in this sense.[96] Besides these actions legal instruments adopted at national levels, there have been also a cooperation among Southern European countries for a law enforcement in order to prevent irregular migration to these countries. This has taken place in the context of the EU's Euro-Mediterranean Partnership (hereinafter EMP).[97] The law enforcement collaboration can be also noted in bilateral agreement with the countries of origin. The most relevant bilateral agreements

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[88] Lutterbeck D., "Policing Migration in the Mediterranean", *Mediterranean Politics*, Vol.11, Issue 1, (Geneva, March 2006) p. 59-82.
[89] *See* chapter III of the present dissertation.
[90] D. Lutterbeck (2006), op. cit., p. 64.
[91] "*Guardia di Finanza* is a semi-military institution which is organized along military lines and also formally considered a military force" (Lutterbeck op. cit., p. 65).
[92] D. Lutterbeck, "Between police and military: the new security agenda and the rise of gendarmeries", *Cooperation and Conflict*, (2004) Vol. 39 Issue 1, pp.45-68.
[93] "*Guardia Civil* is a paramilitary police force which reports both to the interior and the defence ministries" (Lutterbeck (2006) op. cit., p. 66).
[94] http://www.iesparquedelisboa.org/comenius2/Inmigracion/multimedia/sive.html, Last reviewed on 2nd August 2011.
[95] D. Lutterbeck (2006), op. cit., p. 66.
[96] IMO, op. cit., p. 32; D. Lutterbeck (2006).
[97] D. Lutterbeck (2006), op. cit., p. 69.

concern those between Spain and Morocco and between Italy and Libya.[98] As regard to the cooperation between Spain and Morocco, this has been based on the Plan GRECO (Overall Programme for the Control and Coordination of Non-National and Immigration in Spain). This provided a budget to managed the area to be subjected to migration control such as Canary Islands, that Andalusian coastline and Ceuta and Melilla.[99]

In order to assess the degree of compliance to the principle of *non-refoulement* by Italy, it is useful to briefly go through some of the recent episodes of refugees' " pushing back". As far as Italy is concerned, in recent years this country has been involved in several cases of push backs of boats carrying would-be-refugees in Europe. Many of these boats landed in Sicily, especially on the Sicilian minor island of Lampedusa.[100] By July of 2009, UNHCR has registered that more than 900 migrants have been pushed back and returned to Libya.[101] It also stated that, even though many of them evidently were in need of international protection, the Italian authorities didn't assess properly their possible needs.[102] In this regard the cooperation between Italy and Libya played a critical role. Italy and Libya concluded the Treaty of Friendship, Partnership and Cooperation on 30th August 2008. Additionally, a Technical-Operational Protocol was adopted on 4th February 2009. As a result from these agreements, many patrol boats were transferred from Italy to Libya to be jointly managed by both countries.[103] Libyan coast guards were transferred to at the Italian command situated in the island of Lampedusa while the Italian authorities sent some team of *Guardia di Finanza* to a Libyan coast guard station in Zuwarah. [104]

Nevertheless, problems on the compliance of Italy as well as for other Member States may arise also from a lack of specific legal provisions establishing procedures in the EU legal system that Member States should conform to in *refoulement* cases.[105] EU borders officials play a crucial role in this cases and EU legal provisions regulating their functions would facilitate the respect of the refugee's right not to be sent back. In this regards, the Schengen Borders Code mainly establishes

[98] Schuster, I, "The Realities of a New Asylum Paradigm", COMPAS Working Paper WP-O5-25 (compass: Oxford 2005).
[99] A. Betts, "Towards a Mediterranean Solution? Implications for the region of origin", *International Journal of Refugee law*, Vol. 18 issue 3-4 (13 November 2006), p.660.
[100] The tiny island of Lampedusa, which consists of 20 km2 and has a population of around 5500, has been continuously under the media spotlight for the numerous "refugees crisis" that the Island had to face. The recent so-called Arab Spring, which affected Libya Tunisia and Egypt, has brought to an even greater degree of landings into the Island.
[101] "Refugee protection and international migration: a review of UNHCR's operational role in southern Italy" (September 2009), available at: www.unhcr.org/4ac35c600.html.
[102] UNHCR Press Releases "UNHCR deeply concerned over returns from Italy to Libya, 7 May2009, available at www.unhcr.org/4a02d4546.html, last reviewed on 9 August 2011.
[103] Moreno V., "Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea", *International Journal of Refugee Law*, Vol. 23 Issue 2, (2011) p. 183.
[104] Ibidem.
[105] Moreno, op. cit., p. 214.

that entry to Member States territories should be denied to any third country national that does no satisfy the requirements established by the same Code. These include owning valid travel documents and visas.[106] In addition, the Schengen Borders Code also stipulates that " persons refused entry shall have the right to appeal. Appeals shall be conducted in accordance with national law". [107] As a result in this field wide discretion is left to Member States.

The fact that these "push backs" took place recently must be also contextualized both in the internal political climate and national legislation concerning the entry of third country nationals in the Italian territory. As a matter of fact, protection of refugees still remain greatly dictated by national legislations. The Italian political parties played an important role in this context. In recent years right wing parties based their electoral campaigns on an anti-immigration tendency. On this field, the general approach of Italian politics towards the presence of third country nationals seems to be quite ambiguous.[108] Regarding the Italian national legislation, it can be inferred that the notion of sending back unwanted third country nationals is deeply rooted in it. As matter of fact, Italian acts on migration issues have no reference to the fact that exceptions to *refoulement* should be made when it comes to refugees, persons that are entitled to certain rights as laid down by the Qualification Directive. In addition, these acts have even severe procedures of expulsion that have been deemed in certain unconstitutional.

The so-called *legge Turco-Napolitano,*[109]which is the first systematic Italian immigration act adopted in 1998, had the objective to send back to their country of origin those "migrants", category that includes in this case also would-be-refugees, who entered illegally in Italy.[110] Subsequently, the adoption of the *legge Bossi Fini* [111] has provoked intense debated between right wing parties and left wing parties especially as regard to the constitutionality of the law traits.[112] The controversial

[106] Schengen Borders Code, article 13 and 5(1).
[107] Schengen Borders Code Art. 13(3).
[108] On the one hand, there is the conviction that third country nationals (both economic migrants and refugees) are necessary for the national economy progress. On the other hand is extremely diffused the idea that there is a close relationship between crime and immigration. It is precisely on this last point that, in their last years, centre-right parties have based their electoral campaign. Among these the Northern League (*Lega Nord*), which is a federalist and xenophobic party, stands out. Recently, the Lega "shifted from an anti-southern into an anti-immigration platform which blamed the central government for its ineffective struggle against criminality and irregularity". (Finotelli, Sciortino ,2009, op. cit., p. 134).
[109] Legislative Decree of 25 July 1998, n.286 entitled*: Consolidated Text of provisions relating to immigration and the status of foreigners* (the Decree amended the previous Martelli law).
[110] Moreover, the Act authorized the opening of the so-called, *Centri di Permanenza Temporanea* (also known as CPT). In these centres migrants who enter Italy illegally could be detained even up to thirty days before they had been deported. (Article 12 of Act n. 40/1998).
[111] The act is named after the Minister for institutional reform and devolution and Leader of the Northern League Umberto Bossi, and Gianfranco Fini, Deputy Prime Minister and head of the National Alliance, the right wing party.
[112] One of the most controversial provisions of the *legge Bossi Fini* was those concerning the issue of fingerprinting. According to articles 5 and 7 of the Act, all immigrants wanting to obtain a stay permit, or a renewal of their stay permit must give their fingerprint to the authorities. *See* "Italy Asylum Bill Racist says MP'S", available at: http://Cnn.com2002.World.europe.06/04/italy.immigration/index.htm (June 4, 2002).

and highly disputed aspects of this Act are numerous. Among these there are also issues relating to *non-refoulement.* In fact, *Bossi-Fini* made the procedures for expulsion, which were already provided by the previous *legge Turco-Napolitano,* more restrictive. The previous migration act established the possibility to appeal against the decision of expulsion ruled by a designated magistrate within fifteen days from the adoption of the decision. The *Bossi-Fini* made this procedure stricter by "making it compulsory for expulsions to be immediately enforced".[113] Regarding the possibility for the third country national concerned to lodge an appeal, the mechanism was created in such a complex way that the law makes appealing expulsions impossible in practice.[114] Furthermore, the Act established coercive accompaniment to the border when, the immigrant has to be expulsed on the ground of the four instances that lead to expulsion provided in the Act.[115] This provision have been considered unconstitutional, as in breach of article 13 of the Italian Constitution, which rules that the possibility to limit personal liberty can be limited only in exceptional cases. Differently, *Bossi-Fini* found the coercive accompaniment to the border assuming that all the "irregular migrant", category that might include would-be refugees, constitute a threat to the public security.[116] In conclusion, all the major immigration acts adopted in recent years have firmly established measures to send back unwanted and irregular migrants. This provisions have been shaped without considering the event that this immigrants might hold the status of refugees or beneficiaries of subsidiary protection has established by the Qualification Directive.

In conclusion, in several occasions Italy has breached the principle of *non-refoulement*. This has concerned particularly would-be-refugees aiming to reach EU territories. This practice has been exacerbated after the terrorist attack that took place in recent years. Such tragic events provoked a growing fear from Southern European Countries for third country nationals coming to Europe, which led to a border militarization and the intensification of law enforcement activities across the Mediterranean Sea.

The noncompliance of Italy to the prohibition to send back people entitled of the status of refugees maybe traced back to two main factor. The first concern the fact that protection of refugees still remain highly dictated by national legislation. In this sense, it might seem that the EU cannot interfere with this internal sphere.

[113] M. Totah (2002) op. cit, p. 1494.

[114] For instance, the act provided that "appeals must be made *within* thirty days after the expulsion notification" and that " the appeal must be made through the Italian embassy in their country of origin ". (Fordham, op. cit., 2003). However, it happened that the embassies have received the expulsion notification *after* thirty days. As a result, the appeal was no longer valid according to the act. (C. Gubbini," Si può ricorrere alla consulta-Paolo Bonetti, docente all'Università Bicocca: La legge Bossi Fini contiene molti profili di incostituzionalità", *Manifesto* (11 July 2002).

[115] Finotelli, Sciortino (2009), op. cit., p. 125.

[116] M. Totah (2002), op. cit p. 1495.

In addition, the ascent to the government of right wing parties, in particular the Northern League party, openly deemed as a xenophobic party, along with highly strict national acts on remittances that do not take into account the refugee's right to be not sent back, have played a crucial role in this noncompliance. Second, as aforementioned, [117] in the EU legal framework there is a lack of specific procedures that Member States should conform to in r*efoulement* cases. The Schengen Borders Code in this field, which is the main legal instrument supposed to regulate these cases, leave wide discretion to Member States. As a result this shows a discrepancy in the EU policies for the protection of refugees as well as the fact that the refugee's right to be not sent back is not fully taking into account in EU law.

1.2.2 Frontex activities and *non-refoulement*

In this section two aspects will be pointed out. Firstly, the Frontex dependence on EU Member States, which makes this institution just a mere operative organization as well as a manifestation of the Member States willing. In order to prove this assertion, it will be necessary to briefly examine the legal basis of this agency. Secondly, the Frontex noncompliance to the principle of *non-refoulement.* Lastly, the consequences of this two aspects in terms of EU policies towards the protection of refugees.

The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (hereinafter FRONTEX) is the EU body aimed to make the cooperation of border security between Member States operational.[118] It has its origins in the EU objective to build up a system of "integrated border management".[119] The Agency was established by the Council Regulation (EC) 2007/2004 of 26th October 2004. Its formal legal basis can be found in Article 62 (2) (a) and 66 TEC.[120] The main tasks of the Agency are established in the Council Regulation 2007/2004. These consist of coordinating operational cooperation between Member States for the joint management of external borders; to assist Member States to train national border guards; carry out risk analyses; follow up on the development of researches on

[117] *See* page 21 of the present dissertation.
[118] www.frontex.europa.eu, last reviewed 12 July 2011.
[119] The so-called "IBM Model" was articulated for the first time at the JHA Council meeting in December 2006. Three specific elements were recognized as part of the IBM:1) A common corpus of legislation, embodied in the Shengen Border Code: 2) Operational cooperation between Member States, including cooperation as coordinated by FRONTEX; 3) principle of solidarity. (J. Lodge, *Are you who you say you are? The EU and Biometric Borders*, (Nijmegen, 2007) p.70).
[120] Article 62.2 EC Treaty provides that the Council shall adopt: "measures on the crossing of the external borders of the Member States which shall establish: (a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders; (b) rules on visas for intended stays of no more than three months". Further, Article 66 states that " the Council (…) shall take measures to ensure cooperation between the relevant departments of the administrations of the Member States in the areas covered by this Title, as well as between those departments and the Commission".

external borders' control and surveillance; assist Member States when in need of increased technical and operational assistance at external borders and lastly, provide support for the organization of joint return operations.[121]

Several factors illustrate that this agency, in order to carry out its operations, highly depends on the Member States' willingness. Firstly, as far as the agency's financial system is concerned, Frontex budget has increased radically since its establishment and this is due to Member States contribution.[122] Even though Frontex should have acquired full financial independence from 1 October 2006,[123] the main contributors still remain the "Schengen Associated Countries".[124] Secondly, The Council Regulation 2007/2004 states that:

> "The responsibility for the control and surveillance of external borders *lies with the Member States.* The Agency should facilitate the application of existing and future Community measures relating to the management of external borders by ensuring the coordination of Member States' actions in the implementation of those measures". [125]

This provision demonstrates that Frontex has a mere operative role as regard to the management of EU external borders. Thirdly, Member States solidarity is a key element for the success of Frontex operations.[126] This is also due to the fact that the agency has no technical means of its own.[127] Generally, Frontex may act just in case of a request from the Member States. It can launch its own initiatives for joint operations and pilot projects but always in cooperation with other Member States.[128]

The Frontex second aspect relevant for the present dissertation, concerns the relation between the *raison d'etre* of the agency and its "compliance" to the EU, as well as international, obligation to protect refugees from *refoulement.* The cornerstone of Frontex activities clashes with *non-refoulement.* It consists of precluding migrants from arriving to the EU coasts.[129] This is clearly demonstrated by how one of the agency's activity has been named "risk analysis". As stated in the Frontex Regulation:

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[121] Article 2 Council Regulation (EC) 2007/2004, 26th October 2004.
[122] J. Pollack, P. Slominski, " Experimentalist but not Accountable Governance? The role of Frontex in Managing the EU's External Borders", *West European Politics*, Vol. 32, No. 5, p. 909.
[123] Ibidem.
[124] Report on annual Frontex Budget available at: http://www.frontex.europa.eu/budget_and_finance/, last reviewed on 4th August 2011.
[125] Preamble Paragraph 4 of the Council Regulation (EC) 2007/2004, 26th October 2004.
[126] S. Carrera, "Frontex and the EU's Integrated Border Management Strategy", *Are you who you say you are? The EU and Biometric Borders, J. Lodge ed.* (Nijmegen, 2007), p. 77.
[127] Ibidem.
[128] S. Carrera, op. cit., (2007), p.76.
[129] A. Fischer- Lescano, T. Löhr, T. Tohidipur, op. cit., (2009), p. 294.

> ”Based on a common integrated *risk* analysis model, the Agency should carry out risk analyses in order to provide the Community and the Member States with adequate information to allow for appropriate measures to be taken or to tackle identified threats and *risks* with a view to improving the integrated management of external borders”.[130]

The term *risk* reflects the essence of how the eventual arriving of would-be refugees is considered. Moreover, the general aim of Frontex to prevent flows of refugees towards the EU costs can be also inferred by several Regulation’s provisions establishing the Frontex duty to provide EU Member States with the necessary assistance for joint return operation.[131]

Furthermore, in the legal foundation of the EU agency there is no indication to the principle of *non-refoulement*.[132] Neither in the Council Regulation (EC) 2007/2004 nor in the RABIT regulation, there is any reference to this fundamental legal principle for the protection of refugees.[133]

To conclude, as far as the EU policies towards refugees are concerned, Frontex doesn’t comply with the core refugees’ right to be protected from being returned to their country of origin. This shows the existence of a discrepancy within the system of the European Union. On one hand, the EU establishes, through the adoption of directives, the Member States obligation to protect refugees rights including the protection from *refoulement.* On the other hand, it creates, through its own institutions,[134] bodies for the coordination of policies among its Member States that are inconsistent with the above-mentioned refugees rights standards.

Many of the operation undertaken by Frontex aiming to return would-be refugees, took place beyond the EU territory. In the next paragraph, this issue will be examined.

1.3 Applicability of *non-refoulement* beyond EU territory.

This part is relevant to answer one of the question of the present dissertation, thus, whether the cornerstone principle of *non-refoulement* applies even beyond the European Union territory. The necessity to address this issue stems from the fact that Member States have argued that the principle

[130] Para. 6 Frontex Regulation; more directions on this activity are defined by article 4 of the Regulation.
[131] Article 9 rules that: “(…)the Agency shall provide the necessary assistance for organising joint return operations of Member States. The Agency may use Community financial means available in the field of return”. In addition, article 2 (f) mentions among the agency’s tasks to ”provide Member States with the necessary support in organising joint return operations”.
[132] S. Klepp, “A contested Asylum System: the European Union between Refugee Protection and Border Control in the Mediterranean Sea”, *European Journal of Migration and Law*, Vol. 12, Issue 1 (2010) p. 17.
[133] More generally, there are no direct references to any of the refugees’ rights provided by EU legal instruments. Nevertheless, paragraph 22 of the Preamble establishes that: “this Regulation respects the fundamental rights and observes the principles recognised by Article 6(2) of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union”. Article 6 (2) TEU refers to fundamental rights guaranteed by ECHR.
[134] These are the European Council and the EU Parliament.

of *non-refoulement* cannot be applied exterritorialy.[135] If the EU legal documents concerning refugees that have been adopted so far do not lay down this principle, this would indicates that such principle that is of critical importance both at international and an regional level is effected at EU level. As a result, the EU system of protection of refugees couldn't be deemed comprehensive and it wouldn't be in accordance with the Geneva Convention from which EU Member States are legally bound.

As far as primary European Union law is concerned, the CFR and TEC are the relevant sources that deal with protection from *refoulement.*

As already mentioned, Article 19 (2) CFR explicitly refers to the principle of *non-refoulement.* In this provision there is no reference to the territory of EU Member States but it seems rather an absolute prohibition. Furthermore, Article 51 of the same Charter, which regulates the CFR's scope, takes into account the authority responsible rather than the territory involved.[136] Article 299 TEC, which establishes the territorial scope of the same Treaty, provides no restriction as regards to "the geographical scope of European fundamental rights".[137] Last but not least, Article 63(1), as already pointed out, provides that EU secondary law must be concordant with the Refugee Convention and other relevant treaties. It might be inferred that Member States may be bound to abide by the principle of *non-refoulement* whenever the refugee is.

Concerning secondary EU law, Article 21 of the Qualification Directive also establishes the right to be not sent back. As far as the territorial scope of application is concerned, it has be affirmed that the principle of *non-refoulement* as formulated in the this directive has extraterritorial effect.[138] Since it must be concordant with the Refugee Convention, it can be stated that the principle of *non-refoulement* applies even extraterritorially. In fact, literature has showed that Article 33 (1) of the Refugee Convention binds the contracting Parties beyond their territories.[139] UNHCR in Advisory Opinion on the extraterritorial application of *non-refoulement* expresses its view as it follows:

> "(…)the purpose, intent and meaning of Article 33(1) of the 1951 Convention are unambiguous and establish an obligation not to return a refugee or asylum-seeker to a country where he or she would be risk of persecution or other serious harm, which applies *wherever* a State exercises jurisdiction, including at the frontier, on the high seas or on the territory of another State."[140]

[135] Lescano, op. cit., p. 255.
[136] Lescano, op. cit., p. 282.
[137] Ibidem.
[138] Ibidem.
[139] Lescano, op. cit., p. 267.
[140] UNHCR, " Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* , para 24, available at http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f17a1a4&page=search, last reviewed on 8th December 2011.

The Schengen Borders Code is another EU secondary law source relevant for the protection from *refoulement.* Article 3 (b), establishes that entry control must be "implemented" without prejudice to " the rights of refugees and persons requesting international protection, in particular as regards to *non-refoulement*". As a result, the provision implies that obligation to protect refugees from *refoulement* does not apply only when the refugee is on EU territory. On the contrary those in charge of controlling the arrival of third country nationals at EU borders have to allow admission in order to verify whether they need are in need of International protection.

Even though from EU primary and secondary law it can be inferred that the principle of *non-refoulement* applies even beyond the EU territory, operations undertaken by Frontex have produced a process of externalization of EU border control.[141] This aspect concerns particularly the so-called *Hera* operations.[142] Its aim was "to tackle the migration flow towards the Canary Islands".[143] In *Hera II* operations the countries involved were not only European but also African countries. If the Cayucos were found at sea, Frontex would try to seize them in the territorial waters of the third country. At the end, the country of origin's authorities would handle the "would-be refugees" and including their subsequent return to their territory.[144] In this context the countries of origin involved were mainly Mauritania and Senegal. It must be highlighted that the operation entailed to escort the

[141] S. Carrera, op. cit., (2007) p. 22. The International Organization for Migration (hereafter IOM) has also indicated this phenomenon: << EU countries have also attempted to "externalize" border controls towards the Maghreb countries by transforming them into a "buffer zone" to reduce migratory pressures at Europe's southern border. They have done so by pressuring certain North Africa countries to clamp down on irregular migration, toughening immigration law>>. (IOM, "Irregular Migration from West Africa to the Maghreb and the European Union: An Overview of Recent Trends" No. 32 p.11, IOM Migration Research Series (2008), available online at www.iom.int).

[142] The importance of *Hera* joint operation at sea is due to being the longest and most expensive among all the operations carried out by Frontex, using the 20 per cent of the total operational budget. *Hera* has been extended in three different operations, which were all launched upon request of the Spanish government. *Hera I* lasted from July to October 2006. The operation consisted of dispatching experts from several EU Member States to support the Spanish National Police Brigade in identifying irregular migrants arrived to the Canary Islands. An expert from Frontex and representatives from Gambia, Mauritania and Senegal also took part to the operation.

Hera II started on 11 August 2006 and ended on 15 December 2006. This was the longest operation carried out among all the other *Hera* operations. It seeks to strengthen the control of the area between the Canary Islands and the Occidental coasts of African.[142] Particularly, the aim was to prevent the *Cayucos* (open wooden boats) transporting irregular migrants to leave from the Occidental coasts of Africa. *Hera III* started in February 2007 and ended in April 2007.[142] This last operation was constituted by two parts. The first one consisted of interviews with immigrants conducted by experts coming from Italy, Germany, Luxembourg and Portugal along with Spanish authorities.[142] During this part of the operation Spanish authorities were able to arrest several migrants. The object was to identify the migrants and to find out how these sea journeys had been facilitated. The second one focused on the employment of joint patrols by aerial and naval means provided by EU Member States together with the collaboration of Senegalese authorities. The aim is to prevent migrants from leaving the shores. The joint patrols were constituted by one helicopter and two Spanish vessels, one vessel and one aircraft from Italy, one aircraft from France and one aircraft from Luxembourg. In addition, one Finnish plane one Portuguese frigate along with Senegalese boats and plane were also involved. (Sources: Lodge J., *Are you who you say you are? The EU Biometric Borders*; Frontex official website :http://www.frontex.europa.eu/, last accessed on 30th november 2011).

[143] V. Moreno, "Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea", *International Journal of Refugee Law*, Vol. 23 Issue 2, (2011) p. 180.

[144]S. Carrera, op. cit., p.21.

would-be refugees to the Canary Islands and offer them the right to lodge an asylum claim at the only condition that the vessels were intercepted outside the 24-mile zone.[145]

In these operations, the legal basis of this externalization phenomenon consisted of bilateral agreements between the EU Member States and African countries, which are mainly Mauritania and Senegal.[146] The main consequence in terms of human rights, was the impossibility to apply most of the provisions for the protection of refugees deriving from the EU legal instruments previously examined in this dissertation.[147] This is due to the fact that most of these norms are applicable when the "would-be refugees" have reached the EU borders. As far as the *Hera* operation is concerned, the migrants involved can neither acquire the status of refugees nor it can be determined whether those migrants are in need of international protection.[148] Furthermore, the mechanism underlying *Hera*, namely the prevention of migration flow towards the Canary Islands that comes up to the point of blocking the flows from outside the European borders, implies the presupposition of illegality.[149] This again, leads to the impossibility of a full implementation of human rights as well as the application of the rule of law.[150] As a result, Frontex violates both International and European Refugee Law since it doesn't take into account the legal principal that State obligations on human rights are based on the exercise of state jurisdiction, even when exercised outside the State's territory.[151]

1.4 Conclusive remarks

The refugees protection from *refoulement* is granted in TEC, Qualification Directive and the Temporary Protection Directive. In these two directives, the content of Member States obligation to implement this right is not clearly defined. This is also due to the fact that EU directives establish obligation of result. In terms of EU policies this indicates that the European Union has just made an attempt to harmonize national laws in this field.

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[145] Standing Committee of Experts on International Immigration, Refugee and Criminal Law, Comment on Proposal for a Regulation establishing a Mechanism for the Creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism COM(2006) 401,24 October 2006. (For a definition of the 24 mile zone look at article 10 of the 1982 United Nations Convention on the Law of the Sea).

[146] These legal instruments are: the Agreement between Spain and Mauritania of 1st July 2003 for cooperation in immigration matters, [2003] BOE 185/30050; the Convention signed by Spain and Senegal on 5th December 2006 for cooperation in the fight against crime, [2006] BOCG 36, Series A, 11O/000027; and the Agreement between Senegal and Spain, 5th December 2006, for cooperation in the prevention of emigration of unaccompanied Senegalese minors, their protection and re- insertion, [2008] BOE 173/31413.

[147] See chapter I and II of the present dissertation.

[148] In this case the provisions of the EU Qualification Directive cannot, which sets down the minimum standards for the qualification of potential refugees as well as beneficiary of subsidiary protection and the content of protection of both categories, cannot be applied (see page 16 of the present dissertation).

[149] S. Carrera, op. cit., (2007) p. 26.

[150] Ibidem.

[151] M.T Gil –Bazo, " The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited", *International Journal of Refugee Law*, Vol. 18, Issue 3-4 (2006) pp. 571-600.

The brief excursus on Italy's practice and compliance in respect to the principle of *non-refoulement* has showed that too much discretion seemed to be left to Member States in the EU legal framework. Furthermore, there is a lack of specific provisions regulating the official borders' tasks when facing cases of third country nationals that might be in need of international protection and are not in possession of the required documents. In addition Frontex activities showed a discrepancy in the intentions of the EU. The EU agency legal foundation, clashes with the refugee's right standards established within the EU legal framework.

Lat but no least, from EU primary and secondary law it can be inferred that the principle of *non-refoulement* applies even beyond the EU territory. Nevertheless, Frontex activities led to an externalization of EU borders control, especially with the so-called *Hera* operations. In terms of human rights, this led to the impossibility to apply most of the provision for the protection of refugee's right deriving from EU legal instruments.

2. Right to health care.

It is widely demonstrated that the right to health is at risk among the most vulnerable categories of people, such as asylum seekers and refugees. Since this dissertation aims to understand whether the EU legal framework can contribute to a comprehensive system for the protection of refugees, it is significant to analyse the EU approach in ensuring the right to health for refugees. The critical importance of the right to health for refugees is enhanced by the special dangerous conditions that refugees face before and upon arrival in the host country. The next paragraph will explain the importance of this refugee's right and, thus, the deriving necessity to assess the implementation of this right at EU level.

2.1 Refugee right to health: special needs and problems accessing health care services

The importance of the refugees' right to health stems from the particular circumstances in which this category of people was before landing in the host countries. Persecution, forced exile and torture in the country of origin are possible causes for psychological trauma. [152] After experiencing such harmful conditions, refugees are also exposed to serious risks during their journey.[153] Therefore, mental status is the most affected aspect of their health. Moreover, refugees may face mental health problems in the host country due to conditions such as poverty, social isolation and hostility from the local population. This situation of mental unease can be exacerbated by

[152] C. Finney Lamb- M. Smith, "Problems Refugees Face When Accessing Health Services*", NSW Public Health Bulletin*, Vo. 13 No. 7, (2002), p. 161.

[153]Global Health Watch, " Access to health care for migrants and asylum seekers", available at http://www.ghwatch.org/sites/www.ghwatch.org/files/b3.pdf; last reviewed on 15th December 2011.

conditions of distress already experienced in their country of origin caused by persecution, torture and violence. *Médicins sans Frontières* showed in a survey conducted in Belgium[154] that three-quarter of the refugees[155] interviewed, had suffered from at least one mental disorder. In this study, caregivers reported that " the uncertainty and endless wait for an answer creates a state of chronic anxiety that leaves them quite vulnerable. The feeling that they have not been heard, believed or acknowledged can act as a secondary victimization factor and tend to re-open underlying wounds".[156] Nevertheless, mental diseases are not the only ones affecting refugees. Deprivation and unhealthy environmental conditions in the country of origin may be the cause of other diseases such as malnutrition and oral diseases.[157]

Many are the problems that refugees generally face when trying to access to health services. Barriers to attendance are generally related to language, financial constraints, racism and discrimination. In some cases there are even problems due to refugees' lack of faith in health service providers.[158] Problematic issues also arise as to the quality of the health services obtained. Often, health professionals are not well trained to provide refugees with adequate health services. Besides, being able to detect unusual diseases common to refugees,[159] caregivers should be also familiar with the cultural backgrounds of their patients and able to determine whether they have been exposed to human rights violations and the effects on their health. [160] The association *Médecins du Monde* gave rise to a *European Observatory on Access to Health Care* which examined the practice of several European countries. This showed that the most frequent problems relating to access to health care were: "knowledge of rights, not knowing where to go for treatment, treatment costs and administrative difficulties".[161]

To conclude, as aforementioned, many are the threats to refugees health status. Consequently, the implementation of the right to health in EU plays an important role in assessing whether the current EU legal framework is able contribute to a comprehensive system for refugees protection.

In the next paragraph, the protection of the refugee's right to health at international level will be briefly examined in order to provide the reader with the context in which the EU system lays. In addition, an overview of the components of the right to health recognized by the UN Committee for Economic Social and Cultural Rights as the key element of such right will be provided. The need

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[154] "Etat des besoins et de l'accès aux soins en santé mental pour les migrants en séjour précaire", MSF (March 2008).
[155] Even though in the report of *Médicins sans Frontières* the term "migrants" has been used, refugees were also considered in the survey.
[156] C. Escoffier, P. Tainturier, A. Halasa, N. Baba, C. Sidhom, "Economic and Social Rights of Migrants and Refugees in the Euro-Med Region: Access to Health care and the labour Market", Euro-Mediterranean Human Rights Network, (EMHRN), (2008), p. 35. (hereinafter: EMHRN).
[157] C. Finney Lamb- M. Smith, op. cit., p. 161.
[158]Ibidem.
[159] Ibidem.
[160] Ibidem.
[161] EMHRN, op. cit., p. 34. (see n.154).

for such overview lays into detecting what is the content of the right to health from a an international instrument that even if it is non-binding, is functional to both interpret the international standards for the protection of the right to health and to implement them in national legal framework of Member States. These components of the right to health will be employed as parameters to judge whether the EU legal instruments for the protection of refugee's right to health adopted up till now satisfy these international standards.

2.2 Right to health under the international law regime and its key elements

At international level, the 1951 Geneva Convention and the 1966 International Covenant on Economic Social and Cultural Rights (hereafter ICESCR) are the two main legal documents from which the refugee right health might be detected. Nevertheless, the Geneva Convention does not explicitly set out this right in a specific article as it is provided for other social rights.[162] The 1951 Geneva Convention does not contain any specific article which stipulates the States Parties obligation to ensure the right to health. Article 23, establishes that States Parties must provides treatment with respect to public relief at the same level accorded to their nationals. The ICESCR provides at Article 12:

> "The States Parties to the present Covenant recognize the right of *everyone* to the enjoyment of the highest attainable standard of physical and mental health".

General Comment No. 14 of the UN Committee on Economic Social and Cultural Rights [163] summarises the content of the right to health by identifying its four key elements: availability, accessibility, acceptability and quality. *Availability* is connected with making health facilities and goods available in sufficient quantities. In relation to availability, the general comments provides that "functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party".

In relation to *Accessibility*, the UN Committee on Economic Social and Cultural rights set out that "Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party".[164] It concerns non-discrimination, since "health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds".[165] Moreover, it is related to physical, economic and information accessibility.

[162] There are specific articles that deal with the refuge's right to housing (article 21), right to education (article 22), right to employment (articles 24, 17,18,19).
[163]United Nations Committee on Economic Social and Cultural Rights" The right to the highest attainable standard of health: Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights" E/C.12/2000/4, General Comment No. 14 (11/08/2000).
[164]General Comment No. 14, para 12(a).
[165]General Comment No. 14, para 12(b).

Regarding *acceptability*, the general Comment provides that "All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned".[166] Last but not least, *quality* implies that everyone has to have access to health services of good quality. [167]

General Comment 14 of the Committee on Economic Social and Cultural Rights sets out the specific legal obligations of State Parties as to the right to health. These are the obligation to respect, protect and fulfil.[168] According to the Committee, the obligation to *respect "* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health". [169] Practically, this means that States should avoid limiting access to health care or imposing discriminatory practices. Moreover, States should refrain from violating the right to privacy (for instance of person living with HIV/AIDS).[170] Concerning the obligation to *protect*, this requires "States to take measures that prevent third parties from interfering with article 12 guarantees".[171] As a result, States should undertake measures to ensure that private actors conform with human rights standards when providing health care. Furthermore, States should protect individuals from acts by third parties that may be unsafe to their right to health "as well as ensure that third parties do not limit people's access to health related information and services". [172] Regarding the obligation to *fulfil*, this "requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health". [173] This implies that States should adopt national health policy covering both public and private sectors as well as ensure equal access for everyone to the underlying determinants of health such as safe and nutritious food, sanitation and clean water. [174] Moreover, the Committee asserted that the obligation to fulfil incorporates the obligation to *promote*, "in recognition of the importance of health

[166]General Comment No. 14, para 12(c).
[167]General Comment No. 14, para 12(d).
[168]These three categories of obligations have been firstly established in the "Limburg Principles in the Implementation of the International Covenant on Economic Social and Cultural Rights". This document produced by a group of experts in International law, provides a comprehensive framework for understanding the legal nature of the norms found in the Covenant and are widely used as a means of interpreting those norms. (*Handbook for National Human Rights Institutions*, 2005, p. 7).
[169]United Nations Committee on Economic Social and Cultural Rights)(CESCR) "The right to the highest attainable standard of health: Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights" E/C.12/2000/4, General Comment No. 14 (11/08/2000) para.33.
[170]WHO factsheet No.31 : http://www.ohchr.org/Documents/Publications/Factsheet31.pdf p.26, last reviewed on 10th December 2011.
[171]Ibidem.
[172]Ibidem.
[173]United Nations Committee on Economic Social and Cultural Rights (CESCR) "The right to the highest attainable standard of health: Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights" E/C.12/2000/4, General Comment No. 14 (11/08/2000) para.33.
[174]WHO factsheet No.31: http://www.ohchr.org/Documents/Publications/Factsheet31.pdf p.27, last reviewed on 10th December 2011.

promotion in the work of the World Health Organization and other Organization". [175]

At European Union level, the refugees right to health is established by both primary and secondary EU law sources. Provisions are regards to this right are established in the Charter for Fundamental Right of the European Union, the Qualification Directive, and the Temporary Protection Directive. These instruments, differently from the Geneva Convention, contain specific provision setting out Member States obligation to ensure refugee's right to health. In the next section, the content of these provisions and the deriving Member States obligation will be analyzed.

2.3 Protection under the Charter for fundamental Rights of the European Union

Article 95 CFR stipulates as it follows:

> "*Everyone* has the right of access to preventive health care and the right to benefit from medical treatment *under the conditions established by national laws and practices.* A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities".

As mentioned before in the present dissertation,[176] the Charter of Fundamental Rights of the European Union when proclaimed on December 2000 was a mere political commitment, thus, having no binding legal effect. After the adoption of the Lisbon Treaty, The Charter gained the same legal effect of the other founding EU Treaties.[177] Even though it can be inferred that the scope of application of this Directive include persons enjoying the status of refugees,[178] the content of the obligation is still kept vague with a quite broad formulation.

However in order to grant protection of refugee right to health in EU it is beneficial that the right to access to both health care and medical treatment is a established in a Charter having the force of a founding treaties, thus, primary EU law. As a matter of fact, it has been acknowledged in the *Van Gend en Loos v Netherlands*, EU primary law is directly applicable.[179]

2.4 Protection under Qualification Directive

Article 29(1) of the Qualification Directive sets out the Member States obligation to ensure that

[175] "The nature of economic, social and cultural rights", in : Office of the High Commissioner for Human Rights, *Economic, Social and Cultural Rights. Handbook for National Human Rights Institutions* (2005), p. 1-28.
[176] See chapter II of the present dissertation.
[177] Article 1(8) of the Treaty of Lisbon provides that The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
[178] Article 95 CFR uses the wording "*everyone* has the right of access".
[179] See chapter II of the present dissertation.

beneficiaries of refugee status or subsidiary protection status can access health services under the same conditions as nationals of the Member State. ECRE has welcomed the fact that both beneficiaries of refugees status and subsidiary protection status are entitled to the same access and under the same conditions as nationals.[180] Generally, despite the fact that the Qualification Directive ensures a wide set of social rights, many provisions sets out restrictions as to their application. Most importantly EU Member States may allow distinct set of rights to refugees and to beneficiaries of subsidiary protection status.[181] For instance, regarding access to employment, while refugee are entitled to this right under the same conditions as nationals of the host country, Member States may encourage access to employment for its own citizens over beneficiaries of subsidiary protection status[182] based on "the situation of the labour market".[183] Furthermore, this provision includes *accessibility* to health services, the health right component which is considered by the UN Committee on Economic Social and Cultural Rights one of the key element of the right to health. In conclusion, since Member States are obliged under Article 29 (1) to ensure the access to health care services to both refugees and beneficiaries of subsidiary protection status, it can be inferred that the protection of refugees right to health care is more comprehensive than the ones afforded for another refugee's social rights by the same EU legal document.

Nevertheless, the application of the right to health can be limited by a feature that concerns other social rights granted by the same EU legal instrument. Such feature is the limitation to core benefits. Article 29(2) stipulates that:

> "[...] Member States may limit health care granted to beneficiaries of subsidiary protection to *core benefits* which will then be provided at the same levels and under the same eligibility conditions as nationals".

The definition of "core benefits" is provided by paragraph 34 of the Preamble as a " minimum support, assistance in case of *illness*, *pregnancy* and *parental assistance*, in so far as they are granted to national according to the legislation of the Member State concerned". This constitutes a problematic issue as to, for instance, the reproductive health of refugees woman. Reproductive health " implies that people [...] have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition is the right of *access* to appropriate health care services that will enable women to go safely through pregnancy and childbirth and provide couples with best chance of having a healthy infant. Reproductive health care is defined as the constellation of *methods*, *techniques*, and *services* that contribute to reproductive health and wellbeing by

[180]ECRE, "Information Note on the Council Directive 2004/83/EC of 29 April 2004" (IN1/10/2004/ext/CN).
[181]ECRE, "The Impact of the EU Qualification Directive on International Protection" (2008), ELENA- European Legal Network on Asylum; p.7.
[182]P. Boeles, op. cit., (2009), p. 344.
[183]Article 26 (3) Qualification Directive.

preventing and solving reproductive health problems".[184] This definition establishes that the women reproductive health right is rather complex. The Qualification Directive, which is the main legal instrument within the EU legal framework which grants refugees rights, has no reference in it as to the women refugees reproductive health right, but rather a diminishment of protection of this right through the limitation to core benefits. This limitation might hinder the application of this right since, as above mentioned, it is a complex right which requires several specific additional facilities and services. As a result, it can be inferred that the protection of the refugee's right to health care provided by the Qualification Directive may not be enough comprehensive due to the limitation to core benefit set out at Article 29 (2). The reproductive health right is an example of such observation. Nevertheless, among the Member States bound by this directive only Lithuania and Malta seem to apply these restrictions.[185]

Article 29 (3) establishes the Member States obligation to ensure adequate health care to those having special needs "such as pregnant women, disabled people, persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict". From this provision it may be inferred a lack of clarity. On one hand, Article 29 (3) establishes that EU Member States have the obligation to ensure *adequate* health care services to even the more vulnerable category of people such as pregnant women. Concerning this category, as aforesaid, the implementation of the reproductive health right requires to satisfy several human needs. On the other hand, the provision of health care right may be restricted to core benefits. Consequently, the Member States obligation seems to be quite ambiguous. Moreover, several Member States did not transpose this obligation and its implementation is problematic in others.[186]

Generally speaking, Article 29 of the Qualification Directive seems to lack of further specifications in order to ensure the refugee's right to health care. A more detailed provision would produce a clearer set of Member States obligations. For instance, these specifications could concern the key elements of the right to health established by the Committee for Economic Social and Cultural Rights in the General Comment No. 14.[187] In this way the character of the Member States obligations would be less vague. As far as *accessibility* is concerned, Article 29 (1) of the

[184]United Nations — ICPD 1994, Programme of Action adopted at the International Conference on Population and Development, Cairo, 5-13 September 1994. UNFPA, United States of America, 1996, Art. 7.2. This definition is also endorsed by IPPF.

[185]Report from the EU Commission to the European Parliament and the Council on the "application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the Qualification and Status of third country nationals of stateless persons as refugees or as persons who otherwise need international protection and the content of the protection", (Brussels, 16-6-2010), COM(2010) 314 final, p. 14.

[186]Ibidem.

[187]*See* para. 3.2 of this chapter for a brief description of these key elements as formulated in General Comment No. 14 of CESCR.

Qualification Directive refers to it. As already pointed out in the present section, this element concerns non-discrimination as well as physical, economic and information accessibility. The hindrances that refugees face when trying to access to health services mainly regard these factors. As a matter of fact, in many EU countries refugees face barriers of language, culture, discrimination, lack of information and financial constraints.[188] Given the importance of refugee's accessibility to health care services, the fact that Qualification Directive meets this highly necessary requirement can be deemed as feature that is useful in order to create a comprehensive protection of the right to health in European Union. Nevertheless, the Directive does not refer to the others key elements of the right to health. As regards to *availability* of health facilities, the Qualification Directive makes no reference to it. In some cases, problems concerning availability of health services for refugees are due to inadequate compensation to general practitioners (hereafter GP) for the additional time needed to provide medical assistance for patients with special needs such as refugees.[189] Consequently, this results in a lack of sufficient quantity of health services for refugees. The fact that Article 29 has no reference to *acceptability* might also constitute a failure in establishing a clearly formulated States obligation, given the importance of this element for the provision of refugee's health care. Acceptability entails that health facilities have to be culturally appropriate, sensitive to gender requirements and to improve the health status of those concerned. [190] As a matter of fact, refugees may come from countries with different social backgrounds as well as with greatly distinct health system.[191] Health services that are not provided in a sensitive manner or that make use of clinical procedure that evoke refugees past abuses such as electrocardiography may traumatize them again. Last but not least, it is important to point out the fact that Qualification Directive makes no reference to the *quality* of health services for person entitled to the status of refugee. Refugees constitute a vulnerable population with unique needs. They might have experienced traumatic events and been victims of human rights abuses.[192] Often health care workers are not adequately trained to provide refugees with medical care services that suit their special needs. For instance, they may not be able to detect unfamiliar diseases among refugees and adopt suitable measures to assist refugees with past trauma. Furthermore, they cannot provide sufficient health assessment and primary care follow-up.[193] The fact that in few cases health care providers receive knowledge of human rights violations and their relation with health, leads to an inability to

[188] HUMA network "Access to Health Care for Undocumented Migrants and Asylum seekers in 10 EU countries- Law and Practice" (2009).
[189]C. Finney Lamb- M. Smith, op. cit., p.161.
[190]*See* page (3) of the present dissertation.
[191]C. Finney Lamb- M. Smith, op. cit., p.161.
[192] A. Moreno, "Human Rights Violations and Refugee Health", Journal of the American Medical Association (JAMA), Vol. 285 Issue 9 (March 2001); p. 1215.
[193]Ibidem.

address refugees past abuses.[194] As a result, it is quite manifest the importance to include the *quality* element in EU legal instruments granting refugee's right to health care in order to provide refugees with a comprehensive medical care and to make the legal protection afforded by EU of right to health comprehensive as well.

Furthermore, Article 29 may need more specifications not only because it would make the obligation to ensure refugee's right to health care less vague. This may be also useful to delimit the wide Member States room of discretion and, accordingly, enhance the juridical effect of the Qualification Directive. The ECJ acknowledged in *Van Duyn v. Home Office* that EU directives have direct effect[195] when their provisions are clear, precise and unconditional.[196] Since EU directives' provisions, in order to be clear and precise, might have to provide further details, (for instance as regards to Article 29 those aforementioned concerning the key elements of the right to health) it might be inferred that, generally, too much discretion in implementation left to Member States may negatively affect the direct juridical effect of these EU legal instruments. In conclusion, given that unclear, thus, in some cases poorly detailed directives, may not have juridical direct effect, in order to have a more effective protection of the refugee's right to health in EU, it might be needed a more precise provision than the one provided in the Qualification Directive.

In conclusion, the lack of clarity regarding Member States obligation does not make the protection of this right within the EU legal framework enough comprehensive.

2.5 Protection under Temporary Protection Directive[197]

Similarly to the Qualification Directive's provisions concerning health care, Article 13 (4) stipulates that:

> "The Member States shall provide necessary medical or other assistance to persons enjoying temporary protection who have special needs, such as unaccompanied minors or persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence".

The way in which the Temporary Protection Directive establishes the Member States obligation to provide medical assistance seems to be surpassed by the Qualification Directive. The reason for such an observation can be traced back to the wording used in the above-cited article. It indicates

[194]Ibidem.
[195] Direct effect of EU Directives means that when a directive grant rights, the individuals entitled of these rights may rely on them before their domestic courts (*See* page 14 of this dissertation for a definition of the juridical direct effect of EU Directives).
[196]*Van Duyn v. Home Office*, (Case 41-78) [1975] Ch. 358 ECJ.
[197]*See* page 13 of the present dissertation for a brief overview on the aim of its adoption and its scope of application.

that the categories of persons that have special needs and thus in respect of which Member States are obliged to grant health care assistance, are only two categories: unaccompanied minors and people that have experienced torture or other form of violence. Conversely, the Qualification Directive mentions also pregnant women, disabled people and minors who have not be necessarily unaccompanied. Since the Qualification Directive has been adopted subsequently to the Temporary Protection Directive,[198] this might be an indication of a progress in the degree of protection of the refugee's right to health within the EU legal framework.

Similar considerations to those previously made as to the content of the Member States obligation set out by Article 29 of the Qualification Directive maybe also applied to Article 13 (4) of the Temporary Protection Directive. It seems that the provision leaves too much discretion to Member States in implementing the right to health of those enjoying temporary protection. As far as the UN CESCR's key elements of the right to health are concerned, *availability* seems to be the most relevant element, given the scope of application and the original purpose of the Directive.[199] The Temporary Protection Directive aims to manage large number of displaced persons entering the European Union from areas affected by arms conflict and endemic violence.[200] The wording "displaced persons" includes also persons holding the status of refugees. Consequently, in view of the high need of health services in such emergency situations, the availability of health services should be highly taken into account by this directive. Nevertheless, Article 13(4) doesn't mention this element of the right to health.

Moreover, taking into account the emergency driving nature of the Temporary Protection Directive, the adding of more specifications concerning the establishment of forms of cooperation between reception and health care facilities could enhance the implementation of the refugee's right to health in such situations. Some highly qualified representative from the medical research and psychiatry field have pointed out the necessity to establish a wider cooperation between reception and health care facilities. This would be useful in order to provide refugees with services that meet their special needs and to create an environment that is prone to be adequately hospitable and safeguarded by care givers with specialized skills and able to make the acceptance perceivable so that it will require less efforts to create the basis for their subsequent integration in the host country.[201] This is also important due to the fact that all refugees are potentially vulnerable. The sooner the refugee's level of vulnerability is detected, the better the taking charge of him/her will be. Again, likewise it has been said regarding the Qualification Directive, the lack of clarity as to how EU Member States have to implement the refugee's right to health care, makes it difficult to

[198] The Temporary Protection Directive has been adopted in 2001, while the Qualification Directive in 2004.
[199] *See* n. 44.
[200] P. Boeles, op. cit., (2009), p. 355.
[201] S. Sarti, "L'Italia dei Rifugiati", (2010, Fondazione Anci ricerche); p. 104-105.

achieve a comprehensive protection of this right in EU. It seems that too much discretion is left to Member States especially considering that this Directive deals with emergency situation. Moreover, this might also shows that EU policies do not take into account the complexity required for the implementation of the refugee's right to health care. In this view, the EU has still much work to do in order to create a complete protection of the refugee's right to health.

Further directions are needed to complete Article 13 (4) of the Temporary Protection Directive, as regards to how EU Member States have to implement the right to health for persons enjoying temporary protection. These additional directions should be added maintaining the EU directive juridical feature of establishing obligation of result.

2.6 Conclusive remarks

The right to health acquires a critical importance when it comes to refugees. This stems from the special situations in which this category of people was before landing into the host countries. The harmful conditions in which refugees were in their countries of origins and the risks that they may face during their transit to EU, are threats to both their physical and mental health, often causing psychological trauma. As previously stated in this section, the European Union provide a better legal protection of the right to health than the one provided at international level by the Geneva Convention. No specific provisions as regard to this right are set out in the Convention.

Concerning the two EU directives analysed in this part, which are the only ones adopted so far setting out the obligation to grant the refugee's right to health care, it can be pointed out that the Qualification Directive seems to go beyond the Temporary Protection Directive. The latter provides a less broad protection as regard to which are the refugees eligible to have the right to health care granted. In view of the fact that the Qualification Directive has been adopted subsequently to the Temporary Protection Directive, this might denote an improvement in the degree of protection of this right.

From all the legal documents examined, it can be assumed that Member States obligations are too vague. Too much discretion is left to them in implementing the refugee's right to health care. Further specifications would make the content of the obligation less vague. These specifications may concern the key elements of the right to health established by the UN Committee for Economic Social and Cultural Rights in the General Comment No. 14. The relevance of this international legal document for EU policies in this field arises from the fact that, even though general comments from the UN Committee are not legally binding, they are useful to implement human rights in national legislations. Moreover, the adding of more specific terms to the currently existing provisions, would benefit the juridical effect of these directives. As acknowledged by the ECJ *Van Duyn v. Home Office,* directives have juridical direct effect when they are clear, precise and

unconditional. Consequently it can be inferred that in order to have a more comprehensive protection of the refugee's right to health in EU, it might be needed a more accurate and detailed formulation of Member States obligations.

3. Right to family reunification

The 1951 Geneva Convention on the Status of Refugees does not provide the refugee's right to family reunification. Nevertheless, at the international level is significant the fact that the UNHCR's Executive Committee (hereafter ExCom) brought up this issue in several occasions.[202] In 1999 the UNHCR ExCom Standing Committee issued a document entitled "The Family Protection Issues"[203] which went thoroughly the most important aspects of family reunification for refugees. It pointed out the importance of refugee's family in granting both the protection and well-being of its individual members.

Family members may become more vulnerable when the family unit splits up after physical separation due to persecution and forced migration. Categories of persons that are already more vulnerable such as children and the elderly, may find it more difficult to access to basic needs as food, shelter and health care. Single women and children separated from their families, can be exploited and abused. Separated children are at risk of being neglected or military recruited.

In addition, the refugee family also plays an important role in securing the emotional well-being of its members. As stated by the ExCom Standing Committee "maintaining the family unit is one means of ensuring a semblance of normality in an otherwise uprooted life. This is particularly important for refugee children".[204]

Moreover, protecting family unity of refugees is also important for the subsequent reintegration process. Earning an income might be more difficult for those whose family unit is broken down**.** Access to land and property, for example, is often a problem for female or child-headed households. Furthermore, a family unit has generally more chances to integrate in a new country. Children, who tends to adapt more easily, play an important role in helping other family members to integrate into their new community.

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[202] The UNHCR ExCom adopted several recommendations that focus on the refugee right to family reunification: Executive Committee Conclusions on family reunification (A/AC.96/549, para. 53, (7) and A/AC.96/601, para. 57, (4)); refugee children and adolescents (A/AC.96/702, para. 205, A/AC.96/737. para. 26 and A/AC.96/895, para.21) and refugee women (A/AC.96/673, para. 115, (4), A/AC.96/721, para. 26, A/AC.96/737, para. 27 and A/AC.96/760, para. 23).

[203] UNHCR ExCom Standing Committee, *Family Protection Issues,* EC/49/SC/CRP.14 available at http://www.unhcr.org/refworld/docid/4ae9aca00.html, last reviewed 13 November 2011.

[204] ExCom Standing Committee, op. cit., para. 15. As stated in the same document, The importance of the family unity for the growth and well-being of all its members is also set out in the Preamble to the Convention on the Rights of the Child.

Within the EU legal system, the refugee's right to family reunification is established by several Council Directives. These are the Directive on the right to family reunification,[205] the Qualification Directive[206] and the Temporary Protection Directive.[207]

3.1 The Council Directive on the right to family reunification

All EU Member States are bound by the Directive except for Denmark, United Kingdom and Ireland.[208] The definite version of the Directive is the result of long negotiations. These have resulted in a regression of the original intents. It is indicative of this phenomenon the change made to Article 1 of the Directive.[209] It originally stated that the objective of the Directive was to "establish a right to family reunification for the benefit of third country nationals". [210] On the contrary, the final version of this provision provides that "the purpose of the Directive is to determine the conditions for the exercise of the right to family reunification".

As regards to the scope of application, the Directive covers family members of third country nationals who are not EU citizens. In order to be eligible for family reunification, the so- called "sponsor"[211] must legally reside in a Member State, hold a residence permit valid for at least one year and have reasonable prospects of obtaining the right of permanent residence.[212] The family members that are entitled to join the sponsor are those forming nuclear family. Its components are listed in Article 4. These are mainly the spouse and minor children. In addition to them, Member States may authorise the entry of dependent "first-degree relatives",[213] unmarried adult children of the sponsor or his/her spouse, and an unmarried partner (duly attested long-term relationship or registered partnership) of the sponsor.

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[205] Council Directive 2003/86/EC, of 22 September 2003 on the right to family reunification.

[206] Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. The right to family reunification is laid down at Article 23.

[207] Directive 55/2001/EC of 20 July 2001, 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. The right to family reunification is stipulated at Article 15.

[208] Preamble (17) and (18), establishes that "In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community and without prejudice to Article 4 of the said Protocol these Member States are not participating in the adoption of this Directive and are not bound by or subject to its application. In accordance with Article 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive, and is not bound by it or subject to its application".

[209] A. John, " Family reunification for migrants and refugees: a forgotten Human Right?", A comparative Analysis of Family reunification, under Domestic Law and Jurisprudence, International and Regional Instruments, ECHR Case law and EU 2003 Family Reunification Directive (2003), p. 57; available at http://www.fd.uc.pt/hrc/pdf/papers/arturojohn.pdf , last reviewed on 1 October 2011.

[210] Commission's Proposal for a Council Directive on the right to Family Reunification COM (99) 638, OJ 2000 C116.

[211] Article 2(c) establishes that: " 'sponsor' means a third country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her".

[212] Article 3(1) of the Directive.

[213] Article 4 (2) (a) of the Directive.

3.1.1 Special provisions for refugees

The Directive provides specific provisions on the conditions under which refugees can have the right to family reunification granted. These are included in chapter V of the Directive.[214] Moreover, the preamble sets out that, in view of the reasons that forced refugees to flee their country of origin, more favourable conditions should be set down to their exercise of the right.

Regarding refugee's family members entitled to join the sponsor, the Directive makes Article 4 also applicable to refugees. As a result, spouse and minors children of refugees are entitled to join the sponsor who is residing in a EU Member State. One problematic issue that has been brought up by the European Council on Refugees and Exile (hereafter ECRE) concerns the fact that the admission of children when custody is shared can take place only under the condition that both party have agreed.[215] However, in certain situations, such as war scenario ad/or persecution it can be hard to obtain agreement from the other parent whose location maybe unknown. During the processing of the Directive, ECRE recommended that refugee children should be exempted from this provision.[216] The Directive also leaves the possibility that Member States can extend family reunification to other third country nationals on the condition that these are dependent on the refugee.[217] In practice these persons entitled to join the sponsor could be unmarried partners, persons related to the refugee but who are not bound to him/her by a registered partnership and unmarried minors and adult children.[218] As regard to this possibility, ECRE has recommended that, in view of what is established in the preamble, this should be a compulsory provision to be included into national legislations. One positive remark should be made on the obligation concerning family reunification of unaccompanied minors. As far as the unaccompanied minor refugees are concerned, the Directive establishes that Member States have the obligation to permit the entry and residence of the refugee's first degree relatives in the direct ascending line, not considering the restriction laid down as regards to other third country nationals to whom the Directive applies.[219]

In relation to the documentary evidence of the family relationship, the Directive establishes that when the concerned refugee cannot provide official documents, the Member States have to take into account other evidence. This provision is in agreement with the recommendation made by ECRE

[214] Chapter V of the Directive consists of art 9 to 12.
[215] Article 4 (1) (c) and (d) of the Directive rules that: "(…) Member States may authorise the reunification of children of whom custody is shared, provided that the other party sharing custody has given his or her agreement".
[216] European Council on Refugees and Exiles, " ECRE Information Note on the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification", available at http://www.ecre.org/topics/areas-of-work/integration/188.html, last reviewed on 10 November 2011, p. 7. (Hereafter ECRE Information Note).
[217] Article 10 (2) of the Directive.
[218] ECRE, "Information Note on the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification", (2003) p8.
[219] Article 10 (3) (a) of the Directive.

that "applications form or regarding separated children should be prioritised in view of the potential harm caused by long periods of separation from their parents".[220]

The last provision provided in chapter V concerns the requirements that refugees need to fulfil in order to exercise the right to family reunification.[221] This provision establishes that refugees are exempted from meeting the conditions that are addressed to all other third country nationals covered by the Directive.[222] These consist of providing evidence that the sponsor has own an accommodation, sickness insurance, sufficient income to maintain himself/herself and the members of his/her family and to comply with integration measures. Even though this might show that the Directive take into special consideration the situation of refugees, the Directive also establishes that Member States may require the above-mentioned conditions when the application for family reunification has not been submitted within three month after the granting of the refugees status.[223] This condition seems to impair the exercise of the right itself. As a matter of fact, the three month time limit does not allow the applicants to have enough time to get information about the right to family reunification.[224]

In conclusion it can be noticed that, generally speaking, the rules set out in the Directive 2003/86/EC takes into account the special circumstances of refugees providing them with more favourable circumstances. Nevertheless, the Directive also the Member States desire to keep the EU provisions concerning the issue of refugee family reunification "at the lowest common denominator".[225] As it will be analyzed further, problems arise as to the adoption of specific legislative and administrative measures at the Member States domestic level.

3.1.2 Implementation and transposition

As far as Member States compliance is concerned, several problems emerge as to the adoption of specific measures at national level needed to implement the obligation set out in the Directive. This can be traced back to the juridical nature of EU Directives: the fact that these legal instruments establish obligation of result. The Directive 2003/86/EC can be adjusted to the laws of Member

[220] ECRE Information Note, p.8 (see n.15).
[221] Article 12 of the Directive.
[222] Article 7 (1) (2) of the Directive.
[223] Article 12 (1).
[224] ECRE, "Information Note on the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification", (2003) p.8.
[225] P. De Bruycker, Y. Pascouau, "Family reunification at the Crossroad between European and Belgian Law", (2011); available at: http://www.emnbelgium.be/publication/family-reunification-crossroad-between-european-and-belgian-law, last reviewed on 19 November 2011.

States and for this reason it is deemed of being relatively non binding. This is also confirmed by the fact that it grants greater protection of Member States sovereignty.[226]

As mentioned before, a condition that refugees have to fulfil in order to be eligible for family reunification is that the sponsor has to hold a residence permit valid for at least one year and have reasonable prospects of obtaining the right of permanent residence. The approaches of Member States diverge in applying this provision. The majority of Member States establish as a fundamental condition the holding of a "temporary residence permit" but require also a minimum period of residence. Among these are France and Spain[227]. Some EU countries, such as Czech Republic and Sweden demand a permanent residence permit. Others require that the refugee has to demonstrate reasonable prospects of obtaining the right of permanent residence.[228]In Cyprus this results is a problematic issue. In this EU country the legislations on third country nationals sets out a general rule of four-year maximum residence after which permits are not renewed. As a result, third-country nationals are excluded from the right to family reunification.[229]

Problematic issues emerge also as to the family reunification of unaccompanied minor refugees. Even though the Directive grants to an unaccompanied minor refugee the right to be joined by his/her parents or legal guardian, several EU countries didn't transpose Article 10 (3). In 2006, the Centre for Migration Law of the Radbound University of Nijmegen prepared a questionnaire [230] and delivered it to 25 Member States' experts in migration law. The experts prepared national reports replying on the basis of the situation in November 2006. According to these national reports Austria, Belgium, France, Italy, Lithuania, the Netherlands, Poland, Slovakia and Sweden didn't transposed the Directive in respect to Article 10 (3). Moreover, these reports showed that in Denmark, Germany, Latvia, Luxemburg, Spain and United Kingdom, specific provisions as regards to family reunification of unaccompanied Minors were lacking.[231]

Furthermore, concerning the documentary evidence that refugees are required to hold, specific legal measures haven't been adopted by the following Member States: Denmark Germany, Estonia, France, Luxembourg, Poland Portugal, Spain and United Kingdom.

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[226] P. De Bruycker, Y. Pascouau, "Family reunification at the Crossroad between European and Belgian Law", (2011); available at: http://www.emnbelgium.be/publication/family-reunification-crossroad-between-european-and-belgian-law, last reviewed on 19 November 2011.

[227] The minimum period for residence required in France is 18th month, while for Spain is a renewal of the residence permit at least for another year; Commission of the European Communities, "Report from the Commission to the European Parliament and the Council on the application of directive 2003/86/EC on the right to family reunification" Brussels, COM (2008) 610/3.

[228] Report on the application of directive2003/86/EC, op. cit, p .4 (see n. 26).

[229] Ibidem.

[230] The questionnaire is available at : http://cmr.jur.ru.nl/CMR/Qs/family/other/; last reviewed on 20th November 2011.

[231] K. Groenendijk, R. Fernhout, D, van Dam, R. van Oers, T. Strik, "The Family Reunification Directive in EU Member States, the first year of Implementation" (2007), Centre for Migration Law Nijmegen, p. 42.

Finally, concerning the provision laid down in Article 12 of the Directive which exempts refugees to provide evidence concerning accommodation, sickness insurance or stable and regular resources, problems of compliance also have emerged. Even though above-mentioned national reports showed that several Member States envisaged this more favourable condition for refugees in their national legislations, specific transposition provisions are missing in Germany, Spain and Sweden. Furthermore, the Greek national legislation concerning refugees is explicitly contrary to the Directive. A Presidential Decree establishes that refugees must fulfil the requirements of accommodation, sickness insurance and regular resources.[232]

Concerning the transposition of the Directive in EU Member States several issues emerge. Member States were required to complete transposition by 3 October 2005. Afterwards the expiration of the transposition time limit, 19 Member States were involved in infringement proceedings for not having informed the Commission about their transposition measures.[233] As a result, the Commission addressed ten reasoned opinions. The Commission decided to bring cases before the ECJ against four EU countries. Three of them were removed and only one Member State, Luxemburg, was given a judgment. The judgment[234] was issued by the ECJ during a proceedings for failure of a Member State to fulfil obligations.[235] According to the judgment the Grand Duchy of Luxembourg was required to fulfil a penalty payment. Luxembourg along with Malta and Spain hasn't undertaken any relevant legislative activity as regards to the transposition of the Directive.[236] Last but not least, the United Kingdom, even though is not bound by the Directive, openly denies the refugee's right to family reunification.[237]

In *Chakroun* case the ECJ was asked by the Raad van State, the Dutch Council of State, for an interpretation of the Directive provisions on the conditions needed for the exercising of the right to family reunification, particularly those organized by Article 7(1). As regards to the context of the case, Mrs Chakroun was a Moroccan National resident married to Mr. Chakroun who was a Moroccan National as well but resident of the Netherlands. Mr. Chakroun held a Dutch residence and received an unemployment benefit. In 2006, Mrs. Chakroun tried to applied to join her husband on the basis the rules for family reunification. Eventually, her application was rejected by Dutch public services since Mr. Chakroun's monthly income was below the threshold set by the Dutch

[232] K. Groenendijk, R. Fernhout, D, van Dam, R. van Oers, T. Strik, op. cit., p. 44.
[233] Report on the application of the Directive, op. cit. (see n.26).
[234] Case C-57/07: Judgment of the Court (Seventh Chamber) of 6 December 2007 — Commission of the European Communities v Grand Duchy of Luxembourg (Failure of a Member State to fulfil obligations — Directive 2003/86/EC — Right to family reunification — Non-transposition within the prescribed period) *Official Journal C 022 , 26/01/2008 P. 0014 – 0014.*
[235] *See* chapter II para.1.3 of the present dissertation.
[236] Groenendijk, R. Fernhout, D, van Dam, R. van Oers, T. Strik, op. cit., p.43.
[237] Ibidem.

national legislation. This threshold was equal to the minimum income of a 23 years old person. It corresponds to the 120% of the minimum wage, which is generally the income above which a person no longer is eligible for benefits granted to cover essential living expenses arising from exceptional circumstances. The ECJ with its judgment showed that the Directive strongly maintained the margins of manoeuvre of the Member States in the field of family reunification. However the Court acknowledged that: "the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof ".[238] Moreover, the Court pointed put that the assessment of the conditions laid down by Article 7, must be exercised without jeopardizing the objective of the directive which is to promote family reunification. Accordingly, the Court established that "the Member States may indicate a certain sum as a reference amount, but not as meaning that they may impose a minimum income level below which all family reunifications will be refused, irrespective of an actual examination of the situation of each applicant".[239] This case has showed that, much discretion is left to Member States as to the implementation of the Directive. As a matter of fact, It is up to the national authorities to consider the sponsor's situation and determine the regularity of resources and whether they are sufficient to cover his/her needs and those of the family.[240]

3.1.3 Conclusive remarks

To sum up what has been examined in this section, as regard to the protection of the refugee's right to family reunification the EU legal framework goes beyond the international legal system for the protection of refugees. As a matter of fact, the 1951Geneva Convention on the Status of Refugee doesn't lay down any provision for the protection of this right. Even though there has been a regression of the original intents in its final drafting,[241] the Council Directive on the right to family reunification establishes provisions for the protection of the family reunification right including the various circumstances in which this right can be granted for persons holding refugee status. The Directive 2003/86/EC, by taking into account the exceptional circumstances in which refugees are, provides refugees with more favourable conditions in respect to other category of persons covered by this EU legal instrument, such as migrants or other third country nationals.

Nevertheless, drawbacks come to the transposition and the adoption of specific measures at the Member States' national level. Several Member States haven't adopted specific measures of some of the rules established in the chapter V of the Directive. This can be traced back to the fact that

[238] *Chakroun* case judgment.
[239] *Chakroun* case judgment.
[240] P. De Bruycker, Y. Pascouau, op. cit.
[241] *See* chapter III para. 1.1 of the present dissertation.

since the legal instrument examined in this section is a Directive it establishes a mere obligation of result.[242] As it has been showed in the *Chackroun* case, too much discretion is left to Member States as to the actual implementation of the Directive's provisions and the consequent adoption of legislative and administrative measures. As a result, the main hindrance to the implementation of the right to family reunification seems to be the "large margin of manoeuvre" left to Member States.

[242] *See* chapter II para.1.3 of the present dissertation.

Conclusion

In contrast with other regional systems of protection, the EU has no treaty that specifically regulates this field. Nevertheless, within the European Union's legal framework there are several legal instruments laying down Member States obligation to ensure refugee's rights. Member States obligations to grant refugees rights can be detected in both EU primary and secondary law. The majority of them have been set out in EU directives and function within the larger framework of the Geneva Convention. This Convention still represents the major international instrument for the protection of refugees. The context in which the idea to adopt such measures developed was the so-called CEAS, which has its basis in Article 63 TEC. The most relevant directive for the protection of refugees in EU is the so-called Qualification Directive. This is the first legal instrument binding on EU Member States that deals with refugee's protection under the same umbrella. The adoption of such directive constituted a step-forward in the protection of refugees rights in European Union. This is also due to the fact that it surpasses the Geneva Convention by including a numbers of rights that are not covered by the Convention. Nevertheless, among the legal instruments that can been traced back to CEAS there are more provisions granting rights to asylum seekers rather than refugees. This is a significant drawback of the EU in this field.

In the present dissertation the content of the EU provisions establishing the refugee's right to be protected from *refoulement,* health care and family reunification has been overviewed. As it has been pointed out, there are frequent cases of noncompliance by EU Member States to their obligation in these regards. These cases of noncompliance can be explained in view of the main hindrances to the implementation of this right. All the directives and treaties setting out the three rights discussed in this dissertation have a single common attribute. This is the fact that Member States obligations are not clearly formulated. Too much discretion is left to Member States in implementing refugees rights, thus, leading to a vague content of obligation. As a result, several problems emerge as to the adoption of specific measures needed at national level to implement the obligations set out in the directives. Moreover, in view of what has been acknowledged by the ECJ in *Van Duyn v. Home Office,* the adding of more specifications to the already existing provisions, would benefit their juridical effect.

There is also lack of specific provisions for the implementation of *non-refoulement.* This concerns particularly the Border Schengen Code which is the main legal instrument supposed to regulate *refoulement* cases and lacks of specific procedures in this field. Furthermore, it can be noticed a discrepancy in the intention of the EU to fulfil *non-refoulement* principle. In Frontex legal foundation there is no indication to the principle of *non-refoulement* and the cornerstone of Frontex activities clashes with this fundamental legal principle for the protection of refugees. All of

this factors shows that up till now the body of EU legal tools for the protection of refugees is not able to contribute to a comprehensive system for the protection of refugee's rights.

In the overview provided in the present dissertation on Italy practice, the important role played by political parties and national acts on protection of refugees rights has been highlighted. Even though human rights protection in EU territories remains highly dictated by national legislations and the internal political climate, it cannot be stated that the EU has done the outmost to grant the refugees rights protection.

Selected Bibliography

Books

Boeles P., M. den Heijer, G. Lodder, L. Wouters, *European Migration Law*, (Antwerp, Oxford, Portland, 2009).

Craig P., De Burca G., *EU Law: Text, Cases and Materials* (Oxford, 2008).

De Bruycker P, Pascouau Y., "Family reunification at the Crossroad between European and Belgian Law", (2011).

Goodwin- Gill G.S, McAdam J., *The Refugee in International Law,*(Oxford, 2007).

Groenendijk K., Fernhout R., van Dam D., van Oers R., Strik T., "The Family Reunification Directive in EU Member States, the first year of Implementation" (2007), Centre for Migration Law Nijmegen, p. 42.

John A., " Family reunification for migrants and refugees: a forgotten Human Right?", A comparative Analysis of Family reunification, under Domestic Law and Jurisprudence, International and Regional Instruments, ECHR Case law and EU 2003 Family Reunification Directive (2003).

Kotzeva A., Murray L., Tam QC R., *Asylum and Human Rights Appeals Handbook,* (Oxford, 2008).
Krause C. Scheinin M., "International Protection of Human Rights: A textbook", (Turku, 2009).

Lodge J., *Are you who you say you are? The EU and Biometric Borders*, (Nijmegen, 2007).

Lauterpacht E., Bethlehem D., "The Scope and Content of the Principle of Non- Refoulement: Opinion" *Refugee Protection in International Law* (Cambridge 2003).

Max Planch Insitute for Comparative Public Law and International Law, Encyclopedia of Public International Law, (Amsterdam, New York, 1985), vol.8 p. 456.

Moccia L., *Unione Europea- una guida per argomenti,* (2008).

Shaw M.N., *International Law,* Sixth Edition, (2008 Cambridge).

S. Sarti, "L'Italia dei Rifugiati", (2010, Fondazione Anci ricerche).

UNHCR, *Refugee Protection in International Law*, edited by E. Feller, V. Turk and F. Nicholson, (Cambridge, 2003).

Wouters K., *International Legal Standards for the Protection from Refoulement*,(Leiden, 2009).

Van Krieken P.J., *The Asylum Acquis Handbook,* (The Hague, 2000).

Zwaan K., "UNHCR and the European Asylum Law" (Nijmegen 2005).

Journal articles

Betts A., " Towards a Mediterranean Solution? Implications for the region of origin", *International Journal of Refugee law,* Vol. 18, Issue 3-4 (13 November 2006), pp. 652-676.

Brache J., " Migrants, Transporteurs et Agent d'Etat: Rencontre sur l'Axe Agadez-Sebha", n° 36, p. 43-62,(Niamey, France 2005).

Carling J., "Migration control and migrant fatalities at the Spanish- African borders", *International Migration Review*, Vol. 41, Issue2, (June 2007).

Fasti M., Italian Immigration and Refugee Law, *Immigration, Asylum and Nationality Law*, Vo. 15 Issue 18 (2001).

Finotelli C., Sciortino G., "The importance of being Southern: the Making of Policies of Immigration Control in Italy", *European Journal of Migration and Law,* Vol. 11, Issue 2 (2009), pp. 119-138.

Finney Lamb C, - Smith M., "Problems Refugees Face When Accessing Health Services*", NSW Public Health Bulletin,* Vo. 13 No. 7, (2002), p. 161

Fischer A., - Lescano, Löhr T., Tohidipur T., "Border Control at Sea: Requirements under International Human Rights and Refugee Law", *International Journal of Refugee Law*, Vol. 21, Issue 2, (2009) p. 256-296.

Gil M.T., – Bazo, " The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited", *International Journal of Refugee Law,* Vol. 18, Issue 3-4 (2006) pp. 571-600.

Gilbert G., "Is Europe Living Up to Its Obligations to Refugees?", *The European Journal of International Law*, Vol. 15, Issue 5, (2004) pp. 963.

Hammod S., "EU Libya Cooperation on Migration: A Raw Deal for Refugees and Migrants?", *Journal of Refugee Studies,* Vol. 21 Issue 1, (2008), p. 19-41.

Kengerlinsky M., "Restrictions in EU Immigration and Asylum Policies in the light of International Human Rights Standards", *Essex Human Rights Review,* Vol. 4 Issue 2, (2007) p. 1-19.

Klepp S., "A contested Asylum System: the European Union between Refugee Protection and Border Control in the Mediterranean Sea", *European Journal of Migration and Law*, Vol. 12, Issue 1 (2010) pp. 1-21.

Lutterbeck D. "Between police and military: the new security agenda and the rise of gendarmeries", *Cooperation and Conflict*, (2004) Vol. 39 Issue 1, pp.45-68.

Lutterbeck D., "Policing Migration in the Mediterranean", *Mediterranean Politics,* Vol.11, Issue 1, (Geneva, March 2006) p. 59-82.

Moreno A., ”Human Rights Violations and Refugee Health”, *Journal of the American Medical Association (JAMA),* Vol. 285 Issue 9 (March 2001); p. 1215-1217.

Moreno V., “Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States’ Obligations Accruing at Sea”, *International Journal of Refugee Law,* Vol. 23 Issue 2, (2011) p. 174-220.

Pollack J., Slominski P., “ Experimentalist but not Accountable Governance? The role of Frontex in Managing the EU’s External Borders”, *West European Politics,* Vol. 32, Issue. 5, (2009) p. 904-924.

Pugh M., Mediterranean boat people: a case for cooperation, *Mediterranean Politics,* Vol.6 Issue 1 pp.1-20.

Rogers N., “Immigration and the European Convention on Human Rights: Are new Principles Emerging?”, *European Human Rights Law Review,* (2003) Vol. 8 p. 1-53.
Schuster I., “The Realities of a New Asylum Paradigm”, COMPAS Working Paper WP-O5-25 (compass: Oxford 2005).

Storey H., “ EU Refugee Qualification Directive: a Brave New World?”, *International Journal of Refugee Law,* Vol.20, Issue 1 (2008) pp. 1-49.

Totah M., “ Fortress Italy: Racial Politics and the New Immigration Amendment in Italy”, *Int’l L. J.* 1438, Vo. 26 Issue 5 (2002).

Miscellaneous Sources

ECRE, “The Impact of the EU Qualification Directive on International Protection” (2008), ELENA-European Legal Network on Asylum.

Escoffier C., Tainturier P., Halasa A., Baba N., Sidhom C., “Economic and Social Rights of Migrants and Refugees in the Euro-Med Region: Access to Health care and the labour Market”, Euro-Mediterranean Human Rights Network, (EMHRN), (2008).

Gubbini C.,” Si può ricorrere alla consulta-Paolo Bonetti, docente all’Università Bicocca: La legge Bossi Fini contiene molti profili di incostituzionalità”, *Manifesto* (11 July 2002).

Gubbini C., “Diritto d’Asilo negato”, *Manifesto,*(4th June 2002).

HUMA network,“Access to Health Care for Undocumented Migrants and Asylum seekers in 10 EU countries- Law and Practice” (2009).

Schuster I., “The Realities of a New Asylum Paradigm”, COMPAS Working Paper WP-O5-25 (compass: Oxford 2005).

“The nature of economic, social and cultural rights”, in : Office of the High Commissioner for Human Rights, Economic, Social and Cultural Rights. *Handbook for National Human Rights Institutions* (2005), p. 1-28.

United Nations Committee on Economic Social and Cultural Rights” The right to the highest attainable standard of health: Substantive issues arising in the implementation of the International

Covenant on Economic, Social and Cultural Rights" E/C.12/2000/4, General Comment No. 14 (11/08/2000).

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (1992).

Consulted Treaties, EU Legal Instruments, Case Law, and National Legislation.

Treaties

Convention Relating to the Status of Refugees, 18 July 1951.

European Convention on Human Rights, 4 November 1950.

International Covenant on Economic Social and Cultural Rights, 16 December 1966.

Treaty of Amsterdam Amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts, 2 October 1997, OJ C 340 of 10.11.1997

Treaty on European Union (Treaty in Maastricht), 7 February 1992, OJ C 191 of 29.7.1992.

Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, 13 December 2007, OJ C 306 of 17.12. 2007.

Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (Dublin Convention), OJ C 254, 19.8.1997.

Treaty on the Functioning of the European Union O J C 115 of 9.5.2008.

EU Directives and Regulations

Directive 55/2001/EC of 20 July 2001, 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 2003/9/EC OF 27 January 2003, laying down minimum standards for the reception of asylum seekers.

Council Regulation 343/2003/EC of 18 February 2003, establishing the criteria and mechanisms for determining the Member State responsible for examining asylum application lodged in one of the Member States by a third country national.

Regulation 2725/2000/EC of 11 December 2000 concerning the establishment of "Eurodac" for the comparison of fingerprints for the effective application of the Dublin Convention.

Regulation 407/2002/EC of 28 February 2002 laying down certain rules to implement Regulation (EC) No 2725/2000 concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of the Dublin Convention.

Regulation 1560/2003/EC of 2 September 2003 laying down detailed rules for the application of Council Regulation 343/2003/EC establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national.

Regulation 562/2006/EC of the European Parliament and the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.
Proposal for a Regulation establishing a mechanism for the creation of Rapid Border Intervention Team and amending Council Regulation (EC) No. 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers.

Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

Case Law

Pubblico Ministero v. Ratti, (Case 148/78) [1979] ECR 1629.

Van Duyn v. Home Office, (Case 41-78) [1975] Ch 358 ECJ.

Chakroun v. Minister van Buitenlandse Zaken, (Case-578/08) [2010] ECJ.

Van Gend en Loos v Netherlands Case 26/62 [1963] ECR 1; [1963] CMLR 105.

Case C-57/07: Judgment of the Court (Seventh Chamber) of 6 December 2007- Commission of the European Communities v. Grand Duchy of Luxembourg (Failure of a Member State to fulfil obligations- Directive 2003/86/EC) Official Journal C 022, 26/01/2008 P. 0014.

National legislation

Legislative Decree, n.286/1998 adopted on 25 July, *Consolidated Text of provisions relating to immigration and the status of foreigners*.

Bossi Fini Law, L. n. 290/2002, adopted on 12 July, published in Gazz. Uff. July 22, 2002.
Law n. 94/2009 adopted on 15 July, provisions on public security.

General Assembly resolution

Financial provisions (Article 10 and annex II) of the Draft Constitution of the International Refugee Organization, A/RES/83(I), UN GAOR, 67th plenary meeting (1946) p. 164