

Executive Summary

A *refugee* is a person who, for reasons of persecution (or fear hereto), is forced to leave his home and is outside of his home country. Although the great majority of the world's refugees find themselves in third world countries, also wealthier countries are dealing with considerable numbers of migrants and refugees arriving at their borders. As for Europe, especially the border countries of the EU over the years have received relatively high numbers of migrants and refugees.

The arrival of migrants and refugees in Europe is often conceived as a massive invasion which must be combated, and is placed in a context of security related issues, such as international crime, terrorism, and drug trade. This misconception can be dangerous when it comes to formulating laws to regulate the issue. Over the years, a vast amount of (inter)national laws have been designed for this aim. Within this body of International Refugee law, the principle of *non-refoulement* occupies a fundamental position.

Non-refoulement was first laid down in the 1951 Convention Relating to the Status of Refugees. This Refugee Convention is still in force and constitutes the foundation of International Refugee Law. The non-refoulement principle protects people from being sent (back) to territories where they can face persecution, torture or other ill-treatment. This right to not be sent back to unsafe territories is directly related to many other fundamental human rights.

In theory, the European Union is an area of freedom, security and justice. Yet, a closer analysis of Spanish law and practices, which cannot be separated from European policies and practices in this field, shows that this area is very well protected and closed off for those who do not seem to belong. Despite of its importance in International (Refugee) Law, in Spain the *non-refoulement* principle is not always fully respected, and sometimes even frankly violated. In all these cases, human rights are sidelined in favour of political and economic interests that are often security related.

The right to a fair trial is one of the main fundamental human rights that is most closely linked to the non-refoulement principle. By providing for the right to free legal assistance, the right to a translator and the active involvement of NGOs and UNHCR during the asylum procedure, as well as the right to appeal and re-examination of the case, the Spanish laws seem to guarantee the right to fair trial and accordingly, protect asylum candidates against refoulement.

Nevertheless, these same laws undermine this right by including strict exclusion clauses; by imposing a time limit and geographical limitations; and by legalising re-admission agreements. All these measures somehow impede the access to the asylum procedure, do not guarantee the right to fair trial and risk sending persons (back) to territories where their life and dignity are at risk.

Also in the practical application of non-refoulement, in particular the right to a fair trial is at stake. The usual practice of interception of migrants at sea, or in the border areas around the Spanish enclaves Ceuta and Melilla, without giving them the opportunity to apply for asylum, deprives asylum candidates of their right to a apply for asylum and their right to a (fair) trial. Since the principle of non-refoulement should also apply extraterritorially, that is, anywhere where the Spanish authorities exercise their jurisdiction, this practice is in breach with this fundamental pillar of the international Refugee Law system.

Similarly, the measures employed by Spain in cooperation with neighbouring African countries, which result in the displacement of the outer borders and the externalisation of border controls, seriously undermine fundamental human rights such as the right to apply for asylum, the right to a (fair) trial and the right to be protected against refoulement. These and more violations are repeated in the case of stowaways, to whom all provisions that ensure a fair trial as laid down in Spanish law, do not apply.

Along with the right to a fair trial, the right to non-discrimination also plays a large role in the practical application of the principle of non-refoulement in Spain. The chances to enjoy the right to a fair asylum procedure, are heavily dependent on the location of first encounter with (border protecting) authorities. Asylum seekers that make it to the inland enjoy more rights than those that (are forced to) apply at the borders. Besides, if one is caught before even reaching the borders, the chances of having his rights respected are even slighter.

The same right is violated by the application of readmission agreements. Nationals of those countries with which Spain has come to a re-admission agreement have a far higher chance of being (immediately) deported, than asylum seekers and migrants of other nationalities do. The violation of this right to non-discrimination, in many cases leads to the violation of the principle of non-refoulement.

Nowadays, law making and practice simply do not align with the humanitarian objectives that were established in the Refugee Convention over sixty years ago. Even though these humanitarian objectives are also legal obligations, which in theory are highly valued by the international community, the question is whether they are too idealistic, and incompatible with other values and laws, that in general seem to have precedence.

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Prologue

I once had a Mediterranean dream. I found it in my aunt and uncle’s kitchen in Antwerp, where my Italian uncle made me my first pizza and talked to me with an accent that sounded like music. There was something about this kitchen and it felt good. It was the melody of my uncle’s speech, the smell of fresh pizza and the flowers that decorated the tiny balcony. I believed, this is what Italy must be like. I dreamt about going to the place where this magic came from and I decided it had to be Rome.

I found the same kind of magic in the story, music and images of Disney’s movie Aladdin. I was impressed by the beautiful shape and decorations of the sultan’s castle, the way the people dressed, and the magic sound of the songs. I believed, this is what Morocco must be like.

I followed my dream as I went to study Italian in Rome when I was seventeen, and I followed it as I started Mediterranean Studies at the Radboud University Nijmegen a year later. Although the dream never disappeared, I learned that the Mediterranean was a lot more than it was in my naive and child-like imagination. Italy was much more than the smell of pizza, melodious speech, sun and narrow streets, and Morocco was much more than beautiful architecture and soul-stirring music. I learned that the Mediterranean is not only rich for its colours, sounds, shapes and tastes; it is also very poor for its corruption, ethnic conflict, pollution, oppression, inequalities, poverty, and so on.

One of its phenomena has struck me in particular. Migration is one of its centuries old phenomena, that has brought as much wealth in the form of peaceful intercultural exchanges and trade, as it has brought suffering in the form of death and despair.

Mediterranean studies ended with a successful thesis on *The Art of Migration. Another view on irregular migration from Africa to Europe*, made possible by the inspiring guidance of Prof. dr. Henk Driessen. Although Mediterranean Studies ended, I knew there was a lot more to learn.

At The Hague University I never left my fascination for the phenomenon of migration behind. Instead, it kept on evolving and finally it made a switch from the original socio-/anthropological approach, to a more legal perspective. I decided to end this second chapter in my academic career with an internship and a final thesis both focused on the topic of refugees.

As beautiful as this word may sound in various languages, in reality *refugee* stands for physical and mental suffering in many forms. A *refugee* is often mistakenly viewed as a person who migrates to benefit from another country’s wealth. Yet, being a refugee means being in fear and being forced to leave your home, leaving your life, possessions, and often your identity behind. In Europe, the misconceptions about *refugees* are often created, and maintained by the media. These

ideas have come to live their own lives, and resonate in both lawmaking and practical measures regarding migration and asylum.

In this paper I intend to give an insight into how these processes have worked out in one of Europe’s Mediterranean countries; Spain. Although this paper does not focus on only Mediterranean immigration and refugee movements, for me, this shared African, Middle Eastern and European area has remained a point of reference and inspiration. This inspiration is rooted not only in the old childhood dream, but also, and for a substantial part, in the lectures, books, and guidance of Prof. Dr. Henk Driessen.

As for the legal approach of this research, inspiration was found in the interesting lectures of Maarten van Munster. Also his helpful guidance during the writing process has been an indispensable contribution to this paper. Though the paper is not directly linked to my internship at ONG Rescate Internacional in Valencia, the experiences during this internship and the guidance of my tutor and friend Azahara Montero Magarín have been of priceless value.

As a tutor, Azahara showed me all the ins and outs of the job, and gave me the opportunity to learn, grow, and be fully part of, and contribute to interesting projects. As a friend, she helped me to find my way, and showed me how a young woman can be dedicated to her work, socially very active, a caring mother, a Master student, a great tutor, and beautiful at the same time.

Lastly, many thanks to ONG Rescate, ACNUR, and CEAR for the valuable experiences, lectures, courses and meetings I had the opportunity to be part of. All these experiences have been indispensable contributions to this paper.

Introduction

*“Seguirán viniendo y seguirán muriendo
porque la historia ha demostrado
que no hay muro capaz de contener los sueños.”*

*“They will keep on coming and they will keep on dying
because history has shown
that no wall is high enough to stop their dreams”*

-Rosa Montero in: ‘14 kilómetros’¹

These words are written for those who leave their homes to come to Europe, those coming from places where dreams for a better life arise out of famine, despair, or fear, and often spread like fire. On their way, these persons encounter many difficulties and dangers, too often with fatal consequences.

Some of them decide to leave their country voluntarily, others are forced to leave, since their life and integrity are no longer protected. The latter are called *refugees*. The voluntary movement of people across borders, known as *migration*, is often identified with the forced movement of refugees. Yet these are two very different concepts. Migration is as old as human history, but refugees have been around for not much more than a century. Their special status was recognised by the international community at a moment when it was faced with large amounts of internationally displaced persons, after having experienced some of the most horrific wars in history.

Nowadays, although the media might give another impression, the great majority of the world’s refugees find themselves in third world countries. Yet it is not unreasonable to say that also the world’s more wealthy countries are faced with the arrival of large amounts of asylum seekers, which are possibly refugees. As the Office of the High Commissioner for Human Rights states,

“The problem of the world’s refugees and internally displaced is among the most complicated issues before the World community today. (...) The problem is multidimensional and global (OCHCR, 1992)”.

Because of its great dimensions and worldwide presence, the refugee issue, often ‘blended’ with migration, is a daily recurring theme in local, national and international media. Despite, but also

¹ ‘14 kilómetros’ is a movie on irregular migration from Africa to Spain, based on true stories. Directed by Gerardo Olivares, 2007. The citation of Rosa Montero (Spanish journalist/author) appears at the end of the movie.

because of that, a lot of misconceptions about the issue prevail in public discourse. As Hein de Haas (2007) puts it, the media present us the *Myth of invasion*, that is, the majority of the daily reporting make us believe that ‘we’, the wealthy countries (in Europe), are overwhelmed by an enormous flood of refugees and migrants.

This flood is often conceived as something that must be combated, and is placed in a context of security related issues, such as international crime, terrorism, and drug trade. This (mis)conception can be dangerous when it comes to formulating laws to regulate the issue. Over the years, a vast amount of (inter)national laws have been designed for this aim. Within this body of International Refugee law, the principle of *non-refoulement* occupies a fundamental position. In its *Note on the principle of non-refoulement* (1997), UNHCR states that

“the principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person.”

This statement clearly explains the relation between International Refugee Law and International Human Rights Law. In this paper the focus will be on the *non-refoulement* principle, its relation to Human Rights Law, and its application in the country of Spain. More precisely, the central question is: *To what extent are human rights in the context of the non-refoulement principle respected in Spanish asylum policy and practice?*

Although the non-refoulement principle is in force and thus applied worldwide, it would go beyond the scope of this paper to investigate the application of the principle on a global scale. It was therefore decided to narrow down the scope, and focus on one single country. Since the investigation takes place in Spain, the choice to focus on Spain seems most obvious. Yet, there are more reasons to select this Euro-Mediterranean country as the geographic area of analysis.

In fact, the sole fact of being a Euro-Mediterranean country is one of the main reasons that makes Spain an relevant country to investigate on. Because of its geographic position, it constitutes a significant part of the outer EU border. For that reason, the country over the years has been receiving large inflows of migrants and refugees compared to other EU states. Besides, the country has an interesting (e)migration history of itself, having been one of the main sending countries of labour migrants towards Western Europe in the 1960s and 1970s. After this period of emigration, and partly overlapping with it, Spain became an important transit country for mainly North-African migrants on their way to Western Europe. Spain finally reached the current stage of its migration history, right after becoming a member of the European Union in 1986. Lastly, Spain is an interesting case for this investigation, since for years, human rights organisations like Amnesty International have been denouncing the inadequate asylum system in this country.

In order to get to the bottom of the matter, that is, the application of the principle of *non-refoulement* in Spanish law and practice, a number of sub questions have been formulated:

- What does *refugee* mean?
- How and when did the concept come into being?
- What is the meaning of the *non-refoulement* principle?
- What is the relation between human rights and the refugee issue, and the concept of *non-refoulement* in particular?
- How does the principle resonate in European law?; Which human rights are laid down in the ECHR and the CFREU that are linked to the *non-refoulement* principle?
- How is the non-refoulement principle reflected in Spanish (asylum) law (Ley de Extranjería, Ley de Asilo)?; To what extent are human rights respected in this context?
- To what extent is the non-refoulement principle respected in practice?; To what extent are related human rights respected in this context?

In order to further specify the objectives of this investigation, some definitions of the terms mentioned above will be given. Some of the terms, such as *refugee*, *non-refoulement*, and *human rights* are complex concepts that require an elaborate and critic definition. These concepts will be mentioned only shortly here, but will be discussed in detail in the following chapters.

A *refugee* is a person who, for reasons of persecution (or fear hereto), is forced to leave his home and is outside of his home country. *Non-refoulement* refers to the right of all persons not to be sent (back) to territories where they will be tortured or ill-treated. *European law* in this paper refers to both the European Convention for the Protection of Human Rights and Fundamental Freedoms, commonly known as the European Convention on Human Rights (ECHR); and the Charter of Fundamental Rights of the European Union (CFREU). The term ‘human rights’ refers to

“basic rights and freedoms that all people are entitled to regardless of nationality, sex, national or ethnic origin, race, religion, language, or other status (Amnesty International USA, 2012).”

Asylum is the protection granted by states to refugees. Finally, *practice* in this context refers to the measures taken and executed, which are related to the (in)correct application of the principle of non-refoulement.

In order to give a well founded answer to the above mentioned questions, it is imperative to conduct in-depth research. Firstly, detailed desk research will be conducted, using academic and reliable quality resources, to draw up the theoretic framework. Then, to analyse European Human Rights Law and Spanish Asylum law, legal documents will be studied and analysed critically. Lastly, to investigate the practical application of non-refoulement, NGO reports, statements and articles will be consulted, and interactive lectures and courses by experts in the field will be attended.

In the following four Chapters, the result of this in-depth investigation will be expounded. In Chapter One the fundamental concepts *refugee* and *non-refoulement* will be defined and contextualised. The contextualisation of the refugee concept will be elaborated in Chapter Two, which moreover clears up the term *human rights* as well as the direct relation between the two concepts, and the application of these rights on refugees. Lastly, Chapter Two depicts how the essential Refugee Law principle of non-refoulement and related human rights are reflected in European Human Rights Law (ECHR and CFREU). Chapter Three will then elaborate on how the non-refoulement principle and related human rights, as laid down in European Human Rights Law, are incorporated into Spanish asylum and immigration law. Chapter Four will critically assess how non-refoulement and related human rights are applied in practice in Spain. Finally, Chapter Five contains the conclusions of all the above.

Before starting to have a closer look on the concepts *refugee* and *non-refoulement*, some last observations must be made. First, as regarding the statistics employed in this paper, all of these are statistics of the year 2010, since at time of writing most numbers on 2011 are not yet available. To guard consistency, and to give a complete picture, exclusively 2010 statistics will be used. Second, when referring to refugees, in this paper will be referred consistently to ‘he’. Yet, in all occasions, ‘he’ can be replaced by ‘she’. The choice to employ ‘he’ is purely arbitrarily and does not aim to underline the masculine character of refugee inflows towards Europe, since these movements also include a considerable (and rising) number of women.

1. The definition of refugee and the non-refoulement principle

About one hundred years ago, in the first decades of the 20th century, the refugee issue appeared for the first time on the agenda of the International Community. It became widely accepted that there existed an international and humanitarian responsibility for protecting and assisting refugees. In this context, the League of Nations took the initiative to organise international action on behalf of refugees. A number of ad- hoc international agreements were adopted for specific situations, but these did not fully resolve all the problems that surrounded the refugee issue. A new, international instrument was needed, which included a more general definition of which persons were to be considered a refugee, and general rules on how they should be protected (UNHCR, 1992).

The Second World War in the 1940's provoked a new and enormous wave of refugees. The League of Nations had failed both in preventing war from breaking out and in creating a suitable international instrument to deal with the refugee problem. Its successor, the United Nations, has proven to be more successful in both regards. However, as far as the approach of refugee issue concerns, there were, and still are, many more difficulties to overcome.

This post-war situation, which was one of tremendous destruction and turmoil, brought the refugee issue back on the International Community's agenda. By 1946, the General Assembly of the United Nations established the 'International Refugee Organisation' (IRO). This organisation had a temporary mandate to register, protect, resettle, and repatriate refugees. Unfortunately -yet not unsurprisingly, considering the political tensions in the aftermath of the war-, IRO operations were controversial and inadequately funded. Yet, the need for an international approach towards the refugee issue had not disappeared, if not increased (OHCHR, 1992).

In 1951 the General Assembly made a new effort to approach the refugee issue. This time it decided to establish an organ under the auspices of the UN itself, that is, the *Office of High Commissioner for Refugees*, which was set up as a subsidiary organ of the General Assembly. Initially, the office was set up for 5 years, but by extending routinely the 5-year mandate, it has been active until today, and is not likely to come to the end of its mandate anytime soon (OHCHR, 1992).

The same year, another landmark in the field of international protection of refugees came about. After a recommendation of the United Nations Commission of Human Rights, the 1951 Convention Relating to the Status of Refugees was drafted (OHCHR, 1992). The Convention was adopted on 28 July 1951 and entered into force on 21 April 1954 (UNHCR, 1992). Still today, the Convention relating to the Status of Refugees (henceforth: Refugee Convention) is “the key legal

document in defining who is a refugee, their rights and the legal obligations of states” (UNHCR, 2012).

The Convention gave a clear and detailed definition of who exactly was to be considered a *refugee* and also elaborated on the rights a refugee would have in a host country (Rodger, 2001). The general definition of a refugee in the Refugee Convention contained both a dateline and a possibility to limit the scope of the convention geographically. According to this definition, the events that cause a person to be a refugee, must have had occurred before 1 January 1951. Besides, States were free to opt for a geographical limitation which would limit the scope of their obligation under the Convention, to exclusively refugees from Europe (UNHCR, 1992).

Soon after the adaptation of the Refugee Convention, new refugee situations emerged, especially in Africa (OHCHR, 1992) and once again, the limited definition of ‘refugee’ asked for rectification. The answer to the need of making the provisions of the Convention applicable to a wider range of refugees, was the 1967 Protocol Relating to the Status of Refugees. This Protocol, which had the same provisions as the Refugee Convention, but without the dateline and geographical limitation, entered into force on 4 October 1967 (UNHCR, 1992; Rodger, 2001).

The Refugee Convention and its Protocol contain three types of provisions. The first group of provisions gives a basic definition of who is to be considered a refugee. The second group defines the legal status of refugees in the host country, and his rights and obligations. The last group of provisions deals with the implementation of the instruments. Besides, both the Convention and the Protocol explicitly mention the necessity of co-operation between contracting States and the Office of the United Nations High Commissioner for Refugees (UNHCR, 1992).

In the following, the focus will be on the provisions that fall within the first group, namely those that give a definition of a *refugee*; and on the fundamental provision that lays down the *non-refoulement* principle, which falls within the second group of provisions that stipulate the rights and obligations of a person recognized as refugee. Since it contains the most comprehensive and detailed descriptions of the various elements of the *refugee* definition, the 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) will be the main source for the following section. Besides, even though it is not a binding legal document, it is highly valued and often employed in refugee case-law.

1.1. Refugees

In order to fully understand and analyse the non-refoulement principle as applied in Refugee Law, it is essential to be very well acquainted with the official definition of *refugee*. This official definition entails a lot more than “a person who has fled his home country”. Once a refugee is officially recognized as such, he will be granted refugee status. This refugee status is a form of international protection, which brings along certain rights and obligations, amongst which the right of residence in the host country. Besides refugee status, there are more types of international protection, which apply to people in different situations. These other types will be discussed in Chapter Two. The determination of refugee status is no mechanical and routine process, but a detailed study of the person concerned and his situation and background, in which many factors are involved. It is important to keep in mind, that official recognition does not *make* a person a refugee, but the person is recognised, *because* of being a refugee (UNHCR, 1992).

As laid down in the 1951 Convention Relating to the Status of Refugees (Refugee Convention), the provisions relating to the definition of *refugee*, can be subdivided into three groups, that is, inclusion, cessation and exclusion. The first group ‘inclusion’ defines all the criteria that a person must satisfy in order to be considered a refugee. The provisions on ‘cessation’ lay down the conditions under which a refugee ceases to be a refugee. Finally, the last group of provisions stipulate circumstances under which a person can be excluded from the right of refugee protection, even if he would meet the criteria of the inclusion clauses (UNHCR, 1992).

1.1.1. Inclusion clauses

The general definition, as laid down in Article 1 (a) (2) Refugee Convention, is as follows. It is important to note that it also includes stateless persons (who do not have a nationality):

The term ‘refugee’ shall apply to any person who:

‘as a result of events occurring before 1 January 1951 and 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 residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’

Nowadays, after the adaptation of the 1967 Protocol, the 1951 dateline has lost most of its practical significance, being only of interest to the small number of states that are not also party to the Protocol. (UNHCR, 1992).

This definition consists of many elements that at first sight might seem obvious, but in fact require some further clarification. The key phrase of the definition is ‘well founded fear of persecution’, and reflects the main elements of the refugee character. It consists of both a subjective element (fear) and an objective element (well founded). The personal state of mind of ‘fear’ must be supported by an objective situation and both elements should be taken into account in the process of determining refugee status. The element of fear does not only refer to actual persecution, but can also refer to the wish to avoid a situation in which it might occur (UNHCR, 1992).

Persecution must in all cases be for one (or several) of the reasons stated. People who flee their country for other reasons, such as famine or natural disaster, would not be recognized as a refugee under this Convention. However, for the term *persecution* in itself there is no universally accepted definition yet. A partial definition can be found in Article 33 of the same Convention, which deals with the non-refoulement principle. It refers to a “threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group”. These types of threats will always constitute persecution. Other serious human rights violations (for the same reasons), might also fall within the definition (UNHCR, 1992).

On the European Union level, there does exist a more precise definition of persecution, as laid down in the so called ‘Qualifications Directive’, or more officially, the “Council 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”. As the title implies, this Directive, which is binding upon all European Union Member States, including Spain, lays down minimum standards for the determination of refugee status and other types of international protection (Council Directive 2004/83/EC).

The definition of persecution can be found in article 9 (*Acts of persecution*):

1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must: (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:

(a) acts of physical or mental violence, including acts of sexual violence;

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

(c) prosecution or punishment, which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);

(f) acts of a gender-specific or child-specific nature.

3. In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1 (Council Directive 2004/83/EC).

As stipulated in Article 9 Council Directive 2004/83/EC, persecution can also be determined on cumulative grounds, which means that the accumulation of various measures which in themselves do not constitute persecution, may amount to persecution. It is however impossible to lay down a general rule on which cumulative reasons can give rise to a valid claim to refugee status (UNHCR, 1992).

The term persecution often is confused with the very resembling word *prosecution*. Yet, it is crucial to distinguish the two. A person is prosecuted when legal proceedings are instituted against him in respect of a crime. A refugee is not a fugitive from justice, but from injustice. Prosecution is justified when it means punishment for a common law offence. However, excessive punishment, or punishment based on discriminatory law (especially if related to the reasons mentioned in the refugee definition) may amount to *persecution*. As referred to in Article 1 of the Refugee Convention, ‘persecution’ is usually related to action by the authorities of a country. However, the actions of persecution can also be caused by a large part of the population, when it is tolerated by the authorities, or if the authorities cannot or will not offer protection against these actions (UNHCR, 1992).

The reasons for persecution are not that straightforward and in many cases they can overlap. UNHCR recommends a broad interpretation of these reasons. For instance, ‘race’ has to be understood in its widest sense; it also entails membership of a specific group of common descent forming a minority within a larger population. A reason of ‘religion’ can be prohibition of

membership of a religious community, or serious measures of discrimination imposed on persons because of their religion. ‘Nationality’ not only refers to citizenship, but also to membership of an ethnic or linguistic group. A ‘particular social group’ consists of persons of a similar background, habits, or social status (UNHCR, 1992). Lastly, as the Qualifications Directive very clearly defines:

‘the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.’ (Article 10 (1) (e) Council Directive 2004/83/EC).

A person applying for refugee status must be outside the country of his nationality, meaning outside of the country in which he is an official citizen. Nevertheless, not every human being on the planet has a nationality. People without nationality are known as ‘stateless persons’ and do not enjoy the protection of any national authority. A stateless person can be recognized as a refugee, only if he is outside the country of former habitual residence. A person’s well founded fear must be in relation to the country of nationality or former residence. If that is not the case, and the person can benefit from the protection of his ‘own’ country, he does not need international protection and will not be granted refugee status (UNHCR, 1992).

The last element of the definition refers to a situation of being ‘unable or unwilling’ to benefit from the protection of the country of nationality or of former residence. A refugee is a person who does not enjoy such protection. One can be unable to enjoy international protection in situations as for example civil war. Besides, a person can refuse to accept the protection of the state of which he is a national, but only if he has a well founded fear that causes this refusal, he can obtain refugee status (UNHCR, 1992).

In addition to the above mentioned definition, there are many variations that can be found in numerous national, regional and international conventions and statutes. All of these are however based on the definition in the Refugee Convention. An important (alternative) definition is laid down in the Statute of the Office of the High Commissioner for Refugees, which contains definitions of those persons to whom the High Commissioner’s competence extends. The only – minor, but important- difference between the definitions in the Statute and the Refugee Convention, is that the Statute does not mention any dateline or geographic limitation. Refugees within the Commissioner’s mandate are also known as ‘mandate refugees’. Because of the great

overlap of the definitions, a person can at the same time be a mandate refugee and a refugee under the Refugee Convention or its Protocol (UNHCR, 1992).

1.1.2. Cessation clauses

Article 1 (c) Refugee Convention contains six ‘cessation clauses’, which refer to conditions under which a person falling under the definition of article 1 (a) Refugee Convention, is no longer in need of international protection. The first four clauses refer to changes in the situation caused by the refugee himself, namely:

- (1) Voluntary re-availment of the protection of the country of his nationality;
- (2) Having lost his nationality, voluntary re-acquisition of nationality
- (3) Acquisition of a new nationality (and enjoying the protection of the country of the new nationality)
- (4) Voluntary re-establishment in the country where he feared persecution or another country

The last two cessation clauses are linked to a change of situation in the country of origin (of nationality or last residence). If the reasons for becoming a refugee are no longer present, international protection is no longer justified (UNHCR, 1992).

1.1.3. Exclusion clauses

Although for humanitarian reasons it is important to interpret the before mentioned provisions broadly, when the Convention was created, some limitations were also considered necessary. For security reasons, a number of provisions with exclusion clauses were introduced. These provisions exclude some people from the right to be protected under the Refugee Convention, even if they would fall under the official definition of Article 1 (a). These provisions are laid down in paragraph D, E and F of the first article of the Convention. Paragraph D and E both refer to situations in which protection is already granted to the person concerned, by either a state (the person has been granted rights enjoyed by nationals, but no citizenship) or another United Nations organ, other than UNHCR (such as the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)) (OHCHR, 1992).

Article 1 (f) Refugee Convention clearly reflects the security grounds, excluding people from the right on international protection, when there is reason to believe that the person:

- (a) has committed a crime against peace, a war crime, or a crime against humanity (...)*
- (b) has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.*
- (c) is guilty of acts contrary to the purposes and principles of the United Nations*

The purposes and principles of the United Nations are defined in Article 1 and 2 of the Charter of the United Nations (OHCHR, 1992).

1.2. Non-refoulement

One of the most fundamental elements of international refugee law is the prohibition of the forced return to a country where a person has to fear persecution. This right has found expression in the principle of non-refoulement, as laid down in Article 33 of the Refugee Convention (UNHCR, 1997; OHCHR, 1992; HREA, n.d.) In other words, the principle prohibits the expulsion of persons who are recognised as refugees (UNESCO, 2011). The observance of the principle is therefore intrinsically linked to the determination of refugee status (UNHCR, 1997). Nevertheless, in the last few years, jurisprudence of the European Court of Human Rights has extended the scope of the concept to those persons who qualify for subsidiary protection (Planas, 2011). This will be further discussed in Chapter Two. Besides, the principle is also part of general Human Rights Law, protecting any person to be sent (back) to a territory where he (might) face torture or other ill-treatment. In this chapter, the focus will be on the non-refoulement principle as applied in Refugee Law.

The first paragraph of Article 33 of the Refugee Convention states 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.’

In this case, ‘territories where his life or freedom would be threatened’, refers not only to the country of origin or former residence of the refugee, but to any country in which the person might be subject to persecution (UNESCO, 2011). From a humanitarian point of view, this right should be broadly interpreted and should be absolute. However, at the time of designing the Refugee Convention, because of security concerns, a second paragraph was added, making the right to be protected against refoulement a relative right. This paragraph provides that a person who is considered a danger to national security, is not allowed to claim the right of non-refoulement (Rodger, 2001; UNESCO, 2011). Article 33 can be considered a key article of the Refugee Convention and does not permit any reservations (UNHCR, 1997).

There are many ways in which refoulement can be enforced and all of them should be considered illegal on the basis of Article 33. The clearest example is a deportation order against refugees and the subsequent return of refugees to their countries of origin or unsafe third countries. Other

measures that are less obvious, but could lead to the same result are, for example: (building) electrified fences that prevent entry to a safe country, non-admission of stowaway asylum-seekers and boat migrants, or interception of boats on the high seas. All these forms of rejection, either directly or indirectly, can be considered violations of the principle of non-refoulement, even when this leads to a forced return to territories where the life and freedom of these people are threatened (UNHCR, 1997).

Despite the significance of the principle, the legal ground on which it stands is quite uncertain. This is partly because of the fact that its application requires a recognised refugee status, which is a complex procedure in itself. Besides, the parameters of the principle itself are not that clearly defined either (UNESCO, 2011; Rodger, 2001). The principle has a lot of ‘grey areas’ and is believed to be open for various interpretations and debate. This will be discussed elaborately in Chapter Three and Four, though a short introduction follows below.

1.2.1. The grey areas of the non-refoulement principle

The uncertainty about the parameters of non-refoulement has led to some general developments, which possibly endanger the principle. The first example is the increasing use of temporary protection, as a replacement of recognition of refugee status. This type of protection was developed to deal with cases of mass influx and to protect people escaping from civil turmoil, who would not fall under the official refugee definition. As the name says, this type of protection is only temporary and therefore reduces the ‘burden’ on the host state. Besides, temporary protection is an ad-hoc system, lacking clear definitions and rules, and leaving a large amount of discretion to the states regarding what rights these asylum seekers will be granted (Rodger, 2001).

A development which is especially dangerous for non-refoulement, is the introduction of the safe third country principle. This principle was first adopted by the EU through the Dublin Regulation which stipulates that an asylum seeker has to lodge an application for international protection in the first Member State where he enters the European Union. If he tries to apply in another country, he will be sent back to the state where he entered the EU (Rodger, 2001). This is based on the assumption that all EU countries have similar asylum systems which are all respectful of human (refugee) rights.

One of the problems is the uncertainty as to whether the third country will, in fact, accept responsibility for examining the request and, if appropriate, grant asylum. In order to adhere to the principle of non-refoulement, the prior consent and the co-operation of the country to which an asylum-seeker is returned is necessary. If not, the asylum-seeker's claim may not receive a fair hearing and a refugee might be sent back to territories where he faces persecution (UNHCR, 1997).

Some states have also adopted a ‘safe country of origin’ policy, which means that if an asylum-seeker is fleeing from a state which is identified as a ‘safe’, then it will automatically be assumed that the person is not fleeing persecution. The danger rests in the determination of a ‘safe’ country. The motivations for designating certain states as ‘safe’ are questionable, since (the improvement of) inter-state relationships might also play a role. Besides, a country that is generally safe, is not necessarily free of any risk of persecution for everyone. Again, as with temporary protection, there is no standard for implementing these safe country policies. Therefore it can be considered another way to circumvent the law (Rodger, 2001).

The fact that various EU Member State have different lists of safe countries of origin, shows how arbitrary the selection of these countries is. A recent example can be found in Belgium. On March 23, 2012, the Belgian government adopted a list of seven safe countries of origin, which included Albania and Kosovo, on the assumption that in these countries persecution is unlikely to occur. Yet only three days later, in France, its neighbouring country, the decision of the French administration to add Albania and Kosovo to the French list of safe countries of origin was annulled (ECRE, 2012).

Another problem with respect to the non-refoulement principle is the uncertainty as to whether or not it applies extraterritorially. Article 33 Refugee Convention is unclear about whether practices such as rejection at the frontier, and interdiction of boats at sea, can be understood as non-refoulement. At the creation of the Refugee Convention, many states believed that it would be uncalled for to give states obligations which applied beyond their borders. In other words; non-refoulement should only accrue to refugees who are within the territory of the state. This would mean that governments may return possible refugees to a territory where they might fear persecution, provided they have not yet reached or crossed its borders. Yet, according to UNHCR, there must be a possibility for these people to reach safety and apply for asylum (UNHCR, 1997).

Fortunately, over the years, the international community generally has come to disapprove the rejection at the frontier (UNHCR, 1997). Nevertheless, still today, it is a common practice at the southern European borders. The obligation to take in people from outside the territory of a state still has not been laid down explicitly in international law. At best, it could be deduced from –for example- Article 33 of the Refugee Convention, again by applying a broad interpretation.

2. The refugee problem and human rights

In order to understand the intrinsic relation between the refugee problem² and human rights, it is essential to not only have a clear understanding of what both *refugee* and *human rights* mean, but also to see both concepts in context. In this case, ‘context’ refers to important facts that surround the refugee issue and human rights, such as facts and numbers, (inter)national organs involved in refugee issues, and (inter)national instruments that lay down human rights.

2.1. Refugee in context

Although the definition of *refugee* has already been depicted in detail in the previous chapter, the first part of this chapter will be used to clear up some misunderstandings, since the term is often confused with other closely linked denominations. In everyday language and media stories, the word *refugee* is often used inconsistently, confusing the term with amongst others economic migrants or internally displaced persons (IDPs) (HREA, n.d.). Later on, some current facts and numbers of refugees in the world, and more specifically in Spain will be discussed, and finally some of the main refugee organisations will be shortly commented.

2.1.1. Refugee: a highly contested term

The misuse of the term *refugee* is not surprising. Besides ignorance and inaccuracy on the part of the media, politicians, and other individuals, confusion is also caused by the increase of closely related terms referring to migrants, or to various statuses and types of international protection. Since the creation of the official definition of *refugee*, the situation in and between many countries has changed considerably. Nowadays, people flee for other reasons than fifty years ago, which is why many of them do not qualify as refugees on the basis of the official definition. To protect those persons that fall outside of the scope of the Refugee Convention, many other types of protection have been introduced.

2.1.1.1. Economic migrants

First of all, one of the most common mistakes made is the equation of refugees with economic migrants. A migrant is a person who voluntarily leaves his country to take up residence elsewhere. If he migrates only for economic reasons, than he is an ‘economic migrant’ (UNHCR, 1992, HREA, n.d.). Still, the distinction between a refugee and an economic migrant is not always that clear. For instance, economic measures that are discriminatory in regards of one of the elements

² The use of the term ‘problem’ may seem to imply that the refugees themselves constitute a problem. Often, the arrival of refugees (and immigrants in general) is portrayed as a social and political problem. Nevertheless, in this paper, the arrival of refugees is considered a social phenomenon and the ‘refugee problem’ does not refer to the people, but to the legal difficulties in the procedures and all the grey areas around the refugee issue. These difficulties are partly caused by the fact that refugees are often part of mixed migration flows, which means that they travel the same routes, use the same means of transport as for example economic migrants, victims of human trafficking, etcetera

mentioned in the refugee definition, can in some cases may amount to persecution (UNHCR, 1992; OHCHR, 1992).

2.1.1.2. Asylum seekers

An asylum seeker is a person seeking international protection in another country. However, not all asylum seekers are in fact refugees or in need of international protection. It is up to the host country to determine which applicants qualify for refugee status –or international protection in other forms-, by establishing for each case individually whether or not there is a well founded fear of persecution (HREA, n.d.).

2.1.1.3. Subsidiary protection

One of the alternatives for refugee status is ‘subsidiary protection’. People who are seeking protection, but who may not meet the refugee definition, are able to apply for this type of international protection. The right on subsidiary protection was first laid down in the before mentioned Council 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*, also known as the ‘Qualification Directive’ (Refugee Information service, n.d.).

The Qualification Directive lays down the obligation for all Member States of the European Union, (who are automatically contracting states to this Directive) to grant subsidiary protection to people who are not refugees under the 1951 Convention but who, *‘if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm (...) and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country*. This definition can be found in Article 2 (e) Council Directive 2004/83/EC, in which is also referred to Article 17 of the same Directive, which sets out a number of exclusion clauses. These clauses are similar, but more numerous, than the before mentioned exclusion clauses for refugee status.

An essential part of the definition is “a real risk of suffering serious harm”. According to Article 15 Council Directive 2004/83/EC, ‘serious harm’ can consist of death penalty or execution; torture or inhuman or degrading treatment or punishment; or serious and individual threat to a civilian's life or person by reason of indiscriminate violence (Council Directive 2004/83/EC).

According to jurisprudence of the European Court of Human Rights, persons who qualify for subsidiary protection are also protected against refoulement. A difference with the refugee concept, is that individual persecution is not required, but there must be proof of indiscriminate violence in the country of origin (Planas, 2011). However, in practice, many state authorities do require that the person faces an individual risk of serious harm, in order to qualify for subsidiary protection.

2.1.1.4. Protection based on humanitarian grounds

Another type of international protection, is protection based on humanitarian grounds. This right is mostly applied to persons fleeing armed conflict and civil strife, who not always come within the terms of the 1951 Convention definition (UNHCR, 1992).

This type of protection is one of the three statuses applied to asylum seekers in Spain, the other two being subsidiary protection and refugee status. Beside security grounds (such as civil war in the country of origin), other reasons that make a person eligible for protection on humanitarian grounds in Spain can be: being victim of domestic violence; suffering a disease that cannot be treated in the country of origin; or being victim of grave racist crimes (Inmigramadrid, n.d).

2.1.1.5. Internally displaced persons

Although the difference in definition of a refugee and an internally displaced person (IDP) is miniscule, in practice, the impact of this difference is substantial. An IDP is a person who has been forced to flee his home for much of the same reasons as refugees. The difference, however, lies in the fact that an IDP remains within the territory of his own country (HREA, n.d.; OHCHR, 1992). In practice, this means that these people are *not* refugees and are therefore excluded from the system of refugee protection. Officially, IDPs do not deserve the protection of the High Commissioner for Refugees either. Yet, there are mechanisms available to the Commissioner to make exceptions. Unsurprisingly, most IDPS find themselves in developing countries and are mostly women and children (OHCHR, 1992).

2.1.1.6. Refugee ‘sur place’

It is also possible for a person to become a refugee at a later date, which means that he does not leave his country of origin out of (fear of) persecution, but he becomes a refugee due to circumstances arising in his country of origin during his absence (UNHCR, 1992). Lastly, another type of international protection is ‘temporary protection’, which has been discussed in the previous chapter.

2.1.2. Refugees: facts and figures

In 1951, the year in which the Refugee Convention was adopted and the Office of the United Nations High Commissioner for Refugees was established, there were about 1 million refugees within the UNHCR’s mandate. Back then, most of the refugees were European. The majority of today’s refugees are from countries outside the European continent (OHCHR, 1992). In 2010³, there were 15.4 million refugees around the world, of which an estimated 80 percent are women and children. According to the UNHCR, the leading countries of origin for refugees in 2010 were:

³ At the time of writing, the numbers of 2011 are not yet available. The most recent numbers are of the year 2010.

Afghanistan (3.000.000), Iraq (500.000 – 1.700.000), Somalia (860.000), Democratic Republic of Congo (476.700) and Burma (415.700) (Refugees International, n.d.).

It has to remain clear that the number of actual refugees differs from the number of asylum applications. For the purpose of this research, it is reasonable to focus on numbers of asylum applications and (positive) decisions. Since decisions on the granting of any type of international protection are not necessarily taken in the same year as the application, the numbers of decisions taken in a certain year may differ from the number of applications (UNHCR, 2011a). Such is the case for the year 2010, in which 235.900 asylum claims have been registered (UNHCR, 2011b), whilst only 222.070 decisions on applications for asylum have been taken. This number does not include decisions taken after appeal (UNHCR, 2011a). On a global scale, the total number of applications for asylum amounted to an estimated 728,000 (UNHCR, 2011a).

2.1.2.1. Origin of asylum seekers: EU and Spain

In 2010 and within the EU, most asylum claims, - about 10 % of the total number-, were submitted by individuals originating from Afghanistan (20.590). Other countries ranking in the top five of main countries of origin of asylum seekers in EU countries in 2010 are, respectively, Russia (18.590), Serbia (17.745), Iraq (15.800) and Somalia (14.355) (See ANNEX I)

Since this research focuses on Spanish law and practice, facts and numbers on asylum claims within the Spanish territory cannot be lacking. In 2010, the main countries of origin of asylum seekers in Spain were Cuba (406), Nigeria (237), Algeria (175), Guinea Conakry (166), Colombia (123) and Ivory Coast (119). The high number of applications from Cubans is due to the acceptance of over 300 released prisoners and their families, which was the result of an agreement between the Spanish Government and Cuban authorities (CEAR, 2011b).

2.1.2.2. Decisions taken

As mentioned above, in the course of the year 2010, 222.070 decisions on first-instance asylum applications were taken in the EU. The vast majority (167.025) of the applications were rejected, which means that only 55.460 decisions were positive. There were 27.035 decisions for refugee status, 20.410 decisions for subsidiary protection, and 8.090 persons were allowed to stay based on humanitarian reasons. The EU country in which most decisions on asylum applications were taken in 2010, is Germany (45.310), followed by France (37.610), Sweden (27.650), and the United Kingdom (26.690) (See ANNEX II).

As regards Spain, although it has become one of the EU countries that receive the lowest number of applications⁴, the Spanish government every year rejects a high percentage of asylum

⁴ It has to be taken into account that the number of *applications* does not equal the number of *arrivals* of migrants and refugees.

applications (Planas, 2011.) In 2010, only 2.738 applications for asylum have been admitted to the actual asylum procedure, which number is low compared to the number of migrants that arrived in Spain in the same year, and most likely very low compared to the number of migrants that *intended* to arrive in Spain, but were blocked on their way. The number of migrants that arrived by boat only, was already considerably higher, that is 3.632 persons (CEAR, 2011 b). In the same year, 2.785 decisions on asylum claims were taken (See ANNEX II). These numbers include applications issued, and decisions taken in the whole of Spain, including the Canary Islands and the Spanish enclaves Ceuta and Melilla.

The small amount of applications and decisions can be ascribed to the lack of information provided on the right to apply for international protection on the part of Spanish authorities (Amnesty International, 2005); and difficulties for asylum candidates to reach Spanish territory and to have access to the Spanish asylum procedure, which latter two are caused mainly by restrictive laws and practices on national and European level (CEAR, 2011 b). In Chapter 3 and 4, these difficulties will be discussed and analysed in detail. Of the 2.785 decisions taken, 2.175 were negative, which means that only 610 of the applicants were allowed to legally reside on Spanish territory. 245 Persons were granted refugee status, 350 persons acquired subsidiary protection status, and 15 persons were allowed to stay based on humanitarian reasons (See ANNEX II). This low number of positive decisions is quite worrisome and can be mainly attributed to the high number of asylum applications that are deemed inadmissible (Amnesty International, 2005), and to the strict application of the law in cases that are admitted for processing.

2.1.2.3. Refugee organisations

On the global level, the most well known, influential and omnipresent entity dealing with refugees is the Office of the United Nations High Commissioner for Refugees. The UNHCR headquarters are located in Geneva, Switzerland, but the agency has offices in over 100 countries. According to Article 1 of the Statute of the Office of the UNHCR, the main task of the High Commissioner is to provide international protection to refugees and to seek durable solutions for refugees. This will be achieved by assisting governments to facilitate the voluntary repatriation of refugees, or their integration within new national communities (OHCHR, 1992).

Besides UNHCR, there are numerous organisations that are involved in the issue of refugees, on local, national and regional level. On the European level, The European Council of Refugees and Exiles (ECRE) can be considered the main entity in the field of refugees and international protection. ECRE is an alliance of 70 refugee assisting organisations in 30 European countries that promotes the protection and integration of asylum seekers, refugees and IDPs and aims to bring the refugee issue higher up the European agenda (ECRE, n.d.). In Spain, the main organisations that are specialised in Asylum and International Protection are: CEAR (The Spanish Refugee Aid

Commission; Comisión Española de Ayuda al Refugiado), ONG RESCATE Internacional, ACCEM, Cruz Roja (Red Cross), and of course UNHCR, which goes by the Spanish name of “Alto Comisionado de las Naciones Unidas para los Refugiados” (ACNUR) (ACNUR, 2011). These organisations provide, amongst others, direct social and legal assistance to refugees and migrants.

2.2. Human rights

Now that the term *refugee* has been discussed in detail, in the following the focus will move towards the matter of *human rights*. Although giving a definition of the concept of human rights might not entail too many difficulties, placing it in context undoubtedly will. The discussions surrounding human rights have been around probably as long as the concept itself. These discussions mainly focus on the universality of these rights.

Before going into the details of these discussions, it should be clarified what exactly is understood by the term human rights. There are many different definitions of the concept, but the essence will most likely be more or less uniform. Negative definitions focus on ‘protection’, while positive definitions focus on the rights enjoyed by people. An example of a negative formulation is:

‘Human rights are international norms that help to protect all people everywhere from severe political, legal, and social abuses (Stanford Encyclopaedia of Philosophy, 2010)’

An example of a positive definition is as follows:

‘Human rights are basic rights and freedoms that all people are entitled to regardless of nationality, sex, national or ethnic origin, race, religion, language, or other status (Amnesty International USA, 2012)’

For the purpose of this research, the latter definition will be applied.

Mainly due to the ongoing work of the United Nations, the universality of human rights has been clearly established and recognized in international law. It is generally accepted that the Universal Declaration of Human Rights (UDHR) is the foundation of the international system of protection for human rights. The Declaration was adopted by the United Nations General Assembly on December 10th, 1948 (Amnesty International USA, 2012). Universal Human Rights are further established by the two international Covenants on human rights (International Covenant on Economic, Social and Cultural Rights (ICESCR); and International Covenant on Civil and Political Rights (ICCPR) and many other -more specific- instruments (Ayton-Shenker, 1995).

The Preamble of the UDHR prescribes the universal nature of human rights, proclaiming the Declaration as a "common standard of achievement for all peoples and all nations". However, the universality of these rights is highly contested. The main counter-argument is brought by cultural

relativists, who believe that universal human values and the human rights that derive from these, cannot exist in a culturally diverse world (Ayton-Shenker, 1995).

However, it is argued that universal human rights do not preclude cultural diversity. Rather than imposing one cultural standard, universal human rights constitute a legal standard of minimum protection. These rights do not represent a certain culture, but are the outcome of the coordinated efforts of the international community, with the aim of creating a common standard and an international law system to protect human dignity (Ayton-Shenker, 1995).

The fact that human rights include both *civil and political rights*, such as the right to life, liberty and freedom of expression; and *social, cultural and economic rights*, such as the right to participate in culture, and the right to receive an education (Amnesty International USA, 2012), means that these are partly designed to respect and protect cultural diversity and integrity. Cultural rights are however not unlimited. Since no right can be used at the expense of another, cultural freedom ends at the point at which it infringes on another human right (Ayton-Shenker, 1995).

Although the above mentioned international human rights instruments also apply in Europe, some regional instruments have been designed that are only applicable within the Member States of the European Union and of the Council of Europe. The most important instruments are the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the Charter of Fundamental Rights of the European Union (CFREU). Both instruments will be discussed in more detail in the following section.

2.3. ‘Human rights’ and ‘refugees’: two closely linked concepts

It might not be ground-breaking news that there is a direct relation between human rights and the refugee issue. As discussed before, the severe violation of human rights in many cases amounts to (fear of) persecution and is therefore among the mayor causes that make a person become a refugee. However, this is not the only relation between the concept of human rights and refugees. Many refugees have their human rights violated again after leaving their countries. During the process of seeking asylum, the minimum rights of refugees are often disregarded by means of restricting measures which deny access to safe territories, detention, forcible returns, and so on. Refugees, like all human beings, have rights that should be respected both before, after, and during the process of seeking asylum. Full respect of human rights would serve as both a prevention and a solution to “the refugee problem”.

The most important right that refugees are entitled to is the right of ‘protection’, which includes amongst others, the prevention of refoulement and assistance during the application process for asylum. Although The Geneva Convention does not define the right to protection as a separate right, it does imply the right in its articles, especially in the substantial Article 33 on non-

refoulement. Besides, the right has been laid down in Article 8 of the Statute of the Office of the High Commissioner of Refugees (OHCHR, 1992).

For the purpose of this research, the focus will be on the human rights linked to the non-refoulement principle, that is; all those human rights that should be respected at the time of arrival of an asylum seeker and when processing his application. These rights are linked to access to the safe territories, access to the asylum system, fair and adequate assistance during the application process, etcetera. The violation of (any of) these rights could –but does not necessarily- lead to a violation of the non-refoulement principle.

In the following, an analysis will be made of international human rights that are linked to the non-refoulement principle. However, it would be a considerable job, and outside of the scope of this research, to analyse all current human rights instruments. Accordingly, a limited amount of instruments has been selected, which also enables to study them more in depth. That is: The European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention, or ECHR), and the Charter of Fundamental Rights of the European Union (the Charter, or CFREU).

The selection of these instruments is based on the fact that they are the main European instruments dealing with human rights. Besides, the rights laid down herein reflect to a high extent –in some cases literally- the content of other international instruments such as the UDHR. Lastly, these two instruments have a more direct link to the law and practice in Spain, than do the instruments that apply worldwide.

Before the Charter and the Convention will be analysed, first the scope of these conventions will be discussed. Obviously, it is essential to assure that these rights do in fact apply to refugees just as much as they do to (original) European citizens.

2.3.1. The scope of European human rights instruments

The universal character of international human rights instruments, such as the Universal Declaration on Human Rights, makes them applicable to all people, without distinction. This means that also asylum seekers and refugees are entitled to all these rights and fundamental freedoms (OHCHR, 1992). The European instruments, however, are not so clear on the applicability of the rights they contain.

Although the Convention does refer to the universal human rights in the UDHR, its own scope is defined in a more narrow -though imprecise- way, referring to “everyone within the jurisdiction of the High Contracting Parties” (Article 1 ECHR). The expression “everyone” in itself can be understood as an expression of the universal nature of the rights in the Convention, as do formulations like “all members of the human family”, and “all peoples” in the preamble of the

UDHR. Yet the expression, “within their jurisdiction” seems to limit the number of people covered by the Convention.

Still, this is not the intention of this additional criterion, but it actually serves to establish a necessary link between “everyone” and the Member State; it must be physically possible for the State to secure the rights. This does not mean that these rights can and should only be guaranteed to those who have the nationality of the state, or who officially reside in it. If the state is able to exercise a certain power relative to the person, the person is already “within its jurisdiction”. This means that the Convention protects not just the rights of citizens, but also those of aliens, stateless persons, and so on (Gomien, 2000).

The preamble of the Charter refers to ‘the people of Europe’ and later on to ‘the human community’, but does not define its scope more precisely. However, this happens later on, in Article 52, in which the scope of the Charter is explained by referring to other Treaties and Conventions:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection (Art 52 (3) CFREU).

Most of the CFREU articles that are of interest to this research correspond to rights guaranteed by the Convention, and thus have the same scope. Yet, those articles that do not correspond will be mentioned explicitly.

2.3.2. The non-refoulement principle in European Human Rights Law

Unlike the Universal Declaration of Human Rights and also the CFREU, the Convention neither contains the right to asylum, nor a direct reference to asylum seekers or refugees. However, many of the rights laid down in this document are directly applicable to refugees. In the following, an analysis will be made of those rights that are either directly or indirectly linked to the non-refoulement principle, of both the Charter and the Convention. Before that, some basic information on the two main European human rights instruments will be provided.

2.3.2.1. The Convention and the Charter: a short introduction

The European Convention of Human Rights and Fundamental Freedoms is the first Convention of the Council of Europe that aims to protect human rights. Before joining the Council of Europe, an aspirant member must ratify this Convention. This means that all members of the Council are necessarily contracting parties to the Convention. The Convention was adopted in 1950 in Rome, and would enter into force as soon as it was signed by ten states. This happened on September 3rd, 1953. Since then, many states have joined the Council, and today, there are 47 members, and

accordingly 47 states are bound by the Convention (Council of Europe, 2010 a; Council of Europe 2012). To judge on violations of the rights laid down in this Convention, the European Court of Human Rights was established. All Member States of the Council of Europe are bound by its judgements (euABC.com, 2010). Although the two bodies function independently, the Council of Europe is often wrongly assumed to be part of the European Union. The Council was founded before the precursor of the EU and over the years has come to comprise many more countries than the Union –most likely- will ever do.

Spain joined the Council of Europe, and signed the Convention on 14 November 1977. Yet it took two more years before the Convention was ratified by the Spanish authorities. The Convention eventually entered into force 4 October 1979 (Council of Europe, 2010 a; Council of Europe 2012).

The European Union Charter of Fundamental Rights was signed and proclaimed by the European Parliament, the Council and the Commission on 7 December 2000, in Nice (European Parliament, 2001). Besides fundamental human rights and economic and social rights, the Charter also reflects principles derived from jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights. Since December 2009, based on Article 6 of the Lisbon Treaty (Treaty of the European Union), the Charter has binding legal effect, equal to the EU Treaties (European Union, 2010).

2.3.2.2. Human rights related to the non-refoulement principle

As discussed before, there are two ways in which human rights can relate to the issue of ‘refugees’ and more specifically to the non-refoulement principle. First, the violation of certain human rights can amount to persecution and therefore can be the basis on which an asylum seeker *cannot* be sent back to his home country. Not necessarily any violation of one of these rights will amount to persecution; it depends on the seriousness of the violation, the way in which it affects a certain individual and on the amount of violations, since many often occur in the context of multiple violations.

Second, human rights can be violated when a person arrives at (the borders of) a safe country and during the process of his asylum application. However, both groups partly overlap. For example, rights related to persecution (if violated), can be also be violated by the host country, when it decides to involuntarily return a refugee to a country where these rights are not protected. More human rights violations are possible at a later stage of asylum, but – unless a person is expelled to an unsafe country later on- those have no relation to the non-refoulement principle.

The CFREU and ECHR contain both provisions that are related to reasons for persecution and provisions that relate to refugees’ rights. In the following, first the human rights that can be, if

disregarded, amount to persecution will be analysed. Then, the focus will move towards those rights that, if violated in relation to a refugee, can be in breach with the non-refoulement principle. Some articles will fall within both groups.

2.3.2.2.1. Human rights violations in the country of origin

The following rights are directly linked to the official definition of a ‘refugee’ -and therefore also to the non-refoulement principle-, since they, if violated or not protected by the country of origin of a person, may amount to persecution. The following is not the literal wording of the articles, but aims to display the essence of their content in regards to the purpose of the analysis:

1. The right to life, Article 2 ECHR and Article 2 CFREU:

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. The right to the integrity of the person, Article 3 CFREU:

Everyone has the right to respect for his or her physical and mental integrity.

3. Prohibition of torture and inhuman or degrading treatment or punishment, Article 3 ECHR and Article 4 CFREU:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

4. Prohibition of slavery and forced labour, Article 4 ECHR, and Article 5 CFREU:

No one shall be held in slavery or servitude; No one shall be required to perform forced or compulsory labour.

5. Right to liberty and security, Article 5 ECHR and Article 6 CFREU:

Everyone has the right to liberty and security of person

6. Right to freedom of thought, conscience and religion, Article 9 ECHR and Article 10 CFREU:

Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance ... etcetera.

7. Right to freedom of expression, Article 10 ECHR and Article 11 CFREU:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

8. Freedom of assembly and of association, Article 11 ECHR and Article 12 CFREU:

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests

Since these rights are based on universal and internationally acknowledged human rights, they apply to all people. However, many of these rights are often violated, which in a considerable amount of cases leads to persecution and accordingly, refugees. People who flee from their countries of origin because these rights are violated, and because they are not protected by their governments, are entitled to international protection. This is where the non-refoulement principle comes into play.

2.3.2.2.2. Human rights violations in the host country

A more indirect link between the above mentioned human rights and non-refoulement exists in relation to the host country. If a host country sends a refugee back to the country where these rights are violated, the concerning host country ‘co-violates’ this right and possibly is breaching the non-refoulement principle.

All of the above mentioned human rights, as established by the Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union, are implicitly mentioned in Article 33 on non-refoulement of the Refugee Convention. The part of the definition “*his life or freedom would be threatened*”, which can be interpreted as a definition of ‘persecution’, comprises the right to life, the right to the integrity of the person, the prohibition of torture, the prohibition of slavery, and the right to liberty and security. The last part of the article, which explains the possible grounds for persecution, reflects the right to freedom of thought, conscience and religion; the right to freedom of expression; and the freedom of assembly and of association.

These rights are often called upon by the Court of Justice of the European Union to deal with the non-refoulement issue, thus to protect asylum seekers and refugees. The court has especially stressed the unconditional nature of the prohibition against torture, and interprets the right as an extension of the non-refoulement principle. That is, no one may be returned to a place where they would face a “real and substantiated” risk of ill-treatment (HREA, n.d.; Rodger, 2001; UNHCR, 1997). It must be stressed that ‘ill-treatment’ not necessarily needs to be for one of the motives mentioned in the refugee definition (Planas, 2011). By establishing this, the Court amplified the scope of non-refoulement to persons that might not qualify as refugees, but yet are in need of international protection, that is persons who are eligible for ‘subsidiary protection’.

2.3.2.2.3. Human rights directly linked to non-refoulement

The following rights can be violated directly by a host country, and if so, it can lead to a breach of the non-refoulement principle. The violation should be in relation to a refugee, a person applying

for asylum, a person with refugee status, or a person that might apply for asylum. As explained before, for an adequate and integral application of the Refugee Convention, the non-refoulement principle should be interpreted broadly. That means that it should also apply to asylum seekers ((possible) refugees) who are on their way, but who have not reached the borders of a country yet. Besides, many people who (try to) enter European territory, are not aware of the right of international protection, although many of them might officially be refugees. Therefore, sending back a possible asylum candidate before informing him on his rights to apply for international protection, can also be considered an infringement of the non-refoulement principle. The following is not the literal wording of the articles, but aims to display the essence of their content in regards to the purpose of the analysis:

1. Right to asylum, Article 18 CFREU:

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

2. Protection in the event of removal, expulsion or extradition, reflected in Article 4 of Protocol 4 to the Convention and Article 19 CFREU:

Collective expulsions are prohibited.

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.

3. Right to non-discrimination and equality for the law, Article 14 ECHR and Article 20 and Article 21 CFREU:

Although the Charter prohibits

“any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation”,

the Convention only prohibits discrimination in conjunction with one of the rights and freedoms set out in the Convention. Yet, the additional Protocol n°12, which was opened for signature on 4 November 2000 and entered into force on 1 April 2005, introduced the general prohibition of discrimination (Article 1 Protocol n°12 ECHR; De Schutter, 2005). In 2010, the Protocol had been ratified by 17 States amongst which Spain. In Spain, the Protocol entered into force on June 1, 2008 (Council of Europe, 2010 b).

All States Parties to the additional Protocol N° 12 are legally obliged to apply the right to non-discrimination to any right set forth by law. Besides, those states parties that are also Member States of the EU have the same obligation under Article 21CFREU.

Everyone is equal before the law

4. Right to an effective remedy and to a fair trial, Article 13 ECHR and Article 47 CFREU:

Everyone whose rights and freedoms guaranteed by the law are violated has the right to an effective remedy before a tribunal.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Where the right to asylum and the protection in the event of removal, expulsion or extradition are obviously linked to the non-refoulement principle, the relation with the other mentioned rights is less apparent. Both the right to non-discrimination and equality for the law emphasize the universality of the rights laid down in these instruments, which means that all these rights do apply to all people and not only citizens of the state parties. Besides, the right to non-discrimination has many more consequences that are related to non-refoulement. For example, a person cannot be sent back based just on his nationality.

The right to an effective remedy and a fair trial is an essential right for an asylum seeker. It provides that: he has the right to appeal against the decision of the Court on his application; he has the right to a lawyer; he has the right to effective access to justice, which entails the right to a translator, the right to be informed on his rights and the possibilities, the right to be heard, and so on. Assuming a broad interpretation of non-refoulement, the (serious) violation of any of the rights implied in these articles can be considered to be a breach of the non-refoulement principle.

Referring back to the scope of these human rights instruments, some of the analysed Charter articles do not correspond to articles in the Convention and therefore do not automatically have the same (universal) scope. This concerns Article 2 on the right to the integrity of the person, and Article 18 on the right to asylum. Nevertheless, both articles can, for their own reasons, be interpreted to be (also) applicable to asylum seekers and refugees. Article two refers to ‘everyone’, and does not mention any limitations. Therefore it can be interpreted as a universal right. Article 18 refers –amongst others- to the Refugee Convention and the 1967 Protocol and has the same scope as these instruments.

3. The Non-refoulement principle and related human rights in Spanish law

This paper started with a wide focus, explaining the universal definitions of refugee and non-refoulement. After that, it was brought down to European level, analysing European human rights that are linked to the principle of non-refoulement. The next step is to see how non-refoulement and human rights that are linked to the principle are reflected in Spanish asylum and immigration law, bringing the focus down the national (and final) level.

Since Spain is a member of both the Council of Europe and the European Union, it is automatically a contracting party to the human rights instruments that have been adopted by these two bodies, which are the European Convention of Human Rights and Fundamental Freedoms and the European Union Charter of Fundamental Rights. The Lisbon Treaty, 2009, which amends the Treaty on the European Union, acknowledges both documents. Article 6 (1) of the Lisbon Treaty states that the freedoms and principles set out in the Charter shall have the same legal value as the Treaties. This means that Spain, as all Member states of the EU, is bound by the Charter. Moreover, for being a member to the Council of Europe and having signed the Human Rights Convention, Spain must ensure that its domestic law is compatible with the Convention, even if that means that it needs to make some adjustments to its law and practice (Gomein, 2000). Accordingly, Spanish national law should –in theory- not contradict any of the human rights laid down in these instruments. However, the implementation of European law takes various forms according to the countries and laws in which it is put into effect.

Next, an analysis will be made on how non-refoulement and related human rights, as set out in the Refugee Convention and European human rights instruments, are implemented in Spanish asylum and immigration law. Yet, before that, some necessary information will be provided on the current Spanish immigration and asylum laws and how these have developed over the years.

3.1. Spanish asylum law and development over the years.

Before critically analysing Spanish law, it is essential to know which are the principal laws that address asylum related issues, as well as how they came into (their current) being. For the purpose of this investigation, the focus will be on the general immigration law which is currently in force (*Ley de Extranjería*) and the latest update of the more specific asylum law (*Ley de Asilo*).

3.1.1. Ley de Extranjería

The current Immigration Law, titled *Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social* (Organic Law 4/2000, of January 11, on the rights and liberties of foreigners in Spain, and their social integration) is the legal framework which regulates –as the title already indicates- the rights, freedoms and obligations of foreigners in Spain. Besides this main instrument, there are other tools, such as Regulations and

Royal Decrees that should be employed when it comes to interpreting the legal situation of foreigners in Spain (Ajuntament de Barcelona, n.d.). Each law is supported by a Regulation that serves as an instrument to apply the law.

Compared to Spain's former immigration laws, the Organic law 4/2000 in its original form was quite liberal. However, soon after it came into force, Aznar's Popular Party won the elections and within a short time the new immigration law was amended. There were so many reforms to the original law, that many critiqued it as a complete new law, which was notably more restrictive than its predecessor (Ferguson, 2011). The law was modified again in 2003 and 2009. The Organic Law is supported by a Regulation, which is a tool for interpretation, based on current developments and modifications of the law. The current version of the Regulation is approved by Royal Decree 557/2011, which entered into force on June 30, 2011 (Real Decreto 557/2011).

3.1.2. Ley de Asilo

The first law that regulated the right to asylum and refugees status dates back to 1984 and is titled *Ley 5/1984, de 26 de marzo, reguladora del derecho de asilo y de la condición de refugiado* (Law 5/1984, of march 26, regulating the right to asylum and refugee status). It has been in force until November 20, 2009, when it was replaced by the current asylum law.

Law 5/1984 set out two types of protection with different statuses, that is, asylum and refuge. In general, the law was applied in a very restrictive way, and did not correspond to the spirit of de Refugee Convention (Planas, 2011). A profound revision of the law took place in 1994. The law was adapted to the rising number and changing characteristics of applications for international protection. Besides, other shortcomings were improved (Ley 12/2009, preamble). The former two types of protection were brought down to one, and rules were introduced to exclude certain applications from further investigation, which means that these applications would not be admitted to the actual asylum procedure. This latter rule was introduced to facilitate the processes of asylum applications, eliminating at first instance those applications that were clearly unfounded. Positive changes in this new law were the improved protection of refugees and the granting of an important role to UNHCR. Nevertheless, the law also contained new restrictive measures, taken from other European countries, such as detention of those persons who apply for international protection at the borders (Planas, 2011).

In 2009, the first asylum law was replaced by the current asylum law, titled *Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria* (Law 12/2009, of October 30, regulating the right to asylum and subsidiary protection). This law has been in force since November 20, 2009. Yet, at the time of writing, the corresponding Regulation has not yet been issued, which means that there is no instrument available which facilitates the application of the law (Ley 12/2009).

Since the European Union is working towards the harmonisation of the European asylum system, the current law is adapted to those European instruments that have already entered into force. One of the main European instruments, which is incorporated into the current Spanish asylum law, is the before mentioned Qualifications Directive (Ley 12/2009, preamble). Besides positive influences of European asylum law that sets minimum standards for EU Member States, the new Spanish asylum law also reflects xenophobic attitudes present within countries of the Union. These attitudes can be found in provisions that exclude persons who have committed political crimes in their country of origin, or in the exceptional nature of the admissibility stage (more information on this can be found below). It can be stated that these provisions are based on fear for the ‘other’ and aim to keep out any one that might constitute a threat to Spanish society. The interest of the states, especially concerning security issues, have clearly taken precedence over the right to asylum (Planas, 2011).

3.2. Non-refoulement in Spanish immigration law

Since each country has the prerogative to regulate entries into their territory, the way in which international (human rights and refugee) law is implemented into national law instruments can differ considerably from country to country. Also the determination of refugee status is not specifically regulated in any international agreement and it is left to each state to establish the procedure (UNHCR, 1992). Accordingly, the procedures vary considerably.

Therefore, it is interesting to take a closer look to national – in this case Spanish- laws to find out how they reflect international human rights and refugee law principles. Only a detailed study can show whether these principles haven been respected entirely, or whether a way was found to carefully work around them, as in an inconspicuous intent to escape from certain obligations. Since the Spanish asylum law specifically deals with asylum related matters such as non-refoulement and related human rights, this law will be analysed first. Afterwards, a shorter analysis of the general immigration law will follow. Both analyses focus only on those provisions in which the non-refoulement principle is reflected, or (any of) the human rights that are linked to the principle. Especially those articles that lay down provisions that fully respect or even amplify the right to non-refoulement, and those that violate the principle will be emphasized. To prevent repetition and excessive elaboration, the following analysis will contain, most, but not all articles related to non-refoulement.

3.2.1. Ley de asilo

Although this analysis focuses specifically on the Spanish asylum law, *Ley 12/2009*, it has to be clear that this law cannot be interpreted nor applied without considering the (international) legal context in which it was designed and in which it operates. The right to asylum and international protection is not based on solely domestic (Spanish) legal sources, but is shaped by a body of

public international law instruments, of which the 1951 Refugee Convention is the most significant. All these instruments support, and are incorporated into, Spanish national law. Moreover, the Preamble of the Spanish asylum law also refers explicitly to jurisprudence of European Courts as an important source and motivation for the formulation of the current asylum law (ACNUR, 2011).

3.2.1.1. Respecting the non-refoulement principle

This part will analyse those articles set out in the current Spanish asylum law, which positively reflect the non-refoulement principle. Some of these articles, instead of referring directly to the principle, refer to one (or more) of the human rights that are connected to the principle. For the purpose of this investigation, the relevant articles will be critically analysed on the way in which they lay down the right at stake. An interesting fact that should be noted first, is that this law lays down the (international) right to asylum and international protection in a much more detailed manner as compared to the 1951 Refugee Convention. For instance, the essential first article of the Refugee Convention, which sets out the definition of a refugee, cessation clauses and exclusion clauses, is laid down in the first eight articles of the current Spanish asylum law (Ley 12/ 2009). This fullness of detail in itself can be seen as a positive interpretation of international asylum law, ensuring the correct application of the rights as laid down in the concerning document. However, a critical analysis of the exact formulation is necessary to determine whether the rights are fully respected.

The first articles that will be analysed refer directly to the non-refoulement principle and the right to asylum, which two concepts obviously cannot be separated. After that, other articles are examined, which reflect other human rights that are linked to non-refoulement.

3.2.1.1.1. Non-refoulement and the right to asylum

Article 3 of the Spanish asylum law sets out the definition of a refugee. The definition is almost identical to the original definition in the Refugee Convention, but without any geographical or time limitations, and includes two additional motives for persecution, which are sex and sexual orientation. In other words, the law amplifies the original definition, and therefore widens the scope of the rights that are linked to the definition. According to the wording of the article, it applies to ‘every person’ who falls under definition, without mentioning any limitation. The definition in this article is an extension as compared to the 1951 definition and therefore can be considered a positive application of the original concept. Nevertheless, the inclusion of gender and sexual orientation is no more than an accurate incorporation of current international human rights instruments, in which these concepts have gained more and more value over the years (Planas, 2011).

As for the interpretation of ‘well founded fear’, jurisprudence of the Spanish Supreme Court has established that the decision should not only depend on official evidence, but should also be based on the subjective element of fear. This ruling respects the exceptional and vulnerable situation of the great majority of asylum seekers and helps to prevent refugees from being sent back to places where they fear persecution (Planas, 2011).

Article 4 Ley 12/2009 on subsidiary protection again can be explained as an extension of the refugee definition. The article provides for subsidiary protection for those persons that suffer serious harm for reasons that are not covered by the Refugee Convention. The concept originates from jurisprudence of the European Court of Human Rights related to the right to protection against torture and degrading treatment (Maas, 2009; Planas, 2011). Since persons with subsidiary protection status in Spain enjoy the same rights as recognised refugees, the article is a welcome amplification of the refugee definition and therefore automatically extends the right to non-refoulement to a wider range of persons in need of international protection.

The protection against refoulement of both refugees and persons enjoying subsidiary protection is laid down in Article 5. Later on, Article 18, on the rights and obligations of asylum applicants, provides for the ‘suspension of expulsion’ of asylum seekers, which means that any asylum applicant (or, in case of a very accurate application of the right of protection against refoulement, any possible asylum applicant) cannot be expelled until their application has been resolved. This right is again confirmed in Article 19, on the ‘effects of an asylum application’, which prohibits expulsion until the application is resolved. After the resolution, the right applies only to those that are granted refugee status (Article 5) or those who appeal (to which apply both Article 18 and 19, since during appeal the person is still applying for asylum) (Ley 12/2009).

3.2.1.1.2. Related human rights

Both Article 6 and Article 7 Ley 12/2009 reflect some of the main human rights that are closely connected to the non-refoulement principle. Article 6 lays down acts of persecution on which well founded fear can be based, while Article 7 elaborates on the motives for persecution. Article 6 gives a very open interpretation of ‘persecution’, describing it as a grave violation of human rights, or as repetitive violations of a lesser degree, since the accumulation of ‘low level’ human rights violations might also result in a serious human rights violation (Planas, 2011). According to the article, acts of persecution can be: physical, sexual or psychological violence; discriminatory laws or the discriminatory application of law; discriminatory or disproportional punishment; the lack of legal protection, sexual acts, etcetera. Since there does not exist a universal definition of ‘persecution’, this broad interpretation is very positive, protecting many human rights, such as the right to life, the right to no-discrimination, the right to liberty and security, the right to a fair trial and the protection against torture (Ley 12/2009).

Article 7 Ley 12/2009 again is an amplification of the corresponding Article (1)(a) Refugee Convention. Nevertheless, it does not include additional motives as compared to established European standards, reflecting almost literally the wording of Article 9 of the Qualification Directive (Council Directive 2004/83/EC). The article incorporates many of the same human rights - although more indirectly- as article 6, such as the right to life, the right to no-discrimination and the right to liberty and security.

As mentioned before, the concept of subsidiary protection is based on jurisprudence of the European Court of Human Rights linked to the interpretation of the right of protection against torture and degrading treatment. In the Spanish asylum law, Article 4 and 10 are the main articles dealing with subsidiary protection and thus incorporating this crucial human right. Article 10 gives a definition of ‘serious harm’, which condition makes a person eligible for subsidiary protection status (as laid down in Article 4 of the same law). According to Article 10, ‘serious harm’ can mean any of the following: a conviction of the death penalty or a risk of the execution of the death penalty; torture or degrading treatment; or a serious threat against the life or integrity of a person for indiscriminate violence. The article does not mention that the threat has to be personal and therefore aligns with jurisprudence of the European Court of Human Rights, which established on February 17, 2009 (*Elgafaji vs. Netherlands*) that the sole presence of a person in his country of origin can be a real risk of suffering serious threat (harm) (Planas, 2011).

Lastly, the right to a fair trial, which is an indispensable component of the non-refoulement principle, is generously reflected in many of the law’s articles. First, Article 16, on the right to apply for international protection, lays down the right to free legal assistance during the formulation of the application and during the whole process until resolution. Moreover, it sets out the right to a translator, which increases the chances on a fair and comprehensive investigation of the case. Finally, the application for asylum in Spain automatically leads to the investigation of both refugee status and subsidiary protection status, which enhances the chances of being granted a certain type of international protection (Art. 16 Ley 12/2009).

Then, Article 17 provides for the possibility for the applicant to contact with UNHCR, or NGOs that are concerned with refugees. The applicant must be informed on this right. On top of that, according to the same article, during the interview(s) with the asylum seeker, the sex of the asylum seeker must be taken into account. This sensibility towards the vulnerable situation of (certain) refugees, helps to somehow facilitate the application process and makes it more just (Ley 12/2009).

Once the application is issued, the applicant maintains the right to free legal assistance and a translator, during the whole procedure. In addition, the application will be forwarded to UNHCR. (Article 18 Ley 12/2009). The latter is repeated in Article 34, which adds that UNHCR has access

to the each applicant's file, has the right to add relevant information to it, can be present during the hearings, and has access to the applicant, also if they reside in border centres or migrant detention centres. The involvement of UNHCR, which is an international and independent body that operates to protect the rights of refugees around the world, seriously enhances the fairness of the process. Article 35 continues on the role of UNHCR, adding that its Spanish representatives will be summoned to the sessions of Commission of Asylum and Refuge, in which sessions the application files are investigated and decisions are proposed. During these sessions the UNHCR representatives have a voice, but no vote. Lastly, UNHCR not only has access to the asylum applicants, but they also have the right to interview them (Ley 12/ 2009).

The right to a fair trial is also reflected in those articles that provide for the possibility to appeal. Article 21, on applications presented at the border, lays down the right to re-examination of those cases which are not admitted to the asylum procedure, or those applications that are accepted at first instance, but are refused after further investigation. Article 29 sets out the possibility to a revision of applications in general, but requires the existence of new proof (Ley 12/ 2009).

3.2.1.2. Violating the non refoulement principle

In the following, the focus will be on those articles that seem to violate the non-refoulement principle, either directly, or through the violation of a human right that is connected to the principle. Again, the relevant articles will be critically analysed on the way in which they lay down the right at stake. ‘Violation’ in this context must be used carefully. Most likely, a law will never directly violate an international human right. However, the provisions of a law can be formulated in such a way that they circumvent, not fully respect, or even disregard certain rights.

3.2.1.2.1. Non-refoulement and the right to asylum

The following articles seem to jeopardise the accurate application of the right to asylum and the non-refoulement principle. The first article that should be considered is Article 20, on the non-admission to the asylum procedure of applications presented on Spanish territory. The law makes a clear distinction between applications presented at the border and applications presented within the territory. In both situations, an application can be denied at first instance, which means that the case is not admitted to the asylum procedure (Ley 12/2009).

Article 20 sets out the reasons for non-admission of applications presented on Spanish territory. Some of these reasons possibly jeopardise the non-refoulement principle. For instance, an application will not be further investigated if the Spanish authorities do not have the competence according to international conventions such as the Dublin Regulation 2003/343/CE, which establishes criteria to determine which country is responsible for examining the asylum application of a third country national. As discussed in Chapter One, this Regulation established that an

asylum seeker has to apply for international protection in the first Member State where he enters the European Union. If he tries to apply in another country, he will be sent back to the state where he entered the EU. This rule is based on the presumption that all EU Member States have a similar asylum system, in which human rights are fully respected. Yet, this is not the case. Firstly, not all EU countries will accept the responsibility to examine the request and secondly, not all EU countries have a well functioning asylum system that protects the rights of refugees, amongst which the right to not be sent back to territories where he faces persecution.

For example, Greece lately has been seriously criticised for the malfunctioning of its asylum system and the severe human rights violations of refugees. Nevertheless, it has taken too long before European States excluded Greece from the ‘Dublin area’, that is, before deciding not to send asylum applicants back to Greece considering the precarious asylum system in the country.

Important European Court of Human Rights case-law in this regard, is the *M.S.S. vs Belgium and Greece* case. The applicant, M.S.S., an Afghan national had entered the European Union through Greece, but had continued his journey and had applied for asylum in Belgium. By virtue of the Dublin Regulation, the Belgian Aliens Office requested Greek authorities to take charge of the application. Yet, the Office did not receive an answer from the Greek authorities and accordingly interpreted this as a tacit acceptance. Moreover, despite a letter sent by UNHCR in which it criticized the deficient asylum system and the conditions of reception of asylum seekers in Greece, and recommended the suspension of all transfers to Greece, the Aliens Office ordered the applicant to leave and apply for asylum in Greece (European Court of Human Rights, 2011).

The Court found both Belgium and Greece guilty of several fundamental human rights violations. For the purpose of this paper, it is essential to notice that the Court concluded that the applicant’s removal by Belgium to Greece constituted a violation of Article 3 ECHR. According to the Court, Belgium had been aware of the deficiencies of the asylum procedure and poor reception conditions of asylum seekers in Greece, and therefore knowingly had exposed the applicant to detention and living conditions that amounted to degrading treatment, in violation of Article 3 ECHR (European Court of Human Rights, 2011).

At moment of writing, asylum seekers that apply in Spain, but have entered the European Union in Greece, will not be sent back, but are admitted to the asylum procedure in Spain. Still, as for those applicants that have been sent back to this member country previously, many of them might have been subjected to severe human rights violations and some might have been forcibly returned to territories where they face persecution.

Article 20 also incorporates the safe third country principle, referred to in Chapter One. This principle allows the Spanish authorities exclude from the right to international protection, those asylum seekers coming from countries that are considered ‘safe’. This principle endangers the non-

refoulement principle for two reasons. First, the determination of a country as ‘safe’ might be based not only on the actual living conditions of the people, but also (rather) on inter-state political interests. Second, although a country might be generally safe, this is not necessarily the case for every single resident.

The safe third country principle not only puts at risk the right to non-refoulement, but can also be interpreted as discrimination based on nationality and therefore violates international human rights and even contradicts Article 3 of the same Spanish asylum law. Although these provisions might disregard the non-refoulement principle, they fully respect the European standards, which standards on its turn can be considered contradictory to (European) human rights conventions.

Article 21, on applications presented at the border, after repeating the clauses for non-admission to the asylum procedure laid down in Article 20, includes additional reasons that make a claim inadmissible. These additional exclusion clauses establish an important difference between the border procedure and the procedure on territory. For example, an application presented at the border can be denied to the asylum procedure if the statements of the asylum seeker are considered to be unfounded. A statement can be unfounded for being incoherent, implausible, or contradictory to the information available about the person’s country of origin.

This early screening procedure during which is decided whether an application is admitted to the actual asylum procedure or not, was introduced to avoid investigating unfounded claims or claims that do not correspond to Spain (Planas, 2011). However, it risks not to take enough details into account, denying claims that might prove to be founded in a later phase, after a more profound investigation. Indeed the inadmission of a claim and the subsequent expulsion of an actual refugee, is a direct violation of the non-refoulement principle.

Besides, the statements of just arrived asylum seekers might seem incoherent or implausible at first instance for various reasons, which are not always taken into account. First, most people that just arrived have been through a lot, are (psychologically and physically) exhausted and are therefore not able to immediately and adequately present all the necessary details. Second, many asylum seekers feared the authorities in their country of origin, and therefore will not easily open up towards their interviewers. Also the fact of being in another country, an unknown environment, etcetera, can have a negative effect on the way the statement is presented (ACNUR, 2011; UNHCR, 1992). If these factors are not taken into account, a claim can be considered ‘unfounded’ wrongly, which might lead to the expulsion of an actual refugee. As stated by UNHCR, incoherent or implausible statements should not be a reason for refusal for refugee status, or the non-admission to the asylum procedure. Such statements should be evaluated in the light of all the circumstances of the case (UNHCR, 1992).

The sole fact that Spain employs two different procedures, depending only on the location where the application is presented, can be interpreted as discriminatory and contradictory to article 21 of the Charter, which explicitly prohibits discrimination ‘on any ground’. Many experts share the opinion that this rule was not introduced to protect possible refugees, but rather, to protect the country’s borders (Planas, 2011). Again, human rights are sidelined in favour of security policies.

3.2.1.2.2. Related human rights

By means of disregarding human rights that are connected to the principle, the current asylum law presents more flaws regarding the incorporation of non-refoulement. The first article of the law, which lays down its scope, fully excludes all nationals from EU Member States, from the right to international protection in Spain. This is based on the assumption that all Union Member States are safe for all of its nationals. The law does not provide for any exceptions, or for the possibility to investigate specific cases. This article clearly discriminates based on nationality and with that not only violates the right to no-discrimination, but is also incompatible with the 1967 Protocol to the Refugee Convention, which eliminates any geographic limitations to the *refugee* definition (and therefore to the scope of refugee and asylum conventions). Lastly, it contradicts the right to asylum, laid down in Article 18 CFREU.

Article 16 of the asylum law, on the right to apply for international protection, repeats the exclusion of EU Member State nationals from the right to international protection. Another provision is added which states that only persons that are present on Spanish territory, have the right to apply, without further defining how this should be interpreted. Since the law contains provisions on applications presented at the border, it is clear that the borders are also part of ‘Spanish territory’. Yet, it becomes more complicated when asylum seekers meet with Spanish authorities before arriving at the borders, as for example at sea. Since the southern European borders are very well protected and controlled by an advanced radar system, many migrants and asylum seekers that try to reach the continent by sea, are detected long before they reach the shores. The question is, whether these people enjoy the right to apply for international protection in Spain, or not. If not, many refugees will not get the chance to reach the mainland and actually apply. As discussed in Chapter One, there is no binding rule on the extraterritorial application of the non-refoulement principle and therefore it is debatable whether the principle is violated or not, if people are sent back before they have reached the national territory. Chapter Four contains some more detailed information on how this works out in practice.

In order to fully respect the right to asylum and the rights connected to international protection, any person should have the possibility to apply for international protection at any time. In Spain, however, there is a time limit for applying, that is, the application should be filed within one month after entering Spanish territory or one month after the causes for being (or claiming to be) a

refugee occurred. This is described by Article 17 (2) of the Spanish asylum law. This time limit disregards the social and psychological difficulties that many asylum seekers experience. Fortunately, the interpretation of this provision has become more flexible. Earlier, the fact of not having applied for international protection within one month after arrival was interpreted as a sign of absence of *well founded fear*. Yet, the Supreme Court has recognized that delay in application does not automatically make a declaration of persecution implausible, concluding that delay can be caused by: fear of appearing for security forces; shame to tell one's personal story, ignorance of the existence of international protection, ignorance of the procedures, and so on (Planas, 2011).

The time limit for application does not fully protect the right to a fair trial. The same right is disregarded by Article 24 (3) Ley 12/2009, which stipulates that, if no resolution has been disclosed six months after the application date, the application is automatically denied. Without doubt, the delay in resolving the case cannot be ascribed to the applicant, nor can it be interpreted as evidence of groundlessness of the claim. Therefore the provision is unjust and might lead to the expulsion of a refugee to unsafe territories.

The Spanish asylum law extends many of the provisions of the Refugee Convention, which in many cases, benefits refugees and asylum seekers. Yet, there are some examples in which the extension of the provision reduces the protection or, in case of the following example, the scope of international protection. Article 8 captures Article 1 (d) (e) (f) Refugee Convention, which lay down clauses that exclude persons who might qualify for international protection, from the scope of the Convention. Although Article 8 (b) Ley 12/2009 seems to reproduce Article 1 (f) (b) of the Refugee Convention, which excludes any person who “has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee”, it extends the provision by not specifying that it should be a non-political crime. This means that people who have committed political crimes in their countries of origin can be excluded from the international protection system in Spain (Planas, 2011).

The possible exclusion of those who have committed a political crime, clearly contradicts the definition of a refugee, which includes persons that have a well founded fear of being persecuted for their political opinion. Indeed, the fact of having a political opinion, which is not respected by the authorities, and the act of expressing this opinion explicitly, will often be punished as a political crime. On one side, this fact makes a person eligible for refugee status, on the other side, it might be a reason for exclusion based on Article 8 (b) Ley 12/2009. The article thus partly neglects the right to freedom of expression and disrespects Article 33 (1) Refugee Convention -on the prohibition of expulsion or return (‘*refoulement*’)- itself, in case of sending back a political refugee to territories where his life or freedom would be threatened.

3.2.2. Ley de Extranjería

In this paragraph, the Spanish immigration law, *Ley Orgánica 4/2000*, and the supporting Royal Decree, *Real Decreto 557/2011*, will be critically analysed on how they process and interpret the non-refoulement principle. Since it concerns a general immigration law, which applies to all foreigners, hence not only asylum seekers, many of its articles are irrelevant to this investigation and will not be considered. Since the number of relevant articles is considerably lower as compared to the law on asylum, the relevant provisions will be categorised only in accordance with their link to either the right to asylum and the non-refoulement principle, or related human rights. These categories will contain both positive and negative interpretations of these concepts and rights.

3.2.2.1.1. The right to asylum and non-refoulement

Article 34 *Ley Orgánica 4/2000* describes that a positive resolution of an asylum application implies the recognition of refugee status and consequently the right to reside and work in Spain. In addition, refugee status implies the right not to be expelled or returned as laid down in Article 33 Refugee Convention. By directly referring to this article, the non-refoulement principle is incorporated into the law without any adjustments and should therefore be respected fully as intended in its original formulation.

Real Decreto 557/2011 underlines the importance of protection against refoulement by adding that, even when an a person is sentenced to be expelled, this expulsion will not be carried out when the person concerned applies for international protection, and it will be suspended until his application is not admitted to the asylum procedure, or until the application is resolved and declined. If the applicant's request is admitted to the procedure, he has the right to enter Spanish territory and to reside in it temporarily (Article 23 (6) (b) *Real Decreto 557/2011*). This provision reinforces the protection of (possible) refugees against refoulement, excluding refugees from certain expulsion orders that do apply to persons that do not fear persecution in case of expulsion.

Non-refoulement is also guaranteed by Article 58 (4) *Ley Orgánica 4/2000*. On one hand, the article can be criticized for ‘criminalising’ undocumented migration, by laying down that foreigners who try to enter Spanish territory illegally can be returned without an expulsion proceeding (Article 58 (3) *Ley Orgánica 4/2000*). On the other hand, paragraph 4 of the same article stipulates the suspension of the expulsion of these persons in case they apply for international protection.

Be it that the law provides for a comprehensive application of the non-refoulement principle, it also contains provisions that might be contradictive. A clear example is the sixth additional provision, on readmission agreements, which recognises the application of those agreements to undocumented migrants residing in Spain. In spite of the fact that the provision mentions that these agreements contain clauses that respect human rights as laid down in international Conventions

and Treaties, it is questionable to what extent these rights are respected in practice and to what extent this practice is investigated for each concerning country.

Readmission agreements might be based on other (political or economic) interests, rather than the best interest of the people concerned. An example came up recently, when the Norwegian Government signed a return agreement with Ethiopia, at the same time that it increased the flow of development aid towards the African country. Although authorities deny that there is a connection between the agreement and increased aid, it can be argued that these occasions are not a coincidence (Smith & Sandelson, 2012).

These agreements risk sending back persons to territories where their life and liberty are threatened. This might be the case for many Ethiopian asylum seekers in Norway, since their country of origin is known for (severe) human rights violations (Smith & Sandelson, 2012).

3.2.2.1.2. Related human rights

According to Article 3 Ley Orgánica 4/2000, all fundamental rights as laid down in the UDHR and other international human rights Treaties and Conventions signed by Spain, are (also) applicable to foreigners. This means that all these rights should be fully respected in relation to each person within the jurisdiction of the country.

One of the human rights that is well protected by this law, is the right to a fair trial. Article 20 (1) Ley Orgánica 4/2000 lays down the right to a due process for foreigners. Besides, by legalizing the intervention in the proceedings, of non-governmental organisations that aim to defend the right of immigrants in Spain (Article 20 (3) Ley Orgánica 4/2000), the possibility of a fair trial is enhanced. As discussed before, this right is also laid down in Spain's asylum law. The right to appeal is also guaranteed in Article 21 Ley Orgánica 4/2000.

The particular situation or conditions of asylum seekers is respected by Article 22 Ley Orgánica 4/2000, which provides for free legal assistance for foreigners in Spain. This free legal assistance consists of the right to a lawyer during the proceedings and the right on a translator. These services will be free of costs for those who do not have sufficient financial resources.

Article 26 Ley Orgánica 4/2000 refers to those persons that arrive at the border, but do not fulfil the obligations to enter Spanish territory. They have the right to be informed on why their access is denied and on how, when and where to appeal, as well as on their right to a lawyer and a translator. These rights are repeated in Article 15 Real Decreto 557/2011. The existence of these provisions in both the immigration law and its supporting Royal Decree is very important as regards to respecting the non-refoulement principle. Since many refugees and asylum seekers in general do not know their rights and in some cases are unaware of the existence of international protection, it

is essential that persons arriving at the border are informed on these possibilities. Only people who are adequately informed, will be able to fully enjoy their human rights.

The right to free legal assistance and a translator is repeated in Article 23 Real Decreto 557/2011, which again refers to those persons that try to enter Spanish territory ‘irregularly’. If all these rights, which are related to a fair trial, are indeed fully respected, they help to protect a person from being sent back to territories where he faces persecution. A fair trial is of course no guarantee for protection, but the absence of it seriously jeopardises the non-refoulement principle.

Despite of these very important provisions in the Spanish immigration law, it also includes less favourable provisions that rather work against the protection against non-refoulement. A clear example can be found amongst the additional provisions to the law. The fourth additional provision of the immigration law partly repeats Article 17 Ley 12/2009 and Article 21 Ley 12/2009 (asylum law), describing that applications for international protection will not be admitted to the asylum procedure when the application is filed after the elapse of the time limit (1 month), or when the claim is manifestly unfounded.

Additionally, the fact that the applicant does not have an identity document or his representative does not come up with sufficient proof for the case, the application can be denied to the procedure likewise. The same goes in case the application is not filed by the person himself, when the law does require so. These (additional) reasons that can exclude a person from the access to the asylum procedure are in risk of violating the right of protection against refoulement. Not one of these reasons proves that a person is not in need of, or not entitled to international protection. Besides, they neglect the vulnerable and exceptional situation in which many asylum seekers find themselves. Most people arrive with the barest necessities and are therefore unable to support their statements with documentary or other proof. Consequently, the requirement of proof to make a claim founded, should not be too strictly applied (UNHCR, 1992).

Since immigration law deals with all kinds of foreigners, one very important issue is (non-) discrimination. Article 23 Ley Orgánica 4/2000 lays down a very elaborate definition of discrimination, prohibiting any direct and indirect distinction, exclusion, restriction or preference towards a foreigner based on race, colour, decent, national or ethnic origin, or religious convictions and practices.

Lastly, in the context of non-refoulement, the right to life and integrity of pregnant women in particular is protected by certain provisions (Article 58 (4) Ley Orgánica 4/2000; Article 23 (6) (a) Real Decreto 557/2011), which lay down that the expulsion of pregnant women cannot be carried out if it would jeopardize the gestation or the health of the mother.

4. The non-refoulement principle applied in practice – Spain

In 2010, over 393,000 third-country nationals were refused entry at the external borders of the European Union: 336.789 at the land borders, 50.087 in airports and 6,704 at the sea borders (Migreurop, 2012). According to European and national authorities, all these people did not have the right to enter this well-protected territory. It is getting more and more difficult for non-European citizens of all kind, to set foot on European land. Amongst those people that are rejected at the borders, are undoubtedly many refugees and other people in search for, or (and) in need of international protection.

In the last years –before 2011- the number of asylum claims in many EU countries had decreased considerably, which is most likely due to the ever more restrictive measures of the Union, in its fight against ‘illegal immigration’⁵. The methods used in this fight are manifold, of which some of the most striking examples are massive repatriations and highly advanced border control systems.

These measures are sometimes in contradiction with other European and international laws and regulations, most importantly Human Rights Law (Planas, 2011). The European Union, presented as an area of freedom, security and justice, in theory highly values human rights. However, all those words wasted in discourses on human rights and on the importance of complying with international obligations are void, if at the same time human beings are sent back to places where their lives are threatened –without even having the opportunity to apply for asylum-, or in some cases, are even left to die on a fragile boat on the sea.

Being located at the Mediterranean Sea and being the European country most close to the African continent, Spain plays an important role in the reception of mixed migration flows from the south, which are composed of (economic) migrants, refugees and other asylum seekers, most of which travel undocumented. For this reason, Spain is also actively involved in the Union wide fight against this irregular immigration.

In this chapter, a critical reflection will be made of some of the measures taken in the Spanish ‘fight against illegal immigration’. These measures cannot be seen separately from those that have been implemented on European Union level. What’s more, most of Spain’s practices are part of the European Border protection programme. These border protection programmes can be analysed and criticised on many aspects, but here the focus will be on the application of the non-refoulement principle and related human rights.

⁵ The use of this term ‘illegal’ in itself is one of the problems of -and at the same characteristic for- the EU’s immigration policy. The use of the adjective ‘illegal’ is commonplace in media and political debate, but also highly controversial. By at the same time presenting the subject in a context of delinquency, drug trade and terrorism, it leads to the criminalisation of migration and creates an ever more negative image amongst the population. In this paper, the term ‘illegal immigration’ will only be mentioned referring to the interpretation of the phenomenon by others. In general, the terms ‘irregular migration’, or ‘undocumented migration’ are considered more neutral and will therefore be employed here.

As opposed to the previous chapter, in which both positive and negative reflections on the Spanish immigration and asylum law were disclosed, this chapter will focus only on practical situations in which the non-refoulement principle is endangered or violated. There is no doubt that the Spanish authorities often do respect the principle and the human right that it represents. This has been the case for at least the 610 international protection claims that resulted in the granting of refugee status, subsidiary protection, or other protection based on humanitarian reasons in 2010.

Yet, there is not a lot more to say about these positive outcomes and non-refoulement, rather than that the principle has been respected, as it should be. It is more interesting to know more about the cases in which the principle was ignored, endangered or directly violated. This chapter therefore will describe some of the most important measures that (severely) undermine the non-refoulement principle, and some practical examples in which the principle was obviously violated. The measures that will be discussed in this chapter are all examples that seriously reduce the chances for asylum seekers to reach, or reside legally on the European continent: restrictive border controls, interception of ‘migrant boats’ at sea, the creation of ‘buffer zones’, readmission agreements with sending and transit countries, visa requirements for refugee-producing countries and the ‘special treatment’ of stowaways. Finally, after discussing these measures, a short insight will be given into how heavily the level of enjoyment of human rights for asylum seekers in Spain depends on the location of entry and application.

4.1. Restrictive border controls

In an opinion article published in 2011, Carlos Berzosa, president of the Spanish Refugee Aid Commission (CEAR), stated that “today, the idea of people arriving in Spain and claiming asylum has become an utopia. No one is coming to Spain anymore. The border control policies have turned Europe into an inaccessible fortress [translation TC] (Berzosa, 2011)”.

4.1.1. Spain: border protection on national level

Over the last few years, the Spanish Home Office has seriously increased the state’s security forces, especially those dedicated to border control and the ‘fight against illegal immigration’. The number of civil guards deployed for border control has risen from 10.239 in 2003, to 16.375 in 2010, which is an increase of 60 percent. Moreover, many new mechanisms have been employed to modernize border control, the most important of which are the Seahorse network, the Integrated System of Exterior Border Surveillance (Sistema Integrado de Vigilancia Exterior, henceforth: SIVE) (La Moncloa, 2011), and the high-tech equipped fences that surround the Spanish enclaves Ceuta and Melilla.

4.1.1.1. Seahorse

Seahorse is a communication network between Spain, Portugal and various African countries bordering on the Atlantic Ocean. The network serves to exchange information on irregular immigration and -as the Spanish government states on the official web site- ‘other criminal offences’ that take place at the sea. The network has ten centres, spread around different locations in the participating countries; Mauritania, Morocco, Senegal, Gambia, Guinea Bissau, Cape Green, Portugal and Spain. Since 2006, the program also provides training and courses on border control in the participating African countries (La Moncloa, 2011).

4.1.1.2. SIVE

The Integrated System of Exterior Border Surveillance (SIVE) is described by the Spanish government as a ‘technology to improve the control of coasts and fight more efficiently against delinquency and illegal immigration (La Moncloa, 2011)’. It began its operations in 2002 on the Cadiz coast and gradually extended its activities over the southern Spanish coast and the Canary Islands (Amnesty international, 2005; Departamento de Internet Guardia Civil, 2011). The system nowadays consists of both mobile and fixed radar sensor stations and a control centre at the headquarters of the Civil Guard in Algeciras (Peninsula) and Fuerteventura (Canary Islands). The radar sensors detect vessels that are approaching the Spanish coast, and can identify which type of boat it is, and what kind of people are on board. The information is sent to the Civil Guard headquarters, where will be determined whether the people on board are committing illegal acts. If considered necessary, the Civil Guard will intercept the possible criminals, or assist the irregular migrants (Departamento de Internet Guardia Civil, 2011).

4.1.1.3. Fences around the Spanish enclaves

Both the Spanish enclaves of Ceuta and Melilla, located as ‘European islands’ in Morocco have been surrounded by defensive fences as of the early 1990s (Cimadomo & Martínez Ponce, 2006). Being the European territories most close to (that is: within) Africa, these enclaves over the years have attracted many migrants and asylum seekers. Despite of the construction of the fences, there are still many people that try to enter the Spanish enclaves, mostly by scaling the fences (Cimadomo & Martínez Ponce, 2006; Amnesty International, 2005). This is a dangerous venture, since it concerns high double metal fences, with barbed wire, which is equipped with watch towers and cameras, infrared rays and fibre optic thermal sensors. Between the fences runs a road for use by patrols of Civil Guard and army patrols. This defensive system seriously complicates the entrance into the enclaves and leads to many people risking their lives an getting badly hurt. The chances to be caught even before reaching Spanish territory are very high because of intensive – and aggressive- border controls by Moroccan authorities, and Spanish Civil Guards, who keep a permanent watch on the frontier (Amnesty International, 2005).

4.1.2. Border protection on European level: Frontex

In 2004, when irregular immigration across the Mediterranean was at one of its highest peaks, the European Union set up the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, better known as Frontex (Frontex, 2012a; Diaz Tejera, 2011). According to the official web site: ‘Frontex promotes, coordinates and develops European border management in line with the EU fundamental rights charter applying the concept of Integrated Border Management’ (Frontex 2012b). One of its main tasks is the coordination of the operational cooperation between Member States. On the basis of risk analyses, Frontex proposes joint operations at the Union’s borders in which Member States are invited to take part. These joint operations are either at sea, at land borders or at airports and consist of border checks and border surveillance (Frontex, 2012 b).

Besides, Frontex is responsible for developing common training standards and specialist tools, and serves as a platform to bring together Europe’s border-control personnel and the world of research and industry. Frontex also created a rapid response capability, which consists of expert teams that are kept in full readiness in case of a crisis situation at the external border. Lastly, Frontex serves as an information (system) sharing environment, and assists Member States in joint return operations of expelled migrants (Frontex, 2012 b).

Although both national (Spanish) and European (Frontex) border patrols have saved many lives of people in distress at sea, their main effects—and arguably objectives— are preventing access to the European Union and dissuading people from departing northwards. By acting on sea, the access to Europe for many people is blocked already before even reaching its territory and thereby the outer European borders are relocated ever further away (Migreurop, 2012). The impossibility to reach European land implies the impossibility to access the international protection system. Yet, everyone has the right to asylum and no one should be sent back to territories where his life is threatened. Accordingly, the act of preventing a person to be able to even apply for asylum can be regarded as a manifest violation of the non-refoulement principle and many of the human rights that it encloses.

4.2. Interception at sea

Spain, for its geographical location, is one of the EU countries that receives most irregular immigrants by sea (Oliva Martinez, n.d) Yet, it would be maybe better to say *used to* receive. As a result of the ever stricter border controls, many vessels used by people to cross the Mediterranean are intercepted before reaching the shores of its Northern countries. The practice of intercepting vessels at sea has increased over the years. Because of the very limited judicial and public oversight during these situations, there is no guarantee that the right to seek asylum or to claim

other rights these migrants and asylum seekers are entitled to, is respected (Amnesty International 2009).

These practices do not take into account the special situation of the people they are dealing with. These people risk their lives to reach Europe (Diaz Tejera, 2011), so it must be a very strong and negative force that pushes them on these boats. As an example, it is for a good reason that many Senegalese (aspirant) migrants speak of *Barsaa ou Barsaqq*; Barcelona or hell (De Haas, 2007).

Unfortunately, for these people there is just no other -legal and safe- way to reach Europe. Obtaining the necessary documentation may be impossible for various reasons. One of them is governmental unwillingness to issue the documents. In other cases, attempting to obtain the required documents equals risking your own life, or endless waiting, and in some cases, the appropriate state entities simply do not exist (Diaz Tejera, 2011). The only option left is crossing the sea in a –often unseaworthy- vessel. The il-legality of the Mediterranean crossings (or the Atlantic crossings in the case of those trying to reach the Canary Islands from West-Africa), make these people an easy prey for migrant smugglers (read: exploitation) (Diaz Tejera, 2011).

Comparable to the practice of interception at sea are the measures taken in cooperation with the Moroccan authorities in the proximity of the Spanish enclaves Ceuta en Melilla. The intervention of Moroccan authorities in these border areas prevents many from even reaching Spanish territory and from exercising their human right to apply for asylum.

4.2.1. Sovereignty and jurisdiction

International law recognizes that every state is free to establish border control systems to guarantee security, prevent illegal entries and regulate immigration. This right is derived from their sovereignty (Oliva Martinez, n.d). The interception of persons is one of the legitimised ‘entry-management tools’ that states apply to protect their borders (Diaz Tejera, 2011). However, employing these measures for other objectives, might be in breach of (inter)national law.

There is no doubt that coastal patrols have saved many lives, but it has brought along many threats as well. At first, in order to circumvent the patrols, people take more dangerous routes across the seas (UNHCR, 2007). This again indicates the (desperate) need to escape or flee oppression, war and persecution, in search for a dignified life. Yet, this is not taken into consideration when intercepting boats at sea and directly sending people back to where they came from (transit country or country of origin). Many people on these vessels are indeed in need of international protection (UNHCR, 2007). In the Mediterranean area specifically, there is a large presence of persons potentially eligible for international protection, since many persons come from refugee-producing countries or countries currently involved in armed conflict (Diaz Tejera, 2011).

The facts that most migrant boats are flagless and that the interception of these often takes place at high seas, really complicate the issue of jurisdiction and therefore the (non-)application of the non-refoulement principle. Yet for the fact of intercepting the boat, the intercepting state exercises its jurisdiction over the vessel and the persons aboard. As concluded in Chapter One, if the state is able to exercise a certain power relative to the person, the person is already “within its jurisdiction” (Gomien, 2000). This jurisdiction should be considered a sufficient legal basis to also trigger the country’s human rights obligations (Diaz Tejera, 2011). If a state can exercise border controls in international waters, then its international obligations should also apply (Oliva Martinez, n.d). Accordingly, the state should act in the same manner towards these intercepted persons, as it does to persons on its territory (Diaz Tejera, 2011).

However this conclusion is not universally accepted. As mentioned in Chapter One, the extraterritorial application of the non-refoulement principle is contested by many. The argument goes that the prohibition of returning a person to the frontiers of territories where his life or freedom would be threatened, applies only to persons already within a state's territory. Accordingly, the practice of intercepting and returning of boats on the high seas, to territories where the lives of (some of) the persons aboard are threatened, would not constitute a violation of the non-refoulement principle (Diaz Tejera, 2011).

Nonetheless, the extraterritorial application of this principle is firmly supported by UNHCR and many other (international) entities, amongst which the Council of Europe (Diaz Tejera, 2011). In its Advisory Opinion on the Extraterritorial Application of Non-refoulement (2007), UNHCR states that “...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 at 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 (UNHCR, 2007 in: Diaz Tejera, 2011)”. The non-application of extraterritoriality on the principle would be in contradiction with the spirit of Article 33 of the Refugee Convention (Oliva Martinez, n.d).

4.2.2. European Court of Human Rights case-law

A ground-breaking European Court of Human Rights ruling is the very recent case *Hirsi Jamaa and others v. Italy*, 23 February 2012, being the first case in which the Court delivered a judgement on interception at sea. The applicants were eleven Somali nationals and thirteen Eritrean nationals, who had attempted to cross the Mediterranean from Libya to Italy. They travelled as part of a larger group of migrants of various origins, crossing the sea in three vessels. On 6 May 2009, as they were within the Maltese Search and Rescue Region of responsibility, they were intercepted by

the Italian police and coastguard. They were then transferred onto Italian military ships, to be handed over to Libyan authorities ten hours later (Dembour, 2012).

The Court ruled that the Italian Government had violated Article 3 ECHR (Prohibition of torture and inhuman or degrading treatment or punishment), Article 4 of Protocol n°. 4 which prohibits the collective expulsion of aliens, and Article 13 ECHR, which lays down the right to an effective remedy. In its defence, the Italian Government argued that “the applicants had not adequately proved that they had been subjected to treatment allegedly in contravention of the Convention” (Dembour, 2012). What’s more, according to Italy, Libya was a safe host country since it had ratified the ICCPR and the Convention Against Torture. Besides, in a treaty it had signed with Italy, Libya had declared to comply with the principles of the UN Charter and the Universal Declaration of Human Rights (Dembour, 2012).

The Court responded that the existence of national laws and international treaties do not in themselves protect against ill-treatment. The Italian authorities should have known that these people, being irregular migrants, would most likely be exposed to inhuman or degrading treatment in Libya. Based on this, the Court concluded that Article 3 ECHR had been violated. The Court did not demand any proof of the actual ill-treatment of the people concerned, but decided that the existence of the possibility to ill-treatment was enough.

Then, the Italian state argued that none of the migrants aboard of the intercepted boats had requested international protection. Yet, the court stated that, whether or not the migrant notifies the authorities of the risk of ill-treatment upon return, as long as the authorities are aware of this risk, the person cannot be sent back to these territories. This risk has to be ‘sufficiently real and probable’, but it is not necessarily required to prove individualized persecution (as was the case under former jurisprudence) (Dembour, 2012).

Since the Italian authorities had not carried out any form of examination of the individual situation of the applicants before returning them, the Court also found a violation of Article 4 of Protocol no. 4, which prohibits the collective expulsion of aliens. It was the second time in its history for the Court to apply this article (the first being in the case *Conka v. Belgium*, in 2002) (Dembour, 2012).

Lastly, a violation of Article 13 ECHR was found. All the migrants concerned had been returned to Libya without having had access to an effective asylum procedure (Dembour, 2012). This violation of the right to an effective remedy is at the same time a direct violation of the principle of non-refoulement. This Court’s ruling on Article 13 makes the very practice of intercepting (irregular) migrants at sea and returning them back to the Southern Mediterranean coasts unlawful (Dembour, 2012).

In conclusion, it can be said that this ruling on one hand lays down the extraterritorial application of the non-refoulement principle, and on the other, proves the practice of interception and

is subsequent return of boats of migrants at sea to be in contradiction with the non-refoulement principle.

4.2.3. Practical example in Spain: the case of Lauchling Sonko

Though the above mentioned case does not concern Spanish authorities, the decisions made are applicable to many practical Spanish cases. One horrific and disgraceful example of a Spanish case of interception at sea whereby the non-refoulement principle (and most importantly some of the most fundamental human rights) was violated, is the case of Lauchling Sonko.

Lauchling Sonko, together with two other possible asylum seekers, was intercepted by the Spanish Civil Guard in the night of 25 to 26 September, 2007, while they were trying to reach the Spanish enclave Ceuta swimming. The three men were made to board and then were taken into Moroccan waters, where the Civil Guards pierced their life jackets and forced them to jump into the sea. Lauchling Sonko probably tried to explain to the Civil Guards that he did not know how to swim, but he was not heard. The 29-year old Senegalese died drowning. His travelling companions made it to the Moroccan coast alive (CEAR, 2012).

Sonko came from a conflictive region in Senegal and could have applied for international protection, but never got the chance. The United Nations Committee Against Torture accordingly declared the Spanish state guilty of inhuman and degrading treatment, by disrespecting the right to life and integrity. Moreover, by blocking the possibility for Sonko and his travelling companions to apply for international protection, the Spanish authorities clearly violated the right to asylum and the principle of non-refoulement (CEAR, 2012).

4.3. The creation of buffer zones

The Spanish and other European authorities not only try to relocate the borders further away from the coast by patrolling at sea, but also intend to protect their outer borders within the territory and territorial waters of bordering countries at the southern Mediterranean and West-African shores. Besides having signed agreements with third countries, to patrol in their territorial waters (Oliva Martinez, n.d), European authorities also turned north African countries into their border guards, under the heading of a ‘shared responsibility to protect’, and as part of the ‘external dimension’ of the European asylum system (Migreurop, 2011; Amnesty International, 2005). Thereby, North and West Africa are created into a buffer zone which main objective is preventing people from crossing the sea towards Europe (Migreurop, 2011).

In exchange for –for example- development aid, African countries are hired to chase and detain those people who want to exercise their right to emigrate. The main problems with these practices are, that they prevent people from exercising their right to asylum, that some of the collaborating

African authorities are overtly corrupt, oppressive and irrespective of human rights, and that the fate of the diverted person is often unknown (Migreurop, 2012; Diaz Tejera, 2011).

Besides these cooperation agreements, European authorities are also physically present within the bordering countries. Many representatives of Member States, called ‘immigration liaison officers’ are present abroad to establish and maintain contacts with the authorities of the host country. Again, the aim of this contact is the prevention of ‘illegal immigration’ (European Union, 2011). As Amnesty International claims in a 2009 report *Spain: Briefing to committee against torture*, these externalised border controls can prevent asylum seekers from realising their right to apply for, and to enjoy international protection.

4.3.1. Joint operations at the West-African coast.

Clear examples of joint operations of European and African countries in the fight against ‘illegal migration’ are the Frontex operations hosted by Spain conducted off the West African coast. The Joint Operation HERA in 2008 has returned over 5.000 people back to the nearest coast. There is however no information available as to whether these people have been given the chance to apply for asylum (Diaz Tejera, 2011).

In 2011, a new project called the ‘West Sahel Project’, a partnership between Mauritania and the Spanish Civil Guard and funded by an EU grant, was initiated. The objective of the project is to boost Mauritanian border security with advanced technology, training and personnel exchange programmes (Oumar, 2011). The project is characterised by economic analyst Yaqoub Ould Mustapha as a “fruitful co-operation between Europe and the Sahel States to fight terrorism and illegal immigration (cited in: Oumar, 2011)”. He also states that the increased monitoring helped Mauritania “succeed in stopping the flow of refugees to the neighbouring Spanish Canary Islands” (idem). The West Sahel project has been launched recently, on January 22, 2012 (International Boundaries Research Unit, 2012).

The very objective (and practice) of –as stated by Yaqoub Ould Mustapha– ‘stopping the flow of refugees’ is a serious and direct breach of the non-refoulement principle and a violation of all human rights that the principle encompasses. These Joint Operations are another obstacle on a person’s way to exercise his human rights, and again demonstrate the precedence of warranting border security over protecting human life and integrity.

4.4. Bilateral readmission agreements

Another type of bilateral agreement between European and African countries that prevent people from reaching or residing in Spain, are readmission agreements. These agreements facilitate the expulsion or return of third-country nationals. Contracting African states will readmit to their territory their country nationals returned from a contracting European state. These persons are sent

back either for illegal border crossing, or unauthorised residence in the host country (European Union, n.d.)

Readmission agreements can also be part of joint border control operations. In that case, persons are intercepted at sea and returned to either their country of origin, or the transit country where they embarked. The problem with these agreements is that they are often irrespective of human rights, particularly of the right to access to the asylum system, and the right to a fair trial. Again, persons intercepted at sea (often) do not get the opportunity to apply for asylum in Spain. This practice is therefore contrary to the principle of non-refoulement (Diaz Tejera, 2011).

The same goes for readmission agreements that allow people to be sent back from the host country's territory. Although there are (slightly) better chances that these people do get the opportunity to file an application in Spain, their (forced) return can also constitute a violation of the non-refoulement principle since the 'safety' of the countries they are expelled to is often debatable.

For example, the Spanish readmission agreement with Morocco, signed already back in 1992, according to Amnesty International (2005),

“contains no guarantees that the person returned to Morocco will be protected from torture or ill-treatment, or that they will not be subjected to arbitrary detention. Nor does it guarantee that, if they wish to seek asylum, they will have access to a fair and effective procedure to determine their status as refugees; or that they will be protected from being returned to a country where they may be the victim of human rights violations”

Similarly, Human Rights Watch (2002) explains how, after the signing of the re-admission agreement between Spain and Nigeria, potential asylum seekers from this latter country risk being deported even before having the opportunity to get a lawyer, or to prove that their asylum claim is founded. These practices obviously discriminate based on nationality and therefore violate the right to non-discrimination.

Another exemplar case is the recent readmission agreement between Norway and Ethiopia, mentioned briefly in Chapter Three. First, the motives for this agreement are quite obscure, since the signing of the agreement coincided with an increase in development aid for Ethiopia. Second, shortly before signing the agreement, other countries, including its neighbouring country Sweden, had reduced the aid given to the country on the ground of human rights violations (Smith & Sandelson, 2012). It seems that the criteria to determine if a country is 'safe' depend on political relations, rather than on the actual situation lived by the population in the country concerned.

During the last decade, Spain has signed various readmission agreements with African countries of which it has been receiving -relatively large numbers of- immigrants: Nigeria (2001), Algeria

(2004) and Mauretania (2003). This last agreement provided not only for the readmission of Mauritians, but also of nationals from Mali and Senegal (Bermejo, 2010).

4.5. Visa requirements on refugee-producing countries

The simple fact of requiring visas for entry into the (Spanish) territory can in itself be an obstacle to exercise the right to asylum. Where European citizens can buy a ticket today to fly to Senegal tomorrow, if a Senegalese wants to travel to Europe, he will need to wait for months caused by the bureaucratic hassle that entails the obtention of a visa to enter Europe. In other countries, it is simply impossible to obtain a visa, because of civil conflict or the simple absence of the competent authority.

An example of these obstructing visa requirements is the case of Syrian refugees who tried to apply for asylum in Spain in 2011. They had booked a flight from Algeria to other third countries, with a transfer in Madrid and used this transfer to apply for asylum at the Madrid Barajas airport. However, they were impeded by Spanish authorities who demanded an airport transit visa (CEAR, 2011a). These people were clearly in need of protection and there was no possible way for them to obtain the required visa. By holding on to these requirements, Spain disrespected the human right to apply for asylum.

4.6. Stowaways.

Amongst the various types of migrants that try to cross the sea to reach the European shores, stowaways make up a special category. A stowaway is “a person who has boarded a merchant navy ship without a ticket, without the captain’s consent or that of those responsible for the vessel, who is discovered during the crossing (Migreurop, 2012)”.

The European Union employs various mechanisms to prevent this illegal boarding. These mechanisms include both the cooperation of third countries (from which the boats depart) and the (forced) cooperation of the ship owners. The authorities of European states force ship owners to conduct strict controls before departure, both on the boats and in the port areas (Migreurop, 2012).

If a ship owner fails to prevent a person from going aboard, he will be responsible for the treatment of the stowaway (International Law Office, 2000). Hereby, policing tasks have been transferred to private actors. The ship owner has the duty to repatriate the stowaways to their home country, unless the person applies for asylum and the request is accepted. If the request is rejected, the ship owner has to provide for the costs of repatriation (Gard, 2010; Migreurop, 2012). Moreover, in case of an asylum application, awaiting for the authorities to accept the request, the ship is immobilised, which gives rise to unwanted additional costs and delays in deliveries (Migreurop, 2012).

In consequence, ship owners do not usually take the risk of informing stowaways of their rights, but consider them ‘economic migrants’. Repatriating a person immediately is considerably less costly, then allowing him to apply for asylum. Many stowaways are thus deprived of their right to asylum, and are possibly sent back to a place where they face persecution. Besides, in some countries, after return stowaways are immediately imprisoned for having illegally left its territory. This applies for instance to Tanzania and Morocco (Migreurop, 2012)

4.6.1. Stowaways in Spain

Even if the stowaways do reach the European shores, their rights are minimal. *Polizones* (stowaways) are the most vulnerable category of migrants who arrive in Spain. They are not subjected to the ‘normal’ asylum and immigration law, but to a different procedure that finds itself at the margins of common law (Migreurop, 2012).

The Directives currently in force provide for the intervention of only two police officers (often the sea border police) on board of the ship, but not for legal aid. This is in contradiction with Article 22 Ley Orgánica 4/2000 (Spain’s current immigration law), which stipulates that any foreigner has the right to free legal assistance and the services of an interpreter, insofar as the administrative procedure may result in a refusal of entry into the territory, expulsion, or in a request for international protection (Ley 4/2000; Migreurop, 2012).

The two police officers interview the *polizón* by way of open questions, but do not mention his right to seek asylum. Based on this interview the officers decide whether a lawyer must be contacted. The conclusion of the interview is often that the *polizón* “wishes to continue his travelling”. Lawyers and NGOs are seldom informed of the presence of a *polizón*. The *polizón* is kept on the ship until his application is admitted to the asylum procedure. (Migreurop, 2012).

This ‘special procedure’ is a clear violation of many human rights, that is, the right to asylum, the right to a fair trial, the right to integrity, the right to liberty and security, and the right to non-discrimination. Furthermore, disrespecting the right to asylum may in many cases also be a violation of the non-refoulement principle, by sending people back to territories where they face persecution. In those cases, even more human rights are violated, such as the right to be protected against torture and inhuman or degrading treatment or punishment; the right to freedom of thought, conscience and religion; and the right to life.

4.6.2. A practical example: Ghanaian stowaways in Spain

In June, 2009, two Ghanaian migrants, travelling as stowaways on the Norwegian boat *Virana* were caught in the port of Vigo in Galicia (Spain). They claimed to be minors, so they were subjected to bone tests, which however established they were adults. Although the police officers were aware of the margin of error of these tests, no second test was executed. The boys were asked

about their reasons for leaving their countries, to which one of them answered that when his parents died, “some problems arose with his tribe” (Migreurop, 2012). There was no further research done on this. Since the boys did not mention the word ‘asylum’, nor that they wanted to enter Spain, they were left on the boat, without the assistance of a lawyer or an NGO. The boat finally left towards France.

After finding out about the case, the Spanish Refugee Aid Commission (CEAR) took the case to the Court. In its decision issued on 25 May 2011, the High Court of Justice of Galicia recognised “the violation of the right of effective protection, connected to the right to free legal assistance” for the two Ghanaian boys (Migreurop, 2012).

4.7. The asylum lottery at Spain’s southern borders.

As mentioned in Chapter Three, Spanish asylum law distinguishes between asylum applications at the border on one side, and application on territory on the other side. There is a –slight but fundamental- difference in procedure and rules that apply in both situations. In practice these differences are even more blatant. Over the last decade, human rights organisations, such as Human Right Watch and Amnesty International repeatedly have raised concerns on the incorrect treatment of migrants and asylum seekers at Spain’s most southern borders, that is Ceuta, Melilla, Canary Islands and Andalusia (Amnesty International, 2005; Amnesty International, 2009; Human Rights Watch, 2002) . In contrast, those that made it to the inland, as for example cities such as Madrid or Valencia, had more chances that they could enjoy their rights (Amnesty International, 2005). According to Amnesty International (2005), in these cities asylum seekers had easier access to NGOs, which means: information in an understandable language, legal assistance, etcetera.

Although the law distinguishes between on-territory and at-the-border applications, in all cases it provides for the right of each person to apply for asylum; to be informed on his rights in a language he understands, and to receive legal assistance and if necessary a translator during the process of asylum application. Yet these rights have been violated almost systematically regarding applications issued at the above mentioned southern entry points (Amnesty International, 2005; Human Rights Watch, 2002).

For example, as for Ceuta and Melilla, Amnesty International reports on the aggressive performance of both Moroccan and Spanish law enforcement officials. The interference of Moroccan border guards prevents many from even reaching Spanish territory and does not imply the possibility to express the will to apply for asylum in Spain (Amnesty International, 2005; Amnesty International, 2009). Moreover, also the collective expulsions and immediate and illegal expulsions that have taken place have clearly violated the prohibition of refoulement (Amnesty International, 2005; Amnesty International 2009).

In a report on the treatment of migrants and refugees on the Canary Islands, Human Rights Watch describes situations in which asylum seekers were brought to the court in large groups, without having the opportunity to discuss their personal situation. Besides, for most asylum seekers arriving in the Canaries it has been effectively impossible to comply with the one-month time period to apply for asylum. They simply did not have access to the procedure for being detained upon arrival. Only a minority was released and able to find a lawyer in time to apply within the first month after arrival (Human Rights Watch, 2002).

These just a few examples of situations in which possible asylum seekers are not informed on their rights, do not get (adequate) legal assistance, or do not even get the opportunity to apply. Yet the practices at Spain's southern borders over the years have shown many more similar defects. The fact that these rights, which according to the law apply to all asylum seekers no matter where they apply, are not respected especially at the country's southern borders is worrisome. Besides, as if it were a lottery, it also differs between these southern entry points, and even depends on the particular situation at the time of application, to which extent the migrants' and asylum seekers' rights are respected (Amnesty International, 2005; Human Rights Watch, 2002). This not only constitutes a violation of the right to a fair trial and a violation of the right to asylum, but at the same time, by establishing an un-equal treatment depending on the location of application, the right to non-discrimination is disregarded. Lastly, as a result of the violations of the above mentioned rights, there exists a high risk of sending back person to territory's where their life and integrity is at risk.

5. Conclusion

In theory, the European Union is an area of freedom, security and justice. Yet, the previous analysis shows that this area is very well protected and closed off for those who do not seem to belong, those that supposedly do not deserve to benefit from these privileges. This selective application of certain human rights that are recognized by all EU Member States is highly contradictory to their *universal* character.

In the previous, the focus has been on the principle of *non-refoulement* and its application in Spanish law and practice. As explained before, the non-refoulement principle protects people from being sent (back) to territories where they can face persecution, torture or other ill-treatment. This principle is a universal human right, which is applicable to all individuals, but is especially significant in International Refugee Law.

Despite of its importance, the principle is not always fully respected, sometimes it is circumvented, and other times even frankly violated. In all these cases, human rights are sidelined in favour of political and economic interests that are mostly security related. These borders are not designed to be porous, or to be an open door. Rather, these borders are designed to draw a line between those who are in, and those who are out.

5.1. The non-refoulement principle in Spanish law.

Many human rights are related either directly or indirectly to the principle of non-refoulement. Although Spain recognizes all human rights that can be related to the principle, its laws do not fully protect foreigners against expulsion to territories where they might face persecution or torture, inhumane or degrading treatment. The essential laws that apply to immigrants and asylum seekers in Spain are the Law on Asylum (Ley 12/2009) and the Immigration Law (Ley 4/2000).

5.1.1. Spanish asylum law

Although the asylum law (Ley 12/2009) gives an extended definition of who is considered to be a *refugee*, and what is to be understood by *persecution*, most of its positive extensions of original definitions (as laid down in the 1951 Refugee Convention) are based on European Directives that are binding for this EU Member State, and therefore the country does not voluntarily, but is obliged to, incorporate these provisions in its laws. Nevertheless, it can be concluded that this Spanish law lays down a very comprehensive definition of *refugee*, which respects many fundamental human rights, such as the right to life, the right to be protected against torture, the right to liberty and security, the right to freedom of expression, and so on. As regards to the principle of non-refoulement, this definition is of particular significance, since the principle will protect any recognized refugee of being sent back to (amongst others) their country of origin, or country of former residence.

On the other side, this definition explicitly excludes all EU citizens, which means that no national from a EU Member State can apply for international protection in Spain. This strongly undermines the universality of the right to apply for asylum and the right to non-discrimination.

Yet other positive elements of the asylum law have come up, such as the fact that people deserving subsidiary protection are put at an equal level with refugees. This means that all those persons that qualify for subsidiary protection in Spain, will have the same rights as recognized refugees. Besides, a person does not need to apply separately for each of these types of international protection. A request for asylum automatically implies an application for both types of protection. Also the articles of the law that define who is eligible for subsidiary protection are quite lenient.

An indispensable component of the non-refoulement principle is the right to a fair trial. This right is well incorporated into the Spanish asylum law, which for instance provides for the right to free legal assistance, the right to a translator and the active involvement of NGOs and UNHCR in the asylum procedure. Also the right to appeal and re-examination of a case is guaranteed.

Still, the same law lays down a number of provisions which jeopardize the right to a fair trial and accordingly the right to non-refoulement. A great example are the clauses that make an asylum claim inadmissible. Claims can be declined because the procedure has to be executed by another EU country, through which the applicant entered the European Union, or because the applicant comes from a so called safe country. Nonetheless, these clauses are based on unfounded or even faulty assumptions of safety and protection, and risk sending people back to unsafe territories or a country where –amongst others- their right to asylum will not be respected. What's more, if an asylum application is presented at the border, instead of on national Spanish territory, the claim is also inadmissible if it is considered to be unfounded at first sight. These measures do not take into account the vulnerable situation of most asylum applicants, and also discriminate based on the location where the application is presented.

Another restriction of the right to fair trial, which also undermines the specific situation of asylum seekers, is the imposed time limit of one month for applying for international protection. Besides, if no resolution has been disclosed six months after the application date, the application is automatically denied. Beside time limits, geographical limitations are also carefully incorporated into the law. By laying down that the right to asylum applies only to people that are present on Spanish territory, Spain releases itself from the obligation to apply this right anywhere where it exercises its jurisdiction. All these measures seriously limit the scope of the right to asylum and excludes many that might be in need of international protection.

Lastly, also the right to freedom of expression is partly disregarded, since Spanish asylum law excludes people who have committed political crimes in their countries of origin, from the right to

asylum. These people often are in need of international protection and could be considered political refugees under other laws.

5.1.2. Spanish immigration law

The previous analysis has shown that the Spanish Immigration Law (Ley 4/2000) recognizes that all fundamental rights as laid down in (international) human rights treaties signed by Spain, do also apply to foreigners. Yet, not all fundamental rights are fully respected in the provisions of this law.

The law does emphasize the importance of the non-refoulement principle by referring to its original formulation in the Refugee Convention. Besides, refugees are excluded from certain expulsion orders that can (only) apply to other persons. The law does also recognize the right to a fair trial, by legalising the intervention of NGOs in the asylum procedure, recognizing the right to appeal, the right to be fully informed on your rights, as well as the right to (free) legal assistance and a translator.

Yet this same right to a fair trial is undermined by the imposed time limit to apply for asylum of one month. Also the lack of identity documents or insufficient proof for the case can be a reason for not admitting the application to the official procedure. Lastly, the law also legalises re-admission agreements, based on which undocumented migrants can be sent back to their country of origin, or a country of transit. This measure often leads to the expulsion of people without previously having investigated (thoroughly) their personal situation, in breach of the non-refoulement principle. Besides, these arrangements are often based on political interests, rather than on the interests and human rights of the persons concerned.

5.1.3. Spanish law on asylum and the principle of non-refoulement: concluding remarks

It can be concluded that the right to a fair trial is one of the main fundamental human rights that is most closely linked to the non-refoulement principle. By providing for the right to free legal assistance, the right to a translator and the active involvement of NGOs and UNHCR during the asylum procedure, as well as the right to appeal and re-examination of the case, the Spanish laws seems to guarantee the right to fair trial and accordingly, to protect asylum candidates against refoulement.

Nevertheless, these same laws undermine this right by including strict exclusion clauses, that do not take into account the vulnerable situation of the applicants; by imposing a time limit and geographical limitations; as well as by legalising re-admission agreements. All these measures somehow impede the access to the asylum procedure, do not guarantee the right to fair trial and risk sending persons (back) to territories where their life and dignity are at risk.

Besides, the Spanish laws employ a broad definition of *refugee* and *subsidiary protection*, and with that protect many fundamental rights such as the right to life, the right to be protected against

torture, the right to liberty and security and the right to freedom of expression; and also protects many persons against refoulement. However, the same laws undermine the right to freedom of expression by excluding all persons who have committed political crimes in their country of origin. What’s more, the laws are disrespecting the right to non-discrimination and the right to asylum by explicitly excluding all EU citizens

5.2. The application of non-refoulement in practice

After analysing Spanish laws on immigration and asylum, the focus has moved towards the application of the principle of non-refoulement in practice. It is highly questionable whether the principle is applied lawfully. As many critics and experts have stated, the European border control policies have turned Europe into an inaccessible fortress. During the last decade, Spain has -mostly in cooperation with the EU’s border agency Frontex- created many new mechanisms to increase and modernize border control. The main effects—and arguably objectives- of these controls are preventing access to the European Union and dissuading people from departing northwards. By acting on sea, the access to Europe for many people is blocked already before even reaching its territory and thereby the outer European borders are relocated ever further away.

The interception of persons is one of the legitimised ‘entry-management tools’ that states apply to protect their borders. As for Spain, this tool is not only employed at sea, but also at, and in the surroundings of the borders of the Spanish enclaves Ceuta and Melilla. In these cases, however, these measures are partly or mainly employed to keep possible refugees away from the European (main)land and therefore might be in breach of (inter)national law. These practices do not take into account the special situation of most people they are dealing with, that is people who are willing to risk their lives in order to reach European territory. For many of them, the choice is between *Barsaa ou Barsaqq*; Barcelona or hell.

However, it is hard to establish the illegality of these practices, since there has not been a final conclusion on the extraterritorial application of the non-refoulement principle. Yet it can be stated that the most reasonable interpretation of the principle would also include its extraterritorial application. As for interceptions at sea, if a state can exercise border controls in international waters, and therefore exercise its jurisdiction, then its international human rights obligations should also apply.

The recent European Court of Human Rights ruling on the case *Hirsi Jamaa and others v. Italy* confirms the extraterritorial application of the non-refoulement principle, and also proves the practice of interception and subsequent return of ‘boat migrants’ at sea to be in contradiction with the non-refoulement principle. Accordingly, the Spanish practice of intercepting ‘boat migrants’ on the high seas, without giving them the opportunity to apply for asylum, can be considered illegal as it violates fundamental human rights and breaches the non-refoulement principle.

Besides patrols on the high seas and in the territorial waters of neighbouring African countries, some other measures have been taken in cooperation with these neighbouring countries. These measures are one by one serious obstacles on a person's way to exercise his human rights, such as the right to apply for asylum and the right to be protected against refoulement. Examples of such measures are the creation of a *buffer zone* in north and west Africa, turning these countries into Spain's external border guards; joint operations of European and African countries in the fight against 'illegal migration'; and readmission agreements. All these measures once again demonstrate the precedence of warranting border security over protecting human life and integrity.

Moreover, the special treatment of *polizones* (stowaways) must be mentioned. These persons are not subjected to the 'normal' asylum and immigration law, but to a different procedure that finds itself at (or actually outside of) the margins of common law. In the case of stowaways, all provisions that ensure a fair trial as laid down in Spanish law, do not apply. A *polizón* receives no legal assistance, NGOs do not have access to the person nor his procedure, and the person receives no information on his rights. This 'special procedure' is a clear violation the right to asylum, the right to a fair trial, the right to integrity, the right to liberty and security, and the right to non-discrimination. Furthermore, disrespecting these rights may in many cases lead to the violation of the non-refoulement principle.

Lastly, the distinction made in Spanish law between on-territory and at-the-border application is enlarged in practice. Those asylum seekers that make it to the inland have better chances of having their human rights protected, and therefore, of being able to follow a just asylum procedure, than those that are 'stuck' at the borders, the southern borders in particular. It also differs between these southern entry points, and even depends on the particular situation at the time of application, to which extent the migrants' and asylum seekers' rights are respected. These practices directly violate the right to a fair trial, the right to asylum, and the right to non-discrimination, and are in breach with the principle of non-refoulement.

5.2.1. The principle of non-refoulement in practice: concluding remarks

Just as has been concluded regarding Spanish laws on asylum, also in the practical application of non-refoulement, in particular the right to a fair trial is at stake. The interception of migrants and refugees, without giving them the opportunity to apply for asylum, deprives asylum candidates of their right to a apply for asylum and their right to a (fair) trial. Since the principle of non-refoulement should also apply extraterritorially, that is, anywhere where the Spanish authorities exercise their jurisdiction, this practice is in breach with this fundamental pillar of the international Refugee Law system.

Besides, the measures employed by Spain in cooperation with neighbouring African countries seriously undermine fundamental human rights such as the right to apply for asylum, the right to a

(fair) trial and the right to be protected against refoulement. These and more violations are repeated in the case of stowaways, to whom all provisions that ensure fair trial as laid down in Spanish law, do not apply.

In addition to the right to a fair trial, also the right to non-discrimination plays an important role in the practical application of the principle of non-refoulement in Spain. The chances to enjoy the right to a fair asylum procedure, are heavily dependent on the location of first encounter with Spanish authorities, or with foreign authorities working by order of Spain. It results that asylum seekers that make it to the inland enjoy more rights than those that (are forced to) apply at the borders. Besides, if one is caught by Spanish or collaborating foreign authorities before even reaching the borders, the chances of having his rights respected are even slighter. Finally, the same right is violated in the context of readmission agreements. Nationals of those countries with which Spain has come to a re-admission agreement have far higher chances of being (immediately) deported, than asylum seekers and migrants of other nationalities. As with all human rights discussed in this paper, the violation of this right to non-discrimination, in many cases leads to the violation of the principle of non-refoulement.

5.3. Final concluding observations: the need of a humanitarian approach

Although the 1951 Refugee Convention was designed to protect people in need, that is persons who do not enjoy the protection of their national authorities, this approach seems to be long gone. Maybe it is because back then, *refugees* were more like ‘us’, they were Europeans and therefore persons that seemed to be more similar to the image ‘we’ had of ourselves. Naturally, it is easier to put yourself in the shoes of a person that could be you, than in those of a person you consider a stranger. The ‘other’ is always a possible threat.

Possibly based on this naturally human, but limited way of thinking, the phenomena of immigration, undocumented immigration and refugee movements, have become to be seen as security threats, in the same line with terrorism and drug trade, which tendency rose to its peak just after the 9/11 attacks. However, the refugee issue is not a political problem, nor should it be interpreted as a type of immigration. The current Spanish and European approach of the issue is therefore outright erroneous. The refugee issue is a social phenomenon that must be approached from a humanitarian perspective. It must not be forgotten, that the original objective of the creation of International Refugee Law, was to protect people in need, and not to keep them away.

Nowadays, law making and practice simply do not align with the humanitarian objectives that were established over sixty years ago. Even though these humanitarian objectives are also legal obligations, which in theory are highly valued by the international community, the question is whether they are too idealistic, and incompatible with other values and laws, that in general seem to have precedence.

Specification of legal documents and abbreviations.

1. Legal Documents

In text referred to as:	Official title:
Refugee Convention	Convention Relating to the Status of Refugees (1951)
Protocol to the Refugee Convention	Protocol Relating to the Status of Refugees (1967)
UDHR	Universal Declaration of Human Rights (1948)
ECHR; The Convention	(European) Convention for the Protection of Human Rights and Fundamental Freedoms
CFREU; The Charter	Charter of Fundamental Rights of the European Union.
Qualifications Directive; Council Directive 2004/83/EC	Council 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
Ley 5/1984; Former Spanish asylum law	Ley 5/1984, de 26 de marzo, reguladora del derecho de asilo y de la condición de refugiado
Ley 12/2009; Law on asylum	Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria.
Ley Orgánica 4/2000; Immigration law	Ley Orgánica 4/2000 de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social.
Real Decreto 557/2011; Royal Decree, supporting Ley Orgánica 4/2000	Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración

	social, tras su reforma por Ley Orgánica 2/2000
Dublin Regulation	Council Regulation 2003/343/CE of 18 February 2003 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.
Protocol n° 12	Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms

2. Abbreviations

Abbreviation	Specification
ACNUR	Alto Comisionado de las Naciones Unidas para los Refugiados. Spanish acronym for UNHCR
CEAR	Comisión Española de Ayuda al Refugiado. Spanish Refugee Aid Commission
EC	Council of the European Union
EU	European Union
OHCHR	Office of the High Commissioner for Human Rights
SIVE	Sistema Integrado de Vigilancia Exterior; Spain’s ‘Integrated System of Exterior Border Surveillance’
UNHCR	(The Office of the) <i>United Nations High Commissioner for Refugees</i> . Also known as The UN Refugee Agency.

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ANNEX I.

Countries of origin of asylum seekers in the EU (2009, 2010)

	2010	2009	Change 2009 to 2010		Ranking		
			Absolute (number)	Relative (%)	2010	2009	Change
Non-EU-27 total	258 945	263 990	-5 045	-1.9	-	-	-
Afghanistan	20 590	20 455	135	0.7	1	1	0
Russia	18 590	20 110	-1 520	-7.6	2	2	0
Serbia	17 745	5 460	12 285	225.0	3	16	+13
Iraq	15 800	18 845	-3 045	-16.2	4	4	0
Somalia	14 355	19 000	-4 645	-24.4	5	3	-2
Kosovo (UNSCR 1244/99)	14 310	14 275	35	0.2	6	5	-1
Iran	10 315	8 565	1 750	20.4	7	9	+2
Pakistan	9 180	9 925	-745	-7.5	8	8	0
FYR of Macedonia	7 550	930	6 620	711.8	9	47	+38
Georgia	6 860	10 500	-3 640	-34.7	10	6	-4
Nigeria	6 750	10 270	-3 520	-34.3	11	7	-4
Sri Lanka	6 470	7 380	-910	-12.3	12	11	-1
Turkey	6 350	7 030	-680	-9.7	13	12	-1
Bangladesh	6 190	5 970	220	3.7	14	14	0
China	5 655	5 800	-145	-2.5	15	15	0
Armenia	5 525	6 855	-1 330	-19.4	16	13	-3
Dem. Rep. of Congo	5 515	4 950	565	11.4	17	18	+1
Syria	5 010	4 750	260	5.5	18	19	+1
Guinea	4 895	4 485	410	9.1	19	20	+1
Eritrea	4 525	5 230	-705	-13.5	20	17	-3
Algeria	3 575	3 405	170	5.0	21	21	0
India	3 175	3 030	145	4.8	22	22	0
Zimbabwe	2 615	8 050	-5 435	-67.5	23	10	-13
Haiti	2 345	1 840	505	27.4	24	30	+6
Vietnam	2 320	2 460	-140	-5.7	25	24	-1
Sudan	2 295	1 955	340	17.4	26	27	+1
Bosnia and Herzegovina	2 105	1 330	775	58.3	27	34	+7
Azerbaijan	2 060	2 585	-525	-20.3	28	23	-5
Albania	1 905	2 065	-160	-7.7	29	25	-4
Mongolia	1 680	2 030	-350	-17.2	30	26	-4
Other non-EU-27	42 690	44 455	-	-	-	-	-

(1) Cyprus, data relates to applications instead of applicants.

Source: Eurostat (online data code: migr_asyappctza)

Source: Eurostat, 2011a

ANNEX II.

First instance decisions on (non-EU-27) asylum applications, 2010

	Total number of decisions	Positive decisions				Rejected
		Total	Refugee status	Subsidiary protection	Humanitarian reasons	
EU-27 (1)	222 070	55 460	27 035	20 410	8 090	167 025
Belgium	16 245	3 510	2 700	805	-	12 740
Bulgaria	515	140	20	120	-	375
Czech Republic	500	175	75	75	20	330
Denmark	3 280	1 345	660	520	170	1 935
Germany	45 310	10 445	7 755	545	2 145	34 865
Estonia	40	15	10	5	-	25
Ireland	1 600	25	25	5	-	1 575
Greece	3 455	105	60	20	30	3 350
Spain	2 785	610	245	350	15	2 175
France	37 610	5 095	4 080	1 015	-	32 515
Italy	11 325	4 305	1 615	1 465	1 225	7 015
Cyprus	2 440	425	30	370	25	2 015
Latvia	50	25	5	20	-	25
Lithuania	190	15	0	15	-	175
Luxembourg	-	-	55	15	-	405
Hungary	1 040	260	75	115	70	785
Malta	350	220	45	165	15	125
Netherlands	17 580	8 005	810	4 010	3 180	9 575
Austria	13 770	3 445	2 055	1 390	-	10 325
Poland	4 420	510	80	195	230	3 910
Portugal	130	55	5	50	-	75
Romania	425	70	40	30	0	355
Slovenia	115	25	20	0	-	95
Slovakia	295	90	5	55	30	205
Finland	4 260	1 595	165	1 240	190	2 665
Sweden	27 650	8 510	1 935	5 970	605	19 140
United Kingdom	26 690	6 440	4 445	1 850	140	20 250
Iceland (2)	25	5	0	0	5	25
Liechtenstein	85	0	0	-	0	85
Norway	15 180	5 300	2 975	1 565	760	9 955
Switzerland	18 475	7 815	3 380	1 155	3 280	10 660

(1) Total number of decisions and total number of positive decisions, excluding Luxembourg.

(2) 2009.

Source: Eurostat (online data code: migr_asydcfst)

Source: Eurostat, 2011b