

Restrictions in EU Immigration and Asylum Policies in the light of International Human Rights Standards

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Abstract

If freedom of movement for European Union nationals means the lifting of internal borders, elimination of controls and facilitation of travelling, the freedom of movement for non-EU nationals is associated with notions such as more immigration controls, more identity checks and fewer arrivals at EU external borders. In recent years immigration and asylum policies in the EU have become expansive and constructive of the idea of a 'fortress Europe'. The territorial expansion of the EU has been inextricably linked with the need for repressive measures to protect the external borders of the Union from unwanted threats of migration as well as security considerations.

The paper analyzes the legality of restrictions in light of the principles of protection of human rights in Europe. In particular, it examines the extent and scope of the protection regime rendered to migrants by the European Convention on Human Rights. The article argues that despite the international human rights commitments, the EU Member States, all parties to the European Convention, still fail to ensure the full realisation of immigrants and asylum seekers' human rights. The case study of immigration and asylum policies in the EU *vis-à-vis* third country nationals from the Newly Independent States is aimed at demonstrating the discrepancies between such restrictions and international human rights standards.

1. Introduction

The dilemma in the European Union (EU) has always been how to ensure that the external borders are well protected against unwanted migration and mass refugee flows and, at the same time, how to maintain an efficient system on internal borders that does not undermine the concept of free movement of persons within the EU internal market. Thus, on the one hand, EU governments have welcomed the idea of a free area of movement for goods, capital, services and persons between the Member States. Accordingly, they have been gradually abolishing internal restrictions on the freedom of movement of persons through a favourable set of Community laws, such as the Single European Act of 1986, and intergovernmental agreements, such as the Schengen Agreement of 1985 and the Schengen Convention of 1990.

On the other hand, EU governments have opted for a more restrictive approach in law and policies towards third country nationals. They have attached different meanings to the concept of free movement. Freedom of movement for EU nationals has meant the lifting of internal borders, elimination of controls and facilitation of travelling. However, freedom of movement for non-EU nationals has been associated with more immigration controls, more identity checks and fewer arrivals at EU external borders. In

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the past several years immigration and asylum policies have become expansive and constructive of the idea of a 'fortress Europe'. The territorial expansion of the EU has been inextricably linked with the need for repressive measures to protect the external borders of the Union from unwanted threats of migration, as well as the security considerations which have always been at the top of the EU agenda.¹ In particular, after the terrorist attacks on the United States (USA) on 11 September 2001, border management has been viewed in terms of the overall fight against terrorism and the difficulty of maintaining internal security in the enlarged EU.²

The protection of human rights is seen as one of the main casualties of the politics of migration in both old and new EU Member States.³ Indeed, when it comes to international standards on human rights the situation becomes complicated, as the EU Member States are caught between the conflicting goals of upholding the values of human rights and the demand to tighten up immigration and external border controls. The fact that migration poses a dilemma when human rights issues are involved could be seen, on the one hand, as a humanitarian or human rights issue, and, on the other hand, as an immigration matter which might place a strain on the labour market and social facilities, such as housing, education, and medical facilities.⁴ This leads to, and is reflected in, a continuing tension between international law to protect human rights and national laws where the primary concern is to protect and promote the rights and welfare of citizens. Regrettably, unless specifically protected under national law and practice, migrants, as foreigners, remain vulnerable relative to the nationals of the State.⁵

One can therefore legitimately wonder to what extent the European human rights regime includes non-nationals within its realm of protection and what effect it has had on immigrants' rights at the national level. How far are restrictions in immigration and asylum justifiable *vis-à-vis* the system of human rights protection? Is there enough respect for human rights traditions in immigration and asylum policies that would make the legitimacy of restrictions indisputable?

The paper thus starts with the analysis of international human rights standards in the area of migration. It is necessary to analyse the relationship between the main principles of international protection of human rights and fundamental freedoms and immigration and asylum policies. The study seeks to examine the general status in international law of certain fundamental human rights available to migrants. It refers to EU Member States' obligations when determining migration policies, in light of international legal instruments for the protection of human rights. The number of such documents is myriad, developed at both international and regional levels.⁶ But the paper looks at one of the most important in Europe, namely the European Convention on Human Rights (ECHR), which plays a key role in the determination and application of human rights standards by EU Member States. The European Court of Human Rights (ECtHR) case law applicable to migrants is particularly scrutinised.

The next task of the paper is to explore the restrictions on the movement of those who are traditionally viewed by the EU as third country nationals. A special

¹ J. Occhipinti, 'Police and Judicial Co-operation' in M. Cowles and D. Dinan (eds.), *Developments in the European Union* (London: Palgrave Macmillan, 2004) 181-199 at 196.

² H. Grabbe, 'The Politics of Freedom, Security and Justice in Enlarging Europe' in K. Henderson (ed.) *The Area of Freedom, Security and Justice in the Enlarged Europe* (London: Palgrave Macmillan, 2005) 149-161 at 154.

³ J. Doomernik, R. Penninx and H. Van Amersfoort (eds.), *A Migration Policy for the Future: Possibilities and Limitations* (Brussels: Migration Policy Group, 1997) at 14 and 89.

⁴ G. Brinkmann, 'The Immigration and Asylum Agenda' (2004) 10 *European Law Journal* 2, 182 at 184

⁵ B. Ghosh, *Elusive Protection, Uncertain Lands: Migrants' Access to Human Rights* (Geneva: Office of the High Commissioner for Human Rights, 2003) at 4.

⁶ R. Plender, *Basic Documents on International Migration Law* (The Hague: Kluwer International, 1999).

analytical focus will be placed on migration from the NISs⁷ — the countries which form the EU's largest eastern neighbourhood. This weakly researched area among academics presents a huge interest, as there are many migrants from this region in the EU and there is still great potential for future migratory inflows. Additionally, this region has become a convenient transit zone for migrants from poor and war-torn regions of Africa, Asia and even Latin America. A special relationship between the EU and NIS states, derived from the fact that most NISs enjoy Partnership and Co-operation Agreements with the EU and are included in the EU Neighbourhood Policy, gives the issue of migration an additional emphasis.

2. What does the European Convention on Human Rights spell out for restrictions in immigration and asylum policies?

Although the EU has not acceded to the ECHR⁸, it is important to bear in mind that the ECHR is an international instrument, which all EU Member States must adhere to. Throughout its early case law, the ECtHR, and the Commission of Human Rights (Commission) extended to state authorities a wide margin of appreciation in maintaining immigration controls, thus affording individuals only limited protection. In line with established principles of international law, the ECtHR has traditionally recognised that immigration controls are essentially a matter of domestic policy.⁹ In a passage of the *Abdulaziz* case that has been frequently referred to, the ECtHR put forward the formula, which was apparently to give a wide discretion to states for immigration controls: '[A]s a matter of well-established international law and subject to its treaty obligations, a State has the right to control entry of non-nationals into its territory.'¹⁰

However, in the *Gül v. Switzerland* case the ECtHR, acknowledging the states' interests in maintaining immigration and residence controls as a 'particularly sensitive subject' for Switzerland, at the same time underlined the fact that: '[The Court] has to ensure that State interests do not crush those of an individual especially in situations where political pressure — such as the growing dislike of immigrants in most Member States — may inspire State authorities to harsh decisions.'¹¹

While decisions such as the *Gül* case inspired much criticism of the ECtHR, in fact much of the jurisprudence of the 1980s and 1990s was developed not so much by the Court as by the Commission. Indeed, many of the cases never went beyond the admissibility stage and were declared manifestly ill founded before being considered fully on their merits. However, by the end of the 1990s the ECtHR became more active in dealing with migration issues. In fact, the number of applications to the Strasbourg Court rose exponentially; so did migration-related complaints. Most plaintiffs appealed against expulsion decisions or administrative refusals of entry and residence permits. They generally purported that, in the handling of their cases, public authorities had violated rights guaranteed under Article 3 and Article 8 of the ECHR.

⁷ Newly Independent States (or otherwise Commonwealth of Independent States) — Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, the Ukraine and Uzbekistan.

⁸ Official Journal of the European Communities, 2003, C169/9.

⁹ N. Rogers, 'Immigration and the European Convention on Human Rights: Are New Principles Emerging?' (2003) 8 *European Human Rights Law Review* 1, 53, at 53.

¹⁰ *Abdulaziz, Cabales and Balkandali v. UK*, Judgment (merits) of 28 May 1985, Series A, No. 94, para. 38

¹¹ *Gül v. Switzerland*, Judgment (merits) of 19 Feb. 1996, Reports 1996-I, para. 15, Dissenting opinion of Judge Martens.

Article 3 is often invoked in cases of asylum-seekers whose demand for refugee status has been rejected and who claim that they will suffer inhuman or degrading treatment if they are sent back to their country of origin. At first, the ECtHR did not find that Article 3 was violated in the individual cases that were submitted. Later, however, the ECtHR took a view that the absolute character of the provision means that protection cannot be ruled out by considerations relating to the public security of the state. If an asylum seeker, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in his or her home country then the ECHR implies the obligation on the State not to expel the person in question to that country.¹² Thus, in the case of *Ahmed v. Austria*, the Court clearly stated that the applicant's deportation would breach Article 3 of the Convention for as long as he faced a serious risk of being subjected in his home country to torture or inhuman or degrading treatment.¹³

Judges Morenilla and De Meyer have gone further and expressed the view that the deportation of an integrated migrant *per se* would constitute a breach of Article 3 of the Convention.¹⁴ Judge Morenilla took this view in principle, because he considered it 'cruel and inhuman and clearly discriminatory' for a state to rid itself of 'undesirable' migrants when it had, for reasons of its own convenience, authorised them to enter and remain on its territory in the first place.¹⁵ It has to be mentioned that although the ECtHR recognises different kinds of 'inhuman treatment', the applicants, on their side, must show that they will face a 'real risk' if they are sent back, and the ECtHR's standards when it comes to the burden of proof are very high.¹⁶

The ECtHR has also many rulings concerning violations of Article 8. In cases involving migrants who had lived in the host country since childhood and had tenuous ties to their home country of origin, the Commission and the ECtHR considered that their expulsion from the receiving country could not be tolerated even if they had a criminal record.¹⁷ In a case involving a divorced foreign father of a Dutch girl, the Court found that he could not be denied entry into or residence in the Netherlands so as to see his daughter.¹⁸ However, it appeared that it was not the integration of such immigrants that protected them from expulsion or prohibition of entry, but the extent to which such expulsion or prohibition of entry constituted an interference with their right to family life.¹⁹ Judge Martens pointed out that even if not every migrant has a family life they may have well developed social ties in a country in which they have lived for years. For this reason, he advocated the acceptance that the expulsion of integrated migrants constitutes an interference with their private life,²⁰ following on from the view expressed by the ECtHR in cases, such as *Dudgeon*²¹ and *Rees*²² that, to a certain extent, a person's 'external' relations with others fall within the sphere of private life.

¹² *Chahal v. United Kingdom*, Judgment (merits and just satisfaction) of 15 Nov. 1996, Reports 1996-V

¹³ *Ahmed v. Austria*, Judgment (merits and just satisfaction) of 17 Dec. 1996, Reports 1996-VI

¹⁴ *Beldjoudi v. France*, Judgment (merits and just satisfaction) 26 Mar. 1992, Series A, No. 234-A, Concurring opinion

¹⁵ *Nasri v. France*, Judgment (merits and just satisfaction) of 13 July 1995, Series A, No. 320-B, Partly dissenting opinion

¹⁶ *Giindogdu v. Austria* (Application no. 33052/96), decision of 6 Mar. 1997

¹⁷ *Moustaquim v. Belgium*, Judgment (merits and just satisfaction) of 18 Feb. 1991, Series A, No. 193

¹⁸ *Berrehab v. Netherlands*, Judgment (merits and just satisfaction) of 21 June 1988, Series A, No. 138

¹⁹ S. Peers, 'EU Law and Family Reunion: A Human Rights Critique' in Essays for civil liberties and democracy in Europe (European Civil Liberties Network, www.ecln.org., 2005)

²⁰ *Beldjoudi v. France*, Judgment (merits and just satisfaction) of 26 Mar. 1992, Series A, No. 234-A, Concurring opinion

²¹ *Dudgeon v. UK*, Judgment (merits) of 22 Oct. 1981, Series A, No. 45

²² *Rees v. UK*, Judgment (merits) of 17 Oct. 1986, Series A, No. 106

The ECtHR's analysis of the state's interest in controlling immigration represented a considerable softening of the *Abdulaziz* position on the rights of states to control entry and stay. In the *Ciliz* case, the ECtHR stated:

The Convention does not in principle prohibit Contracting States from regulating the entry and length of stay of aliens. Nevertheless the Court also reiterates that, whilst Article 8 contains no explicit procedural requirements, the decision making process leading to measures of interference must be fair and such as to afford due respect to the interests safeguarded by Article 8.²³

The emerging picture was the following. Whilst the Contracting States were not prohibited from exercising immigration control by Article 8, and would be afforded a margin of appreciation in so doing, the legal reasoning changed its form. The emphasis had moved from applicants having to prove 'insurmountable' obstacles to overcoming various immigration measures in order to demonstrate that their rights had been interfered with, to the State having to justify the interference and to demonstrate that it had proper procedures in place to ensure the respect for family life, giving effect to its positive obligations under Article 8.²⁴

Given the above observations, it should be noted that, though not specifically categorising the migrants' rights, Articles 3 and 8 remain the ECHR's most developed provisions frequently raised by immigrant and asylum seeker applicants.

However, there is one straightforward migration situation which is expressly reflected in the ECHR. This is Article 5(1)f: '[T]he lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.'²⁵

This provision applies in two situations:

- 1.) detention to prevent a person entering a country unlawfully; and
- 2.) detention whilst a person is awaiting the execution of a decision to deport or extradite him or her.

The arrest must be lawful according to domestic law and cannot be arbitrary. The ECtHR found a violation of this provision in the case of *Bozano v. France*.²⁶ An Italian citizen, who had been convicted in his absence of murder by an Italian court, was forcibly taken at night by French police to the Swiss border. He was handed over into Swiss police custody following what transpired to be an unlawful deportation order, drawn up to circumvent the French court's ruling that extradition could not take place. The ECtHR held the deprivation of liberty to be arbitrary in motivation and unlawful. The detention appeared to be for the purpose of deportation, but was in reality a disguised illegal extradition.

Article 5(1)f does not require that the detention is reasonably considered necessary, for example so as to prevent the commission of an offence or to prevent a person fleeing. The ECtHR held in the case of *Chahal v. the United Kingdom*²⁷ that all that is required is that action is being taken with a view to deportation. However, detention under this provision does require deportation proceedings to be in progress and to be prosecuted with due diligence. *Chahal* concerned the proposed deportation on national security grounds of an alleged Sikh militant. The ECtHR found no violation as a result of the extended detention, as the UK was able to demonstrate that its courts had acted with due diligence in dealing with the many legal challenges which the applicant himself had

²³ *Ciliz v. Netherlands*, Judgment (merits and just satisfaction) of 11 July 2000, Reports 2000-VIII, para. 66

²⁴ N. 9 above, at 60-61

²⁵ See CoE's website: <<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CM=8&DF=9/4/2007&CL=ENG>>

²⁶ *Bozano v. France*, Judgment (merits) of 18 Dec. 1986, Series A, No. 111

²⁷ *Chahal v. United Kingdom*, Judgment (merits and just satisfaction) of 15 Nov. 1996, Reports 1996-V

raised in order to challenge his expulsion. In *Quinn v. France*,²⁸ on the contrary, the ECtHR found Article 5 to have been violated, because the detention lacked proportionality and the State had not conducted the relevant proceedings with due diligence.

Another relevant provision of the ECHR concerning migration is Article 2 of Protocol 4, the right to freedom of movement. It stipulates that everyone lawfully within the territory of a State shall have the right to liberty of movement, and that everyone shall be free to leave any country. This is a 'qualified right' under the Convention. That means that states are allowed to interfere with this right under certain specific circumstances. As can be seen from the text of this provision, freedom of movement applies only to persons lawfully within the territory. Those unlawfully within the territory have no such right. As with all qualified rights in the Convention, such as the rights enshrined in Articles 8-11, the ECtHR examines issues under this provision by asking a number of questions.

Firstly, the ECtHR examines the nature of the right, namely if the provision is applicable to the present situation. Secondly, the Court establishes if there has been an interference with the right. Thirdly, if there has been interference, the ECtHR moves on to examine whether such interference can be justified. In order for the interference to be justified, it has to be in accordance with the law, which has to be of a certain quality, precise and ascertainable. Fourthly, such interference has to pursue a legitimate aim, for instance national security. Fifthly and finally, the interference must be necessary in a democratic society. This means it has to correspond to a pressing social need and most importantly be proportionate to the legitimate aim pursued.

There is not much case law from the ECtHR on Article 2 of Protocol 4. Some recent cases have successfully passed the admissibility decision, but are awaiting a final judgment. The cases that do exist concern citizens, and the restrictions imposed have generally been found to be justified. For instance, in the case of *Peltonen v. Finland*,²⁹ the Commission found that the refusal by Finland to issue a passport to a Finnish citizen resident in Sweden was an interference with Article 2 of Protocol 4, but justified as necessary in the interests of national security and the maintenance of the *ordre public*. The applicant had failed to report for his military service, and the Commission noted that states were entitled to a wide margin of appreciation in organising their national defence. In the case of *Sulejmanovic and others v. Italy*,³⁰ the applicants were unable to benefit from the comparable provisions relating to lawful residence, as they had not made a request for refugee status to be recognised. Since the right to seek and enjoy asylum from persecution is a right enshrined in international law, it is unclear why the residence of those who have already made an asylum application is deemed unlawful until the final decision on their application has been taken.

In the ECHR other provisions also address the migrants' condition or can be invoked to protect other aspects of the rights of migrants. Articles 13 and 14 of the ECHR, which provide for the right to an effective remedy and the right against discrimination on many grounds including race, colour, religion, language and ethnic origin, are sometimes invoked by litigating parties in cases involving migrants.³¹

²⁸ *Quinn v. France*, Judgment (merits and just satisfaction) of 22 Mar. 1995, Series A, No. 311

²⁹ *Peltonen v. Finland* (Application No. 19583/92), Decision of 20 Feb. 1995

³⁰ *Sulejmanovic and others v. Italy*, Judgment (struck out of the list) of 4 Mar. 2002; *C v. Belgium*, Judgment of 7 Aug. 1996, Reports 1996-III

³¹ *Monstaquim v. Belgium*, Judgment (merits and just satisfaction) of 18 Feb. 1991, Series A, No. 193 and *C v Belgium*, Judgment of 7 Aug. 1996, Reports 1996-III

However, only in one case did the Court consider that refusing a Turkish national emergency assistance in Austria was a breach of Article 14.³²

A significant development in the jurisprudence of the ECtHR is the adoption of Protocol No. 12 to the ECHR, which contains an independent non-discrimination clause prohibiting discrimination by public authorities on identical grounds as those found in Article 14 of the ECHR. This 'stand-alone' provision has a huge potential to be of use to third country nationals who become victims of direct or indirect discrimination.

There are also some cases in the ECtHR which raise the issue of human rights violations specifically applicable to migrants (regardless of legal status). These are the prohibition of expulsion (Article 1, Protocol No. 7), and the prohibition of collective expulsion of aliens (Article 4, Protocol No. 4). However, most of these sorts of complaints have been declared inadmissible and have not reached the ECtHR's final judgment.

The right to manifest one's religious belief (subject to limitations) is covered by Article 9 of the ECHR. Given the salience of debates on the cultural rights or religious freedoms of migrants, one might have expected plenty of appeals to the ECtHR, yet there is no decision of the ECtHR that has upheld a violation of a migrant's right under Article 9. Applications tend to be rejected either at the admissibility stage or later on, following the ECtHR's examination on merits. It could be explained by the sensitiveness of the religious question and the large margin of appreciation given to civil governments in interfering with this right. Eventually, the ECtHR has 'chosen to restrict itself in the manner in which it can interpret Article 9'.³³

Furthermore, the jurisprudence of the ECtHR does not include the situation when there is a complaint by an asylum seeker regarding the violation of a fair trial right under Article 6 of the ECHR. The Court used to reject such claims on the ground that the procedure followed by public authorities to determine whether an alien should be allowed to stay in a country or should be expelled is of a discretionary, administrative nature, and does not involve the determination of civil rights within the meaning of Article 6(1) of the ECHR.³⁴ Thus, the provision has no application to migrants' complaints about a fair trial in the proceedings concerning refusal of entry, termination of a residence permit, expulsion or deportation.

Unfortunately, the ECtHR has only been able to pronounce itself on narrow aspects of migrants' rights. The ECtHR jurisprudence has been circumscribed to very specific areas of rights with respect to the protection of migrants. Even in such cases the ECtHR has clearly circumscribed the conditions under which the right protected is deemed violated. In all their decisions judges reaffirm that they do not forbid states from regulating the entry and stay of migrants, nor do they have to judge national immigration policy. Decisions actually discuss a number of legitimate reasons why a State may want to limit entries, such as the economic well-being of a country, or to expel individuals because of threats to public order. These restrictions are vaguely defined as applying if they are 'necessary in a democratic society'. The judges weigh the proportionality between the legitimate aim of a measure or of a law, the means used to achieve this goal, and the damage done to the individual by the violation of Convention rights. For instance, in the *Abdulaziz* case, the ECtHR stated:

³² *Gaygusuz v. Austria*, Judgment (merits and just satisfaction) of 16 Sept. 1996, Reports 1996-IV

³³ S. Stavros, 'Freedom of Religion and Claims from Exemption from Generally Applicable, Neutral Laws: Lessons from Across the Pond?', (1997) 6 *European Human Rights Law Review* 607, at 615

³⁴ *Chahal v. United Kingdom*, Judgment (merits and just satisfaction) of 15 Nov. 1996, Reports 1996-V

Regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual. [...] a State has the right to control the entry of non-nationals into its territory. [...] The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept non-national spouses for settlement in that country.³⁵

The same wording was used again in the *Abmut v. Netherlands*³⁶ decision, a case in which the ECtHR deemed it possible for the claimant to live with his partner in his country of origin.

Why is the ECtHR jurisprudence on migrants basically limited to condemning states for violating Articles 3 and 8 of the ECHR? Perhaps it highlights a certain dynamic. First, it might be explained by the fact that the European governments try to keep the issue of freedom of movement of third country nationals within the domain of their national prerogatives and are very sensitive about delivering it to the discretion of international trials. While in the case of the European Court of Justice (ECJ) the extent of the Court's jurisprudence over human rights is largely dependent on economic and nationality conditions,³⁷ in the case of the ECtHR availability of fundamental rights remains dependent on the migrant's status in the host country, in particular his or her family links, as well as on the political situation in the home country. A second reason might lie in the fact that once the ECtHR opened a breach of redress by recognising the pertinence of Article 3 and 8 in cases of expulsion, lawyers and organisations engulfed themselves in it by filing similar cases to build up the jurisprudence in this area or to uncover other types of application. The sensitivity and complexity of the issue of migration and asylum, as well as the logic of 'increasing returns' of litigation, whereby one success in court based on a particular provision leads lawyers to multiply cases based on those grounds might contribute to this state of affairs. The ECtHR's limited focus on migration-related aspects might also be explained by the pre-existence of national jurisprudence in these specific areas. European states have extensive clauses in their Constitutions on the prohibition from torture and inhuman or degrading treatment, as well as on the right to lead a decent family life. Thus, this practice in national legislatures might well have reflected on the relevant experience of the ECtHR. Last but not least, it might be because of the prudence of the ECtHR when it comes to burning political issues, such as immigration or asylum. It balks at solving nations' problems and taking clear-cut sides in controversial issues. This is a matter of maintaining credibility and legitimacy rather than having decisions dismissed as 'judicial meddling' by irate signatory states. The ECtHR has perhaps chosen to assert its authority slowly and has not yet exploited the Convention fully to the benefit of immigrants or asylum seekers.

3. Restrictive immigration and asylum policies in the EU against the citizens of NISs

How does the EU treat the immigrants and asylum seekers from the NISs? To what extent does that treatment differ from the treatment generally applied to third country nationals? What are the role and place of Central and Eastern European Countries (CEECs) in EU-NISs immigration and asylum relations?

³⁵ *Abdulaziz, Cabales and Balkandali v. UK*, Judgment (merits) of 28 May 1985, Series A, No. 94, para. 38

³⁶ *Abmut v. Netherlands*, Judgment (merits) of 28 Nov. 1996, Reports 1996-VI

³⁷ Case 159/90, *Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan* [1991] ECR I-4685

Although none of the NISs has so far been officially recognized by the EU as an official candidate for future EU accession,³⁸ this group of states is related to the process of EU enlargement and covered by the Partnership and Co-operation Agreements (PCAs), as well as the EU Neighbourhood Policy (ENP) (except for Russia and Central Asian states). However, political attempts by the EU to incorporate the former Soviet Union states into its neighbourhood policy and treat them in a favourable way have been guided by an economic and trade agenda and do not contribute much to the freedom of movement of goods, capital, services and persons.³⁹ That is to say, the legal status of NISs migrants in the EU does not significantly differ from that of other third country nationals. The EU does not significantly differentiate between various groups of third country nationals despite its apparent political preferences. Restrictive rules are applied equally to all third country nationals wishing to enter the EU, except in cases when there is a special international agreement. For instance, Article 6 of the Schengen Convention sets out uniform principles for control on external borders, which include the verification of travel documents, and of the other conditions governing entry, residence, work and exit of all aliens. Failing to comply with the requirements of the Schengen Convention will result in the expulsion of an alien, whatever country he or she comes from, from the territory of the EU Member State without delay. The EU Member States have adopted sophisticated policies of non-entrée targeting all third country nationals, designed to keep immigrants and refugees from ever reaching their territories. The EU governments have applied a restrictive approach in their law and policies towards third country nationals, which is embodied in a multifaceted and exclusionary immigration and asylum regime in Europe.⁴⁰ The policies of exclusion are well illustrated by the following examples:

- the extension of the 'black list' of countries whose nationals are required to obtain visas;
- the imposition of penalties on airline carriers carrying unauthorised migrants;
- the sending of asylum seekers back to 'safe third countries', without examining the merits of the asylum-seeker's request;
- the authorisation of law enforcement agencies to conduct random checks;
- the introduction of asylum quotas and the application of strict criteria in determining whether an asylum-seeker is a genuine refugee;
- the introduction of a list of prosecution-free countries; and
- dealing with some types of asylum claims without respecting most of the fundamental procedural safeguards.

Case 1⁴¹

A Russian national, resident in Poland and married to a Polish woman was told that, despite the fact that he has a Polish residence card, he still needs to obtain a visa in order to travel to another EU country.

³⁸ C. Hillion, 'Institutional Aspects the Partnership between the European Union and the Newly Independent States of the Former Soviet Union: Case Studies of Russia and Ukraine', (2000) 37 *Common Market Studies* 1211, at 1211

³⁹ Communication from the Commission: Wider Europe — Neighbourhood: A New Framework for Relations with Our Eastern and Southern Neighbours, COM (2003) 104 Final

⁴⁰ H. Lambert, 'Asylum-seekers, Refugees and the European Union: Case Studies of France and the UK' in R. Miles and D. Thranhardt (eds), *Migration and European Integration: The Dynamics of Inclusion and Exclusion* (London: Palgrave Macmillan, 1995) 112-131, at 127

⁴¹ M. Byrska, 'The Unfinished Enlargement', Report on the free movement of people in EU-25, European Citizen Action Service, Brussels, 2004.

Case 2⁴²

Two Chechen refugees managed to escape from war-torn Chechnya to Kazakhstan, from where they later departed to the UK. Applying the ‘safe third country’ principle the British immigration authorities rejected their application for asylum. They were issued air tickets back to Kazakhstan with a transit stop in Moscow, neglecting the fact that there was a risk that the Chechens might be disembarked and detained by Russian authorities.

Case 3⁴³

A Georgian asylum-seeker in the Traiskirchen Refugee Camp in Austria was allegedly ill-treated in February 2004 when he refused to leave the camp during asylum procedures. According to reports, he was wrestled to the ground by officials and had cigarettes stubbed out on his shoulder.

Furthermore, restrictive attitudes developed in the EU against third country nationals have been transferred into immigration and asylum policies of the CEECs. The CEECs find themselves unsafe from the application of policies of exclusion exercised in the EU Member States. Yet they have no other choice but to accept it as the rules of EU membership do not tolerate exceptions. ‘The CEECs are subject to asymmetrical relationship, whereby they are merely consumers of EU policies, and cannot influence them,’ says Grabbe.⁴⁴ Den Boer adds, ‘they [CEECs] will have to bear the brunt of exclusive policies pursued in Europe.’⁴⁵ Consequently, the CEECs in turn, should adopt restrictive measures *vis-à-vis* their eastern and southern neighbours. Challenging the declaration made by the Helsinki European Council that the enlargement of the Union would further enhance economic dynamism and political stability in the region and increase the possibilities for co-operation with non-EU candidate states, the implementation of EU restrictive *acquis* on immigration and asylum by CEECs has in fact led to the creation of new borders between traditional neighbours and partners in Central and Eastern Europe at a time when the internal borders in the EU are not yet abolished. The European home affairs ministers were able to agree at the Council in early December 2006 that the abolishment of all internal borders between old and new Member States should be technically possible by late 2007. This will allow checks at the European Union’s internal borders to be discontinued from 31 December 2007. But at the moment, bound by EU *acquis*, the CEECs have been forced to give priority to security issues and to act as a ‘buffer zone’, while downgrading the freedom of movement and neglecting humanitarian principles. One such ‘buffer zone’ task has been the abolishment of the visa-free regime for the CEECs’ eastern and southern neighbours, who have remained on the EU’s ‘black list’ of visa-requiring states. By 1999 the visa regime had been introduced for almost all NISs. In this respect, the European Commission directed its praise towards CEECs for making considerable progress in respect of rescinding visa-free agreements with all post-Soviet countries.

⁴² Personal interview with the victims during my internship at International Organization for Migration, London (July 2000).

⁴³ Amnesty International, ‘Europe: Treatment of Refugees and Asylum Seekers’, Media Briefing, EUR 01/010/2005, 2005

⁴⁴ Grabbe, n. 2 above, at 156.

⁴⁵ M. Den Boer, ‘Moving Between Bogus and Bona Fide: The Policies of Inclusion and Exclusion in Europe’ in R. Miles and D. Thranhardt (eds), *Migration and European Integration: The Dynamics of Inclusion and Exclusion* (London: Palgrave Macmillan, 1995) 92-111, at 95

The CEECs have likewise had to sign re-admission agreements, not only between themselves, but also with all NISs.⁴⁶ Although these agreements do not specifically address the situation of asylum seekers, they nevertheless provide for the return of nationals of contracting states or third country nationals and are used as a tool for implementing the 'safe third country' principle. The CEECs have also had to take major steps in border checks and data protection issues. These have included measures on the improvement of the independence of a personal data authority, the computerisation of the visa issuing process in most consular offices in the NISs, the intensification of border checks, the deployment of new resources and the reformation of internal structures to develop the Schengen Information System.⁴⁷

It has to be mentioned that the creation of strict borders between traditional neighbours in Eastern Europe has the potential to disrupt well-established economic and cultural ties in the area. Such policies could also upset the political leadership of NISs and disrupt their Western orientation in favour of closer collaboration with Russia and other non-EU countries. For instance, the abolishment of the visa-free regime between Poland and the Ukraine in 2003 resulted in an inevitable breaking of socio-economic and political ties across borders and negatively affected the economic situation in the region. It has brought about the closure of many small and middle-size enterprises and a substantial fall in the incomes of both Polish and Ukrainian citizens.⁴⁸ It has also significantly affected cultural and historical links between the two Slavic nations, as many Ukrainians and Poles have relatives on either side of the border.

Ironically, while recent developments in the EU show the reassertion of liberal and democratic values throughout the whole European continent, the free movement of populations in the eastern part of Europe was taken away by new political and institutional orders established in the EU. The uncritical adoption of such an approach by the CEECs may present them with the prospect, just a few years after the collapse of authoritarian governments, of constructing new borders and new obstacles to freedom, while re-emphasising the centrality of control, policing and data gathering.⁴⁹

Case 4⁵⁰

A village populated by ethnic Hungarians located on the Slovak-Ukrainian border is now divided into two parts: EU and non-EU territory. The border line running across the village, now an EU external border, forces families living on the Ukrainian side not only to apply for a visa, but also to travel 300 km to the closest border crossing point.

Regarding direct EU-NIS relations, it should be noted that, while by the mid-1990s Europe Agreements (EAs) had been concluded with all ten Central and Eastern European states, Russia and other NISs had been offered Partnership and Co-operation Agreements. These agreements were supposed to govern their relations with the EU.

⁴⁶ J. Chlebny and W. Trojan, 'The Refugee Status in Poland', (2000) 12 *International Journal of Refugee Law* 3, 212, at 214

⁴⁷ Communication from the Commission to the Council and the European Parliament - *Development of the Schengen Information System II*, COM (2001) 720

⁴⁸ A. Getmanchuk, 'Україна-Польща: Приграничні замітки', (2003) *Виртуальна Таможня*, <http://www.vch.ru/cgi-bin/guide.cgi?table_code=15&action=show&id=1794>

⁴⁹ V. Mitsilegas, 'The Implementation of the EU acquis on Illegal Immigration by the Candidate Countries of Central and Eastern Europe: Challenges and Contradictions', (2002) 28 *Journal of Ethnic and Migration Studies* 3, 665, at 678

⁵⁰ M. Byrska, 'The Unfinished Enlargement', Report on the free movement of people in EU-25, European Citizen Action Service. Brussels, 2004

The PCAs signed with the Russian Federation and the Ukraine, followed by Kazakhstan and the Kyrgyz Republic, were the first in the series of now eleven with all post-Soviet countries, except for the Baltic States and Tajikistan. PCAs are also, like the Europe Agreements, in principal mixed agreements based on Articles 133 (ex Article 113) and Article 308 (ex Article 235) of the Treaty of Rome.⁵¹ PCAs' legal frameworks are primarily premised on the respect of democratic principles and human rights, setting out the political, economic and trade relationships between the EU and its partner countries.⁵² Each PCA is a ten-year bilateral treaty signed and ratified by the EU and the individual state. The preambles of all PCAs are the same and much like the EAs. Parties declared that they are 'convinced of the paramount importance of the rule of law and respect for human rights, particularly those of minorities, the establishment of a multiparty system with free and democratic elections and economic liberalization aimed at setting market economy'.⁵³

However, the PCAs are definitely not like EAs. This difference is not only a matter of simple legal text, but also of high-level politics. It derives from the fact that the latter fall within the political ambition of the CEECs to obtain EU membership sooner or later while the former are concluded without any implication of EU membership.⁵⁴ There is also another remarkable difference between the PCAs themselves — those concluded with Russia, the Ukraine, Moldova and Belarus and those signed with non-European NISs. The difference is generally that the first category only defines the status of NISs workers in the EU. It covers the rights of entry, residence and obtaining work permits for 'key personnel' employed by companies of the Parties.⁵⁵ These rights are given solely for the purpose of employment in a company and only for the period of that employment. The NISs workers may therefore enjoy very limited freedom of movement within the EU, largely dependent on the establishment purposes and work permits, as in the case of all third-country nationals. However, the latter category of PCAs includes an additional emphasis on illegal migration, adding the provisions on readmission and the prevention of illegal activities in Title VIII. The Member States and the non-European NISs thus agree to cooperate in order to prevent and control illegal migration.

In June 1999 the Cologne European Council decided on a 'Common Strategy of the European Union on Russia',⁵⁶ and in December 1999 the Helsinki European Council adopted another Common Strategy with respect to the Ukraine.⁵⁷ Contrary to PCAs, the Common Strategy has a specific legal basis in the Treaty on European Union (TEU), which presents it as an instrument of external policy. The Common Strategies were conceived as means to strengthen and deepen relations with the NISs based on PCAs. So far the European Council has endorsed only two Common Strategies, namely those with Russia and the Ukraine. This puts a special impulse on the relationship between the EU and these countries as compared with PCAs with the rest of the NISs.

From 2007 onwards, multifaceted support for the ENP and ENP countries is provided through a dedicated European Neighbourhood and Partnership Instrument

⁵¹ Official Journal of the European Communities, 2002, C 325/33

⁵² M. Maresceau, 'On Association, Partnership, Pre-accession, and Accession' in M. Maresceau (ed.), *Enlarging the European Union: Relations between the EU and Central and Eastern Europe* (London: Palgrave Macmillan, 1997) 3-22, at 12

⁵³ Proposal for a Council and Commission Decision on the Conclusion of the Agreement on Partnership and Co-operation between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, COM (1994) 257 Final

⁵⁴ M. Maresceau and E. Montaguti (eds.), 'The Relations between the European Union and Central and Eastern Europe: A Legal Appraisal', (1995) 32 *Common Market Law Review* 1327, at 1342

⁵⁵ Official Journal of the European Communities, 1997, L 327

⁵⁶ Official Journal of the European Communities, 1999, L 157/1

⁵⁷ Official Journal of the European Communities, 1999, L 331/1

(ENPI), which has been established to promote the development of an area of prosperity and good neighbourliness between the EU Member States and the partner countries covered by the ENP. The ENPI targets sustainable development and approximation of national systems to EU policies and legislation. This brings a radical improvement in the capacity to support cross-border cooperation along the EU's external borders – thus giving substance to the aim of avoiding new dividing lines in Europe. The ENPI replaces the MEDA programme, Technical Aid to the Commonwealth of Independent States (TACIS) and other previous instruments existing in the EU.

Country Strategy Papers (CSPs) have also been developed for ENP countries covering the period 2007-2013. While the assistance to these countries over that period will be provided principally under the new ENPI, the principal objective of CSPs is to develop an increasingly close relationship, going beyond past levels of cooperation to gradual economic integration and deeper political cooperation, principally in the framework of the PCAs and the more recent ENP. EU assistance over the period covered by this strategy will therefore aim at supporting reform agendas on the basis of the policy objectives defined in the PCAs and the ENP Action Plans. The ENP Action Plans define the broad areas of cooperation in the field of justice, freedom and security. In this context EU assistance will focus on: 1.) migration and asylum, and 2.) border management, including document security and biometrics and visas.

Whereas the CSPs provide a comprehensive overview of future EU assistance priorities encompassing all instruments and programmes and following the structure of the ENP Action Plan, the National Indicative Programmes 2007-2010 spell out in greater detail the focus of operations under the national allocation of the ENPI. They are intended to guide planning and project identification by identifying a limited number of priority areas, together with the objectives and results to be achieved. However, they have scarce wording on migration and asylum, only mentioning the need for further improvement in the area of justice, freedom and security, including border management and migration and asylum.

The Copenhagen European Council reiterated that the European Union should take the opportunity offered by enlargement to enhance relations with its neighbours on the basis of shared values. It underscored the EU's determination to avoid the drawing of new dividing lines in Europe and to promote stability and prosperity within and beyond the new borders of the Union. In return for concrete progress, demonstrating shared values and effective implementation of political, economic and institutional reforms, including aligning legislation with the *acquis*, the EU's neighbourhood should benefit from the prospect of closer economic integration with the EU. Furthermore, in its communication, the European Commission stated that the 'EU should aim to develop a zone of prosperity and a friendly neighbourhood – "a ring of friends" – with whom the EU enjoys close, peaceful and co-operative relations'.⁵⁸ Whether or not all this is merely a political declaration remains to be seen.

4. Conclusion

The paper has established that human rights are the strongest case against restrictive immigration and asylum policies, because migration control and exclusion impose increasingly harsh suffering on immigrants and asylum seekers⁵⁹ and negatively affect their fundamental rights. The EU Member States have been at the forefront of

⁵⁸ Communication from the Commission: Wider Europe – Neighbourhood: A New Framework for Relations with Our Eastern and Southern Neighbours, COM (2003) 104 Final

⁵⁹ V. Guiraudon, 'International Human Rights Norms and their Incorporation: The Protection of Aliens in Europe', EUI Working Paper, EUF No. 98/4. Florence, 1998, at 6

developing and utilising increasingly creative and harsh restrictions to deter the entry and stay of non-nationals in their territories.⁶⁰ In parallel with the infringement of the freedom of movement, restrictive policies tend to undermine a long list of other human rights, such as the right not to be subjected to torture, inhuman and degrading treatment, the right not to be arbitrarily arrested and detained, the right to a fair trial, the right to family life and the right to work. Restrictive migration control policies run counter to the principles of international human rights law, especially the requirements of the ECHR. Individual human rights provisions that the EU tries to adopt very often come after restrictions on the freedom of movement have already been put in place. In this case, it becomes difficult to rectify the situation, with migrants' human rights already affected by restrictive measures. Human rights should precede restrictions and be a landmark for any decision in the immigration and asylum field.

As a matter of fact, the Member States' power to restrict immigration and asylum is not absolute and unlimited, as it is to be measured against the states' international obligations and humanitarian traditions. Human rights in international law are primary immunities against sovereign actions of governments that may result in human rights violations. The ascendancy of human rights is to be interpreted as an attempt to curb state sovereign rights in favour of individual rights and freedoms.⁶¹ Therefore, states should abide by international rules designated to protect and promote human rights of immigrants and asylum seekers. In our case, restrictive policies and laws, if applied, should be in compliance with the obligations of the EU Member States arising from a number of international treaties, including the ECHR, so as to guarantee the protection and respect for human rights.

The power of international human rights law offers and demands at the same time the enjoyment of human rights and fundamental freedoms for all categories of people, irrespective of an individual's legal status. It benefits everyone — nationals, foreigners, migrants or refugees — whether lawfully or unlawfully in the state, and regardless of any situation of emergency.⁶² Instruments protecting human rights generally apply to all persons within a state's jurisdiction. In other words, a person's status as an alien does not take him or her outside the protection of human rights law. Although international law allows distinctions between citizens and non-citizens, the rights and freedoms that are available to the former must not be discriminatorily denied to the latter.⁶³ It is true that governments can justify restrictions in immigration and asylum policies by referring to issues such as national interest, public order or security, but each time such justifications undermine rather than reinforce the principles of protection and promotion of human rights in Europe. Restrictions on immigration and asylum threaten the supremacy of liberal freedoms and fundamental human rights for the individuals in question.

The paper has demonstrated that, despite the international human rights regime, the EU Member States still fail to ensure the full realisation of immigrants and asylum seekers' human rights. Even though there are many documents adopted at the EU level

⁶⁰ G. Borchelt, 'The Safe Third Country Practice in the European Union: A Misguided Approach to Asylum Law and a Violation of International Human Rights Standards', (2002) 33 *Columbia Human Rights Law Review* 473, at 475-476

⁶¹ M. Reitzes, 'Towards a Human Rights-based Approach to Immigration Policy: The Migrant Challenge to Realpolitik', (2007) Occasional Paper, Foundation for Global Dialogue

⁶² G. Goodwin-Gill, 'The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam', in E. Guild and C. Harlow (eds.), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford: Oxford University Press, 2001) 141-163, at 147

⁶³ A. Aleinikoff and V. Chetail (eds.), *Migration and International Legal Norms* (The Hague: TMC Asser, 2003), at 16

that go on to propose laws, policies, and amendments to enhance human rights standards, they are inconsistent and selective, often ignoring standards that are needed for the maximum protection of migrants. The legal protection of immigration and asylum matters, in particular in respect of refusal of admission and expulsion, is largely dictated by national legislative and administrative rules, which in general lack international standards of protection and respect for human rights.

One should not forget that the protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for the legitimacy of any action taken within the framework of EU law. The EU is an organisation founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. The EU human rights order, inspired by the ECHR authority, provides certain mechanisms for the realisation of the human rights of immigrants and asylum seekers against the background of restrictions and limitations. Respect for migrants' rights is a condition of the lawfulness of Community acts in this area. A human being with his or her interests is central to the EU, and the Member States have a responsibility to protect the human rights of all those within their territory and jurisdiction. There is an individual and collective duty of EU states to protect persons moving across borders and it is incumbent on them to act and co-operate to achieve this purpose.⁶⁴

⁶⁴ G. Goodwin-Gill, 'Migration: International Law and Human Rights' in B. Ghosh (ed.) *Managing Migration: Time for a New International Regime?* (Oxford: Oxford University Press, 2000) 182-198, at 196

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