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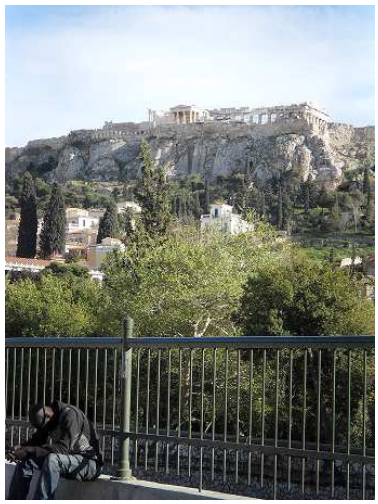
BUILDING NEW FENCES? SECURITY CONCERNS AND PROTECTION OF ALIENS AT THE EUROPEAN BORDERS



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Statement against plagiarism

Abstract

This research paper aims to examine the compatibility of border controls with the human rights standards that the EU and its Member States are bound to. For that purpose, expulsion has been chosen as the comparative element, since the non refoulement principle is one of the most developed constrains to the faculty of the State to expel non citizens. The human rights mechanisms available for the protection against expulsion will be examined and compared with the most representative EU regulations regarding forced removal of aliens. The analysis on the compliance of the EU policy with human rights standards is illustrated with a case study about Spain, which is one of the "guardians" of the Southern borders. The protection of citizens against security threats is the most common justification for the downgrading of the safeguards available for third country nationals aiming to reach Europe. The question is whether a balance between the interests at stake can be stroke, and to which extent the apparent clash between citizens and non citizens' rights is illusory. In fact, the non refoulement principle has been reinforced in Europe thanks to the case law of the ECtHR. This development challenges the idea that aliens can be deprived of protection on account of an artificial equilibrium between their rights and the well being of the host community.

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List of abbreviations

AI	Amnesty International
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture
CRC	Convention on the Rights of the Child
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
HRC	Human Rights Committee
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
JHA	Justice and Home Affairs
MEPs	Members of the European Parliament
OAS	Organization of American States
OECD	Organisation for Economic Cooperation and Development
QMV	Qualified majority voting
SIS	Schengen Information System
SIVE	Spanish system of external vigilance
TEU	Treaty of the European Union
TEC	Treaty Establishing the European Community
UDHR	Universal Declaration of Human Rights
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees

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Introduction

Even though immigrants coming to Europe from developing countries are not significant in comparison with the total amount of the population movements around the globe, a sharp European reaction to migration in terms of border controls illustrates the debate about the controversial balance between security and human rights[1]. Thus, human rights´ advocates worldwide appeal for the upgrading of the available guarantees for aliens in the frontiers.

Actually, according to international customary law, a State is allowed to control the entry of aliens and establish the requirements needed to obtain membership status. Hence, the vulnerability of migrants and refugees find its root in the accepted practice of confining certain rights only to citizens on account of their legal status.[2] The question is what are the reasons behind the faculty of a country to decide who is allowed to be part of a certain society?

The widespread reaction in Europe to the increase of the migration flows can be summarised in a single word: *fear*. Thus, border controls became the mean through which the authorities protect their citizens against security threats. In fact, the concept of security has different layers and its understanding substantially impacts the balance of citizens and non-citizens rights.[3]

Nowadays, the motives that States have to restrict the entrance of *unwanted migration* are highly connected with the perpetuation of their citizens´ status quo. Foreigners coming from developing countries are blamed for offering cheap labour force and thus, creating unfair competition in the labour market. In the last years the situation worsened with the economic downturn, and it substantially contributed to the spread of xenophobic attitudes.[4] Moreover, the interaction between "insiders" and "outsiders" is a challenge given the differences on cultural backgrounds, and the divergences on values and lifestyles. Thus, both sides are afraid they will be imposed the culture of the others, and their own identity will be emptied. As Rebecca Larson points out, those fears are the economic and social spheres of security.[5]

[1] United Nations High Commissioner for Refugees (UNHCR), 1998, p. 45.
[2] Goodwin-Gill, 1989, p. 527.
[3] Guild, 2009, pp, 6-10, Huysmans, 2006, pp. 751-753.
[4] Fix, & Papademetriou, et al., 2009, pp. 108, 109.
[5] Larsen, 2005, pp. 2-16.

Actually, security is more often understood in its political sphere, which links with the stability of the institutions, the trust on the governments and the management of national and transnational crime.[6] The terrorist attacks in Manhattan, Madrid and London considerably influenced the worldwide approach to migration. The idea that industrialized countries are under the continuous threat of terrorism has a great impact in world politics, and those arguments are used to lower the guarantees and rights which everyone is entitled to, and justify the restrictions on an often illusionary "emergency situation". In this case, the stress is given to the protection of public order, and the assurance that the members of the host community are confident with the institutions and feel safeguarded by them.[7] Nevertheless, the risk of those discourses and their impact on human rights is scary since they are easily manipulated, and often used by the politicians to get a part of the electorate, no matter at the expense of whom.[8]

Certainly, *human* security is on the other side of the "security coin". When Elspeth Guild examines the dilemma between human rights and sovereignty, she throws a very illustrative question in her analysis of the link between security and migration in the 21st century: *whose security and security in whose name?*[9]

States are increasingly interrelated, and the construction of the international community challenges classic notions of sovereignty.[10] In the last century, a wide number of nations have recognised the existence of universal, inalienable human rights which they are bound to. Countries have a mutual responsibility to assure the compliance of those standards, and institutions as monitoring bodies, or regional or international Courts has been set up in order to oversee the fulfilment of the States´ obligations. [11]

Those standards are not meant to be exclusive privileges for citizens, but safeguards for the respect of everybody´ s dignity. In fact, among the internationally recognised human rights, there are some standards which are particularly protected and admit few exceptions. Hence, the prohibition of torture, inhuman or degrading treatment, do not allow for any distinction on the basis of nationality[12] and the likelihood of balance it

[6] Huysmans, 2006, pp. 760, 761, Larsen, R, pp. 2- 16.
[7] Ackerman, 2004, pp. 1029-1090.
[8] Fitzpatrick, 2003, pp. 255,260.
[9] Guild, 2009, p. 191.
[10] Dauvergne, 2004, pp. 593-595.
[11] Purcell, 2007, pp. 185,186.
[12] Goodwill-Gill, 1989, p. 537.

with arguments of security and public order is under a very contentious discussion in the international arena.[13]

The existence of an unavoidable clash between border controls and due respect to human rights remains controversial and has a huge impact on the lives of millions of people who intend to reach the promising Europe or are currently living within the Schengen borders. The available data significantly underestimates the number of foreigners affected by border controls since it does neither include the migrants which are irregularly staying, nor the rejected in the border. The difficulties of measuring illegal migration are self evident, given the interest of those foreigners to hide from the authorities, and avoid public census or any other registration which could entail the risk of being discovered and deported.[14] Additionally, the attempts to cross the borders can be only partially estimated with the number of asylum applications in the frontier. Even though, the figures offered by the Organisation for Economic Cooperation and Development (OECD) in its report about *World Migration 2008* shows better the effect that migration flows have in Western and Central Europe. According to their report, in the majority of the European countries, the proportion of the people who was born abroad amounted from 7 to 15 per cent and almost the 85 per cent of the European population growth has been caused by migration flows.[15]
In any case, the movement of people is a natural act and is clearly not likely to diminish in the future. Thus it remains to be seen whether the tough European response to population movements can be reviewed and creatively adequate to the respect for individuals.[16]

The aim of this research paper is to find out whether the dilemma between border controls and respect for human rights within the European context is a zero sum, or both goals can be compatible and mutually reinforcing. To test that relationship, the figure of expulsion, as a paradigmatic example of border controls, has been chosen. Although the faculty of the State to control migration has a wide range of expressions,

[13] Guild, 2009, pp. 91-107.
[14] Khalid, 2005, p. 7.
[15] OECD, 2008, p. 455.
[16] Goodwill-Gill, 1989, pp. 545,546.

namely prevention, detection, selection and removal,[17] to focus on the latter is useful for the purpose of this research due to a number of reasons.

Firstly, the sovereign right to deny entry is configured as an international customary rule, meaning it has a significant strength, since it obliges every country without consideration on the international Treaties they signed up.[18] Additionally, States have not only the right, but also the obligation to protect their citizens from internal and external threats, and provide for a peaceful environment.[19] Both factors apparently leave human rights a tiny margin of manoeuvre, and a tough struggle to put up. Thus, it is necessary to resort to specific well developed standards which are able to offer effective protection against removal, and will not be automatically submitted by security claims. Therefore, the non refoulement principle, which has also acquired the category of customary law[20], is the most adequate rule to challenge States´ discretionary power over migration. The prohibition of torture, inhuman or degrading treatment or punishment is configured as an absolute right in international and regional human rights treaties, thus, foreigners should never be expelled if there is sufficient evidence that they would be mistreated upon their return. [21]

Secondly, when expulsion is interpreted broadly, it includes a number of circumstances which are of high concern in Europe, particularly regarding rejection in the frontiers and interception before the borders. To handle those situations became a crucial issue especially in those countries which now constitute the external borders of the European Union (EU). In order to clarify the notion of expulsion which will be used along this research paper, a further explanation on the typology of measures related to removal is required.

Three groups of measures will be the object of this study, namely rejection in the border, expulsion of aliens residing in the territory of the host country, and extradition. Interception in the sea poses many question marks regarding its legal nature and the attribution of responsibility over the victims of fatalities in international waters. Thus, it falls out of the scope of this thesis since the application of the non refoulement principle is very controversial and would lead to an independent study itself.

[17] Peers, 2006, p. 240.
[18] Den Heijer, 2008, pp. 279-286.
[19] Guild, 2004, pp. 223-226.
[20] Lauterpacht, & Bethlehem, 2001, pp. 217-253.
[21] Guild, 2009, p. 90, 91.

Refoulement in the frontiers generally lacks the protection granted for aliens who are expelled when they are already within the territory of the country. [22] In fact it has a crucial impact on a huge number of immigrants automatically rejected when they arrive at the European newly established boundaries. That is the why it ought to be included within the scope of this analysis. In the case of foreigners living in the territory of the Member State, expulsion orders can be issued as an administrative or a criminal sanction. The administrative orders are normally based on the illegal entry or residence, or on considerations related to the threat that an alien embodies for the community. On the other hand, when expulsion orders are established as a criminal sanction, a Court is generally in charge of deciding about them, and the crime often require a particular degree of seriousness. Some countries do even have a type of expulsion which is directly issued by the Government in case there is a risk to security or to public order.[23]
Regarding extradition, when someone is accused of a particularly grave offence in a foreign country, its removal responds to the demand of the State in order to prosecute him in their territory. In those situations, human rights might be also abused by the State against political dissidents, and that is the reason why extradition is also examined among this study. In fact, all those measures will be comprised within the working concept of expulsion.

As referred above, human rights do increasingly constitute a limit for the discretionary power of the State to expel. In order to pursue this analysis, Chapter 1 aims to examine the available human rights mechanisms and standards for the protection against refoulement, both at the international and regional level.
Thus, a brief analysis on the right to freedom of movement and its inadequacy to respond to the current needs of aliens will be also provided. The principle of non refoulement and the prohibition of torture, inhuman and degrading treatment is the core of the discussion, and an assessment on how this obligation is framed in the international treaties, namely the International Covenant on Civil and Political Rights (ICCPR)[24], the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) [25], the Convention Relating to the Status of Refugees

[22] Nascimbere, B, 2001,p.590.
[23] Nascimbere, B, 2001, pp. 590-592.
[24] ICCPR, 16 December 1966.
[25] CAT, 10 December 1984.

(Refugee Convention)[26] and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[27], is mandatory in order to point up the existing safeguards.

On the other hand, Europe has been depicted as one of the best examples of migration restrictive policies. Thus it illustrates very well the so called *securitization* of migration and it shows the interests at stake in the relationship between border controls and human rights. Therefore, Chapter 2 aims to explore the progressive build up of a new sovereign entity which is the EU, and its impact on the control of migration flows. As Elspeth Guild highlights migration only exist because borders do. The elimination of internal frontiers, the setting up of the *Schengen acquis* and a recently shaped immigration and asylum common policy has led to a new understanding of the classic notion of sovereignty,[28] and entail essential challenges regarding the respect of the human rights obligations; which both the Member States and the EU as an independent entity, are bound to. Special focus will be given to the regulation of expulsion and the potential clashes it has with the non refoulement principle contained in the ECHR, which is already discussed in Chapter 1.

To conclude with, Chapter 3 contains a case study about Spain, which shows the result in practice of the tension between efficiency of border controls and the States responsibility to respect human dignity. Although Spain is a country of recent immigration, it became one of the most important southern gateways for immigrants in their way towards Europe. An examination of the legal framework and policies regarding expulsion measures illustrates the challenges and flaws of the current protection, as well as the opportunities for a better management of migration flows in the future. The case of the two Moroccan cities of Ceuta and Melilla, are examples of worst practices, and give a glimpse on how much the EU has still to do in order to meet the commitments they made before the international community.

[26] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951.
[27] ECHR, 4th November 1950.
[28] Guild, E, 2009, p. 2.

1. Human Rights obligations and safeguards against expulsion.

The tension between the State sovereign power and human rights is particularly present in the management of migration. As Catherine Dauvergne says, migration policies are the "*last bastion of sovereignty*" in our increasingly interconnected world.[29]

However, the States are not entitled with a non limited power over everyone under their jurisdiction. The proclamation of equal dignity of every human being and, the recognised universality of certain rights have an essential effect over State actions, since the majority of them have compromised to respect, protect and fulfil those standards. The development of human rights in the international arena offers the opportunity for vulnerable individuals to activate a range of checks and balances against arbitrary actions and abuses, both at the international and regional level.[30]

In this Chapter, I will select the most relevant human rights mechanisms available against the discretionary power of a State to expel foreigners. It actually begins with a brief discussion about the freedom of movement and its interpretation by the international community.

In fact, the right to leave is asymmetrically configured since it does not include a right to relocate in another place which is not the country of origin. In addition, it is not an absolute right and it can always be submitted to restrictions on account of security or public order. Thus, even if a right to enter a third country was inferred from the right to leave, this construction would be very limited and clearly inadequate for the current needs of migrants and refugees.

The foundations of the freedom of movement, which are also the human rights´ fundamentals, will be presented also hereinafter. That overview, lead to the conclusion that even though there is not a general obligation for States to allow everybody to enter their territory, there is an effective ceiling to their capacity to expel, and that is the principle of non refoulement.

[29] Dauvergne, 2008, p. 62.
[30] Guild, 2009, p. 22.

The prohibition of refoulement is included in several international and regional instruments, namely ICCPR, CAT, the Refugee Convention and ECHR.[31] All of them will be examined and compared since there are several divergences which shape the whole protection against removal depending on the instrument used. Due to its wide acceptance, this principle has become an international customary norm. Nonetheless, its *ius cogens* nature is controversial since that would imply that it can never be balanced with any other interest, and that is especially sensitive given the security concerns of our time.

Once the human rights standards which can be possibly used to restrict the faculty to expel are sufficiently clear, I will move to one of the paradigms of border controls, the EU. Its border policy and compliance with the human rights standards will be tested in the next chapter.

1.1. – International human rights standards: an overview on the freedom of movement.

As Cranston states, "*freedom of movement is the first and most fundamental of man's liberties*"[32]. The deprivation of the right to leave one's country of origin and relocate, leads to denial of other fundamental human rights and dispossess human beings of the opportunity to develop one's personality in a dignified manner. [33]

Nonetheless, it becomes an "*inconvenient*" human right for States in their intent to stop the flow, and secure their citizens´ status quo.[34] Apparent competent rights of citizens and non citizens are balanced by the sovereign State for the benefit of their own members. Though, the existence of an unavoidable clash between the protection of aliens and the preservation of the host community is not self evident.

Migration is not an exclusive phenomenon of the 21st century, and it contributes substantially to human development. [35] There is not evidence supporting the widespread idea that migrants represent a threat for the economic well being of the society, and for the stability of the country. On the contrary, there is increasing agreement over the fact

[31] Lambert, 1999, pp. 515-544.
[32] Juss, 2004, p. 289.
[33] Juss, 2004, pp. 289-292.
[34] Harvey & Barnidge, 2007, p.2
[35] UNDP, 2009, pp 14-16.

that mobility contributes to relocate resources, and has a potential positive impact in both the send and the host country. [36]

In this subchapter, the interpretation given by the international community to the broadly recognised freedom of movement is going to be examined. The freedom of movement in human rights positive law is restricted to the right to leave any country and return to the country of origin.[37] The corresponding right to enter a third country and relocate is contentious, and will be the core of this analysis.[38]

1.1.1. - The right to leave and return under international Human Rights law.

Several International instruments refer to the freedom of movement from different perspectives. Article 13 of the Universal Declaration of Human Rights (UDHR)[39] includes a broad reference to it. However, due to its controversial binding nature, a more adequate scheme for the protection of the right can be found under article 12 of the ICCPR[40].

The Art 8 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)[41] also contains a mention to the right to leave. However, none of the EU Member States have ratified it due to a variety of reasons, including the common fear that they can not afford the strong guarantees provided by this international instrument.[42]

Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD)[43], and article 10 of the Convention on the Rights of the Child (CRC)[44], also incorporated references to the freedom of movement.

Notwithstanding the right to leave one's country is contained in several legal instruments, consideration of its specific content has only been taken by the Human Rights Committee (HRC), in its General Comment nº 27.

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[36] UNDP, 2009, pp. 71-92.
[37] General Comment 27, 1999.
[38] Purcell, 2007, p. 178.
[39] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948.
[40] ICCPR, 1966, art.12.
[41] ICRMW, 1990, art.8.
[42] McDonald, & Cholewinski, 2007, pp.51- 65.
[43] CERD, 1965, art.5.
[44] CRC, 1989, art.10.

According to the HRC interpretation, freedom of movement has a negative character, meaning that States are forbidden to prevent their citizens to abandon their territory. However, as stated in article 2 of the Strasbourg Declaration on the right to Leave and Return,[45] States are guarantors of the effective enjoyment of the right, and therefore have also positive obligations for its implementation.

The right to leave is not an absolute right, and thus, can be submitted to restrictions under several circumstances, which are exceptional, and should be interpreted narrowly, so that they do not become the rule themselves.[46] The General Comment nº 27 refers to the grounds on which freedom of movement can be limited, and they are connected to security and public order[47]. Anyhow, it should never be forgotten that those limitations must be proportional and consistent with other internationally recognised human rights. [48]

In case a right to enter could be inferred from the right to leave, its non absolute character would be analogically applied to the counterpart. Therefore, even in the best scenario in which we could conclude that massive flows of people should be allowed to reside whenever they chose, the State would still keep the faculty to restrict the entrance in specific cases on account of security concerns, which actually means, on account of the protection of the inner community against the threat of the outsiders.

To sum up, the effective protection of the right to leave faces a paradox since there is no correspondent right to enter anywhere else apart from the home country.[49] Additionally, it is not configured as a peremptory right, and restrictions on account of public order are allowed, and would be equally applied to a right to enter. The following subchapter aims to determine to which extent claims regarding a right not to be expelled from a foreign country could be effectively inferred from the foundations of freedom of movement.

[45] Strasbourg Declaration, 1986, art.2.
[46] HRC, General Comment 27, 1999, para. 3.
[47] General Comment 27, 1999, para. 3.
[48] Harvey, & Barnidge, 2007, p. 3.
[49] Purcell, 2007, p. 197, Juss, 2004, p. 294.

1.1.2.-The foundations of the freedom of movement and the controversial right to relocate.

Forced migration flows heading to Europe leave their countries due to a combination of factors which involve war, political instability, persecution, extreme poverty, natural disasters and ethnic or religious conflicts among others.[50] If mass influx of people is allowed to leave any country under internationally recognised human rights, they should be permitted to relocate somewhere as well.[51] Obviously, the right to return to their home countries does not improve the situation of vulnerable immigrants who are displaced against their will.

On the other hand, the faculty of the authorities to control membership and entrance into the national territory would fully vanish if everyone would be allowed to live in the place of their choice. Thus, not everybody is allowed to restart a life somewhere else and categories of migrants and/ or refugees are worth different levels of protection.[52] Being realistic, nowadays it is inconceivable that a general right to enter every country could be resorted anywhere in the world. Nonetheless, immigrants are not let absolutely in the hands of the State discretion.

The conceptual basis of this dilemma is found in the tension between the sovereign power of States to decide who they are willing to accept beyond their borders, and the increasing importance of the right to enjoy a dignified existence no matter the place of origin.[53]

The current link between the protection of the nation State and migration, shape the trend of tougher border controls in Western countries.[54] The proposition that there is an indisputable capacity of the States to expel anyone who is not a citizen, and therefore, not a member of the community is controversial[55], although it plagues political discourses all around Europe. Therefore it is important to look back to the theoretical foundations of that claim.

[50] Hailbronner, 2000, p. 16.
[51] Perry, 1984, p. 8.
[52] Dauvergne, 2004, pp. 596-598.
[53] Harvey, 2003, pp. 147-149.
[54] Dauvergne, 2004, p. 589.
[55] Natzinger, 1983, pp. 804-807.

Bodin´s doctrine of sovereignty, as an absolute power exercised by the State, find its limits in international morality and natural law, which are the foundations of human rights law. Francisco de Vitoria, Pufendorf and Grotious, among others, argued in favour of allowing the entrance of aliens on different basis.[56] During the Enlightenment, the social contract philosophers set up the foundations for a new social order, where individuals voluntary cede their natural rights to the authority in order to guarantee collective security and order. However, they also recognised the existence of inalienable rights previous to the creation of the State which should be guaranteed.[57]
In addition, the rise of nationalism movements in the 19th century leads to increasing importance of membership, and the development of strong feelings of belonging to a specific group, which are crucial to understand the interpretation given to the freedom of movement in the last century.[58] The importance of self preservation results in a limited club for citizens with the supreme right to decide about whom to include in their closed society on behalf of economic contribution, family tights or humanitarian motives.[59] The well know publicist Michael Walzer reaffirms the right of the State, acting on behalf of the nation, not to accept individuals who are external to the community, and does not fulfil the agreed requirements set up by its members[60]

On the other hand, human rights have become positive law after the Second World War. Although standard setting has proliferated and several institutions at a universal and regional level were set up, the implementation of standards is still lacking effectiveness.[61] However, States bind themselves to human rights obligations, which represent the so-called international morality, and guarantee each other compliance.[62] Therefore, the responsibility of the State goes further than safeguarding exclusively their citizens´ human rights, since international cooperation is the basis of the human rights system. [63]

Besides, in a supposedly globalised world, where nations are hypothetically losing their relevance and transferring competences to regional and international

[56] Juss, 2004, pp. 298-300, Nafzinger, 1983, pp. 810-815.
[57] Purcell, 2007, pp. 180-185.
[58] Harvey, 2003, p. 148, Dauvergne, 2004, pp. 589,590.
[59] Dauvergne, 2004, pp.589,590.
[60] Juss, 2004, pp. 319-324.
[61] Martin, 1989, p. 552-558.
[62] Purcell, 2007, pp. 184-186.
[63] Purcell, 2007, pp.184, 185.

institutions, mobility of goods and capital are taking by granted, while mobility of people stays at stake.[64]

Despite of the fact that the States´ capacity to control their borders is well established under international law, every individual is entitled to the enjoyment of a decent life under well recognised human rights principles. Positive human rights´ law includes a concrete limitation to the ability to expel, which is the principle of non refoulement.[65] This principle is enshrined by several international instruments including the Refugee Convention and the ECHR, which will be further commented in the following subchapters. Even if a general right to enter can not be directly implied from the assertion of the freedom of movement, the prohibition of expulsion under certain circumstances represent an effort of the international community to balance the interests at stake.

The question which arises at this point is whether the existence of a mechanism for the protection against removals automatically entails a right to stay. The issuing of residence permits to the newcomers who are not expelled should be automatically. Otherwise, the entitlement becomes an empty formality which confines the victims to an unlimited *limbo legal status*. Regularisation of undocumented migrants and amnesties has been seen with fear by developed countries, which are concerned about the effect of this type of programmes could have on encouraging illegal migration.[66] Therefore, a little bit of political realism is required when refoulement can not be carried out either because of the activation of the non refoulement clause or due to the difficulties that States faces to deal with high numbers of foreigners arriving at their borders.

In the following subchapters, the scope and divergences in the configuration of the non refoulement principle under several international treaties will be examined.

[64] Dauvergne, 2004, pp.593, 594.
[65] Purcell, 2007, pp. 177-180.
[66] Levinson, 2005, pp. 9-10.

1.2. The protection of the non refoulement principle at the international level.

Article 33 of the Refugee Convention establishes the prohibition of refoulement. Similar provisions on the protection against expulsion can be found in article 3 of the CAT, and article 7 of the 1966 ICCPR, at the universal level. The ECHR includes the prohibition of refoulement in article 3, and it will be reviewed hereinafter in chapter 2.3.

In broad terms, expulsion and extradition are forbidden in case there is a serious danger for the person integrity upon his return. This general statement is differently shaped in the abovementioned instruments. While the prohibition of torture is the key provision under the CAT, the ICCPR adds inhuman and degrading treatment or punishment as a type of ill treatment which would qualify for protection. On the other hand, under the Refugee Convention, forced return is forbidden when there is a reasonable risk for the life or freedom of the person subjected to a deportation.[67]
Notwithstanding the legal systems established by each of those treaties differ in several aspects the available devices complement and impact each other.[68] This idea is illustrated by Hélène Lambert when she affirms that *when Refugee Law fails, Human Rights Law "come to the Rescue*". [69]
In fact, the prohibition of refoulement under CAT and ICCPR is absolute, and can not be overridden by any other consideration, whereas articles 1F and 33.2 of the Refugee Convention set up several limitations for the available protection.[70] In the case *Paez vs Sweden*[71], the Torture Committee stressed that although someone might fall within one of the exclusion clauses under the Refugee Convention, he or she can still find protection against deportation under article 3 of CAT.[72]

The following subchapter will initially approach the non refoulement principle from the Refugee Law perspective. Therefore, it aims to detect flaws and gaps which need to be covered by the remaining human rights protection system available.

[67] Lambert, 1999, pp. 532- 535.
[68] Bruin, & Wouters, 2003, pp.21-25.
[69] Lambert, 1999, pp. 515-544.
[70] Duffy, 2008, p. 374.
[71] Paéz v. Sweden, nº 29482/95.
[72] Bruin, & Wouters, 2003, pp.21-25.

The non refoulement principle is broadly accepted within the international community. That is illustrated by the high number of ratifications that the named international instruments count with. Thus, some scholars have fiercely defended its ius cogens nature as a norm of customary international law. [73] Nevertheless, arguments against the non derogability of the principle rose after the terrorist attacks on the 11th of September.[74] Fear from threats to security shapes the discussions in the international forum, and served as justifications for violations of well established human right norms. To strike a balance between the increasing calls for protection against security dangers, and the human rights obligations which the States are bound to, represents one of the challenges for the management of migration in our 21st century.[75]

1.2.1-Non refoulement under the Refugee Convention

The Geneva Convention related to the status of Refugees, was opened for signature in 1951 aiming to address the Second World War consequences over forced movement of people. The Convention scope was widened with the New York Protocol of 1968 in order to tackle new realities related to migration.[76] Nowadays, although it is the bedrock of the Refugee Law system, it faces severe criticism because of the inability to respond to the needs of contemporary non voluntary migration.[77]. Arguably, some of the features present in the Refugee Convention contribute to unfairly minimize its impact to a small group of privileged migrants.

Firstly, the available protection is reduced to persons who have "*well founded fear of persecution*" on the grounds of "*race, religion, nationality, membership of a particular social group or political opinion"*.[78] The distinction between refugees and migrants, who flee because of been deprived of an adequate standard of living, is assumed generally as a reasonable border line. Economic migrants and victims of environmental disasters are excluded of the scope of the Refugee Convention.
Although there have been developments in the broadening of the refugee concept, many contracting States remain fix in the idea that those categories are naturally diverse. This

[73] Allain, 2001, p. 9, Lauterpacht, & Bethlehem, 2003, pp.164-171.
[74] Bruin & Wouters, 2003, pp. 7-14.
[75] Bruch, 2008, pp. 1-12.
[76] UNHCR, 1992, Introduction, C).
[77] Dauvergne, 2004, pp. 596-598; Lambert, 1999, pp. 543.
[78] Convention relating to the Status of Refugees, 1951, art. 1.

approach indirectly discriminates in favour of a specific type of forced migration, and acts as a device to control the number of newcomers who officially *"deserve compassion*" from the West.[79]

In our time, huge number of people is victim of starvation; many are deprived from the basic goods in life as water or minimum health conditions, and unsettled conflicts causes displacement on high numbers because of widespread violence. A glimpse on the push and pull factors of migration[80] is sufficient to understand that the Refugee Convention does not respond to the current challenges of population movements[81]. A positive development in broadening the definition of refugee has been the Cartagena Declaration 1984 in Latin America, and the development of subsidiary protection based on humanitarian reasons.

Secondly, the Refugee system leaves in the hands of the States the implementation of the Convention, and UNHCR plays mainly an advisory and recommendatory role to the national governments, alerting about the bad practices in case of violations of the Convention. Thus, there is not an international legal forum where States are hold accountable for their non compliance.[82]

Thirdly, the Refugee Convention only applies to refugees and asylum seekers, which implies that the third country nationals whose applications have been rejected on the basis of "safe third country" are considered not worthy of international protection. This admissibility rule functions as a burden sharing mechanism among transit countries, in order to deal with migration pressure.[83] An application would be non admissible when the asylum seeker would or could have availed himself to the protection of another country.[84] UNHCR has expressed its fear that the indiscriminate use of the "safe third country" rule would leave asylum seekers without a substantial examination of their claim, and therefore, in risk of being expelled.[85]

[79] Dauvergne, 2004, p. 597, Perry, 1984, p. 11.
[80] Hailbronner, 2000, pp. 16,17.
[81] Purcell, 2007, pp. 198-202, Perry, 1984, pp. 1-3, Dauvergne, 2004, pp. 596-598.
[82] Lambert, 1999, p. 520.
[83] Gil Bazo, 2006, pp. 595-600.
[84] Lambert, 1999, pp. 522,523.
[85] UNHCR, 1996, pp. 1-7.

In addition, the protection offered by the Refugee Convention against expulsion is not absolute, meaning that it can be balanced with other interests. Therefore, the fulfilment of the requirements incorporated in the refugee definition does not always mean automatic entitlement of refugee status. Some profiles under article 1F are considered not worthy of protection due to their participation on *crimes against peace, war crimes, crimes against humanity, serious non political crimes or crimes against the aims of United Nations* (UN). Furthermore, article 33.2 includes a provision which expressly limits the non refoulement principle if the person represents a threat to the host society[86]. Here again the dilemma between the human rights of aliens and the security of the citizens comes to the forefront.

Some scholars as Harvey and Hathaway have underlined that interpretation of 33.2 should be restrictive, since it applies to persons who, despite of qualifying for refugee protection, might be expulsed because they constitute a danger to security, or to the community of the country. [87]A conviction of a serious crime is not a pre-requisite in case there are "reasonable grounds" to believe that the person represents a risk for security. Nonetheless, the institutions in charge at the national level should require high evidentiary standards, so that non refoulement is not emptied with exceptions. In case of existing conviction, not only the nature of the crime should be taken into account, but also the implications for the society *ex future*. [88]

1.2.2. The Human Rights mechanisms against refoulement.

As mentioned above, the article 7 of CAT and article 3 of ICCPR provide for protection against refoulement. Both Conventions set up Treaty Bodies which are located in Geneva and have the task of monitoring the States´ compliance. Moreover, both the Human Rights Committee, and the Committee against Torture can received individual complaints, and have been ratified by the majority of the European countries.[89]

The most relevant advantage of the human rights mechanisms is that the prohibition of expulsion is not submitted to any restriction, and applies to everyone

[86] Lambert, 1999, p. 519.
[87] Hathaway & Harvey, 2001, p. 147.
[88] Bruin & Wouters, 2003, pp. 16-18.
[89] ICCPR, Optional Protocol 1, 1966, art 1-14, CAT, 1984, art. 22.

without distinction. However, there are differences on the foreseen treatment necessary to qualify for protection, and the standard of proof required before the two Geneva Committees. [90]

Under the CAT, the treatment which meets the requirements for protection is limited to torture and does not include inhuman and degrading treatment or punishment. The elements examined to determine if ill treatment amounts to torture are: *intend, and intensity of the pain; the source of the act, and the purpose*[91]. Nonetheless, General Comment number 2 refers to the difficulties in differentiating torture from other kinds of ill treatment and establishes the non derogability of the later as well. Non refoulement is not specifically mentioned at that point, and the limited scope of the provision to the territories under the control of the State, poses the question if it could apply analogically. It is therefore uncertain, if it would be taken into consideration by the Committee against Torture in case an application is submitted.[92] On the contrary, the ICCPR in its article 7 explicitly refer to inhuman and degrading treatment.

Regarding the standard of proof required, the HRC demands for stricter substantiation of the claim than the Committee against Torture, and the handing over of concrete evidence is critical for its success.[93]. Nonetheless, before the Human Rights Committee other rights can be taken into account in the examination of the individual complain, which might contribute to strengthen the allegations.[94]

In relation to the Refugee Convention, the UNHCR Handbook on Procedures requires no more than showing "good reason" why the person fears persecution to prove the danger he or she faces.[95] Despite the fact that the evidentiary requisites appear to be lower than for the Geneva Committees, wide discretion is left in the hands of the States, who have the last word on deciding about asylum seeker applications.[96] Nonetheless, the Refugee Convention has a well established set of legal entitlements for asylum seekers who are granted refugee status, whereas the human rights instruments do not

[90] Lambert, 1999, pp. 515-544.
[91] Lambert, 1999, p. 533.
[92] Duffy, 2008, pp. 380,381.
[93] Duffy, 2008, pp. 380, 381, Lambert, H., 1999, p. 536.
[94] Duffy, 2008, p. 382.
[95] UNHCR, 1992, para 45.
[96] Lambert, 1999, pp. 532-535.

clarify the further consequences of non refoulement, and therefore become "bare bones" prerogatives as Hathaway call them.[97]

1.2.3. – The contentious ius cogens nature of non refoulement.

The discussion over the *ius cogens* nature of the non refoulement rule and it characterization as a customary rule of international law will be the subject of this subchapter, since it substantially impacts the widening of its binding force and the predominance of the non refoulement principle over other considerations, namely public order and national security.

Customary law applies to every State without distinction based on individual ratification. There are two elements which are taken into account to determine customs at the international level: *opinio iuris*, and States´ practice.[98] Despite the fact that there seems to be consensus over the customary nature of non refoulement, its non derogability remains very controversial.[99]

The prohibition of expulsion is contained in several international instruments, as mentioned above.[100] Around 90 per cent of the World's countries are part in at least one of the Treaties which refer to the prohibition of expulsion.[101]. The CAT alone counts with 146 States party, and 76 signatories.[102] Additionally, the Human rights Committee reaffirmed the customary nature of the prohibition of torture in its General Comment nº 24, stating that reservations should not be made to such provision.[103]

Soft law instruments, namely the UN General Assembly Declaration and the Conclusions of the UNHCR Executive Committee also reiterate the consensus over the internationally recognised custom.[104] Besides, already in the 80s, the UNHCR Executive Committee conclusion nº 55 restated the customary value of the norm.[105]

[97] Hathaway, 2010, p. 504.
[98] Duffy, 2008, p. 384.
[99] Allain, 2001, p. 538.
[100] Lauterpacht & Bethlehem, 2003, pp. 68,69 annex 1.
[101] Duffy, 2008, p. 384.
[102] CAT, 1984, state of ratification.
[103] Bruin & Wouters 2003, p. 26.
[104] Duffy, 2008, pp. 387, 388, Lauterpacht & Bethlehem, pp. 69, 70.
[105] Allain, 2001, p. 539, UNHCR, Executive Committee Conclusion nº 55.

Even though, Hathaway argues that participation of a high percentage of the World's countries in international Treaties, which contain references to non refoulement, does not necessarily imply the existence of *opinio iuris*. He stresses the divergences in the concepts, their interpretation, and the system of protection articulated by the different Treaties, and underline that State practice is more aligned with refoulement than with protection against expulsion. [106]

The question which arises at this point is whether non compliance diminishes the value of the principle downgrading it to the extent that it is deprived of its character. The International Court of Justice in the case *Nicaragua vs. US: Military and Paramilitary Activities in and against Nicaragua*[107] clarifies that the value of the principle is not undermined if the country justifies its behaviour based on exceptions which are connected to the norm itself.[108]

In the Nicaragua case, the International Court of Justice (ICJ) rule about the intent of US to avoid the application of the Geneva Conventions, based on some reservations made in a multilateral Treaty. The Court shows in its ruling how the parallel development of treaty obligations and customary rules intertwines. It argues that the Conventions do not create, but include some rules which are fundamental humanitarian principles, and therefore customary norms, so that States reservations do not affect their validity. Some critics were made to the fact that is not clear how the Court implies the existence of *opinio iuris* at the time those provisions were drafted[109]. Nonetheless, the ICJ based its conclusions on the existence plenty of UN and Organization of American States (OAS) resolutions reaffirming the principles enshrined by the Convention[110].

In either way, the strongest point of disapproval with the ruling was that the concrete practice of the States was apparently forgotten and could lead to reduce the two components of customary law solely to the *opinio iuris*. Hathaway claims that a customary norm can never be inferred if States do not even make big efforts to justify their conduct, and they use rather weak arguments when they refer to the violated norm.[111] Nevertheless, some scholars stress that since the belief on the binding character of a norm could be inferred from consistent and regular States practice, the opposite should be also possible. Hence, *opinio iuris* affects State practice, even if it does for the

[106] Hathaway, 2010, pp 509-512.
[107] Nicar. v. U.S.,1986 ICJ REP. 14.
[108] Allain, 2001 p. 541.
[109] Meron, 1987, pp. 351-358.
[110] L. Kirgis, 1987, p. 147.
[111] Hathaway, 2010, pp. 511- 519.

justifications of an unlawful act. In order to determine the customary value of a norm, both requirements are necessary, but also both are highly interconnected and feed each other.[112] Thus, in the case of the non refoulement principle, its customary character should be accepted even if States do not often behave accordingly, since it is included in a broad number of international legal instruments and continuously mentioned within the international forum,.

On the other hand, to assess whether non refoulement is also an *ius cogens* norm, a further explanation of the concept is required. The principle of *jus cogens* was codified in Article 53 and 64 of the Vienna Convention on the Law of Treaties (1969)[113], and it implies the acknowledgement that there are certain norms which entail such a great importance for the international community, that they can never be submitted to derogation under any circumstance. Some scholars, as Jean Allain, argue that the ius cogens nature of the prohibition of torture should not be questioned in order to uphold the already undermined safeguards available.[114]

Allain´s arguments in favour of the recognition of the peremptory character of the principle are based mainly in the impact of the Cartagena Declaration on States practice in Latin America, and the Conclusions from the UNHCR Executive Committee, which support the peremptory nature of the principle.[115] In addition, the Cartagena Declaration contributed to expand the refugee definition, allowing for protection in case of general violence, external aggression, and internal conflict among some other grounds which fall out of the scope of the Refugee Convention. That constitutes an indicator of the increasing acceptance within the international community of the absolute character of non refoulement, despite of its non-binding character. Furthermore, the UNHCR Executive Committee Conclusion number 79[116] stated that the "principle of non refoulement is not subject to any derogation".[117]

Notwithstanding all these developments, in the last decade, security has increased dramatically its importance since the Western World is afraid that terrorist attacks would disturb their peaceful livelihoods after the events of the 11th of

[112] L. Kirgis, 1987, P. 147-151.
[113] Duffy, 2008, p. 374.
[114] Allain, 2001, pp. 533- 558.
[115] Allain, 2001, pp. 533- 558.
[116] UNHCR, Executive Committee Conclusion nº 79.
[117] Allain, 2001, p. 539.

September.[118] Both the UN General Assembly and the Security Council have taken a new approach, aiming to fight against terrorism at a universal level, even at the expense of other fundamental rights. [119]

The General Assembly, in its Resolution on Measures to Eliminate International Terrorism establishes that *acts of terrorism are contrary to the principles and standards of the United Nations*.[120] The Refugee Convention set up some categories of people who do not deserve to benefit from the Convention, as it has been commented above. The exclusion clause contained in article 1(F) (c) is framed as follows: *guilty of acts contrary to the purposes and principles of the United Nations*. Thus, it seems that the General Assembly through a non binding resolution intends to expressly deny the refugee status to a specific category of people who are connected with terrorist activities.[121]

According to the UN Charter, the Security Council is in charge of defending peace and security. Article 103 establishes the primacy of the UN obligations above any other commitment under International Treaties.[122] Therefore, some scholars argue that when there is a real threat to peace or world stability, the Security Council would be able to act even in violation of the non refoulement principle, unless there would be consensus that the norm is *ius cogens*, and therefore non derogable under any circumstance. The Judge Elihu Lauterpacht, in the *Genocide case* reaffirmed the superiority of *ius cogens* norms above any Security Council resolution even in the name of article 103, since the opposite would open the door for complicit acts of UN with particularly serious crimes.[123]

As referred above, the non refoulement rule is included in international Treaties namely ICCPR and CAT, as an absolute right and thus, not submitted to any limitations. However, paradoxically, it seems that it can always be overridden by Security Council resolutions in virtue of article 103 if there is an emergency situation or a serious risk for the World order. Resolution 688 and 1373 are some examples of how the Security Council has exercised to a certain extent those competences[124]. In Resolution 688, it

[118] Bruin, & Wouters, 2003, p. 6.
[119] Bruin, & Wouters, 2003, pp. 7, 8, Allain, 2001, pp. 542- 547, Duffy, 2008, pp. 385-387.
[120] A/RES/62/71.
[121] Duffy, 2008, pp. 382,383.
[122] UN Charter, 1945, art. 103.
[123] Allain, 2001, pp. 542, 543.
[124] UN Security Council, Resolutions: S/RES/688 and S/RES/1373.

claims that the high number of Iraqi Kurds displaced to Iran and Turkey would put in danger the security in the area.[125] Resolution 1373 advises States to take the necessary measures to assure that asylum seekers have not previously participated in terrorist acts, so that the guarantees of the Convention are not "abused".

Oppositely, Van den Wyngaert stresses that following the article 103, which establishes the primacy of the UN principles over any other treaty obligation, article 55 of the UN Charter[126], which is the UN compromise with human rights, upgrade those standards to a category that is also above other commitments established at the international level, and protect them from restrictions on account of other interests. Therefore, particularly those human rights which are recognised as customary international law, as the non refoulement is, are worth special protection. [127]

In addition, political opinion is one of the grounds on which persecution by the country of origin is based. Frequently State actors justify their harassment towards political opponents claiming that they represent a danger for the community and should be prosecuted and/or extradited.[128] Thus, the assessment on whether someone is worth to be granted protection against refoulement, become blurred if elements related to terrorism are included.

In fact, there is no uniform definition of terrorism, allowing for wide discretion of the States to exclude and expulse. Some countries developed lists which are regularly updated, with the name of political or military groups which qualify for the label. Thus, the current trend of "securitization" risks damaging the right to an individual assessment, and the presumption of innocence.[129]

After the examination of the arguments and counter arguments on the nature of the non refoulement rule, there appear to be sufficient evidence to conclude that non refoulement is a customary norm. However, its *ius cogens* nature at a universal level is perhaps too optimistic in the 21st century context. The behaviour of the States and the last developments at the UN level contribute to reinforce the idea that expulsion is allowed under certain circumstances at the international level. Lauterpacht and

[125] Allain, 2001, pp.543- 547.
[126] UN Charter, 1945, art. 55.
[127] Van Den Wyngaert, 1990, p. 762.
[128] Feller, 2006, pp 518-522.
[129] Bruin, & Wouters, 2003, p. 14, 15.

Bethelem, in their analysis of the content and scope of the principle, defend its customary value, but reaffirm that it can be subjected to restrictions based on security if the rule of law guarantees are respected. [130]

On the other hand, perhaps forcing the acceptance of the principle as a peremptory norm is not the only way of advocating for the protection of migrants against expulsion. Wouters proposed that, taking into consideration the need of "balancing" security with human rights of individuals; the best solution would be that States cooperate in matters related to criminal law, so that the most serious crimes would be prosecuted at a universal level, instead of removing the persons from the territory of the host country.[131] Consequently, big amounts of money which are spent in the execution of massive deportations without the sufficient safeguards for the immigrants would be saved.[132]

1.3. - The protection against refoulement at the regional level: the European Convention on Human Rights: article 3.

Article 3 of the ECHR establishes that "*no one shall be subjected to torture or to inhuman or degrading treatment or punishment.*[133] Expulsion is forbidden under article 3 of ECHR when there are *substantial grounds* to believe that the person would be tortured or treated in an inhuman or degrading manner if he or she is expelled to the country of origin.[134] The cornerstone of the protection granted by the Convention resides in the construction of an absolute prohibition against torture, so that the entitlement can not be subjected to any limitation on account of security.[135]

This Chapter aims to describe the main characteristics of the protection set up by the ECHR regarding refoulement. The European Court of Human Rights (ECtHR) case law has substantially affected the guarantees against expulsion at the regional level. Hence, it is crucial for the purposes of this study to clarify the developments that the ECtHR has made concerning the interpretation of torture and inhuman or degrading

[130] Lauterpacht & Bethlehem, 2001, p. 87.
[131] Bruin & Wouters, 2003, p. 28.
[132] Juss, 2004, p. 309.
[133] ECHR, 1950, art 3.
[134] Alleweldt, 1999, pp. 365-370.
[135] Lambert, 2006, p.27, Bekerman, 2005, p. 758.

treatment or punishment, and the extraterritorial application of the Convention, since the Court's approach have substantially contributed to uphold human rights of aliens within Europe.

Although the prohibition of refoulement has been strongly connected to article 3, other rights as the right to privacy and family life (article 8), have been taken into account in order to prevent States to forcibly return migrants[136]. However, the Court has been reluctant to expand further its extraterritorial scope, and the case law has been rather restrictive in this regard.[137] To conclude with, a brief analysis of advantages and disadvantages of the regional system of protection set up by the ECHR will be presented.

1.3.1 Territorial scope of the ECHR and its extraterritorial application regarding refoulement.

Article 1 establishes that the contracting States should guarantee the rights set up by the Convention to everybody within their jurisdiction. Nonetheless, the territorial scope has been interpreted broadly by the European Court of Human Rights (ECtHR).
In the case *Loizidou v. Turkey*[138], the Court clarified that jurisdiction is not limited to the national borders of the country and it includes territories which are under the *effective control* of a State. Therefore, it concluded that Turkey would be responsible for the protection of people living in northern Cyprus, since the area is ruled by the Turkish army, no matter the lawfulness or unlawfulness of the occupation. [139]
The Court has acknowledged the extraterritorial application of the Convention in limited situations, so that States are responsible for the impact of their actions out of their jurisdiction. In *Soering v. UK* and *Chahal v. UK*[140] the Court recognized the applicability of the Convention regarding refoulement.[141] Hence, States can be held accountable for the consequences of forced return of aliens to their home countries, when there is a high probability they would face ill treatment upon their return. [142]

[136] Lambert, 2005, p.43.
[137] Den Heijer, 2008, pp. 279-286.
[138] Loizidou v Turkey, 1995, 40/1993/435/514.
[139] Blake, 2004, pp. 432-437; Kirchner, 2003, p. 5.
[140] Soering v. UK, 1989, 1/1989/161/217, Chahal v. UK, 1996, 70/1995/576/662.
[141] Allewedlt, 1993, p. 360, Blake, 2004, pp. 436, 437.
[142] Lambert, 2005, pp. 39-41.

1.3.2 The absolute character of the prohibition of torture under article 3.

The prohibition of torture is expressed in absolute terms, and it can not be subjected to restrictions on behalf of other rights or interest, nor can it be derogated in time of emergency according to art. 15.2 ECHR.[143] The Parliamentary Assembly of the Council of Europe reaffirmed the non derogability of article 3 in 1965.[144]
The inclusion of non refoulement as a peremptory norm coincides with the guarantees established by the CAT and the ICCPR, and clearly contrasts with the Security Council resolutions about the international fight against terror, and the limited scope of the Refugee Convention and its exclusion clauses, as referred above.
In fact, to protect everyone who is threatened with torture or inhuman treatment is a big achievement for human rights advocates, and for the international community. The sole idea that this right could be downgraded and submitted to bounds on account of the "security panic" of our decade, would definitely be a shameful step back.

Generally the rights enshrined by the ECHR can be restrained in the name of other interest if the limitations are "necessary in a democratic society" and proportional with the objectives pursued. However, States do not count with a margin of appreciation regarding the prohibition of refoulement, and thus, the proportionality test which is a common tool used by the Court to balance competing rights, does not apply here.[145] Actually, refoulement is forbidden even if "*there are good reasons to consider that the person is a threat to national security*", and can not be granted protection under refugee law due to the exception provided by article 33.2. [146]

The peremptory character of the norm has been stressed in several judgements, namely *Chahal v. UK*, and *Ireland v UK*. [147] In *Chahal v. UK*, a Sikh activist who was suspected to have participated in a conspiracy to kill the First Minister of India was granted protection against refoulement.[148] Despite the fact that the UK appealed to the importance of securing its citizens and the sovereign right of the State to regulate entry,

[143] ECHR, 1950, art 3, art. 15.2.
[144] Lambert, 2005, p. 516.
[145] Alleweldt, 1993, pp. 371, 372.
[146] Blake, 2004, pp. 437, 438.
[147] Duffy, 2008, p. 378, Lambert, 2005, p. 40, Chahal v. UK, 1996, 70/1995/576/662, Ireland v. UK, 1978, 5310/71.
[148] De Londra, 2008, p. 617.

the Court considered that those arguments are irrelevant when there is evidence enough that the person would very likely face torture if he is deported to his home country. [149] Thus one of the strengths of the protection under ECHR is the absolute nature of its article 3 and the abundant case law of the ECtHR restating its content and safeguards against the abuses of the host State.

Nonetheless it has to be stressed that the unconditional prohibition of expulsion does not mean impunity. Oppositely, it offers equal respect of everyone ´s dignity, without distinction on behalf of their place of origin or criminal record, and it prevents abuses of the discretionary power of the States, which are apparently overwhelmed with migration pressures in the last years. Therefore, it does not imply that the State absolutely forget about its citizens, and allow terrorist cells to multiply and spread fear without control. On the contrary, reinforcing the cooperation on criminal matters and/or widening the use of international criminal mechanisms as the ICJ, seems to be a better and more human manner of treating suspects of participation in armed groups, than sending them back to their home countries even if their lives and integrity are seriously threatened.

1.3.3. – Situations which qualify for protection under article 3, and the developing concepts of torture, inhuman and degrading treatment or punishment.

There are three main circumstances which are granted protection under article 3 of the ECHR. The most common is the likelihood that a person would be subjected to mistreatment if he or she is expelled to the home country. Nevertheless, expulsion is also not allowed if the minimum safeguards can not be provided when the execution of the expulsion order take place. It should be noted that this situation is strongly connected to the rule of law and the adequate procedures to carry out a deportation, though it has been accepted in connection to article 3 in order to strengthen the safeguards against refoulement. The third situation relates to the physical conditions of the person previous his or her departure. A deportation of someone whose life might be in danger in case of travelling should never be carried out either.[150] In fact, all of the cases are linked to the respect for the physical and mental integrity and their inclusion

[149] De Londra, 2008, pp. 618, 619.
[150] Lambert, 2006, p. 31.

under article 3 contributes significantly to the prevention of abuses by the authorities on the execution of removals.

On the other hand, it is crucial to examine the interpretation that the ECtHR has given to torture, inhuman or degrading treatment or punishment, so that the scope of the protection offered under article 3 of ECHR is well understood and delimited.

The distinction between torture and inhuman or degrading treatment has significantly evolved in the last decades. The Court used to demand for extreme intensity and cruelty of the ill treatment to conclude that the victim was subjected to torture. Therefore, it received wide criticism that the standards introduced in *Ireland v. United Kingdom* were too high, and thus, the interpretation of article 3, too narrow.[151] It was not until 1996, in the case *Aksoy v. Turkey,* when the Court found for the first time that the so called "Palestinian hanging" qualifies for torture.[152] Moreover, in *Selmouni v. France* in 1999, the Court acknowledged that future assessments of the ill treatment were going to be less strict and therefore, previous findings of inhuman or degrading treatment might qualify for torture in the following case law.[153]

It is important to keep in mind that no matter how the ill treatment is defined, once it cross the minimum threshold, the prohibition is equally activated for the three of the concepts included.[154] In fact, regarding expulsion cases, the Court refers to inhuman or degrading treatment rather than to torture.[155]

The key element which activates the protection under article 3 is the "*level of severity"* which was introduced by the Commission in the case *Ireland v United Kingdom.*[156] According to the ruling, the specific circumstances of the victim, namely age, gender, state of health and effects on his or her physical and mental well being, as well as the method of execution, and the nature and context of the ill treatment, ought to be taken into consideration. [157]

[151] Cullen, 2008, pp.35-42,Ireland v. UK, 1978, 5310/71.
[152] Aksoy v Turkey, 1996, 21987/93.
[153] Selmouni v. France, 1999, 25803/94.
[154] Evans & Morgan, 2001, p. 79-97.
[155] Lambert, 2006, p 29.
[156] Cullen, 2008, p. 35, Lambert, 2006, p. 29, Ireland v. UK, 1978, 5310/71.
[157] Alleweldt, 1993, p. 364, Bekerman, 2005, p.754.

Degrading treatment or punishment is the lowest level of severity required in order to qualify for protection. The concept of degrading treatment was further explained in the case *Pretty v. UK* where the Court stated that this kind of ill treatment *produces humiliation, diminish human dignity, and creates feelings of fear, anguish or inferiority*.[158] In the case *Peers v. Greece* the ECtHR clarified that the rule applies even in the absence of the intention to humiliate the victim.[159] In addition, the lack of medical treatment in the country of origin, and the consequential diminishing of the life expectancy of the applicant, are enough grounds for the protection against expulsion, under exceptional circumstances, as the ECtHR states in the case *D v. UK*.[160]

1.3.4. - The substantive and evidential requirements

The ECtHR has set up a number of standards to prove the likelihood that a person would face a *real risk* to be ill treated in case of expulsion. Their examination allows for a better understanding of the burden that an applicant carries if he or she wants to be granted protection under article 3.

The Court requires the existence of "*substantial grounds for believing that a person would be in danger of being submitted to torture*". [161] In fact, when someone has previously faced persecution or ill treatment, this constitutes a "*strong indicator*" that the same might happen again[162]. Nonetheless, the Court examines the person's credibility, meaning the coherence of the allegations and absence of contradictions, as well as the current situation in the country of origin, as for example the existence of voluntary programmes of return to which the person could avail himself. [163]Thus, the changing circumstances in the home country are also taken into consideration when assessing the existence of a risk for the integrity of the applicant. In addition, the consequences of the deportation need to be severe enough and able to be individualised. Thus, situations of general violence fall out of the scope of the provision[164]

[158] Alleweldt, 1993, pp. 363, 365, Lambert, 2005, p. 41, Pretty v. UK, 2002, 2346/02.
[159] Lambert, 2005, p. 41, Peers v. Greece, 2001, 28524/95.
[160] Lambert, 2006, p. 30. Blake, 2004, pp. 437,438, den Heijer, 2008, p. 280. D v. UK, 1997, 146/1996/767/964.
[161] Alleweldt, 1993, pp. 365-370.
[162] Ibidem.
[163] Ibidem, p. 362.
[164] Lambert, 2005, pp. 41, 42.

On the other hand, the burden of proof shall not be placed solely on the person who risks being expelled. Therefore, the hosting State has a shared responsibility to investigate *ex oficio* the foreseeable consequences of refoulement.[165]As it will be further discussed in the following section, generally, diplomatic assurances are not enough to prove that the person would be safe if he or she returns, and the State can not neglect its obligation to investigate and assess the particular claims solely on the basis of such guarantees.[166]

The ECtHR has habitually referred to a "*real risk*" or "*serious risk*" of being tortured or mistreated. This can only be measured with an artificial probability test, and its application indirectly implies that, statistically, a certain number of people who would be expelled with a small probability of being mistreated will face torture upon their return. Therefore, the only way to fully protect aliens against ill treatment is to avoid their return even if the likelihood of being subjected to inhuman treatment is very low, as Alleweldt argues.[167] However, that solution would easily encounter fierce criticism especially from those countries which are particularly keen on their sovereign power to control entry, and would never accept such a broad interpretation of the non refoulement principle.

1.3.5. - A landmark case: Saadi vs Italy 2008 [168]

This case is particularly relevant because of the intervention of the UK as a third party, in an attempt to reverse the *Chahal*[169] judgement. The Court reaffirmed the principles enshrined in its previous judgements, and strongly rejected the arguments related to security threats and special treatment for members of terrorist groups, sustained by Italy and UK in their intent to weaken the safeguards offered by the peremptory non refoulement rule. Hence, Naasim Saadi, a Tunisian citizen suspect of participation in terrorist activities, was granted protection against expulsion under article 3 of the ECHR given the high probability that he would face torture in case of being expatriated to his home country.

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[165] Lambert, 1999, p. 620.
[166] De Londra, 2008, p. 619.
[167] Alleweldt, 1993, p. 366.
[168] Saadi v. Italy ***2008,*** 37201/06.
[169] Chahal v. UK, 1996, 70/1995/576/662.

Naasim Saadi lived in Italy with a residence permit until he was detained in 2002 and accused of participation in international terrorism, falsification of documents, reception of stolen goods, and smuggling of a number of aliens into Europe. He was brought before the Milan Assize Court, and after a lengthy procedure, he was not found responsible for participation in any terrorist activities, but charged instead with criminal conspiracy. Parallel, another procedure took place against him in absentia, before a military Court in Tunisia, where he was condemned because of his alleged active membership in a fundamentalist Islamist cell. Mr. Saadi remained imprisoned from 2002 until 2006 when was released by the Italian authorities,[170] with the sole purpose of executing his extradition.

Mr. Saadi applied for asylum, but he was deemed inadmissible, due to the assumption that he represented a threat to national security, and thus fell in the exclusion clause contained in article 33.2 of the Refugee Convention[171]. Hence, he submitted an application to the ECtHR based on article 3, asking for protection and arguing that "*is a matter of common knowledge*" that people who are allegedly related to terrorist activities face severe ill treatment in Tunisia.

The arguments made by Italy and United Kingdom before the Court, relate to the necessity of balancing the "*real risk*" that the applicant would face torture if he is deported, with the fact that he represents a threat to the community. Actually, the UK states that this probability test is not appropriate in cases related to security, and the certainty of the mistreatment should be higher than in other less relevant cases. They also argue that in cases connected to terrorism, the burden of proof should rely more in the applicant than in other situations, and that diplomatic assurances ought to be considered enough guarantee.[172]

The Court denied the validity of the three arguments, reaffirming the peremptory character of the prohibition of torture, which can not be limited on account of the dangerous conduct of an individual. [173] Moreover, regarding the diplomatic assurances, the ECtHR stresses that the existence of domestic regulation which forbids torture,

[170] Saadi v. Italy, 2008, 37201/06.
[171] De Londra, 2008, pp. 616, 617.
[172] Saadi v. Italy, 2008, 37201/06.
[173] De Londra, 2008, pp. 618-620.

inhuman or degrading treatment does not imply that the Court should rely on those standards and neglect the protection ought to the applicant. It argues further that not even specific diplomatic assurances for a concrete individual can be relied on. That is of particular importance in our days, since there is an increase concern that European countries are pushing the use of those guarantees in order to execute expatriations and expulsions without the due respect to non refoulement.[174] Political discourses are also fuelled with arguments about the need to review the absolute character of the prohibition of expulsion, given that we live in the era of "emergency and international terrorism" and new responses shall be articulated for the protection of the citizens. In fact, in 2005 Tony Blair argued that diplomatic assurances ought to be accepted in case of removal because of the particularities of our time, especially when someone represents a threat for the society of the host country.[175]

The significance of this case resides in the impact it has on strengthening the guarantees against refoulement at the European level. Despite of the tough pressure imposed by the political atmosphere and the clear lack of will to protect aliens from many European States, the Court firmly substantiated the judgement and did not accept any of the restrictions argued by Italy and UK. Thus, this ECtHR case reinforces the strength of the protection under article 3, leaving no doubt that participation in terrorist activities does not imply the total deprivation or even diminishing of the guarantees provided by article 3 of the ECHR.

1.3.6. - Limits to non refoulement on account of other rights established in the Convention.

The ECtHR has been rather reluctant to take into account other provisions else than article 3 when it applies the Convention extraterritorially. The reasons for that approach are that, under customary law, States are allowed to use migration measures to control entry. Moreover, the Convention does not govern the behaviour of the countries which are not party to it.[176]

[174] AI, 2010, pp. 5-32.
[175] De Londra, 2008, pp. 618-620.
[176] Den Heijer, 2008, pp. 279-286.

Other rights, as article 8 and the right to privacy and family life or article 5 and 6 containing some procedural guarantees has been taken into consideration in some of the Court's judgements.[177] In fact the right of an effective remedy is normally invoked in relation with other Convention rights and frequently overlaps with the prohibition of refoulement. [178]

In the case *F v UK* the Court clarifies that non refoulement cannot be expanded to the extent that a contracting party is forbidden to expel an alien to a non contracting country on the basis that it does not comply with some of the freedoms set up in the Convention, since the application of the ECHR, as other international Treaties, is based on the consent of the States.[179] Thus, not all the rights contained in the Convention are customary law and apply worldwide without the required ratification. Actually, non refoulement is an entitlement which has acquired a special category in the international arena, and since it is not equally protected as other rights included in the ECHR, its extraterritorial applicability should not be excessively widened.

However, the ECtHR remind us that its role is to protect rights that are not "illusions" but effective in counterbalancing the sovereign right of the State to exclude.[180] The principle of effective protection applies to Section I and determines the existence of negative and positive obligations of the contracting parties under ECHR. Therefore it is not evident that the protection of refoulement has to be limited to article 3, and the broadening of the protection granted will depend on the future approach taken by the ECtHR regarding those matters. Currently, the tendency is to bring other Convention rights under inhuman and degrading treatment, so that the arguments are easily accepted.[181]

1.3.7. - The advantages of disadvantages of the system established under ECHR.

The protection granted by article 3 of ECHR is definitely stronger than the guarantees set up by the Refugee Convention.[182] As previously mentioned, the Refugee Convention contains a number of exclusion clauses on behalf of the participation in

[177] Lambert, 2005, pp. 43-49.
[178] Ibidem, 2005, p. 47.
[179] Den Heijer, p. 283.
[180] Ibidem, p. 288.
[181] Ibidem, p. 294.
[182] Duffy, 2008, p. 379.

particularly serious crimes in its article 1F, and also an exception to the non refoulement principle if the person constitutes a threat to national security in article 33.2. Additionally, the States are granted a broad discretion to decide who do they accept as refugee, and there is no monitoring body able to review a decision, since the UNHCR is more an advisory body, and can not be compared with the impact that the ECtHR has had on the protection of vulnerable aliens.

Regarding the CAT and ICCPR, both include an absolute right not to be expelled, and both have the advantage to be applicable internationally. In addition, the existence of monitoring bodies, namely the HRC and the Committee against Torture opens the possibility to resort mechanisms of protection against arbitrary actions of the States. On this regard, the regional scope of the ECHR is a disadvantage since it limits the potential impact to the member States of the Council of Europe.[183] In fact, before the ECtHR the applicants face strict evidentiary requirements for the acceptance of their claims, so that in certain circumstances is more efficient to apply to one of the Geneva Committees. Moreover, the ECtHR is also well known for its big backlog of cases, which increase the lengthy of the procedures[184]. However, the impact of the Security Council Resolutions regarding terrorism at the international level, and the increasing concern about global security could seriously undermined the protection granted by the CAT and ICCPR if the Committees adopt the restrictive vision of the Security Council.

The firm defence that the ECtHR made of the absolute character of the prohibition of torture in relation to terrorism and security threats, is a milestone in the protection of alien's human rights, and could be a benchmark for the international scheme. Furthermore, it has been proven that the Court has even potential as a norm creating mechanism, which is illustrated in the case *Jorge A Páez v Sweden*[185] in which the applicant was granted a temporary residence permit after applying to ECtHR. Hence, the Court had no longer to deal with the ruling since the Swedish authorities assumed that the non refoulement principle would prevail.[186]

In fact, it is still to be seen how the configuration of a binding peremptory non refoulement rule impacts the European legal framework and its implementation at the

[183] Blake, 2004, p. 438, Duffy, 2008, p. 389.
[184] Lambert, 1999, pp. 515,523.
[185] Páez v Sweden, 1996, 29482/95.
[186] Lambert, 1999, p. 544.

national level. That is of particular importance after the Treaty of Lisbon since the EU will formally accede to the ECHR as an institution, without prejudice of the obligations to which the Member States are bound to[187]. In the next Chapter the evolving EU legal framework regarding migration and expulsion will be examined, as well as the impact of the article 3 of the ECHR on the recent Directives adopted.

[187] EU, Lisbon Treaty, 2007.

2. - The management of migration flows: expulsion within the European Union framework.

The increasing securitization of the European Union[188] illustrates the tension between border controls and the internationally recognised human right standards poses the question whether human rights do completely vanish in the borders.[189]
Considerations of public security and public policy have become one of the most controversial justifications for expulsion orders, since they can be issued for EU citizens or aliens who are lawfully residing in a Member State if they are considered a serious threat for their communities. In the public debates there is a recurrent controversy over the need to balance the rights of individuals with pressing needs regarding protection from security threats. It should be noted that human rights are not generally absolute entitlements, and sometimes different rights collapse and need to be weigh up and prioritize depending on the circumstances and the aims pursued. In those cases, the authorities in charge of balancing the interests at stake should be able to make a proportionality test, and not abuse their faculty to limit essential entitlements as human rights are. Nonetheless, as discussed in Chapter 1, a number of international and regional instruments upgrade the category of the non refoulement principle and the prohibition of torture to a peremptory norm which does not allow to any limitation, and therefore, should never be weakened on behalf of arguments related to national security.

This Chapter aims to provide a clear picture of the difficulties and challenges which the European Community (EC) and the EU have overcome in the process of establishing a common policy for asylum and immigration. In fact, the creation of a common external border has substantially influenced the increasing importance of dealing with migration flows within Europe, and has contributed to a new approach to the notion of sovereignty as it will be discussed hereinafter. Thus, for a better understanding of the rationale behind the EU current policy, a revision of the instruments adopted and decision making rules will be briefly presented.

[188] Huysmans, 2006, pp. 751–77.
[189] Peers, 2006, pp. 1-77, 241-297, Juss, 2004, pp. 289-335, Cholewinski, 2004, pp. 159-192, Hailbronner, 2000, pp. 37-46, Dauvergne, 2008, pp. 93-119.

As mentioned in the introduction, security has different spheres and, as a consequence, expulsion orders within the EU are differently shaped and justified depending on the motive behind the decision. Thus, expulsion based on the political layer of security is connected to the potential threat that a person might constitute for the community on behalf of his or her participation on criminal activities. It should not be forgotten that extraditions must be included in this category as well. On the contrary, expulsion measures issued on account of the economic and social spheres of security are generally based on the illegal entrance, stay or work of the person.

In this Chapter the Directive 2004/ 38/ EC *on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States*[190] (Directive 2004/38/EC) will be further examined. This instrument set up the conditions to expel a foreigner who is lawfully resident within the EU on account of *public security, public policy or public health*. To analyse this regulation is relevant because it shows the impact that the political sphere of security has even in one of the most fundamental freedom of the EU, which is the freedom of movement of EU citizens. Obviously, this group of foreigners is granted the higher level of protection, and the comparison of their guarantees against expulsion with the ones granted for third country nationals who unlawfully reside or enter the EU territory is illustrative of the different applications of the non refoulement principle.

On the other hand, the controversial *Directive 2008/115/EC on minimum standards for return decisions,* [191](so called Returns Directive) is the landmark instrument to assess the regulation of the expulsion of aliens who illegally reside within the EU territory. At this point, the stress is given to the economic and social threat that the mass influx of immigrants arriving to Europe represent. The examination of the Directive text will throw some light over the EU compliance with the prohibition of refoulement in its borders. In fact automatic removal in the frontiers is one of the most important concerns of international organisations and NGOs in relation with the continuous violation of the prohibition of torture, inhuman or degrading treatment.

[190] EU, Directive 2004/38/EC
[191] EU, Directive 2008/115/EC

It should be noted that the European Union policy on migration has been neither comprehensive nor uniform for the last three decades[192] since it addresses sensitive issues which the national governments have been traditionally reluctant to leave in the hands of any other external power. [193] Priority has been often given to efficiency over dignity[194] and the complex decision making rules and legal instruments used within the "pillar structure"; have generally lead to lack of legal clarity, democratic control and accountability. [195] All those aspects and how they overlap or collapse with human right standards, will be discussed in this Chapter.

2.1. - The regulation of migration within the EU: from States discretion towards a common policy.

The transformation of the EU policy regarding the control of population movements along their internal and external boundaries deserves particular attention. It shows how the creation of an internal market and a non border territory can be counter-productive if the integration does not include connected issues as the regulation of migration flows and asylum, which have been left in the hands of the Member States for too long, creating important asymmetries and gaps. The configuration of a new independent political entity which is the EU can not efficiently tackle issues affecting all its Member States if there is not a compromise so that classical sovereign rights as border controls are at least partially ceded. Transnational crime and terrorism is one of the major worries of our days and only a coherent cooperation among the States can effectively combat it. Nonetheless, the fight against crime should not be done at any price, and especially not at the expense of the most vulnerable.

Actually, the EU has progressively submitted itself to human rights standards, not only because of the Member States´ compromises, but also independently as a system able to assume obligations before the international community[196]. Thus, the management of border controls must always be respectful with those responsibilities to which the EU is bound.

[192] Guild, 2006, p.640, Peers, 2006, pp. 1-77, 242-297; Hailbronner, 2000, pp. 15, 48, 125.
[193] Peers, 2006, pp. 1-77, 242-297, Cholewinski, 2004 pp. 159-184.
[194] Ibidem.
[195] Peers, 2006, pp 1-77.
[196] Peers, 2006, pp 64-67.

The gradual integration of migration matters from the third pillar, namely intergovernmental cooperation into the first pillar, the European Communities, will be briefly commented since it illustrates the response that Europe has developed at the institutional level, to the increase on arrivals of third country nationals to its territory.
In addition, the creation of a Schengen space has considerably contributed to the construction of a new notion of sovereignty exercised by a regional organisation whose competences and faculties have been exponentially rising in the last decades. Actually, the EU management of the external borders is the object of a controversial discussion regarding its "securitization" and the consequential building up of the "Fortress Europe". An examination of the impact that Schengen has in the regulation of migration flows will be provided henceforward.

2.1.1. – Migration policy prior to the Treaty of Amsterdam: intergovernmental cooperation.

This subchapter reviews the development of increasing cooperation among Member States for preventing and controlling migration flows during the period prior the Treaty of Amsterdam. It primarily discusses the mechanisms for the adoption of migration decisions and their democratic legitimacy.

In the period previous to the Treaty of Maastricht, the EC had a very restricted competence to regulate the status of third country nationals, due to Member States´ lack of willingness to compromise in such a controversial matter. However, as the economic integration became a fact and the Schengen agreements put and end to internal borders, the need to regulate migration flows increased in importance.[197]
An illustrative example of the reluctance of the EU to exercise competences, and coordinate policies regarding migration is a proposed Directive which was submitted by the Commission in 1976, and never approved by the Council. Actually the proposition was even omitted from the Council's *Communication on Guidelines for a Community Policy on Migration* in 1985. [198]

[197] Hailbronner, 2000, pp.37, 38, Peers, 2006, pp. 10 -20, Cholewinski, 2004, pp.164-192.
[198] Cholewinski, 2004, p. 165.

The mechanism used for decisions related to migration, asylum and cooperation on civil and criminal matters was based on intergovernmental cooperation during the first stage. The so-called third pillar on Justice and Home Affairs (JHA) was formally established by the Treaty of Maastricht[199], and a set of soft law instruments were approved.[200] However, the number of measures agreed on "combating illegal migration" far outnumbered regulations on legal migration, and protection. [201] In particular, in the case of return policies, recommendations regarding practices of expulsion, transit and cooperation for removals, were adopted. [202]

During this period, the Council played a dominant role with scarce parliamentary control, a shared Commission initiative, and a very restrictive competence of the European Court of Justice (ECJ),[203] which allowed the Member States to have broad authority on deciding about border controls. In addition, EU´s accountability regarding immigration policy and decision making processes was extremely low. Hence, few instruments were published before adoption, and even preparatory sessions´ papers were destroyed. At that point, the lack of transparency ran the risk of lessening the democratic legitimacy of the decisions taken.[204]

2.1.2. – Migration policy after the Treaty of Amsterdam: the inclusion under the first pillar.

The progressive inclusion of the areas connected to migration and asylum into the keystone of the EU, which is the EC, will be discussed hereinafter. The institutional framework and decision making rules for immigration, asylum and civil law, changed with the Treaty of Amsterdam, when they were transferred to the "first pillar", and thus the EC competence on migration was established in article 63.3 of the Treaty Establishing the European Community (TEC).[205]

As a consequence, the decision making method progressively turned into a system where the Council does not need anymore unanimity but qualified majority (QMV), the Parliament participates in the co-decision procedure, and the Commission has initiative

[199] EU, Treaty of Maastricht, 1992, Title IV.
[200] Cholewinski, 2004, pp. 166-168, Peers, 2006, pp. 10-20; 242, 243.
[201] Cholewinski, 2004, pp. 185-191.
[202] Cholewinski, 2004, pp. 187, Peers, 2006, pp. 243.
[203] Peers, 2006, pp. 10-18.
[204] Peers, 2006, pp. 19,20.
[205] EU Treaty of Amsterdam,1997.

monopoly, which improved the democratic legitimacy of the decisions taken.[206] Nonetheless, a number of soft law instruments, product of intergovernmental cooperation were still produced after the Treaty of Amsterdam. Although they were not binding, their impact on operational issues is not depreciable, especially with regards to illegal migration and expulsion. Examples of those soft law instruments are the *Comprehensive Plan to Combat Illegal Migration and Trafficking,* or the *Council's Return Action Programme*. Despite both mention at some point the due respect for human rights and the prohibition of refoulement, they clearly prioritize the practical implementation and effectiveness of the control measures over the respect for individual safeguards and guarantees.[207]

2.1.3. - The Schengen area: the elimination of internal borders and its impact on border controls.

From 1985, when the first Schengen agreement was signed by five member States, the complex process of eliminating the European internal borders has taken place until our days. The broadening and deepening of the Schengen progress coincided with the adoption of the Single Act in 1986, which aimed the abolition of internal frontiers within the EC for 1992.[208]

Those two parallel processes had the particularity to share common goals, and also many of the actors involved. Therefore, the overlapping of areas covered by Schengen and the competences assumed by the EC and EU was unavoidable. That is why the "*Schengen acquis*" was integrated in the Amsterdam Treaty through a Protocol which conferred to the Council the power of assessing the legal value of the elements included and assigning them to the correspondent pillars.[209] In fact, the *Schengen acquis* contains a set of instruments, namely the initial agreement of 1985, the 1990 Schengen Convention, the accession Protocols and decisions from the Executive Committee.[210]

In 2006 the EU adopted the Schengen Code, which application is direct, and thus do not need transposition from the member States. The definition of the external EU border, as well as the duties of the border guards in relation the control of entry and expulsion are

[206] Peers, 2006, pp. 48-54.
[207] Cholewinski, 2004, p. 175-182.
[208] Guild, 2009, p. 5.
[209] Peers, 2006, p. 44.
[210] Hailbronner, 2000, pp. 70-72.

contained in the Code.[211] In fact, in 2004 an External Border Agency called FRONTEX was established for the safeguarding of the European frontiers against external threats. It should be noted that the EU accepted the opt-out of the UK and Ireland in particular areas, and Denmark, Iceland, Switzerland and Norway participate in Schengen through intergovernmental agreements. [212]

The configuration of the EU external border and the mechanisms which have been set up in order to safeguard the European citizens from external dangers portray the difficult balance between internal and external security. Thus, the protection of internal prosperity seems to directly imply rejection of external threats.[213] Actually, in this case "threat" is equal to "outsiders", "irregulars", "undocumented", alleged terrorist and collaborators with transnational crimes. All of them are mixed together in a melting pot and depicted as risks for our societies. Actually, they unluckily became the new enemy for our thriving Europe. Fears that the transit of illegal immigrants would have a great impact in the proliferation of trafficking and transnational crime imbue political debates all around Europe, often without factual and statistical support. As a result, the EU policy aims to restrain the total cross border flows, so that the problem is drastically solved.[214] EU border policies are inconsistent and fragmentary as a consequence of the rush to regulate migration since this issue was previously forgotten by the EC, as referred above.

In addition, the frontiers are increasingly well equipped for the surveillance and interception of foreigners aiming to cross. The *Schengen Information System* (SIS) was established for the member States to share information on policy and criminal matters in order to prevent crime and control entrance and exit. Actually, nowadays the borders are not only provided with barbed wires and checkpoints, but video cameras are installed and high technology is used for the more efficient control of entry.[215] As Spijkerboer says the European external border has a "quasi-military character".[216] The aim of the frontier is not anymore a military one, meaning the defence of the territory against external attacks, but the focus is given to the protection of the members of the community against uncertainties and risks that the contact with the outside world could bring within their societies.

[211] Guild, 2009, p. 8.
[212] Guild, 2009, pp. 4-12.
[213] Grabbe, 2000, p. 519.
[214] Grabbe, 2000, pp..522, 523.
[215] Buckle & Wissel, 2010, p. 37.
[216] Spijkerboer, 2007, p. 127.

All those measures and how they use could seriously undermined the protection of human rights will be further examined in Chapter 3 when I proceed to the analysis of the particular case of the Spanish "gateway" towards Europe.

2.2. The regulation of expulsion under EU law.

The prevailing goals governing migration policy within the EU could be summarised as: prevent, detect, and remove aliens who are unlawfully resident in the territory of the Member States[217]. Measures dealing with "prevention" are linked to visa and border control, fight against trafficking and the discouragement campaigns sort out by International Liaison Offices among others,[218] whereas the setting up of the SIS is also connected to cooperation on "detection".[219] Despite of the fact that all of them raise transversal human rights concerns, the scope of this thesis will not extend to the two first, and will focus on the analysis of expulsion as referred above.

Thus, when an alien is unlawfully living within the territory of a member State, the general consequence is that he or she would face is expulsion to the home country. However, automatic removals are not allowed since the person should be given an opportunity to explain the circumstances of his of her departure and to ask for asylum or for protection under the non refoulement principle. On the other hand, aliens lawfully residing within the EU territory can also be subjected to expulsion in case they are considered a serious or imperative threat to public policy or public security as it will be further discussed hereinafter.

Kay Hailbronner states that primary EC law does adequately guarantee human rights for third country nationals, but exclude them from the enjoyment of the privileges of citizenship[220]. This statement raises some doubts, in particular with regards to return procedures, and needs further examination. The following set of hard and soft law instruments adopted show the lack of a human rights perspective which is present not only in the implementation at the national level, but also already in the standard setting stages.

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[217] Peers, 2006, p. 240.
[218] Kabera Karanja, 2008, pp.371-373.
[219] Peers, 2006, p. 241.
[220] Hailbronner, 2000, p.87

2.2.1..- The enforcement of expulsion measures and its human rights component.

An essential component of expulsion is the need to cooperate with other Member States in order to enforce the removal. Therefore, member States should not participate in expulsion procedures which do not comply with the minimum human rights standards, both in a substantive and procedural manner. [221] The Directive 2001/40 on Mutual Recognition of Expulsion Orders[222] was very controversial because it barely offers precise and substantive protection for the expelled. Actually, it is also criticized because it applies Schengen rules for foreigners who intend to enter the territory to persons who are already residing in it, and thus weaken their protection for them.[223] Nevertheless, as Steve Peers remarks, the Directive was not transpose by some Member States and not often used in practice, despite the approval of the Council Decision 2004/191/EC, aiming to compensate expenditures on the enforcement of "foreign return decisions". [224]

In addition, enhance cooperation between Member States on removal decisions, and their enforcement, was further promoted through the Directive 2003/110 on expulsion via air[225]. A member State can reject the demand of supporting the execution of an expulsion for several reasons, including on behalf of public security, public policy or public health or even for practical reasons. Moreover, in the Preamble of the Directive, the fact that expulsion to a transit or destination State should not be performed in case there is a risk of inhuman or degrading treatment is also mentioned.

Despite the fact that both Directives do mention at some point the relevance of respecting human rights standards, there is no obligation for a *transit State* to refuse processing an expulsion procedure on the basis of violation of human right standards or even a diligence obligation in verifying that all the procedural guarantees were taken into account by the sending country.[226] Thus, if there is no legal obligation enshrined in the legal instruments, few guarantees can be inferred and resorted from them at the internal level. Then, the only available and effective safeguards for those cases are the human rights´ mechanism discussed in the previous Chapter, since a wide discretion is left in the hands of the States.

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[221] Guild, 2006, pp. 642, 643, Cholewinski, 2004, pp. 172, 173; Peers, 2006, pp.276-278.
[222] Council Directive 2001/40 on Mutual Recognition of Expulsion Orders.
[223] Peers, 2006, p. 277.
[224] Statewatch, (Peers), 2008, p. 2. Council Decision 2004/191/EC.
[225] EU, Directive 2003/110 on expulsion via air.
[226] Peers, 2006, pp. 281, 282, Cholewinski, 2004, pp. 172,173.

On the other hand, some soft law measures also have a relevant impact in the regulation of expulsions. The *Commission Green Paper on a Community Return Policy on Illegal Residents*[227], and the subsequent adoption by the Council of a *Return Action Programme*, showed that States are willing to give priority to effectiveness and implementation of expulsion orders than a proper examination of the individual claim, assessment of the circumstances and articulation of the guarantees required. The *Return Action Programme*[228] includes a surprising statement, claiming that the removal procedures "are already and should continue to be conducted in accordance with human rights standards and international obligations". [229] This provision apparently forgets the automatic removals that take place in the Moroccan borders, or recent case law of the ECtHR confirming the violation of the non refoulement principle by some of the Member States.

2.2.2 - The grounds for expulsion and its link with security concerns.

The political discourses about migration in Europe are full with references to aliens as a threat to the stability and peaceful enjoyment of rights of the European citizens. This phenomenon has been called the "*securitization of migration*"[230] and affects not only the third country nationals who are illegally residing or intend to enter in a Member State, but also the lawfully residents.

In this subchapter the configuration of the "security concepts" as boundaries for the freedom of movement will be examined. The EU nationals are granted the highest level of protection against expulsion since they are normally allowed to move within EU internal borders without almost any limitation. However, even in the case of EU citizens, expulsion is allowed if they are considered a serious threat for the host country. The *Directive 2004/38/EC* regulates the expulsion of EU nationals and their family members and the criteria used to justify denial of entry or removal[231] is illustrative of the widespread fear in the EU that crime could multiply and impact the well being of

[227] EU, Green Paper on a Community Return Policy on Illegal Residents, COM(2002) 175 final.
[228] EU, The Return Action Programme, 2002.
[229] Cholewinski, 2004, p. 179.
[230] Huysmans, 2000, pp 751-771.
[231] Directive 2008/115/EC, art. 27, 28.

our societies. Thus an examination of the notions of security used to restrict the fundamental freedom of movement will be provided.

On the other hand, expulsion is in the majority of the cases issued to third country nationals who illegally try to enter, reside or work in the territory of the Member States. The recently adopted the *Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals* -so called "Returns Directive"- aims to coordinate the efforts of the European countries to control illegal migration and unify the standards and practices for the implementation of removals. Therefore, its analysis is crucial for a better understanding of the compliance with the prohibition of refoulement at the normative level.

The examination of those two instruments portrays the diverse situations which give rise to refoulement concerns, and how the EU provide for protection against expulsion in the case of foreigners who are lawfully and unlawfully residing within its territory.

2.2.2.1. - The "security concepts" as grounds for expulsion under Directive 2004/38/EC.

With the abolition of the internal frontiers in the EU, the States lost their prerogatives to deny the entry to nationals of other member States, and the freedom of movement become one of the most critical pillars of the communities. Therefore, the discretion of the State to decide over the entry of EU nationals vanishes if the person complies with the requirements established by community law to be entitled a right to move. In fact a member State can only expel an EU citizen on account of *public security, public policy or public health*.[232]

Nevertheless, a concrete definition of those concepts was lacking, and references to them were mixed and widespread throughout several European regulations and directives until the adoption of the Directive 2004/38.[233] It should be reminded that the scope of the Directive 2004/38 is limited to the European Union citizens and their

[232] Guild, 2001, pp. 61,62.
[233] Janosi, 2008, p. 4.

family members.[234] Therefore the "type of foreigners" affected by this regulation is with no doubt in a better legal position than other third country nationals, who fall out of the scope of this Directive unless they have family tights with a EU citizen.

As referred above, since the freedom of movement is one of the basic fundamental freedoms of the EU citizens, its restriction on account of grounds related to public security should be interpreted narrowly, and thoroughly justified by the State as the ECJ has several times stated. [235] Given the initial lack of clarity regarding the interpretation of the "security concepts", the ECJ has been crucial to clarify their application at the national level, since they substantially affect and limit a particularly sensitive right.

The definition of public security and public policy has been extracted from the *Bochereau* case[236] and it is contained in article 27 of the abovementioned Directive. [237] The stress is given to the "*personal conduct of the individual concerned*", which "*must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society"*. Additionally, the measure has to be proportional and solely based on the behaviour of the individual without considerations of previous criminal convictions unless it is foreseeable that it will have an impact on the conduct of the individual, and thus a current or future danger for the host society. [238]

In fact, the Court has controversially accepted that the personal conduct which constitutes a ground for expulsion or denial of entry does not necessarily have to be unlawful. In the *Van Duyn* case[239], a Dutch citizen was not allowed to enter in the UK given her intention to participate in activities related to the sect of Scientology. Thus, the Court understood that it was enough if the behaviour was understood by the host country as "socially harmful", even if it was not forbidden for the country national, which rise concerns about the respect of the non discrimination principle.[240]

It should be highlighted that the Court has generally allowed for a certain margin of discretion of the States, in order to decide which activities are against the most fundamental interests of their societies. That way, it acknowledges that what might

[234] Directive 2004/38/EC; art. 3.
[235] Guild, 2001, pp.63-65.
[236] R v. Bochereau , case nº 30/77 (1977) ECR 1999.
[237] Berry, E & Hargreaves, S., pp 232-244.
[238] Directive 2004/38/EC, art. 27, Guild, E, 2009, pp.57-59.
[239] Van Duyn 41/74 [1974] ECR 1337
[240] Barnard, 2007, p. 463.

constitute a risk for security, varies from one country to another, and changes over time. Nonetheless, since the *Bochereau* case, the ECJ has always stressed the importance of a strict interpretation of the "sufficiently serious threat", so that the restriction on the freedom of movement is not abused at the national level.[241] It must be stressed again that expulsion is an exception to the freedom of movement fundamental right, and if interpreted broadly, it would become itself the general rule. Therefore, any criminal behaviour does not qualify for expulsion, and States should not widen its interpretation to an extent that they deprive individuals of their right to move.

Furthermore, the TCE in its article 12 contains one of the most basic principles of the Community, which is the prohibition of discrimination on the basis of nationality. [242] However, the wording of article 28 concerning "protection against expulsion" indicate the existence of different levels of enjoyment of the right, depending on the lengthy of the stay, which raises concerns about the violation of the non discrimination rule. [243] Thus, minors and Union citizens who have lived for the previous ten years in a Member State can only be deported on "imperative grounds of public security", while the general rule is that a expulsion decision would be granted on "serious grounds".

The establishment of a higher protection for children and individuals who have resided in the territory for a longer period, places them at the equal level as the nationals of the home country.[244] Therefore, the *imperative grounds of public security* would be the top threshold justifying removal, under Directive 38/2004. However, the EU citizens and their family members who do not fall under those categories, and thus have lived for a shorter period in the recipient country could clearly be "more easily" expelled, even if they entail the same level of risk for the public order. Thus, the clash between the regulation of expulsion contained in the Directive, and the non discrimination on the basis of nationality is unsolved, and the ECJ has argued that the right not to be discriminated has also to be weigh up with the faculty of the State to exercise border controls, and thus a margin of appreciation has be allowed for the States to exercise their sovereignty.[245]

[241] Barnard, 2007, pp. 462-465.
[242] Guild, 2001, p.60, TEC, art. 12.
[243] Guild, 2001, p. 67**,** Directive 2008/115/EC art. 28.
[244] Barnard, 2007, p. 468
[245] Guild, 2001, p. 69.

2.2.2.2.- The "Returns Directive" 2008/115/EC of 16 December 2008 on common standards and procedures in Member States, for returning illegally staying third-country nationals.

The *Returns Directive* was the first co-decision instrument adopted by the EC for undocumented migrants.[246] Following The Hague Programme call for an EU common policy on removals of third country nationals, the Commission made a Proposal for a Return Directive in 2005.[247] The final text was only approved in December 2008 after a lengthy process which shows the difficulties within the EU for reaching a consensus over illegal migration.[248] The disagreements of some Member States over crucial provisions, and the weak role of the Parliament on softening the proposed text, make the resultant piece of legislation a compromise on minimums, which risks lowering down the already poor human rights´ standards in the national regulations.[249]

The approval of the Directive in first reading also raises some concerns over the accountability of the working methods used by the Parliament and the Council. The so-called informal *trilogues* are determinant to understand the outcome of the process and refer to agreements reached by members of the European Parliament (MEPs) and Council members in order to speed up the course of action and avoid public debate over controversial issues.[250] However, after three years struggling with Member States´ objections, a question arise whether if protection against expulsion is improved after the approval of the Directive or it become another operational tool for locking third country nationals out of the EU frontiers.[251]

Scholars, International Organisations and non governmental organisations, have expressed their fear that the Directive would become not only an incentive, but also a justification to downgrade existing guarantees and speed procedures on behalf of efficiency. [252] A key provision in this regard is the article 4, which offers the possibility for the Member States to upgrade the standards, and provide for more favourable rules. However, taken into account the current European political and economic context it is

[246] Baldaccini, 2009, p. 1, Acosta, 2009, pp 19-39.
[247] COM/ 2005/391.
[248] Statewatch, 2007, p. 4, Acosta, 2009, pp. 20-22.
[249] Acosta, 2009, pp 19-39; Statewatch, 2007, p. 6; European Council on Refugees and Exiles (ECRE), 2009, p. 5.
[250] Farrel, & Héritier, 2002, pp. 10-12.
[251] ECRE, 2009, p. 8
[252] UNHCR, 2008, pp.1- 4, ECRE, 2009, pp. 1-24, Acosta, 2009, pp 19-39, Olmos Giupponi, 2009, p.17.

hardly conceivable that any country would be willing to provide for higher safeguards.[253]

The language, scope and specific content of the Directive will be further examine in the following paragraphs, as well as its adequacy and respect for the international obligations which the Member States are bound to.

The use of vague concepts and imprecise expressions to define the grounds on which some fundamental rights can be restricted weaken the few guarantees offered.[254] Thus, an extensive interpretation of the risk of absconding in article 15, which set up the conditions for detention, could lead to the general acceptance of the deprivation of liberty previous removal for third country nationals who are unlawfully resident in the territory of the EU[255]. In addition, references to "*threat to public policy, public security or national security"* are made in article 7 regarding the rules dealing with the deprivation of a voluntary period for departure, and article 11 in connection with the extension of an entry ban over the established limit of 5 years. In those cases, if a person constitutes a risk for the security of the host country the sanctions are hardened, and the guarantees fade.

Furthermore, the definition of "return" in article 3, is also non conventional, as it includes not only the country of origin, but also a transit country or a third country to which the person "voluntarily" agrees to be expelled.[256] The vulnerability increases when several countries are in charge of the execution of the removal, as it has been commented before in Chapter 2.2, since those transit countries do not have any obligation under EC law to check if the expulsion is carried out with due guarantees and respect for the rule of law.

The use of imprecise language also raises concern about possible divergences on the implementation of the standards at the national level. Actually, as it has been suggested by ECRE, a "monitory system" for accountability of the Member States on their expulsion practices, would serve as a useful tool for the evaluation of the progress towards a consistent policy on illegal migration.[257]

[253] See Introduction.
[254] ECRE, 2009, pp. 1-24.
[255] ECRE, 2009, p. 9.
[256] Statewatch, 2009, p. 5.
[257] ECRE, 2009, p. 5.

The scope of the Directive has also been contentious since it excludes two categories of aliens which safeguards are reduced to the minimum.[258] Neither the immigrants rejected in the border or crossing illegally, nor the subjected to an expulsion order as a criminal sanction are covered. Nonetheless the Directive does not totally forget about them and imposes a few obligations for the treatment of the third country nationals who fall out of its scope. Those guarantees are connected to the proportionality of the coercive measures prior removal, with particular focus on the protection of the child and family unity.

Regarding the specific content, throughout the text of the "Returns Directive" there are some provisions which explicitly recognise the need for providing procedural and substantial guarantee in order to avoid human rights violations in the context of expulsion. The Preamble of the Directive, containing its guiding principles, includes a number of mentions to safeguards available. Nevertheless expressions as "fight against illegal migration" early indicates the tension between the wish of developing an "effective removal policy" and the due "respect for fundamental rights and dignity".[259] Though, references to the Refugee Convention, and the Charter on Fundamental Rights of the European Union,[260] emphasize the existing obligation of the Member States with regards to human rights standards. Furthermore, article 5 sets up some limits to the discretion of the Member States in their return policies, in connection with the special protection for children, family life, health and the non refoulement principle[261].
Although, the Directive presents provisions in favour of the rights which third country nationals should be granted, the margin left for the discretion of the States is still very broad and the obligations established are rather directed to facilitate the effective removal than to protect its subject.[262] The possibility of issuing long entry bans to asylum seekers rejected in the admissibility phase illustrates this idea since it could entail a serious violation of the non refoulement principle. Actually, when asylum seekers claims are found manifestly unfounded, they are not granted a period of voluntary departure, and they are issued the expulsion order together with a compulsory

[258] UNHCR, 2008, pp. 1, 2, Statewatch, 2007, p. 5.
[259] ECRE, 2009, pp. 2-5.
[260] EU Charter Fundamental Rights, 2000.
[261] Statewatch, 2009, p. 6.
[262] ECRE, 2009, pp. 1-24.

entry ban. Nevertheless, the denial of the refugee status does not imply that persecution will not take place in the future, especially in some countries of origin where the situation is highly volatile. Thus the prohibition of entrance locks the individual out of Europe, and deprives him or her of international protection against refoulement for a long lasting period. [263]

In the same line, procedural safeguards and the right to effective remedy are also seriously undermined since article 12 allows States not to translate the return decisions of "third country nationals who have irregularly entered the territory". In fact, the availability of leaflets with general information on expulsion should never replace an individual explanation of the rights and obligations that the procedure the alien goes through entails. The deprivation of this entitlement seriously undermined the required guarantees according to human rights standards.[264]

In fact, the corollary of the trend to diminish the scarce safeguards available to the minimum is illustrated by the provision on emergency situations contained in article 18. It allows States which receive "exceptionally large number" of third country nationals to use coercive measures in an abusive manner, on account of their lack of administrative or judicial capacity.[265] Moreover, the decision to resort such an exceptional mechanism is not submitted to control by the European Union, but the States has only to inform de Commission on the reasons for applying such a measure. [266] It should not be forgotten that the Governments of many Member States are dealing with overwhelming "migration pressure" which often challenges their capacity, since the enforcement of human rights standards, requires financial resources.[267] The high cost of the enforcement of expulsion decisions is critical,[268] and attempts to control and regulate illegal migration often has caused that a high number of people are left without any legal status trapped in the so-called "limbo situations." [269] According to the Directive, the Member States should issue a written confirmation acknowledging the impossibility of carrying out the removal.[270] Therefore, illegal migrants, who cannot be removed because of financial constrains, or due to the Member States´ inability to

[263] Ibidem.
[264] ECRE, 2009, pp. 17, 18; Statewatch, 2007, p. 5.
[265] Olmos Giupponi, 2009, p. 19, 20.
[266] Directive 2008/ 115/ EC, article 18.
[267] Grant, 2005, p. 25.
[268] Carling, 2007, p. 4.
[269] ECRE, 2009, pp. 1-19.
[270] Directive 2008/ 115/ EC, Preamble (12).

obtain the necessary travel documents should have the possibility to apply for a residence permit.

Overall, this Directive should not be criticized for what it says, but more for what it does not. The use of vague concepts to define restrictions of rights, the limited scope of the Directive, which excludes the third country nationals refused in the borders, and the flawed balance between human rights standards and effectiveness, explains the disappointment that the international community and civil society experienced with the result of such a lengthy process. The coordination of efforts within the EU for a common border control system still lacks a stronger human rights component, and the ability to overcome the idea that Europe should *fight* illegal migration at any price.

2.3. – The EU human rights obligations: the regulation of expulsion vis-à-vis article 3 of the ECHR.

The examination of the adopted instruments regarding expulsion gives a glimpse of the importance given to human rights in the regulation of removals. In this subchapter the consonance of the legal instruments adopted with article 3 of the ECHR will be further assessed. The provision of non refoulement contained in the ECHR has a particular strength given its absolute character, and also due to the essential role that the ECtHR plays in transforming it into a real legal entitlement, as discussed in Chapter 1. In addition, the regional scope of the Convention might provide a more accurate respond to the needs of the European countries, and a better understanding of the current dilemmas at stake. Moreover, with the Lisbon Treaty the EU accession to ECHR as an independent entity will become true[271]. Even though a compromise to respect and promote human rights, and in particular ECHR, was already enshrined in article 6 TUE[272], the new Treaty allows for the EU as a whole, to be formally bound by the Convention. Thus, EU citizens will be able to submit complains to the ECtHR on account of violations of their rights by EU institutions, and not only against the authorities of the Member States. That is the reason why this analysis of compatibility

[271] CoE, 2009.
[272] Peers, 2006, p.64.

between human rights and expulsion measures will be focus on the ECHR approach to non refoulement.

As discussed, the regulation of expulsion at the EU level has been shaped in the last years. Before, the general rule was a wide discretion of the Member States, which were allowed to cooperate and adopt soft law measures which lack the democratic guarantees that binding instruments generally require for their adoption. Once the EU realised that the building up of an economic area without internal frontiers impacts also other different cross borders issues, namely migration, asylum and transnational crime, a stronger effort was made in order to tackle more consistently those transversal matters. Parallel, the progressive assumption that the establishment of an independent political and economic regional entity could not be performed without due respect to human rights was illustrated by the introduction of article 6 in the TUE and the references to the due respect to ECHR made by the ECJ in several rulings[273]. The Lisbon Treaty represents the culmination of this process since it provides the legal basis for the EU accession to ECHR as a unique political entity.

The regulation of expulsion comprises a wide number of soft law and binding instruments approved within the EU and EC in order to combat illegal migration and preserve the EU citizens from threats to public security which have been previously examined. As it has several times stated along this research paper, security is a multilayered concept, and thus expulsion decisions based on security also diverge depending on the motive on which the measure is taken. The protection against threats based on the political sphere of security relates to the safeguarding of the stability of the country, and the prevention of crime and other major disturbances to public order. On the other side, the social and economic sphere of security links to the preservation of the citizens' status quo, and the sovereign right to control entry and deny acceptance to unwanted members of the community. The first area is illustrated with the analysis of the security concepts contained in the Directive 2004/38 and the limits to freedom of movement even for the most privilege third country nationals which are the ones who have family tights with EU citizens, and therefore, are lawfully residing in the territory of the EU. The second area is better depicted by the recent regulation on common

[273] Tridimas,2006, pp.298-369.

standards for return decisions to third country nationals residing unlawfully within the territory of the EU. Both instruments relate to expulsion and find their boundaries on the non refoulement principle, but both find their basis on two diverse concepts of security. Additionally, the EU has given special stress to the cooperation of the member States for the enforcement of expulsion measures. The execution of the removal potentially entails a relevant risk for the respect of the human rights safeguards since several countries are involved and all of them should respect the procedural and substantial guarantees. Thus, *transit countries* must also comply with the principle of non refoulement if they cooperate on the implementation of an expulsion order.

Regarding the expulsion of third country nationals lawfully resident within the EU which is contained in the Directive 2004/38/EC, the instrument do not expressively refer to the prohibition of refoulement and set up the conditions under which a person can be removed from the EU on account of *public security, public policy or public health*[274]. The text of the Directive only mentions the necessity that expulsion decisions are proportional with the aims pursued and the specific circumstances of the person, and comply with the procedural safeguards. However, the fact that the Directive remains silent about the customary principle of non refoulement does not imply that the EU is not bound by it. As mentioned above, the 27 Member States are obliged to comply with the compromises they acquired regarding the ECHR, and the participation in regional entities as the EU does not justify the violation of those standards. Therefore, the omission of any reference to non refoulement in the Directive can not be used to justify its violation. Particularly now, that the EU is entitled to accede the ECHR, the standard setting process should be very careful when configuring the guarantees and motives regarding expulsion. Actually, there is not a clash between the Directive 2004/38/EC and the prohibition of expulsion in cases the person would very likely face torture upon his or her return. That is to say that expulsion can be issued if an EU citizen or its family members constitute a threat to security, unless the State in charge of expelling them verify that they would be submitted to mistreatment in case they are expelled. Therefore, the non refoulement principle does not imply that security is not a valid reason to decide whether and alien is entitled to stay within the EU territory or not, but

[274] Directive 2004/38/EC, art. 27.

constitute a limit for this discretion in the case torture would be the result of the decision.

On the other hand, regarding the expulsion of third country nationals who are unlawfully residing within the territory of the EU, the *Returns Directive* is characterised by its lack of clarity, ambiguous legal concepts, limited scope and a wide discretion left to the States in order to decide about the expulsion of aliens. Even if there is a provision allowing the member States for a more favourable treatment, it is disappointing that the EU has not been able itself to upgrade the basic safeguards for illegal migrants against expulsion. The major concern is that automatic expulsion would be enforced on account of emergency situations, and the guarantees softened because of the prioritization of efficiency. Even if the prohibition of refoulement is mentioned in the text of the Directive, as well as the protection of asylum seekers contained in several international instruments namely the Refugee Convention, the specific configuration of this legal instrument opens the door for flagrant violations of non refoulement. Thus, the role of the ECtHR in protecting the rights of third country nationals expelled without being heard or without due investigation on the consequences upon their return, is essential. However, in this case the mechanism is very limited given the high number of arrivals and the scarce information and resources that third country nationals have to protect their rights. Thus, even if the instrument does not frontally collapse with the non refoulement principle, it fails in creating the necessary legal environment for the member States to comply and respect human rights when they control and restrict the entry within the European external borders.

To conclude with, enforcement of expulsion orders involve a crucial element of transnational cooperation between Member States. The transit countries are allowed to reject collaboration on the execution of an expulsion order on several grounds, including public security and practical issues. However, none of the instruments provide for a legal obligation of the transit States to review the compliance with human rights, and determine if the non refoulement principle is being violated by the expelling State. This is again a lost opportunity to reinforce the protection and guarantees offered to aliens, and substantially contribute for the protection of non refoulement.

The following Chapter shows how border controls are implemented at the national level, and aims to illustrate the relevance of setting up higher standards within Europe in order to avoid Member States unwillingness to respect them. As a consequence, excessive discretion and an abusive implementation of EU norms is the disappointing outcome of all the EU efforts to coordinate migration policies.

3. - A case study: Spain

Within the last 30 years Spain became one of the main gateways for immigrants heading to Europe. Small boats (*cayucos)* overcrowded with Sub Saharan Africans have arrived on regular basis to the Canary Islands and the southern cost of Spain from different routes.[275] Furthermore, Ceuta and Melilla became a very illustrative example of how the European border policy works in relation to human rights protection- or violation-, as we will further discuss in this chapter. The establishment of bureaucratic barriers in order to prevent immigrants to exit their home countries, and the detection and rejection of *cayucos* in the sea, are crucial means to avoid *unwanted migration* in its first stages. Therefore many immigrants are blocked even before they manage to reach the territory of the host country, and they are deprived of the possibility to seek for their rights there.[276]

Even if the number of arrivals have substantially decreased due to the big efforts of the Spanish governments to stem the flow, and the effect of the economic crisis on employment, people keeps on risking their lives in the Straits of Gibraltar[277]. As a consequence, many of them remain undocumented for years, swell the "informal economy" and are granted very limited rights, while always threatened with the possibility of expulsion.[278]

This chapter aims to depict the difficulties of guarding the doors of Europe without neglecting human rights. The case of Spain illustrates very well how the changing migration patterns and the accession to the EU had an impact on the development of the border control mechanisms. The newly reformed Foreigners´ Law and Asylum Law are examples of the influence that the European *securitization* of its borders has at the national level, and the difficulties to strike a balance between the prevention of illegal migration and the protection of human beings.

The Spanish regulation on migration differentiates between expulsion of an unlawful resident and rejection at the border, as well as between entry from a habilitated checkpoint or from an illegal route. The safeguards available in those cases diverge and

[275] Carling, 2007, p. 316,317.
[276] Carling, 2007, p. 321,323; Gil Bazo, 2006, p. 8.
[277] AI, 2010, p. 299.
[278] Iglesias Machado & Becerra Domínguez, 2007, p. 203.

the procedural differences have a crucial impact in the protection against refoulement. Thus, ambiguous situations in the border lead to removals without the required guarantees and alleged execution of direct expulsions deprives the immigrants of a due process before they were forcibly returned. In addition, the asylum system is flawed and thus immigrants are reluctant to apply for refugee status in Spain.

As Spain is part of a wide range of human rights instruments, the examination of the Concluding Observations and reports from their monitoring bodies would throw some light over Spanish compliance with the obligations to which is bound, and the broad application of the non refoulement principle to diverse situations along the borders. Additionally, a brief overlook to the specific case of Ceuta in Melilla illustrates the current prioritization of the control on population movements over the respect for individuals´ dignity and the protection against refoulement.

3.1. - Immigration patterns in Spain in the last 30 years: from a country of emigration to a country of immigration.

Spain did not face the challenge of managing high numbers of immigration until the 1980s, since the general rule before was emigration instead. [279] Along the 20th century, Spanish citizens searched for a better life in other European countries and Latin America or they fled abroad because of political reasons after the Civil War and the establishment of Franco's dictatorship. [280] Actually, although it is difficult to determine the exact moment when the situation reversed, Laura Huntoon states that the number of immigrants exceeded the emigrants in 1986 or 1989[281].

Spanish emigration in the first 15 years of the 20th century was mainly directed towards Latin America. It was arguably induced by a crisis on agriculture due to the impact that the exportation of goods from America had in the local markets.[282] Afterwards, the industrialisation brought about important population movements, both internal and external. Therefore, from the 50s on, the preferred area of destination was

[279] Huntoon, 1998, p. 429, Calavita, 1998, p. 538, De Tapia, 2008, p. 39.
[280] Maas, 2006, p. 4.
[281] Huntoon, 1998, p. 429.
[282] Bover & Velilla, 2001, p. 5.

not anymore South America alone, but also France, Germany and Switzerland, which were growing economies in need of extra workers.[283]

It was not until in the 80s, when citizens of the former colonies started to move to the *"ex-metropoli",* namely Spain or Portugal[284]. In addition, the Spanish transition to democracy facilitated the return of the exiled[285] and some emigrants, who had left for Northern Europe and South America searching for a better life, came back to their home country[286].

The Spanish experience with immigration is therefore relatively recent in comparison with other EU countries[287]. Moreover, Spain acceded to the EU in 1985 and between 1990 and 2005; the number of citizens from other EU Member States residing in Spain multiplied per eight.[288] According to the OECD study on *International Trends of migration*, Spain was in 1993 the third country with the highest proportion of EU nationals in their foreign population, representing 42.7% of the total. It is worth to highlight the importance of European pensioners generally from UK or Germany, who move to the southern European countries in search of good weather conditions.[289]

Although Spain started to receive immigration in the 80s, it was not until the beginning of the 21st century when the number of immigrants boosted. According to the National Institute of Statistics, from 2001 to 2005 the number of foreigners doubled, reaching almost 4 million of people which represents around the 10 per cent of the total Spanish population.[290]

There is a controversial discussion over the factors which influenced the speedy augment of the number of foreigners. Some scholars argue that Spain was too generous with its policy of regularisation and amnesties, and that this produced a "call effect" (*efecto llamada*) for other migrants. Nonetheless, one of the most critical reasons was the unprecedented growing of the Spanish economy and the need of extra labour mainly in the construction sector.[291]

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[283] Bover & Velilla, P, 2001, p. 7.
[284] De Tapia, 2008, p.39.
[285] Aruj & González, 2007, p. 42.
[286] Calavita, K, 1998, p. 539.
[287] Zapata Barrero & de Witte, 2007; p. 85.
[288] Maas, 2006, p. 4.
[289] OECD, 2001, p. 34.
[290] Iglesias Machado, & Becerra Domínguez, pp. 112, 113.
[291] Pajares, 2009, pp. 23-31.

After all, Spain is at the crossroad between Africa and Europe, and thus became a "gateway" towards the dreamt Northern Europe[292]. Hence, the Canary Islands, the Straits of Gibraltar, Ceuta and Melilla turned into key exit points for migration flows.[293] The diplomatic relations with Morocco has been marked by the importance given to the control over entry due to the big numbers of illegal migration who challenge the border enclaves of Ceuta and Melilla since 1992. Both cities enjoy a mixed special status given that they are part of the EU but not of Schengen. Thus, the entrance to Europe was less complicated from there than from many other border cities.[294] As a consequence, fences were erected, and the readmission agreements between Spain and Morocco were modified in order to provide mechanisms to prevent the exit of irregular migrants.[295]
In spite of all the efforts made by the Spanish authorities to halt the flow, the *cayucos* from Mauritania and Dakar-Senegal do still arrive to the Spanish coasts full with undocumented migrants in an extreme situation of vulnerability. [296]

The Spanish society had to adapt rapidly to the idea that they have to live together with people who were not born in their territory and do not share the same tradition, culture or mother tongue.[297] The media repeated continuously that there was an "avalanche", "wave", or "invasion" of immigrants from Africa[298], which contributed to an unease feeling about migration that was already growing within the Spanish community. The economic crisis added discontent to the public and exacerbated the xenophobic and racist feelings[299]. Although there has been some reduction in the arrivals, the overall impact was not as big as expected, and programmes of voluntary return have definitely failed in their attempt to give incentives to leave.[300]

[292] Huntoon, 1998, p. 437, Gil Bazo, 2006, p.3.
[293] Maas, 2006, p. 7, De Tapia, 2008, p. 41, Zapata Barrero & de Witte, 2007, p.86.
[294] Zapata Barrero, & de Witte, 2007, pp. 86, 87.
[295] Baldwin-Edwards, 2006, pp.318, 319, Goldschmidt, 2006, pp. 36-41.
[296] Zapata Barrero & de Witte, 2007, p. 87.
[297] Magone, 2008, pp. 71, 72.
[298] Huntoon, 1998, p. 430.
[299] Pajares, 2009, pp. 205, 206.
[300] Pajares, 2009, pp. 163-191.

3.2. – The regulation of immigration and asylum at the national level and its convergence with European policies.

The development of an immigration policy in Spain runs parallel to its accession to the European Communities in 1985.[301] Since the approval of the Spanish Constitution in 1978, four out of the five laws about immigration were passed in the last decade. Actually, both the Foreigners´ Law and the Asylum Law have been amended in 2009 in order to implement several European Directives.[302]

The Spanish Constitution is by no means clear when it states in article 13.1 that foreigners have the rights contained in the international treaties and the law. In fact, there is no further mention about the exclusive rights which are reserved solely to the Spanish citizens and those that also third country nationals enjoy[303]. Therefore, the interpretative role of the Spanish Constitutional Court (TC) is essential to safeguard basic rights in case the laws become too harsh. Nonetheless, in its judgement STC 24/ 2000, it reminds that according to the rulings of the ECtHR, States have broad powers to control de entry, expulse and regulate the lawful residency. [304]

The control over *unwanted immigration* has been one of the most controversial issues at the EU level.[305] The Economist reported in 1990 that the "Schengen five" were worry that the weak policies of the southern European countries, would lead to unlimited entry of illegal migrants into Europe.[306] In order to be part of the Schengen area, Spain had to tighten its controls to comply with the European requirements[307], and in June 1991, the accession to the European internal space without borders became true.[308]

Despite of the prevailing trend of fear from migrant "avalanches", poor safeguards in the administrative procedures, tough controls in the border and a non prepared society to deal with the challenges of migration, the 4/2000 Law on the rights and freedoms of immigrants, was considered a substantial improvement and set up the basis for a better protection of the third country nationals´ interests. However the conservative party

[301] Calavita, 1998, pp. 542,543.
[302] Law 12/ 2009 regulating asylum and the subsidiary protection. Royal Decree 1162/2009 modifying Law 4/2000 on the rights and freedoms of foreigners and their integration in Spain.
[303] Calavita, 1998, p. 542.
[304] Picó Lorenzo, 2002, p. 63.
[305] Huntoon ,1998, pp. 423, 424.
[306] Huntoon, 1998, p. 424.
[307] Maas, 2006, p. 9.
[308] Calavita, 1998, p.545.

(*Partido Popular: PP*) was re-elected in 2000 and introduced some amendments through the Law 8/2000, which deprived the previous instrument of its potential effect in improving the human rights of migrants at a national level.[309] Afterwards, the centre-left party (*Partido Socialista Obrero Español: PSOE*) won the elections in 2004 and one of the first measures taken, was the regularisation of undocumented migrants in 2005, which was object of disapproval and sharp criticism from many European countries, given the fear that it would contribute to increase the number of arrivals instead of halting it.[310]

As already discussed in the previous chapter, there has been a crescent interest about migration in Europe in the last years. Thus, a number of Directives have been adopted with the aim of uniting efforts to prevent illegal migration and provide for a more coherent control of the borders. The transposition of those Directives was recently implemented in Spain and both the Foreigners Law and the Asylum law were amended in 2009 in order to comply with the harmonisation of the European policy.[311] Although they have been severely criticized specially by non governmental and human rights organisations[312] it is still to be seen how their implementation will be carried out by the authorities. Overall, the Spanish administration has received several critics about its management of migration in the last decade. Hence, it has been blamed for using an *a la carte* policy, due to the extreme discretionary power of the executive[313] and for creating "*institutionalized irregularity*", since undocumented migrants have limited possibilities to obtain residence permits.[314] In addition, the incoherencies and informal obstacles lead to disinformation and lengthy administrative procedures in the so called "*bureaucratic labyrinth"* that migrants have to face if they aim to remain in Spain. [315]

[309] Relaño Pastor, 2004, p. 137.
[310] Zapata Barrero & de Witte, 2007, pp. 89,90.
[311] Sánchez Legido, 2010, pp.2 -6, Triguero martínez, 2009, pp. 4, 5.
[312] CEAR, 2009-2010, pp.1,2.
[313] Calavita, 1998, p. 545, Picó Lorenzo, 2002, p. 63.
[314] Calavita, 1998, p. 552.
[315] Calavita, 1998, p.553.

3.2.1-The regulation and implementation of expulsion measures.

As referred, the Constitutional Court stresses in several of its judgements[316] that there is not a general right for aliens to enter the Spanish territory unless they fulfil the requirements established by the authorities to be granted a residence permit.[317] Therefore, as a general rule, third country nationals who unlawfully intent cross the frontier, or who live in the country without a residence permit would face a forcibly return.

Under Spanish law it is crucial to be able to differentiate expulsion from other similar measures aiming to prevent the entry. Therefore, the rejection in the border or the denial of a residence permit, also lead to the removal of the territory, but can not be strictly called expulsion, since they are not issued as a sanction for an administrative or a penal infraction. The question which arises is whether the human rights safeguards against refoulement should apply equally to any of those situations. In fact, as commented in Chapter 3, one of the critics made by international organisations to the recently adopted *Returns Directive* was that it does not cover cases of rejection in border, and therefore deprive them from the few safeguards provided, increasing the likelihood of refoulement.

The variety of situations that are connected to expulsion and how they function in practice will be commented in this subchapter, so that the gaps regarding protection of aliens in the light of human rights standards are better understood.

An alien can be rejected at the border if the authorities in charge consider that he does not comply with the requirements. In that case the expulsion – which is called *retorno* - does not constitute a sanction, but it is considered to be part of the normal exercise of the faculty to regulate entry. [318] Thus, the power granted to police in the border checkpoints is very broad, since they have to examine substantial issues, as the

[316] STC 55/1996, STC 24/2000.
[317] Batuecas Florindo, 2009, p. 20.
[318] Batuecas Florindo, 2009,p. 21.

sufficient economic means which the immigrant counts with to provide for his stay, in a accelerated manner. [319]

In case an alien is trying to enter from a non habilitated place in the frontier, or breaks a previous entry ban, the figure used is called *"devolución"* and the guarantees are softened since an illicit action is implicit on the attempt to reach the host country. Devolutions are carried out in a very short period of time and do not require an expulsion file, but only an administrative one. [320]

One of the few safeguards available against the enforcement of the removal, both in the cases of "*devolución"* or expulsion, is the suspension of the removal in case the immigrant applies for asylum[321]. However, as we will examine in the next section, the protection available for asylum seekers is not at its pick in Spain currently.

Thirdly, there is a type of forced return which is called "*salida obligatoria"* (*obligatory exit*). In this case, a foreigner who requests a permit will be "invited to leave" within a specific period of time, in case the authorities reject his application. Again the removal is not the consequence of a sanction, but of the faculty to deny a right to stay which every sovereign country is entitled to. In practice, third country nationals are generally compelled to apply for a residence permit when they are in their home countries, since the period of validity of the tourist visa is shorter than the length of the procedure, and therefore the approval would take place when the alien is already illegally resident.

Additionally, expulsion can also be issued because of the commission of an administrative or a criminal infraction. In the case of administrative sanctions, the most common causes are residing and/ or working without the required authorisation.[322] It is important to stress that in those cases, both the law and the jurisprudence of the Supreme Court maintain that, according to the principle of proportionality, the sanction which should be issued to a migrant who is irregularly staying in Spain is a fine, and not an expulsion order, unless there are other aggravating circumstances which motivate the

[319] Batuecas Florindo, 2009, p. 24.
[320] Batuecas, Florindo, 2009, p. 25.
[321] Art. 58.4 Law 4/ 2000 modified by the Law 2/2009.
[322] Art. 53.1 Law 4/ 2000 modified by the Law 2/2009.

sanction.[323] In fact, the objective of controlling migration, prevent transnational crime and disincentive the actors involved in the migratory process influence the definition of some of the infractions. Thus, to participate in trafficking or other type of transnational crimes, to employ immigrants irregularly, or not to perform the verifications which the carriers are obliged to do, constitute reasons for administrative expulsion in case they do not amount to a crime.

Security reasons are also included as grounds for an administrative expulsion. Therefore, the participation in activities which are contrary to the public order, or affect the external relations of Spain with other countries could trigger the issuing of a removal. [324] That reasoning links to the exception of non refoulement contained in the Law 12/2009 which regulates asylum and the subsidiary protection. The text of article 9 and 11 allows for the expulsion when there is a risk for the internal or external security of Spain, or the person had been convicted of a crime which could constitute a danger for the community.[325] Here again, a cautious interpretation of the exceptions needs to be done since it could potentially deprive an alien of any safeguard against inhuman treatment upon his or her return on the basis of a past action which does not necessary have repercussions for security in the future, or does not have the magnitude enough to be considered a threat for the society. In any case, the examination of the reasons for denying asylum should be separately made from the administrative file in which the expulsion decision is issued.

Regarding expulsion as a criminal sanction, when an alien is involved in a penal procedure because of the alleged commission of a crime, upon the agreement of the governmental authorities, a Judge can authorise the expulsion.[326] Actually, the article 57.2 includes the possibility of issuing an expulsion order to someone who prior the processing of the expedient had been convicted in Spain or abroad, for a crime sanctioned with more than a year deprivation of liberty. That poses doubts about its compatibility with the principle of *non bis in idem*, since the punishment for the illicit

[323] Art. 57.1 Law 4/ 2000 modified by the Law 2/2009, STS 9th March 2007 confirming STJ Cantabria 663/2003, Calderer i Reig &Sagarra Trias, 2002, pp. 254, 255.
[324] Articles 9 and 11 Law 12/ 2009, regulating asylum and the subsidiary protection.
[325] Sánchez Legido, 2010, pp. 11-15.
[326] Calderer i Reig & Sagarra Trias, 2002, p. 247.

action has been already imposed before, and the execution of the removal might unlawfully double the sanction, even if both are based on different aims. [327]

In practice, in many of the cases mentioned above, particularly "*retorno*" and "*devolución*", the execution of the "removal", and the identification of the persons´ nationality entail serious difficulties. Between 2002 and 2003 approximately three quarters of the removals were not carried out and therefore more than 66,000 people were order to leave the country, and released from the detention centres[328]. Hence, they found themselves in a "pending" situation, which implies a desperate try to survive with no legal entitlements and fearing expulsion, until they can be regularized in case they prove their stay for at least 3 years within the Spanish territory and their integration and well command on the language. [329]

Although the guarantees against expulsion and rejection at the border are very limited, an application for asylum should suspend any execution of the removal and open the examination of the particular case according to article 57.6 of the Law 4/2004[330]. In the following chapter the weaknesses of the protection of refugees in Spain will be discussed since it substantially impacts the position of the immigrants who are in risk of facing refoulement.

3.2.2. - The deficiencies of the asylum system.

In 2009, the number of asylum seekers registered in Spain descended to 2999, representing a 33, 6 per cent less than in 2008. [331] Spanish total population, geographical location, and economic growth in the last decade, does not correspond with the insignificant number of asylum seekers received in comparison with other European countries.[332] Therefore, it is self evident that other factors have an impact in the low number of applications, and trigger the decision of migrants to search for protection in other European countries, or not to apply to any protection there.

[327] Calderer i Reig &Sagarra Trias, 2002, p. 252.
[328] Carling, 2007, p. 323.
[329] Calderer i Reig, &Sagarra Trias, 2002, p. 252; art. 31 Law 4/ 2000 modified by the Law 2/2009, art. 45.2 Royal Decree 2393/2004.
[330] Art. 57.6 Law 4/ 2000 modified by the Law 2/2009.
[331] CEAR, 2009, p. 1.
[332] Fullerton, 2005, p. 660.

As commented above, one of the few limits of the States´ sovereign right to control de entry and expulse is the protection established by the Refugee Convention. According to the statistics published by the Ministry of Interior in 2005, 5.553 people applied for asylum in Spain and only 175 of them where granted refugee status, meaning only the 2, 7 % were accepted.[333]

It is worth to mention here that in June 2005 the European Parliament adopted a Resolution stressing the need to reinforce the protection of asylum seekers in Europe, so that Member States comply with their duties regarding non refoulement, in accordance with Article 6 of the Treaty of the European Union (TEU) and Article 63 of the TEC, which are the cornerstone of human rights protection at the EU level,[334] together with the European Charter and the ECHR.

Concerning the Spanish case, Fullerton has underscored the impact that the admissibility stage has in the denial of the refugee status to asylum seekers in Spain, increasing the possibility of refoulement. [335]When the application goes through the admissibility test, the claim is in practice subjected to a quick and superfluous examination on its merits[336], including the likelihood of qualifying for the exclusion clauses. The evidence required for denying refugee protection on the grounds of public security or past involvement in war crimes or crimes against humanity should never be assessed summarily. [337] As a consequence, a filter is placed in the first stages of the procedure so that the applicants need to overcome a higher burden of proof, with very few possibilities of success even in the case of been deemed admissible. Therefore, is understandable that asylum seekers, foreseeing the likelihood of not been deemed admissible, would prefer to use Spain as a transit country and apply for asylum somewhere else, or to remain in Spain illegally until they can be regularised after 3 years of residence.

[333] Boggio, 2006, p. 16.
[334] Gil Bazo, 2006, p. 11.
[335] Fullerton, 2005, p. 664.
[336] Fullerton, 2005, p. 659-664.
[337] Fullerton, 2005, p. 684.

3.3. – Border controls and compliance with human rights obligations at the regional and international level.

After examining the regulation of expulsion, and discussing about the flaws of the available protection granted by the asylum system, it is essential to have an overview on the human rights obligations to which Spain is bound, and the recommendations, conclusions an reports published by the monitoring bodies regarding its compliance.

Spain is party to several human rights instruments at the international and regional level, namely the ICCPR, CAT, CRC, ECHR and the Refugee Convention. Thus it is compelled to observe a broad range of obligations before the international community, particularly regarding the management of immigration.

As commented above, Spain has seen a sharp increase in the number of aliens arriving to its frontiers, and this poses the question whether border controls can be effectively enforced without neglecting human rights or, on the contrary, we must accept that we need to sacrifice one in the virtue of the other. [338]

In 2008 the Parliamentary Assembly of the Council of Europe issued a report about boat people arriving to the South of Europe. In the report, it acknowledged the challenge that it represents for the host countries to manage migration and encouraged them not to forget their responsibilities concerning the assessment of asylum applications and the prohibition of refoulement.[339]

The HRC, in the Concluding Observations of the Spanish periodical review in 2009, reminds that the authorities should ensure the availability of procedural guarantees for asylum seekers, as well as the possibility to be granted protection on humanitarian basis.[340] It further expressed its concerns about the role of the Courts in supervising the availability of asylum procedures, since the appeals seem to have been reduced to a mere "formality", and some expulsion decisions are allegedly arbitrary.[341]

[338] Zapata Barrero & de Witte, 2007, p. 88.
[339] Council of Europe (CoE), 2008, p 2-6.
[340] HRC, 2009, para 16.
[341] HRC, 2009, para 13.

Moreover, The CAT underscore that the new Asylum Law approved in 2009 could be used to reduce protection. Actually it stresses that the examination of article 33.2 of the Refugee Convention regarding rejection of the refugee status in case the person represents a threat to security, should never be reviewed in the accelerated phase of the procedure. The Committee advised Spain to apply the Law in a way it does not contradict article 3 of the Convention.[342]

On the other hand, at the regional level, the European Committee for the Prevention of Torture (CPT) was created on the basis of the European Convention for the Prevention of Torture in order to monitor and protect more effectively the prohibition of ill treatment contained in article 3 of ECHR.

The CPT visited Spain in December 2005 and in its report, it stressed some areas of concern in relation to the expulsion of aliens. First of all, it highlighted that the bilateral agreements with Morocco sometimes lead to a weakening of the safeguards. Thus, "*direct expulsion"* is sometimes carried out, and migrants are deprived of a legal procedure before they are forcibly returned. It furthers underscore the importance of providing the immigrants with sufficient information about their rights and obligations. In fact particularly worrisome is the situation in Melilla, especially after the incidents which took place in 2005. The particular legal status of the city and the vague delimitation of a so called "area around the border" have implications in the treatment of asylum seekers, increasing the risk of abuses from the authorities.[343]

Additionally, the CPT points out that there is evidence that unaccompanied children who tried to cross the border where forcibly returned to Morocco without safeguards, after they managed to cross the frontier. Moreover, the Moroccan police stated that they will only face some "pedagogical slaps" upon their return.[344]

The problem of irregular expulsions of children have been noticed by other international organisations and monitoring bodies. Human rights Watch (HRW) argued that readmission agreements about unaccompanied children with Morocco and Senegal

[342] CAT, 2009, para 15.
[343] CoE, 2007, p. 29.
[344] CoE, 2007, p. 31.

do not sufficiently protect the best interest of the child, and guarantees against refoulement are left aside given the prioritization of the speed of the procedure,.[345] In addition, Courts have repeatedly cancel repatriations of children, and as noted by the Spanish Ombudsman, at least two times the authorities did not respect the suspension of the expulsion, and performed it before the ruling of the Court. [346]

The HRC in its Concluding Observations in 2009 also recommended Spain to make sure that the rights of unaccompanied children entering Spanish territory are protected, and mentions its obligation to offer legal assistance in the expulsion procedure. [347] In the same line as HRW, the Committee against Torture in its Concluding Observations 2009 refers to the readmission agreements with Morocco and Senegal as obstacles for the availability of a meaningful asylum procedure for unaccompanied children. [348] The Committee Racial Discrimination and Committee Right of the Child also expressed their worries about the situation of minors in Morocco.[349]

To conclude, it is of particular concern that lately, many European countries tend to rely on diplomatic assurances to expel foreign nationals, even if there is evidence that they would face torture or inhuman or degrading treatment if they are returned.[350] The CAT in its Concluding observations in 2009 highlights that although Spain argues that diplomatic assurances can be enough if there are supplementary mechanisms for the supervision of the integrity of the expulsed after his return, that can never apply if the likelihood of being torture or mistreated is sufficiently proven.[351]

The landmark case is the extradition of Murad Gasayev, an ethnic Chechen suspected of participation in the attacks in Ingushetia in 2004. Murad Gasayev was repatriated from Spain to Russia in December 2008 due to the reliance on diplomatic assurances from the Russian authorities.[352]

[345] HRW, 2008, p. 4, 5.
[346] HRW, 2008, p. 10.
[347] HRC, 2009, para 21.
[348] CAT, 2009, para 16.
[349] CERD, 2004, para 14, CRC, 2002, para 45, 46.
[350] AI, 2010, pp. 18-28.
[351] CAT, 2009, para 13.
[352] AI, 2010, p. 25.

Murad was accused to collaborate in armed activities in Russia due to the "confession" of some other detainees about his participation in the events of 2004 in Ingushetia. Although they windrowed their statements, the Russian government continued the procedure against him, and therefore, he applied for international protection in Spain. Despite the fact that there was enough evidence to prove that Chechens ethnic, when accused of participation in armed groups are very likely to face ill treatment, the extradition was agreed by the Spanish National Criminal Court. The decision was based on the diplomatic assurances which the Russian Government offered, together with an additional mechanism entailing the CPT monitoring of the case, which allegedly would guarantee the applicants´ integrity. Nonetheless, when the CPT was informed, they rejected the requirement claiming that they did not have the capacity to articulate this type of mechanism and they are generally reluctant to rely on the effectiveness of any diplomatic assurance. Despite of the proven vulnerability of Murad Gasayev and the denial from the CPT to act as a supervisor after his removal, the extradition has been already approved and the authorities decided that the Spanish embassy would monitor the case instead. Actually, after his extradition, Murad was send to pre trial detention and reported to live with constant fear, since the Russian authorities did not stop threatening him and his family. Moreover, those additional guarantees in place, namely the monitoring of the Spanish Embassy, can not be effective for an unlimited time, and thus the question is how long the risk will last and how long the supervision would remain. [353]

International organisations, as HRW and Amnesty International (AI), have recently criticized the reliance on diplomatic assurances in order to issue expulsion orders or to expatriate.[354] It is worth to remind that as commented in Chapter 2.3, the ECtHR in its case law have repeatedly denied the validity of this reasoning as an excuse to enforce expulsion.

To sum up, according to the evaluation of compliance made by the monitoring bodies, Spain needs to direct more efforts to fulfil its obligations towards the international community. Special mention needs to be made to the flagrant flaws of asylum system, particularly in key transit places as Ceuta and Melilla where safeguards are downgraded, and even unaccompanied children do not receive the proper treatment.

[353] AI, 2010, pp. 25- 27.
[354] HRW, 2004,pp.37,38.

In addition, the Spanish Courts, which have a crucial role in relation to the review of asylum decisions and the protection of individuals against the violation of their substantial and procedural rights, have not very usually exercised their capacities in that regards. In fact, the suspensive effect of the appeal has been too frequently forgotten and expulsion decisions have been carried out immediately.[355]

Regarding the extradition of suspected criminals, or alleged members of armed groups, diplomatic assurances have been used to justify the forcibly return even if there was evidence enough to believe that the person would face ill treatment by the authorities. Spain is part to the ECHR, CAT and ICCPR, and under those instruments, the prohibition of torture is configured as an absolute right, and can not be submitted to restrictions on the grounds of security or public order. Therefore when someone qualifies for protection given the risk to be mistreated in his home country, diplomatic assurances are irrelevant and the extradition should never be carried out.

3.4. - Ceuta and Melilla: human rights at stake in the gateway from Africa.

The relationship between Morocco and Spain is a good example of the dilemma between security, control of immigration and respect for human rights.[356] Ceuta and Melilla became the transit place not only for Moroccans trying to reach Spain, but also for other immigrants coming from sub Saharan countries who are smuggled to the border. The two Moroccan cities were created as fortresses around five centuries ago when the Moors where expulsed from Spain. [357] In fact, before the 90s, the control over the border was softer since the influx of immigrants was considerably lower than it turned to be later on. [358]

Following the accession to the EU and the fast increase in the number of immigrants attempting to enter Europe, Spain and Morocco intensified their diplomatic relationships in order to effectively expel undocumented migrants. As mentioned above, both cities have a peculiar status, since they are part of the EU but not of Schengen, which lead to schizophrenic situations. Actually, in both Ceuta and Melilla, a well

[355] Lozano Ibáñez, 1999, pp. 10-14.
[356] Baldwin-Edwards, 2006, pp. 311,312.
[357] Andreas, 2003, p. 106.
[358] Carling, 2007, p. 317.

equipped wired fence covered with blades has been constructed thanks to the funding given by the EU, so that its southern border is protected against the "avalanche" of migrants. [359]

As commented, the CPT expressed its concern that expulsions have been regularly carried out in an accelerated manner without the guarantees of a due process.[360] The "bloodbath" which took place in 2005 is worth some attention since it shows the inadequacy of the current policy, and the disastrous consequences it has on the lives of the people who attempt to reach the borders.[361] In September 2005 several hundred people with makeshift ladders tried to climb the fences at Ceuta[362] As a consequence, the Spanish and Moroccan police opened fire causing the death of three people[363]. Some other immigrants were injured due to the cross fire and also because they fell from the improvised ladders to the "razor fences". When the international community received the information about the events, which was spread by the media coverage, there was severe criticism about the brutal intervention of the security forces. The Moroccan police, irritated about the image that the media disseminated about their actions, started "hunting" immigrants in the mountains and forcibly returned them to a camp in Oujda, Algeria.[364] One year after the incident, Amnesty International noticed that no investigation had been conducted to attribute responsibility over the deaths, and also no action has been taken to prevent the same events happening in the future[365] In fact similar incidents have taken place in the area in the following months as Amnesty International reports[366]

Although this incident alone illustrates that human rights perspective is regularly lost when aiming to halt migrants´ flows, the guard of the fences is not the only mean to control the frontier between Spain and Morocco. Hence, the next step in the "surveillance chain" is the management of the Straits of Gibraltar. It should not be forgotten that to control a maritime border substantially differs from the supervision of a

[359] Andreas, 2003, p. 106, AI, 2006, p. 3.
[360] Goldensmith, 2006, p. 37.
[361] Baldwin-Edwards, 2006, p. 321.
[362] AI, 2006, p. 7.
[363] AI, 2006, p . 9.
[364] Goldensmith, 2006, p. 36.
[365] AI, 2006, p. 2.
[366] AI , 2006, p. 8, 9.

land frontier, because it means to "control an area" [367]In Spain *a system of external vigilance* called SIVE aims to early detect small boats in the see and prevent the entry. This mechanism has been fiercely opposed by NGOs which argued that Spain would do better spending the money on development assistance than in surveillance methods.[368] The Spanish government alleged that the purpose is the fight against transnational crimes, so that mafias do not multiply and take advantage of vulnerable people. Although SIVE still lacks a more humanitarian perspective, if it is used with the required guarantees, it could contribute to the control of smugglers and traffickers and also help to locate ships in danger of fatalities.[369]

In conclusion, the need for a more humanitarian perspective in the management of the borders is definitely one of the required improvements that the Spanish government should implement in order to comply with its human rights obligations, and in particular with the prohibition of refoulement. Additionally, the authorities in the frontier are granted broad competences and thus the lives of thousands of people are in their hands, so they should be trained on the guarantees and safeguards that an alien is entitled. In fact, the use of force should only function as last resort, and direct expulsions should never be carried out without examination of the person´ s circumstances since they openly contradict the principle of non refoulement. Actually the efforts that many countries are devoting to halt the flow do not normally have the expected outcomes[370] and entails unnecessary costs which should be better used to trigger the root causes of population movements. As Juss Satvinder says in its article about Freedom of Movement and the World Order, "*a political realism is badly needed in international migration policy"*[371] meaning that States should relocate their expenditures in finding out new creative ways of managing migration, instead of ineffectively spending big amounts of money in guarding their territories.

[367] Carling, 2007, p. 324.
[368] Carling, 2007, p. 325
[369] Carling, 2007, p. 325- 328, 336-340
[370] Andreas, 2003, p. 109.
[371] Juss, 2004, pp. 309,310.

Conclusions

The tension between the sovereign right to control the entry and the due respect to human rights standards is well illustrated by the European reaction to migration flows. In fact, the establishment of the EU as an independent political entity challenges and transforms the classical concept of sovereignty. Thus, the establishment of an internal zone without frontiers substantially impacts the development of border controls along the external boundaries of the Schengen area, and raises concerns about the violation of essential entitlements for third country nationals which are enshrined in international treaties.

Additionally, the 21st century has been characterised for the widespread fear from security threats, which represent one of the most relevant concern of western societies in our days. Therefore, it is argued that in order to combat transnational crime and terrorism, the only limit to the action of the States is the proportionality rule. As recurrently stated in the elaboration of this study, security has also an economic and social sphere, which is illustrated by the fear that the citizens experience when a high number of foreigners arrive to their territory and compete for the resources and predominance of cultural values. All those spheres of security have an impact on expulsion, since removals are based on at least one out of the three referred interpretations of security.

Within this research paper, the mechanisms available for the protection against expulsion and the upgrading of the freedom of movements were examined and compared. Hence, it has been concluded that the recognition of the freedom of movement does not entail a general right for every alien to enter the country of their choice, even if that interpretation lead to an asymmetric right to leave but not to be relocated anywhere else than in the home country. In fact, the States well established customary right to expel and control the entry would fade if a right to remain in the territory could be implied from the freedom of movement. Since this option is also politically unrealistic, the analysis moved to the most important restriction contained in positive international law regarding expulsion, which is the *non refoulement* rule.

The *non refoulement* principle is contained in the Refugee Convention, the CAT, the ICCPR and the ECHR among others. The study of how the norm is shaped within those instruments shows that the guarantees are differently configured and does not exclude

but complement and reinforce each other. In fact, the crucial discussion over the nature of non refoulement is its customary and *ius cogens* nature. After an examination of the *opinio iuris* and State practice of the international community, the customary character of non refoulement has to be acknowledged.

However, the fact that the prohibition of expulsion has an absolute character and can not be balance with other interests is very controversial, particularly in the context of a rising concern about international terrorism. Some scholars have interpreted that even if the right contained in the CAT, the ICCPR and ECHR has an absolute nature, and only the Refugee Convention includes limitations on the basis of public order, the non refoulement principle should not be denominated *ius cogens*.

In fact, the Security Council, acting on behalf of article 103 of the UN Charter, has issued several resolutions limiting human rights of aliens on virtue of the need to protect the host community from security threats. It should be noted that, as mentioned above, the protection of peace and security at the international level is not the only UN principle which is given special treatment before other international obligations. According to article 55 of the UN Charter, *the UN shall promote universal respect for and observance of human rights*. However, in practice the strength and political impact of Security Council resolutions is indubitable, and the advance of human rights protection over security concerns have a long way to go. Hence, at the international level it might be too optimistic to univocally state that the prohibition of refoulement is peremptory, and it can not be submitted to any limitation on account of security.

On the other hand, the most powerful instrument for the protection against refoulement at the regional level is the ECHR. Its article 3 provides for a non derogable right not to be expelled to a country were there is serious grounds to believe that the person would face torture or inhuman or degrading treatment or punishment. The ECtHR case law has repeatedly reaffirm this assertion against the arguments of the States party that the absolute prohibition of expulsion should be balanced with the right of the citizens to be secured from external threats. The Court has further claimed that none of the procedural guarantees provided for the examination of the application should be weakened on behalf of the criminal conduct of the person. Thus, the only element under consideration is the likelihood that the person would face torture or inhuman treatment upon his or her return. However, the regulation of expulsion

measures within the EU raised concerns about its compatibility with this strong statement.

In fact, with the Lisbon Treaty, the EU has established the legal basis for the accession to the ECHR as an independent entity without prejudice of the obligations to which the Member States are bound. The regional character of the instrument, together with the fierce defence that the Court has made of the non refoulement principle determines the stress given in this research paper to the ECHR in order to compare it with the European regulation about migration. Thus, the compatibility between article 3 of the ECHR and the regulation of expulsion in Europe is one of the cornerstones of this study.

It should be remarked that the protection granted against refoulement by the CAT and ICCPR is also absolute, and the procedural requirements before the Geneva Committees could be advantageous in some cases. However, the relevance of ECHR overtakes any consideration of practical issues regarding evidentiary requirements or lengthy of the procedures, and deserved to be positioned in the centre of the analysis.

Even though expulsion has been regulated by the EU and EC in a wide number of soft and hard law instruments in the last decades, two illustrative examples has been picked in order to show the impact that non refoulement has in diverse situations. Therefore, the Directive 2004/38/EC and the Returns Directive have been briefly commented and compared with article 3 of the ECHR. The scope of both Directives drastically differs, since the first covers EU citizens and their family members, and the later is directed to immigrants who unlawfully reside in the territory of a Member States. Nonetheless both have an impact on the violation of non refoulement from different perspectives and depict the available protection.

The Directive 2004/38/EC includes the possibility to expel an EU citizen or their family members on account of *public policy, public security and public health*. Even though there is no reference at all to the prohibition of refoulement along the Directive, this does not mean that the EU is not obliged to respect the principle. In fact, the Directive does not collapse with the prohibition of expulsion contained in article 3 of ECHR if it is correctly interpreted by the national authorities and the Courts. In fact, the prohibition of refoulement does not imply that expulsion orders can not be issued on account of security grounds. However, those measures are limited in the case the host country verifies that the person would be in danger of being mistreated if he or she is returned. It is important not to forget that the general rule is that the State is allowed to expulse

aliens who represent a risk for the well being of their societies. The non refoulement rule does not empty this entitlement, but limit it in case the person integrity faces a serious risk if he or she is forcibly returned.

On the other hand, the Returns Directive illustrates the danger of granting too wide discretion for the national authorities to regulate border controls. The likelihood that refoulement will take place increased when States are apparently overwhelmed by migration pressures and efficiency comes to the forefront even in the standard setting stage. If the rights are vaguely define, and their limits based on wide concepts easily manipulated, the European regulation contributes very few to the upgrading of the protection against refoulement. Therefore, it can not be argued that the Directive does not respect the prohibition of expulsion, but the omission of higher protection standards has the same consequence if the national governments do not improve the low safeguards provided.

The case study of Spain, and its progressive transformation into a gateway from Africa to Europe, illustrates the difficulties to enshrined human rights standards when there is not a proper legal framework limiting the action of the authorities who implement the policies. The EU countries which are at the external border of the Schengen area are very influenced by the European pressure to halt the flow and strengthen the regulation over migration so that the entrance of aliens is reduced. That leads to automatic rejection from a not clearly defined border, denial of procedural rights and the lack of the examination of claims of many potential asylum seekers.

To sum up, the acceptance of the absolute character of the prohibition of refoulement does not imply a total denial of the right of States to expel. The faculty of States to deny entrance or expel is considered international customary law and can no be absolutely emptied by human rights statements. Nevertheless, it can definitely be restricted by them. The possibility of limiting the sovereign right to expel does not always mean that the interest at stake will be balanced, but implies that in certain cases, human rights entitlements prevail over other considerations no matter the circumstances. That is particularly true when the human right acting as a boundary to the State discretion is particularly strongly shaped, as it happens with the non refoulement principle.

Therefore, the question is not if non refoulement can be limited by security considerations, but the opposite one. Thus, expulsions based on the political layer of security not only might, but shall find its boundaries on the absolute protection against refoulement.

On the other hand, the same is applicable for the economic and social spheres of security. An expulsion order will be obviously issued to an alien who unlawfully resides within the territory of a Member State. Nonetheless this power is not absolute and finds its limit on the prohibition of torture, similarly to the removals issued on the name of security. Even if the prohibition of refoulement is configured as a very concrete restriction of the wide discretion of the States to decide about membership, its compliance is still lacking at the European Union level, and the newly adopted instruments does not improve much the available safeguard for a better protection of third country nationals.

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