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A Legal Analysis of the Current Migration Crisis
Compliance with the Non-refoulement Principle

LLM Paper
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“You have to understand, no one puts their children in a boat unless the water is safer than the land”

-Excerpt from *Home* by Warsan Shire-
Foreword

I would like to express my gratitude to the people that helped me creating this LLM Paper.

Firstly, I want to thank my supervisor, prof. dr. Lannon, for giving me the opportunity to write about this intriguing and very actual subject. Prof. dr. Lannon always believed in me and kept me up-to-date with the most recent information.

Secondly, I would like to thank the co-reader of this paper, Ms. Joyce De Coninck. She was always available to answer my questions and she gave me excellent guidance for the writing process.

Lastly, I am grateful for everyone that helped me and supported me during the LLM-year and for finalising this thesis. Many thanks!

Johanna Vijverman, 16 May 2016
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<tbody>
<tr>
<td>AFSJ</td>
<td>Area of Freedom, Security and Justice</td>
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<td>CEAS</td>
<td>Common European Asylum System</td>
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<td>CFR</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>Commission</td>
<td>European Commission</td>
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<td>Council</td>
<td>Council of the European Union</td>
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<td>EASO</td>
<td>European Asylum Support Office</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<td>EEAS</td>
<td>European External Action Service</td>
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<td>ECHR</td>
<td>The European Convention for the Protection of Human Rights and Fundamental Freedoms</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EFTA</td>
<td>European Free Trade Association</td>
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<td>FRA</td>
<td>Fundamental Rights Agency</td>
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<td>Frontex</td>
<td>European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<td>IRO</td>
<td>International Refugee Organisation</td>
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<td>MEP</td>
<td>Member of European Parliament</td>
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<td>Parliament</td>
<td>European Parliament</td>
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<tr>
<td>TEU</td>
<td>Treaty on European Union</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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General Introduction

1. 2 September 2015. The picture of the three-year-old boy Alan Kurdi spreads around the world. The infant was found near the Turkish city Bodrum, after he drowned in the Mediterranean Sea. The boy and his family were trying to reach the Greek island Kos. They were fleeing from the Syrian War and terror attacks. In exchange for their spaces on the boat, they paid an enormous amount to smugglers. The circumstances of the crossing were extremely dangerous. The inflatable boat, carrying too many passengers, capsized almost immediately, resulting in the death of Alan and others. The image became a symbol for the migration crisis.

2. The gravity of the refugee problem was once again demonstrated. In May 2015, the EU had launched its Agenda on Migration\(^1\), that elaborated on the political guidelines of Commission President Juncker. The objective was to develop a clear common policy, supplemented by the necessary tools and measures, to stop the migration crisis and remedy its terrible consequences. The Commission called upon the other institutions, the Member States and the international community of states and citizens, to cooperate for the realisation of a renewed common European asylum policy.

3. Many ideas, proposals, meetings and reports lead to the adoption of various measures and instruments as a solution for the crisis. The two best known initiatives are the quota-system and the EU-Turkey cooperation. The overburdening of Greece and Italy led the EU to adopt quota for the relocation and resettlement of persons in all Member States. This system received a lot of criticism and was not sufficient to resolve the untenable situation. The EU-Turkey Joint Action Plan was adopted in October 2015, and further implemented by the Statement in March 2016. They agreed that all new irregular migrants arriving in Greece would be send back to Turkey, and for every returned Syrian, another Syrian would be resettled in the EU. This ‘solution’ raised several questions, concerning the respect for the non-refoulement and non-discrimination principle.

4. The objective of this paper is to analyse the current migration crisis, focussed on the compliance of the EU-Turkey cooperation mechanism with the non-refoulement principle. In order to answer this question, it is essential to give an overview of the context of the crisis and the legal framework, before proceeding to the legal analysis.

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\(^1\) DG MIGRATION AND HOME AFFAIRS. European Agenda on Migration. 29 October 2015. [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/index_en.htm].
5. Part 1 will provide the background information that is needed to situate the crisis. This is supplemented by an overview of recent statistics on asylum in the EU, presented by Eurostat. This will be included in the annex to this paper.

6. Part 2 will present the legal framework surrounding the current migration crisis. Firstly, the international law on migration and asylum shall be reviewed, with a focus on the Convention of Geneva relating to the status of refugees. Secondly, the EU’s institutional and legislative framework will be discussed. This information is a prerequisite for the later analysis.

7. Part 3, the legal analysis, explains the non-refoulement principle and examines the EU-Turkey cooperation plan as to its compliance with the principle. The three main problems concerning the plan are related to the prohibition of collective expulsion, the presumption that Turkey is a safe third country and the EU’s policy of externalisation of the borders. Other issues that undermine the legality of the EU-Tukey strategy will also be investigated. Finally, a few recommendations for the future of the EU’s policy will be made.

8. This LLM-paper does not aim to present a complete overview of the complex migration crisis. Its purpose is to present a case study, to test a recent EU mechanism to the EU’s own policy and laws.
Part 1: Context of the Current Migration Crisis

9. The migration crisis that the EU is currently facing affects the highest amount of people ever since the aftermath of the second World War. In order to understand the actions and reactions of the EU institutions concerning this crisis, the wider context as to why people are fleeing their home countries must be explained briefly.

10. Over the years, people have migrated to Europe from many countries and regions, for a variety of reasons. Currently, asylum seekers that arrive in the EU are mainly coming from Syria, Afghanistan, Iraq, Iran and Albania. The latter is a candidate for EU membership, that is already engaging in several programmes, under the auspices of the Union. The country had a troubled communist regime for years, which caused a refugee stream towards the EU countries. Nowadays however, many refugees strand in Albania, on their way to the EU, thereby overburdening the country even more. The other four countries that represent the most irregular migrants are located in the so-called ‘Middle East’, a region that has been problematic for decades, even more since the uprisings of the Arab Spring. It must be remembered that refugees are no longer a military problem, and they are above all human beings, thus the problem is of a humanitarian nature.

11. The civil war in Syria is one of the key factors that explains the increased migration to Europe. The EU always wanted close cooperation with Syria, in order to reform the country’s domestic system. Moreover because Syria is an important player in the region, which is an asset for the EU’s external relations policy. However, they never managed to establish those envisaged relations with Syria. Triggered by the Arab Spring, the Syrian citizens demanded a democratic approach for the country, stepping away from the al-Assad dictatorship. This caused major public uprisings, that resulted in the use of extreme violence. This was the beginning of the Syrian civil war and the breeding ground for terrorist organisations to further develop.

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2 An overview of recent statistics concerning the migration crisis will be provided infra in the Annex.


4 This term is rather ambiguous, it has different meanings and might not cover the situation that it is supposed to represent, see DOOMERNIK, JEROEN and VAN AMERSFOORT, HANS. “People from the Middle-East in the Netherlands.” AL-SHAI, AHMED and LAWLESS, RICHARD. Middle East and North African immigrants in Europe. London: Routledge, 2005, p. 296 & CALLEYA, STEPHEN C. Security challenges in the Euro-Med area in the 21st century: Mare Nostrum. New York: Routledge, 2012, p. 25.


6 “The main worry regarding Syria is that the violence will transform into a prolonged civil war with no winner”, Ibid., p. 105.
12. Refugees and asylum seekers are finding their way to the EU by all possible means. The most common ways of entering the EU are by sea, crossing the Mediterranean, or by land, often through Turkey. Human trafficking or migrant smuggling is becoming one of the main sources of deaths among refugees. This malpractice has become a booming business, built upon the fear and desperation of the people.\(^7\) The countries of the EU are the most favourable destination for refugees, searching for a new home to establish a safe future. According to the Dublin III Regulation\(^8\), the Member State of first arrival shall be responsible for the asylum seekers and the processing of their asylum applications. With the increased influx of migrants, that started around 2011 and still keeps on growing, the efficacy of the responsibility-system has been questioned. Member States with an external frontier, towards the land or the sea, are most likely to be the first country of arrival. This results in a overburdening of Italy, Greece, Malta, Cyprus and Hungary.

13. This situation became untenable, and was addressed by the European Commission President Juncker, who proposed a burden-sharing model, a temporary deviation from the Dublin system. Juncker’s State of the Union on 9 September 2015\(^9\) called upon the Member States to provide additional shelter for refugees, based on a quota-model, thereby dividing the problems more evenly over all countries. The relocation scheme and distribution keys have been decided on the EU level, as a part of the general EU Agenda on Migration.\(^10\) The refugees that arrive in Italy and Greece are to be reassigned to the other Member States. The United Kingdom (hereinafter: UK), Ireland and Denmark are not a part of this quota-mechanism, because of their opt-outs in the Area of Freedom, Security and Justice (hereinafter: AFSJ). Another solution for the refugee crisis was addressed by the increased cooperation plan between the EU and Turkey. One of the additional challenges of this migration crisis will be to change the attitude of the EU citizens. Currently, the fear of the unknown seems to hinder the development of a “spirit of humanitarian reception and solidarity”\(^11\) amongst people.

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\(^7\) See infra no. 47-49.

\(^8\) Regulation (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person., 26 June 2013. OJ L 180/31 (hereinafter: Dublin III Regulation).


14. The context of the current migration crisis was set out in order to provide the necessary background information for this paper. When adopting and assessing new policies, the original circumstances must be kept in mind. In the following parts the international and EU legal frameworks will be discussed, and subsequently the specific measures designed to combat the crisis, namely the EU-Turkey Agreement\footnote{The official designation of the enhanced cooperation mechanism between the EU and Turkey is a Joint Action Plan and a Statement. However, given its contents and conditions, in the following it will be referred to as ‘the Agreement’. There is discussion concerning the nature of Statement, whether or not it is a treaty, as defined by the Vienna Convention on the Law of Treaties. This paper will not go in to this question, however more information can be found in the following articles: DEN HEIJER, MAARTEN and SPIJKERBOER, THOMAS. “Is the EU-Turkey refugee and migration deal a treaty?” 7 April 2016. \textless http://eulawanalysis.blogspot.be/2016/04/is-eu-turkey-refugee-and-migration-deal.html\textgreater and PEERS, STEVE. “The draft EU/Turkey deal on migration and refugees: is it legal?” 16 March 2016. \textless http://eulawanalysis.blogspot.be/2016/03/the-draft-euturkey-deal-on-migration.html\textgreater.}, shall be examined as to their compliance with the non-refoulement principle.
Part 2: Legal Framework

15. In this part the legal framework concerning refugees and migration will be discussed. It is a multi-layered structure, a combination of international, EU and national laws. However, due to the large divergence in the national policies, they will not be mentioned.

I. International Law

16. The international legal framework concerning refugees and migration is wide-ranging and consists both of written and unwritten sources. Customary international law is unwritten, however binding for all States. The most important written legal documents are the 1951 Geneva Convention relating to the status of refugees and its 1967 additional Protocol of New York. The Convention and the Protocol established important definitions and explain key principles concerning refugees. In order to fully understand the reach of international law, it is necessary to give more information on both types of sources.

A. Customary International Law

17. Customary international law is an unwritten source of law, based on custom, that has developed and gained importance over the years. The Statute of the International Court of Justice defines it as “evidence of a general practice accepted as law”. States cannot derogate from these fundamental principles of customary international law, even if they have no equivalent in their national legal system. Customary international law consists of two elements, state practice (usus) and the believe in that state practice as a legal rule (opinio juris). The principles of customary international law must thus be a “widespread and uniform practice of nations”, and nations must “engage in the practice out of a sense of legal obligation”. In the context of migration and refugees, the non-refoulement principle is the most important element of customary international law. The principle is

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15 UN General Assembly. Statute of the International Court of Justice. San Francisco, 24 October 1945, art. 38(1)b (Hereinafter: Statute ICJ).
16 This was confirmed by Nicaragua v. United States. ICJ. 27 June 1986, §83: “The Court has next to consider what are the rules of customary law applicable to the present dispute. For this purpose it has to consider whether a customary rule exists in the opinio juris of States, and satisfy itself that it is confirmed by practice”.
18 Ibid.
said to be a part of the *ius cogens*, which is a special category under customary international law.¹⁹ No derogation shall be permitted under any circumstance. The principle of non-refoulement shall be further explained and scrutinized *infra*, see no. 102 *et seq.*


§1. History

18. Before the 1951 Convention of Geneva, initiated by the General Assembly of the United Nations, a general legal framework for the protection of refugees did not exist. There was a more *ad hoc* system for determining the refugee status and the rights that came along with it. For example, after the Armenian genocide of 1915, many Armenians were in need of protection. A tailor-made definition had to solve the problem.²⁰ The first large-scale framework to give a definition of refugees, was set-up within the context of the post-World War refugee problem. The International Refugee Organisation (hereinafter: IRO) was created in 1946 and can be seen as the predecessor of the current United Nations High Commissioner for Refugees (hereinafter: UNHCR), that was established in 1950.²¹ A global definition of a ‘refugee’ was given in the annex to the IRO Constitution.²² This definition was very specific, with references to the then relevant historical events. However, despite the restricted formulation, the designation of a refugee status was certainly a step in the right direction.²³

§2. Convention of Geneva

19. One year after the foundation of the UNHCR, the Geneva Convention was adopted within the United Nations (hereinafter: UN) framework. Refugee and migration problems occurred worldwide, and there was not yet a regional approach such as currently provided by the EU. Thus, it was appropriate to operate on the UN-level. The relocation of refugees was a crucial problem in the years after the war, and an international standard could offer a solution. The Convention defines who can be considered as a refugee, what rights they have and how states have to deal with refugees. The Convention was signed by 145 states, including all 28 EU Member States.²⁴ It is important to notice

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²⁰ The definition is was as follows: “*Any person of Armenian origin, formerly a subject of the Ottoman empire, who does not enjoy or no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired any other nationality*”, VAN SELM-THORBURN, JOANNE. *Refugee protection in Europe: lessons from the Yugoslav crisis*. Den Haag: Martinus Nijhoff Publishers, 1998, p. 22.


7
that the Convention was characterized by temporary and geographic restrictions. In article 1(A), that defines the term refugee, the protection is limited in time to people in situations that happened before the 1st of January 1951, the year in which the Convention was adopted. There was also a possibility for a geographic restriction, in article 1(B). The parties could choose to limit the protection to “events occurring in Europe”\(^{25}\). State-parties could choose to extend the protection for events that occurred in other places, it was however not obligatory.

20. There is no definition for ‘asylum seeker’ in the Convention. This category consist of persons who have left their national territory and ask another state to offer them a certain form of protection, called ‘asylum’. This is the first step is the process when persons flee their home country. As an asylum seeker, you must apply to the national system of the country, to be granted asylum.

21. The international standard definition for determining who can be a ‘refugee’, can be found in article 1 of the Convention. Herein the conditions are explained which one must fulfil, in order to be recognized and protected as a refugee. A refugee is to be understood as:

“A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”\(^{26}\)

22. Furthermore, other reasons for eligibility to a refugee status are listed, as well as some exceptions to the general rule. A refugee can be seen as a qualified asylum seeker, who is granted special rights and protection. The application of an asylum seeker must be reviewed by the domestic authorities, respecting international, supranational and national laws and procedures. If the application is unsuccessful, the asylum seeker must leave the territory. The definition of the Geneva Convention has previously been the subject of detailed research, in order to further explain and understand the different elements of the definition.\(^{27}\)

\(^{25}\) Art. 1(B) Convention of Geneva.
23. This legal definition is recognised worldwide and offers substantial protection to the people that are acknowledged as refugees. However, there still is a large group of people that do not fit the legal definition, even though they are in need of the same protection. A temporary protection mechanism could solve this problem, especially in complex situations, such as the current migration crisis. 28

24. A crucial obligation of the Geneva Convention is stipulated in article 33, the so-called non-refoulement principle. 29 This principle offers an additional protection mechanism and it has been used frequently. 30 The article represents a crucial factor in the asylum-policy of countries, as well as in the EU’s migration framework. This principle will be the key issue in part three, the legal analysis of the current migration crisis.

§3. Protocol of New York

25. In addition to the 1951 Convention, the New York Protocol was adopted in 1967, providing even more protection for refugees. The Protocol has 146 state-parties, however some of those are not a party to the Convention, and not all states who signed the Convention are party to the Protocol. 31 Nonetheless, article 1(1) declares that all parties to the Protocol will be bound by the articles 2 to 34 of the Convention. This is even the case when a State party did not sign the Convention. The Protocol was adopted to remediate the temporary and geographic limitations of the Convention. In 1951, the general idea was to provide a solution for the great refugee streams that were caused by the second World War. That is why the temporary element was written into the text. After some years it became obvious that the refugee-stream would never stop. This altered situation required an adaptation of the Convention. The term ‘refugee’ was redefined in article 1(2); it had to be applied without the limitation in time. Article 1(3) states that the protection will be granted for events that occur anywhere in the world. The states that had previously declared to restrict the protection to Europe, are however


28 See infra no. 132-134.

29 This principle is also a part of the customary international law, hence it is binding for all States, also those who have not ratified the Geneva Convention.


permitted to uphold their restriction. Nowadays, the Convention of 1951 must be read with the changes of the 1967 Protocol in mind.

II: European Union Law on Asylum and Migration

26. The EU has established its own framework concerning migration, asylum seekers and refugees, based upon the international obligations, such as the Geneva Convention and its New York Protocol. Currently this framework is being heavily criticised, because it seems to be no longer able to manage the migration crisis. In what follows, the relevant EU legal system will be reviewed, making a distinction between the journey to the EU, the entry and arrival into the EU and the consequences of the asylum system. The institutions and their competences to manage the refugee crisis will be examined first, after a brief introduction that narrows down the scope of the research.

A. Delimitation

27. The general EU framework on asylum and migration is very comprehensive and cannot be explained in a few pages. Therefore, the scope must be limited to the relevant parts concerning the current migration crisis. A distinction can be made between migration of EU and non-EU citizens on the one hand, and regular or irregular migration on the other hand.

28. Regular and irregular migration are possible scenarios for both EU and non-EU citizens. Regular migration occurs when the applicable rules and procedures are followed. Therefore, depending on the specific situation, migrants will need to be in the possession of the required documents and must fulfil the conditions for eligibility to a regular migrant status. If a migrant has no valid documents and does not fulfil the conditions, he or she will be a migrant in an irregular situation. The people in this category cannot benefit from the EU’s asylum policy and shall be required to return to their home country.

29. In what follows, the focus shall be on irregular migration of non-EU citizens. Only the parts of the institutional and legal framework that are relevant to this selection shall be discussed.

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33 The internal market and its four freedoms are not only open for the citizens of EU Member States, also for the States of the European Economic Area (hereinafter: EEA), Norway, Iceland and Liechtenstein. These countries are Member States of the European Free Trade Association (hereinafter: EFTA). Switzerland is also an EFTA state, however it does not participate within the EEA framework. The EU and Switzerland use a system of bilateral relations.
B. Institutional Framework

30. The EU’s asylum and migration policy is the result of an intensive cooperation between the institutions and responsible agencies. The most important features of the institutional framework will be highlighted in the following paragraphs. First an overview of the competences will be given, subsequently the institutions and agencies shall be presented.

§1. Competences

31. The EU started out as an European Economic Community (hereinafter: EEC), so asylum protection was not present in the original treaties. It gradually developed through the years, resulting in the Common European Asylum System (hereinafter: CEAS). The Treaty of Amsterdam, that entered into force in 1999, provided the EU with the official competence for matters of asylum and migration, which was considered to be “a milestone in the creation of a European asylum policy.” The concept of asylum was further developed by the Tampere European Council, later that year. The Member States decided that there “should be a harmonised or common way for immigrants and asylum seekers to seek and obtain entry to all EU states.” The CEAS has been in use since 1999 and has developed ever since. Common rules on asylum finally became a part of the AFSJ, one of the core objectives for the further development of the Union, established by the Treaty of Lisbon in 2009. However, the focus will not be on the system’s history, rather on its functioning today and any possible improvements for the future.

32. The basic principles of the CEAS are provided in the Treaty on European Union (hereinafter: TEU), the Treaty on the Functioning of the European Union (hereinafter: TFEU) and the Charter of...
Fundamental Rights of the European Union\(^2\) (hereinafter: CFR). Within the TEU, article 3 recognizes the importance of the AFSJ, in combination with appropriate measures for, \textit{inter alia}, asylum and immigration. The more specific articles on this topic can be found in the TFEU.\(^3\) The AFSJ, the overarching theme of migration and asylum, is an area of shared competence\(^4\), according to article 4(2)j TFEU. Title V of the TFEU goes into detail on the AFSJ. Article 78 TFEU explains the common asylum policy, that must be in accordance with the Geneva Convention and its Protocol.\(^5\) Compliance with the non-refoulement principle is explicitly mentioned. The Parliament and Council can adopt implementing measures, as described under point 2 of the article. The third part of the article provides for an emergency procedure\(^6\), to help Member States who receive a sudden large inflow of migrants. However, in this current migration crisis, so many countries are affected and have to cope with a higher number of migrants than usual, that the emergency procedure is not sufficient to solve the problem.

The common immigration policy is explained under article 79 TFEU. The aim is to ensure the management of refugee flows, the preventing and combatting of illegal immigration and human trafficking, along with the protection of legally residing migrants in the EU territory. Again, the Parliament and Council are responsible to adopt measures of implementation. Both the asylum and immigration policy must be guided by the principles of solidarity and fair sharing of responsibility, as stated by article 80 TFEU. The right to asylum is also expressly recognized by article 18 of the CFR, which refers to the Geneva Convention and its Protocol. The non-refoulement principle is stipulated by article 19(2) of the CFR.

33. The CEAS is shaped by case law, that is essential to apply to the asylum and immigration law in practice. Moreover, since all EU Member States are party to the European Convention on Human


\(^3\) The articles of the TFEU should be read in conjunction with the protocols and declarations attached to it. The two protocols that are important for asylum and migration are no. 21, that regulates the special position of the UK and Ireland regarding the AFSJ and no. 24, on asylum for nationals of EU Member States.

\(^4\) In areas of shared competence, a Member State may only exercise their competence “to the extent that the Union has not exercised its competence”, art. 2(2) TFEU. There is however discussion on the exact scope of this shared competence. The EU has harmonised the system on so many aspects, that there are hardly competences left to the sovereignty of Member States, see MONAR, JÖRG. “The External Dimension of the EU’s Area of Freedom, Security and Justice: progress, potential and limitations after the Treaty of Lisbon.” SIEPS (2012:1), p. 24, <http://www.sieps.se>.

\(^5\) Although all EU Member States are parties to the Convention and Protocol, the EU itself is not; see RODRIGUES ARAÚJO, ALEXANDRA MARIA. “The Qualification for Being a Refugee under EU Law: Religion as a Reason for Persecution.” European Journal of Migration and Law, (vol. 16 no. 4, 2014), p. 537.

\(^6\) Art. 78(3) TFEU: “In the event of one or more Member States being confronted by an emergency situation characterised by a sudden flow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament”.

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Rights (hereinafter: ECHR)\(^{47}\), the European Court of Human Rights (hereinafter: ECtHR) has a similar competence as the Court of Justice of the EU (hereinafter: CJEU), namely to control whether the state parties fulfil their obligations under the Convention, and respect fundamental human rights and freedoms. The combined systems of the CJEU and ECtHR provide the EU with a “unique double-judicial check”\(^{48}\), whereas some situations will be governed both by EU law and ECHR principles. (See infra no. 59-61 for more detailed information on the CEAS)

§2. Institutions & Agencies

34. The Commission is responsible for creating the general policy and ensuring its proper functioning, as guardian of the Treaties. The Parliament and Council are responsible for drafting the legislation that implements the Commission’s policy, and for representing respectively the citizens of the Union and the Member States. On the highest political level, the Union and the Member States are represented by the European Council, which is responsible for key negotiations with third countries. The migration crisis is affecting the EU every day, and new policies, communications, decisions and legal acts are adopted continuously. It is therefore impossible to explain the whole complexity of the institutional actions and reactions.

Institutions

35. The European Council\(^{49}\) facilitates consultations at the highest political level. At one of their meetings, the EU-Turkey Statement of 18 March 2016 was adopted, which serves as a strategic outline for the further policy developments. The European Council has to find a balance between different interests, or as President Tusk stated, “To be true Europeans, we need to remain open and tolerant, yet at the same time tough and effective”\(^{50}\).

36. Within the Commission\(^{51}\), President Juncker, the High Representative Ms. Mogherini and Commissioner for Migration, Home Affairs and Citizenship Mr. Avramopoulos, are responsible for the policy making of asylum and migration affairs. The new Agenda on Migration includes measures for the short-term, focussing on helping those in need, and the long-term, preparing an updated

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\(^{47}\) Even though the EU itself is not yet a signatory party to the ECHR, it does intend to become one, according to art. 6(2) TEU and Protocol no. 8 to the Lisbon Treaty. However, the Court of Justice issued a negative opinion concerning the foreseen accession, thus it is unsure what will happen next. See: Opinion 2/13. CJEU. 18 December 2014. ECLI:EU:C:2014:2454.


\(^{49}\) Art. 18 TEU.


\(^{51}\) Art. 17 TEU.
framework that can prevent situations like the migration crisis in the future. To preserve the status and credibility of the Union in the world, a coherent and consistent asylum policy, with the utmost respect for human rights, is necessary: “We must act well, we must act fast, and we must act united”.52

37. The Council’s task53 is to adopt legislation, thereby representing the interests of Member States. Currently however there is an enormous divergence between the national policies regarding asylum and migration. Furthermore, the Council plays an essential role in the Union’s common foreign and security policy, one of the major elements of importance in the current migration crisis. Migration management is one of the top priorities for the Council.

38. The Parliament’s competences54 relating to the migration policy are focused on legislative and budgetary functions. Moreover, they carry out political control, inform the EU citizens, and take their interests into account. The various political groups represent the different opinions of society and offer a platform for discussing national sensitive issues. The Members of the Parliament (hereinafter: MEPs) can adopt non-binding resolutions that are an indication of the policies they prefer.

Agencies

39. Even though they are not mentioned in the Treaties, agencies55 are another important part of the EU administration, policy shaping and policy making. The process of agencification has created several agencies that are relevant in the migration context. The European External Action Service (hereinafter: EEAS) operates under the supervision of the High Representative, and can be seen as the “diplomatic service” of the EU. The EEAS is involved in foreign affairs and security issues. The European Asylum Support Office (hereinafter: EASO)56 is an accessory to the CEAS. Its main objectives are to be a centre of expertise, to contribute to the development of the CEAS, to help the Member States fulfilling their obligations and to provide the necessary practical, technical and operational support to the Commission and the Member States. The Fundamental Rights Agency (hereinafter: FRA)57 is a decentralised agency that assists the EU and its Member States with expert advice on matters

53 Art. 16 TEU.
54 Art. 14 TEU.
55 For an extensive overview of this topic, see CHAMON, MERIN. Transforming the EU administration: legal and political limits to agencification. Gent: UGent, 2015.
concerning fundamental rights. Its main tasks are to collect and interpret data, to provide expertise and to communicate to the citizens, in order to raise awareness for fundamental human rights. The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (hereinafter: Frontex)\textsuperscript{58} was created to safeguard the external borders of the EU, as a counterbalance for the free movement of persons and the liberties of the Schengen Area. Frontex assists the Member States in carrying out the necessary measures for the protection of the common external frontiers of the Union. The main objectives of the agency consist of providing training for national border guards, supporting Member States when dealing with irregular migration and undertaking joint operations for the safeguarding of the external land, sea and air borders. Frontex is active in the context of entry and arrival into the EU. One of the best known operations is Operation Triton, which was launched in 2014, as successor of the Italian operation Mare Nostrum.\textsuperscript{59} The objective is to protect the sea borders, and moreover to rescue immigrants who are coming to Europe by boat, which often occurs in dreadful situations.

C. Legislative Framework

40. After explaining the limitations of this paper and the institutional framework, the most important aspects of the Union’s asylum and migration law will be set out. The different legal acts will be divided according to the ‘timeline’ of migration, this means that first the journey to Europe will be discussed, then the entry and arrival into the EU and finally the possible consequences of migration to the EU. As a preliminary point, the difference between a ‘safe country of origin’, ‘a first country of asylum’ and a ‘safe third country’ shall be explained. These concepts are of great importance for the legal analyses of the EU-Turkey Agreement.


§1. Terminology

Safe country of origin

41. A first concept is ‘safe country of origin’. This is defined by article 36 of the Asylum Procedures Directive and annex 1 to this Directive. In order to be such a country, the national system must be democratic and governed by the rule of law. Moreover, there can be no persecution, no torture, no inhuman or degrading treatment or punishment and no threat to indiscriminate violence, in situations of armed conflicts. The assessment must be based on, inter alia, the respect for the non-refoulement principle and fundamental rights and freedoms. If a country is considered as a safe country of origin, the EU and its Member States may refuse to accept migrants with the nationality of that country. The Dublin system is based on this rationale, and moreover, the Member States adopted a Protocol that allows them to declare asylum claims from EU nationals inadmissible. According to article 36(2) and 37 of the Asylum Procedures Directive, Member States must further implement this concept in their national legislation.

42. Several EU Member States have already published a list of third countries that they assume to be safe countries of origin. Belgium has adopted such a list by a Royal Decree of 11 May 2015, and regards Albania, Bosnia and Herzegovina, Kosovo, Serbia, Montenegro, the Former Yugoslavian Republic of Macedonia (hereinafter: FYROM) and India as safe countries. Usually the EU candidate countries will be seen as safe, because they have to comply with strict pre-accession Copenhagen criteria. The EU has not yet adopted a common list of safe countries of origin, however this was proposed by the Commission, as a part of the Agenda on Migration. It is preferable to adopt an EU list, in order to prevent divergence between the different national lists, and thus to eliminate the appeal of asylum shopping. The proposal of the Commission would include Albania, Bosnia and Herzegovina, the FYROM, Kosovo, Montenegro, Serbia and Turkey. The actual state of play in these

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62 Ibid., Annex 1.


64 Koninklijk Besluit tot uitvoering van het artikel 57/6/1, vierde lid, van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, houdende de vastlegging van de lijst van veilige landen van herkomst. BS 15 May 2015.

countries must be assessed by the Parliament and the Council, who will be assisted by the EASO and the FRA.⁶⁶

First country of asylum

43. The notion of ‘first country of asylum’ is stipulated by article 35 of the Asylum Procedures Directive. A country can obtain this status if an applicant has been or can be recognized as refugee, or he or she enjoys sufficient protection, including respect for the non-refoulement principle. This concept is important in the context of the return of asylum seekers. If a person applies for asylum in a EU country, however he or she previously resided in another country that fulfils the criteria of first country of arrival, then the EU Member State can send the applicant back to that country, without violating the non-refoulement principle. This concept is applied in the Dublin Regulation. It is furthermore applicable in situations regarding third countries that might have this status.

Safe third country

44. The concept of a ‘safe third country’ is explained in article 38 of the Asylum Procedures Directive. In order for a third country to be considered as safe, the treatment of a person seeking international protection must be in accordance with the following cumulative principles:

“(a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
(b) there is no risk of serious harm as defined in Directive 2011/95/EU⁶⁷;
(c) the principle of non-refoulement in accordance with the Geneva Convention is respected;
(d) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
(e) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.”⁶⁸

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⁶⁷ This is the Qualification Directive.

Furthermore, article 39 of the Asylum Procedures Directive established the concept of a ‘European safe third country’.\(^6^9\) This implies that no, or no full examination of the application is needed, if the applicant entered a state’s territory illegally, coming from a European safe third country. Three criteria need to be fulfilled cumulatively to be taken into consideration:

“(a) it has ratified and observes the provisions of the Geneva Convention without any geographical limitations;
(b) it has in place an asylum procedure prescribed by law; and
(c) it has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and observes its provisions, including the standards relating to effective remedies.”\(^7^0\)

The EU’s and Member State’s asylum policies use the concept of a safe third country to justify the expulsion of migrants. When deported to a safe third country, there would be no violation of the non-refoulement principle.

§2. Journey to Europe

There is a long way for migrants between leaving their home country and arriving to the EU. The political situation the people are fleeing from does often not provide a humane exit strategy, there is often no money or there are no adequate means, so the refugees will do whatever they can to reach their destination. Getting to the EU means travelling by land or sea\(^7^1\), which both entail serious risks. In these troublesome situations, there are the additional problems of migrant smuggling and human trafficking. The first step towards a strategic plan to combat irregular or illegal migration is to treat the root causes of the problem.\(^7^2\) Within the current migration crisis, this means to stop the excessive influx of irregular migrants into the Union, to protect the external borders and to take action against smuggling and human trafficking.\(^7^3\) Above all, the EU and its Member States must keep in mind that receiving asylum is a right, an international obligation, that cannot be neglected.\(^7^4\) The main migration routes and the basics of smuggling and trafficking will now be investigated briefly.

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\(^7^0\) Art. 39(2) Asylum Procedures Directive.

\(^7^1\) Migrants can also reach the EU by air travel, however this is not relevant for the scope of this paper.


\(^7^3\) CARRERA, SERGIO and GUILD, ELSPETH. “Irregular Migration, Trafficking and Smuggling in Human Beings”. 2016. <www.ceps.eu>.

Migration routes

48. Frontex provides a detailed overview of the main migratory routes into the EU, which are both by land and sea.\textsuperscript{75} Access to the Union’s territory is furthermore obtained by air traffic, however this option is less relevant for the current migration crisis. Nowadays, Italy and Greece receive the highest amount of migrants, who reach the EU territory most commonly by the Central- or Eastern-Mediterranean route. The Central-Mediterranean route has been popular for years, and became even more frequently used since 2014. According to Frontex, approximately 153,946 people reached Europe via this route in 2015. The Eastern-Mediterranean route brings the migrants to Greece and the Greek islands, arriving mainly from Turkey’s territory. During 2015, 885,386 people were registered as users of that route. Once the asylum seekers have arrived in Italy or Greece, they regularly try to reach more northern countries in the EU. This is accomplished via the Western Balkans route, which leads through non-EU and EU countries, and has more northern Member States such as Germany and Belgium as final destination. There were over 764,038 illegal border crossings on the Western Balkan route in 2015. The increased amount of refugees passing through Hungary on this route was seen as a threat by the Hungarian politicians. Therefore, a safety fence was built along the Serbian and Croatian borders, to keep refugees out of their national territory. This initiative has been condemned by international organisations\textsuperscript{76}, however within the EU there is still no solution adopted to sanction Hungary for not respecting several fundamental values of the EU.

Migrant smuggling and human trafficking

49. Migrant smuggling and human trafficking are consequences of the increased instability in third countries and the failing asylum policy of the EU. Even though these reprehensible practices are similar, they slightly differ.\textsuperscript{77} Human trafficking is always associated with coercion and exploitation, which is not necessarily the case for migrant smuggling. Furthermore, smuggling intrinsically implies crossing the border to another state, while trafficking can also occur within one state. It is however possible that smuggling becomes trafficking, either on the road, or once the migrants have reached their destination.\textsuperscript{78} Smugglers and traffickers will benefit from the uncertainty that govern the migrants’ lives. Smuggling and trafficking are both severe breaches of fundamental human rights. The CFR

\textsuperscript{75} See <http://frontex.europa.eu/trends-and-routes/migratory-routes-map>. The information and numbers used in this subparagraph are derived from the Frontex website.


\textsuperscript{77} For a more elaborated comparison between the concepts, see TRIANDAFYLIDOU, ANNA and MAROUKIS, THANOS. Migrant smuggling: irregular migration from Asia and Africa to Europe. New York: Palgrave MacMillan, 2012, p. 177 et seq.

\textsuperscript{78} Ibid., p. 192.
explicitly prohibits trafficking in human beings.\textsuperscript{79} The main problem relating to these situations is the
general incapability to solve the situation. The irregular migrants will often try to forget about their
horrible experiences, however, their information is a key element in effectively combatting the
practices. Within the EU, the battle against smuggling and trafficking is ever more present\textsuperscript{80}. However,
the stories about the unfortunate fates of migrants remind us every day that there is still a long way
to go. The shipwreck of 19 April 2016, that caused the deaths of over 400 migrants who all had paid
the smugglers to reach Europe, is another tragic example of the daily reality that is haunting the
Mediterranean Area.

\textbf{§3. Entry and Arrival in the EU}

\textbf{50.} The regulation of the access and entrance to the EU is a crucial part of the general migration
policy. The EU territory is stretched out over 28 Member States, covering a surface area of more than
four million square kilometres.\textsuperscript{81} The internal and external borders of the EU are governed by the
Schengen system, that will be discussed first. Secondly, upon entry in the EU, the division of asylum
seekers will depend on the Dublin Regulation, which designates the responsible Member States for the
handling of an asylum application. These two systems are the backbone of the entry and arrival
framework, and they will be examined in what follows.

\textbf{Schengen Zone}\textsuperscript{82}

\textbf{51.} What is currently known as the Schengen Area, originated in 1985 as a ‘side-project’ for five of
the ten then Member States of the EEC. Belgium, the Netherlands and Luxemburg were already
engaged in an intergovernmental cooperation ‘the Benelux’, since 1944. That agreement created a
customs union.\textsuperscript{83} The Benelux-countries, together with Germany and France, concluded the Schengen
Agreement, on an intergovernmental basis. The reason why this system was adopted outside the EEC

\textsuperscript{79} Art. 5(3) CFR.

\textsuperscript{80} Within the framework of Europol, a European Migrant Smuggling Centre has been established in February
2016. The main objective is to help Member States in the dismantling of the international criminal organisations
that are frequently involved in migrant smuggling and human trafficking, <www.europol.europa.eu> . The
involvement of organised crime in smuggling and trafficking has been the subject of a study by VERMEULEN, Gerd,
De Bondt, Wendy and Van Damme, Yasmine. “Perceived involvement of organised crime in human trafficking and


\textsuperscript{82} See Craig, Paul and De Búrca, Gráinne. EU Law. Op. cit.; Den Boer, Monica. The Implementation of Schengen :
First the Widening, Now the Deepening. Maastricht: European institute of public administration, 1997; Den Boer,
Monica. Schengen’s Final Days? : the Incorporation of Schengen Into the New Teu, External Bordes and

\textsuperscript{83} <http://www.benelux.int>.
framework, is because the five other Member States\textsuperscript{84} were not yet willing to cooperate and thus lose their sovereignty on these sensitive topics. The objective of the agreement was to gradually abolish the checks at their common borders, and progressively ensuring the free movement of persons. Free movement was already foreseen as the basis of the common market by the 1957 Treaty of Rome, nevertheless not many concrete steps were taken until the Schengen agreement. It took another five years to draft and sign the Schengen Convention, which set out precisely the necessary measures to obtain the free movement zone, without internal border checks. Another five years later, the Schengen Convention entered into force. As a result, checks at the internal borders were abolished, a single external border was created and a common policy on visas and asylum was adopted. By the time of the entry into force on 26 March 1995, the intergovernmental mechanism had become popular. Italy, Spain, Portugal and Greece joined the cooperation. Within the next year, also Austria, Sweden, Denmark and Finland became a part of the Schengen area. During the negotiations of the Treaty of Amsterdam, it became obvious that it would be better to handle the Schengen-project on the Community level. By 1999 the Schengen Convention became a part of the acquis of the European Community, and all Member States were bound by it.\textsuperscript{85} The incorporation can be seen as “the return of the prodigal son”\textsuperscript{86}, as if the system always belonged within the supranational sphere, and the intergovernmental cooperation was just an experiment, “un laboratoire d’essay”\textsuperscript{87}.

52. After the Schengen Area became a part of the Union’s general framework, all new Member States were under the obligation to participate.\textsuperscript{88} However, for some countries there were practical and political problems for the implementation of the Schengen system. Romania, Bulgaria, Cyprus and Croatia are currently not yet a part of the Area, even though they will be in the future. A new decision was to be taken this year.\textsuperscript{89} However, under the present circumstances there is no certainty as to what can be expected. All these countries are situated at the external frontiers of the Union, so if they become a part of the free movement zone now, it is likely that the migration crisis will become even

\textsuperscript{84} The five non-participating Member States were Denmark, Greece, Ireland, the UK and Italy.
\textsuperscript{85} The UK and Ireland are not a part of the Schengen Area, they choose to opt-out of the system, when it became a part of the community policy with the Amsterdam Treaty. Nonetheless they also have the possibility to opt-in on a case-by-case basis. Their position is currently regulated by protocol no. 19 and 20 to the TFEU.
\textsuperscript{86} PAPAGIANNI, GEORGIA. Op. cit., p. 35.
\textsuperscript{87} PAPAGIANNI, GEORGIA. Op. cit., p. 111.
\textsuperscript{88} The current Schengen Area stretches out over 26 European countries, namely 22 EU countries (excluding Ireland and the UK, and currently neither Croatia, Cyprus, Romania and Bulgaria) and the 4 EFTA-countries (Iceland, Norway, Liechtenstein and Switzerland), who associated themselves with the Schengen framework. Moreover, micro-states Monaco, Vatican City and San Marino act as if they are a part of Schengen, even though they are formally not. See FORSTER, NICOLA and MALLIN, FELIX. “The Association of European Microstates with the EU.” German Institute for International and Security Affairs (2014). <http://www.swp-berlin.org/fileadmin/contents/products/comments/2014C27_frr_mln.pdf>.
\textsuperscript{89} <http://www.romaniajournal.ro/decision-on-romania-bulgarias-schengen-bids-put-off-again>.
more uncontrollable. On the other hand, in the absence of a common policy on border controls in these frontier states, national governments might adopt additional protective measures to safeguard their borders, thereby making the problem of irregular migration even worse.

53. Regarding the specific provisions of the Schengen Area, the Schengen Borders Code\(^{90}\) and the Schengen Information System\(^{91}\) (hereinafter: SIS) must be clarified. The new Schengen Borders Code has entered into force on 12 April 2016. The previous regulation (562/2006/EC), was amended too many times, so a codification was in order. This Code’s objective is to provide a common policy for the absence of border controls at the internal frontiers and the rules for border controls at the external frontiers.\(^{92}\) It is one of the key principles of the internal market in the EU to adopt so-called flanking measures, as a counterbalance to the free movement, which is guaranteed by the Schengen system.\(^{93}\) In the implementation of this Code, the fundamental rights shall be protected, as stipulated by the Treaties, CFR, and international law. Especially the non-refoulement principle is of major importance.\(^{94}\) With regard to the migration crisis, articles 25 to 35 on the “temporary reintroduction of border control at internal borders” are of utmost importance. When a serious threat to public policy or internal security occurs, a Member State can exceptionally reintroduce border controls, in principle for 30 days. There are however numerous exceptions, described in article 25. These measures should be seen as the last resort and must be adopted in accordance with a strict procedure. The migration problem and recent terror attacks have caused a ‘crisis’ of the Schengen system. Multiple countries are temporarily reinforcing border controls, thereby undermining the principle of “Europe without borders”\(^{95}\).

54. The SIS is a database that supports the practical use of the Schengen-acquis. It was established under the intergovernmental Schengen Convention, and later became incorporated in the EU framework by the Treaty of Amsterdam. The objective of the SIS is “preserving internal security in the Schengen States in the absence of internal border checks”.\(^{96}\) This means that cooperation between different national authorities is necessary, all countries must contribute to keep the Schengen Area operative and safe. The database has information on third-country nationals that are refused entry or


\(^{92}\) Art. 1 Schengen Borders Code.

\(^{93}\) See articles 67(2), 77(1) and 77(2) TFEU.

\(^{94}\) Art. 4 Schengen Borders Code.

\(^{95}\) GROS, DANIEL. “Can Schengen survive?”. 14 December 2015. <www.ceps.eu>.

stay in the EU, on alerts for missing persons or persons wanted for criminal offences, and a specific registration system for certain vehicles. The SIS is a joint system for information, primarily used by the police, customs and border guards and judicial authorities.\textsuperscript{97}

**Dublin Regulation**

55. The migrants that have entered the EU will be treated according to the CEAS and national systems. The Dublin Regulation decides which Member State will be held responsible for the asylum application.

56. The ‘Dublin’-system was established in 1990, with the signature of the Dublin Convention\textsuperscript{98}, also known as Dublin I, which then entered into force in 1997.\textsuperscript{99} There were originally only twelve state-parties. By 1998, already fifteen countries were bound by the mechanism.\textsuperscript{100} Since it was only in 1999, with the entry into force of the Treaty of Amsterdam, that the Union became competent to decide on asylum-matters, the initiating countries of Dublin I opted for a Convention to cooperate in this context. The Convention was built upon the spirit of the Single European Act (hereinafter: SEA) of 1986, which had as aim to further develop the internal market of the Community, to “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured ...”\textsuperscript{101}. Measures concerning the asylum system in the Member States were seen as a necessary counterbalance to the freedom of the internal market. The current Dublin Regulation, Dublin III, is still based upon the premise of the Dublin Convention, namely a system created to divide the responsibilities concerning asylum applications: “Member States undertake to examine the application of any alien who applies at the border or in their territory to any one of them for asylum”.\textsuperscript{102} This entails that the Member State where the asylum seeker first enters the EU shall be responsible for the handling of the application. However, exceptions to this ground rule are possible, Member States can voluntarily examine an application for asylum, even if it is not their responsibility. This is known as the sovereignty clause. The purpose of this mechanism was to prevent asylum shopping, a phenomenon where an asylum seeker would apply in different countries, in search for the most liberal national policy.

\textsuperscript{97} *Ibid.*.

\textsuperscript{98} Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities. 19 August 1997. *OJ C 254/1* (hereinafter: Dublin Convention).

\textsuperscript{99} This Convention replaced the provisional articles 28-38 on asylum of the Schengen Convention. This replacement is seen as an example of the ‘laboratory function’ that Schengen had, see VAN DER KLAAUW, JOHANNES. “The Dublin Convention: a difficult start.” *DEN BOER, MONICA. Schengen’s final days?. Op. cit.*, p. 77.

\textsuperscript{100} *DEN BOER, MONICA. Schengen still going strong. Op. cit.*


\textsuperscript{102} Art. 2 Dublin Convention.
57. The Dublin Convention was substituted in 2003 by the Dublin II Regulation. At this time, the framework of the SEA and the Treaty of Maastricht was replaced by the Treaty of Amsterdam, that made the AFSJ a community policy and created the CEAS. The basic principle of the responsible Member State is still the same, as explained by article 3. There are however more detailed criteria foreseen under chapter 3 of the Regulation, which must determine the state that bears liability to handle the application. Overall, the Dublin II system was more precise and extensive than the previous system. Unlike under Dublin I, not all the Member States were bound by Dublin II. Denmark did not participate, because of its opt-out from the AFSJ. The UK and Ireland, that were granted a flexible opting-out system for AFSJ-matters, decided to take part in the Dublin Regulation.

58. Currently, the responsibility for asylum matters is decided by the Dublin III Regulation, established in 2013 and replacing the Dublin II Regulation. This Regulation is applicable since 1 January 2014. All EU countries, except Denmark, and the EFTA states are bound by this act. To facilitate the information and data cooperation between the states, the Eurodac system is used. The fingerprints of the migrants arriving in Europe are registered in the database. This implies that when the people decide to move to another Member State, the national authorities can easily check whether or not their country is the first country of arrival and thus responsible for the asylum seeker and his or her application. Under the present circumstances however, it is not always clear in which country the migrant first arrived. The unseen high number of asylum seekers and refugees has put an immense pressure on the system, making it practically impossible to work with. The main problem with and criticism on the Dublin-system is that states at the EU’s external frontiers are overburdened and cannot cope with the increasing amount of migrants arriving at their borders. Finding a solution for this

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103 Council Regulation (EC) no. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. 25 February 2003. OJ L 50/1.

104 The Amsterdam Treaty brought various new competences under the community pillar, which was not appreciated by the UK, Ireland and Denmark. As a compromise, an opt-out mechanism was created for these countries. The UK and Ireland were granted a flexible opt-out, with the possibility of opting-in, on a case-by-case basis. Thus the states kept their sovereignty regarding the AFSJ matters, which were part of the intergovernmental Justice and Home Affairs (JHA) pillar, before Amsterdam. Denmark was also given an opt-out mechanism, however without the possibility of 'cherry picking', choosing to opt-in. The AFSI matters between the EU and Denmark are arranged through intergovernmental cooperation.

105 Regulation (EU) no. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of Regulation 604/2013/EU establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) no. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice. 29 June 2013. OJ L 180/1.

106 CALLEYA, STEPHEN C. Op cit., p. 87.
inequality and creating a system of burden-sharing, is a top priority for the EU. The current system leads to believe that “some Member States are more equal than others”, and that the states at the external borders must solve the migration problem on their own, as if solidarity is not a part of the plan.

§4. Consequences of migration

59. After the journey to the EU and the entry and arrival into the EU, the migrants’ situation will be governed by the CEAS. The aim of this system was to align all national asylum practices, by setting an EU minimum standard for the different steps in the procedure, although some Member States currently act as if it were maximum standards. As mentioned before, the notions refugee and asylum seeker do not necessarily cover the same group of people. The CEAS deals with asylum seekers, who may or may not be refugees, according to the international definition as given by the Convention of Geneva. In what follows, the origins and development of the CEAS will be outlined, along with an overview of the most important EU legal acts in this field. The system is characterised by the interaction between the various Directives.

60. The CEAS-process starts when a migrant comes to an EU Member State and applies for asylum. This is governed by the Asylum Procedures Directive. The Directive harmonises the national procedures of the Member States, concerning the application process and the procedural safeguards for asylum seekers. The asylum seekers’ rights are protected and the obligations are clarified. Member States can only take more favourable measures, the Directive states the absolute minimum standards. The second step in the process is administered by the Reception Conditions Directive, which determines the standards for the reception of asylum seekers of refugees. This Directive has to ensure the rights of asylum seekers, while waiting for the examination of their application. During the waiting period, the asylum seekers will often be kept in detention, in order to ensure the proper functioning of the asylum system. However, that detention is a limitation of the personal freedom, and is therefore carefully regulated in this Directive. The main aim is to ensure that the fundamental rights of the asylum seekers are guaranteed. Whether or not an applicant qualifies for protection under

110 The Directive uses the general term “applicants for international protection”.
111 “Il est paradoxale que les biens, les services et les capitaux circulent librement dans le monde, pendant que les êtres humains voient leur liberté restreinte”, GUILIANI, JEAN-DOMINIQUE. Op. cit.
the CEAS, will be determined by the Qualification Directive\textsuperscript{112}. This Directive determines who is eligible for international protection, and what rights are attached to that status. The asylum seeker will only be accepted under this Directive if he or she can qualify for the refugee status, or for subsidiary protection. Furthermore, the Directive deals \textit{inter alia} with residence permits, travel documents, access to employment and healthcare.\textsuperscript{113}

61. If the application is successful, the migrant shall be protected according to the relevant legal acts. However, if the asylum is not granted, the migrant shall have to leave the EU territory. There is a possibility to lodge an appeal to overturn the decision of the national authority.\textsuperscript{114} If the application is not brought to appeal, or if the appeal is unsuccessful, the situation of the migrant shall be governed by the Return Directive\textsuperscript{115}. Member States are obliged to take action after a failed application, and they must take into account certain interests, like the family life, state of health and the non-refoulement principle.\textsuperscript{116} Even though the Return Directive provides a detailed plan for the return and removal of illegal migrants, in reality only 40 percent of them are returned accordingly.\textsuperscript{117} Several additional measures are therefore necessary, in order to fulfil the objectives of the EU’s migration policy. The Union has set up a framework of bilateral cooperation with third countries, for the purpose of the identification and readmission of their nationals. These are called Readmission Agreements\textsuperscript{118} and they set out the obligations and procedures for the authorities of third countries, following a decision under the Return Directive. In exchange for cooperation under the Readmission Agreement, the EU can offer a visa facilitation agreement for third-country nationals that are coming to the EU. However, after the conclusion of a Readmission Agreement, there still remain concerns as to its effectiveness.


\textsuperscript{113} These subjects are respectively foreseen in articles 24, 25, 26 & 30 of the Qualification Directive.

\textsuperscript{114} The EU criteria for appeals are provided in the Asylum Procedures Directive.


\textsuperscript{116} Art. 5 Return Directive.


\textsuperscript{118} The legal base for Readmission Agreements is art. 79(3) TFEU. For more information on this topic, see COLEMAN, Nils. \textit{European readmission policy: third-country interests and refugee rights}. Boston: Martinus Nijhoff Publishers, 2009. 395p.
Part 3: Legal Analysis

62. The current migration situation in the EU is too broad and complex to analyse as a whole. Therefore, the legal analysis shall be focused on the brand new refugee-Agreement, concluded between the EU and Turkey. In what follows, the compatibility of the cooperation plan with the non-refoulement principle will be tested. The principle will be explained first, especially by looking at the case law and its implications for the EU. Subsequently, the Agreement itself and its realisation are explained. The compliance with the non-refoulement principle will be critically analysed. The EU’s policy in solving the migration crisis and the measures that have been taken in that regard, are not to be taken for granted, and deserve further research. Additionally, some other issues with the Agreement will be criticised. Finally, recommendations for better solutions shall be proposed.

I: Legal framework of the Non-refoulement Principle

63. This part will first examine three sources of the non-refoulement principle, customary international law, treaty law and case law. Subsequently, the impact of the principle on the EU’s primary and secondary law will be analysed. Preliminary, the difference between direct and indirect refoulement must be explained. Direct refoulement entails that an individual will be subject to an extradition or deportation to a country that does not meet the non-refoulement criteria. This could be the case if an asylum seeker in the EU would be send back to Syria. Indirect refoulement occurs when an individual is subject to expulsion to a country where he or she will risk extradition to an unsafe country. For example, returning a Syrian migrant, that applied for asylum in Belgium, to Greece, the first country of arrival, whereas the Greek procedure would deport him or her to Syria, is a violation of the indirect non-refoulement principle.

A. Sources

§1. Customary International Law

64. Customary international law is one of the four sources acknowledged by the ICJ, in article 38(1) of its Statute (see supra no. 17). International custom is the evidence of a general practice accepted as law. The principle of non-refoulement is a part of customary international law. This entails that the principle must be respected at all times, by all states, and derogations are impossible. Under the non-refoulement principle, a person cannot be obliged by a state to return to a country where he or she may be exposed to persecution. The status of the principle as customary international law is confirmed by its incorporation in international and regional treaties.

\[\text{Art. 38(1)(b) Statute ICJ.}\]
\textbf{§2. Treaty Law}

\textbf{65.} There are many international and regional treaties that protect the non-refoulement principle, although it is not necessarily always explicitly mentioned. However, if a treaty or convention prohibits torture or inhuman or degrading treatment, this will be regarded as providing the same protection as the non-refoulement principle.

\textbf{International protection}

\textbf{66.} The best known international instrument is the Geneva Convention, supplemented by the New York Protocol, that defines the principle in its article 33(1)\textsuperscript{120}:

\begin{quote}
\textit{``No Contracting State shall expel or return (\textquoteleft{refouler}\textquoteright{}) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.''}
\end{quote}

\textbf{67.} Other instruments include the UN General Assembly’s International Covenant on Civil and Political Rights\textsuperscript{121} (hereinafter: ICCPR), that was adopted in 1966. It aims to protect certain fundamental rights, \textit{``derived from the inherent dignity of the human person''}.\textsuperscript{122} This multilateral Treaty is a part of the \textit{‘International Bill of Human Rights’}, alongside with the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. Although the ICCPR does not explicitly refer to the non-refoulement principle, it is generally acknowledged\textsuperscript{123} that it refers to the principle in its article 7.

\textbf{68.} A second international protection mechanism protecting non-refoulement is the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter: UN CAT)\textsuperscript{124} that was signed in 1984, and protects the principle in its article 3(1). The non-refoulement principle is seen as a peremptory norm, deviations can never be tolerated.\textsuperscript{125}

\ \textsuperscript{120}See supra no. 24.
\textsuperscript{121}UN GENERAL ASSEMBLY. \textit{International Covenant on Civil and Political Rights}. United Nations, 16 December 1966 (hereinafter: ICCPR).
\textsuperscript{122}Preamble, §3 ICCPR.
\textsuperscript{123}NOWAK, MANFRED. \textit{UN Covenant on Civil and Political Rights: CCPR Commentary}. Kehl am Rhein: Engel, 2005.
\textsuperscript{124}UN GENERAL ASSEMBLY. \textit{Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment}. United Nations, 10 December 1984.
69. All EU Member States are signatory parties to the ICCPR and UN CAT, however the EU as a *sui generis* organisation is not a party. This entails that the EU cannot be held responsible for breaches of those international treaties. Only the respect for the Geneva Convention is mentioned in the Treaties and secondary legislation.

**Regional protection**

70. Within the European legal atmosphere, the Member States are additionally bound by the protection mechanisms of the Council of Europe and the EU. The Council of Europe adopted the ECHR in 1950. The non-refoulement principle is indirectly protected by article 3, the prohibition of torture:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."¹²⁶

71. This article offers protection to the refugees or asylum seekers that would risk ill-treatment if send back to their home countries. The ECtHR has interpreted this principle in a progressive way. Although all Member States are signatory parties, the EU has not yet acceded to the ECHR (see *supra* no. 47). Article 52(3) CFR stipulates that the rights of the CFR, corresponding to the ECHR will have the same scope and meaning as laid down by the Convention. Furthermore, the TEU refers to the fundamental rights and freedoms of the ECHR as general principles of EU law.¹²⁷

72. On EU level, the CFR is the most important human rights instrument. It must be applied by EU institutions and bodies in their policy making and by Member States, however only when implementing EU law. The non-refoulement principle is protected by article 19(2):

> "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

73. This article must be read together with article 4, on the prohibition of torture and inhuman or degrading treatment or punishment and article 18 that stipulates the right to asylum.¹²⁸ The increasing

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¹²⁷ Art. 6(3) TEU.

number of asylum seekers arriving in the frontier countries of the EU cannot justify a derogation of the principle of non-refoulement. It must be noted that the CFR offers substantially more protection than the ECHR. The compliance of the EU’s policy with this principle will be examined in no. 102 and following.

§3. Case Law

74. A third source of the non-refoulement principle is the case law of international and regional courts. In what follows, the basics of the case law of the ECtHR and the CJEU will be discussed, with special attention to cases that will be relevant for the later analyses of the EU-Turkey Agreement.

European Court of Human Rights

75. Following the rationale of article 52(3) CFR, the practical meaning and scope of ECHR-principles will be determined by the case law of the ECtHR. Due to the extensive amount of cases concerning non-refoulement, it is not possible to discuss the whole spectrum of questions surrounding the principle. In what follows, the basics of the case law will be presented, as well as two specific cases that are of importance for the scope of this paper. Each case shall be examined based on the personal situation and the general circumstances in the country. A certain threshold of seriousness needs to be reached, in order for the case to be taken into account.

76. The ECtHR’s case law on non-refoulement is based on article 3 of the ECHR. The Soering-judgment of 1989 recognized this:

“...The decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.”

77. This case was the start of the Court’s doctrine of protection against direct refoulement. Protection against indirect refoulement, or expulsion, was found on the basis of that same article 3, in the Cruz Varas-case:

129 GRABENWARTER, CHRISTOPH. Op. cit. The absolute nature of the prohibition of torture will be further explained on the basis of previous case law.
130 Art. 52(3) CFR allows a more extensive protection on EU-level, compared to the similar provisions of the ECHR.
131 Soering v. The United Kingdom. No. 14038/88. ECtHR. 7 July 1989, §91.
“...Although the present case concerns expulsion as opposed to a decision to extradite, the Court considers that the above principle also applies to expulsion decisions and a fortiori to cases of actual expulsion.”

78. A crucial part of the case law is linked to the EU’s Dublin Regulation, that is based on mutual trust. This implies that all EU Member States are supposed to be safe countries. The Court had already recognized the possibility of rebuttal of the safety-concept, the false premise of mutual trust, in its T.I. v. UK-case in 2000. However it was only with the M.S.S. v. Belgium and Greece-case in 2011 that this principle was applied in practice.

79. In this case, an Afghan national, Mr. M.S.S., who entered Greece in 2008 and later applied for asylum in Belgium, filed a complaint, against Belgium and Greece, for breaching the non-refoulement principle. The problems were on the one hand related to the sub-standard detention and reception conditions in Greece, and on the other hand to the decision of the Belgian authorities to refer the applicant back to Greece, given the fact that they knew, or had to know the deficiencies in the Greek asylum system. Belgium and Greece were accused of violating articles 2, 3 and 13 ECHR.

80. In its judgment, the ECtHR took into account the many reports on the situation in Greece, thereby making its assessment based on the facts, the concrete circumstances. These facts are in contradiction to the assumption that Greece is a safe country, being a state party to the ECHR and thus respecting its obligations. The Court acknowledged the difficult situation in the southern frontier states, given the growing influx of asylum seekers, and the heavy burden this can place on a country, especially one in a difficult economical position. However, the absolute nature of article 3 ECHR makes it impossible for a state to derogate from its obligations, regardless of the circumstances. Greece violated the non-refoulement principle by not providing adequate detention and reception conditions. Belgium also violated the principle, by returning the applicant to Greece, given the deficiencies in the Greek system and the exposition to detainment and poor living conditions in breach of article 3 ECHR.

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132 Cruz Varas and Others v. Sweden. No. 15576/89. ECtHR. 7 June 1990, §70.
135 Article 2 ECHR protects the right to life, article 3 ECHR provides the prohibition of torture and article 13 ECHR concerns the right to an effective remedy.
137 Ibid., §223.
138 Ibid., §224.
81. The case was ruled in favour of the applicant on all points, it is a landmark ruling of the ECtHR, that changed the deep-rooted principle of safe countries within the EU. The mutual trust premise, the building stone of the Dublin Regulation, is no longer a solid concept. The fact that a country is an EU Member State and a party to the ECHR, does not automatically imply that the practices in reality will respect the fundamental rights provided in those documents. This case has set a new standard for the Member States when implementing the Dublin Regulation: if the responsible state is not able to respect fundamental rights of asylum seekers, and the other state knows this, or at least should know this, then that state must take responsibility for the application, according to the sovereignty clause139. The wording “each Member State may decide”140 concerning the examination of an asylum claim, even if they are not responsible, must thus be read as “each Member state must decide”141, when a situation similar to the M.S.S.-context occurs.

82. Given the enormous amount of migrants reaching Europe by sea, the Hirsi Jamaa-case142 must be recalled. The facts are as follows143, the applicants were boat-refugees coming from inter alia Somalia and Eritrea, who were intercepted by the Italian authorities in the Mediterranean Sea, outside of the naval territory of Italy. They were returned to Libya, as result of an agreement between that country and Italy. They claimed the non-refoulement principle was violated due to the troubled situation in Libya and its flawed asylum system. Italy was allegedly responsible for an indirect and direct violation of the non-refoulement principle, under articles 3 and 13 ECHR and article 4 of the Protocol 4144 to the ECHR.

83. The ECtHR decided that there was a “real risk that the applicants would be subjected to treatment in Libya contrary to Article 3”145, and thus declared that Italy had violated the indirect non-refoulement principle. Concerning the risk of arbitrary repatriation to the unsafe countries Eritrea and Somalia, due to the lack of a genuine working asylum system in Libya, the Court stated that “Italian authorities knew or should have known that there were insufficient guarantees protecting the parties concerned...”.146 Therefore, Italy also breached the direct non-refoulement principle. This judgment

139 The sovereignty clause can be found in art. 17 Dublin III Regulation.
140 Own emphasis added.
141 Ibid.
142 Hirsi Jamaa and Others v. Italy. No. 27765/09. ECtHR. 23 February 2012.
143 Ibid., §9-17.
144 Art. 4 protocol 4 ECHR: “Collective expulsion of aliens is prohibited”.
145 Hirsi Jamaa and Others v. Italy, §136.
146 Ibid., §156.
can be seen as a victory\textsuperscript{147} for the protection of the fundamental rights of asylum seekers. Even when the interception of asylum seekers occurs at the high seas, outside of the scope of application of the normal regulatory framework, the fundamental principle of non-refoulement must be respected.\textsuperscript{148} This judgment must be taken into account by the Member States when operating in the Mediterranean. The migrant crisis cannot be solved by shifting the problems towards non-EU countries, especially if these countries cannot themselves guarantee protection of fundamental rights.

**Court of Justice of the EU**

84. With the entry into force of the Lisbon Treaty, the CFR became a part of the Union’s primary law. The CJEU has jurisdiction to rule on non-refoulement cases, directly based on art. 19(2) CFR. However, the EU and its Member States respect the Geneva Convention in their asylum framework, so even before the CFR was legally binding, the CJEU had developed its own interpretation concerning the impact of fundamental rights on the CEAS.

85. In relation to the current migration crisis and the EU-Turkey Agreement, this section shall focus on the *N.S. v. Secretary of State*\textsuperscript{149}, which is very similar to the *M.S.S.*-case of the ECtHR. The facts\textsuperscript{150} are alike. Third-country nationals coming the EU arrived in Greece, however they did not apply for asylum in that country. Then they travelled to respectively the UK and Ireland, and lodged an application there. According to the Dublin Regulation, Greece is responsible for processing the asylum applications. The applicants claimed that the non-refoulement principle would be violated if they were to be send back to Greece, given the condition of the national asylum system and lack of respect for fundamental human rights. The national Courts in the UK and Ireland referred several preliminary questions to the CJEU, which all relate to the coherency of the EU’s CEAS with the fundamental rights, especially the influence those rights can have on the asylum policy.\textsuperscript{151} The questions can be seen as the general abstract version of the concrete allegations in the *M.S.S.*-case.

86. The CJEU stated that the decision of a Member State concerning the sovereignty clause of the Dublin Regulation falls within the scope of the fundamental rights protection in the EU, as stipulated


\textsuperscript{148} Ibid.


\textsuperscript{150} Ibid., the facts are derived from §34-54.

\textsuperscript{151} Ibid., §50 & 53.
by article 51 CFR.\textsuperscript{152} This implies that Member States must respect those rights, including the non-refoulement principle, when deciding whether or not to invoke the sovereignty clause. The Court then continues, stating that it “must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the CFR, the Geneva Convention and the ECHR”.\textsuperscript{153} This is however only an assumption, that can be refuted, it is not a conclusive presumption.\textsuperscript{154} The Court refers to the M.S.S.-case\textsuperscript{155}, that pointed out the systemic deficiencies in the Greek asylum system and in the implementation of EU law. In conclusion, the CJEU decided that Member States may not ‘refoule’ an asylum seeker to the responsible state, if there are “substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment”, because of the systemic deficiencies in the asylum procedure and reception conditions of that state.\textsuperscript{156}

**Conclusion**

87. The result of the CJEU preliminary ruling case is very similar to the ECtHR’s judgement.\textsuperscript{157} Both European Courts have clearly stated that the mutual trust of the Dublin system does not work, the fundamental rights assessment must always executed according to the actual circumstances, ‘on the ground’. This reasoning shall apply a fortiori when an asylum seeker is to be send back to a non-EU or non-ECHR country.

### B. Applicability of the Non-refoulement Principle to the EU

88. The EU, as a sui generis international organisation, is bound by the non-refoulement principle. As already mentioned, the principle is incorporated in the CFR and ECHR, and constitutes a crucial element in the EU’s asylum policy. The adaptation and implementation of the CEAS must happen in accordance with the principle. There are numerous examples of explicit references to the principle in Directives and Regulations of the CEAS.\textsuperscript{158} The current migration crisis can no longer be solved by the existing legal framework. Therefore, the Commission is searching for new remedies, political agreements, to deal with the crisis. Prior to the detailed analysis of the EU-Turkey refugee-deal, it must be recalled that the non-refoulement principle applies in this situation. The values on which the EU is founded, as stipulated in article 2 TEU and the recognition of fundamental rights set out in the CFR and

\begin{itemize}
\item \textsuperscript{152} Ibid., §64-69.
\item \textsuperscript{153} Ibid., §80.
\item \textsuperscript{154} Ibid., §103.
\item \textsuperscript{155} Ibid., §88-89.
\item \textsuperscript{156} Ibid., §94 & 106.
\item \textsuperscript{157} For more information, see COSTELLO, CATHRYN. “Dublin case NS/ME: Finally, and end to blind trust across the EU.” A&M (2012), p. 83-92.
\item \textsuperscript{158} See for example the Qualification Directive, the Return Directive and the Asylum Procedures Directive.
\end{itemize}
ECHR, as promised in article 6 TEU, preclude the Union from acting in contradiction with the non-
refoulement principle. Furthermore, the Commission must not neglect its role as guardian of the
Treaties. This includes ensuring the respect for the non-refoulement principle by the Member States.
The EU and its Member states must represent one united front, with a common policy, characterised
by the respect for human rights and the non-refoulement principle. Any Member State that fails to
fulfil its obligations in this regard, must be brought to justice by means of the infringement procedure
of article 258 TFEU.

II: Legal Analysis of the Non-refoulement Principle in the Context of the EU-Turkey
Agreement

89. Within this part, a brief historical overview of the relations between the EU and Turkey shall
be given first, subsequently the creation and contents of the current Agreement will be explained,
thereafter it will be analysed in the light of the non-refoulement principle. Furthermore, other issues
regarding the Agreement will be evaluated, and some recommendations shall be made.

A. EU-Turkey Relationship

90. The EU and Turkey share a long and complex history. Turkey played an important role on the
European continent. During the first half of the 20th century, the ancient Ottoman Empire was defeated
in the Turkish War of Independence, led by Atatürk, who became the first president of the new Turkish
Republic in 1923.159 Turkey became a Member State of the North Atlantic Treaty Organisation
(hereinafter: NATO) in 1952, and is seen as an important geopolitical player in the region. The urge for
modernisation and international recognition could explain why Turkey applied for membership
of the EEC in 1959, only two years after its establishment.160 The application was unsuccessful, however it
paved the way for an Association Agreement that was concluded in 1963, better known as the Ankara
Agreement.161 The objectives of this Agreement were to improve the standards of living of the Turkish
people, and was guided by political, economic and security related reasons for the EEC and its Member
States.162 The Ankara Agreement provided for the progressive establishment of a customs union, and

160 MARESCAU, MARC. “Turkey, a candidate state destined to join the Union.” SHUIBHNE, NIAMH NIC and GORMLEY,
LAURENCE W. From Single Market to Economic Union, Essays in Memory of John A Usher. Oxford: Oxford University
161 EUROPEAN COMMUNITIES. Agreement establishing as Association between the European Economic Community
162 GROENENDIJK, Kees. “The Court of Justice and the development of EEC-Turkey association law.” THYM, DANIEL and
ZOETEWIJ-TURHAN, MARGARITI. Rights of third-country nationals under EU Association Agreements: degrees of free
was generally perceived as a pre-accession strategy. An additional Protocol was adopted in 1970, and the Association Council was empowered to adopt legally binding decisions. Over the years, the CJEU has developed a progressive interpretation of the Agreement, Protocol and the Decision with direct effect\textsuperscript{163}.

91. Even though Turkey already established close cooperation with the EEC, they wanted to become a Member State of the Community. Unfortunately for Turkey, the Commission gave a negative opinion regarding the application in 1989. The Helsinki Council in 1999 was revolutionary, because Turkey was recognized as a “candidate state destined to join the Union”\textsuperscript{164}. It is now seventeen years later, the EU has been enlarged with thirteen new Member States, however the Turkey remains to be a candidate-state. The negotiations started in 2005. Nevertheless due to certain political difficulties, \textit{inter alia} the conflict in Cyprus, there has not been great progress. The development of the situation is furthermore complicated by the troublesome relations between the EU’s and Turkey’s political leaders. The EU says to be “committed to intensify further the political dialogue with Turkey in particular on foreign policy issues of mutual interest”\textsuperscript{165}. However, one might question whether this is satisfactory for Turkey, given the guarantees for membership that were promised in the past.

92. The current migration crisis is a crucial factor for the future of the EU-Turkey relations. Refugees are coming to Europe from Syria, Iraq and Afghanistan, and Turkey is often used as a transit-zone.\textsuperscript{166} The EU has always sought to protect itself and has therefore concluded an extensive neighbourhood policy, the so-called ‘ring of friends’\textsuperscript{167}. Turkey is an important factor in the migration policy that cannot be neglected. In the last years, the idea of having a ‘privileged partnership’ with Turkey, rather than making it a new Member State, has gained popularity in the EU. President Juncker even made it clear that there would be no new enlargements during his presidency\textsuperscript{168}, despite the enlargement-portfolio of Commissioner Hahn. Notwithstanding this anti-enlargement attitude, the EU needs its ‘ring of friends’ now more than ever to act as a buffer-zone to solve the refugee crisis. The EU and Turkey therefore agreed to cooperate within this context, which resulted in the Agreement that shall be analysed next. However, nothing ever comes for nothing, and the EU had to come up with

\textsuperscript{163} For an overview of the case law of the CJEU, see GROENENDIJK, KEES. \textit{Op. cit.}
\textsuperscript{164} MARSESEAU, MARC. \textit{Op. cit.}
\textsuperscript{165} EEA. \textit{EU relations with Turkey}. \texttt{<http://eeas.europa.eu/turkey>}
\textsuperscript{167} PRODI, ROMANO. \textit{A Wider Europe - A Proximity Policy as the key to stability}. Brussels, 5-6 December 2002. \texttt{<http://europa.eu/rapid/press-release_SPEECH-02-619_en.htm>}

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benefits for Turkey, in exchange for tackling the refugee problem. Besides the granting of financial support, the EU and Turkey are negotiating the terms for visa liberalisation.

B. The EU-Turkey Agreement

93. The enhanced cooperation between the EU and Turkey for solving the current migration crisis is the result of a political process, where promises and compromises have played an important role. Rather than focussing on the reform of its own legal framework, the CEAS, the EU is seemingly trying to transfer the problem to Turkey. This approach must be careful, the EU cannot do ‘whatever it takes’ to solve the crisis without seriously deviating from its own values and principles. Prior to the analysis of the Agreement and the criticism, its realization, contents, conditions and follow-up process are illustrated, based on the policy documents of the Commission and Parliament.

§1. Political process

94. In July 2014, the candidate-president Juncker explained his vision for Europe in a policy paper, “A New Start for Europe”. Among the possible innovations, a new migration policy was put forward. A stronger CEAS was necessary, and solidarity must be ensured. Juncker already called for a closer cooperation with third countries to join forces against irregular migration. In May 2015, the initial policy ideas were gathered in the European Agenda on Migration. At that point, Turkey had already received financial support to deal with migration and refugees, within its own national context. Although not mentioned by the Commission, the idea behind the financial support was most likely to keep irregular migrants from coming to the EU, by using Turkey as a buffer zone. The real challenge for the Commission is to implement the Agenda on Migration, by adopting concrete measures to carry out the policy. At first, close cooperation with the neighbouring countries was mainly focused on the allocation of funds. Furthermore, there was an urgent need for adaptation of already existing and adoption of new legislation. The already mentioned safe countries of origin-system was proposed to be organised on EU level, Turkey being one of the safe countries. The actual beginning of the cooperation between the Union and Turkey is when the Commission presented the EU-Turkey Joint

169 See supra no. 14.
172 Ibid.
Action Plan\textsuperscript{173} in October 2015. The Plan consists of two general parts, first to support the Syrians that are living in Turkey under a temporary protection regime, and thereby assist the Turkish hosting communities; and secondly to strengthen cooperation to prevent irregular migration. Both partners are committed to take the necessary actions. The Joint Action plan was activated by the EU-Turkey Summit, a meeting of the Heads of State, in November 2015.\textsuperscript{174} The next Summit on 7 March 2016 regarded the further implementation of the Plan and the discussion of broader proposals for cooperation.\textsuperscript{175} The climax of the political process was reached on 18 March 2016, in conclusion of the European Council meeting with the Turkish high officials, by adopting an EU-Turkey Statement\textsuperscript{176} on migration and refugees. It must be stressed that this is a policy document that will determine the EU’s actions concerning the current migration crisis. However, it has no legal value and thus cannot be the subject of an action for annulment or a preliminary rulings procedure before the CJEU.

\section*{§2. Contents and conditions}

95. Several parts of the contents and conditions of the Agreement are troublesome and will be analysed as to their compliance with the non-refoulement principle. This paragraph will only describe the most crucial provisions summarily.

96. The most important provision of the Agreement is the ‘one-for-one’-deal concerning asylum seekers.\textsuperscript{177} This is described by the EU-Turkey Statement as follows:

\begin{quote}
“All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey... For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the UN Vulnerability Criteria”\textsuperscript{178}
\end{quote}

\footnotesize
\begin{footnotes}


\textsuperscript{177} A similar plan was suggested by Dutch politician DIEDERIK SAMSON. The Netherlands holds the Council presidency from January until June 2016. This plan proposed to send the migrants arriving in Greece via Turkey, back to Turkey, and in exchange the EU would resettle recognized refugees staying in Turkey, within the Member States.

\textsuperscript{178} EU-Turkey Agreement.
\end{footnotes}
97. The people that qualify for this deal are Syrian irregular migrants, who arrive on the Greek islands, after having crossed Turkey. These migrants have either not applied for asylum\textsuperscript{179}, or their application was unfounded or inadmissible, according to the Asylum Procedures Directive. This measure is said to be temporary and extraordinary, however in full compliance with the CEAS and the non-refoulement principle. A further specification is that migrants who have not previously entered or tried entering the EU irregularly will be granted a priority treatment for resettlement.

98. Notwithstanding the ‘one-for-one’-approach, it is of utmost importance for the EU to keep irregular migration from happening in the first place. Therefore, they cooperate with Turkey, which must take measures aimed at preventing new routes of reaching the EU through Turkey. On the humanitarian level, the EU and Turkey agreed to activate a Voluntary Humanitarian Admission Scheme. Moreover, the EU, its Member States and Turkey are to cooperate “in any joint endeavour to improve humanitarian conditions inside Syria”\textsuperscript{180}, to provide safe areas for the local population and refugees.

99. As previously mentioned, nothing ever comes for nothing, and the EU had to offer several advantages to Turkey, in exchange for its cooperation. Besides the financial support, the EU agreed on three other points, as a kind of concession to Turkey. First of all, “the fulfilment of the visa liberalisation roadmap will be accelerated”\textsuperscript{181}, which means that, if Turkey meets the necessary benchmarks, visa free travelling for Turkish citizens to the EU will become reality in 2016. Secondly, the framework for the customs union, which has been operative since 1995, will be upgraded. Finally, the Union and Turkey have “reconfirmed their commitment to re-energise the accession process”\textsuperscript{182}. Turkey has been negotiating with the EU for over ten years, however the process did not develop well. This new impulse has been put into effect by opening new negotiation chapters. Nevertheless, president Juncker’s decision on the enlargement-pause will prevent Turkey from becoming a Member State anytime soon.

§3. Follow-up

100. The Action Plan has been approved by the Commission and Turkey. The further development of the system shall be closely monitored by the institutions. Hitherto, the Commission has published three implementation reports. These reports provide the most recent statistics and information on the state of progress for the EU’s and Turkey’s commitments. President of the European Council Tusk has

\textsuperscript{179} However, see infra no. 122.
\textsuperscript{180} EU-Turkey Agreement.
\textsuperscript{181} Ibid.
\textsuperscript{182} Ibid.
visited Turkey in April and stated that “Turkey is the best example for the whole world on how we should treat refugees”\(^{183}\). Acting on its obligation to resettle Syrian refugees currently residing in Turkey in the EU, the Commission has proposed a concrete plan for resettlement.\(^{184}\) A more critical point of view is presented by the European Parliament. Many MEPs have questioned the respect for human rights in Turkey, and whether the country could be considered as a safe third country.\(^{185}\) Some blamed the EU for ‘outsourcing’\(^{186}\) its problems to an unreliable partner. The facilitation of visa liberalisation is definitely a sensitive issue. MEPs are reluctant to give Turkey ‘a blank cheque’\(^{187}\), as compensation for the migration-deal. The Agreement and its implementation are furthermore monitored by several international organisations, *inter alia* UNHCR, Statewatch, Amnesty International and Human Rights Watch.

101. However, regardless of the progress that is being made in Turkey and Greece for the resettlement and relocation of irregular migrants, the basic premise of the Agreement still remains the same. The numerous problems concerning the EU-Turkey cooperation shall now be examined.

C. Compliance with the Non-refoulement Principle

102. The non-refoulement principle must be respected at all times by the EU and by Turkey, based on customary international law, the Geneva Convention and its Protocol, the ECHR and the Union is additionally bound by its acquis. In order to be legitimate and acceptable under international and European law, the EU Turkey Agreement must respect the fundamental rights and principles protected therein. The EU and Turkey are jointly responsible for the correct implementation of the Agreement. However, damage has already been done, the Agreement does not comply with the non-refoulement principle. In what follows this assumption shall be analysed, first on the basis of the prohibition of collective expulsion, secondly based on the safe country-presumption and thirdly within the broader framework of externalisation of borders.


\(^{187}\) Ibid.
§1. Collective Expulsion

103. Collective expulsion can be defined as “any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group”\(^{188}\). This is prohibited both under ECHR\(^ {189}\) and EU\(^ {190}\) law. There is numerous case law to support this prohibition.\(^ {191}\) The first element of the EU-Turkey Statement stipulates that “All new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey. This will take place in full accordance with EU and international law, thus excluding any kind of collective expulsion”\(^ {192}\). The proposed return of all new irregular migrants is in complete contradiction with the second sentence.\(^ {193}\) The EU cannot simply evade its responsibilities by adopting a ‘non-liability’-clause. The mere fact that the Statement considers all irregular migrants is a breach of the prohibition on collective expulsion. The basic principle of examining each application individually may not be compromised. By allowing collective expulsion, the EU and Turkey are in breach of their fundamental obligations. The exceptional character of the current situation does not make unlawful deviations excusable. This kind of expulsion will trigger the non-refoulement principle, since the migrants are transported to a country where they might experience violations of their fundamental rights. The safety of the situation in Turkey shall now be examined in the following paragraph.

§2. First Country of Asylum and Safe Third Country

104. As already explained (supra no. 41-46), countries can be categorised for asylum purposes. The EU-Turkey Statement stipulates that “…migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey”. An application shall be unfounded if the applicant does not qualifies for international protection, as defined the of the Qualification Directive.\(^ {194}\) Inadmissibility of an application can only be possible if one of the situations as described in article 33 of the Asylum Procedures Directive occurs:

\[(a)\text{ another Member State has granted international protection;}\]
(b) a country which is not a Member State is considered as a first country of asylum for the applicant, pursuant to Article 35;  
(c) a country which is not a Member State is considered as a safe third country for the applicant, pursuant to Article 38; ...

105. In order for the Agreement to be in accordance with the EU legal framework, Turkey must be considered as either a first country of asylum or a safe third country. Both assumptions are however problematic.

106. In order for Turkey to be a first country of asylum, the applicants must be recognised as a refugee in Turkey. This is far from self-evident, since the country has preserved the geographic restriction of the Geneva Convention. Thus, the international law in Turkey only protects refugees coming from Europe. Currently however, the refugees are arriving mainly from Syria, Afghanistan and Iraq. Turkey has installed a temporary protection mechanism for these people, which may not offer the sufficient protection that is needed to be considered as a first country of asylum under EU Law.

107. The assumption in the Agreement of Turkey as a safe third country does not comply with EU law. The non-refoulement principle includes the prohibition of sending asylum seekers or refugees to unsafe countries. The M.S.S. and N.S. cases decided that the non-refoulement principle, as protected by the ECHR and CFR, was violated by returning an asylum seeker to Greece, where the reception and detention conditions were unacceptable. This reasoning must be applied a fortiori when the return decision includes a non-EU country, such as Turkey. Instead of carrying out a genuine assessment of the current situation in Turkey, it seems that the Commission preferred an approach where the problems are “swept under the carpet”, not to be discussed again. There are multiple reasons why the refugee deal fails to respect international and European standards. This is the result of a hasty decision, that is not suitable to solve the complex crisis. The reasons why Turkey cannot be considered as a safe third country shall now be explained.

108. First of all, the reception and detention conditions of asylum seekers and refugees in a safe third country may not give rise to serious harm, as stipulated in article 15(b) of the Qualification

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195 Own emphasis added.
Directive, or a breach of article 3 ECHR. The overall respect for human rights in Turkey is not per se relevant, the focus is on the human rights protection in asylum related issues. Moreover, the national asylum framework needs to be clearly prescribed by the law and must be functioning in a proper manner. Amnesty International’s report on Turkey as Europe’s ‘gatekeeper’\(^{198}\) tells the story of asylum seekers in Turkey, living in dire conditions, being subject to ill-treatment and unlawful detention and even deportation to unsafe countries such as Syria. This is in contradiction to the non-refoulement principle. Moreover, the complaints mention the lack of correct information, healthcare and respect for other fundamental human rights. Turkey has been generous in receiving migrants, hosting the largest refugee population in the world\(^ {199}\), however the laws and the infrastructure are not adapted to the current circumstances. A part of the refugee-deal is the financial aid of the EU and its Member States, funding the Refugee Facility for Turkey. The expenses must cover food, healthcare and accommodation of the returned irregular migrants on the one hand, and general priorities of humanitarian aid for Syrian refugees on the other hand. Amnesty International has proposed to suspend the funding for detention centres that unlawfully detain or deport migrants.\(^ {200}\) The EU must not support the violation of human rights in Turkey, and Turkey needs to reform its internal system urgently. Another thorny issue is the geographic restriction of the Geneva Convention that is still applicable in Turkey. Syrian and other non-European refugees are not able to request a refugee status and thus cannot receive the adequate protection and assistance.\(^ {201}\) There is a temporary protection mechanism in place, however in respect of its own Asylum Procedures Directive, the EU should not have settled for this weaker form of protection. This situation creates a climate of uncertainty\(^ {202}\) for the refugees and returned irregular migrants.

109. A second reason why Turkey cannot be considered as a safe third country relates to the deportations that occur, violating the non-refoulement principle directly. A direct violation is facilitated by the Agreement and falls within the joint responsibility of Turkey and the EU.\(^ {203}\) The situation where irregular migrants are sent back to Turkey, and subsequently are deported to their home country, for example Syria, constitutes a breach of the direct non-refoulement principle. This

\(^{198}\) AMNESTY INTERNATIONAL. “Europe’s gatekeeper: unlawful detention and deportation of refugees from Turkey”. 16 December 2015.


\(^{201}\) HUMAN RIGHTS WATCH. “Q&A: The EU-Turkey Deal.” Op. cit.

\(^{202}\) See ULUSOY, ORÇUN. “Turkey as a safe third country?”. University of Oxford - Faculty of Law, 29 March 2016. <http://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborders/criminologies/blog/2016/03/turkey-safe-third> for more information on the Turkish asylum system and its deficiencies.

prohibits extradition to countries that cannot fully protect an individual against torture or inhuman or degrading treatment or punishment. There is no doubt that Syria is unsafe, however Amnesty International’s research has shown that those illegal deportations are still happening.204

110. A third reason, in line with the second reason, why Turkey should not be considered as a safe third country, is because the physical safety of the people cannot be guaranteed.205 Especially in the southern provinces, close to the Syrian border, the lives of migrants and refugees is endangered. Turkey has closed its border with Syria206, which causes a refugee hold up at the border, resulting in a dangerous conflict zone. The sovereign right of Turkey to close its borders should not interfere with the international obligation of the non-refoulement principle. The situation across the border is life threatening, as was once again proven by a recent airstrike attack, causing deaths of dozens of civilians.207

111. Compliance with the non-refoulement principle would require that the Agreement would follow the international and European standards, which have been overlooked. Turkey cannot be considered as a first country of asylum or a safe third country. Another element of the non-refoulement principle, the problems relating to the EU’s policy of the externalisation of borders, shall be examined now.

§3. Externalisation of Borders

112. The externalisation of borders consists of two elements. The first element is the practice whereby the EU outsources its border management to third countries or to private entities208. It is nicknamed ‘sub-contracting’ of EU border control management.209 A second element of the externalisation is the transfer of responsibilities to third countries, especially concerning migration and asylum, by providing the necessary technical and financial assistance.210 The process of externalisation

204 Ibid.
210 Ibid.
of borders has become of crucial importance in the EU’s asylum and migration policy. This can be linked to the increasing trend of securitisation and the wish of the Union to be surrounded by a ‘ring of friends’, a buffer zone. The externalisation of borders is a part of the EU’s Global Approach to Migration and Mobility.

113. The EU must comply with the non-refoulement principle while carrying out its policy and obligations under its legal framework. As been explained above, this principle must be understood in a broad way. Combined with the externalisation of borders, it means prohibiting the EU to cooperate with third countries, in a way that would facilitate a violation of the non-refoulement principle. Regarding the current migration crisis and the cooperation with Turkey, the necessary respect for the principle is not always evident. Therefore, some light must be shed on the envisaged visa liberalisation between the Union and Turkey.

114. As previously stated, the EU and Turkey share a long history of cooperation, however visa-free travel was still not realised. One of the promises of the EU, as a counterpart for the refugee-deal, was the acceleration of the fulfilment for the visa liberalisation roadmap, which would allow Turkish citizens to travel without a visa for short stays in the Schengen zone. June 2016 is the provisional deadline, assuming that all benchmarks have been met by then. The final decision shall be made by the Parliament and Council, based on implementation reports of the Commission. Turkey has promised to take the required steps to comply with the benchmarks. So far the ideal scenario was presented by the EU-Turkey Statement, a clear example of the quid pro quo-technique. However, the reality is far more complex. The visa liberalisation is a part of a broader framework that was established in 2013, a roadmap containing 72 requirements, concerning document security, migration management, public order and security, fundamental rights, and the readmission of irregular migrants. This Roadmap was adopted in parallel with the Readmission Agreement. The EU-Turkey Summit of November 2015 set the new deadline in October 2016, which finally became June 2016, a further acceleration as a concession for the migration deal. The Commission agreed to move up the timeline. Nonetheless,

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211 EU-Turkey Statement.
Turkey still had to fulfil all the benchmarks in time, to be considered for the visa-free travel regime. The latest report of 4 May\textsuperscript{215} pointed out that five benchmarks have not been met yet, the most problematic of these being the essential revision of the legislation and practices on terrorism, to be adopted in line with European standards.

115. However, the Commission decided to officially propose Turkey as a visa-free country to the Parliament and Council, given that the benchmarks will be addressed urgently. The Turkish Ambassador to the EU, Mr. Selim Yenel\textsuperscript{216}, said to have confidence in the rapid fulfilment of the benchmarks. According to him, the migration crisis has a silver lining, namely that it brought the EU and Turkey back together, after years of distrust and separation. However, in reality the situation is largely determined by the Turkish president Erdoğan, who decided on the 6\textsuperscript{th} of May 2016 that Turkey would not change its anti-terror laws. Earlier that week, the prime minister of Turkey, Mr. Ahmet Davutoğlu, a pro-EU politician, resigned, or was forced to resign, from his post. These two novelties combined are likely to make Turkey an unpredictable negotiation partner for the migration crisis. If the legislation will not be changed, then the visa liberalisation cannot happen, even though it is one of the important aspects of the EU-Turkey Statement. The unwillingness of Turkey to carry out the indispensable reforms might be another sign for the EU that they have chosen the wrong solution for the refugee problem. Entrusting a crucial aspect of the border management to an unreliable third country can result in a violation of the non-refoulement principle.

§3. Conclusion

116. The EU-Turkey refugee-deal is not an acceptable solution for the current migration crisis, rather a ‘poisoned chalice’ for the EU and its Member States.

117. Given the current political situation, Turkey is not a reliable partner. It cannot be denied that Turkey has been far more generous than EU Member States, hosting a very large population of refugees. Considerable efforts have been made by the government to facilitate the life of migrants. However the general situation is still substandard. The EU has made several promises to Turkey


concerning continuing the membership negotiations, the upgrade of the customs union and the acceleration of the visa liberalisation. In exchange, Turkey must accept the resettlement of all new irregular migrants that are currently arriving in Greece. The Agreement can be a ‘poisoned chalice’, because the Turkish politicians now have leverage to control the migration stream, and judging by the recent statements of the Turkish President, the refugee-deal can be cancelled easily.

118. Apart from this political problem, the Agreement is fraught by several legal issues. It constitutes a flagrant breach of international and European law, and the EU and Turkey are both to blame. The proposed return of all new irregular migrants arriving in Greece, without conducting an individual investigation, is in opposition to the prohibition on collective expulsion, protected by the ECHR and CFSR. Furthermore, the Agreement implicitly considers Turkey as a safe third country, while various international human rights organisations have proven that it does not meets the standards for being qualified as a safe third country. Returning migrants to Turkey would thus be a violation of the non-refoulement principle, in line with the case law of the CJEU and ECtHR. Finally, the EU’s process of externalisation of the border management can trigger a breach of the non-refoulement principle, if the third-country partner is unreliable and does not respect the fundamental human rights standards. The proposed implementation of the visa liberalisation with Turkey is too soon and likely to cause additional problems for the migration crisis. However, one might wonder why some MEPs are so reluctant to grant visa-liberalisation to Turkey, given the fact that in May 2015 a similar agreement was concluded with the United Arab Emirates217, a state guilty of textbook example of human rights violations.218 The current mind-set of European politicians seems to adopt a flexible approach concerning fundamental rights, as long as they are not bothered by the refugee problem.

119. The failure to comply with the international and European standard of the non-refoulement principle is not the only issue related to the EU-Turkey Agreement. There a many other potential issues, which shall be critically analysed in the next section.

D. Other Issues

120. The Agreement cannot be accepted, for the reasons described supra, and additionally, because of the existence of several other issues, not related to the non-refoulement principle.


121. Firstly, concerning the obligation to return all irregular migrants to Turkey, the EU-Turkey Statement stipulates that:

“Migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed individually by the Greek authorities in accordance with the Asylum Procedures Directive, in cooperation with UNHCR. Migrants not applying for asylum or whose application has been found unfounded or inadmissible in accordance with the said directive will be returned to Turkey.”

122. Regardless of the non-refoulement principle, this plan can only work if the migrants are given an effective opportunity to be duly registered as asylum seekers. Greece has to deal with a large share of the migrants coming to Europe, and it is therefore not surprising that their asylum system and responsible authorities have to operate under extreme pressure. Refugee camps are overcrowded and despite the international aid and funding, there remain serious shortcomings that endanger the correct process for asylum applications. The case law and international human rights organisations have demonstrated serious flaws in the Greek national asylum system that are incompatible with the EU-standards. There is currently an ever-growing risk that candidate asylum seekers will attempt to flee from the Greek islands towards other EU Member States, in order to avoid being returned to Turkey, which is not a safe third country, knowing that they do not have an effective opportunity in Greece for their application to be examined individually. The Greek situation worsened after the financial crisis, however it is the Dublin system that created the difficulties in the first place. By following the first country of arrival-approach, the states at the external frontiers became overburdened with asylum seekers. This idea stems from the original Dublin Convention that was adopted in 1990, when intergovernmentalism was still more important than supranationalism. The decision to let Member States manage their problems in a sovereign way might have made sense then, however it certainly does not anymore. Greece does not have the capacity to deal with the superfluous influx of migrants today. It is time for all Member States to acknowledge that the current Dublin III Regulation does not work, and the Commission must focus on adopting a new system, based

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219 EU-Turkey Statement.
220 As required by art. 6(2) Asylum Procedures Directive: “Member States shall ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible”.
on an efficient burden-sharing model. It is too late to save the existing system, by trying to supplement it with extraordinary measures in times of need. A fundamental change is required.

123. A second issue that is associated with the EU-Turkey refugee deal concerns the non-discrimination principle. The Agreement stipulates that:

“For every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU.”

124. This entails that, while all new irregular migrants, regardless of their nationality, shall be returned to Turkey, the ‘one-for-one’-deal is only applicable to Syrian nationals. Thus only for every Syrian that is returned to Turkey, another Syrian shall be resettled in the EU. The gravity of the situation in Syria cannot be denied, however that is no excuse for discriminating migrants coming from other countries. Article 3 of the Geneva Convention prohibits discrimination based on the country of origin. There is no objective justification to disadvantage refugees or asylum seekers with other nationalities. Moreover, by resettling Syrians from only Turkey, the EU seems to forget the enormous efforts of countries like Lebanon and Jordan, who are also responsible for the shelter of many refugees. The substitution of one Syrian for another does not fit in the EU’s asylum framework, that is based on respect for fundamental rights. Moreover, how can it be explained that a person who risked his or her life by coming to Europe shall be punished by being returned to Turkey, while another, who has not yet tried to reach the EU shall be rewarded with resettlement? The rationale behind this system is the wish of the EU to combat the irregular migration, where people risk their lives to come to Europe, to put a halt to the many deaths that occur in the Mediterranean. However, the roots of this problem should be attended first, by providing better control of the migration routes and by eliminating migrant smuggling and human trafficking. The mere idea of overcoming these problems, by operating under an unfair return-and-resettle regime, cannot work.


226 Ibid.

227 This fundamental principle is protected by, inter alia, art. 2 TEU, art. 10 TFEU and art. 21 CFR.

228 Own emphasis added.

229 CARRERA, SERGIO and GUILD, ELSPETH. “EU-Turkey plan for handling refugees is fraught with legal and procedural challenges”. 10 March 2016. <www.ceps.eu>.


125. A last issue that must be addressed is the joint endeavour of the EU and Turkey to improve humanitarian conditions inside Syria. The idea is to create safe zones, particularly in areas close to the Turkish border. This is a noble plan, and humanitarian aid is certainly needed, however the implementation might not be so self-evident. Despite the civil war, Syria remains a sovereign country. The EU and Turkey must operate under international mandates of the UN and International Committee of the Red Cross. They may not exercise effective control on Syrian territory. The creation of safe zones is of utmost importance, nevertheless under international law, interference on the sovereign territory of another state might be seen as an unauthorised annexation.

126. In sum, the EU-Turkey refugee-deal does not only not comply with the non-refoulement principle, there are additional aspects that make it an intolerable ‘solution’ for the current migration crisis. However, the situation is in critical condition, and workable solutions are needed as soon as possible. Therefore, some recommendation shall be made in the following part.

E. Recommendations and Solutions

127. The current migration crisis causes the EU to face many challenges, and the solutions therefore will determine the Union as it is now, and how it will be in the future. After analysing the legal framework of the CEAS, the definition and case law of the non-refoulement principle, the EU-Turkey Agreement and its compliance under international and EU law, some recommendations can be made. This may serve as an inspiration for the adaptation of other solutions to solve the crisis now, and prevent it from happening in the future.

128. To solve the current migration crisis, it can be recommended to follow the approach as proposed by VAN SELM-THORBURN, in her book Refugee protection in Europe. Lessons of the Yugoslav crisis.\(^\text{232}\) Although the book dates from 1998 and was written in the aftermath of the Yugoslav Wars in the early nineties, its content is still relevant today. In order to solve a migration crisis, the author introduces three main goals: prevention, protection and durable solutions. Only if all different aspects are carefully dealt with, the further development of the crisis can be stopped and the EU shall be equipped for the future. In what follows, these three steps shall be explained, along with possible recommendations for a new EU policy.

§1. Prevention

129. The main focus of the first step is to address the root causes of the crisis. Migration flows can be limited by tackling the reasons why people are fleeing. This is a difficult task and it cannot be completed by the EU alone. An international cooperation between states and human rights organisations is needed. The root causes of this migration crisis cannot be pinpointed to one occasion or country, it is rather a combination of factors that has caused so many people to flee their homes. The overall issues are related to a lack of democracy and respect for the rule of law. The measures taken as prevention must not be completed in order to focus on the next steps. However, the EU must certainly keep the root causes and its possible solutions in mind while drafting its policy. The Member States must understand that they cannot stop migration without taking these preventive measures. The importance of addressing the root causes has been stressed by the EU, inter alia at the Valletta Summit on Migration in November 2015.233

§2. Protection

130. The second step in the process relates to the protection of asylum seekers and refugees. This includes providing humanitarian aid and offering temporary protection and asylum. Both the EU and Turkey are providing humanitarian assistance and are helping to create safe areas. However, as stated before, these kinds of protective measures, in a country at war like Syria, might give rise to “questions of sovereignty and territorial integrity”234.

131. Whereas the preventive measures and the first step of the protective measures are adopted to ensure safety and support to the people living in the conflict zone, the following aspects concern the migration process itself. Especially in the beginning of a conflict and later on, if the previous measures turned out to be unsuccessful of ineffective, an “exodus of civilians”235 will follow. This situation requires mechanisms of temporary protection and asylum.

132. Temporary protection is necessary, because the already established procedures of asylum, that have to determine the refugee status, will be overwhelmed by a large-scale influx of migrants, and therefore the proper functioning cannot be guaranteed.236 It is a practical solution, whereby the essential rights of the migrants will be ensured, until a more permanent system comes into effect.237

235 Ibid., p. 119.
236 Ibid.
237 Ibid.
On EU level, the Temporary Protection Directive\(^\text{238}\) (hereinafter: the TPD) was adopted for this cause. This solution seems to be forgotten in the whole migration debate. This TPD is not a perfect solution for all problems, however it does allow to combine protection for human lives with respect for states’ asylum procedures. VAN SELM has advocated for the use of this TPD, for several reasons.\(^\text{239}\) The TPD was adopted in the aftermath of the Yugoslav refugee crisis. Member States agreed that a similar situation was to be avoided. Nevertheless, the current crisis is a regrettable example of the theory that history repeats itself. The Member States do not seem to agree on concrete measures to solve the crisis, and it cannot be expected that crucial decisions will be adopted easily. The TPD can offer a way out, a coordinated strategy for the Union. Unlike the Dublin Regulation, this Directive has a built-in solidarity mechanism, resulting in burden-sharing between the Member States. There would be no need to use the unpopular quota-system\(^\text{240}\). If the Member States would designate Syrian nationals as the specific group for temporary protection, according to article 5 TPD, there would also be no need for the discriminatory ‘one-for-one’ system of the EU-Turkey Agreement. The protection can be offered for one to two years, giving both national authorities and the EU legislators the time required to properly reform the existing asylum procedures, and to genuinely examine all applications for asylum.\(^\text{241}\) When the temporary protection comes to an end, and the original conflict has been solved, the migrants can return to their home countries. However, given the seriousness of the crisis in Syria, which has been going on for five years now, a more realistic approach is needed, and asylum must be offered. To rule out the abuse of temporary protection by terrorists, the registration must be thorough.\(^\text{242}\)

133. As to the reasons why this mechanism has not been used, there are several possibilities. First of all, whom shall be protected? Among the migrants that have arrived in the EU, most of them are Syrian nationals.\(^\text{243}\) However, as stated before, there are also numerous people coming from Afghanistan, Iraq and Iran. The right definition of the protected group is not easy to formulate. Furthermore, the TPD needs to be activated by a qualified majority Council Decision upon a proposal

\(^{238}\) Council Directive (EC) no. 2001/55 of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof. 7 August 2001. OJ L 212/12.


\(^{240}\) Hungary, as strong opponent of the EU’s quota-plan, has lodged an application at the CJEU for the annulment of the Council Decision 2015/1601/EU of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, pending case C-647/15.


\(^{242}\) Ibid.

\(^{243}\) See infra Annex.
of the Commission. Given the current rise of right-wing, populist and Eurosceptic parties in the EU, such a majority would be difficult to reach. The reluctance of some Member States to cooperate on any level of asylum policy can prevent the proper functioning of the whole Union. A third problem is that the TPD has never been implemented since its entry into force. The Member States seem to be afraid of the unknown, and have chosen to adopt a new framework, rather than working with the already existing Directive. It is highly regrettable that the Commission has not proposed to implement the TPD in its Agenda on Migration. The focus has been on the intra-Europe resettlement plan and the EU-Turkey Agreement, which is contrary to the EU’s own CEAS and fundamental rights and values. The UNHCR has recalled the importance of the TPD, stating that it would bring “efficiency gains and cost reductions.” The TPD can help the EU to overcome the crisis, if only it would be considered by the Commission. As long as that is not the case, there shall be an important “missing piece” in the asylum-puzzle. Within the European Council, Member States could propose to utilise this Directive as an alternative solution.

134. Any temporary protection mechanism must eventually be replaced by a coordinated asylum system, to examine every claim based on the individual circumstances of the applicant. In the EU, asylum procedures are governed by the CEAS. Even though many Directives have been upgraded in the last years, resulting in several recast Directives, the system has serious flaws that prevent an effective application of the asylum policy. The existing rules of the Dublin system can no longer be tolerated. The absence of burden-sharing is untenable. The cooperation between the EU and Turkey might have not been necessary if the EU’s own system worked properly. The overcrowding in frontier countries such as Greece causes breaches of fundamental rights of asylum seekers, resulting in a violation of the non-refoulement principle. The EU should not focus on saving long lost mechanisms such as Dublin, on the contrary, the attention should go to creating new and effective Directives and Regulations.

244 Art. 5(1) Temporary Protection Directive.
Code. This Code would combine “all existing EU rules and standards covering access to Europe and the rights of immigrants”. These existing rules must of course be updated, given the fact that the current crisis has proven that they do not function under high pressure. An alternative for the Dublin system must include burden-sharing, to result in a more effective and efficient model of cooperation. The Commission has already proposed a reform of the CEAS, recognizing the need for a sustainable system that divides responsibilities in a fair way. A fairness mechanism must be developed for Member States that are under too much pressure. The determination for pressure should be based on the size of the population and total GDP. To overcome the inequalities in the national implementation of EU standards, the Commission must ensure compliance by acting as guardian of the Treaties. Member States that do not respect their obligations must be brought to the CJEU. In case of severe breaches, the procedure of article 7 TEU might be used. All Member States have entered the EU voluntarily and transferred an important part of their sovereignty, and they are now obliged to respect the rules if they want to stay in the Union.

Another important novelty would be the reform of EASO, or even the creation of a new agency. The EASO could become a ‘Common European Asylum Service’ or a ‘EU Migration, Asylum and Protection Agency’, “responsible for processing asylum applications and determining responsibilities across the EU, and with competence for overseeing a uniform application of EU asylum law”. In any way, a comprehensive new European approach on migration is required, both in the short and long term. It should be based on the protection of fundamental human rights. The new asylum and migration policy must “challenge the many negative conceptualisations that underpin current social and policy debates relating to migration within the EU”. Migration must not be a problem, it can be an opportunity. It is time that the Member States acknowledge this.

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251 Ibid.
253 CARRERA, SERGIO. “To adopt refugee quota’s or not: Is that the question?”. 2 October 2015. <www.ceps.eu>.
255 Ibid.
257 Ibid.
§3. Durable solutions

136. Durable solutions are the key to success for overcoming the migration crisis and helping those in need. Migrants must be either returned or resettled, and thereby integration is a crucial factor. Being a migrant, refugee or asylum seeker should be a temporary stage in a person’s life, not one’s definitive status. Long-term reliable solutions can either be focused on return or resettlement. Both solutions are governed by the criticized EU-Turkey Agreement. The proposed return and resettlement cooperation with Turkey does not respect the non-refoulement principle and is a violation of the prohibition of discrimination. If the EU had applied the TPD, or if the CEAS had been updated before the crisis struck, there would not have to be a deal with Turkey. The EU has bought its way into Turkey, under the pretext of humanitarian assistance, while in reality the objective is to use Turkey as a buffer for irregular migration.258 All return and resettlement mechanisms must endorse the uttermost respect for the non-refoulement principle. Discrimination based on inter alia sex, race, religion, colour, ethnic or social origin or sexual orientation is prohibited.259 Returning migrants can only be an option if there is no more danger to their fundamental rights, either in their home country, or in a third country.

137. Resettlement can be seen as a new beginning for displaced people, in a country other than their home country. The UNHCR has defined resettlement as “the transfer of refugees from an asylum country to another state that has agreed to admit them and ultimately grant them permanent settlement”260. The respect for human rights is of vital importance. If the EU wishes to continue operating under the EU-Turkey Agreement, regardless of its deficiencies, an independent controlling mechanism must be established, to monitor the correct and efficient implementation of the refugee-deal. Currently only the Commission is responsible for the assessment of the situation, however its opinion might be biased and thus not preferential for correct reporting. It must never be forgotten that many migrants have risked their lives to reach the EU, and that they probably would have stayed in their home countries if there was no war or conflict. Refugees, migrant and asylum seekers are first and foremost human beings, who deserve to be treated with respect.

138. Only an approach that combines prevention, protection and durable solutions, respecting the non-refoulement principle and fundamental human rights, shall be successful to overcome the current migration crisis and to offer peaceful and humane solutions for migrants.

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258 Ibid.
259 Art. 21 CFR.
Part 4 : Conclusion

139. “Never be afraid again”. This is the English translation of a Belgian book, written about the life story of Yazam Azmi, a young Syrian refugee who reached Belgium after a long and tough journey.\textsuperscript{261} It is a touching anecdote which provides an insight of the refugee crisis, from an insider-perspective. The title is the summary of the hopes and wishes of the many refugees and asylum seekers arriving daily in the EU. For these people it does not matter how they get to Europe, as long as they have hope to reach a destination, giving them a better future. This is perfectly worded by the Somali-British poet Warsan Shire: “who would choose to spend days and nights in the stomach of a truck unless the miles travelled meant something more than journey”.

140. The current migration crisis consist of a broad range of problems, and the adoption of solutions for each of them must happen urgently. However, a lack of respect for fundamental values in the asylum and migration policy will only aggravate the situation. Compliance with the non-refoulement principle is an international obligation that cannot be waived, whatever the circumstances may be.

141. The Convention of Geneva and its New York Protocol define a ‘refugee’ and protect them against non-refoulement. The EU laws are built upon the condition that they respect the Convention. The Union’s asylum and migration policy can be divided according to the several stages of migration. The first stage, the journey to Europe, is currently still very dangerous, due to the reprehensible practices of human trafficking and smuggling. The elimination of these criminal offences must receive a priority treatment. The entry and arrival into the EU is regulated by the malfunctioning Schengen mechanism and the outdated and unfair Dublin system. If the EU truly wishes to update its policy, in respect of human rights, the Dublin Regulation needs to be reinvented, headed for a burden-sharing model. Lastly, the consequences of migration to the EU, governed by several minimum harmonisation Directives, has shaped the national policies. However, the system can only function if the underlying structure is flawless. Since that is currently not the case, the CEAS as a whole is endangered and in need of a crucial reform.

142. The non-refoulement principle is protected by both international and regional treaties and conventions, and is considered to be a part of the customary international law. A deviation of the principle can never be tolerated. The case law of the ECtHR and CJEU has demonstrated the importance of a case-by-case analysis of asylum applications and has proven the refutability of the safe country-

concept. The automatic assumption that a country is safe for the reception and treatment of asylum seekers and refugees, without performing an ‘on-the-ground’ analyses, is a violation of the non-refoulement principle, as was stipulated by both the M.S.S.- and N.S.-cases. The EU and its Member States are bound to respect the principle in the adoption and implementation of their policies.

143. This paper has indicated the evidence that the EU does not respect its own fundamental norms and values. The EU-Turkey Agreement, adopted through a comprehensive political process, is burdened by several legal problems. Firstly, the prohibition on collective expulsion makes it impossible to return all new irregular migrants arriving in Greece to Turkey. Secondly, the indirect assumption of Turkey as a safe third country is in contradiction with the actual situation. Following the case law on the reception and detention conditions in Greece, and taking into account the current situation in Turkey, the conditions of the Asylum Procedures Directive concerning a safe third country are not fulfilled. By returning migrants to Turkey, the EU has violated the indirect non-refoulement principle. Moreover, given the absence of a genuinely functioning asylum system in Turkey, migrants risk to be deported to their home countries, for example Syria and Iraq. Hereby both the EU and Turkey are responsible for breaching the direct non-refoulement principle. The third main issue is related to the process of externalisation of borders. One of the promises made to Turkey in exchange for its cooperation with the refugee-deal, is the acceleration of the visa-free regime. However, the Turkish authorities are reluctant to change the legislation on terrorism, one of the benchmarks of the visa-roadmap. Turkey can therefore not be considered as a reliable partner to solve the migration crisis, and the outsourcing of border management can facilitate damages to the non-refoulement principle.

144. Pursuing the EU-Turkey Agreement does not fit the EU’s human rights framework. Moreover, the effectiveness of the Greek national system has been questioned, as well as the respect for the non-discrimination principle. By only applying the one-for-one system to Syrian nationals, the prohibition of article 21 CFR is neglected. It is not possible to defend this strategy, that presents various flagrant breaches of international and European law.

145. Given the fact that the proposed cooperation with Turkey cannot be accepted, the EU should focus on reforming and renewing its CEAS. Hereby, a certain structure must be followed. The first step must be to address the root causes of the crisis. Subsequently, protective measures must be adopted, to provide temporary protection and asylum. Lastly, the focus should be on accepting durable solutions, translated in return or resettlement policies. Everything must of course be in accordance with the utmost respect for human rights, specifically the non-refoulement principle.
146. In the previous years, the EU had to fight several battles, ignited by the euro- and financial crisis. The Member States and institutions were still in recovery when the next crisis struck, the refugee problem, caused by the uprisings of the Arab Spring and its consequences. Now, more than ever, the EU needs a coherent common policy, to stop from heading towards an even bigger crisis, that might be irreversible. All Member States must act as a united front, they must carry out a policy that respects the values on which the EU is built. The answers for the migration crisis must be found on the supranational level. The keynote for the future should be more EU, not less.
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Annex

This annex provides an overview of the recent statistics concerning the migration crisis.¹

1: First time asylum applicants registered in the EU Member States
2: First time asylum applicants in the EU Member States
3: First time asylum seekers in the EU Member States by country of citizenship

1: First time asylum applicants registered in the EU Member States, 2015/2014

- **2014**: 562,680
  - Other: 400,000
  - Iraq: 200,000
  - Afghanistan: 0
  - Syria: 0

- **2015**: 1,255,640
  - Other: 800,000
  - Iraq: 600,000
  - Afghanistan: 200,000
  - Syria: 0
2: First time asylum applicants in the EU Member States

<table>
<thead>
<tr>
<th>Country</th>
<th>Number of first time applicants</th>
<th>Share in EU total (%)</th>
<th>Number of applicants per million inhabitants*</th>
</tr>
</thead>
<tbody>
<tr>
<td>EU</td>
<td>562 680</td>
<td>100.0%</td>
<td>2 470</td>
</tr>
<tr>
<td>Belgium</td>
<td>14 045</td>
<td>+123%</td>
<td>3.1%</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>10 805</td>
<td>+178%</td>
<td>1.6%</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>905</td>
<td>+36%</td>
<td>117</td>
</tr>
<tr>
<td>Denmark</td>
<td>14 535</td>
<td>+43%</td>
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<td>Germany</td>
<td>172 945</td>
<td>+155%</td>
<td>35.2%</td>
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<tr>
<td>Estonia</td>
<td>145</td>
<td>+54%</td>
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<tr>
<td>Ireland</td>
<td>1 440</td>
<td>+127%</td>
<td>0.3%</td>
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<td>Greece</td>
<td>7 585</td>
<td>+50%</td>
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<tr>
<td>Spain</td>
<td>5 460</td>
<td>+167%</td>
<td>1.2%</td>
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<tr>
<td>France</td>
<td>58 845</td>
<td>+20%</td>
<td>5.6%</td>
</tr>
<tr>
<td>Croatia</td>
<td>380</td>
<td>-63%</td>
<td>0.0%</td>
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<tr>
<td>Italy</td>
<td>63 655</td>
<td>+31%</td>
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<td>Cyprus</td>
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<td>+42%</td>
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<td>Latvia</td>
<td>365</td>
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<td>0.0%</td>
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<tr>
<td>Luxembourg</td>
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<td>+129%</td>
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<td>Hungary</td>
<td>41 215</td>
<td>+323%</td>
<td>13.9%</td>
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<td>Malta</td>
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<td>+33%</td>
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<td>Netherlands</td>
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<td>3.4%</td>
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<td>Austria</td>
<td>25 675</td>
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<td>2.6%</td>
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<tr>
<td>Norway</td>
<td>10 910</td>
<td>+179%</td>
<td>-</td>
</tr>
<tr>
<td>Switzerland</td>
<td>21 940</td>
<td>+73%</td>
<td>-</td>
</tr>
</tbody>
</table>

Number of first time applicants is rounded to the nearest 5. Calculations are based on exact data.

* Inhabitants refer to the resident population at 1 January 2015.

- Not applicable

The source dataset can be found on <http://appsso.eurostat.ec.europa.eu/nui/show.do>.
3. First time asylum seekers in the EU Member States by country of citizenship, 2015

<table>
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<tr>
<th>Country</th>
<th>Number</th>
</tr>
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<td>Syria</td>
<td>362,775</td>
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<tr>
<td>Afghanistan</td>
<td>178,230</td>
</tr>
<tr>
<td>Iraq</td>
<td>121,535</td>
</tr>
<tr>
<td>Kosovo*</td>
<td>66,885</td>
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<tr>
<td>Albania</td>
<td>65,935</td>
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<tr>
<td>Pakistan</td>
<td>46,400</td>
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<tr>
<td>Eritrea</td>
<td>33,095</td>
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<tr>
<td>Nigeria</td>
<td>29,915</td>
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<tr>
<td>Iran</td>
<td>25,360</td>
</tr>
<tr>
<td>Other</td>
<td>325,510</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>1,255,640</strong></td>
</tr>
</tbody>
</table>