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Out of sight, out of mind

The Allocation of Refugee Protection Responsibilities to Third Countries in European Union Asylum Policy

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Contents

Summary

The use of readmission agreements and safe third country rules enable the allocation of protection responsibilities from EU member states to third countries. Due to the increased displacement of individuals from Syria and Afghanistan, these legal mechanisms have been of increased importance to the European Union asylum policy during the recent year.

The purpose of this thesis is to examine to what extent the practice of allocating the responsibility to protect refugees to third countries through safe third country rules and readmission agreements, as enshrined in European Union asylum policy, is compatible with the obligations of European Union member states under international law and what implications this practice has for the institution of refugee protection. This thesis thus examines the content and scope of refugee protection and the obligations of states under international law in relation to the allocation of protection responsibilities to an intermediary country. The examination is primarily focused on state obligations under the Refugee Convention, but takes into regard state obligations under the Convention against Torture, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Furthermore, this thesis examines European Union readmission agreements and European Union safe third country rules as regulated on a policy level and as implemented in practice. To this end, this thesis primarily employs a legal dogmatic method.

This thesis shows that the practice of allocating the responsibility to protect refugees to third countries, as enshrined in European Union asylum policy, is compatible with the practical obligations of states under international law to some extent. However, it is found that the objective behind refugee protection in international law is incompatible with the objective behind the allocation of protection responsibilities in EU asylum policy. While states are obliged under international law to offer surrogate protection to refugees, they are expected, and to some extent obliged, under EU asylum policy to manage refugees and their movements. Some divergences are also found between the practical obligations of the European Union member states in the respective legal systems, especially as regards obligations under the principle of non-refoulement. In this thesis, it is further found that the practice of allocating protection responsibilities to third countries transforms the institution of refugee protection through, inter alia, imposing obligations on states that are opposite to their obligations in relation to refugee protection under international law. The allocation practices also have the potential of enabling a return of a refugee back to her country of persecution without an examination of her asylum claim even being made, which may effectively undermine the right to seek asylum.

Sammanfattning

Bruket av så kallade återtagandeavtal i samband med regler om säkra tredjeländer möjliggör en förflyttning av ansvaret för att skydda flyktingar från Europeiska unionens medlemsstater till tredje stater. Med anledning av ökade flyktingrörelser från bland annat Syrien och Afghanistan, har dessa rättsliga mekanismer kommit att få ökad relevans i den Europeiska unionen asylpolitik under de senaste åren.

Syftet med förevarande uppsats är att undersöka i vilken mån överföringen av ansvaret för att skydda flyktingar genom återtagandeavtal och regler om säkra tredjeländer, såsom det kommer till uttryck inom Europeiska unionens asylpolitik, är förenligt med staters skyldigheter under internationell rätt samt att undersöka vilken innebörd en sådan överföring av ansvar har för flyktingskydd som institution. I uppsatsen undersöks omfattningen av och innehållet i flyktingskyddet såsom det kommer till uttryck i internationell rätt. I uppsatsens undersökts även vilka skyldigheter stater har under internationell rätt vid en överföring av ansvaret för att skydda flyktingar till ett annat land. Utredningen tar huvudsakligen sikte på staters skyldigheter under Flyktingkonventionen, men undersöker även staters skyldigheter under Tortyrkonventionen, Europakonventionen om de mänskliga rättigheterna, Internationella konventionen om medborgerliga och politiska rättigheter och Internationella konventionen om sociala, ekonomiska och kulturella rättigheter. Vidare undersöks nämnda återtagandeavtal och regler om säkra tredjeländer såväl på policynivå som i deras implementering. I förevarande uppsats företas dessa undersökningar huvudsakligen genom bruket av en rättsdogmatisk metod.

I uppsatsen påvisas att överföringen av ansvaret för att skydda flyktingar till tredjeländer, såsom det kommer till uttryck i Europeiska unionens asylpolitik, i viss utsträckning är förenligt med staters skyldigheter under internationell rätt. I uppsatsen identifieras emellertid vissa avvikelser vad avser bland annat motivet bakom flyktingskydd inom internationell rätt och motivet bakom en överföring av ansvaret att skydda flyktingar inom Europeiska unionens asylpolitik. Medan stater är skyldiga under internationell rätt att förse flyktingar med skydd, så förväntas de, och är i viss mån skyldiga, inom Europeiska unionens asylpolitik att hantera flyktingar. Vissa avvikelser har även identifierats vad avser staternas praktiska skyldigheter i de respektive rättsliga systemen, särskilt vad avser staternas skyldigheter till non-refoulement. I förevarande uppsats framgår även att överföringen av ansvaret för att skydda flyktingar till tredje länder transformerar flyktingskydd som institution genom att bland annat pådyvla stater skyldigheter som står i direkt motsättning till deras skyldigheter under internationell rätt. Överföringen av ansvaret att skydda flyktingar möjliggör att flyktingar skickas tillbaka till det land de har flytt ifrån utan att deras asylansökan någonsin undersöks i sak, vilket riskerar att undergräva rätten att söka asyl.

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Abbreviations

CAT	Convention Against Torture Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OAU	Organization of African Unity
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
VCLT	Vienna Convention on the Law of the Treaties

1 Introduction

Following increased refugee movements caused by armed conflicts and violence, there has been a trend of what has been labelled as an "internationalization" within the European Union (hereinafter EU) asylum policy during the recent decade. The trend includes a number of actions and proposals agreed between the EU and countries of transit.[1] Such proposals have up until today included the establishment of border enforcement cooperation with third countries, regional protection programmes, resettlement schemes and readmission agreements. These measures have been identified by the EU as necessary to control the migratory "influx" into the member states, to prevent primary and secondary movements from countries of origin and transit, and to combat irregular migration.[2] Early EU policy touching upon the external aspects of asylum developed in the 1990s as a response to the "influx" of refugees from the conflict in the Balkans. At this time, attention was primarily given to the root causes of migration. More recently however, the emphasis has shifted to "externalising" the responsibility of refugee protection on to transit countries.[3]

Readmission agreements create a legal framework for forced returns of non-nationals affected by an enforceable expulsion decision, including those seeking refuge from persecution and armed conflicts.[4] Through these agreements, states are obliged to readmit both their own nationals and third-country nationals.[5] Readmission agreements have been given a central position in the external dimension of EU asylum policy. The Tampere European Council of 1999 invited the EU member states to conclude readmission agreements with relevant third countries.[6] Similarly, the Seville European Council of 2002 stressed the importance of ensuring the cooperation of countries of transit in the area of readmission, and urged for the inclusion of readmission agreements in every future cooperation or

[1] McKeever, David, Schultz, Jessica, Swithern, Sophia: *Foreign Territory – The Internationalisation of EU Asylum Policy*, Oxfam GB, 2005, p. 2.

[2] See European Council, Tampere European Council, Presidency Conclusions, Tampere, 15–16 October 1999, para. 27; European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union (2005/C 53/01), in: Official Journal of the European Union, OJ C 53/01, 3 March 2005, paras 1.6 – 1.7.1; Communication from the Commission to the European Parliament and the Council, *EU Action Plan on Return*, COM (2015) 453 final, 9 September 2015, Brussels p. 10 and 13.

[3] Baldaccini, Anneliese: "The External Dimension of the EU's Asylum and Immigration Policies: Old Concerns and New Approaches" in: *Whose Freedom, Security and Justice?: EU Immigration and Asylum Law and Policy*, ed. Anneliese Baldaccini, Elspeth Guild and Helen Toner, Hart Publishing, London, 2007, pp. 277–298.p. 277–278.

[4] Giuffré, Mariagiulia, "Readmission Agreements and Refugee Rights – From a Critique to a Proposal", in *Refugee Survey Quarterly*, Vol. 32, No. 3, 2013, 81–82.

[5] Guild, Elsbeth, Moreno-Lax, Violeta: "Current Challenges regarding the International Refugee Law, with focus on EU Policies and EU Cooperation with UNHCR", in: *Centre for European Policy Studies Paper in Liberty and Security in Europe*, No. 59, September 2013, p. 9.

[6] European Council, Tampere European Council, Presidency Conclusions, Tampere, 15-16 October 1999, para. 27.

agreement that the EU would conclude with any third country.[7] The cooperation with third countries on readmission was also listed as a topic of primary importance in the conclusions of the Thessaloniki European Council of 2003.[8] Accordingly, there has been a rise in the conclusion of readmission agreements since the nineties, out of which many have been concluded with third countries along transit routes.[9]

Cooperation with third countries in form of readmission agreements are partially rooted in rules incorporated in the EU asylum legislation on "safe" third countries. The safe third country rules, found in the Directive 2013/32/EU[10] (hereinafter Asylum Procedure Directive), govern the mode through which the responsibility to protect those fleeing from persecution and armed conflict can be unilaterally allocated externally.[11] A similar mechanism is found in the Regulation 604/13[12] (hereinafter Dublin Regulation), stipulating the allocation of protection obligations internally between EU member states.[13] In relevant scholarly literature, these safe country practices have been described as a procedural barrier to asylum and as mechanisms of non-entrée, posing a legal barrier to the entry into Europe.[14]

Albeit applicable to protection seekers, readmission agreements do not generally include separate provisions on such individuals. It has thus been argued that they create a real risk for protection seekers to be removed as unauthorised migrants to "safe" third countries.[15]

Although neither the conclusion of readmission agreements nor the allocation of protection responsibilities to third countries are new phenomena, they are once again on top of the agenda of EU asylum policy. The reason for this can be derived from the increased refugee movements from Syria and Afghanistan, which has created a notion of a European "refugee crisis" which needs to be managed. In July 2016, the European Commission thus presented a proposal for a regulation on harmonized asylum procedures, making the implementation of safe third country concepts mandatory for member states.[16]

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[7] European Council, Seville European Council, Presidency Conclusions, Seville, 21-22 June 2002, para. 33-34.

[8] European Council, Thessaloniki European Council, Presidency Conclusions, Thessaloniki 19-20 June 2003, para. 19.

[9] Coleman, Nils: *European Readmission Policy – Third Country Interests and Refugee Rights*, Martinus Nijhoff Publishers, Leiden, 2009, p. 36–37.

[10] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), in: Official Journal of the European Union, L 180/60, 29 June 2013.

[11] Asylum Procedure Directive, Articles 36-39.

[12] 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 (recast), in: Official Journal of the European Union, L 180/31, 29 June 2013.

[13] See Dublin Regulation, recital 7.

[14] See e.g. Price, Matthew: Rethinking Asylum - History, Purpose, and Limits, Cambridge University Press, Cambridge, 2009, p. 201; Hathaway, James: *The Rights of Refugees under International Law*, Cambridge University Press, Cambridge, 2005, p. 293.

[15] Giuffré (2013), p. 81.

[16] See European Commission, *Proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, COM (2016) 467 final, Brussels, 13 July 2016.

Similarly, the European Commission has expressed a need for greater efforts to be made in the conclusion of readmission agreements with third countries in the after math of what has come to be known as the European "refugee crisis".[17]

The revived interest for readmission agreements and safe third country rules within the EU asylum policy motivates an analysis of these practices in relation to the ways they affect states' obligations and refugees' rights, as well as the ways they shape and transform the institution of refugee protection.

1.1 Aim and research question

Safe third country rules and readmission agreements have been subject to extensive research during the past decade. However, no focused and comprehensive analysis of these mechanisms, particularly as enshrined in EU asylum policy, has been made as regards the compatibility of their objective, content and implementation with the obligations of states under international law. Neither has any comprehensive analysis been made on the implications of these mechanisms for the institution of refugee protection. The aim of this thesis is thus to examine to what extent the allocation of refugee protection responsibilities from EU member states to third countries through safe third country rules in conjunction with readmission agreements within EU asylum policy is in compliance with the obligations of states under international law. It also explores whether this practice is compatible with the objective behind refugee protection in international law and what possible implications it may have for the institution of refugee protection. In light of this, this thesis seeks to answer the following research question:

To what extent is the practice of allocating responsibilities to protect refugees to third countries through safe third country rules and readmission agreements, as envisaged in EU asylum policy, compatible with the obligations of EU member states under international law and what are its implications for the institution of refugee protection?

The exploration of the practice of allocating protection responsibilities to third countries will entail an examination of safe third country rules and readmission agreements on a policy level as well as an examination of their implementation. The focus of this examination is on the compatibility between the said practice and the objective, content and scope of state obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol[18] (hereinafter the Refugee Convention or the Convention) Given the complementary role of general human rights law to the scope and

[17] See e.g. European Commission, Fact Sheet, *EU-Turkey Joint Action Plan*, 15 October 2015, Brussels; European Commission, Joint communication to the European Parliament and the Council, *Addressing the Refugee Crisis in Europe: The Role of EU External Action*, Brussels, Join (2015) 40 final, Brussels, 9 September 2015, p. 6.

[18] Convention relating to the Status of Refugees, 28 July 1951, Geneva; Protocol relating to the Status of Refugees, 31 January 1967, New York.

content of refugee protection in international law,[19] fundamental human rights instruments such as the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment[20] (hereinafter CAT), the European Convention on Human Rights[21] (hereinafter ECHR), the International Covenant on Civil and Political Rights[22] (hereinafter ICCPR) and the International Covenant on Economic, Social and Cultural Rights[23] (hereinafter ICESCR) cannot be ignored. The examination of the compatibility between the said practice and international law will thus include these instruments.

1.2 Method

A study of the compatibility between the obligations of states under international law and the practice of allocating protection responsibilities to third countries within EU asylum policy has demanded an establishment of what international law requires for an allocation of protection responsibilities to be permissible. Similarly, a study of the implications for the institution of refugee protection has demanded the establishment of the what the objective, content and scope of refugee protection is under international law. To this end, a legal dogmatic method has been used. The legal dogmatic method entails the systematization and interpretation of relevant legal sources to discern the meaning of the law.[24] In international law, the interpretation of the law shall follow the interpretation rules of the Vienna Convention on the Law of the Treaties[25] (hereinafter VCLT). The examination of the content and scope of refugee protection and the obligations imposed on states in relation to responsibility allocation to intermediary countries has therefore entailed an interpretation of relevant provisions in international law in their ordinary meaning, and if needed, their context or their objective and purpose.[26] The sources of international law are international conventions, international customary law and general principles.[27] As mentioned above, this thesis is set out to examine not only state obligations under the Refugee Convention but also the CAT, the ICCPR, the ICESCR and the ECHR. The ECHR is not to be interpreted in the same way as other treaties in international law. The European Court of Human Rights (hereinafter ECtHR) has explained that the

[19] See Chapter 2.
[20] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, New York.
[21] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, Rome.
[22] International Covenant on Civil and Political Rights, 16 December 1966, New York.
[23] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, New York.
[24] Sandgren, Claes: *Rättsvetenskap för uppsatsförfattare – ämne, material, metod och argumentation*, 3rd ed., Nordstedts Juridik, Stockholm, 2015, p. 43–45.
[25] Vienna Convention on the Law of the Treaties, 23 May 1969, Wien.
[26] See VCLT, articles 31-33.
[27] Statute of the International Court of Justice, 26 June 1945, San Fransisco, article 38 (1).

ECHR is to be interpreted in light of its present-day conditions and in manner that gives practical effect to the rights enshrined in the treaty.[28]

The research question of this thesis has further demanded an examination of the safe third country concepts and readmission agreements in EU asylum policy. The examination of these practices employs a legal dogmatic method through which relevant provisions in EU asylum legislation and readmission agreements have been interpreted and systematized to discern the obligations of EU member states in relation to responsibility allocation in EU asylum policy. EU asylum legislation, as opposed to other treaties in international law, is not to be primarily interpreted according to its ordinary meaning. Instead a variety of interpretation methods are used, in which the interpretation of a provision in light of its spirit and general scheme is the most common one.[29] The relevant provisions of EU asylum legislation have thus been interpreted in light of the spirit and general scheme of the legislation for discerning the obligations of EU member states under EU asylum legislation, while the provisions of the EU readmission agreements have been interpreted using the rules of the VCLT. The examination of the *objective* of responsibility allocation practices in EU asylum policy, however, goes beyond a legal dogmatic method. Instead, the author has looked "behind" and beyond the law to understand the objective of allocating refugee protection responsibilities. To this end, communications, decisions and press releases by the European Commission and the European Council are included in the analysed material. More importantly, the study of the said allocation practices is not restricted to an examination of the practices on a policy level but will also treat their implementation. For this purpose, the author has chosen to examine agreements on readmission between the EU and Turkey and the determination of Turkey as a safe third country. To understand how the allocation practices are implemented and what protection is envisaged for refugees in the third country, various reports from non-governmental organizations on the protection of refugees in Turkey are used.

Furthermore, this thesis undertakes a comparative analysis of the obligations of states under international law in relation to the allocation of protection responsibilities to an intermediary country with the practice of allocating protection responsibilities to intermediary countries in EU asylum policy. This comparative analysis builds on the findings made in the previous steps.

Lastly, this thesis undertakes an analysis of the implications of the allocation practices in EU asylum policy on the institution of refugee protection. This analysis builds on the findings made on the objective, content and scope of refugee protection in a previous step and seeks to understand how the used mechanisms may transform the institution of refugee protection.

According to article 38 of the Statute of the International Court of Justice, judicial decisions and the teachings of the most highly qualified publicists of

[28] ECtHR, Airey v. Ireland, appl. no. 6289/73, 9 October 1979, paras. 24 and 26.
[29] Gil-Bazo, María-Teresa: "The Charter of Fundamental Rights of the European Union and the Right to be granted Asylum in the Union's Law" in: *Refugee Survey Quarterly*, Vol. 27, issue 3, 2008, pp. 33-52, p. 40.

the various nations may be used for the determination of the law.[30] In this thesis, judicial decisions from the ECHR, the Human Rights Committee and the Committee Against Torture have been used to determine the content of the law. The Refugee convention, unlike the ECHR, does not have an international monitoring body with the competence to conclude binding decisions for state parties to the convention. Thus, decisions from national courts are cited in this thesis for the determination of the content of protection in the Refugee Convention. It should be noted however, that the UNHCR has been appointed as the guardian of the Refugee Convention[31] and that, although the conclusion of the UNHCR Executive Committee does not create binding obligations for state parties to Convention, the conclusions seek to resolve differences of interpretation between the state parties.[32] Hence, the conclusions of the UNHCR have been used to determine the meaning of refugee protection in the Refugee Convention. Finally, scholarly literature has been employed as support for the determination of the content of the law.

1.3 Delimitations

Provisions imposing obligations upon states towards each other and towards individuals in relation to displacement is found in several treaties in international law. The focus of this thesis is on the Refugee Convention and on *general* human rights treaties such as the CAT, the ECHR, the ICCPR and the ICESCR. Although not explicitly included as an instrument towards which the legality of allocation practices is measured, the Universal Declaration on Human Rights[33] (hereinafter UDHR) will be briefly highlighted in this thesis. The choice of treaties excludes provisions on refugee protection found in *specialist* human rights treaties, such as the Convention on the Rights of the Child[34]. Due to the limited scope of this thesis, including specialist human rights treaties into the examination of international law would most likely be at the expense of an indebt analysis of the compatibility of the protection allocation practices with international law. Since this thesis focuses on the allocation of protection responsibilities to third countries in EU asylum policy it is the obligations of *EU member states* under international law that is relevant. Thus, regional treaties on the protection of refugees that the EU member states are not parties to, such as the OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa[35], are excluded from examination in this thesis. Treaties

[30] Statute of the International Court of Justice, article 38 (2); Linderfalk, Ulf (ed.): Folkrätten i ett nötskal, 2 ed., Studentlitteratur AB, Lund, 2012, p. 27.
[31] Lauterpacht, Elihu, Bethlehem, Daniel: "Non-refoulement (Article 33 of the 1951 Convention", in: *Refugee Protection in International Law – UNHCR Global Consultations on International Protection*, ed. Erika Feller, Volker Türk and Frances Nicholson, Cambridge University Press, Cambridge, 2003, pp. 87–177, para 20.
[32] Goodwin-Gill & McAdam (2007), p. 217.
[33] Universal Declaration on Human Rights, 16 December 1948, New York.
[34] Convention on the Rights of the Child, 20 November 1989, New York.
[35] Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, Addis-Ababa.

on humanitarian law regulating the treatment of refugees during armed conflict, such as the 1949 Convention related to the Treatment of Civilian Persons in Time of War[36] are also excluded from examination in this thesis.

The responsibility allocation mechanisms chosen for this thesis are the *safe third country concept*, the *safe European country concept* and readmission agreements. Although of primary importance to this thesis, the examination of readmission agreements is not limited to actual treaties governing the readmission of individuals between states. "Political" agreements on readmission and readmission *clauses* found in other types of bilateral or multilateral treaties between the EU and third countries are also included in the examination. As shown in chapter 5, the conclusion of readmission agreements with third countries is not exclusive for the EU but is also done by EU member states and third countries. As the focus of this thesis is on *EU* asylum policy, the readmission agreements chosen for examination are those concluded by the EU.

An additional legal mechanism governing the allocation of protection responsibilities to third countries in EU asylum policy is the concept of *first country of asylum* found in article 35 of the Asylum Procedure Directive. Including this mechanism could perhaps have contributed to the aim of doing a comprehensive analysis of the responsibility allocation mechanisms found in EU asylum policy. This thesis is however thought to only examine such mechanisms where a refugee is transferred to a third country based on the *assumption* that she will find protection there. The concept of first country of asylum, in contrast to the chosen mechanisms, is used when a refugee has been *granted* protection in a third country.

As stated in subchapter 1.1, this thesis also examines the *implementation* of the mentioned responsibility allocation mechanisms. It would have served the purpose of this thesis to also examine the implementation of the safe *European* third country concept. However, due to the limited scope of this thesis, the examination of the implementation of responsibility allocation mechanisms has been limited to the safe third country concept in conjunction with readmission agreements.

1.4 Outline

Chapter 2 is devoted to the objective, content and scope of refugee protection under international law. The purpose of this chapter is to provide the reader with a yardstick onto which state obligations under EU asylum policy and the protection envisaged for refugees in third countries under EU asylum policy can be measured in the analysis.

Chapter 3 examines the obligations of states under international law in relation to the allocation of protection responsibilities to intermediary countries. The chapter first examines whether states may deny a refugee protection on the ground that she could have sought protection elsewhere. The rest of the chapter is devoted to examining whether a state may at all transfer

[36] See Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Geneva, articles 2, 6 and 44.

a refugee to an intermediary country and what obligations the state must respect for such a transfer to be permitted under international law.

Chapter 4 deals with refugee protection and the allocation of protection responsibilities as enshrined in the EU legal framework. The purpose of this chapter is to present how the obligations of states under international law are reproduced in EU asylum policy and how protection allocation mechanisms are codified in the EU legal framework.

Chapter 5 examines the purpose, content and use of readmission agreements and of EU cooperation with third countries on readmission. This chapter further examines the implementation of the safe third country concept in conjunction with readmission agreements. The example chosen to contextualise the implementation is the readmission agreement between the EU and Tukey, and the determination of Turkey as a safe third country.

Chapter 6 is devoted to analysing the compatibility between the practice of allocating protection responsibilities to third countries through safe third country rules and readmission agreements, as enshrined in EU asylum policy, with the obligations of states under international law. The chapter will further analyse the implications of this practice for the institution of refugee protection. This chapter thus uses the findings made in Chapters 2-3 and compare them with the findings of Chapters 4-5. However, the chapter includes new material as regards the situation for refugees in Turkey, for an analysis of the implementation of readmission agreements in conjunction with safe third country rules to be made.

Chapter 7 is devoted to answering the research question of this thesis. The chapter thus summarizes the findings from the analysis made in Chapter 6.

1.5 Terminology

Some concepts of vital importance for this thesis are briefly introduced in this subchapter.

In this thesis, the term "refugee" is used to describe a person whom owing to a well-founded fear of persecution or ill-treatment is outside of her country of nationality or habitual residence and is unable or, owing to such fear, is unwilling to avail herself of the protection of that country. The term "refugee" in this thesis is also used to describe anyone who suggests that she fulfils this criterion, irrespective of whether she has had or could have had her status positively determined in the event of a status determination taking place. Meanwhile, the term "migrant" in this thesis refers to individuals who have left their country of origin or habitual residence for other reasons than those of refugees. The term "irregular migrant" is used by the EU to describe a migrant that is unauthorized to reside or enter into the territory of a member state.[37] The term "irregular" is thought to describe something that is made without authorization. Thus, the EU sometimes use the term "illegal" and "irregular" interchangeably. In this thesis, these terms will be used when referring to statements made by the EU.

[37] European Commission, EMN Glossary and Thesaurus, *Irregular migrant.*

The term "refugee protection" in this thesis is understood as the rights of refugees and the obligations of states in relation to the protection of refugees Meanwhile, the term "asylum" is used as protection against persecution.

The term "third country" in this thesis refers to a country that is not a member state of the EU. The term "country of persecution" is used to refer to the country from which the refugee has fled. Meanwhile, the term "intermediary country" refers to a country that is not the country currently hosting the refugee and that is not the country of persecution for the refugee. The term is sometimes used interchangeably with the term "safe country" in this thesis. The term "transit country" in this thesis refers to a country through which a refugee has transited on her way to her chosen country of asylum. Additionally, the term "safe third country" will be used to describe a non-EU state that supposedly fulfils the criteria set out in article 38 of the Asylum Procedure Directive, while the term "safe *European* country" will be used to describe a European non-EU state that supposedly fulfils the criteria set out in article 39 of the Asylum Procedure Directive.

In this thesis, a "readmission agreement" is an agreement between the EU or an EU member State with a third country, on the basis of reciprocity, establishing rapid and effective procedures for the identification and safe and orderly return of persons who do not, or no longer, fulfil the conditions for entry into, presence in, or residence in the territories of the third country or one of the member states of the EU, and to facilitate the transit of such persons.[38]

The term "requesting state" in this thesis refers to a state that, on the basis of a readmission agreement, requests another state to readmit an individual. Reversibly, the term "requested state" refers to a state that is requested to readmit an individual on the basis of a readmission agreement.

[38] European Commission, EMN Glossary and Thesaurus, *Readmission Agreement*.

2 Obligations of States and Refugee Rights under International Law

The focus of this chapter is to examine the content and scope of refugee protection in international law. The chapter also refers to the historical context in which codification of refugee protection was made as well as the purpose of refugee protection. This will allow for a discussion in the later chapters on the compatibility of protection allocation mechanisms in EU asylum policy with the protection standards of international law and their implications for the institution of refugee protection.

2.1 Codification of Refugee Protection in Europe before the Refugee Convention

The Refugee Convention was originally concluded to provide a legal framework for the protection of European refugees from the World War II.[39] It was not, however, the first legal instrument to be adopted on the protection of refugees, nor was the World War II the first case of refugee displacement that the world had witnessed.[40] The rising numbers of displaced people at the end of World War I in conjunction with political unrest in some parts of Europe led to the conclusion of a number of international legal instruments with the purpose of regulating protection for displaced populations. These generally provided for the issuance of travel documents and applied to certain categories of people whose governments had failed to protect them and whom had not acquired the nationality of any other state. [41] The codification of refugee protection was partially based in the understanding that the granting of certain treatment and assistance would be in the mutual self-interest of states. Deciding to do otherwise would have led to a continuing influx of unauthorized and destitute refugees into their territories. One of these treaties was the 1928 Arrangement relating to the Legal Status of Russian and Armenian Refugees, concluded by the League of Nations, framed as a non-binding recommendation to states on the treatment of refugees and the recognition of personal status.[42] The Treaty, as its successors, recognized the vulnerable position of refugees and for the first time stipulated rights that

[39] Hurwitz, Agnès: *The Collective Responsibility of States to Protect Refugees*, Oxford University Press, Oxford, 2009, p. 14.
[40] See e.g. Hathaway (2005), p. 76; Hurwitz (2009), p. 15–16.
[41] Hurwitz (2009), p. 10.
[42] Hathaway (2005), p. 85-86.

were specific to refugees rather than enfranchising refugees with the treatment accorded to aliens generally.

The conclusion of non-binding treaties on refugee protection had been predominant up until the 1930s. The non-binding character of the treaties however showed to be inefficient in the midst of economic crisis. During this period, states were increasingly reluctant to share the scarce entitlements of their nationals with refugees. Meanwhile, refugees, in contrast to other aliens, had no country of origin to return to when the economic situation in their host countries started to deteriorate.[43]

In 1933 the first binding international agreement of general application regarding the protection of refugees was concluded.[44] The 1933 Convention Relating to the International Status of Refugees, the predecessor of the Refugee Convention that we know today, included an express restriction on the contracting states' right to expulse a refugee as well as provisions on the enjoyment of civil, economic and social rights.[45]

The main principle of these inter-war treaties was that refugees were a distinct category of aliens whom, due to their vulnerable situation, deserved special attention and assistance and that refugees should not be sent back to persecution.[46]

Preceding the Refugee Convention was also the UDHR. Although not a refugee specific treaty, but rather a non-binding human rights document, its article 14 (1) states that everyone has the right to seek and enjoy asylum from persecution. This provision has commonly been understood as a right of states to grant asylum, rather than a right for refugees to be granted asylum. The idea being that states have a right to grant asylum in the exercise of their sovereignty without having it considered as a hostile act towards other states. The right to asylum thus corresponds with a duty for *other states* to respect it.[47]

The historical context in which the codification of refugee protection was born shows that the codification of refugee protection was motivated by the acknowledgement of the vulnerability of refugees and the need for binding obligations for states to respect and mitigate this vulnerability. As will be shown in the following subchapter, this acknowledgment permeates the Refugee Convention as well.

2.2 Nature and Objective of the Refugee Convention

The Refugee Convention, concluded in 1951, like its predecessors, entails the notion that refugees are individuals that are present outside their countries of

[43] Hathaway (2005), p. 83–91.
[44] Skran, Claudena, "The Historical Development of International Refugee Law" in: *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol – A Commentary*, ed. Andreas Zimmermann, Oxford Press, Oxford, 2011, pp. 3–36, p. 14.
[45] Hurwitz (2009), p. 10–11.
[46] Skran (2011), p. 6.
[47] Gil-Bazo (2008), p. 38, see also Declaration on Territorial Asylum, 14 December 1967, New York, article 1.

origin and that lack the protection of any state.[48] Thus, the Refugee Convention stipulates that a refugee is a person who, owing to a well-founded fear of persecution on account of her race, religion, nationality, membership of a particular social group or political opinion, is outside of her country of nationality or habitual residence and is unable or, owing to such fear, is unwilling to avail herself of the protection of that country.[49] It is the de facto circumstances of a refugee that makes her a refugee, rather than the validation of those circumstances. In this respect, the refugee definition is of declaratory nature.[50]

As stated in the previous subchapter, is was the vulnerable situation of refugees that motivated the conclusion of legal instruments on the protection of refugees. The primary responsibility to protect an individual rests on her state of origin. Those suffering serious human rights violations in their countries of origin or habitual residence which their governments are unable or unwilling to protect them from, may be forced to seek protection in another country. The Refugee Convention, like its predecessors, was concluded to provide refugees with a surrogate to the protection that they have lost.[51] In particular, the Refugee Convention stipulates a certain set of fundamental rights and a certain standard of treatment of refugees.[52] Some refugee scholars thus perceive the Convention as a human rights instrument. On the other side of the spectra there are those who claim that the Convention, rather than being a human rights instrument, is a duty based instrument[53] that regulates the relationship between states in the management of refugee protection.[54] The latter standpoint finds support in the preamble of the Convention, stipulating that a solution to "the refugee problem" cannot be achieved without international cooperation. This had led to an extensive debate about the character of the Convention.

Chetail points out that the phraseology of the Convention is atypical for a human rights treaty. The Convention seldom speaks about "rights", but rather spells out obligations of states. From this he draws the conclusion that the refugee under the Refugee Convention is not perceived as a rights bearer, but as a beneficiary of common standards regulating the conduct of states.[55] The language of the Refugee Convention could be explained with the fact that it was drafted before the emergence of international human rights law. As

[48] Hurwitz (2009), p. 13.
[49] Refugee Convention, article 1 (a) (2).
[50] Hathaway (2005), p. 158; UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, Geneva, December 2011, para 28.
[51] Chetail, Vincent: "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law", in: *Human Rights and Immigratio*n, ed. Ruth Rubio-Marín, Oxford University Press, Oxford, 2014, pp. 19–72, p. 24–25.
[52] Goodwin-Gill & McAdam (2007), p. 509; Refugee Protection – A Guide to International Refugee Law", p. 8.
[53] Chetail (2014), p. 39–40.
[54] Legomsky, Stephen: "Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection", in: *International Journal of Refugee Law*, Vol. 15, No. 4, 2003, pp. 567–677, p. 615.
[55] Chetail (2014), p. 39–40.

Wachenfeld and Christensen puts it, the Refugee Convention was restricted by the theoretical limitations of its day.[56]

Legomsky further notes that the Refugee Conventions is about solidarity between states in shouldering the responsibility for refugee protection.[57] The importance of international cooperation in the protection of refugees was also underlined in the Conference of the Plenipotentiaries, leading up to the conclusion of the Convention. The state representatives at the conference recommended that the contracting states to the Convention act in accordance with "[t]he true spirit of international cooperation in order that […] refugees may find asylum […]".[58]

Hathaway on his part describes the Refugee Convention as a "remedial and palliative branch of human rights law". He maintains that the specific purpose of the Convention is to guarantee that refugees, whose basic rights by default are not protected in their own country of origin, are entitled to invoke rights of substitute protection in any contracting state to the Refugee Convention.[59] Furthermore, McAdam describes the Refugee Convention as a "specialist human rights treaty". She draws this conclusion, inter alia, from the direct referral to the UDHR in the preamble of the Refugee Convention, which she claims indicates a desire of the drafters for the refugee definition to evolve together with human rights principles. She further points out that the preamble of the Convention directly urges state parties to ensure refugees with the widest possible exercise of their fundamental rights and freedoms.[60]

Chetail, albeit promoting a view that the Convention is a duty based instrument, underlines that the distinction between the Refugee Convention as a duty based instrument versus a human rights based instrument should not be overestimated. In practice, the duties of states under the Refugee Convention are naturally reflected as rights for refugees.[61]

Merging the standpoints of the scholarship together, one could make the claim that the refugee convention essentially deals with two relationships. On the one hand, the Convention sets out to regulate the relationship between states and on the other hand it sets out to regulate the relationship between the state and the refugee.

2.3 Obligations of States and Refugee Rights under the Refugee Convention

As mentioned previously, the Convention rarely spells out rights for refugees, but instead sets a minimum standard of treatment with regards to certain activities in the host states that states are obliged to grant refugees with. The

[56] Wachenfeld and Christensen, "Note: An Introduction to Refugees and Human Rights", in: *Nordic Journal of International Law*, Vol. 59, issue 2, 1990, pp. 178–185, p. 181.
[57] Legomsky (2003), p. 615.
[58] UN General Assembly, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.
[59] Hathaway (2005), p. 5.
[60] McAdam, Jane: *Complementary Protection in International Refugee Law*, Oxford University Press, Oxford, 2007, p. 30–31.
[61] Chetail (2014), p. 40.

standard of treatment is divided into levels; treatment at the level of *nationals*, treatment at the level of "*most favoured aliens*" and treatment at the level of *aliens*. Moreover, the obligation of states to provide assistance and certain substantive rights grows stronger as the legal attachment of a refugee to the state intensifies.[62] The Refugee Convention mentions four different levels of attachment: *presence* on the territory of a state, *lawful* presence on the territory of a state, *lawful stay* on the territory of a state and lawful *residence* on the territory of a state. The mere presence of a refugee on the territory of a state imposes a set of obligations for states. States are obliged not to return a refugee to persecution,[63] not to expulse her before her status has been negatively determined,[64] not to detain her for her illegal entry into the state's territory[65] and not to restrict her freedom of movement other than when necessary.[66] States are further obliged to accord refugees *lawfully* present on their territories with access to court[67], access to elementary education,[68] the right to self-employment[69] and the right to movable and immovable property.[70] Lawful presence is obtained as soon as the refugee's presence in the territory of a state is officially sanctioned through e.g an ongoing status verification,[71] whereas lawful stay requires an officially sanctioned *ongoing* presence in the state. [72] The latter brings with it a more significant number of state obligations.

The UNHCR holds that the Refugee Convention gives refugees a basis on which they can restore the social and economic independence needed to get on with their lives.[73] Thus, states are obliged to accord refugees with, inter alia, access to public education,[74] housing,[75] the right to be employed in a wage-earning employment,[76] to be self-employed and to establish commercial and industrial companies.[77] States are further obliged to provide refugees with, inter alia, identity and travel documents,[78] freedom of association,[79] freedom of religion[80] and freedom of movement.[81]

[62] Wachenfeld & Christensen (1990), p. 180.
[63] Refugee Convention, article 33.
[64] Ibid., article 32.
[65] Ibid., article 31.
[66] Ibid., article 33.
[67] Ibid., article 16.
[68] Ibid., article 22.
[69] Ibid., article 18.
[70] Ibid., article 13.
[71] Hathaway (2005), p. 176–177.
[72] Ibid., p. 189.
[73] UNHCR Executive Committee, *Local Integration and Self-Reliance*, 33rd Meeting, June 2005. para 11.
[74] Refugee Convention, article 22.
[75] Ibid., article 21.
[76] Ibid., article 17.
[77] Ibid., article 18.
[78] Ibid., articles 27–28.
[79] Ibid., article 15.
[80] Ibid., article 4.
[81] Ibid., article 26.

States are obliged under international law to take all necessary measures to protect refugees.[82] There are, however, issues relevant to the refugee experience that are left outside the scope of the Refugee Convention. Such issues have been partially mended by the protection granted to refugees through international human rights law. Some rights relevant for refugees in this legal framework will be highlighted in the following subchapter.

2.4 Obligations of States and Refugee Rights under the ECHR, the ICCPR and the ICESCR

States which have ratified the ICCPR or the ECHR are obliged to grant all individuals within their jurisdiction with the rights inherent to them in those treaties.[83] Meanwhile, state parties to the ICESCR have bound themselves to ensure a number of social rights to *everyone*.[84] The *universal applicability* of these treaties complement the protection granted to refugees under the Refugee Convention.[85] For example, the ICCPR stipulates a right to personal liberty and security,[86] the right to leave a country,[87] and the right to family unity.[88] Of importance is also that the ECHR, in contrast to the Refugee Convention, contains a general prohibition against discrimination.[89] Seeing that refugees often arrive to host countries with little belongings, the right to work,[90] the right to social security and the right to an adequate standard of living[91] stipulated in the ICESCR are also of great importance for refugees.

The universality of the rights in these treaties is of particular worth to refugees, given that the treatment granted to refugees under the Refugee Convention is based on the level of their attachment to the host state and at different levels of treatment.[92] Thus, while a refugee which has not had her status positively determined yet does not have a right to freedom of association,[93] the ICCPR stipulates that *everyone* has the right to freedom of association, without any limitations bound to the legal status of the individual. Similarly, a refugee that *has* had her status positively determined may still not have a right to freedom of association under the Refugee Convention if such

[82] UNHCR Executive Committee, Conclusion No. 81, *General*, 1997, para. (e); Hathaway (2005), p. 120.
[83] See ECHR, article 1 and ICCPR, article 2.
[84] See ICESCR, articles 2 (2), 6-9 and 11-13.
[85] UN Human Rights Committee, General Comment No. 15: *The Position of Aliens under the Covenant* 11 April 1986, para. 1–2; UN Human Rights Committee, General Comment No. 31: *The Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, (CCPR/C/21/Rev.1/Add. 13), 29 March 2004, para. 10; Hathaway (2005), p. 121.
[86] ICCPR, article 9.
[87] Ibid., article 11 (2).
[88] Ibid., article 23.
[89] Compare ECHR, Protocol No. 12, article 1 and Refugee Convention, article 3.
[90] ICESCR, article 6.
[91] Ibid., article 11.
[92] See subchapter 2.3.
[93] See Refugee Convention, article 15.

treatment is not accorded to nationals of the host contracting state, while the ICCPR makes no such limitations.[94] Nor does the ECHR.[95]

While states are obliged under international law to secure the personal freedom and the economic and social well-being of refugees, they are also obliged to protect refugees from return to persecution This obligation is enshrined in the principle of non-refoulement, often referred to as the "cornerstone of international refugee protection".[96] The content and scope of state's obligations under this principle will be subject to examination in the following chapter.

2.5 The Obligations of States under the Principle of Non-Refoulement

The term "refoulement" derives from the French "refouler", meaning to drive back or to repel,[97] and in the context of international law refers to the act of sending an individual into the arms of their persecutor.[98] The duty to non-refoulement under international law is enshrined in the Refugee Convention and in a number of human rights treaties.

Article 33 (1) of the Refugee Convention states that "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his *life or freedom* would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" [emphasis added]. The phrasing of this provision might raise some questions as to whom this protection against refoulement applies, since the refugee definition as entailed in article 1 (A) of the Convention makes no mention of persecution having to amount to threats against an individual's life or freedom for that person to be protected under the Refugee Convention. The protection granted by article 33 is however thought to apply to anyone encompassed by the refugee definition found in article 1 (A).[99]

Another relevant question as regards the beneficiaries of protection under article 33, is the status of the refugee. The UNHCR Executive Committee has stated that the prohibition on refoulement as expressed in the Refugee

[94] Refugee Convention, article 15; ICCPR, article 22.1. Although restrictions of this right may be made if prescribed by law, necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

[95] See ECHR, article 11 (1). Although, restrictions of this right may be made if such as prescribed by law, are necessary in a democratic society in interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. See article 11 (2) ECHR.

[96] Gammeltoft-Hansen: *Access to Asylum – International Refugee Law and the Globalisation of Migration Control*, Cambridge University Press, Cambridge, 2011, p. 44.

[97] Goodwin-Gill & McAdam (2007), p. 201.

[98] Hathaway (2005), p. 301.

[99] Caroni, Martina, Heim, Lukas, Kälin, Walter: "Article 33, para. 1 (Prohibition of Expulsion or Return ('Refoulement')/Défense d'Expulsion et de Refoulement)", in: *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol – A Commentary*, ed. Andreas Zimmermann, Oxford Press, Oxford, 2011, pp. 1327–1396, para 23.

Convention is in force irrespective of whether an individual has been formally recognized as a refugee.[100] This view is supported by Goodwin-Gill and McAdam, who argue that the protection against refoulement applies not only to those granted refugee status but also those with a presumptive or prima facie claim to refugee status. The principle of non-refoulement, as expressed in article 33 in the Refugee convention thus applies to *all* individuals claiming that they have a well-founded fear of persecution.[101]

It is apparent from the wording of article 33 that refoulement to *any* country is prohibited under the Refugee Convention. Article 33 states that the sending of a refugee "to the frontiers of *territories where* [the refugee´s] *life or freedom* would be threatened" is prohibited. The article contains no explicit referral to the country of origin. Thus, the sending of a refugee to any country in which they are at risk of persecution would be in breach of article 33. [102]

The content and scope of the principle of non-refoulement has to some extent been widened by several treaties within the field of international human rights. This widened scope of the principle of non-refoulement has been termed as "complementary protection".[103] The use of complementary protection has been encouraged by the UNHCR Executive Committee, as it applies to individuals in need of protection who do not fulfil the refugee definition of the Refugee Convention.[104] The clearest treaty-based sources of complementary protection under international human rights law are article 3 of the CAT, article 6 and 7 of the ICCPR and article 3 of the ECHR.[105]

While the principle of non-refoulement in the CAT is explicit, the principle is simply implied in the ICCPR and the ECHR. The principle as expressed in these treaties has instead been developed through the jurisprudence of the ECtHR and the Human Rights Committee.[106] The latter has interpreted article 7 of the ICCPR as a duty of states not to return individuals to a place where they would face a real risk of torture or cruel, inhuman or degrading treatment or punishment, when such treatment or punishment is a necessary and foreseeable consequence of the removal.[107] Similarly, the ECtHR has established that article 3 of the ECHR is applicable where substantial grounds have been shown for believing that an individual, if expelled, would face a real risk of being subjected to torture or other inhuman or degrading treatment or punishment in the receiving country.[108] Article 3 of the CAT, in contrast

[100] UNHCR Executive Committee Conclusion No. 6, *Non-refoulement*, 1977, para (c); UNHCR Executive Committee, Conclusion No. 81, para. (i), UNHCR Executive Committee Conclusion No. 82, *Conclusion on Safeguarding Asylum*, 1997, para. (d)(i).
[101] Goodwin-Gill & McAdam (2007), p. 233–234.
[102] Lauterbacht Elihu, Bethlehem, Daniel, "Non-refoulement (article 33 of the 1951 Convention" in *Refugee Protection in International Law*, p. 122 (para. 113 and 115–116).
[103] See e.g. Goodwin-Gill & McAdam (2007), p. 285;
[104] UNHCR Executive Committee, Conclusion No. 103, *Conclusions on The Provision on International Protection Including Through Complementary Forms of Protection*, 2005, paras. (i) and (k).
[105] Goodwin-Gill & McAdam (2007), p. 285.
[106] Ibid., (2007), p. 286.
[107] UN Human Rights Committee, *G.T. v. Australia*, CCPR/C/61/D/706/1996, 4 December 1997, para. 8.1.
[108] See e.g ECtHR, *Chahal v. The United Kingdom* (Grand Chamber), appl. no. 22414/93, 15 November 1996, para. 74; ECtHR, *Soering v. The United Kingdom*, appl. no. 14038/88, 7 July 1989, para. 91; ECtHR, *Cruz Varas and Others v. Sweden*, appl. no. 15576/89, 20

to the other treaties, only protects individuals from removal to a country where that person would risk *torture*. Additionally, its definition of torture only encompasses acts carried out by states as well as pain or suffering arising out of "lawful sanctions".[109] Neither the Refugee Convention, the ICCPR nor the ECHR makes such requirements.

While article 33 (2) of the Refugee Convention allows for derogations being made to the principle of non-refoulement when there are reasonable grounds to regard an individual as a danger to the national security or public order of a contracting host state, the principle of non-refoulement as entailed in general human rights law is absolute.[110]

2.6 The Obligation of States to Admit a Refugee into their Territories

The right to enter a territory where they can be protected from the risk of persecution is of fundamental concern for refugees. A refugee denied admission to a state is likely to either be returned to her country of origin or end up in orbit, in search for a state willing to admit her.[111] Meanwhile, states have the sovereign power to decide who gets to enter and reside in their territories.[112]

Article 14 (1) of the UDHR states that everyone has the right to seek and enjoy asylum from persecution. The notion of asylum has been explained by McAdam and Goodwin-Gill as *admission* to residence and lasting protection against the jurisdiction of another state.[113] States have commonly perceived this provision as a right *of states* to grant asylum, rather than the right of an individual to be granted asylum.[114] However, a great part of the scholarship, as well as the UNHCR, share the view that the principle of non-refoulement entails a duty not to reject a refugee at the border.[115] Yet, the question of whether the principle of non-refoulement entails such a notion has been heavily debated by the scholarship and even amongst the drafters of the Refugee Convention.

March 1991, para. 70; ECtHR, *Vilvarajah and Others v. The United Kingdom*, appl. nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, 26 September 1991, para. 103.

[109] See article 2 (1) CAT.

[110] ECtHR, *Chahal v. The United Kingdom*, para, 79; UN Human Rights Committee, *Mansour Ahani v. Canada*, CCPR/C/80/D/1051/2002, 29 March 2004, para. 10.10; UN Human Rights Committee Concluding Observations: *Canada*, (CCPR/C/79/Add.105), 7 April 1999, para. 13; UN Committee Against Torture, *Gorki Ernesto Tapia Paez v. Sweden*, CAT/C/18/D/39/1996, 28 April 1997, para 14.5; UN Committee Against Torture, *Seid Mortesa Aemei v. Switzerland*, CAT/C/18/D/34/1995, 29 May 1997, para. 9.8.

[111] Hathaway (2005), p. 279.

[112] International Legal Standards for the Protection from Refoulement. P. 569.

[113] Goodwin-Gill & McAdam (2007), p. 358.

[114] Gil-Bazo (2008), p. 38, see also Declaration on Territorial Asylum, 14 December 1967, New York, para 1.

[115] See e.g. Goodwin-Gill & McAdam (2007), p. 208; Hathaway (2005), p. 301; Noll, Gregor: *Negotiating Asylum. The EU acquis, Extraterritorial Protection and the Common Market of Deflection*, Martinus Nijhoff Publishers, Leiden, 2000, p 431; Lauterpacht & Bethlehem, (2003), para. 114; UNHCR Executive Committee, Conclusion No. 6, para. (c).

Article 33 does not contain an explicit referral to non-admission. However, the expression "in any manner *whatsoever…"* [emphasis added] in article 33 of the Refugee Convention suggests that refugees should be protected from refoulement not only in terms of expulsion, but also as non-admission.[116] Furthermore, Edwards argues that article 33 read together with the refugee definition in article 1 (A) of the Convention suggests a duty on states to, at a minimum, grant refugees access to asylum procedures for the purpose of a refugee status determination.[117] This view is shared by Stoyanova, who claims that the denial of access to state territory results in the denial of a status determination procedure. Without such a determination procedure, it would be impossible to identify those whom would be at risk of persecution upon return.[118] This suggests that article 33 implies at least temporary admission into a state's territory for the assessment of such a risk.[119]

A similar view was expressed by the ECtHRs in the case *Hirsi Jamaa and Others v. Italy*. The Court ruled that Italy had acted in breach of article 3 when its coast guards had picked up hundreds of refugees on international sea that were heading from Libya towards Italy and had returned them to Libya.[120] The Court found that article 3 of the ECHR was applicable because the applicants, while being on board the Italian coast guard's boat, had been under the effective control of the Italian authorities and thus under Italian jurisdiction.[121] The Court further concluded that Italy had acted in breach of article 3 by failing to assess the risks of ill-treatment awaiting the applicants in Libya.[122] The court referred to previous cases that it had before it, in which it had ruled that states are obliged to assess an individual's protection claim with rigorous scrutiny,[123] and that such an assessment must be meaningful for the applicant.[124] This implies that a state is obliged under the principle of non-refoulement to admit an individual in order to perform a meaningful and rigorous scrutiny of the risks awaiting an individual upon return where there is a (foreseeable) risk of refoulement.

In a similar vein, the Human Rights Committee has stated that although it is a matter for states to decide who it will admit to its territory, a non-national may enjoy the protection of the Covenant in relation to entry when a rejection could lead to inhuman treatment.[125]

Although the notion that the principle of non-refoulement entails a duty to admittance is controversial to some extent, the findings of this subchapter

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[116] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, para 7.
[117] Edwards, Alice: "Human Rights, Refugees, and the Right 'To Enjoy' Asylum", in: *International Journal on Refugee Law*, Vol. 17, issue 2, 2005, pp. 293-330, p. 302.
[118] Stoyanova, Vladislava: "The Principle of Non-Refoulement and the Right of Asylum-Seekers to Enter State Territory", in: *Interdisciplinary Journal of Human Rights Law*, Vol. 3, issue 1, 2008, pp. 1–11, p. 5.
[119] Goodwin-Gill & McAdam (2007), p. 215.
[120] ECtHR, *Hirsi Jamaa and Others v. Italy* (Grand Chamber), appl. no. 27765/09, 23 February 2012, paras. 136 and 158.
[121] Ibid., paras. 81–82.
[122] Ibid., paras. 133 and 157.
[123] ECtHR, *Chahal v. the United Kingdom*, para. 96.
[124] ECtHR, *Jabari v. Turkey*, appl. no. 40035/98, 11 October 2000, para. 40.
[125] UN Human Rights Committee, General Comment No. 15, para. 5.

implies that the principle of non-refoulement as expressed in international law imposes an obligation upon a state whose jurisdiction is triggered to admit a refugee temporarily for a fair and effective assessment of the risks faced upon rejection. Taken together, the principle of refoulement is perhaps the closest one could get to a right for refugees to seek asylum in international law.

2.7 Conclusion

The findings of this chapter show that the codification of refugee protection in international binding treaties was motivated by the need to provide refugees with a surrogate protection for their loss of state protection. The purpose of codifying refugee protection was further to guarantee that states would shoulder the responsibility to offer such surrogate protection and to respect other states which offered such protection. The examination of the nature of the Refugee Convention suggest that these objectives have been reproduced in the Convention. While the Convention deals with a vertical relationship in which states have a certain set of obligations towards refugees, it simultaneously deals with a horizontal relationship in which states have certain obligations towards each other.

This chapter has further shown that the principle of non-refoulement under international law obliges states to refrain from returning a refugee to any country where she would be at risk of persecution, torture or inhuman or degrading treatment or punishment. The findings of this chapter further suggest that the principle of non-refoulement, by obliging states to admit a refugee into their territories under certain circumstances, creates a right for refugees to seek asylum.

It has also been shown that the relationship between the refugee and the state entails more than simple protection from persecution. Instead, the Refugee Convention aims at securing the independence and well-being of a refugee both while she is awaiting a refugee status determination and after she has received one. The protection granted to refugees has been complemented by the ECHR, ICCPR and the ICESCR which entail a number of rights inherent to refugees as human beings.

3 The Allocation of Protection Responsibilities to an Intermediary Country under International Law

This thesis deals with the compatibility of the unilateral allocation of the responsibility to protect refugees to intermediary countries through the use of readmission agreements and the determination of countries as safe. As stated in subchapter 2.2, the purpose of refugee protection is to provide refugees with surrogate protection for the state protection that they have lost. The question raised in this chapter is whether a state may allocate its obligations to offer such surrogate protection to an intermediary state and if so, under which circumstances such an obligation allocation is permissible under international law.

3.1 The Obligation of Refugees to Seek Protection in an Intermediary Country

As mentioned in chapter 1.1, the countries to which an allocation of protection responsibility is executed are often transit countries, through which a refugee has passed en route to their chosen country of asylum. A relevant first question here is whether the *refugee* herself is obliged under international law to seek protection in the first country willing to offer it and if a failure to make use of this possibility can exempt the state from its obligation to offer her protection. Some argue that article 31 of the Refugee Convention can be interpreted as an obligation for refugees to seek protection in the first country willing to grant it.[126] The article's paragraph 1 states an obligation for states to refrain from imposing penalties on refugees "on account of their illegal entry or presence […] [when] coming directly from a territory where their life or freedom was threatened…" [emphasis added]. However, neither a textual analysis of the article nor an interpretation of the article in its context can be said to create an obligation for refugees to seek protection in the first country willing to grant it. The article stipulates a negative obligation for states, rather than a positive obligation for refugees. It should be noted that the travaux préparatoires of the article clearly show an acknowledgement by the state representatives that the path from the country of origin to the country of (potential) asylum is far from straight, and that it can entail temporary

[126] See Foster, Michelle: "Protection Elsewhere: The Legal Implications of Requiring Refugees to Seek Protection in Another State", in: *Michigan Journal of International Law*, Vol. 28, issue 2, 2007, pp. 223–286, p. 235 footnote 44.

presence and even failed attempts to seek protection in other countries.[127] Nothing in the travaux however suggest that a refugee should be excluded from protection for not having arrived directly to the country of asylum from her country of persecution.

3.2 The Permissibility of Transferring a Refugee to an Intermediary Country

One could argue that if article 33 of the Refugee Convention simply prohibits states from sending a refugee to a country in which she would be at risk of persecution then reversibly, the sending of a refugee to an intermediary country where she would not be subject to persecution should be permitted. Drawing such a conclusion through an e contrario reading of article 33 would however be slightly unwary. Article 33 establishes a negative obligation to not send a refugee to a country where she would be at risk of persecution. It does not authorize states to send a refugee to another country.[128] Since the article itself is silent on the issue of forcible return to a safe country, one must turn to an interpretation of the article in light of other articles in the Refugee Convention. Article 31 (2) stipulates that states shall not put unnecessary restriction on the freedom of movement of refugees that have entered a contracting state illegally until "their status in the country is regularized or *they obtain admission into another country*" [emphasis added]. This could possibly suggest that the sending of a refugee to an intermediary country is permissible under the Refugee Convention. In fact, there seems to have been a mutual understanding between many of the state representatives during the drafting of the Refugee Convention that an alternative for contracting states in place of returning a refugee to her country of persecution was to send her to another state.[129] Foster, applying a textual analysis of article 31, however argues that the wording of article 31 (2) rather implies admission into another country on the basis of the individual's own free will.[130] This view is supported by the next sentence in the article, stating that "[t]he Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country". As Noll puts it, this wording suggest that states are to refrain from imposing such restrictions on the refugee that will interfere with the objective of obtaining admission into another country, while it clearly suggests a refugee taking an active role in obtaining admission to another country.[131] During the drafting of the Refugee Convention, the US state representative wanted to include a wording into

[127] See UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, under the title "Article 31. Refugees Unlawfully in the Country of Refuge".
[128] Foster (2007), p. 234.
[129] See UNHCR (1990), under the title "Article 31. Refugees Unlawfully in the Country of Refuge".
[130] Foster (2007), p. 234.
[131] Noll, Gregor: "Article 31", in: *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol – A Commentary*, ed. Andreas Zimmermann, Oxford Press, Oxford, 2011, pp. 1243–1276, paras. 116 and 123.

article 24, now article 33 of the Convention, that explicitly stipulated that a refugee should *have the opportunity of trying to obtain* legal admission into another country before their expulsion order was put into effect.[132] This too suggests that admission into another country is to be preceded by a voluntary act by the refugee herself. Article 31 (2) thus does not seem to support the *forcible* return of a refugee to an intermediary country.

Article 32 prohibits expulsion of a refugee while she is lawfully present in a contracting host country. A refugee is lawfully present in a country from the moment she lodges an application for protection.[133] Meanwhile, article 33 is applicable from, at the very least, the moment a refugee is under the jurisdiction of a state.[134] This suggests that a state is not explicitly constrained from removing a refugee to a country in which she would not be at risk of persecution between the point at which she comes under the jurisdiction of a state and the point at which she lodges an asylum application in that state.[135]

Turning to the CAT, the Committee Against Torture has been more outspoken on the permissibility of transferring a refugee to an intermediary country. In the case Amei v. Switzerland, the Committee concluded that one way for a state to fulfil its obligation to non-refoulement was to find a third state willing to admit the applicant for protection.[136] Taking recourse to the interpretation of article 3 of the CAT as a final step of the interpretation of article 33 of the Refugee Convention, one can conclude that the forcible transfer of a refugee to an intermediary country is permitted under international law, provided that the refugee is offered protected in that country. It is thus relevant to examine what the scope and content of protection in that other country must be.

3.3 The Content and Scope of Protection in the Intermediary Country

For a transfer of a refugee to an intermediary country to be permitted under international law, the refugee must be protected from refoulement in that country. As mentioned in subchapter 2.5, states are obliged under international law to refrain from sending a refugee to a country where she would be at risk of persecution or ill-treatment. The principle of non-refoulement however also obliges states to refrain from sending a refugee to a country which would subsequently return her to a county where she is at risk of persecution or ill-treatment.[137] As regards the Refugee Convention, this follows from the phrasing of article 33, prohibiting the return of a refugee

[132] See UNHCR (1990), under "Article 31. Refugees Unlawfully in the Country of Refuge".
[133] Hathaway (2005), p. 658. Note that Hathaway claims that a refugee is lawfully present both while her claim to refugee status is being verified and when the reception state has opted to not to verify her refugee status. Drawing on this, she should thus be lawfully present as soon as she asks for protection.
[134] Hathaway (2005), p. 278.
[135] Foster (2007), p. 235.
[136] UN Committee Against Torture, *Seid Mortesa Aemei v. Switzerland*, para. 11.
[137] Lauterbacht Elihu, Bethlehem, Daniel, "Non-refoulement (article 33 of the 1951 Convention" in *Refugee Protection in International Law*, para 115.

"in any manner whatsoever" to the frontiers of territories where that person's life or freedom would be threatened.[138] The notion that article 33 entails a prohibition against both direct and indirect refoulement is not controversial.[139] Instead, the UNHCR has repeatedly confirmed this notion.[140]

The expulsion of a refugee to a country where there is a risk of subsequent refoulement is also prohibited under article 3 of the ECHR. The ECtHR has explained that a contracting state to the ECHR is held responsible under article 3 for removing an individual to a state which subsequently returns her to a place where she faces a serious risk of ill-treatment.[141] As regards the ICCPR, the Human Rights Committee has acknowledged that the prohibition on refoulement is applicable in situations where there is a real risk that the country to which a removal is to be executed will subsequently remove the individual to a country where she will be subject to ill-treatment.[142] Similarly, the Committee Against Torture has explained that article 3 of the CAT entails a prohibition on indirect refoulement.[143]

In order to avoid a risk of both direct and indirect refoulement, states are obliged to assess the risk of ill-treatment and subsequent refoulement in the country to which a removal is to be completed.[144] This includes, at least in regards to the Refugee Convention, an obligation to conduct a fair and effective refugee status determination procedure.[145] As regards the ECHR, the ECtHR has explained that a state is obliged to assess the risk of subsequent refoulement in an intermediary country before returning an individual to that country.[146] A risk of refoulement can arise from sending a refugee to a country where the law or practices cannot be relied upon to recognize her status as a refugee.[147] This issue can arise when the intermediary country lacks a proper adjudication procedure to assess the claims of refugees transferred to that country. It can also arise when the intermediary country has adopted a more restrictive interpretation of the refugee definition or of its obligations under the Refugee Convention. It should be noted, however, that it is not sufficient that the intermediary country has an adjudication procedure in place if the

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[138] Wouters Wolfram, Cornelis, *International Legal Standards for the Protection from Refoulement - A legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture*, Intersentia Ltd, Antwerp, 2009, p. 140.
[139] Foster (2007), p. 244.
[140] See e.g. UNHCR Executive Committee, Conclusion No. 58, *Problem of Refugees and Asylum-Seekers who move in an Irregular Manner from A Country in which they have already found Protection, 1989*, para. (f) (i); UNHCR Executive Committee, Conclusion No. 97, *Conclusion on Protection Safeguards in Interception Measures*, 2003, para. (a) (iv)
[141] See e.g. ECtHR, *T.I. v. The United Kingdom*, appl. no. 43844/98, 7 March 2000, under *The Court's Assessment.*
[142] UN Human Rights Committee, General Comment No. 31, para. 12.
[143] UN Committee Against Torture, General Comment No. 1: *Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*, 21 November 1997, para 2.
[144] Lauterbacht Elihu, Bethlehem, Daniel, "Non-refoulement (article 33 of the 1951 Convention" in *Refugee Protection in International Law*, p. 118 (para. 110).
[145] Stoyanova (2008), p. 2.
[146] ECtHR, *Hirsi Jamaa and Others v. Italy*, para. 133.
[147] See e.g. Hathaway (2005), p. 326.

transferred refugee cannot gain access to it.[148] It is likely not in breach of article 33 to send a refugee to a country that has interpreted its obligations in differentiation with the sending state at the level of "legal niceties and refinements",[149] but where it is known or could reasonably had been known that the status determination procedure or the understanding of the refugee definition of the Convention is *deficient*.[150] The ECtHR concluded in the case of *M.S.S v. Belgium and Greece* that the transfer of a refugee from Belgium to Greece had been in breach of article 3 of the ECHR due to the documented deficiencies in the Greek asylum system.[151]

As shown in subchapters 2.3-2.4, refugee protection consists of more than protection from refoulement. The question is whether a refugee must be entitled to protection beyond protection from refoulement in the intermediary country for her to be legally transferred to that country. As Legomsky points out, no official international authority has made a clear statement on what the content of protection must be in the intermediary country.[152]

Hathaway argues that refugees should at least be entitled to the rights that they have already acquired in the sending state before their transfer. Refugees would otherwise be stripped of their rights upon a transfer.[153] This view is supported by Foster. She argues that it would be in conflict with the purpose of the Refugee Convention if a contracting state could circumvent its obligations under the Convention by transferring a refugee to another state. Therefore, a state is under an obligation to ensure that the refugee enjoys all the rights she is entitled to under the Convention in the contracting state at the time of the transfer.[154] Following this logic, refugees should not only be entitled to the treatment accorded to them as lawfully present in the sending state upon return to another state but also all the rights entitled to them as human beings under the ICCPR, the ICESCR and the ECHR provided that the sending state is bound by those treaties.

The question of what the content of protection must be in the intermediary country leads us to the question of whether the intermediary state must be *legally bound* by the same obligations towards refugees as the sending state. The UNHCR has taken the view that the destination state's accession to the Refugee Convention, although essential, should not be a prerequisite for a transfer to that country. Instead, it is sufficient that it can be *demonstrated* that the destination country has developed a practice that is in accordance with either the 1951 Refugee Convention or its 1967 protocol.[155] This

[148] Foster (2007), p. 245–249.
[149] United Kingdom House of Lords (Judicial Committee), R v. Secretary of State for the Home Department, ex parte Thangarasa; R v. Secretary of State for the Home Department, ex parte Yogathas, [2002] UKHL 36, 17 October 2002, para. 9.
[150] Hathaway (2005), p. 326.
[151] ECtHR; *M.S.S v. Belgium and Greece* (Grand Chamber), appl. no. 30696/09, 21 January 2011, paras. 353, 358 and 360.
[152] Legomsky (2003), p. 640.
[153] Hathaway (2005), p. 333.
[154] Foster (2007), p. 270.
[155] UNHCR Lisbon Expert Roundtable, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers*, 9–10 December 2002, para. 15 (e); Foster (2007), p. 239.

suggests that whether or not the other state has ratified the Refugee Convention, there must be some form of compliance with the treaty.

Meanwhile, several scholars argue that accession to the Convention should be required for a lawful transfer to another country to be made. Byrne and Shacknove consider that an accession to the Refugee Convention is crucial, since it represent a binding commitment to respect and implement the provisions of the Convention.[156] Foster further questions whether a transfer to another state can result in the protection of the refugee's rights if the country in question is not even obliged as a matter of international law to implement the rights to which a refugee is entitled in the sending state.[157] Legomsky also points out that an accession to the Refugee Convention decreases the risk that the country later abandons refugee policies that are in line with the Convention.[158] As regards the CAT, the Committee on Torture has found in several cases that the fact that a transfer country is not a state party to the CAT speaks in favour of treatment contrary to article 3 of the CAT to take place, since the danger of being subjected to torture in that country will be bigger and because the applicant will lose their legal possibility to apply to the Committee for protection in that country.[159]

3.4 Assumptions of Safety in the Intermediary Country

During the drafting of the Refugee Convention, the state representatives expressed an assumption that a risk for refoulement would not arise upon transfer to a state which had ratified the Refugee Convention, since such a state would respect the duty to non-refoulement.[160] The question is whether a state may rely itself on the assumption that an intermediary country is safe on the ground that it has ratified the Refugee Convention or any other relevant treaty. On this subject, the UNHCR has stated that the designation of a country as safe must take in regard the country's *compliance* with human rights instruments, the actual degree of respect for human rights and the rule of law.[161] Adopting this view means that the mere ratification of the Refugee Convention by a country would not be sufficient for another state to send an individual there.

The question of assumptions of safety based on the accession of an intermediary state to the Refugee Convention was addressed by Lord Bridge of Harwich in a case before the House of Lords regarding the return of a

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[156] Byrne, Rosemary, Shacknove, Andrew, 'The Safe Country Notion in European Asylum Law', *Harvard Human Rights Journal*, vol. 9, 1996, pp. 190–196, p. 200.
[157] Foster (2007), p. 240.
[158] Legomsky (2003), p. 660.
[159] See e.g. UN Committee Against Torture, *Balabou Mutombo v. Switzerland*, CAT/C/12/D/013/1993, 27 April 1994, para. 9.6; UN Committee Against Torture, *Tahir Hussain Khan v. Canada*, CAT/C/13/D/15/1994, 4 July 1994, para. 12.5.
[160] Statement of Mr. Rochefort of France, UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting, 23 November 1951, A/CONF.2/SR.16; Hathaway (2005), p. 328.
[161] UNHCR Global Consultations on International Protection, 2nd meeting, *Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, para. 39.

Ugandan refugee to Kenya. He argued that, when a refugee from a totalitarian regime has arrived to a state from an intermediary country which is a state party to the Refugee Convention, there rests no obligation on the host state to investigate that individual's asylum claim. Instead, the individual can be returned to the intermediary state, whose responsibility it will be to investigate the individual's claim. This is due to the assumption that a state party to the Convention will not engage in refoulement or ill-treatment contrary to article 33. However, when it is well-known that the intermediary country regularly returns refugees to the totalitarian regime, it would be as much in breach of article 33 to send the individual to the contracting state, as sending her directly to the totalitarian regime. He further argued that, in a case where such returns are not so well-known but there is some evidence of danger, the task is to decide whether the danger is sufficiently substantial to involve a potential breach of article 33.[162]

Similarly, the ECtHR has accepted that an assumption of safety in an intermediary country can be applied when that country is bound by treaties that obliges it to have certain reception conditions and an asylum procedure in place that ensures that the transferred individual will have her human rights protected.[163] However, the Court has underlined that such an assumption must be rebuttable.[164] It has stated that it would be against the purpose and object of the ECHR to absolve a state from its responsibility to non-refoulement under the ECHR through *automatic* reliance on arrangements attributing protection responsibilities to other states.[165] Whether a state is considered to be safe or not, article 3 of the ECHR obliges the sending state to assess the safety for the particular applicant in that state before sending her there.[166] No blanket statements of safety are thus permitted under article 3. The ECtHR has further concluded that when reliable sources have reported that the intermediary country engages in or tolerates practices that are manifestly contrary to the principles of the ECHR, the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in the intermediary country are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment in that country.[167] Neither may a state merely assume that an individual will be treated in conformity with the ECHR standards and be protected against refoulement in an intermediary country. The sending state is instead obliged to *ex officio* verify how the intermediary country applies its asylum legislation in practice.[168] Similarly, the Court has held that when the national authorities in the sending state is faced with information that human rights are being systematically violated in the intermediary country, it is obligated under article 3 of the ECHR to find

[162] United Kingdom Court of Appeal (England and Wales), *R v. Secretary of State for the Home Department, Ex parte Khawaja,* [1982] 2 All ER 523, [1982] 1 WLR 625, 26 February 1982.
[163] ECtHR, *K.R.S v. The United Kingdom*, appl. no. 32733/08, 2 December 2008, under *The Court's assessment*, para (b).
[164] ECtHR, *M.S.S v. Belgium and Greece*, para. 345.
[165] ECtHR, *T.I. v. United Kingdom*, under *The Court's assessment.*
[166] See ECtHR, *M.S.S v. Belgium and Greece*, para. 325; ECtHR, *Tarrakhel v. Switzerland* (Grand Chamber), appl. no. 29217/12, 4 November 2014, para. 104.
[167] ECtHR, *M.S.S v. Belgium and Greece*, para. 353.
[168] Ibid., para. 359.

out about the treatment that the individuals would risk after their return to that country.[169]

The Committee on Torture, in a case concerning the transfer of an individual from Switzerland to Turkey, rejected the argument that Turkey would be safe for the individual because the country had ratified the CAT. The Committee explained that, since the practice of torture was still systematic in Turkey, the mere ratification of the CAT did not constitute a sufficient guarantee for the individual's security.[170]

Taken together, the findings of this subchapter suggest that an assumption of safety in an intermediary country is insufficient for a transfer of a refugee to be undertaken by a state in compliance in international law. Instead, the sending state is obliged to undertake an individual assessment of whether the country is *de facto safe* for the refugee in her particular circumstances.

3.5 The Consent of the Intermediary Country

Another question raised is whether the transfer of a refugee to an intermediary country should be preceded by the consent of that country to take on the responsibility to protect the refugee in question. As Legomsky has noted, the consent of the intermediary state is the key to all other elements of effective protection. Still, the UNHCR has been inconsistent on this point.[171] It has previously stated that a readmitting country should expressly agree to take back the refugee, to determine her asylum claims and to provide any needed protection.[172] It has further stated that the transfer of a refugee must be made after consent given on a case-by-case basis. This, according to the UNHCR, is inherent in the protection objective of ensuring that one state will assume responsibility for assessing the asylum claim of every refugee. Such a responsibility cannot be presumed but must be subject to a mutual agreement between the sending state and the intermediary state.[173] The UNHCR has also advised against the use of readmission agreements for such responsibility allocation, unless the agreement does not explicitly provide due regard for the special situation of the refugee.[174] However, other UNHCR statements suggest that an *implicit* consent given on a bilateral basis to admit a refugee and to grant her access to a fair asylum procedure, through which her application will be examined on its merits, is sufficient. The absolute minimum should be that the authorities of the readmitting state are informed

[169] ECtHR, *Hirsi Jamaa and Others v. Italy*, para. 133.
[170] Ismail Alan v. Switzerland, CAT/C/16/D/21/2015, 13 May 1996, para. 11.5.
[171] Legomsky (2003), p. 630-631.
[172] UNHCR, Global Consultations on International Protection, 2nd meeting, Regional meeting, Budapest, 6–7 June 2001, para. 15.
[173] UNHCR, Global Consultations on International Protection, Background paper No. 2, *The application of the "safe third country" notion and its impact on the management of flows and on the protection of refugees*, Geneva, May 2001, para (iii).
[174] UNHCR Regional Bureau for Europe, *An Overview of Protection Issues in Europe Legislative Trends and Positions Taken by UNHCR*, European Series, Vol. 1, No. 3, Geneva, September 1995, p. 24.

that the substance of the asylum claim has not been examined in the sending state. This is to avoid that the intermediary country returns the refugee to her country of persecution based on the assumption that her asylum claim was rejected in the sending state.[175]

3.6 Conclusion

The findings of this chapter show that international law neither explicitly prohibits nor permits the allocation of protection responsibilities to an intermediary country. However, a state may send a refugee to an intermediary country if she is protected in that country and if that country has consented, at least implicitly, to admit her to an asylum procedure. It is thus clear that no unilateral allocation of protection responsibilities is permitted under international law. The refugee must further be protected against persecution, ill-treatment and refoulement in the intermediary country. In this regard, it is essential that the intermediary country has a proper asylum procedure in place. For a state to legally send a refugee to an intermediary country, that country must be able to grant the refugee with protection in accordance with the Refugee Convention and the ICCPR. The country must also respect human rights and the rule of law. However, the intermediary must not have ratified the Refugee Convention for a transfer of a refugee to that country to be permissible. It must however have ratified the CAT.

States are under all circumstances obliged to assess the risk for refoulement and subsequent refoulement in the intermediary country before sending a refugee there. The intermediary country's ratification of the Refugee Convention or any other relevant treaty does not absolve the sending states from this obligation.

It has further been shown in this chapter that a refugee is not obliged under international law to seek protection in the first state willing to grant it. There is nothing in international law that suggest that states may deny a refugee protection on the ground that she could have sought protection elsewhere.

[175] UNHCR, EU Seminar on the Associated States as Safe Third Countries in Asylum Legislation, *Considerations on the "Safe Third Country Concept"*, Vienna, 8 - 11 July 1996, p. 3; UNHCR, Bureau for Europe, p. 24.

4 The Allocation of Protection Responsibilities to an Intermediary Country in the EU Legal Framework

In this chapter the focus is shifted from an international context to a European context. The main purpose of this chapter is to examine the obligations of member states under EU asylum policy when engaging in responsibility allocation practices through the determination of countries as safe. In order to fully understand these practices and the obligations that EU member states are bound by while using them, it is necessary to put them in their legal context. This chapter thus briefly presents the legal basis for a harmonized EU asylum policy and how states' obligations in relation to refugee protection under international law is codified in the EU legal framework.

4.1 The Common European Asylum System

The Common European Asylum System (hereinafter CEAS) was established by the 1999 Tampere Presidency Meeting. In Tampere, the European Council decided to establish a system for a clear and workable determination of the member state responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception of asylum seekers and a harmonization on the rules of the recognition and content of refugee status.[176] The legal basis for CEAS is found in article 78 of the Treaty on the Functioning of the EU[177] (hereinafter TFEU).[178] The article states that the EU "shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement […]". The establishment of a common asylum system has resulted in a harmonized legal framework, consisting of a number of legal instruments related to, inter alia, refugee protection. Trough the sub-

[176] European Council, Tampere European Council, Presidency Conclusions, Tampere, 15–16 October 1999, para 13-14.
[177] Consolidated version of the Treaty on the Functioning of the European Union, in: Official Journal of the European Union, OJ C 202/47, 7 June 2016.
[178] Boeles, Pieter, den Heijer, Maarten, Lodder, Gerrie, Wouters, Kees: *European Migration Law*, 2nd ed., Intersentia Ltd, Cambridge, 2014, p. 249.

paragraphs of article 78 (2) has emerged several secondary EU instruments on the concept of "asylum".[179]

The CEAS does not exist in a legal vacuum. Article 78 (1) of the TFEU expressly states that the common policy on asylum shall be in compliance with the principles of the Refugee Convention and "other relevant treaties". Reference to the Refugee Convention is also found in article 18 of the Charter of Fundamental Rights of the European Union[180] (hereinafter the Charter), stating that "the right to asylum" shall be guaranteed with due respect for the rules of the Refugee Convention.[181] Moreover, article 19 (2) of the Charter explicitly prohibits refoulement. The explanations relating to the Charter makes clear that this prohibition incorporates the relevant case law from the ECtHR regarding article 3 of the ECHR.[182] If a matter is within the scope of EU law, a Member State must act in accordance with the EU Charter of Fundamental Rights of the European Union (hereinafter The Charter). The rules of the Charter are legally binding to the member states and its provisions has treaty status. The secondary EU legislation, including directives and regulation on refugee protection, must thus be in compliance with the Charter for them to be valid and legal.[183] It is thus clear that the EU member states are bound by the same obligations as the state parties to the Refugee Convention and the ECHR. Additionally, all 28 member states have ratified the CAT, the ICCPR and the ICESCR.[184]

One directive whose basis is found in the subparagraphs of article 78 (g) of the TFEU is Directive 2012/33/EU[185] (hereinafter Reception Conditions Directive), which stipulates obligations for states to lay down reception standards for refugees awaiting an assessment of their asylum claims. Once a refugee has had her asylum claim positively determined, states are obliged under Directive 2011/95/EU[186] (hereinafter Qualification Directive) to provide her with an additional set of rights.[187] Some of the rights in the

[179] Ibid., p. 250.
[180] The Charter of Fundamental Rights of the European Union (2016/C 202/02), in: Official Journal of the European Union, OJ C 202/389, 7 June 2016.
[181] The Charter, article 18; Explanations relating to the Charter of Fundamental Rights of the European Union, (2007/C 303/2) in: Official Journal of the European Union, C 303/17, 14 December 2007; see also TFEU, article 78 (1)
[182] Explanations relating to the Charter of Fundamental Rights of the European Union.
[183] Gil-Bazo (2008), p. 33; See also Consolidated version of the Treaty on European Union, in: Official Journal of the European Union, OJ C 202/15, 7 June 2016, article 6 (1).
[184] Council of Europe, *Chart of signatures and ratifications of Treaty 005 Convention for the Protection of Human Rights and Fundamental Freedoms Status as of 29/12/2016;* High Commissioner for Human Rights, List of State Parties to the ICCPR, ICESCR and the CAT.
[185] Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), in: Official Journal of the European Union, L 180/96, 29 June 2013.
[186] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), in: Official Journal of the European Union, L 337/9, 20 December 2011.
[187] See Qualification Directive, article 20 (2).

Directive can be traced back to the Refugee Convention[188] while others reflect general human rights standards.[189] Thus, as regards the treatment accorded to refugees, the EU legal framework, at least in its internal dimension, goes beyond the content of protection under the Refugee Convention. More importantly, the concept of "subsidiary protection" has been introduced through the Qualification Directive. Subsidiary protection refers to the protection granted to individuals under general human rights treaties.[190] In the context of the Qualification Directive, subsidiary protection includes protection of all third country nationals who do not qualify as refugees but have left their country or origin or habitual residence due to a real risk of "serious harm" and owing to such a risk is unwilling or unable to avail herself from the protection of that country.[191] Serious harm, as defined in the Directive, includes not only death penalty, torture or other inhuman or degrading treatment or punishment but also a serious and individual threat to a civilian's life or person by reason of indiscriminative violence in situations of international or internal armed conflict.[192] This broadening of protection, covering those who may not qualify as refugees but still have a fear of harm upon return, can be seen as a contribution to the international refugee law regime. Another directive whose legal basis is found in article 78 of the TFEU is the Asylum Procedure Directive, whose purpose it is to create "common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status".[193]

Although the CEAS consists of several legal instruments on refugee protection, Ineli-Ciger, Singer and Stoyanova claim that it would be misleading to perceive it as a completely protection oriented system. They argue that its rationale is more complex and that the system partially is a product of the member state's policy interests in the field of migration and asylum. Thus, it was not only established with the view to enhance asylum protection but also to combat so called "asylum shopping".[194] In fact, they argue, the development of harmonized asylum policies serves the purpose of limiting secondary movements of asylum seekers in search for better protection.[195] One legal instrument clearly set out to combat this (perceived) phenomenon, is the Dublin Regulation[196], which also has its legal basis in article 78 (g) of the TFEU. The Regulation creates a regime governing how the responsibility to protect refugees is to be allocated between member states. According to the Dublin Regulation, the asylum claim of an individual

[188] See e.g. Qualification Directive, articles 25 (right to travel documents), 26 (access to employment), 29 (access to social welfare), 32 (right to accommodation).
[189] See e.g. Ibid., articles 30 (access to healthcare),
[190] Boeles, den Heijer, Lodder, Wouters (2014), p. 250.
[191] Qualification Directive, article 2 (f).
[192] Ibid., article 15.
[193] TFEU, article 78 (2) (e).
[194] Bauloz, Céline, Ineli-Ciger, Meltem, Singer, Sarah and Stoyanova, Vladislava: "Introducing the Second Phase of the Common European Asylum System" in: *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System*, Martinus Nijhoff Publishers, Leiden, 2015, pp. 1–19, p. 1.
[195] Bauloz, Ineli-Ciger, Singer and Stoyanova (2015), p. 2.
[196] Boeles, den Heijer, Lodder, Wouters (2014), p. 257.

shall only be examined by one single member state.[197] As a general rule, that country should be the first country in which an individual files her application for protection.[198] However, if an applicant has crossed irregularly into the EU through a third country and it can be established which that country is, then the responsibility to examine the asylum application will be allocated to that country. [199] The allocation of the responsibility to protect refugees relies on the notion that all EU member states are "safe" countries.[200] The notion that an intermediary state, which a refugee has transited through on her way to her chosen country of asylum, should be responsible for the protection of the refugee is reproduced in the safe third country concepts. The safe third country concept and the safe *European* third country concept build on the notion that an EU member state is precluded from the obligation to protect refugees when they have had the *possibility* to receive protection in a third country.[201] These concepts and the criteria laid down in the Asylum Procedure Directive for the allocation of protection responsibilities to safe third countries will be examined in the following subchapters.

4.2 The Allocation of Protection Responsibilities to a Safe Third Country

According to article 33 (2) (c) of the Asylum Procedure Directive, member states may declare an asylum application as inadmissible if they consider that the possibility exists for the refugee to receive protection in a third country.[202] The Directive requires that the country in question should be one to which the refugee has a reasonable connection.[203] In practice, the third country will often be a country through which the refugee has transited on her way to the member state.[204]

An application being decided as inadmissible means that no examination will be made of the asylum claim that the refugee presents.[205] The formal identification of a safe third country thus precedes the substantive examination of a refugee's asylum claim.[206] If a third country is considered as safe in accordance with the criteria laid down in article 38 of the Asylum Procedure Directive, the refugee will be excluded from the protection granted

[197] See Dublin Regulation, article 3 (1).
[198] Ibid., article 7 (2).
[199] Ibid., article 13 (1).
[200] See Ibid., Recital (3).
[201] Boeles, den Heijer, Lodder, Wouters (2014), p. 281.
[202] Asylum Procedure Directive, articles 38 (1) and 38 (2) (a).
[203] Ibid., article 38 (2) (c).
[204] Albuquerque Abell, Nazare: "The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees", in: *International Journal of Refugee Law*, Vol. 11, issue 1, 1999, pp. 60-83., p. 63.
[205] Boeles, den Heijer, Lodder, Wouters (2014), p. 280.
[206] Lavenex, Sandra: *Safe Third Countries – Extending the EU Asylum and Immigration Policies to Central and Eastern Europe*, Central European University Press, Budapest, 1999, p. 51.

under the Qualification Directive and returned to the third country for a (possible) examination of her asylum claim.[207] A determination of an asylum application as inadmissible on safe third country grounds can be made either when the refugee applies for protection from within the physical territory of the member state or when she is present at the border or in a transit zone of that state.[208] The member states are, however, obliged to make an inadmissibility decision at the border or within their transit zones within reasonable time. If a decision has not been taken within four weeks, the applicant shall be granted entry to the territory of the member state to have her application processed in accordance with the general procedural rules of the Directive.[209]

There are different methodologies for designating third countries as "safe". The Asylum Procedure Directive requires member states to either make case-by-case considerations of the safety of the country for a particular refugee or to make a national designation of countries considered being generally safe.[210] Either way, the safe third country concept may only be applied when a member state is satisfied that the refugee will be treated in accordance with certain principles in the third country concerned. Namely, that her life and liberty is not threatened on account of her race, religion, nationality, membership of a particular social group or political opinion, that there is no risk for serious harm as defined in the Qualification Directive, that the principle of non-refoulement in accordance with the Refugee Convention is respected and that 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. Furthermore, there must exist a possibility to request refugee status in the third country concerned and, *if found to be a refugee*, to receive protection in accordance with the 1951 Geneva Convention.[211] The first set of principles mentioned are all different variations of protection against persecution or ill-treatment. The second set of rights is more thought-provoking. Judging from the wording of article 38 (1) (e) of the Asylum Procedure Directive, protection in accordance with the Refugee Convention, with the exception of the protection against refoulement, must only be provided after a positive refugee status determination. This excludes the rights accorded to refugees under the Refugee Convention before they have their status positively determined. This includes, inter alia, the protection against expulsion and penalties for an illegal entry into the host state, protection against restrictions on the freedom of movement of the applicant in certain circumstances, the right to access to court, the right to self-employment and the right to elementary education.[212] Neither does the article require that the country concerned should grant the individual protection in accordance with general human rights law.

In the preamble of the Asylum Procedure Directive, it is stated that the designation of a third country as safe cannot establish an absolute guarantee

[207] Albuquerque Abell (1999), p. 64.
[208] Asylum Procedure Directive, article 43 (1) (a).
[209] Ibid., article 43 (2).
[210] Ibid., article 38 (2).
[211] Ibid., article 38.
[212] See subchapter 2.3.

of safety for refugees from that country.[213] Accordingly, member states are obliged to lay down rules in their national legislation that will allow for an individual examination of whether the third country concerned may be considered as safe for the particular refugee.[214]

The Directive further stipulates a number of procedural safeguards to be taken in relation to the decision that a third country is considered as safe for the refugee. Most importantly, safe third country rules laid down in national legislation must permit the refugee to challenge the application of the safe third country concept on the ground that the third country is not safe in her particular circumstances.[215]

It should be noted that the decision to determine a safe third country as safe and to allocate the responsibility to protect a refugee to that country is a strictly unilateral act by a EU member state. The Asylum Procedure Directive nowhere stipulates that the determination of a country as safe requires the consent of the third country in question. Article 38 (4) states, however, that the sending member state is obliged to examine the asylum application in substance according to the principles and guarantees laid down in the Asylum Procedure Directive if the third country concerned refuses to admit the refugee into its territory. It is not clear whether this means that the transfer of an individual to the member state must be preceded by a formal request to the third country in question to admit the refugee to its territory, or if the obligation to examine the application is activated when a transfer to the other state has been attempted but have failed. More importantly, the Asylum Procedure Directive nowhere requires the member states to acquire the consent of the third country concerned to examine the asylum application of the refugee and to grant her protection if found that she is in need of it.

The European Commission has recently laid down a proposal for replacing the Asylum Procedure Directive with a regulation.[216] As a regulation, the rules of the treaty will be immediately applicable and enforceable by all member states.[217] The proposal aims at achieving full harmonisation of the rules laid down in the Asylum Procedures directive, including the safe third country rules. National safe country lists are thus to be replaced by EU common safe country lists.[218] More importantly, the Commission has proposed that the use of the safe third country concept becomes mandatory for the EU member states.[219] If the proposal goes through, member states will also be obliged to examine the admissibility of an application on safe third country grounds *before* they determine the member state responsible under

[213] Asylum Procedure Directive, recital (42).
[214] Ibid., recital (42).
[215] Ibid., article 38 (2) (c).
[216] European Commission, *Proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, COM (2016) 467 final, Brussels, 13 July 2016, p. 3.
[217] TFEU, article 288; Lenaerts, Koen, Van Nuffel, Piet: *European Union Law*, 3rd ed., Sweet & Maxwell, London, 2011, p. 812.
[218] European Commission, *Proposal for a regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU*, COM (2016) 467 final, Brussels, 13 July 2016, p. 5.
[219] Ibid., p. 28.

the Dublin regulation.[220] Member states are today free to choose whether they want to apply the safe third country rules before or after the transfer of a refugee to another member state under the rules of the Dublin Regulation,[221] if they want to apply it at all. The Commission's proposal thus implies not only a move towards further externalization of the responsibility to protect refugees but of *obliging* states to do so.

4.3 The Allocation of Protection Responsibilities to a European Safe Third Country

The European safe third country concept applies, as the name suggests, exclusively to European states that are not member states of the European Union. When a refugee has entered, or is trying to enter, a member state "illegally" from a country deemed as safe under article 39 of the Asylum Procedure Directive, that member state is exempted from examining their asylum application according to the rules laid down in the Asylum Procedure Directive. No *individual* assessment must be made of the safety for the refugee in the European third country.[222]

The criteria for determining a country as safe under the European safe third country concept is stricter than the criteria applied for the determination of a third country as safe under article 38 of the Asylum Procedure Directive. While the safe third country concept only requires that refugees shall be treated in accordance with a certain set of principles primarily concerned with protection against refoulement, the safe European third country concept requires that the third country in question has *ratified* and *observes* the provisions of the ECHR[223] and the Refugee Convention without any geographical limitations,[224] and that is has in place an asylum procedure prescribed by law.[225] The concept thus implies that other rights than those simply protecting refugees from refoulement should be guaranteed upon transfer. Like the safe third country, however, the determination of a European third country as safe is a unilateral action. It does not require the consent of the third country in question to admit the refugee into its territory or to admit her to an asylum procedure.

Certain procedural safeguards apply to the European safe third country concept. Firstly, the refugee is allowed to rebut the presumption that the country will be safe for her in her particular circumstances.[226] When a member state declares the application of a refugee inadmissible on European

[220] Ibid., p. 16.
[221] Dublin Regulation, article 3 (3); Court of Justice of the European Union, Case C-695/15, *Shiraz Baig Mirza v. Bevándorlási és Állampolgársági Hivatal*, 17 March 2016, EU:C:2016:188, paras. 42, 46 and 53,
[222] Asylum Procedure Directive, article 39 (1).
[223] Ibid., article 39 (2) (c).
[224] Ibid., article 39 (2) (a).
[225] Ibid., article 39 (2) (b).
[226] Ibid., article 39 (3).

safe third country grounds, the member state is obliged to inform the applicant about the grounds for the inadmissibility of her application. The member state is further obliged to provide her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.[227] Strangely, no equivalent obligation exists as regards the safe third country concept.

When the third country refuses to readmit the refugee, the member state is obliged to undertake a substantive examination of the refugee's asylum application in accordance with the basic principles and guarantees of the Asylum Procedure Directive.[228]

4.4 Conclusion

This chapter has shown that there is an EU legal framework in place which imposes obligations on the member states in relation to refugee protection, that largely corresponds to the obligations of states under international law. In the same legal framework, responsibility allocation mechanisms are codified which excludes refugees from the protection inherent to them under that very framework. These practices are found both in the Dublin Regulation and in the safe third country concepts as laid down in the Asylum Procedure. The act of allocating protection responsibilities thus seems to have been institutionalised in EU asylum policy.

This chapter has also shown that certain protection must be granted to the refugee in a third country for an allocation of protection responsibilities to that country to be permissible under the Asylum Procedure Directive. The protection envisaged for refugees in the third countries differs between the respective third country concepts. While a safe third country is mainly to protect refugees from refoulement and persecution, a European safe third country must accord refugees with protection in accordance with the Refugee Convention and the ECHR.

The allocation mechanisms also differ as regards the member state's obligation to assess the safety of the refugee in the third country. While member states are obliged to assess the safety for the refugee in a safe third country on account of her particular circumstances, no such obligation rests on member states as regards the allocation of protection responsibilities to a *European* safe third country. A commonality between the respective safe country concepts is, however, that the member states are under no obligation to receive the consent of the third country to which it allocates the responsibility to protect the refugee.

[227] Ibid., article 39 (5).
[228] Ibid., article 39 (6).

5 The Allocation of Protection Responsibilities to a Safe Third Country through Readmission Agreements

The purpose of this chapter is to present the purpose of readmission agreements, their scope and content and their interrelationship with the safe third country concept. In order to contextualize the implementation of readmission agreements in conjunction with the safe third country concept, an examination of the readmission between the EU and Turkey is made.

5.1 Conclusion, Content and Use of Readmission Agreements

As stated in the previous chapter, the EU legal framework on refugee protection stems from article 78 (2) of the TFEU. Meanwhile, article 78 (2) *(g)* forms the legal basis for the *external* dimension of CEAS. It states that the EU is to conclude partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection. One such measure stemming from the partnership and cooperation with third countries is the conclusion of readmission agreements.

Readmission agreements create reciprocal obligations for the contracting states to readmit third country nationals and their own nationals and stipulate rules on the readmission procedure.[229] The purpose of a readmission agreement is thus to facilitate expulsion.[230] As shown in the previous chapter, the safe third country concepts as expressed in the Asylum Procedure Directive are based on unilateral decisions and do not require the consent of the third country in question. However, states are not obliged under international law to accept the return of a third country national into their territory.[231] The effective implementation of safe third county concepts thus requires the cooperation of the third country concerned. [232] Hence, to facilitate the operation of the third country concept, several readmission agreements have been drawn up between various EU member states and third countries.[233] However, readmission agreements are not exclusively used to readmit refugees on third country grounds. They are also used to readmit any third country national who has lost, or who never had, the permission of the

[229] Giuffré, Mariagiulia: "The European Union Readmission Policy after Lisbon", in: *Interdisciplinary Political Studies*, Vol.1, 2011, p. 10.
[230] Lavenex (1999), p. 79.
[231] European Readmission Policy, p. 38 & 47; Giuffré (2013), p. 85.
[232] Coleman (2009), p. 67.
[233] Albuquerque Abell (1999), p. 63; Coleman (2009), p. 46.

readmitting state to enter or reside within its territory.[234] In a European context, this includes anyone who have had her asylum application declined on grounds in the Qualification Directive or the Asylum Procedure Directive.[235]

Readmission agreements naturally contain a provision obliging the contracting states to readmit their own nationals or third country nationals. This obligation is conditional upon proof or a valid assumption based on prima facie evidence on either the nationality of the individual concerned, or that the individual has resided in or transited through the territory of the requested state. The documents considered as valid proof or prima facie evidence by the contracting parties are normally listed in the annex to the agreement.[236] Readmission agreements generally do not contain any provisions regarding the protection of refugees. Refugees are simply treated as migrants without a residence permit in the context of readmission agreements. Thus, no specific provisions regulating the readmission of individuals readmitted on safe third country grounds are found in these agreements. Most readmission agreements contain a so called "non-affection clause", stipulating that the readmission agreement concerned shall be without prejudice to the rights, obligations and responsibilities of the EU, its member states and the third country arising from international law. Certain conventions are particularly highlighted in this part, amongst them the Refugee Convention, the ECHR and the CAT.[237] The non-affection clause does not grant any new obligations for any of the contracting states to which they are not already bound.[238] Rather, it is a reminder to the contracting states to respect their obligations under international law when applying the readmission agreements.

[234] Guild & Moreno-Lax (2013), p. 9.
[235] Giuffré (2013), p. 86.
[236] See e.g. Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, in: Official Journal of the European Union, L 134/3, 7 May 2014.
[237] See e.g Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, para 18.1; Agreement between the European Community and the Republic of Albania on the readmission of persons residing without authorisation, in: Official Journal of the European Union, L 124/22, 17 May 2005, para. 17; Agreement between the European Community and Bosnia and Herzegovina on the readmission of persons residing without authorisation, in: Official Journal of the European Union, L 334/66, 19 December 2007, para 17; Agreement between the European Community and the former Yugoslav Republic of Macedonia on the readmission of persons residing without authorisation, in: Official Journal of the European Union, L 334/7, 19 December 2007, para. 17; Agreement between the European Community and the Republic of Moldova on the readmission of persons residing without authorisation, in: Official Journal of the European Union, L 334/149, 19 December 2007, para. 17; Agreement between the European Community and the Republic of Montenegro on the readmission of persons residing without authorisation, in: Official Journal of the European Union, L 334/26, 19 December 2007, para. 17; Agreement between the European Community and Serbia on the readmission of persons residing without authorisation, , in: Official Journal of the European Union, L 334/46, 19 December 2007, para. 17; Agreement between the European Community and the Russian Federation on readmission, in: Official Journal of the European Union, L129, 17 May 2007, para. 18.
[238] Coleman (2009), p. 105.

In the language of the EU, individuals being returned with readmission agreements are "illegal immigrants".[239] Readmission Agreements have been identified by the EU as an instrumental part of its Community Return Policy.[240] The main objective of the Community Return Policy is to fight "illegal immigration" and to expand the number of safe third countries around the EU that could take on the burden of accepting expulsed individuals from the EU.[241] Readmission agreements with third countries have thus been concluded both by the EU and by its member states. The EU and its member states, in principle, have shared competence over the conclusion of readmission agreements.[242]. Readmission agreements concluded by the EU and those concluded by its member states are parallelly applicable. Albeit, EU readmission agreements take precedence over the state-negotiated agreements in case of incompatibilities between agreements concluded with the same third country.[243] Member states may not conclude agreements if these might be unfavourable to existing EU agreements.[244] The EU has as of today signed readmission agreements with seventeen third countries,[245] and is momentarily prioritizing the conclusion of readmission agreements with an additional fifteen third countries.[246] Several of these countries are located along the transit routes to the EU.[247]

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[239] See e.g. European Commission, Memo 02/217, *Readmission Agreements*, Brussels, 27 November 2002, p. 3; European Commission, Commission Staff Working Paper Accompanying the document Communication from the Commission to the European Parliament and the Council Annual Report on Immigration and Asylum (2010) COM (2011) 291 final, SEC (2011) 620 final, 24 May 2011, Brussels, p. 33.

[240] See European Commission, Green Paper on a Community Return Policy on Illegal Residents (presented by the Commission), COM (2002) 175 final, Brussels 10 April 2002, p. 22–23.

[241] Giuffré (2011), p. 9.

[242] Coleman (2009), p. 75

[243] Giuffré (2013), p. 83-84, see e.g. Agreement between the European Community and the former Yugoslav Republic of Macedonia on the readmission of persons residing without authorisation, para 20; Agreement between the European Community and the Republic of Moldova on the readmission of persons residing without authorisation, para. 20; Agreement between the European Community and the Republic of Montenegro on the readmission of persons residing without authorisation, para. 20; Agreement between the European Community and Serbia on the readmission of persons residing without authorisation, para. 20; Agreement between the European Community and Ukraine on the readmission of persons, in: Official Journal of the European Union, L 332/48, 18 December 2007, para. 17; Agreement between the European Community and the Macao Special Administrative Region of the People's Republic of China on the readmission of persons residing without authorisation, in: Official Journal of the European Union, L 143/99, 30 April 2004, para. 19.

[244] Giuffré (2013), p. 84.

[245] Albania, Armenia, Azerbajdzjan, Bosnia and Hercegovina, Cape-Verde, Former Yugoslav Republic of Macedonia, Georgia, Hong Kong, Macao, Moldova, Montenegro, Pakistan, Russia, Serbia, Sri Lanka, Turkey and Ukraine, see European Commission, Joint communication to the European Parliament and the Council, *Addressing the Refugee Crisis in Europe: The Role of EU External Action*, Brussels, Join (2015) 40 final, Brussels, 9 September 2015, p. 10.

[246] Afghanistan, Algeria, Bangladesh, The Democratic Republic of Congo, Egypt, Ethiopia, the Gambia, Guinea, Ivory Coast, Mali, Morrocco, Nigeria, Pakistan, Senegal, Sri Lanka, see Andrade García, Paula, *EU Cooperation with Third Countries in the Field of Migration*, European Parliament, Brussels 2015, p. 29.

[247] Coleman (2009), p. 37.

The consent to readmit third country nationals is not exclusively given in agreements with the sole purpose of regulating readmission obligations, but is also found in other types of agreements between states. Since 1996, readmission *clauses* have been included in trade and cooperation agreements with several third countries.[248] The 2002 Seville European Council urged the EU and its member states to include readmission clauses in any future cooperation, association or equivalent agreement with third countries.[249] One such agreement is the Cotonou Agreement[250], signed between the EU and 79 countries from Africa, the Caribbean and the Pacific. The agreement is mainly focused on development cooperation, political cooperation and economic and trade cooperation. The agreement, however, also includes a clause binding the state parties to readmit *their own* nationals. The clause further stipulates that negotiations on readmission agreements binding the state parties to readmit third country nationals shall be initiated on the request of any state party, including the EU.[251]

Readmission agreements are commonly framed as reciprocal undertakings by the EU and third countries resulting from cooperation. [252] However, Cassarino, Coleman and Giuffré suggest that the reciprocities in readmission agreements are unbalanced.[253] The third country is typically a common transit or migrant producing country and does not share the other state party's interest in establishing a binding obligation to readmit third country nationals.[254] This is because readmission agreements only creates obligations for the third country in practice.[255] Accordingly, third countries often demand benefits in exchange for the conclusion of a readmission agreement. Benefits are given in the shape of cooperation in areas such as development aid, financial assistance, border security and visa facilitations.[256] They are sometimes concluded with a promise from the typical requesting state to construct reception capacity in the typical readmitting state, which often lacks the infrastructure or competence to assess protection claims.[257] This holds true in the case of EU readmission agreements as well. The EU readmission agreements with third countries are often concluded in conjunction with

[248] Inter alia, Algeria, Armenia Azerbaijan, Croatia, Egypt, Georgia, Lebanon, FYROM and Uzbekistan. See European Commission, Memo 02/217, *Readmission Agreements*, Brussels, 27 November 2002, p. 2.
[249] European Council, Seville European Council, Presidency Conclusions, Seville, 21–22 June 2002, para. 33–34.
[250] Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, in: Official Journal of the European Union, L 317/3, 15 December 2000.
[251] Cotonou Agreement, Article 13 (5) (c) (ii)
[252] See e.g. European Commission, "Memo 02/217, *Readmission Agreements*, Brussels, 27 November 2002, p. 1.
[253] Cassarino, Jean-Pierre, "Dealing with Unbalanced Reciprocities: Cooperation on Readmission and Implications", in: *Unbalanced Reciprocities: Cooperation on Readmission in the Euro-Mediterranean Area*, ed. Jean-Pierre Cassarino, Middle East Institute, Washington DC, 2010, pp. 1–29, p. 2; Coleman (2009), p. 39; Giuffré (2013), p. 107.
[254] Cassarino, (2010), p. 5; Coleman (2009), p. 39.
[255] Coleman (2009), p. 39.
[256] Cassarino (2010), p. 6.
[257] Coleman (2009), p. 68.

agreements on visa liberalisation for nationals of the third country or with agreements on other benefits for the third country in question.[258]

It has been a policy of the EU since a decade back to stimulate third countries to conclude readmission agreements with other third countries. The EU has taken on the duty of assisting third countries with the negotiation of such agreements.[259] Coleman suggest that the reason for this is found in the interest of the EU to avoid the re-entry of returned individuals. Third countries with which the EU has concluded readmission agreements share the interest in concluding readmission agreements with other third countries, as they are seeking to avoid becoming a "bottleneck" for refugees in transit that are unable to enter the EU. These countries are also trying to avoid the additional burden imposed on them under the EU readmission agreements to readmit refugees that have once transited through their territories.[260]

5.2 Readmission between the EU and Turkey

In March of 2015, the European Commission launched the European Agenda on Migration, set out to "better manage migration". The Agenda rests on four main areas of action; *strengthening the CEAS* through, inter alia, relocation and resettlement efforts, *building a new European policy on legal migration* that can attract "talent" to Europe, *securing Europe´s external borders* through enforcement of border surveillance and *fighting irregular migration and human trafficking* in close cooperation with third countries through, inter alia, readmission agreements and cooperation frameworks.[261]

One measure that has been adopted under the European Agenda on Migration is the establishment of a framework for large scale readmission from Greece to Turkey. The establishment of this framework has been made through a joint "statement" by the EU and Turkey in March 2016. The legal nature of this statement has been widely debated. Some argue that the statement does not constitute a treaty in the meaning of the VCLT and that it is not legally binding,[262] while others claim that it is.[263] It does not serve the purpose of this thesis do look further into this discussion. However, it is clear that the statement goes beyond a regular readmission agreement. It should be noted that the content of the statement has not been made public. Instead, the

[258] See e.g. European Commission, Press Release, *The EU and Tunisia start negotiations on visa facilitation and readmission*, Brussels, 12 October 2016.
[259] See Regulation (EC) No 491/2004 of the European Parliament and of the Council of 10 March 2004 establishing a programme for financial and technical assistance to third countries in the areas of migration and asylum (AENEAS), in: Official Journal of the European Union, L 80/1, March 18, 2004, article 2 (2) (j); Coleman (2009), p. 66.
[260] Coleman (2009), p 64.
[261] European Commission, Press Release, *Commission makes progress on a European Agenda on Migration*, Brussels, 04 March 2015.
[262] See e.g. Peers, Steve, *The draft EU/Turkey deal on migration and refugees: is it legal?*, 16 March, 2016,
[263] den Heijer, Maarten, Spjikerboer, Thomas, *Is the EU-Turkey refugee and migration deal a treaty?*, 7 April 2016.

European Commission has published press releases explaining the content of the statement. The press release from the Commission states that, as an extraordinary and temporary measure, all "irregular migrants" arriving in the Greek Islands will be returned to Turkey. Any person seeking asylum in Greece will have their application processed individually by the Greek authorities in accordance with the Asylum Procedure Directive. Those not applying for asylum in Greece or whose application has been found unfounded or inadmissible under the Asylum Procedure Directive will be returned to Turkey. The statement further includes a resettlement scheme based on a 1-for-1 mechanism, where one Syrian will be resettled from Turkey to one of the EU member states for every Syrian being returned to Turkey from the Greek Islands. Priority for resettlement will be given to those who have not previously entered or tried to enter the EU irregularly.[264]

The European Commission has supported Greece by "providing it with all the elements to conclude that Turkey is a safe third country […]" in the meaning of the Asylum Procedure Directive, for the purpose of returning "irregular migrants" from the Greek islands to Turkey under the terms of the EU-Turkey Statement.[265] Thus, under the EU-Turkey statement, all those who have had their applications deemed as inadmissible on safe third country grounds under article 38 of the Directive in Greece will be returned to Turkey. All individuals intercepted when leaving Turkey and attempting to enter Greece are to be detained in EU-mandated closed screening centres on the Greek Islands, also known as "hotspots", where they are to be registered while awaiting the opportunity to formally lodge an asylum application.[266]

As mentioned above, the statement is thought to be temporary solution to what has been perceived by the EU as necessary to reinstate public order. The future of the cooperation on readmission is uncertain due to an impoverished relationship between the EU and Turkey during the months following the announcement of the readmission statement.[267] However, an actual readmission agreement, laying down a reciprocal obligation for the EU and Turkey to readmit their own nationals and third country nationals, has been in place since 2014 and forms the legal basis for the returns to Turkey.[268] The obligation to readmit third country nationals was set to enter into force four years after the readmission agreement in itself, or after a formal decision by state officials from the EU and Turkey respectively.[269] A decision was taken in April 2016 by the European Council for the obligation to readmit third country nationals to enter into force on 1 June 2016.[270] The content of the

[264] European Council, Press Release, EU-Turkey Statement 18 March 2016.
[265] European Commission, Fact Sheet, *Implementing the EU-Turkey Statement, Questions and Answers*, Brussels, 15 June 2016.
[266] Human Rights Watch, *Q&A: Why the EU-Turkey Migration Deal is No Blueprint*, 14 November, 2016.
[267] See e.g. Shaheen, Kareem, Rankin, Jennifer, Wintour, Patrick, "Turkey threatens to end refugee deal in row over EU accession", in: *The Guardian*, 25 November 2016.
[268] European Commission, Fact Sheet, Implementing the EU-Turkey Statement, Questions and Answers, Brussels, 28 September 2016.
[269] Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, para. 24 (3).
[270] Council Decision (EU) 2016/551 of 23 March 2016 establishing the position to be taken on behalf of the European Union within the Joint Readmission Committee on a Decision of the Joint Readmission Committee on implementing arrangements for the application of

agreement is more or less identical to other EU readmission agreements. Like other readmission agreements, it contains no explicit referral to refugees. Instead, the agreement contains a non-affection clause, stating, inter alia, that the readmission agreement shall be without prejudice to the rights, obligations and responsibilities of the EU, its member states and Turkey arising from international law including international conventions to which they are parties. Here, the provision makes explicit mention of the Refugee Convention, including its 1967 protocol, the ECHR and the CAT.[271] The clause further stipulates that the readmission agreement shall be without prejudice to the Asylum Procedure Directive and the Receptions Conditions Directive.[272]Again, the non-affection clause does not impose any new obligations on Turkey or the EU member states that they are not already bound by.

As mentioned in the previous subchapter, the unbalanced reciprocity inherent to readmission agreements often require some benefits being given to the state party that is more likely to be readmitting individuals under the agreement. Neither the 2014 readmission agreement nor the EU-Turkey joint readmission statement has been any different in this regard. Turkey, as the country bearing the "burden" of readmission under these agreements in practice, were granted financial and technical help from the EU after the negotiation of the 2014 readmission agreement to strengthen its border police and install border surveillance equipment.[273] In exchange for the commitment of Turkey to readmit refugees under the EU-Turkey statement, the EU agreed to advance the work on visa liberalisation for Turkish nationals and to proceed on formal talks on an Turkish accession to the EU.[274] The EU further agreed to provide Turkey with 3 billion euros for the establishment of project that will strengthen the reception conditions in the country. Once the funding has been used to its full, Turkey will be provided with additional funding with an additional 3 billion euro to the end of 2018.[275]

5.3 Conclusion

This chapter has shown that the purpose of readmission agreements is to facilitate expulsion by laying down rules on the readmission procedure and by obliging states to admit an expulsed individual into their territories. Readmission agreements are often concluded with countries along the transit

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Articles 4 and 6 of the Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, in: Official Journal of the European Union, L 95/9, 9 April 2016, article 1.
from 1 June 2016

[271] Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation, para. 18.1.

[272] Ibid., para. 18.4.

[273] European Parliament, Press release, *Parliament backs EU-Turkey deal to return clandestine migrants*, 26 February 2014; European Council on Refugees and Exiles (ECRE), *EU-Turkey readmission agreement endorsed by European Parliament raises concerns amongst NGOs*, 28 February 2014.

[274] European Council, Press release, EU-Turkey statement 18 March 2016.

[275] Ibid.

routes to the EU. The use of readmission agreements enables the return of refugees on safe third country grounds. Readmission agreements do not contain any specific provisions to refugees. Refugees readmitted to transit countries on safe third country grounds are thus returned as "irregular migrants" without any indication that they have sought asylum in the sending country. Accordingly, readmission agreements do not impose any obligations on the contracting states to assess the asylum claims of the returned refugee.

This chapter has further shown that the unbalances reciprocities on which cooperation on readmission builds enables the unilateral allocation of protection responsibilities onto countries that might not be able or willing to shoulder the responsibility to protect refugees. It has also been shown that, in a European context, the conclusion of readmission agreements is used as a measure to combat "irregular" migration. Thus, when used in conjunction with third country rules, readmission agreements put the protection of refugees in the context of political cooperation on, inter alia, trade, development and migration control. This suggests that the relevant relationship in the external dimension of EU asylum policy is that between states.

6 Compatibility and Implications for the Institution of Refugee Protection

It has been concluded in previous chapters what the obligations of states are when an individual is seeking refuge in their territories or at their borders, whether international law permits an allocation of protection responsibilities, what obligations states have when allocating such responsibilities and what the scope and content of the protection obligations transferred should be. It has also been shown what the obligations of states are in EU asylum policy when allocating the responsibility to protect a refugee, and how third country concepts and readmission agreements are used on a policy level and in practice. The purpose of this chapter is to analyse whether the obligations of states under the respective legal frameworks are compatible, whether the objective behind the respective systems have commonalities and lastly, what implications a responsibility allocation regime has for the institution of refugee protection. The chapter will begin with an analysis of the compatibility between the obligations of states under the respective frameworks, to then move on to an analysis of the objective behind the respective systems and the implications for the institution of refugee protection.

6.1 Compatibility on a policy level

The starting point of this analysis is whether the act of allocating protection responsibilities, as enshrined in EU asylum policy, is compatible with international law. It has already been said in Chapter 3 that international law neither explicitly prohibits nor permits an allocation of protection responsibilities. It has also been said that while a refugee is not entitled to choose its country of asylum, she does not have an obligation to seek refuge in the first country willing to grant it. In EU asylum policy, the notion of intermediary protection goes even further than that; the refugee is obliged to seek protection in the first country that, in theory, *could* offer her protection, and the failure to seek protection elsewhere could lead to a denial of protection. As shown in subchapter 4.2, the safe third country notion is based on an *assumption* that the third country will not subject the applicant to serious harm, persecution or refoulement. It is evident from the jurisprudence of the ECtHR that a state may not return an individual to another state based on an assumption that the country will treat her in accordance with its obligations under the ECHR. Instead, the state is obliged to go through with a rigorous assessment of whether an individual will be subject to ill-treatment or subsequent refoulement before rejecting her at the border or returning her to another country. This obligation is reflected in the Asylum Procedure Directive, at least as regards the safe third country concept, where a member

state is obliged to assess the safety of the applicant on account of her particular circumstances before returning her to a safe third country. As part of the assessment of whether the other state is safe for the refugee, states are obliged under international law to take into account the existence of an asylum procedure in the other state. The existence of a well-functioning asylum procedure decreases the risk for refoulement, as there will be a framework in place to assess the refugee's need for protection. As regards the safe third country concept, the Asylum Procedure Directive does not require that an asylum procedure shall be in place in the third country for a member state to legally transfer an applicant there. The Asylum Procedure Directive simply requires that the *possibility exist* to *request* refugee status. Now, a refugee status determination will automatically entail a determination of whether the applicant is at risk of persecution if returned to their country of persecution. The Asylum Procedure Directive does not, however, explain what standards such an asylum procedure should hold, nor does it inform whether an asylum procedure should be in place for the assessment of whether an individual is at risk of refoulement on other grounds than on persecutory grounds. The silence of the Asylum Procedure on these parts gives the member states a considerable margin of appreciation.

Furthermore, the safe third country concept as enshrined in the Asylum Procedure Directive does not require the third country in question to have ratified the Refugee Convention nor any relevant human rights treaty. Although it is not clear whether international law requires an intermediary state to have ratified these treaties, it does seem to demand that the state has ratified the CAT and that it can be demonstrated that it has developed a practice that is in accordance with the Refugee Convention. As Byrne, Shacknove, Foster and Legomsky have pointed out, an accession to the Refugee Convention is crucial since it provides some security to the question of whether the country will uphold its obligations towards refugees in international law. The absence of a requirement in the Asylum Procedure Directive for the third country to have ratified the Refugee Convention or any of the relevant human rights treaties is thus not in divergence with the requirements of international law, but has the risk of putting refugees in a vulnerable situation.

As stated in subchapter 3.4, the dedication of a country as safe must take in regard, inter alia, the actual degree of respect for human rights and the rule of law in that country.[276] Under the Asylum Procedure Directive, however, states are not required to take such matters in regard when determining a country as safe.

As regards the *European* safe third country concept, the Asylum Procedure Directive does not require member states to go through with an assessment of the safety in the European third country for the refugees in her *particular circumstances.* Instead, the concept rests on an assumption that the third country concerned will treat the individual in accordance with its obligations under international law because it has ratified and typically complies with the Refugee Convention and the ECHR. As stated in subchapter 3.4, such blanket statements of safety are not in compliance with states obligations under

[276] See subchapter 3.4.

international law. Again, it is clear from the jurisprudence of the ECtHR that states are required to assess the risk of ill-treatment or subsequent refoulement in an intermediary country before sending her there. The divergence between the European safe third country concept and international law is somewhat mitigated by the fact that the Asylum Procedure Directive does require that a member state's assumption of safety in the European third country shall be rebuttable. This complies with the obligations of states under ECHR as expressed by the ECtHR in its jurisprudence.

The different standards set for the safe third country and the safe European third country does raise some questions. The fact that the safe European third country concept, as enshrined in the Asylum Procedure Directive, requires the third country to have ratified and act in compliance with the Refugee Convention and the ECHR suggests that the third country concerned is expected to provide refugees with *all* of their rights under these treaties. Meanwhile, the safe third country concept as enshrined in the Asylum Procedure Directive only requires the third country concerned to provide the transferred individual with their rights under the Refugee Convention *if and when* her refugee status is positively determined. Two things should be noted here. First, the safe third country concept ignores the rights of refugees under international human rights law. Secondly, the fact that the transferred individual is only to be provided with her rights under the Refugee Convention if and when her refugee status has been positively determined suggests that the third concerned is not required to provide her with the rights that she is entitled to *before* she acquired such a status determination. This effectively excludes rights such as access to court, access to elementary education, right to immovable and movable property and a whole range of other rights. As stated in subchapter 3.3, it is not clear what the content of the protection granted in an intermediary country must be for a transfer to that country to be permissible under international law. It is clear however that the refugee must be provided with protection in accordance with the Refugee Convention. The author of this thesis is prone to agree with Hathaway, Foster and Legomsky whom all argue that a refugee should be guaranteed at least the rights that she has already acquired in the sending state when transferred to the intermediary state. Another solution would effectively rip refugees of the rights that they have already acquired, and would make it unreasonably easy for a state to escape its obligations under international law to protect a refugee. This includes the rights granted to refugees under general human rights law, which they are entitled to as soon as they trigger the jurisdiction of a state.

As Legomsky has noted, the consent of the intermediary state is the key to all other elements of effective protection. Yet, the Asylum Procedure Directive is silent on the question of whether a member state must acquire the consent of the third country or the European third country for a transfer to be permissible. Instead, the Asylum Procedure Directive stipulates that a member state is obliged to assess the asylum application of a refugee when the third country concerned refuses to admit her into its territory. The requirement to acquire the consent of the third country thus seems to be implicit in the Asylum Procedure Directive. However, the consent does not seem to include anything beyond the consent to *admit the individual into its*

territory. Nowhere does the Asylum Procedure Directive suggest that the third country in question should have consented to provide the refugee with an assessment of her asylum claim or with protection if found to be needed. That such protection will be granted is, again, merely assumed. As stated in Chapter 5, a state is not required under international law to admit non-nationals into its territory. Although the principle of non-refoulement does restrict state's sovereign right to deny an individual entry, it is not likely that a third country, especially one that does not consider itself bound by the principle of non-refoulement, would admit a refugee that is handed over to it by another state that has denied her protection. Thus, the EU and its member states are concluding readmission agreements with third countries for the effective implementation of the safe third country concepts. As stated in subchapter 5.2, readmission agreements do not contain any provisions directly related to refugees. Refugees are thus returned to intermediary countries either individually or clumped together with other returnees with nothing to indicate their specific status as refugees. Here it should be noted that while the Asylum Procedure Directive does require member states to inform the readmitting intermediary state of the status of the individual returned when member states are applying the *European* safe third country concept, no such requirement exists for member states when applying the safe third country concept. Thus, in the eyes of the readmitting intermediary state, an individual returned with a readmission agreement on safe third country grounds is nothing more than an "irregular migrant" having lost her permission to stay in the sending country or whom have entered the sending country without ever having it. If the individual's status cannot be confirmed, this creates a real risk for refoulement. It also creates the risk of putting the refugee "in orbit", in search for a state that is willing to admit and accept her. Unfortunately, as shown in subchapter 3.5, the UNHCR has been inconsistent on the question of whether a responsibility allocation requires the consent of the intermediary country. The UNHCR has been clear, however, that an implicit consent to grant the refugee with access to a fair asylum procedure where her application will be examined on its merits must be acquired by the sending state on a bilateral basis and that, at a minimum, the intermediary readmitting state is informed that the substance of the asylum claim has not been examined in the sending state. Thus, in this regard, the allocation of protection responsibilities through the safe third country rules in conjunction with a readmission agreement in EU asylum policy is not compatible with state's obligations under international law.

6.2 Compatibility in practice

As stated previously in this chapter, the Asylum Procedure Directive is silent on several important matters and it seems that the EU member states are provided with a rather wide margin of appreciation when implementing the safe third country concepts. An analysis of how EU member states implement the safe third country concept in conjunction with readmission agreements should thus create a clearer picture of the compatibility between the allocation mechanisms in EU asylum policy with the EU member state's obligations

under international law. The "safe" third country chosen to exemplify the use of these mechanisms in this thesis is Turkey. Of interest in this analysis is how the determination of Turkey as a safe third country by the EU and Greece is compatible with the criteria set out in the Asylum Procedure Directive and how the determination is compatible with Greece's obligations under international law.

As stated above, the Asylum Procedure Directive does not require that the third country to which an applicant is to be transferred must have ratified the Refugee Convention, but only that the applicant in question should have the possibility to acquire refugee status and, if found to be a refugee, to receive protection "in accordance with" the Refugee Convention. The fact that Turkey has been considered as a safe third country by the EU and Greece is interesting since it does not fulfil this requirement. Turkey is a state party to the Refugee Convention. However, it has ratified the 1967 protocol to the Refugee Convention with a limited geographical scope,[277] meaning that Turkey is only obliged to determine those individuals as refugees that have fled from events taking place in Europe. This effectively excludes the clear majority of those seeking refuge in Turkey today from the protection granted to them under the Refugee Convention.[278] Albeit the geographical limitation, there is a legal framework in place in Turkey for granting protection to those fleeing persecution or ill-treatment from non-European countries. Under the recently adopted national asylum legislation, a "conditional refugee" status is granted to non-European refugees fleeing persecution. These are however entitled to a lesser number of rights and entitlements than those with refugee status under the Refugee Convention.[279] Protection is only granted temporary, pending resettlement in a third country. Thus, the status of non-European refugees in Turkey is that of transit refugees.[280] A second category of beneficiaries of protection are non-European refugees who without fulfilling the definition of "conditional refugees", would be subjected to death penalty or torture or would run a personal risk of indiscriminate violence due to war or armed conflict upon return. These obtain "subsidiary protection" under national legislation. The concept very much replicates the subsidiary protection concept of EU asylum legislation.[281] The statuses available to refugees in Turkey thus goes beyond what the Asylum Procedure Directive requires. Hence, in this regard, the determination of Turkey as safe is in accordance with the obligations of Greece under international law. However, as regards the *content* of the protection granted to refugees with alternative statuses under national legislation, Turkey does not fulfil the requirements of the Asylum Procedure Directive. As stated above, it is not clear whether international law requires that the intermediary state should grant refugees with the all rights inherent to them under international human rights law for

[277] UNHCR, *State Parties to the 1951 Convention relating to the Status of Refugees*, p. 5.
[278] Roman, Emanuela, Baird, Theodore, Radcliffe, Talia: *Why Turkey is not a "Safe Country",* Statewatch Analysis, February 2016, p. 18.
[279] Asylum Information Database (AIDA), *Country Report: Turkey*, ed. European Council on Refugees and Exiles (ECRE), December 2015, p. 17.
[280] Zieck, Marjoleine, "UNHCR and Turkey, and Beyond: of Parallel Tracks and Symptomatic Cracks", in: *International Journal of Refugee Law*, Vol. 22, No. 4, 2010, pp. 593–622, p. 597.
[281] AIDA, 2015, p. 17 – 18.

an allocation of responsibility to that country to be permissible. It does, however, require that refugees are granted with all of their rights under the Refugee Convention

As mentioned above, the Asylum Procedure Directive does not expressly require a third country to have an asylum procedure in place for it to be considered as safe while international law requires a sending state to make sure that the intermediary state has an asylum procedure in place for a fair assessment of the transferred refugee's asylum claim. Turkey does have an asylum procedure in place for such an assessment under its national legislation.[282] In this regard, the determination of Turkey as a safe third country is in accordance with international law and goes beyond the requirements of the Asylum Procedure Directive.

Furthermore, both the Asylum Procedure Directive and international law require that the third country to which an individual is to be sent must respect the principle of non-refoulement. Turkey, having ratified the Refugee Convention, the ECHR and the CAT is bound by the obligation to non-refoulement.[283] Thus, so far, Turkey seems to be fulfilling the requirements laid down in both the Asylum Procedure Directive and the international law in most parts, and in some parts even goes beyond what the Asylum Procedure Directive requires.

However, as stated in subchapter 3.4, a sending state cannot rely itself on the fact that the intermediary country is in de jure compliance with the Refugee Convention and international human rights treaties. Instead, the sending country must take into regard, inter alia, the actual degree of respect for human rights and the rule of law in the intermediary country as well as the country's compliance with human rights instruments *in practice*. It seems that it is the existence of an asylum legislation that in many parts is in accordance with the requirements of international law that has led the EU to help Greece adopt the necessary means to determine Turkey as a safe third country.[284] In reality, however, several human rights organisations have reported that compliance with this legislation is poor. Turkish migration officers often act against the clear rules of the law.[285] Although the country's national legislation lays down a framework for reception conditions for asylum seekers, many human rights organisations and non-governmental organisations have reported that refugees live in poverty without access to shelter, food or financial assistance.[286] As stated by the ECtHR in the case

[282] See Ibid., 2015, p. 29–53.
[283] Council of Europe, *Chart of signatures and ratifications of Treaty 005 Convention for the Protection of Human Rights and Fundamental Freedoms Status as of 29/12/2016*; High Commissioner for Human Rights, List of State Parties to the ICCPR, ICESCR and the CAT; UNHCR, *State Parties to the 1951 Convention relating to the Status of Refugees*, p. 5. Turkey has however suspended the ECHR following a declared state of emergency in the country, see Shaheen, Kareem, Bowcott, Owen, "Turkey MPs approve state of emergency bill allowing rule by decre", in: *The Guardian*, 21 July 2016.
[284] European Commission, Fact Sheet, *Implementing the EU-Turkey Statement, Questions and Answers*, Brussels, 15 June 2016.
[285] Ulusoy, Orçun, *Turkey as a Safe Third Country?*, University of Oxford, Faculty of Law, 20 March 2016.
[286] Amnesty International, *No Safe Refuge: Asylum-Seekers and Refugees denied Effective Protection in Turkey*, June 2016, p. 24-26; Centre for Transnational Development and Collaboration, *Syrian Refugees in Turkey: Gender Analysis*, 2015, p. 3; Skribeland

M.S.S v. Belgium and Greece, mentioned earlier in this thesis, it would be in breach of the principle of non-refoulement for a country to knowingly send an individual to a country where the reception conditions are so deficient that the individual will live in deprivation amounting to ill-treatment. Several reports from human rights organisations further show that Syrian refugees are being shot and killed by Turkish border enforcement while attempting to enter Turkey,[287] and that they are otherwise being subjected to push back operations or cursory detention.[288] There have also been incidents of collective expulsion of Syrian refugees to Syria.[289] Due to the widespread violence and the number of civilians casualties predominant in Syria following the Syrian revolution of March 2011, the return of refugees to Syria would undoubtedly amount to refoulement. Reports further show that Iranian and Afghan asylum seekers have been collectively expulsed to their countries of origin while awaiting their status determinations.[290] As stated previously in this thesis, the principle of non-refoulement under international law requires states to assess the risk for persecution or ill-treatment before returning a refugee to their country of origin. Thus, the mentioned practices by Turkey seem to be in direct divergence with the principle of non-refoulement. These practices by Turkey must reasonable have come to the knowledge of both the EU and Greece. As stated in subchapter 3.4, to knowingly send an individual to a country where that individual would be at risk of subsequent refoulement would be as much in breach of the principle of non-refoulement as to send that individual directly into the hands of her persecutor. Luckily, this seems to have been acknowledged by the Greek Asylum Appeals Committees, which in several cases has concluded that Turkey cannot be regarded as a safe third country for refugees that have appealed their removal decisions to the Committees.[291] In spite of the Greek Committees' reluctance to return refugees to Turkey on safe third country grounds, the EU is still determined to implement the readmission of refugees to Turkey.[292] The image that emerges here is thus that the *national designation* of a safe third country in its implementation contradicts both the principle of non-refoulement in international law and the criteria laid down for determining a country as safe in article 38 of the Asylum Procedure Directive. Meanwhile, the procedural safeguards laid down in the Directive, depending on the discretion of the member state's courts, may safeguard that no refugee is returned to persecution or ill-treatment whether directly or indirectly. However, the fact that the Greek committees have

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Gürakar, Özlem, *Seeking Asylum in Turkey – A Critical review of Turkey's asylum laws and practices*, Norwegian Organization for Asylum Seekers, 2016, p. 26.

[287] Human Rights Watch, *Turkey: Border Guards Kill and Injure Asylum Seekers Border Lock-Down Puts Syrian Lives at Risk*, 10 May 2016.

[288] Roman, Baird & Radcliffe (2016), p. 17.

[289] Amnesty International: *Europe´s Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey*, 16 December 2015, p. 10; Amnesty International: *Turkey: Illegal Mass-Returns of Syrian Refugees Expose Fatal Flaws in EU-Turkey Deal*, 1 April 2016.

[290] Roman, Baird & Radcliffe (2016), p. 17; Amnesty International, *Turkey Safe Country Sham Revealed as Dozens of Afghans Returned Hours After EU Refugee Deal*, 23 March 2016.

[291] European Database of Asylum Law, *Greece: The Appeals Committee issues decisions on Turkey as a Safe Third Country*, 17 May 2016.

[292] See e.g. European Commission, Press release, *Commission proposes to modernise the Customs Union with Turkey*, Brussels, 21 December 2016.

acknowledged the risk for refoulement in Turkey, does not mean that the migration authorities in Greece or in any other member state will always acknowledge such a risk. Where there is a national designation of a third country as safe, it is up to the discretion of the national authorities to assess whether a particular refugee can be returned to that country. Border officials and officials at the national migration authorities might not assess the risk for refoulement in the safe third country with the same rigorous scrutiny as an appeals court, and every refugee might not have the practical possibility to have their case assessed by the appeal court even if such a right is laid down in national legislation. Swedish border police have recently attempted to reject refugees seeking protection at the border when arriving from the neighbouring Denmark on the ground that Denmark, as a EU member state, is a safe country to seek protection from.[293] In theory, nothing prevents similar scenarios to occur on the border between an EU member state and a third country listed as safe by that member state. Especially not when the neighbouring countries, as a result from the implementation of the Dublin Regulation, are responsible for assessing more asylum applications than their immigration authorities are able to handle.[294] Thus, in this thesis' author's view, the political will expressed by the EU to determine Turkey as a safe third country and the conclusion of a readmission agreement with Turkey does create a real risk for refoulement contrary to international law even though the procedural safeguards laid down in the Asylum Procedure Directive might mitigate that risk.

6.3 Compatibility of objectives

As stated previously in this chapter, international law neither explicitly prohibits nor explicitly permits the allocation of a state's protection responsibilities. The question of whether responsibility allocation may take place is thus to some extent left open and is subject to the discretion of states. As shown in previous chapters, responsibility allocation has been expressly codified in EU asylum policy. The question of whether responsibility allocation is permitted is thus not treated as an open question within EU asylum policy, but responsibility allocation has instead been institutionalized. Meanwhile, readmission agreements in conjunction with safe third country rules are perceived in EU asylum policy as crucial measures to prevent irregular migration. Taken together, the image that emerges is that of responsibility allocation as migration management. Through readmission agreements, the safe third country concepts and the Dublin Regulation, member states are expected to manage migration through (forcibly) directing refugees in certain directions, be it to a state within the EU or outside of it. In

[293] As told to the author by a Syrian refugee seeking protection at the Swedish border when arriving from Denmark. The Swedish border police explained that she could seek protection in Denmark as it was a safe country and attempted to forcibly drive her back to the Danish side of the border. After having persisted in her refusal to be returned to Denmark she was eventually granted admission by the Swedish border officials.

[294] See e.g. Peers, Steve, *The Refugee Crisis: What Should the EU do next?*, 8 September, 2016.

this regard, the objective of responsibility allocation is in divergence with the objective of refugee protection under international law. As shown in subchapter 2.2, the Refugee Convention was concluded with the acknowledgement that refugees were in need of surrogate protection to replace the loss of state protection. Additionally, the codification of binding obligations on refugee protection in international treaties seems to have had the objective to oblige states to shoulder the responsibility to offer refugees with such a surrogate protection.

At the moment, EU member states are free to refrain from allocating the responsibility to protect refugees to a third country under the Asylum Procedure Directive. However, as mentioned in subchapter 4.2, the European Commission has proposed that the safe third country rules shall become mandatory for member states to apply. This proposal suggests that member states are no longer *expected* to manage migration, but are *obliged* to manage migration. If the proposal is accepted, member states are also obliged to determine whether a refugee is to be returned to a safe third country before it determines the member state responsible for assessing the refugee's asylum application. The proposal thus suggests a further obligation for states to steer refugees away from the EU. Put differently, one can claim that states are being obliged to *deny* protection. If the proposal is accepted, member states will have obligations that are not only in divergence with their obligations under international law, but rather the exact opposite.

6.4 Implications for the Institution of Refugee Protection

As stated in subchapter 5.1, the EU is actively aiding third countries with which it has itself concluded readmission agreements to conclude readmission agreements with other third countries. Several scholars have suggested that the conclusion of readmission agreements between third countries generates a risk of creating chains of readmission agreements along the travel routes of refugees back to their countries of origin.[295] Returning to Turkey as an example, Turkey had ten readmission agreements in place by February 2015 while simultaneously negotiating agreements with an additional fifteen countries.[296] On top of that, Turkey has safe third country rules of its own laid down in its national legislation.[297] Supposing that a refugee is returned from an EU member state on safe third country grounds with the help of an EU readmission agreement, that refugee could be

[295] See e.g. Coleman (2009), p. 66.
[296] Currently readmission agreements are in place with Syria, Greece, Kyrgyzstan, Romania, Ukraine, Pakistan, Russia, Nigeria, Bosnia and Herzegovina, and Moldova. Negotiations were taking place with Serbia, Belarus, Montenegro, Afghanistan, Iran, Iraq, Azerbaijan, Bangladesh, Georgia, Libya, Lebanon, Macedonia, Uzbekistan, Sri Lanka, and Jordan, see Aka, Burç, Özkural, Nergiz: "Turkey and the European Union: A Review of Turkey's Readmission Agreement", in: *The European Legacy – Toward New Paradigms*, Vol. 20, issue 3, 2015, pp..255–272, p. 259 and footnotes 23 and 24.
[297] AIDA, 2015, p. 64-65.

subsequently returned to another third country considered as safe by Turkey with the help of a Turkish readmission agreement in order to later be returned from that country to her country of origin. In theory, all of these countries could return the refugee without ever going through with a substantive examination of the refugee's asylum claim. If so happens, one can wonder whether there is any worth left in the right to seek asylum.

Even if it is not clear exactly what the content of the protection granted in the intermediary country must be for an allocation of protection responsibilities to that country to be permissible under international law, one can still wonder what the implications for the institution of refugee protection will be if the required protection granted to refugees in the third country is limited to be in accordance with the Refugee Convention "if found to be a refugee". Again, this effectively excludes all the rights granted to refugees under the ECHR, the ICCPR and the ICESCR. As mentioned in subchapter 2.4, these international human rights treaties have made a great contribution to the institution of refugee protection under international law. To ignore these treaties means to enable the transfer of a refugee to a third country that does not ensure, inter alia, a refugee's right to family unification, to personal liberty, to leave a country and to an adequate standard of living. This could lead to a gradual limitation of the scope and content of refugee protection over time, provided that the EUs efforts to allocate protection responsibilities to third countries is fruitful.

As mentioned in subchapter 2.2, refugee protection in international law entails two essential relationships; that between the refugee and the state and that between states. These relationships seem to have been distorted in EU asylum policy. While the Asylum Procedure Directive envisages sparse obligations for member states when allocating protection responsibilities, EU readmission agreements speak nothing of protection at all. The reference being made to international obligations under the non-affection clause of traditional readmission agreements could perhaps even be perceived as a signal that the contracting states aim at upholding their obligations towards the international community, rather than their obligations towards the refugee. Meanwhile, the EU is using its financial advantage over third countries as leverage for the conclusion of readmission agreements and to obtain the cooperation of these in preventing (unwanted) migration into the territory of its member states. Accordingly, it is the obligations between states that has gotten the prominent role in the external dimension of EU asylum policy. The relationship between the host state and the refugee, in contrast, is downplayed. In the external dimension of EU asylum policy, the refugee is thus not perceived as a right-bearing subject, but rather as a burdensome object that can be traded in exchange for physical or financial assistance. This distorts the very notion of refugee protection; that refugees are a vulnerable group that deserves the protection of states.

7 Conclusion

The purpose of this thesis has been to examine to what extent the practice of allocating the responsibility to protect refugees through safe third country rules and readmission agreements, as enshrined in EU asylum policy, is compatible with state's obligations under international law and what implications this practice has for the institution of refugee protection. This thesis has thus explored the safe third country rules and the readmission agreements used in EU asylum policy, as well as the scope and content of refugee protection and the obligations of states under international law in relation to the allocation of protection responsibilities to an intermediary country. The said examination suggests that the practice of allocating protection responsibilities to third countries, as enshrined in EU asylum policy, is compatible *to some extent* with the practical obligations imposed on states in relation to responsibility allocation under international law. There are, however, some divergences found between the two systems in relation to the practical obligations of states. Firstly, international law requires the sending state to go through with an individual assessment of the safety for the refugee in her particular circumstances in the intermediary country. While this requirement is fulfilled as regards the safe third country concept, it is not fulfilled as regards the *European* safe third country concept. Secondly, international law requires that an asylum procedure shall be in place in the intermediary country for an allocation to that country to be permissible, since the absence of an asylum procedure entails a great risk for refoulement. In EU asylum policy, however, no *explicit* requirement is expressed that an asylum procedure shall be in place in the intermediary third country for an allocation of protection responsibilities that country to be permissible. Thirdly, the examination of the implementation of the safe third country rules in conjunction with readmission agreements has shown that protection must not be granted in accordance with the Refugee Convention in the intermediary country for an allocation of protection responsibilities to be considered permissible. Meanwhile, it is clear that international law requires that protection is granted in accordance with the Refugee Convention in the intermediary country for a responsibility allocation to that country to be permissible. Additionally, international law clearly requires that a state refrains from returning a refugee to a country where she would be at risk of persecution, ill-treatment or refoulement. Although this obligation is enshrined in EU asylum policy on a policy level, it is not respected in practice. The examination of the implementation of the said allocation mechanisms has shown that, in the eyes of the EU, a member state may send a refugee to a country which regularly engages in refoulement, and whose reception conditions could cause ill-treatment contrary to the principle of non-refoulement. The safeguards enshrined in EU asylum policy mitigates the risk of refoulement, but does not absolve it. Finally, international law clearly requires that a state wishing to allocate the responsibility to protect a refugee to an intermediary county must acquire the consent of the intermediary country to admit the refugee to its territory and to an asylum procedure. In EU asylum policy, there are no such obligations imposed on the sending EU

member states. Readmission agreements serve the purpose of obliging the intermediary country to admit the refugee into its territory, but does not oblige the state to protect the refugee. Instead, the refugee is returned to the intermediary country as an "irregular migrant", with no indication that she has an asylum claim and that no substantive examination of that claim has been executed. The findings of this thesis show that this may result in an indefinite denial of protection and can result in refoulement back to the country of persecution, which is clearly in divergence with international law.

This thesis has further shown that while international law neither explicitly prohibits nor permits the allocation of protection responsibilities to an intermediary country, the practice of allocating protection responsibilities has been institutionalised in EU asylum policy. The practice of allocating protection responsibilities further seems to fulfil the objective of managing migration, rather than to offer refugees with surrogate protection. Meanwhile, steps are being taken within EU asylum policy to *oblige* states to manage migration and, essentially, to *deny* refugees protection. The findings of this thesis thus suggest that the obligations of states in relation to responsibility allocation are the opposite of state obligations under international law; that to offer surrogate protection to refugees.

It has been found in this thesis that the content and scope of refugee protection has been expanded by the contributions of general human rights law. However, the practice of allocating protection responsibilities in EU asylum policy effectively denies refugees their rights under general human rights law upon transfer to an intermediary country. This has the potential of limiting the content and scope of refugee protection over time.

This thesis has further shown that the allocation of protection responsibilities to third countries through the use of safe third country rules and readmission agreements entails a risk of subsequent return of a refugee back to her country of persecution without a substantive examination of the refugee's asylum claim ever being made. This has the potential of making the right to seek asylum completely hollow.

Finally, it has been found in this thesis that the objective of codifying refugee protection is twofold. On the one hand, it sets out to make sure that refugees are offered surrogate protection in place of the state protection that they have lost. On the other hand, it sets out to make sure that states shoulder the responsibility to protect refugees. This objective permeates the Refugee Convention. Thus, refugee protection entails two relevant relationships: that between states and that between the refugee and the state. This thesis shows that the relevant relationship in the external dimension of EU asylum policy is that between two states. In EU asylum policy, the refugee is perceived as an object that can be traded in exchange for financial assistance, rather than as a rights-bearing subject. This distorts the very notion of refugee protection; that refugees are a vulnerable group that deserve the protection of states.

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