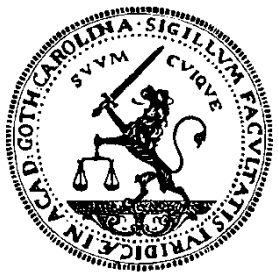

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It's not me, it's EU

Critically assessing the relationship between human rights and sovereignty in the CEAS, with a particular focus on the Dublin Regulation

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Contents

Summary

The current global order is organised into territorial, sovereign states – a system built upon many assumptions. One major aspect is the claim that being sovereign entails the ability to control one's borders as well as the presence of aliens on one's territory. At the same time, recent developments have shown that approaches to (and attempts to regulate) individuals crossing borders cannot be understood in isolation. Here, the birth of the human rights regime of the 20th century seems to challenge the foundations of the functioning of the sovereign state. Furthermore, the EU has attempted to create a Common European Asylum System, making asylum and migration no longer a matter reserved for the sovereign state alone.

The purpose of this thesis is to identify the underlying tensions of the CEAS, how these shape asylum law and policies in the EU, with a particular focus on to the Dublin Regulation. In order to fulfil this purpose, the thesis firstly examines key characteristics of sovereignty as well as the human rights regime. By doing so, it has been shown that at the core of the sovereign state is the want and need to distinguish between 'inside' and 'outside'. This borderline is marked (and upheld) through notions such as citizenship and territoriality, as well as the state using its monopoly on legitimate use of force against aliens (e.g. through immigration detention). In stark contrast to this, the human rights regime claims to be universal, meaning that rights are attached to the very notion of being human, irrespective of e.g. nationality. However, a closer examination has shown that the human rights regime is nonetheless characterised by state-centrism. The state-centrism of human rights is evident both in the way in which human rights are formulated, but crucially also through the reliance upon states to constitute the vehicles through which human rights are to be realised. Therefore, the logic of the sovereign state prevails, as it is not radically challenged by the human rights regime.

This understanding of sovereignty and human rights provides the background against which the EU and CEAS have been further examined. At first glance, the very project of establishing the EU seems to promise a much-needed re-conceptualization of sovereignty, with a focus on community considerations and human rights. Seen from this perspective, the CEAS could be regarded as the creation of a sophisticated regional legal framework providing protection to those in need. However, a more thorough examination of the logic and priorities of the EU and CEAS, as well as discussions of relevant provisions and case law in the Dublin Regulation, have established that this promise is left unfulfilled. Instead, tensions between sovereignty and human rights still have profound impacts on how policies on migration and asylum is treated by the EU, and therefore also the CEAS. Both the EU and the CEAS are indeed built on the same need to uphold the distinction between 'inside' and 'outside', similarly to how sovereign states function, albeit arguably on a grander scale and with more innovative measures. The result is a system containing elements of coercion and transforming human rights into questions of managerial bureaucracy.

Sammanfattning

Det nuvarande globala systemet är organiserat i territoriella, suveräna stater – ett system som vilar på många antaganden. En viktig aspekt är att påståendet att en del av att vara suverän för med sig förmågan att kontrollera ens gränser och förekomsten av icke-medborgare på ens territorium. Samtidigt visar senare utveckling att förhållningssätt (och försök att reglera) individer som korsar gränser kan inte förstås isolerat. För det första verkar födseln av mänskliga rättigheter under 1900-talet utmana grunden för hur suveräna staters funktion. För det andra har den Europeiska Unionen försökt skapa ett gemensamt europeiskt asylsystem (CEAS), vilket leder till att asyl och migration upphör att vara ett ämne reserverat för den suveräna staten självt.

Syftet med den här uppsatsen är att identifiera de bakomliggande spänningarna i CEAS, och hur dessa formar asyllagstiftning och politik i EU, med ett särskilt fokus på Dublinförordningen. För att uppfylla detta syfte undersöker uppsatsen först viktiga egenskaper hos såväl suveränitet som i mänskliga rättigheter. Genom att göra det har det visat sig att kärnan i den suveräna staten är såväl viljan som behovet att skilja mellan ”inuti” och ”utanför”. Denna gränslinje markeras (och upprätthålls) genom begrepp som medborgarskap och territorialitet, samt att staten använder sitt monopol på legitim användning av våld mot utlänningar (t.ex. genom förvar). I stark kontrast mot detta hävdas mänskliga rättigheter som universella, vilket betyder att rättigheter är inneboende i mänskligheten sig självt, oberoende av t.ex. nationalitet. En närmare undersökning har emellertid visat att människorättsregimen präglas av statscentrism. Statscentrismen hos mänskliga rättigheter är uppenbar både i hur mänskliga rättigheter formuleras, men definitivt också genom beroendet av stater som de medel genom vilka rättigheter ska realiseras. Därför överlever också den suveräna statens logik, då den inte är radikalt utmanad av människorättsordningen.

Denna förståelse av suveränitet och mänskliga rättigheter utgör också den bakgrund mot vilken EU och CEAS har ytterligare diskuterats. Vid första anblick verkar projektet med att skapa EU lova ett behövligt sätt att omdefiniera suveränitet, med ett fokus på kollektiva överväganden och mänskliga rättigheter. Från det här perspektivet skulle CEAS betraktas som skapandet av ett sofistikerat regelverk som skyddar den som behöver det. En noggrannare granskning av logiken i EU och CEAS, tillsammans med diskussioner av relevanta bestämmelser och rättspraxis i Dublinförordningen, har dock slagit hål på detta löfte. Istället når uppsatsen slutsatsen att spänningen mellan suveränitet och mänskliga rättigheter har en djupgående påverkan på hur EU behandlar frågor om migration och asyl, och därför också CEAS. Både EU och CEAS bygger på samma behov att upprätthålla skiljelinjen mellan ”inuti” och ”utanför” på liknande sätt som suveräna stater fungerar, om än på en större skala och med mer innovativa åtgärder. Resultatet är ett system som innehåller tvångsdelar och som förvandlar mänskliga rättigheter till frågor om administrativ byråkrati.

Preface

First and foremost, I would like to thank Eleni for being my supervisor and continuously sharing your thoughts on my thesis. A huge thank you also to everyone at the Swedish Refugee Advice Centre for the time I have spent there during the writing of this thesis.

My sincerest gratitude towards my friends for feeding me, supporting me, forgiving me whenever I had to study instead of spending time with you, comforting me, sharing your thoughts on my choice of subject and, most importantly, all of the proof reading: Miran, Nioosha, Jasmine, Deria, Donjeta, Marija and Sara.

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Stockholm, August 2018.

Abbreviations

CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CLS	Critical Legal Studies
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees sand Exiles
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
Refugee Convention	Convention Relating to the Status of Refugees
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

1.1 Background

Different measures introduced by states to regulate the crossing of borders seem to have become an almost self-evident fact in our contemporary context. A commonly asserted statement in this particular context is that border control and, in the larger picture, the ability to regulate the presence of aliens on a state's territory, is inherently part of being a sovereign state.[1] Yet, the profound impacts on the lives of those who, for various reasons, experience the crossing of borders, renders it necessary with a more in-depth understanding of this claim.

Although any attempt to further categorise migrants, e.g. between forced migration and voluntary migration, sometimes risk being too simplifying or unable to capture the reality, one group that is increasingly talked about and regulated are those who cross borders without prior authorisation by the state, often to seek asylum. Novelties in the regulations of this group of migrants are profoundly illustrated by the measures introduced by the European Union (EU) in its attempt to create a common asylum policy. The last years in Europe has seen the EU adopting various legislative and administrative instruments aimed to control absolute and relative numbers of asylum seekers, many of them with the purpose of creating a Common European Asylum System (CEAS).[2] Yet this attempt has proven to be difficult due to various reasons. This may not come as a surprise, as the area of immigration control can in many ways be seen as characterised by various tensions and consequently different interests. Within the context of the European Union, two areas are seemingly a source of tension and therefore potentially also a cause of conflicts: human rights, and the sovereignty of states.

Human rights are often described as being universal, drawing upon the assumption that every human being is sacred (inviolable, etc.) with certain inviolable rights *because* the fact of every human being's sacredness.[3] But despite its claims of universality, human rights are still to be implemented in a world built upon particularistic notions of belonging, i.e. within a global order of sovereign states. In stark contrast, sovereignty is commonly understood as the state's power to exercise exclusive control over its jurisdiction, including who is allowed to enter and remain on its territory.[4]

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[1] See e.g. N. Walker, 'Late sovereignty in the European Union', in *Sovereignty in transition,* ed. N. Walker (Oxford: Hart Publishing, 2003); W.G. Werner and J.H. de Wilde,
[2] See E. Thielemann, 'Why Asylum Policy Harmonisation Undermines Refugee Burden-Sharing', *European Journal of Migration and Law* 6 (2004), 54.
[3] M. J. Perry, 'Are Human Rights Universal? The Relativist Challenge and Related Matters', *Human Rights Quarterly* 19 (1997), 462.
[4] G. Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Leiden/Boston: Martinus Nijhoff Publishers, 2010), 59.

Already from this short overview, it is clear that the relationship between sovereignty and human rights adds an additional layer of complexity to any contemporary discussions on migration control. The development of international human rights law in relation to notions of sovereignty has indeed been a topic for academic discussions for quite a time.[5] Hence, tracing the relationship between human rights and sovereignty is important to understand the different, and sometimes clashing, interests that are contained within the CEAS.

This complex scenario constituted the backdrop of 2015, when Europe witnessed migratory movements of persons seeking international protection in a magnitude that had not been seen since the Second World War. Almost 1.3 million first-time applications for international protection were lodged throughout the EU, approximately double the amount received in comparison with the previous year.[6] This led to disorder in the national reception for asylum seekers in certain Member States, notably countries of first arrival, i.e. mainly Greece and Italy.[7] However, far from all EU Member States were affected.[8] Nonetheless, the dramatically overall increased amount of people seeking protection in the territory of the EU caused a sense of crisis amongst the Member States, and the already started project of reforming the CEAS became an even more urgent topic for wide discussion and debates.

At the moment of writing, CEAS is mostly comprised of Directives that are not immediately binding upon the Member States. This means that EU Member States are able impose their own means to achieve objectives set forth in the Directives. However, on 6 April 2016, in response to the 2015-16 crisis described above, the European Commission issued a communication stating that the CEAS was to be thoroughly reformed.[9] The development of the CEAS is thus amidst a new stage, where there are proposals for the Directives to be replaced by Regulations. This marks a significant shift, as a Regulation has the immediate force of law on each EU Member State, thereby leading to binding obligations.[10] At the same time, the importance placed on national sovereignty in the imagery of many European states continues to constitute a major obstacle to the objective of harmonisation so strongly advocated at European level.

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[5] See e.g. J. Donelly, 'Human Rights' in *Globalisation of World Politics: introduction to International Relations,* edited by J. Baylis, S. Smith and P. Owens (Oxford: Oxford University Press, 2016).

[6] Eurostat (2016a): Asylum statistics; Data extracted on 30 March 2018. Most recent data: Further Eurostat information, Main tables and Database. Accessed at http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics.

[7] B. Parusel and J. Schneider, *Reforming the Common European Asylum System: Responsibility-sharing and the harmonisation of asylum outcomes,* Delmi report (2017), 21.

[8] Ibid.

[9] Press release of the European Commission from 13 July 2016 [source: http://europa.eu/rapid/press-release_IP-16-2433_en.htm, last viewed on 24 May 2018]

[10] Article 288, TFEU.

Harmonisation within the particular context of the CEAS refers to the approximation of domestic law by means of Community law standards in the field of forced migration.[11] The current lack of such harmonisation within the CEAS is considered an "evident failure", leading to disparities in asylum burdens and their variation over time.[12] Harmonisation has therefore often been viewed as vital in order to achieve more equitable sharing of asylum seekers and less competition for the most effective deterrence measures.[13] At the same time, there are concerns that such strive towards harmonisation are difficult to achieve due to the different interests at hand, thereby risking mutual agreement only in terms of "the lowest common denominator" when it comes to protection standards.[14] Any attempt to comprehensively address and navigate matters of migration and asylum must therefore acknowledge that it is a topic whose context is characterised by many complexities.

1.2 Purpose and research question

This thesis seeks to trace the conflicting interests contained in the CEAS, with a particular focus on how these are expressed in the actual laws and policies, as well as the potential impact on those subject to the systems. However, due to the limits of this thesis, it is unfortunately not possible to comprehensively examine all parts of the CEAS. Instead, this thesis focuses on one of the foundational, and perhaps also one of the most controversial, cornerstones of the CEAS, namely the Dublin Regulation.

A more in-depth study of the Dublin Regulation is relevant for this thesis due to various aspects. Firstly, the Dublin Regulation is the legal framework allocating responsibility for assessing asylum applications between different Member States. As it is a Regulation, its provisions are directly applicable and are binding in its entirety.[15] Adding to the actuality of studying the Dublin Regulation is how current proposals entail the transformation of CEAS instruments from Directives into Regulations. The way in which the Dublin Regulation contains binding provisions on responsibility allocation and the resulting procedure of transfers seems to be directly interfering with sovereignty, as a state is unable to determine freely on the matter. However, the Dublin Regulation simultaneously contains provisions, which give room for states to exert certain discretion, notably by containing discretionary clauses allowing Member States to assume responsibility without being responsible according to the stipulated criteria of the Regulation. Hence, this ambiguous relationship renders it interesting to analyse to what extent States have discretion when applying certain provisions within the Dublin Regulation and what this discretion is used for.

[11] Thielemann, 59.
[12] Susan Fratzke, 'Not adding up, The fading promise of Europe's Dublin system, (Migration Policy Institute Europe, 2015) 16; Thielemann, 47.
[13] Ibid.
[14] Ibid.
[15] Article 288, TFEU; Article 49(5), Dublin III Regulation.

Furthermore, the creation of a system on EU level regulating asylum is obliged to adhere to international law, thereby including international human rights law.[16] At the same time, this is not mirrored in reality. Instead, we see restrictions and obstacles introduced, thereby hindering asylum seekers from gaining access to protection. It is precisely this discrepancy, and the tensions causing it, that constitutes the primary focus of this thesis.

In light of its purpose, this thesis therefore seeks to answer the following research question:

> *How do the tension between human rights and sovereignty shape asylum law and policies in the EU, with especial regards to the CEAS and the Dublin Regulation?*

1.2.1 Sub-questions

In order to achieve the purpose of this thesis, the following questions will be addressed:

I. What are some relevant key features in current understandings of sovereignty?

Addressing sovereignty as a concept is an essential starting point. An understanding of sovereignty allows this thesis to latter on address how some of sovereignty's features may be understood in relation to human rights and the EU.

II. What is the relationship between sovereignty and migration control?

This sub-question seeks to understand the logic of regulating migration, primarily from the perspective of sovereign states. In doing so, this lays the groundwork for understanding any tensions that may arise, and the reasons behind them.

III. Do human rights challenge sovereignty, in particular when it comes to matters regarding migration control?

Narrowing down the relationship between human rights and sovereignty to the area of migration control is essential for the main purpose of this thesis. In doing so, this sub-question therefore traces potential tensions between the concept of human rights and sovereignty.

IV. What is the rationale behind the Dublin Regulation and to what extent do its provisions on discretion, as well as detention, confirm this rationale?

This sub-question addresses the specificities of a particular migration control measure introduced on a EU level. In tracing the inter-relationship between the wider rationale of the Dublin Regulation and its concrete provisions, the sub-question addresses both theoretical and practical aspects from several perspectives.

[16] Article 78, TFEU.

V. *How do the European Courts (i.e. the European Court of Human Rights, ECtHR, and the European Court of Justice, CJEU) approach states' decisions on transfers within the framework of the Dublin Regulation?*
This last sub-question adds depth to the main purpose of this thesis. By introducing the question of interpretation of provisions from different courts, any implementation issues relating to the broader research question may be identified.

1.3 Delimitations

Provisions regarding the regulation of migration exist in several international treaties, regional agreements as well as in domestic law. However, domestic legislation will not be addressed, unless indirectly through analyses of case law by the ECtHR and the CJEU. Instead, the focus will be on relevant EU law, in combination with relevant international and regional human rights obligations. The main focus will be the 1951 Convention Relating to the Status of Refugees (Refugee Convention), the European Convention on Human Rights (ECHR) and Charter of Fundamental Rights of the European Union (EU Charter). Other specialist human rights treaties on the matter, e.g. the Convention on the Rights of the Child, will be excluded.
In terms of the notion of sovereignty and immigration control, this thesis is unable to address all aspects. Therefore, only some selected features of sovereignty with particular importance for this thesis will be examined. These are namely the importance of the intersection between nationality/identity/citizenship, territory and the state's use of force. Next, both the historical overview and the depictions of theory on sovereignty will be broad rather than detailed in order to attain a more general overview to assist the analytical parts of this study. For the same reason, this part touches only upon selected parts of the history and development of sovereignty in the context of Europe, and more specifically in the CEAS.

1.4 Methodology

A study of the CEAS in terms of effects on rights of asylum-seekers demands an establishment of the EU legal framework within which the CEAS is located. As the EU, as well as the individual Member States, is under several international law obligations when it comes to regulation of migration, the essential parts of the regime for protection of asylum-seekers under international law must similarly be established. To this end, a legal dogmatic method will be used.

Firstly, Article 78 of the Treaty on the Functioning of the European Union (TFEU) maps out the legal foundations in creating an asylum policy of the EU by stipulating that:

> "The Union 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.* This policy must be in accordance with the Geneva Convention of 28 July 195 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties."

Furthermore, Article 79 states that

> "The Union shall develop a common immigration policy ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings."

Continuing, as the CEAS consists of EU law instruments, namely Directives and Regulations, these are under the purview of the CJEU.[17] This includes the rights provided for in EU Charter, especially since its 'constitutionalization' through the Lisbon Treaty. The Lisbon Treaty gave the EU Charter the same legal value as other EU Treaties, thereby becoming legally binding on all EU institutions, bodies and agencies as well as Member States.[18] The CJEU offers authoritative interpretation on the provisions of these instruments.[19] Furthermore, the CJEU interprets EU law as a coherent system by drawing upon linguistic interpretation, systemic interpretation, the purpose of the regulation and teleological interpretation hierarchically. According to systemic interpretation, main rules are interpreted broadly, whereas exceptions are interpreted narrowly. Preambles and recitals indicate the purpose of the legislation. The CJEU has further stressed that, when applying EU law, the EU institutions and its Member States are subject to judicial scrutiny of the compatibility of their acts with the Treaties and with the general principles of EU law, including fundamental rights.[20]

Furthermore, relevant provisions as well as case law on the ECHR will be examined in this thesis. The ECHR is often described as having a special position in Europe, not least considering that contracting parties have

[17] Article 19, TEU.
[18] Article 6, TEU; Lisbon Treaty; S. Iglesias Sanchez, 'The Court and the Charter: The Impact of the entry into force of the Lisbon Treaty and the CJEU's approach to fundamental rights', *49 Common Market Law Review* (2012), 1576.
[19] Article 19, TEU.
[20] Communication from the Commission to the European Parliament and the Council 'A new EU Framework to strengthen the Rule of Law' COM(2014) 158 final/2, 19 March 2014, 4.

undertaken to abide by the judgments of the Court, and generally do so.[21] Thus, the ECHR and its relevant case law, as interpreted by the ECtHR, is an exemplary site to conduct an analysis of the way in which national states may be restrained by international legal norms that aim to protect human rights of unauthorised migrants.[22] The ECHR is also to be interpreted in light of its present-day conditions and in a manner that gives practical effect to the rights enshrined in the treaty.[23]

As for the relationship between the legal order of the ECHR and the EU Charter, this is multifaceted. In particular, Article 52 of the EU Charter (on the scope and interpretation of rights and principles) establishes in paragraph 3:

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

At this point, it should be noted that the Lisbon Treaty, giving binding effect to the EU Charter and providing for the future accession of the EU to the ECHR, added to the complexity of human rights in the EU and its relationship with the ECHR without necessarily increasing human rights protection in itself.[24] A legal link between EU law and the ECHR was established through Article 6(3) of the TEU, providing that fundamental rights from the ECHR constitute general principles of EU law.[25] At the same time, a crucial technicality is that the ECHR does not constitute a legal instrument, i.e. it has not been formally incorporated into EU law.[26] Although this is indeed a very relevant and interesting discussion, any in-depth details cannot fit within the scope of this thesis. Rather, it suffices to re-state the fact that there may be a close relationship between the EU and the ECHR, but that the nature of this is neither established nor fixed.[27]

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[21] *Airey v. Ireland,* no. 6289/73 (ECtHR 9 October 1979), paras 24 and 26; S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006), 317.

[22] Article 32, ECHR.

[23] See e.g. *Tyrer v United Kingdom*, no. 5856/72 (ECtHR 25 April 1978) para 31; *Austin v United Kingdom* no 39692/09, 40713/09 and 41008/09 (ECtHR 15 March 2012), para 53.

[24] S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon', 2011 *Human Rights Law Review* 11, no. 4, 682.

[25] Article 6(3) TEU states that fundamental rights, as guaranteed by the ECHR and resulting from constitutional traditions common to the Member States, shall constitute general principles of the Union's law. See also: C-571/10 *Kamberaj*, para 60.

[26] C-617/10 *Åklagaren*, para 44.

[27] See e.g. P. Van Elsuwege, 'New Challenges for Pluralist Adjudication after Lisbon: The Protection of Fundamental Rights in a Ius Commune Europaeum', in *Netherlands Quarterly of Human Rights* 30 (2012), 216.

As for the mapping of relevant obligations under international law, a few words must initially be said regarding the relationship between international human rights law and international refugee law. Although this relationship has been subject for some discussions, it cannot be dealt with within the framework of this thesis. Instead, as international human rights law provides the *general context and background* of the norms developed under international refugee law, they can and will be discussed in the same contexts in this thesis.[28] Hence, this thesis will regard the international refugee protection regime as a specialized branch of international human rights law, in line with what has been argued by some scholars.[29] In doing so, interpretation of international law is necessary. The sources of international law are international conventions, customary international law and general principles.[30] This thesis will accordingly examine what relevant obligations on states that stem from relevant sources.

As for immigration detention, this measure is used in various different scenarios before, during and after an asylum process. However, this thesis will only address immigration detention within the context of the Dublin Regulation. In other words, the focus will be on the deprivation of an individual's personal liberty as provided for by Article 28 of the Dublin III Regulation. This choice is both because the Dublin Regulation is specifically examined by the thesis, but also because this type of immigration detention seems to be more 'administrative' in nature, as it is in order to transfer someone to the Member State deemed responsible according to the criteria of the Dublin Regulation. Other types of immigration detention will not unfortunately be accounted for in specifics.

However, the approach of this thesis does not rests upon the view that the refugee protection regime and the international human rights regime are to be understood as a utopian ideal standard against which the CEAS will be compared. Instead, thesis draws upon the general approach of Critical Legal Studies (CLS) to law.[31] CLS regards law as not neutral, but instead both a product of, as well as produces, politics and ideology.[32] A critical approach therefore regards legal proceedings not as mainly and/or only determined by legal provisions. This choice of theory is motivated by the very scope of the thesis, as answering the broadly formulated research question requires a more in-depth analysis of the relationship between sovereignty, human rights and the CEAS. Hence, this needs to involve more perspectives than what a traditional dogmatic method would allow. Put differently, this thesis is not written from the perspective of legal positivism and instead goes

[28] For a lengthier discussion, see J. Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2015).
[29] J. Mink, 'EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-Refoulement and the Prohibition of Torture and Other Forms of Ill-treatment' in *European Journal of Migration and Law* 14 (2012), 130.
[30] Article 38(1), Statute of the International Court of Justice-
[31] See A. Hunt, 'The Theory of Critical Legal Studies' in *Oxford Journal of Legal Studies* 1 (1986); R.M. Unger, *The Critical Legal Studies Movement* (Harvard: Harvard University Press, 1986).
[32] Ibid.

beyond the legal provision in itself, in order to more comprehensively address the interests behind creating certain legal provisions and framework.

1.5 Terminology

The crucial aspect of this term *unauthorised migrant* used in this thesis is that it denotes those individuals whose presence has not been authorised by the state, e.g. not allowing such migrants legal documents to cross the border, not providing the possibility of regularization of the migrant's legal status. The term consists of people who are territorially present within a sovereign state but who have, as a formal matter, failed to/been denied the possibility abide to formal rules of graduated membership.[33]

The term *asylum seeker* in this thesis refers to persons who initiate an asylum procedure or have the intention of lodging an application for asylum, most often within in the territory of the EU.

The terms *state, nation* and *nation state* will be used broadly and somewhat interchangeably. Although there are ample discussions regarding distinctions between these terms, for the purpose of this thesis it is sufficient to establish that they may be understood as a body that possesses legitimate authority to rule over a particular territory.[34]

1.6 Outline

Chapter 2 addresses relevant historical and current aspects of the concept of sovereignty. The purpose of this chapter is to provide the reader with an understanding of the role of sovereignty in the current global political order, with a focus on its implications in relation to matters concerning migration.

Chapter 3 examines the notion of human rights in relation to sovereignty. The chapter firstly addresses the birth of the human rights regime, thereby giving an insight into what interests were at stake already at the point of departure, as well as changes brought about by the human rights regime. Relevant characteristics of human rights in relation to sovereignty are thereafter discussed. The chapter then proceeds to examine human rights provisions of relevance for this thesis, and under what circumstances such rights can be limited and/or derogated from.

Chapter 4 provides an insight the EU's approach to matters related to migration. By contrasting concepts such as freedom of movement for EU citizens against the regulation of asylum seekers, the chapter then proceeds to discuss the evolution of the CEAS. In doing so, this chapter connects back to the already discussed concepts of sovereignty and human rights.

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[33] L. Bosniak, 'Being Here: Ethical Territoriality and the Rights of Immigrants', *Theoretical Inquiries in Law* 8 (2007), 392.
[34] Bosniak, 408.

Chapter 5 deals with a particular CEAS instrument, namely the Dublin Regulation. By firstly establishing the motif behind having such a mechanism, the chapter then analyses relevant provisions, as well as important case law. This chapter aims to illustrate the specific impacts of the tension between sovereignty and human rights, in terms of how these may shape a legal framework.

Chapter 6 is devoted to providing an overview of the findings so far, as well as giving some conclusive remarks in relation to the purpose and research question of this thesis.

2 Understanding sovereignty

2.1 Introduction

The concept of sovereignty has many dimensions. Due to the limits of this thesis, all of them will unfortunately not be addressed. Instead, this section seeks to provide more of a general framework, addressing some of the prominent features of contemporary understandings of sovereignty and characteristics that are of particular relevance for this thesis. Hence, this essay does not seek to establish an actual working definition of sovereignty, nor does it attempt to assert loyalty towards any specific theory on sovereignty.

Instead, it suffices to firstly establish that the general understanding of sovereignty is that it is fundamentally a governing principle, i.e. the exercise of political power over individuals; a state's power of exercising exclusive control over its jurisdiction; the question of who has decision-making status in a political system.[35] Continuing, a state is here broadly defined as any centralized structure of domination.[36] Nonetheless, as will be shown by the historical overview below, the concept of sovereign states is dynamic and susceptible to changes.

The purpose of the initial historical overview is to highlight that sovereignty is not a self-evident concept, nor is it static. Thereafter, this chapter will discuss current features of sovereignty that is particularly important to understand its relationship to matters of immigration.

2.2 A short historical overview

Medieval Europe constitutes the starting point of this historical overview, although the notion of sovereignty can be traced back even further.[37] In medieval Europe, different territorial entities overlapped each other. Hence, instead of territorial units being the main building blocks for political life, power structures were more complex and hierarchical in varying degrees.[38] However, by the end of the fifteenth century, monarchism had grown enormously throughout Europe at the expense of medieval institutions, e.g. feudalism, free city state and, notably, the church.[39] This marked the gradual consolidation of power and territory under a single and supreme ruler,

[35] C. Lafont, 'Accountability and global governance: challenging the state-centric conetion of human rights, *Ethics & Global Politics* 3 (2010), 194.
[36] N. A. Englehart. *Sovereignty, State Failure and Human Rights,* (Milton Park: Taylor & Francis Group, 2017), 22.
[37] See F.H. Hinsley, *Sovereignty* (Cambridge: Cambridge University Press, 1986) on earlier manifestations of sovereignty.
[38] Cornelisse, 35.
[39] Cornelisse, 36.

thereby changing the modes of political thought towards the notion of sovereignty.[40]

The first one to make a systematic statement of the modern idea of sovereignty was Jean Bodin (1529-1596).[41] Sovereignty for Bodin was indivisible and inalienable, and consisting of the unlimited power to make law. The very existence of a sovereign power was considered necessary in the interests of the community, as without the existence of a sovereign power, there would just be anarchy. Furthermore, the originality of Bodin laid in his partial conceptual detachment of the notion of sovereignty from God, Pope, Emperor or King. Hence, he presented sovereignty as a legal theory necessary for all political associations, thereby not needing to be justified by an appeal to God and instead explained by the nature of the political community as such.[42] Though Bodin's views on the limitless quality of sovereignty are not altogether clear and the subsequent theories of sovereignty have evolved significant, the basic conceptual foundation has remained largely the same. Thus, we will see below that contemporary sovereignty is still concerned with the unity of the body politic.

2.2.1 The Treaty of Westphalia

The Treaty of Westphalia in 1648 is commonly asserted as the starting point for the conception of clearly demarcated and independent territorial units as the basis for political power.[43] By establishing external sovereignty as a principle of international relations, the Peace of Westphalia ascribed to each territorial state the exclusive government of the population within its territory.[44] Notably, the treaty was considered necessary in order to prevent the recurrence of the violent Thirty Years War, which had in large devastated Europe.[45] Hence, with the establishment of Westphalian sovereignty, an inter-state order began to materialise and gradually grew profoundly stronger. As the notion of sovereignty was partly formulated in response to the violence, the subsequent consolidation of the European territorial state system also brought with it a vigorous institutionalisation of the state's monopoly on the use of force.[46] The impact of this on immigration control will be further elaborated later in the thesis.

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[40] J.H. Hinsley, *Sovereignty* (Cambridge: Cambridge University Press, 1986).
[41] Conelisse, 37.
[42] J.W. Allen, *A History of Political Thought in the Sixteenth Century* (London: Dawsons of Pall Mall, 1967), 59; D. Engster, "Jean Bodin, scepticism and absolute sovereignty", in *History of Political Thought* 17 (1996).
[43] Cornelisse, 26.
[44] B. Hindess, "Divide and Rule: The International Character of Modern Citizenship", *European Journal of Social Theory* 1 (1998), 65.
[45] D. Campbell, "Violent Performances: Identity, Sovereignty, Responsibility," in *The Return of Culture and Identity in IR Theory,* eds. Y. Lapid and F. Kratochwil (Boulder: Lynne Rienner Publishers, 1996), 171.
[46] R.L. Hough, *The Nation-States, Concert or Chaos* (Lanham: University Press of America, 2003), 7.

Continuing, the period after the Treaty of Westphalia brought with it more logical coherence to the notion of sovereignty.[47] Furthermore, as the turmoil and civil wars of the sixteenth and seventeenth centuries came to an end, European monarchies were increasingly able to consolidate their powers. Thus, the idea of the sovereign monarchical power became commonly accepted.[48] Yet, sovereignty could not be equivalent to absolutist power in relation to the society that was subjected to it.[49] The question was therefore how to merge the idea of sovereignty with the notion that the ruler is responsible to the community he governs. As will be shown below, popular sovereignty was to provide the answer.

2.2.2 The growth of popular sovereignty

Popular sovereignty is the idea that sovereignty rests with the people who have conferred it, by means of a contract, on the ruler.[50] This marks a shift in the thinking about the state and power, as the ruler is no longer seen as the personification of the community.[51] Hence, the implications of popular sovereignty is that the community is free to decide how much power to give up to government and how much to retain for itself.

The work of Jean-Jacques Rosseau (1712-1778) on the notion of popular sovereignty needs to be particularly mentioned. According to his theory on popular sovereignty, absolute power is unconditionally and permanently transferred to the people. Furthermore, he opposed systematic individualism and instead argued that people do not really exist if not within a community. Put differently, the state is the community, but as the people possess exclusive and omnipotent sovereignty that is also inalienable, the government therefore represents merely an executor of the community's general will.[52] And although the doctrine of popular sovereignty has since been modified in detail, it has in essence not been outdone and arguably remains the prevalent doctrine.[53]

The theory of popular sovereignty was clearly expressed in the French Declaration of the Rights of Man and Citizen. Another aspect of sovereignty that was introduced at the same time, and of importance for the latter parts of this thesis, was the notion of citizenship. The revolutionaries of the French Revolution (1788-1789) aimed to abolish all titles of distinction of the old regime. As such, the idea of equality amongst all members of the body politic required the introduction of a novel notion.[54] Therefore, the French Declaration of the Rights of Man and Citizen introduced the concept of *citizenship,* supposed to represent the ideals of equality and universal

[47] See the works of Hobbes, Locke and Rosseau.
[48] C.W. Pot and A.M. Donner, *Handbook van het Nederlandse Staatsrech* (1995), 21.
[49] Hinsley, 151.
[50] Cornelisse, 41.
[51] Ibid.
[52] See J. J. Rosseau, *Du Contrat Social* and Sabine (1941), 588.
[53] Hinsley, 154.
[54] Cornelisse, 75.

mankind. This new kind of citizenship spread over Europe after the French Revolution. Consequently, the rights and freedoms of universal humankind were confined in a particularistic notion that has retained much of its relevance.[55]

The French Revolution is often considered to be the first time in history that man appeared as an individual who carried rights, thereby constituting a universal claim. Yet this immediately became identified with the rights of peoples and therefore supposed to be guaranteed through the concept of the state.[56] This duality between man/citizen essentially concerns the interdependence of sovereignty and rights. Although the nation is to implement supposedly universal rights, those rights can only be secured by membership in that particular nation – thereby causing a considerable limit to the claims of universalism.[57] The identification of the rights with the rights of citizen in our contemporary context will be further examined below.

Lastly, it should be underlined that citizenship was not simply a notion fabricated in a time dominated by ideals of equality and universality of mankind. Instead, it should be understood as intimately linked to the processes of state formation and the operations of sovereign power.[58] In other words, ”citizenship became an indicator as well as an instrument of exclusion and provided protection only for those who ”belonged”.[59] As will be further discussed, the changing character of the concept of the nation has also brought with it changes on the understanding and implications of citizenship.

2.3 Contemporary characteristics of the sovereign state

The short historical overview above shows that the notion of sovereignty eventually became necessary for the legitimisation of states' exercise of political authority within the body politic. But with regards to the role and impact of sovereignty in the current system of territorial states, there are differing opinions amongst scholars. Some argue that the nation state is more important than ever, whereas others argue that the role of the nation

[55] Cornelisse, 77.
[56] H. Arendt, *The Origins of Totalitarianism* (San Diego/New York/London: Harcourt Brace and Company, 1976), 291; and N. Xenos, 'Refugees: The Modern Political Condition,' in *Challenging Boundaries. Global Flows, Territorial Identities,* edited by M.J. Shapiro and H.R. Alker (Minneapolis: University of Minneapolis Press, 1996), 233.
[57] G. Shafir 'Citizenship and Human Rights in an Era of Globalisation' in *People out of Place: Globalization, Human Rights and the Citizenship Gap,* edited by A. Brysk and G. Shafir (New York/London: Routledge, 2004), 24.
[58] Cornelisse, 79.
[59] A. Linklater, *The transformation of political community* (Cambridge: Polity Press, 1998), 161.

state is diminishing.[60] Although this is indeed a very interesting discussion, it is not in its entirety of relevance to this thesis. Rather, this particular section focuses on characteristics of the prevailing understanding(s) of sovereignty. Due to the narrow scope of this thesis, only certain relevant aspects of sovereignty will be addressed. In doing so, this provides the framework within which the latter parts of the thesis will be situated.

2.3.1 The Art of Belonging

In our modern time, the concept of "the people" is largely intertwined with the notion of "the nation".[61] This is relevant for the understanding of how sovereignty asserted over the peoples within a demarcated territory is intricately intertwined with determining the border between "inside" and "outside", i.e. the divisive lines between inclusion and exclusion.[62] The modern state therefore, apart from claiming exclusive territorial jurisdiction, also asserts a specific national identity. Hence, any individual rights were in reality national rights.[63] The borders of this system have been described as "inscribed both on maps and in the souls of citizens."[64] In other words, the current perception of the territorial state is that it serves as a "container of society"[65].

Even prior to the existence of modern states, social boundaries were still defined in terms of who was deemed as belonging or not belonging to the community. The implication of being a member of a certain body politic was that one was subjected to the authorities of that state.[66] In contrast to this image, contemporary belonging, as expressed through citizenship, carries with it larger implications. In the contemporary system of territorial states, most accounts of citizenship therefore emphasises the rights and equality that it entails. However, it is precisely *because* of the membership in a certain polity that such rights and freedoms are endowed upon the individual.[67] This current function of citizenship as a marker of one's belonging to the state has been described as "the gatekeeper between

[60] See e.g. R. Munck, 'Globalisation, Governance and Migration: an introduction' in *Third World Quarterly Journal* 7 (2008).
[61] Cornelisse, chapter 2.
[62] N. Walker, "Late sovereignty in the European Union", in *Sovereignty in transition,* ed. N. Walker (Oxford: Hart Publishig, 2003), p 22; and W.G. Werner and J.H. de Wilde, "The Endurance of Sovereignty" *European Journal of International Relations* 7 (2001), 288.
[63] Cornelisse, 103.
[64] N. Xenos, "Refugees: The Modern Political Condition" in *Challenging Boundaries: Global Flows, Territorial Identities,* eds. Michael J. Shapiro, and Hayward R. Alker (Minneapolis: University of Minneapolis Press, 1996), 239.
[65] J. Agnew and S. Corbridge, *Mastering space: Hegemony, territory and international political economy* (London: Routledge, 1995) 82; J. Tully, *Strange multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1997), 187.
[66] J. Habermas, 'The European Nation-state – Its Achievements and Its Limits. On the Past and Future of Sovereignty and Citizenship', in *Mapping the Nation,* ed. G. Balakrishnan, (London: Verso, 1996), 285
[67] Cornelisse, 53.

humanity in general and communities of character".[68] Hence, "belonging" has arguably become more important in our contemporary world precisely because of the rights it carries with it. This will be further discussed throughout the thesis.

2.3.2 Territoriality

The concept of territoriality refers to the linkage of political power to clearly demarcated territory and the embedded nature of borders within geographical territory.[69] In the modern concept of sovereignty, territoriality is one of the ways through which we understand the boundaries between "inside" and "outside", parallel to the notion of citizenship described above. Indeed, the very fact that contemporary sovereignty is expressed in a mainly *territorial* form influences the way in which political power may be exercised over people.[70] Hence, modern sovereignty experiences a necessary intertwining of the sovereign exercise of power over both territory and people.[71] As will be shown below, this has profound effects on the shape of contemporary migration regulation.

Territoriality is nonetheless a relative new addition to the history of mankind. Interestingly enough, even before this concept of demarcated territories had become self-evident, the process of state formation in Europe contained exclusionary elements. For instance, states had previously already attempted to homogenise populations by resorting to expulsion of those deemed as not belonging, such as religious minorities.[72] Territorialisation, however, became the process that eventually led to people over whom the sovereign ruled were defined by virtue of their location within certain borders.[73] Furthermore, the territorial state is currently and commonly regarded as the central, proper, and perhaps even neutral, unit for organising political life.[74] Therefore, unfixed and/or unstable territoriality is perceived as threatening the very foundations of sovereignty. Consequently, this explains states' interest in protecting territorial boundaries/borders, especially with regard to the movement of individuals.[75]

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[68] F. Kratochwil, "Citizenship: On the Border of Order," in *The Return of Culture and Identity in IR Theory,* edited by Y. Lapid, and F. Kratochwil (Boulder: Lynne Rienner Publishers, 1996), 182.
[69] Cornelisse, 33.
[70] Ibid.
[71] C. Dauvergne, "Sovereignty in Global Times" in *The Modern Law Review Limited* (2004), 595.
[72] Linklater, 28.
[73] D. Philpott, 'Ideas and he evolution of sovereignty' in *State Sovereignty: Change and Persistance in International Relations,* edited by S.H. Hashmi (Pennsylvania: Pennsylvania State University Press, 1997), 19.
[74] A.P. Jarvis and A.J. Paolini, 'Locating the State' in *The State in Transition, Reimagining Political Space,* edited by J.A. Camilleri, A.P. Parvis and A.J Paolini (London: Lynne Rienne Publishers, 1995), 7.
[75] R. Doty, 'Sovereignty and the nation: constructing the boundaries of national identity' in *State sovereignty as a Social Construct,* edited by T.J. Biersteker and C. Weber (Cambridge: Cambridge University Press, 1996), 122.

Territorial borders, and the safeguarding of them, are therefore an instrument for states through which they are able to clearly separate between the *national* (domestic) and the *foreigner*. But territories in the current prevailing political tradition of nation-states are not only associated with the "invention" of the border, they are also inseparable from the institution of power as *sovereignty.*[76] More precisely, territoriality is the concept through which the institutions of sovereignty, the border, and the government of populations (the peoples) may merge together into a single unity.[77] In other words, sovereignty is expressed as power to attach populations to territories in a stable or regulated manner, but also to "administrate" the territory through the control of the population and conversely, to govern the population through the division and the survey of the territory.[78]

2.3.3 Legitimate state violence and immigration control

Societies have for a long time had and continues to have mechanisms to control and sanction violence. The link between violence and the state has been aptly expressed as "the state made war while war made the state"[79]. However, this relationship between society and violence is clearly dynamic, as public institutions have changed over time and particularly so in terms of controlling private violence.[80] For instance, as previously described, the notion of sovereignty was partly formulated in response to the violence that ravaged Europe at the time. In particular, the establishment of this understanding of sovereignty endowed upon the modern state a task of providing security to its citizens.[81] Subsequently, one of the defining characteristics of modern sovereignty is its monopoly over the legitimate use of force.[82] As such, individuals within sovereign territorial states no longer had the right to use force against each other. Put differently, states succeeded in establishing such a monopoly on the legitimate use of force partly through this very ability to provide security to its citizens.[83]

The state monopoly on force, in its ideal form, is supposed to guarantee the security of its citizens.[84] With the establishment of modern sovereignty, an additional distinction between international and external violence materialised, namely the difference between internal and external state violence. Internal violence was perpetrated against those within the territorial boundaries of the sovereign state; the regulation of which was the prerogative of the sovereign state alone, consistent with the idea of

[76] E. Balibar, 'Europe as Borderland' in *Environment and Planning D: Society and Space* 27 (2009) 4.
[77] Ibid.
[78] Ibid.
[79] C. Tilly, *Coercion, Capital and European States.* (Oxford: Basil Blackwell, 1992).
[80] Ibid.
[81] Cornelisse, 60.
[82] Englehart, 22.
[83] Cornelisse, 60.
[84] H. Wulf, 'The Privatization of Violence: A Challenge to State-Building and the Monopoly on Force', *The Brown Journal on World Affairs* 18 (2011), 137.

sovereignty as the supreme political authority over the population within a certain territory.[85] On the other hand, external violence, such as the use of force between states, was regulated by the articulation of international norms, which were in turn based on strong territorial assumptions.[86]

How does state monopoly on violence relate to immigration control? As what has been previously established in this thesis, in order for the modern state to exist, it must have both members and boundaries and therefore ways of separating between "inside" and "outside". In this sense, a state's migration policy is often considered as essential to its construction as it is part of determining the boundaries between members and non-members.[87] Indeed, it has been claimed that the question as to what constitutes legitimate political power cannot be seen in isolation from the modern state's claim to determine its boundaries.[88] Control over migration is thus in many ways linked to the very fundamentals of being a sovereign state.

Furthermore, states' responses to international migration illustrate how the distinction between internal and external sovereignty (thereby including its monopoly on violence) is at times very complex and perhaps even blurred. Indeed, the external aspect of sovereignty in a world divided into territorial states is naturally engaged when people cross borders. At the same time, international migration also triggers the internal aspect of sovereignty in a policy area where its identity-based boundaries and its territorial borders converge.[89] The result is that a state, which regards immigration as a threat, may attempt to protect its territorial boundaries through resorting to violence, e.g. military patrols to intercept illegal migrants at the border and military police to carry out expulsions. Simultaneously, the state may attempt to establish control *within* its territorial boundaries through measures to ensure that its identity remains unthreatened, e.g. checks on 'bogus' marriages, obligatory language courses etc.[90] In fact, restrictive migration policies are often justified by reference to the importance of maintaining the cohesion of the national community.[91] In this context, some scholars have interestingly enough argued that states are currently asserting themselves through attempts of implementing more restrictive migration laws and policies as a response to the perceived loss of control over flows of money, ideas and the setting of economic or cultural policies.[92]

Conclusively, it has been argued that prior to the widely established notion of territorial states, it was difficult to differ between legitimate and

[85] Cornelisse, 61.
[86] Ibid.
[87] E. Balibar, "The Borders of Europe," in *Cosmopolitics: Thinking and Feeling Beyond the Nation,* edited by P. Cheah and B. Robbins (Minneapolis: University of Minneapolis Press, 1998), 590.
[88] Cornelisse, 59.
[89] Cornelisse, 62.
[90] Ibid.
[91] O'Nions, *Asylum – A Right Denied: A Critical Analysis of European Asylum Policy,* (Farnham: Ashgate Publishing, 2014) 13.
[92] Dauvergne, 595.

illegitimate violence, as there was an overlap of identity-based boundaries.[93] But with the very process of territorialisation and the demarcations between 'us' and 'them', a structure materialised that allowed for the differentiation between legitimate and illegitimate violence.[94] Currently, the very act of crossing a national border without prior authorisation from the state seem to often be presented as constituting a ground for resorting to state violence. It is the manifestations of such violence that the gaze will now be turned towards.

2.3.3.1 Restricting the freedom of movement and depriving personal liberty of individuals

Freedom of movement in this context denotes the movement of individuals once *within* national borders.[95] This definition of freedom of movement has been described as fundamental through the way it distinguishes liberty from servitude.[96] Furthermore, it is commonly accepted that individuals in a liberal state should be as free as possible to determine life choices – including which geographic areas they want to be present in.[97] The centrality of the right to free movement has been expressed as it being "not merely an instrument for other freedoms but is, alongside the other basic freedoms of thought, speech and association, also a core aspect of what it means to be free".[98]

Yet at the same time, control over an individual's mobility has long been considered as one of the main forms of sovereignty, deriving partly from the state's power to control and govern its population with reference to security.[99] In the context of asylum seekers, examples of such measures may be states assigning unauthorised refugees to compulsory stay in reception centres.[100] However, for the purpose of this thesis, it should be underlined that by far the most common consequence of an asylum seeker's unauthorised arrival in a country is that they will be detained or otherwise denied internal freedom of movement.[101] This will be further elaborated in the forthcoming sections regarding states' usage of mechanisms to conduct transfer in the Dublin Regulation.

Fundamental for a more in-depth understanding of detention is the fact that deprivation of liberty is often seen as one of the sharpest tools that can be

[93] Cornelisse, 60.
[94] Ibid.
[95] M. Longo, 'Right of Way? Defining Freedom of Movement within Democratic Societies' in *Democratic Citizenship and the Free Movement of People,,* edited by W. Maas (Leiden: Martinus Nijhoff Publishers, 2013), 32.
[96] Longo, 31.
[97] J.H. Carens, 'Migration and Morality. A Liberal Egalitarian Perspective', in *Free Movement: Ethical Issues in the Transnational Migration of People and Money,* edited by B. Barry and R.E. Goodin (Philadelphia: Pennsylvania University Press, 1992).
[98] R. Bauböck, 'Global Justice, Freedom of Movement and Democratic Citizenship', *Arch. Europ. Sociol.* 1 (2009), 7.
[99] S. C. Colombeau, "Policing the internal Schengen borders – managing the bind between free movement and migration control", *Policing and Society,* 27 (2017), 480.
[100] Hathaway, 378.
[101] Hathaway, 374.

used against an individual within a sovereign order.[102] Nevertheless, states regularly deprive the liberty of individuals in situations other than immigration detention, most commonly in the shape of imprisonment within a criminal law system. However, when used in response to crime, such deprivations of liberty are most often intended to function as a site for reform.[103] This is in stark contrast to immigration detention, which has no such intention. Instead, immigration detention arguably instead seeks to reaffirm the territorial control of persons in order to hold onto the validity of the ideal notion of sovereignty.[104]

The very existence and usage of immigration detention should therefore be seen as states violently guarding the rigid link between territory, identity and the rights.[105] Hence, states' using immigration detention as a measure of immigration control profoundly illustrates how the idea of a world divided into territorial nation states undeniably impacts on the individual's life. In other words, "immigration detention is an attempt to provide a territorial solution to a problem which is perceived as a problem precisely because it cannot be reduced to the conventional territorial solution"[106]. States depriving individuals of their personal liberty through the usage of immigration detentions seems to be a violent consequence of the territorial foundations of the global political system. The perceived need and legitimacy behind doing so has been described as state's capacity to crackdown on unwanted immigration being the "last bastion of sovereignty"[107].

However, although the state has monopoly on the use of force, this power is not unlimited. In this context, it has been argued that there is a disparity between people and state, stemming "from the very abstraction of the modern notion of sovereignty."[108] And it is precisely because of this divergence that safeguards for the people are needed – it is the *state,* and not the *people,* who have the monopoly on legitimate violence. Such safeguards limiting the extent of state sovereignty have historically been based on a variety of grounds, including divine commandment, legal rights, and extra-legal checks such as a balance of power or the threat of popular revolt.[109] In recent years, the birth of the international human rights regime is said to constitute such a safeguard against the use of violence by the state.

[102] Ibid.
[103] See G. David, *The Culture of Control – Crime and Social Order in Contemporary Society* (Chicago: Chicago University Press, 2001).
[104] Cornelisse, 242.
[105] Ibid.
[106] Cornelisse, 245.
[107] Dauvergne, 600.
[108] Cornelisse, 64.
[109] J. Donelly, "The Relative Universality of Human Rights," *Human Rights Quarterly* 29, no. 2 (2007), 284.

2.4 Conclusive remarks

The modern notion of sovereignty has developed over quite a long period of time. Already from the work from Bodin in the 16th century, the concept of sovereignty concerned the location of political authority and how it may be exercised, and any potential limits to this. From the historical overview, it is evident that sovereignty is dynamic in its nature and therefore carrying with it different theoretical understandings as well as practical implications.

In our contemporary world, a sovereign state can be understood as a body that possesses legitimate authority to rule over a particular territory.[110] The notion of sovereignty includes the commonly asserted right of states to regulate entry into (if not the departure of any individual from) the national territory. The importance of protecting its borders can be explained especially in terms of two characteristics of sovereignty, namely territoriality and what this chapter has referred to as "the art of belonging", i.e. notions of inclusion and exclusion. In other words, the state can be said to be using both the form and content of sovereignty to protect the political community and to maintain a collective identity.

Another key aspect of the state is its monopoly on legitimate use of force. This is often understood as deriving from a state's role to provide security for its citizen. In the context of measures of migration control, the legitimate use of force may be expressed in various ways, including such a sharp tool as the deprivation of liberty through the usage of immigration detention.

Lastly, current understandings of sovereignty do not regard it as being without restrictions. Indeed, scholars argue that every person present within the space of a sovereign state, and "subject to the jurisdiction" of that power, should be armed with individual protections against its exercise.[111] In the particular context of the rights of immigrants, it has been argued that "[m]en and women are either subject to the state's authority, or they are not; and if they are subject, they must be given a say, and ultimately an equal say, in what that authority does."[112] Such limits may be derived from several grounds, including the notion of international human rights. It is this latter concept that the subsequent chapter will address.

[110] L. Bosniak, 'Ethical Territoriality and the Rights of Immigrants', *Theroretical Inquiries in Law* 8 (2007), 408.
[111] Ibid.
[112] M. Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), 61.

3 Human rights and sovereignty

3.1 Introduction

Although the human rights regime can be both praised and criticized from various perspectives, this chapter will not be able to offer a comprehensive discussion on all aspects of this topic. Instead, the aim of this chapter is to particularly address how the human rights regime interacts and/or interferes with the concept of sovereignty. The chapter begins with a short historical overview of international law and international human rights law to illustrate any potential changes brought about by the human rights regime. Thereafter, both a theoretical framework to suggest ways in which to interpret and evaluate human rights, as well as closer examinations of some relevant human rights provisions will be provided. The focus in these sections will mostly concern relevant rights in the situation where a non-citizen seek to enter a state's territory for non-citizens, including those who enter a country in order to seek asylum, mostly without prior authorisation.

3.2 Historical overview

3.2.1 International law

The earliest stages of international law actually included the individual as a subject, mainly due to the fact that the state had not yet acquired the status of the decisive political entity.[113] However, with the previously described emergence of the modern state as the dominant way of political organising, tensions arose regarding the issue of who and what was to be regarded as subjects of international law. This issue was gradually decided in favour of the sovereign states. As result, the individual lost much of their relevance as a subject of international law.[114] The prevalence of natural law persisted amongst some theorists, but natural rights were now ascribed to states instead of to individuals, as states had become the exclusive subjects of international law.[115] One of the natural rights of states was considered to be the right to non-interference by other states.[116] This rested on the underlying premise of the notion that all states are equal and independent; a notion that will be further discussed in latter parts of this thesis.[117]

[113] Cornelisse, 87.
[114] Ibid.
[115] E. Nijman, *The concept of international legal personality: an inquiry into the history and theory of international law* (The Hague: T.M.C. Asser Press, 2004), 82.
[116] Ibid.
[117] A.R. Choudhury and J. Hossain Bhuiyan, *An Introduction to International Human Rights Law* (Leiden/Boston: Brill, 2010), 2.

A transition occurred in the 18th century, involving a shift from natural law theories in international law to an approach that identified the law of nations as positive law between sovereign states.[118] Nonetheless, the exclusion of external interference continued to constitute one of the cornerstones of the law of nations, together with the aforementioned premise of all states being equal and independent.[119] Furthermore, the influence of legal positivism brought with it the complete reliance of the law of nations on national sovereignty, whereas legal personality in international law became dependent on absolute sovereignty.[120] In other words, this development of international law solidified the sovereign state as the sole bearer of rights. In those few cases where the individual features, their position was derived from and dependent on the will of the sovereign state.[121] This did not dramatically change until the emergence of the human rights regime after the end of the Second World War, which will now be discussed.

3.2.2 The rise of the human rights regime

The period between the First and the Second World War has been described as characterised by sovereignty's narrow link between power, territory, identity and rights being at its firmest, and thereby leading to a gap between international and domestic law.[122] This gap entailed the absence of enforceable rights for large groups of individuals, resulting in the horribly many lives lost during the two World Wars.[123]

In terms of rights of asylum seekers and refugees, early efforts of the international community to protect them can be traced back to the years after the First World War, when some two million Russians, Armenians and others were forced to flee their countries.[124] However, this period also coincided with the emergence of modern systems of social organization throughout most Europe. Consequently, governments began to regulate large parts of economic and social life, safeguarding critical entitlements for their own citizens.[125] This led to states reasserting the importance of definite boundaries between insiders and outsiders, materializing in e.g. the reinforcement of passport and visa controls at their borders.[126]

Nonetheless, the end of the Second World War brought with it a significant shift, as the wellbeing of the individual became increasingly a matter of

[118] See the work of Emmerich de Vattel (1717-1767); Cornelisse, 88.
[119] Choudhury and Hossain Bhuiyan, 2.
[120] Nijman, 111.
[121] C. Harding and C.L. Lim, 'The significance of Westphalia: an archaeology of the international legal order' in *Renegotiating Westphalia. Essays and commentary on the European and conceptual foundations of modern international law,* eds. C. Harding and C.L. Lim (The Hague: Kluwer Law International, 1999), 5.
[122] Cornelisse, 97.
[123] See in general Arendt; S. Oda, 'The Individual in International Law', in *Manual of Public International Law,* edited by M. Sorenson (London: MacMilan & Co, 1968), 495.
[124] Hathaway, 83.
[125] Ibid.
[126] Ibid.

international concern by the international community, irrespective of nationality/citizenship.[127] As such, the period post-Second World War is often seen as the starting point for the emergence of international human rights law as a distinct field of international law, thereby changing the way in which international law had previously perceived only states as its central subjects.[128]

Concerns for human rights have arguably existed in different shapes prior to the 20th century. However, what is striking for the post-war period is the unique proliferation of international institutions and norms dedicated to protecting human rights. The establishment of the United Nations in 1945 is often considered to constitute yet another turning point from which international law changed from 'the laws of nations' towards embracing more universal notions of human rights.[129] Subsequently, the Universal Declaration of Human Rights (UDHR) was adopted in 1948 and has been described as "the first authoritative international footprint on the path towards the collective affirmation by the international community to the supremacy of the human being over his man-made institutions".[130] Following the UDHR, several declarations, conventions and covenants have been developed with the purpose of securing human rights.[131]

Thus, with the emergence of the human rights regime, the individual became a subject of international law. This development of international law has been, perhaps too optimistically, described as "likely to be framed and not so much judged by the way international law defines relations between states, as by the way it defines relations between persons and states."[132] Reiterating the purpose of this thesis, the regulation of asylum on EU level – where relations between the Member States meet individual rights – lends itself to a discussion against this particular context.

3.3 Human rights in relation to sovereignty

International human rights law has been described as referring to the overarching mission to protect universal features of the human being from the exercise of sovereign power.[133] Yet in practice, states have generally not

[127] S. Oda, 'The Individual in International Law', in *Manual of Public International Law,* ed. M. Sorenson, 469-530 (London: MacMilan & Co, 1968), 495.
[128] D. Luban, *Legal Modernism* (Ann Arbour: University of Michigan Press, 1994), 336; Arendt, 291.
[129] Choudhury and Hossain Bhuiyan*,* 3.
[130] Ibid.
[131] See ICCPR, IESCR, CEDAW, ICERD, CRC.
[132] R.A. Brand, 'Sovereignty: The State, the Individual, and the International Legal System in the Twenty First Century' in *Hastings International and Comparative Law Review* 25 (2002), 280.
[133] P. Machlem, *What is International Human Rights Law? Three Applications of a Distributive Account* (Texas: Bernard and Andre Rapoport Center for Human Rights and Justice University of Texas School of Law, 2007).

been willing to acknowledge the force of international human rights law.[134] Hence, it can be said the relationship between human rights and states' sovereignty seems to consist of various tensions. For instance, it is commonly asserted that states are responsible for human rights conditions within their borders.[135] Does these obligations carry the implications regardless of the status of the individual present on a state's territory, e.g. if it is someone who crossed the borders of a state without prior authorisation?

Central to understanding the tension between state sovereignty and the human rights regime is the fact that human rights are often claimed to be universal, i.e. equal and inalienable entitlements to all individuals.[136] Furthermore, human rights are ordinarily understood to be the rights that one has simply because one is human, referring to that it being inherent in all human beings.[137]

This notion of universalism is clearly expressed in Article 2 UDHR, which provides that everyone is entitled to the listed human rights

> "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[138]

It could therefore be argued that universal human rights carry with it the effect that states asserting sovereignty over individuals can no longer be justified by claiming that it is a matter of domestic jurisdiction.[139] Although the notion of universality is indeed very appealing, one still has to examine whether it might be promising more than it delivers. Therefore, the focus below will be on understanding expressions of state-centrism in human rights, and the effects of this.

3.3.1 State-centrism

The concept of state-centrism is arguably one of the central ideas of international human rights and entails that states, and only states, are the entities responsible for satisfying certain conditions in the treatment of individuals.[140] Accordingly, although the international community has some responsibility in terms of protecting human rights, this responsibility is secondary.[141] This secondary responsibility is further manifested in two ways. Firstly, the responsibility of the international community is triggered

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[134] Hathaway, 31.
[135] Engleheart, 163.
[136] I. Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003)*;* M.N. Shaw, *International Law* (Cambridge: Cambridge University Press, 1997).
[137] J. Donelly, 'The Relative Universality of Human Rights', in *Human Rights Quarterly* 29 (2007) 282.
[138] Article 2, UDHR.
[139] Cornelisse, 101.
[140] C. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), 13.
[141] See R. Goodin, 'Globalizing Justice' in *Taming Globalization,* edited by D. Held (Oxford: Policy Press, 2003), 76.

only if and when states are unwilling or unable to protect the rights of their own citizens.[142] Secondly, the responsibility of the international community is secondary in the sense that it is not supposed to replace the protective function of states.[143]

Hence, as state-centrism is inherent in the human rights regime, the implementation and enforcement of universally held human rights is extremely relative and dependent on state interests. Put differently, the global human rights regime relies on national implementation of internationally recognized human rights.[144] Enforcement of authoritative international human rights norms is left almost entirely to sovereign states, with a few exceptional circumstances.[145]In essence, although the international human rights regime can be described as a system for constraining state power, it is simultaneously a *product* of state power.[146] Therefore, the claim of universality of human rights is supposed to be able to function within a system characterised of particularities, i.e. the system consisting of sovereign states. The universal of human rights of unauthorised migrants, for example, are supposed to be recognised and enforced by the very same state that, according to the logic of the sovereign state, seeks their speedy removal from the territory.

3.4 Examining the rights of unauthorised migrants in the context of the European Union

3.4.1 The right to enter and the principle of *non-refoulement* – who has the right to enter and who cannot be forced to leave?

It is commonly asserted that there exists no right for aliens to enter a foreign state's territory, save some exceptions.[147] On the other hand, states are seen as possessing a general competence to require aliens to leave.[148] This has been described as the right to leave and the right to enter a country not being symmetrically protected in the human rights regime.[149] Already at this initial stage, this points out the inconsistencies in the legal regime of international movement in a world divided into territorial sovereign states.

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[142] Lafont, 199.
[143] Ibid.
[144] Donelly, 283.
[145] Ibid.
[146] S. Marks, 'State-Centrism, International Law, and the Anxieties of Influence, *Leiden Journal of International Law,* 19 (2006), 346.
[147] G. Fourlanos, *Sovereignty and the ingress of aliens* (Stockholm: Almqvist & Wiksell International, 1986), 61.
[148] Ibid.
[149] Cornelisse, 175.

The right to leave one's own country is seen as generally bestowed upon persons for whom the sovereign state, as discussed in previous chapters, bears a clear responsibility. In contrast to this, an individual claiming the right to enter a state of which they do not belong, i.e. are not a national of, does not fit into the current system's way of structuring the relationship between rights, territory and power/responsibility.[150] Consequently, translating this claim into a right is rendered very difficult. This is evident by the fact that states throughout the world, to a greater or lesser extent use different measures to restrict access to their territories by non-citizens.[151] The way in which individuals are granted the right to leave any country, including their own, without recognizing the right to enter another country, is indeed paradoxical considering how the current world is organized around territorial units.[152]

As previously discussed, the current international legal regime differs between different categories of persons crossing boundaries. This is the case also when it comes to matters of entering the territory of a state of which you are not a member. For the purpose of this thesis, it is natural to now specifically dwell into the rights of those who cross borders in order to lodge applications for asylum.

The starting point here is the UDHR, as it constitutes one of the prominent documents during the birth of the human rights regime.[153] However, it should be underlined that the provisions in the UDHR are not legally binding, as it is a "soft law" instrument.[154] Nonetheless, the UDHR provides a good insight into the aspirations of the human rights regime. With this said, Article 14 UDHR anchors the right to asylum as a universal human rights, stipulating that:

> "Everyone has the right to seek and to enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations".[155]

Furthermore, since the adoption of the UDHR, it has been complemented by several international covenants with legally binding provisions.[156] The UDHR has arguably also served as a template even for national law-making, thereby forging a continuum between the international protection of human

[150] Ibid.
[151] Hathaway, 279.
[152] See S. Benhabib, *The Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004).
[153] G. Brown. *The Univeral Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (Cambridge: Open Book Publishers, 2016).
[154] Brown, 34.
[155] Article 14, UDHR
[156] See in particular the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

rights and their protection under public law in particular countries.[157] Of importance to this thesis is the fact that these international and national instruments are further complemented by regional treaties.

The cornerstone of the regime for refugee protection is the Refugee Convention. First and foremost, the definition of a refugee contains an alienage requirement, referring to the refugee status being restricted to people who are outside of their own country.[158] However, the Refugee Convention contains no right to enter a state even for those who seek to claim international protection. Accordingly, some people seeking refugee status will *de facto* enter through irregular means. On the other hand, the drafters of the Refugee Convention agreed that the alienage requirement of the refugee definition in no sense requires lawful entry. Therefore, Article 31 stipulates that persons who otherwise meet the requirements of the definition are genuine refugees even if they cross frontiers covertly or disguise their true motive when they seek entrance.[159] Mere physical presence of an individual suffices to trigger Article 31, meaning that this provision must be granted to all persons who claim refugee status, until and unless they are finally determined not be refugees according to the Convention. Yet Article 31 is also tempered in critical way: only those who come forward to regularize their status with authorities of the host country are entitled to this immunity.[160] Conditioning the provision in this way suggests that the entitlement to non-penalization rests upon gaining the state's authorisation in the shape of 'regularization', i.e. formally acknowledged to stay on a state's territory.

Proceeding to relevant regional instruments in the context of Europe, the right to seek asylum is expressed by Article 18 of the EU Charter, stating that "[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community"[161]. However, from the wording of the article, it is clear that the right to asylum in Article 18 EU Charter does not have autonomous legal content. Instead, the right to asylum stipulated by the provision has to be guaranteed within the legal framework of the Refugee Convention and the EU law. Consequently, the provision cannot be interpreted as creating an individual right that national courts of the Member States must adhere to, as the provision does not contain a clear and unconditional right.[162] Instead, the implementation of Article 18 of the EU Charter is made conditional to the adoption of EU secondary legislation and/or measures enacted under national law.[163]

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[157] Brown, 35.
[158] See Article 1, Refugee Convention for the definition of a refugee.
[159] Article 31, Refugee Convention; Hathaway, 28.
[160] Hathaway, 388.
[161] Benhabib, 69.
[162] F. Ippolito, 'Migration and Asylum Cases before the Court of Justice of the European Union: Putting the EU Charter of Fundamental Rights to Test?', *European Journal of Migration and Law* 17 (2015), 20.
[163] Ibid.

Continuing, any account of the discussion regarding the right to enter/leave a territory must also give due mention to the principle of *non-refoulement,* entailing the prohibition of sending individuals back to territories where they may risk violations of certain fundamental human rights, most often the prohibition on torture or other forms of ill-treatment. However, the formulations of the principle of *non-refoulement* are not identical under relevant treaties.[164] For instance, Article 33 of the Geneva Convention explicitly states the principle of *non-refoulement,* whereas the ECHR do not comprise such a reference and instead protect against *refoulement* via an extended scope of the prohibition of torture and other forms of ill-treatment.[165] Nonetheless, the principle of *non-refoulement* is reiterated both in the prohibition of torture and other forms of ill-treatment under general human rights law, as well as in particular to the life or freedom of refugees.[166] As such, it is applicable to migrants other than refugees.[167]

However, the principle of *non-refoulement* is not the same as a right to asylum from persecution, as explained above.[168] Its content stipulates a negative obligation, i.e. not to refoule, but not a positive obligation to admit an individual onto the territory and/or to grant asylum. In other words, the principle of *non-refoulement* constrains, but does not fundamentally challenge, the usual prerogative of states to regulate the entry into their territory of non-citizens.

From this overview, it can be concluded that even if the right to *seek* asylum could arguably be said to be commonly recognized, the right to enter a country that you are not a citizen of, as well as a state's obligation to *grant* asylum continues to be a matter of discussion. The two latter not being expressed in human rights instruments indicates how states continue to guard the granting of entry, even for the purpose of seeking asylum, as a sovereign privilege.[169] This conflict between universal human rights and sovereignty claims has been described as one of the "root paradoxes at the heart of the territorially-bounded state-centric international order"[170].

3.4.2 Freedom of movement and personal liberty

Freedom of movement is recognized in various international law instruments.[171] However, the exercise of this right is most often dependent

[164] See e.g. Article 3 ECHR and Article 33 of the Refugee Convention.
[165] J. Mink, 'EU Asylum Law and Human Rights Protection: Revisiting the Principle of *Non-Refoulement* and the Prohibition of Torture and Other Forms of Ill-treatment' in *European Journal of Migration and Law* 14 (2012), 130.
[166] See e.g. Article 7 ICCPR and Article 3 ECHR in comparison to Article 33 of the Refugee Convention.
[167] See Mink, (2012).
[168] Hathaway, 304.
[169] Benhabib, 69.
[170] Ibid.
[171] See e.g. Article 26, Refugee Convention, Article 13 UDHR, Article 45 EU Charter, Article 2, ECHR.

on whether the individual is *lawfully* residing on a State's territory. This can be explained by the fact that even though freedom of movement is considered fundamental, it is at the same time closely intertwined with citizenship or at least authorised/acknowledged presence on a state's territory.[172] Even Article 26 of the Refugee Convention, which concerns freedom of movement, accrues once a refugee is "lawfully" in the territory of a state party. A refugee is present once formally admitted to the asylum state's refugee status determination procedure, or otherwise expressly or impliedly authorized to remain at least temporarily in that state's territory.[173]

As for right to personal liberty, this thesis has previously described how the act of depriving someone their liberty is arguably one of the most intruding forms of state violence. Interference with the right to liberty occurs if a person is forced to remain in a narrowly confined space, whereas less serious restrictions (in terms of bodily movement) falls within the scope of the right to freedom of movement.[174] As neither of these rights is absolute, there are several instances when such restrictions are considered as legitimate acts by the state, even under international human rights law.[175]

The right to personal liberty is a fundamental principle in all major human rights instrument, as well as in the EU Charter and the ECHR.[176] When it comes to personal liberty in the form of immigration detention, it should first and foremost be clearly established that international human rights regime does allow states to use immigration detention. Indeed, the human rights regime acknowledges immigration detention as a legitimate form of state control, thereby reaffirming the pre-existing right for states to control the entry and expulsion of aliens on its territory and, by extension, the sovereign right to monopoly on violence. In doing so, this reaffirms the previous discussed view of the human rights regime as being unable to radically challenge the system of sovereign states.

Despite this, the human rights regime arguably place limits on sovereignty by only allowing immigration detention for certain narrowed purposes. Hence, resorting to immigration detention is not allowed for the sole purpose of deterring or penalising immigrants, nor is it permitted to use immigration detention for purposes related to criminal law.[177] Furthermore, such detention should often be necessary as well as proportional in relation to the permissible purposes it serves. For the purpose of this thesis, Article 5 ECHR serves an illustrative example, stating that "[e]veryone has the right to liberty" and thereafter proceeding to listing an exhaustive list of

[172] E. Balibar, 'Europe, an 'Unimagined' Frontier of Democracy', *Diacritics* 33 (2003), 36-44; M. Longo, 'Right of Way? Defining Freedom of Movement within Democratic Societies, in *Democratic Citizenship and the Free Movement of People,* edited by W. Maas (Leiden: Martinus Nijhoff Publishers, 2013)31.
[173] Hathaway, 414.
[174] Ibid.
[175] S. Joseph, S. Schults, and M. Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford: Oxford University Press, 2004), 304.
[176] See Articles 3 and 9 UDHR; Article 5 ECHR; Article 6 EU Charter; Article 7.
[177] See e.g. Article 31 of the Refugee Convention.

permissible restrictions on personal liberty. Of particular relevance is Article 5(1)(f) ECHR, allowing states to control the liberty of aliens in the immigration context. Thus, the ECHR recognises the regulation of entry and removal as legitimate reasons for states to have recourse to immigration detention. Immigration detention based on any other reasons is prohibited by the ECHR.[178] For the purpose of this thesis, it should also be noted that CJEU has established that Article 6 of the EU Charter[179] corresponds to Article 5 ECHR.[180] This suggests that the right to personal liberty for the purposes of regulating entry (i.e. preventing unauthorised entry) and securing expulsion (enforcement of deportations) are more strictly interpreted when it comes to refugees or asylum seekers.

3.5 Conclusive remarks

The emergence of the international human rights law regime in the twentieth century is indeed one of historical importance. This chapter has sought to discuss how this concept, particularly with its promise of universality, intersects, and conflicts, within a world organized into sovereign states.

Drawing from the discussions on state-centrism inherent in the human rights regime, it can be said that if sovereignty has been challenged by human rights, it is only to a certain extent. A clear example of this is that national citizenship can no longer legitimately be the only foundation upon which rights are attached and determined, as international law guarantees fundamental rights irrespective of a person's nationality. Indeed, the combination of universalism with the aforementioned depictions of relevant rights of migrants, namely the principle of *non-refoulement,* freedom of liberty and freedom of movement, seems at first glance to support the claim that human rights may indeed pose a real challenge sovereignty. However, although international human rights law can be said to have imported certain legal, and sometimes actual, conditions, it remains clear that it has not managed to resolve all paradoxes.

The pre-supposed logic accepted by the human rights regime becomes particularly visible in the lack of a right for unauthorised noncitizens to enter a state's territory. Furthermore, despite its claims of universality, the crossing of borders without prior authorisation constitutes ground for legitimate restrictions on rights for migrants. This suggests that the human rights regime may not only be working in parallel with the system of sovereign states, but perhaps that it serves to, if not legitimise, then at least acknowledge, the latter. The tension is also one with many practical consequences, as human rights are arguably dependent on the state as a

[178] Cornelisse, 279.
[179] Article 6 EU Charter states that "everyone has the right to liberty and security of person".
[180] C-601/15 (PPU) *J.N. v Staatsecretariat van Veiligheid en Justice* [2016], para 47.

venue for their realisation. The flaws of this relationship are particularly striking in the context rights of migrants. Or, put differently:

> ”The present international legal system is so determined to protect the interests of states and their territorial boundaries that any people who seek to move across those boundaries are seen as intruders. If they can enter at all, they enter at their own risk.”[181]

After discussing the tensions between sovereignty and human rights from a theoretical as well as a dogmatic perspective, the focus will now be on the practical implications. In other words, the coming chapters will focus on whether the human rights regime succeed in establishing a guarantee for individual freedom that is not trapped within “the image of the sovereign, the territorial state and its traditional […] institutions”[182] in the context of the EU. Indeed, the previously mentioned constitutionalization of the EU Charter through the Lisbon Treaty in combination with all of the Member States being Contracting Parties to the ECHR, suggest that human rights should have a vital role in the EU.

[181] R. McCorquodale, ”International Law, Boundaries and Imagination”, in *Boundaries and Justice: Diverse Ethical Perspectives,* eds. D. Miller and S. Hashmi (Princeton/Oxford: Princeton University Press, 2001), p 145 and p 152.
[182] J. Huysmans, ‘Discussing Sovereignty and Transnational Politics’ in *Sovereignty in Transition,* edited by N. Walker (Oxford: Hart Publishing, 2003), 223.

4 The creation of a common migration and asylum policy within the European Union

4.1 Introduction

This section aims to present an overview of the CEAS and some of its underlying tensions. Doing this requires first and foremost an introductory discussion regarding the EU, and in particular the relationship between the sovereignty of the Member States and the EU as a polity. Although there are many interpretations of sovereignty in relation to the EU, this section will only provide a brief introduction to highlight some of the discussed aspects, without necessarily confine itself to a certain viewpoint.

Furthermore, the CEAS has already from its inception been conceived as a "flanking measure of EU integration to compensate for the abolition of internal borders."[183] In order to understand the potential conflict that this statement implies, this chapter will address the creation of an area of freedom of movement for EU citizens in relation to matters of immigration from non-EU countries. Thereafter, this chapter will outline the key foundations and content of the CEAS and thus lay the foundation the latter discussions regarding the Dublin Regulation.

4.2 Re-thinking sovereignty and belonging through the European Union?

The EU was created with two primary aims: establishing a common market and an economic and monetary union.[184] These aims presuppose that states surrender some of their sovereignty, e.g. over geographical territory, in order to achieve these ends.[185] In order to facilitate the purpose of this thesis, one may further distinguish between two ways of sharing sovereignty among Member States and EU institutions.[186] The first one is horizontal, referring primarily to the relationship of sovereignty among states.[187] The second is the vertical one, referring instead to Member States sharing sovereignty with EU institutions or delegating sovereignty "upwards" to

[183] V. Chetail, *Reforming the Common European Asylum System: The New European Refugee Law* (Leiden: Brill, 2016), 4.
[184] See E. Guild, 'The Europeanisation of Europe's Asylum Policy' in *International Journal of Refugee Law* 18 (2006).
[185] P. Craig, 'The Evolution of the Single Market' in *The Law of the Single European Market, Unpacking the Premise* (Oxford: Hart, 2002), 1-41.
[186] Ibid.
[187] Ibid.

those institutions.[188] Thus, the EU can be regarded as an area within which the principle of sovereignty applies as regards many powers of the Member States, at the same time as the supranational sovereignty at work demands a high degree of trust and confidence among states as regards their activities.[189] The predominant view among scholars studying the European Union is that the project of European integration violated the Member States' Westphalian sovereignty or even deprived them of it.[190] Further, some scholars argue that sovereignty ceased to be an individual attribute of each Member State, and instead have become shared with other entities in some sort of "pooled resource", a sense of "common sovereignty".[191] This will be further discussed below.

Formally defined as a confederation of independent states, the EU is currently often considered as constituting a notable exception to the fundamental position that the territorial state otherwise occupies in the global political order.[192] In order to understand whether this statement also includes unauthorised migrants, such as asylum seekers and refugees, this thesis will now focus on the development of the policies of the EU.

4.2.1 Freedom of movement and re-imagining the European citizenship

The notion of a EU citizenship was formally created with the TEU. Article 2 TEU provides that:

> "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime."

One of the intentions behind this idea was to facilitate free movement in Europe through the abolishing of internal borders, thereby granting additional rights to those already present by virtue of having a Member State citizenship.[193] Subsequently, the Schengen Agreement was signed in 1985 and consequently allowed nationals of Member States to move freely throughout the Schengen Area.[194] In 1990, the Schengen Convention was

[188] Ibid.
[189] M. Anderson and J. Apap, *Striking a Balance between Freedom, Security and Justice in an Enlarged European Union* (Brussels: CEPS, 2002).
[190] S.D. Krasner, 'The Persistence of State Sovereignty' in *The Oxford Handbook of Historical Institutionalism,* edited by O. Floretos, T.G. Falleti and A. Sheingate (Oxford: Oxford University Press, 2016) 523, 526.
[191] T.G. Grosse, 'Sovereignty in the European Union: A Critical Appraisal' in *The Polish Quarterly of International Affairs* 3 (2016), 115.
[192] E. Balibar, 'Europe as a Borderland', 5; Cornelisse, 58.
[193] E. Guild, *The Reconceptualization of European Union Citizenship* (Leiden: Brill, 2013), 16.
[194] The Schengen area consists of 26 European states. 22 of them are EU Member States, whereas the rest are non-EU members, i.e. Iceland, Norway, Switzerland and Liechtenstein.

adopted, extending this right to citizens of other states who had a residence permit in one of the Schengen Member States. These implementations led to the dismantling of ports of entry and systematic border checks within the area. The abolishment of internal borders between EU Member States has therefore led to an extensive freedom of movement that EU citizens may exercise within EU territory.[195]

However, it is crucial to remember that already at this initial stage, asylum-seekers were specifically excluded from the creation of the abolishment of internal borders within the EU.[196] This failure to include refugees as a central part of the EU project was a positive choice and should not be understood as an unfortunate oversight.[197] Arguably, this follows what has been previously discussed in the thesis, namely that at the core of the sovereign state is the ability to exclude those migrants who are rendered unwanted and as not belonging. The discrepancy in the relationship between the freedom of movement within the EU and the relationship towards non-EU-citizens, i.e. not only asylum seekers, is further illustrated by Article 67(2) TFEU:

> "[The Union] shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and *external border control*, based on solidarity between Member States, which is fair towards third-country nationals. (…)"

The tension in this relationship is further exemplified by the fact that some national government actors took advantage of the adoption of compensatory measures included in the Schengen Convention to strengthen control over citizens as well as non-citizens.[198] These measures, mainly police and judicial cooperation, were meant to counterbalance the "security deficit" that the abolishment of internal borders was expected to result in.[199] Hence, this might explain the policies introduced across the EU with the goal of reducing the ability of asylum seekers to access the territory of EU Member States, e.g. dispersal systems, accommodation centres, the denial of labour market access as well as visa requirements, recognition of safe third countries, carrier sanctions.[200]

Although it have been argued that the EU opens up for new ways of imagining citizenship and belonging without relying on the current system of sovereign territorial states, the aforementioned description seems to

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[195] E. Guild, *The Reconceptualization of European Union Citizenship* (Leiden: Brill, 2013).
[196] See similarly E. Guild, 'The Europeanisation of Europe's Asylum Policy' in *International Journal of Refugee Law* 18 (2006), 635-635.
[197] Ibid.
[198] V. Guiraudon, 'Before the EU border: remote control of the "huddled masses"' in *In Search of Europe's Borders,* edited by K. Groenendijk, E. Guild and P. Miderhoud (Leiden: Brill, 2003)
[199] Colombeau, 485.
[200] Ibid.

suggest quite the opposite.[201] Indeed, the EU seems to retain much of the dichotomy between 'inside' and 'outside', albeit placing the boundaries between EU citizens and those who are not, instead of between national citizens and non-citizens. In addition and, reiterating that the EU was mainly created with the aim of creating a common market and an economic and monetary union, it has been argued that the movement of refugees and asylum seekers is treated similarly as the movement of goods under the internal market.[202] This is amply shown in the abolishment of internal borders leading to extensive freedom of movement for EU citizens, whereas on the other end, measures have been introduced with the purpose of fortifying the external frontiers. This latter part will be further elaborated in the forthcoming section.

4.3 Tracing the creation of a Common European Asylum System: from inter-state regulation towards what?

The CEAS is a relatively new endeavour compared to other regional initiatives regulating refugee protection.[203] What is particularly striking about the CEAS is that it also includes, apart from provisions regarding the refugee definition and legal status of those qualified under the Refugee Convention, asylum procedures, other forms of protection (subsidiary protection), reception conditions and mechanisms for determining the Member State responsible for examining asylum requests.[204]

The legal foundation for the CEAS is Article 78 TFEU, stipulating that:

1. The Union 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.* This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures for a common European asylum system (…).

Furthermore, Article 79 TFEU states that "The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals

[201] See D. Kostakopoulou, "EU Citizenship: Writing the Future", *European Law Journal* 13 (2007).
[202] See E. Guild, 'The Europeanisation of Europe's Asylum Policy' in *International Journal of Refugee Law* 18 (2006), 635-635.
[203] Chetail, 3.
[204] Chetail, 4.

residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings."[205]

The common immigration policy of the EU can thus be said to several aims, including efficient management of migration flows and prevention of illegal migration, but also fair treatment of lawfully resident third-country nationals. In this, there is an inherent certain tension, not least since all EU measures and their application by Member States have to be in conformity with the requirements of the ECHR and the EU Charter.[206] For the purpose of this thesis, it is important to remember that CEAS must also be in accordance with the Refugee Convention and other relevant international human rights treaties. In this context, some relevant provisions have been discussed above, namely the principle of *non-refoulement,* the freedom of movement and the right to personal liberty.

4.3.1 The evolution of a Common European Asylum System

Co-operation on matters regarding immigration and asylum within the EU was for quite a long time purely intergovernmental and rather informal, largely because this area was seen as the core of national sovereignty.[207] This informal cooperation was concretized in 1990 with the adoption of two treaties aimed at anticipating the abolition of internal borders scheduled for the end of 1992: the Schengen Implementing Convention[208] and, noteworthy for this thesis, the Dublin Convention[209]. The latter focused mainly on determining the State responsible for examining asylum applications. Interestingly enough, the mechanism of allocating responsibility for asylum application materialised before the existence of similar standards throughout the Member States in matters regarding asylum procedures, refugee definition and reception standards.[210] That the Dublin Convention materialised before harmonization of legislation in the EU was one of the incentives for establishing a common asylum system.[211]

Continuing, this intergovernmental approach was eventually abolished, firstly through the Treaty of Maastricht in 1992 (i.e. TEU) and then with the Treaty of Amsterdam in 1997. The Maastricht Treaty explicitly acknowledged asylum as a "matter of common interest" within its Third

[205] Article 79, TFEU.
[206] K. Groenendijk, 'Recent Developments in EU Law on Migration', in *European Journal of Migration and Law* 16 (2014), 325.
[207] Cornelisse, 208.
[208] Convention Implementing the Schengen Agreement of 14 June 1985 on the Gradual Abolition of Checks at the Common Borders (Schengen Implementing Convention), OJ (2000) L 239/19, 19 June 1990 (entry into force 1 September 1993).
[209] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, OJ C 254/1, 15 June 1990 (entry into force 1 September 1997).
[210] Chetail, 7.
[211] Ibid.

Pillar, although still retaining an intergovernmental approach.[212] The Treaty of Amsterdam constituted immigration and asylum policy part of EC competence, a process referred to as communitarization of the area.[213] In doing so, the Amsterdam Treaty provided the legal foundation for the creation of the CEAS and prompted the dramatic development of the harmonization process of the field.[214]

However, the very notion of the CEAS was not mentioned in the Treaty of Amsterdam. Instead, its founding acts can be traced back to the Tampere Conclusions in October 1999, which stated that "[t]he European Council (…) has agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention."[215]

The first generation of Community Asylum Legislation regarding the CEAS was adopted by the end of 2005, in particular standards regarding the reception of asylum seekers, the qualification as refugees and the procedures for granting or withdrawing refugee status and the criteria for determining the Member State responsible for considering an asylum application.[216] Notably, the natures of these common rules agreed upon were *minimum* standards, meaning that States had discretionary room to impose better standards. However, the implementation of these minimum standards as set out by the first generation legislative instruments also showed that there remained significant disparities between Member States in their reception of applicants, asylum procedures, and assessment of qualification for international protection.[217]

Hence, according to Article 67(5) of the Treaty of Amsterdam, the second generation of Union legislation was to be continued under co-decision with the European Parliament. Hence, the European Parliament officially became co-legislator in matters concerning asylum as from December 2005. The new rules were to be an upgrade to the existing rules, establishing a truly common policy on asylum and subsidiary protection.[218] This second stage of the CEAS was initially thought to end in 2010, but was rescheduled to the end of 2012.[219] The goal of reform brought with it attempts to identify the flaws of the CEAS. These were, and are, often attributed to the broad

[212] Chetail, 8.
[213] Ibid.
[214] Chetail, 9.
[215] European Council, *Tampere European Council 15 and 16 October 1999, Presidency Conclusions,* para. 13.
[216] See Consolidated version of the Treaty establishing the European Community, OJ C 340, 10 November 1997, Article 67(5). Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13, 13 Decmber 2005.
[217] B. Parusel and J. Schneider, 28.
[218] Chetail, 55.
[219] European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Policy Plan on Asylum, an Integrated Approach to Protection across the EU,* COM(2008)360, 17 June 2008.

margin of discretion left by the CEAS instruments to Member States.[220] Hence, increased policy harmonisation was seen as the most promising approach to achieve a more equitable distribution of asylum seekers.[221]

The second stage of the CEAS was completed by June 2013, with the enactment of amended or so-called "recast", secondary legislation. During this time, the TFEU had also been adopted, thereby marking EU primary law now explicitly referring to the creation of a CEAS.[222]

4.3.2 Current state of affairs – what happens now?

On 6 April 2016, the European Commission issued a communication stating that the CEAS was to be thoroughly reformed – a third stage of the CEAS.[223] In other words, while the abovementioned second-generation legislative instruments are being transposed into national laws by the Member States, new proposals from the Commission have been put forward. Thus, May and July saw the Commission's proposals for a new Dublin IV Regulation as well as a comprehensive EU asylum package that would result in many amendments to the pre-existing directives as well as regulations.[224]

Notably, the proposals would result in many of the current directives being re-formulated as regulations. This would fundamentally change the nature of the CEAS, as regulations apply directly in Member States and do not need to be transposed into national law. By shrinking this space of state discretion, the goal is to achieve full harmonization throughout the Union.[225] At the same time, the Commission's proposals also see the introduction of some considerable restrictions and sanctions aimed at the asylum seekers and refugees. The motive for this is the same as the ones behind reforming the entire system, i.e. avoiding secondary movements and abuse of the procedures.[226]

In light of the EU's strong focus on harmonization, it is important to underline that policy differences only constitute one of several determinants

[220] See V. Chetail, *Reforming the Common European Asylum System* (Leiden: Brill, 2016).
[221] Thielemann, 59.
[222] See Article 78 TFEU.
[223] European Commission, *Communication from the Commission to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe,* COM(2016) 197 final, 6 April 2016.
[224] European Commission, proposals COM/2016/0270 final – 2016/0133 (COD), COM/2016/0467 final – 2016/0224 (COD), COM/2016/0466 final – 2016/0223 (COD), COM/2016/0468 final – 2016/0225 (COD), COM 2016/0271 final – 2016/0131 (COD), COM/2016/0465 final – 2016/0222 (COD).
[225] See European Commission, *Communication from the Commission to the European Parliament and the Council, Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe,* COM(2016) 197 final, 6 April 2016.
[226] Press release of the European Commission from 13 July 2016 [source: http://europa.eu/rapid/press-release_IP-16-2433_en.htm, last viewed on 24 May 2018]

for a protection seeker's choice of host country. Other structural factors, such as historic networks, employment opportunities and a host country's reputation are often equally important.[227] Furthermore, the EU's exaggerated concern with potential pull factors, not only has pushed aside joint initiatives aimed to tackle the root causes of asylum flows, but it has also undermined its declared burden-sharing objective. Put differently, European initiatives in this area do little to address the underlying *structural* causes for the unequal distribution of asylum burdens.[228] Even if Europe succeeded in harmonising restrictive policy measures, the unequal distribution of asylum burdens would persist as a result of the continued effect of differences in the structural pull factors of European states.[229] The neglecting of the underlying causes of forced migration, and instead choosing to focus on lowering of standards, is a very unfortunate development seen from the perspective of those whose rights are increasingly at risk.

Lastly, at the moment of writing, the negotiations have reached some sort of stalemate due to many reasons, one of them being the fact that Member States are unable to agree on if and how to proceed with the proposals. This can be seen as evidence of how control over migration matters continue to constitute one of the core questions of being sovereign, not easily regulated on an EU level. With this in mind, the turn towards more repressive policies on the matter suggest that Member States are unwilling to give up their sovereignty and only manage to do so in the shape of "lowest common denominator", meaning a lowering of standards and the risk of violation of rights of asylum seekers and other unauthorised migrants.

4.4 Conclusive remarks

This chapter has illustrated first and foremost that the EU was initially created with the purpose of establishing an economic union and thereby not having migration matters as one of the key fundaments. Nevertheless, with the creation of a common market within the EU territory, the abolishing of internal borders for EU citizens eventually followed. In doing so, it has been argued that the EU promises a new way of imagining belonging – one that is not tempered by notions such as national citizenship.

At the same time, it has been shown that the increased freedom of movement established throughout the EU never included asylum seekers. Indeed, asylum seekers were *specifically* excluded. This is a mechanism similar to the ones that have been described in the chapter regarding sovereignty, i.e. one that functions with the purpose of drawing boundaries between 'inside' and 'outside'. In other words, the fortifying of the EU's common external border towards non-EU-citizens illustrates how the EU is indeed built on a similar exclusionary logic as a sovereign state, but perhaps

[227] Ibid.
[228] See Thielemann (2004).
[229] Ibid.

on a grander scale and sometimes through the usage of different, somewhat measures. EU cooperation and integration may in this context actually have enabled Member States to develop innovative ways of regulating those forms of migration deemed as ”unwanted”, as illustrated by the exclusion of refugees from the establishment of freedom of movement within the EU. Hence, the constellation of the EU can be seen as ambiguous, uncertain or perhaps even hypocritical in the way it approaches matters of inclusion versus exclusion.

Although it could be argued that the understanding of sovereignty has changed somewhat through the project of the EU, the concept of sovereignty is far from being abandoned. For instance, and as will be discussed below, the EU Member States still wishes to keep their discretionary powers with regard to the entry of non-EU citizens.[230] The current situation has been described as ”controls are still there, but now over the whole of territory, although perhaps not applied to everyone, but certainly to persons categorised as dangerous and especially as ’unwelcome migrants […]””[231]. In other words, the relationship between the sovereignty of the Member States and the EU as a political organization is ambiguous – the Member States give up sovereignty in some matters (e.g. through the abolishment of internal borders), but retain in others.

Against this background, it becomes clear that the creation of a CEAS cannot be understood in isolation from the EU at large. Furthermore, the growth and changes in the evolution of the CEAS also highlights how there has been a slow and steady movement from intergovernmental-based cooperation to a more Community-based form of integration.[232] Yet, it is important to remember that the common migration policy has been described as entering into the realm of EU competency “through the back door”, referring to it being an area in which compensatory measures were deemed as necessary in order to counter the undesirable outcomes that the abolition of internal borders could bring.[233] At the same time, EU Member States seems to, at least formally, retain a (arguably somewhat symbolic) commitment to the right to asylum while eroding the ability of people who want to enter the territory of EU Member States and exercise this right. The specificities of the relationship between human rights and parts of the CEAS will be addressed in the next chapter.

[230] Cornelisse, 203.
[231] M. Anderson and D. Bigo, ‘What are EU frontiers for and what do they mean?’ in *In Search of Europe’s Borders,* edited by K. Groenendijk, E. Guild and P. Minderhoud (The Hague: Kluwer Law International, 2002), 18.
[232] See A. Geddes, ’International Migration and State Sovereignty in an Integrating Europe’ in *International Migration* 39 (2008), 27.
[233] E. Guild, 71.

5 Examining the Dublin Regulation

5.1 Introduction

The previous chapters have so far illustrated how the EU's common approach to asylum and migration is an area where there are constant meetings between sovereignty and human rights, thereby laying the ground for many different conflicts. With reference to the notion of state sovereignty, there is an assumption that states have an inherent right to control their borders and, in other ways, regulate immigration. On the other hand, the overview of the human rights regime in Chapter 3 has illustrated how the human rights regime in theory contains claims of universality conflicting with state sovereignty, yet in reality it is profoundly affected by state-centrism. In the previous chapter, the focus has been on how these concepts have been come to be expressed in the way that the EU have sought to establish a CEAS, as well as related tensions.

Whereas these chapters have sought to trace a somewhat broader framework, devotion will now be paid to the specifics by examining one of the CEAS instruments, namely the Dublin Regulation. This is highly relevant for the purpose of this thesis, which aims to understand how the previously traced underlying tensions in the CEAS impact the shape of the resulting policies. In order to do so, the purpose and goals of having a Dublin Regulation will firstly be identified. Thereafter, the chapter will provide an overview of the criteria in the Regulation in determining the allocation of responsibility.

The focus of this chapter, however, will be on examining certain provisions in the Dublin Regulation and how they relate to the previously addressed tension between human rights and sovereignty. These provisions are namely contained in Article 3(2) and Article 17 of the Dublin III Regulation. Article 3(2) contains the prohibition on transfers when there are "systemic deficiencies" in the Member State responsible according to the Dublin Regulation, while Article 17 contains the discretionary clauses whereby states can choose themselves to assume responsibility. Furthermore, this section will also address how the ECtHR and the CJEU have interpreted these provisions in their rulings in relevant cases. Thereafter, the question of legitimate state violence will be addressed by examining the usage of immigration detention in the Dublin Regulation.

5.2 Understanding the Dublin Regulation

The Dublin system is, as noted in the previous chapter discussing the CEAS, one of the oldest building blocks of the common asylum policy of the EU.

Initially in the form of the Schengen Convention[234] and the Dublin Convention[235] of 1990, it was later transformed into Community legislation with the 2003 Dublin II Regulation[236], and then finally recast into a EU Regulation resulting in the current Dublin III Regulation of 2013[237]. As it is a Regulation, its provisions are directly applicable and are binding in its entirety for all EU Member States as well as for the Schengen associated states, namely Denmark, Norway, Ireland and Switzerland.[238]

5.2.1 Purpose and content

The Dublin Regulation is a mechanism for allocating responsibility by establishing which EU Member State that is responsible for examining an application for international protection submitted by an asylum seeker.[239] Apart from the responsibility criteria, which will be discussed below, the Regulation also includes procedures for taking charge of and taking back asylum seekers, administrative cooperation, and conciliation.

Furthermore, the Dublin Regulation is also supposed to provide asylum seekers with a fair and effective access to asylum procedures, as well as curbing secondary movements.[240] Secondary movements can be defined as the onward movement of the asylum seeker, after having initiated an asylum application in one State or having been afforded international protection, but also by relocation within the EU illegally without having initiated asylum procedures.[241] Preventing such secondary movements is attached to the aim of preventing the lodging of multiple applications that often follows

[234] Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders of 19 June 1990, OJ L 239/19, 22 September 2000 (entry into force 1 September 1993; applied since 26 March 1995).
[235] Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, OJ C 254/1, 15 June 1990 (entry into force 1 September 1997).
[236] Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50/1, 25 February 2003 (Dublin II Regulation).
[237] 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), OJ L 180/31, 29 June 2013 (Dublin III Regulation or DR III).
[238] Article 288, TFEU; Article 49(5) of the Dublin III Regulation.
[239] See Recital 7 and Article 3(1) Dublin III Regulation.
[240] Dublin III Regulation and Dublin IV Regulation Proposal Article 3(1) and recital 5 and EU Charter art. 18; Council of the European Union, 'Presidency Conclusions, Tampere European Council, 15-16 October 1999' (October 1999); European Commission COM (2007) 301, 4.
[241] UNHCR EXCOM Conclusion No 58 (XL) 'Problem of Refugees and Asylum-Seekers Who Move in an Irregular Manner from a Country in Which They Had Already Found Protection' (1989).

secondary movements.[242] In doing so, this could prevent the phenomenon of 'refugees in orbit', referring to the uncertainty that would occur if lodged asylum applications are never assessed by any Member State.[243]

5.2.2 Overview of the system

5.2.2.1 Responsibility criteria

Chapter III of the Dublin Regulation contains a hierarchical list of criteria used to determine which Member State that is responsible for examining an asylum application. Accordingly, these criteria firstly state the Member State where the asylum seeker's family members are present as responsible, thereafter the Member State that previously issued a visa or residence permit for the asylum seeker, followed by the Member State of irregular entry, and finally the Member State where the application was first lodged. However, it should be noted that practice shows that in the majority of asylum applications, it is the country of first entry in the EU that in the end is identified as responsible.[244]

The underpinning logic behind the responsibility criteria has been described as based on "the principle of authorisation".[245] According to this principle, the state that is considered to have "authorised" the entry of an asylum seeker on the territory of the Member State is responsible for examining his or her application.[246] This is part of the general idea that states are responsible for their actions and omissions, e.g. not guarding its border properly (i.e. the EU's external borders) properly, in the sphere of entry and residence of aliens.[247]

At this point, it should be mentioned that there is no substantial transfer of asylum seekers in practice. The numbers of "take back requests", i.e. outgoing requests for another Member State to receive an applicant, exceed almost entirely the number of "take charge requests", which are requests to

[242] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council of 4 May 2016 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)' COM (2016) 270 p. 3.3; cf. Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, 'Enhancing the Common European Asylum System and Alternatives to Dublin', European Parliament (July 2015) 48; cf. Susan Fratzke, 4.
[243] Ibid.
[244] F. Maiani, 'The Reform of the Dublin III Regulation', European Parliament (June 2014), 14.
[245] A. Hurwitz, 'The 1990 Dublin Convention: A Comprehensive Assessment' in *International Journal of Refugee Law* 11 (1999).
[246] Ibid.
[247] S. Morgades-Gil, 'The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses After the Interpretations of the ECtHR and the CJEU?', *International Journal of Refugee Law* 27 (2015), 434.

assume responsibility for the application.[248] This raises doubts regarding whether the Dublin Regulation is as efficient as it aims to be.

5.2.2.2 The principle of mutual trust

Mutual recognition and mutual trust are supposed to constitute the cornerstones of the cooperation between the EU Member States, including in the area of migration and asylum.[249] The principle of mutual trust therefore constitutes part of the underlying logic of the Dublin Regulation, as recognized in the preamble to the Dublin Regulation.[250] This entails the assumption that each Member State respects the rights of asylum seekers in accordance with European and international law.[251] Hence, if an application for international protection is lodged in another Member State, which has no primary responsibility according to the Dublin criteria, the applicant can be sent back to the State responsible according to the stipulated criteria in the Dublin Regulation.[252]

Part of the foundations upon which principle mutual trust rests, although not explicitly referred to in the Regulation, is that all Dublin states are party to the ECHR and the rights in contains, including the previously described *non-refoulement* principle in Article 3 ECHR.[253] As what has previously established, the principle of *non-refoulement* is also included in Article 33 of the Refugee Convention as well as Article 4 of the EU Charter. The issues resulting partly from this principle of mutual trust will be addressed throughout the remainder of this chapter.

5.3 The logic behind derogations from binding Dublin transfers

As stated above, the Dublin Regulation provides that individuals should be transferred to the Member State that is responsible for the asylum application according to the stipulated criteria. However, both the Regulation as well as relevant case law from the CJEU and the ECtHR provides for interesting examples of derogations from such stipulated transfers.

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[248] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council of 4 May 2016 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)' COM (2016) 270, 10; F. Maiani, 'The Reform of the Dublin III Regulation', European Parliament (June 2016), 14.

[249] See e.g. Case 120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein*; E. Brouwer, "Mutual Trust in the Dublin Regulation: Protection of Fundamental Rights in the EU and the Burden of Proof", *Utrecht Law Review* 9 (2013), 136.

[250] Recital 2, Dublin III Regulation.

[251] E. Brouwer, 138.

[252] Chapter III and IV of the Dublin III Regulation.

[253] See H. Battjes, "Mutual Trust in Asylum Matters: the Dublin System" in *The Princple of Mutual Trust in European Asylum Migration and Criminal Law. Reconciling Trust and Fundamental Rights,* edited by H. Battjes et al (Utrecht: Forum Institute for Multicultural Affairs, 2011) 10.

For instance, the preamble to the Dublin III Regulation explicitly recognises that "[a]ny Member State should be able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations and examine an application for international protection lodged with it or with another Member State, even if such examination is not its responsibility under the binding criteria laid down in this Regulation."[254] Accordingly, Chapter VI of the Dublin III Regulation contains discretionary clauses whereby Member States are free do themselves determine whether they want to derogate from the Dublin Regulation's ordinary responsibility allocation mechanism. The subsequent section will examine these discretionary clauses more closely.

Furthermore, some of the more controversial provisions that the CJEU and the ECtHR established in their interpretation of the Dublin II Regulation have now been partially included in the Dublin III Regulation. Most notably, there is now a prohibition on transfer when there are "systemic deficiencies", as expressed in Article 3(2) of the Dublin Regulation. Put differently, not only are Member States free to themselves derogate from Dublin transfers, it seems that they are sometimes also *obliged* not to transfer an individual despite binding responsibility criteria. This will be further discussed below.

5.3.1 Article 17 – Discretionary and humanitarian clauses

In the first two versions of the Dublin system, the criteria for determining responsibility was accompanied by two discretionary clauses allowing states to accept applications asylum for which they were not responsible according to the previous criteria.[255] These were the so-called sovereignty clause, allowing a Member State to examine any application for asylum presented to them, and the humanitarian clause, allowing states to assume responsibility on humanitarian and cultural grounds.[256]

In the Dublin III Regulation, the discretionary clauses are now contained within Article 17. Nevertheless, they still build on the same logic of the need to respect the state's role of granting asylum, referring to the granting of asylum ultimately being a state prerogative that cannot be transferred to an international organization.[257] Continuing, Article 17 of the Dublin III Regulation consists of two parts. Article 17(1) is commonly referred to as

[254] Recital 17, Dublin III Regulation.
[255] See Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, OJ C 254/1, 15 June 1990 (entry into force 1 September 1997); Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50/1, 25 February 2003 (Dublin II Regulation).
[256] See the Dublin Convention and the Dublin II Regulation.
[257] S. Morgades-Gil, 437.

the 'sovereignty clause' and contains the old Article 3(2) of the Dublin II Regulation with improved wording, thereby providing:

> "By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.
>
> The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility."

Continuing, the provision in Article 17(2) contains what is left of the old humanitarian clause (together with a consideration of the consequences of its use and some practical procedural issues), stipulating that

> "The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Article 8 to 11 and 16. The persons concerned must express their consent in writing."

In the Dublin II Regulation, the humanitarian clause contained additional provisions that are now separated into other parts of the Dublin III Regulation. These concern clauses concerning unaccompanied minors (Article 8), dependency (Article 16). Nonetheless, according to the current provision, a serious violation of the right to family unity could also lead to the assignment of responsibility for examining an asylum application being called into question.[258]

5.3.2 Article 3(2) – Systemic flaws and the obligation *not* to transfer

According to Article 3(2),

> "Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are

[258] Recital 17, Dublin III Regulation.

> systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in the Chapter III in order to establish whether another Member State can be designated as responsible."

Understanding the existence of this provision requires us to go back to the Dublin II Regulation and the case law attached to it. The Dublin II Regulation contained a discretionary provision in its "sovereignty clause" in Article 3(2), which allowed a Member State to choose to process an asylum claim, even if it was not considered the responsible State according to the criteria of the Dublin Regulation.[259] Nonetheless, the sovereignty clause was in practice rarely applied by the Member States.[260] However, with the ECtHR and CJEU rulings in especially two significant cases, attention was given to this broader question of discretion and sovereignty in the Dublin Regulation. It is these rulings that will now be briefly discussed, namely the ECtHR ruling of 2011 in *M.S.S. v Belgium and Greece,* and the CJEU ruling in *NS and ME* of 2003. Both of these cases concern Dublin transfers of asylum applicants to Greece, with Greece being the responsible Member State according to the criteria of the Dublin Regulation.

In the *M.S.S.* case, the ECtHR had to firstly consider the question of its own jurisdiction in when assessing application of EU law by a EU Member State. The ECtHR established that the *Bosphorus* doctrine[261] did not apply due to the existence of the sovereignty clause in the Dublin system giving states 'a way out' despite it being a Dublin Regulation. Hence, the Court found that the transfer did not 'strictly fall within Belgium's international legal obligations'.[262] The ECtHR then proceeded to establishing that with reference to the circumstances, Belgium had violated Article 3 ECHR by transferring the applicant from Belgium to Greece on the basis of the Dublin Regulation. The violation stemmed from that Belgium through the transfer exposed the applicant to the risks from the serious flaws in the asylum procedure in Greece, as well as the conditions of detention and existence in Greece. The Court then found that the activation of the sovereignty clause

[259] A. Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford: Oxford University Press, 2009) 103-104.
[260] European Refugee Fund, *Dublin II Regulation:Lives on Hold, European Comparative Report,* 2011, 6.
[261] According to this principle, the ECtHR will in principle not examine measures for the enforcement of rules taken by states if they arise from legal requirements that result from their membership of an international organization where 'the relevant organization is considered to protect fundamnetal rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides', see *Bosphorus Hawa Yollari Turizm ve Ticaret Anonim Sirketi c Irlande,* no 45036/98, ECHR 2005-VI, para 155.
[262] *M.S.S. v. Belgium and Greece,* para 340.

was *mandatory* in cases like that of *MSS,* in which the transfer of asylum seekers to a EU Member State would risk a breach of Article 3 ECHR.

The CJEU's ruling in *NS and ME* concerned the same underlying issue as *M.S.S.,* i.e. whether states could be obliged to deal with asylum applications presented to them on the basis of the sovereignty clause. The CJEU established first and foremost that in this case, "the presumption underlying the Dublin mechanism (…) that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable."[263] Notably, with regard to the question of *when* this would occur in general, the CJEU held that "not any infringement of a fundamental right by the Member State responsible will affect the obligations of other Member States to comply with the provisions of Regulation No. 343/2000)".[264] Continuing, and unlike the approach of the ECtHR, the CJEU established that the mandatory usage of the sovereignty clause and thereby not transferring an asylum seeker to the responsible Member State could only be required when "there are systemic flaws in the asylum procedures and reception conditions" that involve a serious risk of violating the freedom from torture and inhuman or degrading treatment contained in Article 4 of the EU Charter.[265] In contrast to the ECtHR's ruling in *MSS,* the CJEU then concluded that in the case of such risks, the state in which the applicant is present should continue to examine the criteria for allocating responsibility in order to determine which Member State that is responsible, according to the Dublin Regulation.

Thus, the rulings interpreted the sovereignty clause of the Dublin II Regulation. According to the Court's interpretation, the Member States were obliged to active the sovereignty clause in certain cases of serious risk of human rights violation and thereby effectively stopping transfers. In doing so, it could be argued that a provision that was supposedly discretionary for states (i.e. giving room for manoeuvre for states themselves to decide which applications to assume responsibility for), through the rulings of the ECtHR and the CJEU, instead became a guarantee that the Dublin system would respect the protection of human rights.

However, the current Article 3(2) of the Dublin III Regulation does not oblige the state in which the individual is present to also assume responsibility whenever a transfer is deemed impossible due to systemic deficiencies. Instead, the state should instead continue to examine which other Member State that can be responsible according to the responsibility criteria contained in Chapter III of the Regulation, similar to what was argued by the CJEU in the *NS and ME* ruling. Furthermore, and more importantly from the perspective of the asylum seeker, the threshold for Article 3(2) to be triggered is very high as it requires the *entire* system for receiving and trying applications for asylum to be flawed. Having such a high threshold suggests how highly prioritised the maintaining of the

[263] C-411/10, *NS and ME*, para 104.
[264] C-411/10, *NS and ME*, para 82.
[265] C-411/10, *NS and ME*, para 86.

effectiveness of the Dublin Regulation is, and the potential costs on behalf of the individuals affected.

5.3.3 The relationship between Article 3(2) and Article 17 – obligation not to transfer, but then what?

As stated above, Article 3(2) of the Dublin III Regulation regulates the so-called "impossible transfers", i.e. prohibition on transfers when there are systemic deficiencies that could lead to a violation of the right to freedom from inhuman or degrading treatment. However, this obligation creates only a right not to be transferred for the asylum seeker, but not a right for their application to be processed, or for them to receive shelter in the state in which they are present and from which they have asked for protection, despite the line of argument in ECtHR's above described judgment in the case of *MSS.* This could result in the previously described phenomenon of "refugees in orbit", referring to asylum seekers losing certainty of having their application examined by any EU Member State.

At the same time, the Dublin III Regulation also contains discretionary clauses whereby Member States may assume responsibility for asylum applications, despite not being responsible according to the criteria of Chapter III of the Dublin Regulation. This provision indeed seems to be interesting to discuss considering that establishing "impossible transfers" under Article 3(2) may be lengthy, whereby applications lodged for international protection may not be examined if no Member State is considered responsible. Hence, this section will now look at more recent case law in order to attain a more in-depth understanding of the relationship between Article 3(2) and Article 17, as both the CJEU and the ECtHR have in their rulings continued to address the relationship between Article 3(2) and Article 17. Two illustrative and recent cases are the ECtHR ruling in the *Tarakhel*[266] case and the CJEU ruling in *C.K. v Slovenia*[267].

5.3.3.1 The approach of the ECtHR in the *Tarakhel* case: the role of individual guarantees

In *Tarakhel,* a family of asylum seekers (a couple with six children) from Afghanistan were supposed to be transferred from Switzerland to Italy, as the latter was the responsible Member State according to the Dublin Regulation. The applicants challenged the transfer decision by arguing that the accommodation conditions in Italy would not meet the requirements of the ECHR. This was in particular so because of the circumstance of them being a family with young children. Hence, the applicants submitted that a transfer to Italy, in the absence of individual guarantees concerning their care, would expose them to inhuman and degrading treatment constituting violations of Article 3 and Article 8 ECHR.

[266] *Tarakhel v Switzerland,* no 29217/12, ECtHR 4 November 2014.
[267] C-578/16 PPU *C.K. and Others v Supreme Court of Republic Slovenia.*

The ECtHR did not examine the complaints under Article 8 and instead focused on Article 3. Hence, the Court recalled the mutual principle of trust that the Dublin Regulation relied upon, i.e. the presumption that all Member States respect fundamental human rights. Reiterating the *M.S.S* case, the Court then proceeded to establishing that this presumption could be rebutted in cases where states are obliged suspend the Dublin transfers due to systemic deficiencies in the responsible Member State. Nonetheless, the Court then proceeded to establishing that "the current situation in Italy can in no way be compared to the situation in Greece at the time of the *MSS* judgment".[268]

However, the ECtHR then established that Member States must nevertheless carry out "thorough and individualised examination of the situation of the person concerned" before making the transfer when there is a risk of inhuman and degrading treatment, irrespective of the source of that risk.[269] In requiring the relevant authorities to obtain these individual assurances, the Court emphasised the vulnerability of the particular applicants (being a family, having children and being asylum seekers). In other words, Switzerland could not transfer the family to Italy unless they obtained sufficient assurances.

The introduction of individual guarantees in the *Tarakhel* ruling in relation to the principle of mutual trust is particularly interesting for this thesis. On one hand, it could be argued that this falls somewhat in line with its earlier ruling in *M.S.S,* establishing that the principle of mutual trust is indeed rebuttable. In doing so, the *Tarakhel* ruling can be seen as diminishing the importance of the "systemic deficiencies"-test established in the *NS and ME* ruling by the CJEU. Rather than prohibiting or allowing all removals to Italy, the ruling of *Tarakhel* obliges the sending state to undertake a thorough and individualised assessment of the applicant's situation, and also to request and obtain guarantees from the receiving state. From this perspective, the *Tarakhel* ruling can be seen as an improvement from the viewpoint of asylum seekers.

At the same time, it should be underlined that although the vulnerability of the applicants was emphasised, it was still not enough to completely rebut the principle of mutual trust – thus indicating that the Dublin Regulation remains more in favour of states' interests of quickly allocating responsibility, rather than devoted to guaranteeing both the rights as well as the will of the individuals directly affected. Hence, despite the Dublin Regulation being formally committed to human rights obligations, the ruling of *Tarakhel* does not question the foundation of the Dublin Regulation, namely that it is first and foremost an administrative tool for the Member States.

[268] *Tarakhel v Switzerland,* para 114.
[269] *Tarakhel v Switzerland,* paras 103-104.

5.3.3.2 The approach of the CJEU in *C.K. v Slovenia:* mandatory usage of Article 17(1)?

The applicants in the case of *C.K. v Slovenia* consisted of a family (couple with a newly born child) who together applied for asylum in Slovenia. However, according to the responsibility criteria of the Dublin Regulation, Croatia was the Member State responsible for considering their application and therefore, Slovenia was to transfer the family to Croatia. The applicants argued that such a transfer would lead to negative consequences for the state of health of both C.K. and her child, given that C.K already suffered from psychiatric difficulties, mainly caused by uncertainty regarding her status.

The Slovenian Court noticed the absence of systemic flaws in the Croatian asylum system, but also observed that the mother of the child was in a very bad state of health. Therefore, the question posed to the CJEU was whether reliance upon the sovereignty clause of Article 17 of the Dublin III Regulation could be *mandatory* for the purpose of ensuring the family an effective protection against risks of inhuman and degrading treatment.[270] Furthermore, Slovenia also asked whether an applicant in a transfer procedure under the Dublin Regulation could themself make a claim that Article 17(1) should be applied, with the consequence that such a claim must be assessed by the relevant authorities. In other words, the legal issue regarded whether Dublin transfers were prohibited *only* in case of the existence of such systemic deficiencies in the responsible state that risks subjecting asylum seekers to violations of Article 4 of the EU Charter, or whether transfers also had to be precluded when such a risk was faced due to the specific and individual situation of the asylum seeker.

The CJEU simultaneously answered the questions above by reiterating that Member States indeed had the possibility to themselves examine asylum applications according to the sovereignty clause in Article 17(1) of the Dublin III Regulation. However, the CJEU also stated that Article 17(1) does not *oblige* a Member State to examine any application lodged with it, even when read in the light of Article 4 of the Charter. This also follows the argument of the opinion of the Advocate General. The Advocate General discussed Article 17(1) by referring to the actual wording of the provision, as well as previous case law and the fact that the proposal on Dublin IV seeks to restrict the right to apply the sovereignty clause. The Advocate General thereby concludes that "(…) [a]rticle 17(1) of Regulation No 604/2013 cannot be interpreted as meaning that, where a Member State is required not to transfer an applicant to the Member State responsible, it must itself examine the application for international protection lodged with

[270] "Does it follow from the interpretation of Article 17(1) of the Dublin III Regulation that the application of the discretionary clause by the Member State is mandatory for the purpose of ensuring effective protection against an infringement of the rights under Article 4 of the Charter of Fundamental Rights of the European Union in cases such as the one forming the subject matter of the present reference for a preliminary ruling, and that such application prohibits the transfer of the applicant for international protection to a competent Member State which has accepted its competence in accordance with that regulation?", *C.K. v Slovenia,* para 46.

it even though that examination is not its responsibility under the criteria laid down in that regulation".[271]

Regarding the suspension of transfers in the *C.K.* case, the Court established that the Member State supposed to carry out a transfer should is to eliminate any serious doubts concerning the impact of the transfer on the state of health on the person by taking "necessary precautions". The particular seriousness of the illness of the asylum seeker should in this context be taken into account. If the taking of precautions does not suffice to ensure that the transfer does not result or risk in a significant and permanent worsening of the individual's health, the authorities are to suspend the transfer for such time as the health conditions renders a transfer unfit.

Continuing, the Court withheld that it "fully respected the principle of mutual trust since, far from affecting the presumption of respect of fundamental rights by Member States, it ensures that exceptional situations are duly taken into consideration by Member States". Notably, the CJEU also stated that "if a Member State proceeded to the transfer of an asylum-seeker in such circumstances, the resulting inhuman and degrading treatment would not be attributable, neither directly or indirectly, to the authorities of the responsible Member State, but solely to the first Member State".[272]

The CJEU therefore arguably attempts to reconcile the principle of mutual trust with the protection of individual rights. Indeed, for asylum seekers subject to the Dublin Regulation, the ruling is promising as it underlines the importance of specific and individual considerations of asylum-seekers when assessing risk of transfers under the Dublin Regulation. However, even if the ruling would lead to the threshold for derogating from transfers being lowered, it does not solve the potential issue of "refugees in orbit", as it does not assign obligatory responsibility to Member States even when transfers are suspended.

5.4 Understanding immigration detention during Dublin transfers

This thesis has previously described how the act of depriving someone of their liberty is arguably one of the most intruding forms of state violence, often seen as one of the sharpest tools that can be used against an individual. This point of departure is essential to remember, as the focus will now be turned towards the usage of immigration detention according to the Dublin Regulation. Relevant for this thesis is therefore Article 28 of the Dublin III Regulation, with its two first paragraphs stating that

[271] Opinion of Advocate General Tanchev in Case C-578/16 PPU, 6 February 2017, paras 62-67.
[272] C-578/16 PPU *C.K. v Slovenia,* para 95.

1. Member States shall not hold a person in detention for the sole reason that he or she is subject to the procedure established by this Regulation.
2. When there is a significant risk of absconding, Member States may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.

Under EU law, the proportionality principle stated in Article 28(2) of the Dublin Regulation can understood with reference to Article 52(1) of the EU Charter. According to Article 52(1) of the EU Charter, "any limitations on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognised by the Union on the need to protect the rights and freedoms of others".[273] In a case of detention under the Dublin III Regulation, the objective of the general interest recognised by the EU is "to secure transfer procedures in accordance".[274]

As for the stated "significant risk of absconding", the criterion is defined in Article 2(n) of the Dublin III Regulation as:

> "[T]he existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or third-country national or a stateless person who is subject to a transfer procedure may abscond."[275]

Prior to the entry into force of the Dublin III Regulation, there was an absence of express provisions in EU law providing grounds for detention of asylum seekers subject to a Dublin procedure.[276] However, even after the entry into force of Article 28 of the Dublin III Regulation, research shows that Member States' assessments of what constitutes such a "risk of absconding" differ, ranging from non-cooperative behaviour to previous criminal convictions, lack of documents and insufficient ties to

[273] See mutatis mutandis judgment of the CJEU in the case C-601/15 PPU, J.N., 15 February 2016, para 50. Necessity and proportionality are mentioned also in recital 20 of the Dublin III Regulation. Among other things, recital 20 of the Dublin III Regulation states that detention of applicants must be in accordance with Article 31 of the Geneva Convention. Article 31 of the Geneva Convention states that contracting States shall not apply to the movements of such refugees restrictions other than those which are "necessary".

[274] Articles 28(2) and 28(4), Dublin III Regulation.

[275] Article 2(n), Dublin III Regulation.

[276] AIDA, *The Legality of Detention of Asylum Seekers under the Dublin III Regulation,* AIDA Legal Briefing (June 2015), 4.

the country of residence.[277] This points towards the criteria determining "risk of absconding" being overly broad and unclear and thereby increasing the risk of arbitrary detention of asylum seekers.

5.4.1 Analysing the usage of detention in Dublin transfers: state violence meets human rights?

Understanding why "risk of absconding" is one of the criteria in Article 28 of the Dublin III Regulation able to justify the deprivation of an individual's liberty requires us to reiterate what has previously been discussed in this thesis regarding measures of legitimate state violence through which sovereign states assert control. Of specific interest is the claim that control over the individual's mobility has for long been considered as one main forms of sovereignty, deriving partly from the state's power to control and govern people present on its territory.[278]

At the same time, it is important to remember that immigration detention in the Dublin Regulation is used specifically for the purpose of *transferring* the individual to *another Member State*. This particular reason for depriving someone of his or her liberty can therefore also be seen as part of upholding the EU's interest in having a system regulating the allocation of responsibility, as discussed previously in this chapter. Hence, although the criterion "risk of absconding" in the Dublin Regulation can be seen as a rather classical expression of the *state's* interest of maintaining control over its territory, it should be underlined that in this particular context, it is simultaneously a tool for upholding the current CEAS.

Continuing, as the provision on immigration detention is part of the Dublin Regulation, it must also adhere to relevant human rights obligations.[279] The human rights regime, as previously discussed, regards detention as a particular serious interference on the individual's personal liberty. At the same time, the human rights regime also allow for states to use detention under certain circumstances. The case law of the European Courts is in particular illustrative of the interplay between sovereignty and human rights in the context of immigration detention, both within and outside the context of Dublin transfers. Some relevant rulings will now be discussed.

Regarding detention during Dublin transfers, the case of *Al Chodor* from the CJEU is illustrative of how the provision can be interpreted.[280] The case

[277] See Odysseus Network, *Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation* (2015), 72-74.
[278] Colombeau, 480.
[279] See Recital 32 and Recital 39 of the Dublin III Regulation, as well as Article 78 TFEU in combination with Recital 20 of the Dublin III Regulation.
[280] C-528/15, *Al Chodor.*

concerned a Kurdish family who were detained in the Czech Republic according to Article 28(2) of the Dublin III Regulation. The "serious risk of absconding" was determined on the basis that the Al Chodors did not have a residence permit or accommodation in the Czech Republic, had previously absconded and intended to travel to Germany. In the submitted question to the CJEU, the Czech Supreme Administrative Court asked whether the sole fact that national legislation has not defined objective criteria for assessment of significant risk of absconding render detention under Article 28(2) of the Dublin III Regulation inapplicable. In its ruling on the matter, the CJEU concluded that settled case-law confirming a consistent administrative practice, such as that of the Czech authorities, cannot suffice to conform to Articles 2(n) and 28(2) of the Dublin III Regulation. The objective criteria to assess a "serious risk of absconding" must be established in a binding provision of general application and, in the absence of such provision, detention on this ground is unlawful.

The *Al Chodor* ruling could arguably be seen as an example of how human rights can restrict states' ability to exercise violence, at least in terms of detention usage. However, discretion is nevertheless left to states in terms of implementing legislation in line with human rights obligations. This is illustrated by the *Arslan* case, which also relates to detention, where the CJEU explicitly stated that "it is for Member States to establish, in full compliance with their obligations arising from both international law and EU law, the ground on which an asylum seeker may be detained or kept in detention."[281] This is yet another expression of how human rights obligations are characterised by state-centrism, especially in terms of the reliance on states being the main vehicles through which human rights are to be realised.

In the *Saadi* ruling regarding detention from 2008, the ECtHR addressed whether it is permissible to detain an asylum seeker or immigrant in circumstances where there is no risk of his absconding or other misconduct. Interestingly, the Court argued that the level of protection for the right of liberty of would-be immigrants under the Convention is lower than for "individuals that are lawfully at large in a country" because the former "are not 'authorised' to be on the territory".[282] In order to uncover the meaning of that phrase, the Court first stressed the often repeated "undeniable right of states to control aliens' entry into and residence in their territory." It deduced from that undeniable right of control a "necessary adjunct": the power to detain would-be immigrants who have applied for permission to enter.[283]

The logic behind the ECtHR's approach in the *Saadi* ruling can be seen as following the line of what this thesis has previously been discussed regarding the state-centrism of human rights. In other words, the ECtHR's act of differentiating between the levels of rights depending on whether or

[281] C-534/11 *Arslan,* para 56.
[282] *Saadi v United Kingdom,* no 13229/03 ECtHR 29 January 2008, paras 39-41.
[283] *Saadi v United Kingdom,* para 64.

not a state has authorised the entry of a migrant confirms the argument that human rights are indeed not truly universal, and should rather be understood as strongly influenced by states' interests (in this case: a state's interest of controlling its borders and presence of aliens). The state-centrism is particularly explicit in the notion that a state's prior consent to someone entering their territory is seen as legitimate ground for according someone more rights compared to someone who enters irregularly, i.e. without prior authorisation.

Hence, although the introduction of the criterion of "serious risk of absconding" in Article 28(2) of the Dublin III Regulation has been described as "better than nothing"[284] compared to its previous versions, it cannot be said to be radically challenging the logic of state sovereignty and legitimate state violence, nor the fundaments of the Dublin system.

5.4.2 Conclusive remarks

This chapter has sought to establish an understanding of the Dublin Regulation by drawing on earlier discussions on sovereignty and human rights. Firstly, the Dublin Regulation can be seen as a system distributing the exercise of states' role in assessing asylum applications between Member States recognising each other as states that fulfil their international human rights obligations. In other words, the Dublin Regulation is a mechanism for allocating responsibility based on the principle of mutual trust. This presupposes that the treatment of asylum seekers adheres to fundamental rights in all Member States, thereby taking human rights for granted. But being a CEAS instrument means that the Dublin Regulation in itself must simultaneously adhere to international human rights obligations.

After highlighting the central goals and content of the Dublin Regulation, the thesis has particularly focused on three aspects of the Regulation: Article 3(2) on the prohibition of transfers when there are systemic deficiencies, the discretionary clause of Article 17 allowing Member States to assume responsibility without being obliged to do so and, lastly, the usage of immigration detention for the purpose of Dublin transfers. These provisions are interesting because of the different ways in which they illustrate the coercive nature of the Dublin Regulation. Drawing on the interpretations of the CJEU and the ECtHR in relevant cases, a few conclusions can therefore be reached.

Firstly, it has been established that the interplay between the systemic deficiencies test of Article 3(2) and the discretionary clause in Article 17(1) is particularly illustrative of the underlying tensions of the Dublin Regulation. Even though human rights considerations are the foundation for the assessment of the 'systemic deficiencies' test of Article 3(2), case law has however shown that this is a very high threshold to reach. It targets

[284] See S. Peers, 'The Second Phase of the Common European Asylum System: A brave new world or lipstick on a pig?' Statewatch (2013), 8.

flaws in the entire *system* of a Member State, instead of being a provision focusing on the particular situation of the individual concerned, thereby prioritising the effectiveness of the Dublin Regulation over the interest of the individual. More recent case law from both CJEU and ECtHR suggests that this criterion is changing, e.g. by making the particular circumstances of the individual becoming more important. However, there are still questions left unanswered, e.g. what potential violations of other rights of the applicant that could be enough to reach the threshold after which suspension of transfers must occur.

Despite the Dublin Regulation's formal commitment to human rights, it cannot be said that human rights considerations challenge the very foundations of the Dublin Regulation. This is particularly clear by the fact that the suspension of transfers does not obligate the state in which the applicant is present to also assume responsibility. The discretionary clause of Article 17(1) remains truly discretionary, entailing that a state is never obliged to use it as a basis for assuming responsibility, and the individual applicant may not himself/herself invoke it. That the triggering of the discretionary clause remains within the confinement of the Member State's own decision-making can also be understood as evidence of how the human rights regime does not fundamentally challenge the logic of the sovereign state. Hence, the previously discussed notion of the granting of asylum being sovereign privilege remains intact. In other words, in the conflict between control and protection, the Dublin Regulation seems to be tilted towards the interest of the Member States' ability/right to regulate migration, a crucial part of being a sovereign state. Therefore, the Dublin system can be said to be mainly about inter-state cooperation, with only a residual role for asylum-seekers' agency and voice – thereby making it a system containing coercive elements impacting on the individuals who are subject to the Dublin mechanisms.

An example of the serious consequences of this coercive character inherent in the transfer procedure of the Dublin Regulation is that the usage of immigration detention during transfers become a logical and, therefore, sometimes necessary condition. It should be reiterated that the deprivation of someone's liberty is recognised as a particularly serious measure, both according to the logic of the sovereign state as well as according to international human rights instruments. Nonetheless, although having different justifications of such acts of deprivations, both the notion of sovereignty as well as human rights instruments allow for the usage of detention. That the Dublin Regulation contains provisions on immigration if there is a "serious risk of absconding" is in line with the sovereign state's ability to assert control over individuals present on their territory. However, it also speaks about the general functioning of the Dublin Regulation, where asylum applicants are seen as passive objects that could and should be coerced, i.e. detained and transferred to a Member State with which usually they have no ties. Hence, the Dublin Regulation should be mainly understood as a system that aims to tackle administrative issues for national governments, sometimes with a heavy cost on the lives of asylum seekers.

6 Findings and conclusions: the relationship between human rights and sovereignty – a battle between giants?

The current global political order is organised into territorial sovereign states. The implications that such a system carries with it are many, including the commonly asserted claim that part of being a sovereign state entails the ability to control one's borders as well as the presence of aliens on named territory. When assessing the consequences of this system for the lives of those individuals who seek to cross borders without being wanted or acknowledged by the state in question, a deeper analysis of the topic at hand is rendered necessary. At the same time, newer political institutions, notably the EU, are becoming more involved in questions regarding migration and asylum – a matter traditionally confined within the sphere of the sovereign state. Against this backdrop, this thesis has primarily discussed the EU and its project of establishing a CEAS. The overall purpose has been to identify the underlying tensions in the CEAS, and how these shape asylum law and policies in the EU.

In order to fulfil this purpose, two central concepts have been identified and further assessed: the aforementioned idea of sovereignty, and the human rights regime. The provision of historical backgrounds on both notions have illustrated that they share the common trait of being dynamic, therefore not easily defined. Nonetheless, some relevant characteristics and mechanisms have been addressed for the purpose of this thesis. In terms of matters related to migration, it has been shown that the centrality of territoriality and demarcations between inside/outside are vital for the sovereign state. Combined with the state's monopoly on legitimate force, the logic of the sovereign state is often to protect its borders through a range of measures – sometimes by using violence against unwanted aliens, e.g. through depriving them of their liberty in the form of immigration detention.

In stark contrast to this, the human rights regime carries with it the promise of being universal, meaning that rights are derived from the mere fact of a being human. The various international human rights treaties acknowledging the universal dignity of human being as well as the, for this thesis central, right to seek asylum, reflect this. Yet at the same time, the thesis has also shown how the creation of a human rights regime has not evaded nor defeated the logic of the sovereign state. Of crucial importance for this thesis is the fact that that there is no general right to enter a country that you are not a citizen of. Some sort of leeway may be found in the

principle of *non-refoulement,* according to which states are under the obligation to not send an individual back to territories where there is a risk of violations of fundamental rights. However, the prohibition on *refoulement* is not the same as a state's positive obligation to grant protection. In fact, the very act of *granting* asylum remains a sovereign privilege. Hence, although the human rights regime have formally transformed the individual from a mere object to a rights-bearing subject and thereby providing some protection against the sovereign ability to regulate the presence of aliens on its territory, the dominant position of the sovereign state's interest remains largely intact.

Furthermore, despite its claims of universality, human rights do acknowledge limitations as well as circumstances able to justify derogations from its stated rights. When looking at what constitutes permissible grounds for doing so, it becomes clear that it is often in accordance with the interest and logic of the sovereign state. For instance, in allowing the usage of deprivation of liberty in the context of immigration detention (as long as it is not arbitrary), the human rights regime buys into the understanding of the sovereign state as being able to legitimately use force to protect its territorial borders. Therefore, the extent to which human rights challenge or limit the notion of sovereignty in terms of its monopoly on legitimate use of force is limited. Indeed, the human rights regime has correctly been criticized for being state-centric – not only in terms of which rights that it establishes, but also through how it heavily relies on states to act as the vehicles through which the rights can be realized.

This complex relationship between sovereignty and human rights also provides the framework for the discussions in the thesis on the EU and its CEAS. First and foremost, the EU is formally a confederation of independent Member States. However, in terms of freedom of movement and territoriality, the EU seems to constitute an exception or a novelty in relation to the way the global political order otherwise functions. This refers in particular to the removal of internal borders in the area of the EU and the launching of freedom of movement for those with a citizenship in a EU Member State through the Schengen Agreement and the Schengen Convention. Arguably, this has led to a re-conceptualisation of membership and belonging as something no longer inherently attached to the notion of a sovereign and territorial state.

However, the removal of internal borders also resulted in Member States introducing compensatory measures to counterbalance the perceived "security deficit". In other words, the removal of internal borders in the EU did not see the same development in terms of its external borders and its policies towards third-country-nationals. Rather, the Member States are introducing different types of policies and measures that seek to reduce the ability of asylum seekers to access the territory of the EU. Thus, although the EU may be seen as containing the promise of a new approach to the global political order, it retains a characteristic that resonates with the logic of the sovereign state, namely the need to demarcate between 'inside' and

'outside'. The difference that the EU carries with it is where these borders are drawn. For the EU, those regarded as belonging by virtue of being on the 'inside' are its Member States, whereas everyone else may be perceived as on the 'outside', thereby resulting in a perceived need to uphold an common external border towards third country nationals – regardless of what the human rights regime might say in the matter. This is particularly striking when reiterating that asylum seekers were specifically excluded from the abolishment of internal borders within the EU.

Since 1990, there has been a noticeable development in terms of how the EU approach matters on immigration and asylum. Initially, this area was seen as the core of national sovereignty and therefore subject to mainly informal cooperation amongst the Member States. However, with the Treaty of Maastricht in 1992 and Treaty of Amsterdam in 1997, immigration and asylum was communitarized, thereby becoming part of the EC competency. In doing so, this established the legal foundation for the establishment of a Common European Asylum System. Drawing from previous discussions in this thesis, questions naturally arise regarding the role of sovereignty and human rights in such a system on EU level.

As for human rights, the evolution of the CEAS is formally committed to human rights, as stated by the Tampere Conclusions in 1999. In the subsequent development of the CEAS, several instruments have been launched, providing standards on reception of asylum seekers, qualification as refugees, procedures for granting or withdrawing refugee status and the criteria for determining the Member State responsible for considering an asylum application. Initially, these were minimum standards and therefore provided Member States with discretionary room in which states were free to e.g. introduce better standards.

At the same time, the lack of uniform procedures and standards amongst the Member States has continuously been identified as a major issue and a reason for the failures of the CEAS. The impact of this, along with other flaws of the CEAS, became especially evident in light of 2015 and its unusually high number of applications for international protection being lodged throughout the EU. This increased pressure on the national reception systems for asylum seekers caused a sense of "crisis" among the Member States, leading to a renewed process of reforming the CEAS. At the moment of writing, the outcome of these negotiations are still very uncertain, but the process so far indicates that there is a risk of a very unfortunate turn towards a much more repressive migration and asylum policy. Notably, the proposals have also suggested that the current Directives are to be replaced by binding Regulations as a way to address the lack of harmonization throughout the EU. The combination of having binding Regulations containing binding provisions with lower standards for asylum seekers cuts deeply into the core of the topic of this subject, namely the relationship between sovereignty, human rights and the EU.

The implications of the interactions between sovereignty, human rights and the EU are assessed more comprehensively in the chapter addressing the Dublin III Regulation. The findings of this chapter have established that the rationale of having such a mechanism for allocating responsibility rests upon mostly administrative considerations, i.e. serving the interest of the Member States. Although the Dublin Regulation is supposed to prevent the phenomenon of "refugees in orbit", it is simultaneously seeking to prevent the secondary movement of asylum seekers. By looking at the responsibility criteria, it has been shown that even though the Dublin Regulation is formally committed to the protection of human rights, its mechanisms are not shaped to primarily consider the wishes or needs of the individual. For instance, only prohibiting transfers when there are "systemic deficiencies" is a very high threshold, meaning that the particular circumstances of the applicant in question often do not suffice to stop a transfer. Yet another illustrative example of the centrality of Member States' interests in the Dublin Regulation is its provisions on immigration detention. The fact that the Dublin Regulation sees the deprivation of an individual's liberty as legitimate for the purpose of securing a transfer, speaks to the coercive nature aimed against individuals subject to the Dublin Regulation.

Lastly, some relevant rulings on the Dublin Regulation from both the ECtHR and the CJEU have been discussed. Though the Courts through some of their interpretations can be said to have enhanced the role of human rights protection, the rulings have not questioned the very foundations of the Dublin Regulation. For instance, the Courts are clear that even in cases where transfers are prohibited due to systemic deficiencies and the risk of violation of fundamental rights, there is no obligation triggered by the Member State in which the individual is present to also assume responsibility for the lodged application for protection. In maintaining that the discretionary clause remains discretionary, the Court reiterates the logic of the current global political order, whereby the granting of asylum remains a sovereign privilege. Hence, the Dublin Regulation remains first and foremost an administrative tool for the Member States.

Where does all of this leave us? Indeed, the findings of this thesis provide us with a rather glooming picture. The creation of the CEAS by the EU may formally be committed to human rights, but nevertheless seems to be largely following the same exclusionary logic as that of the sovereign state, but perhaps on a grander scale and with more innovative measures through which they can draw and uphold boundaries. Hence, the EU's asylum and migration policy can indeed be seen as characterised by the tension between sovereignty and human rights. However, if we assess this conflict by looking at the impacts on those who seek to cross territorial borders, the human rights regime cannot be said to be pose a radical challenge to the current prevailing global order – whether it is in relation to the sovereign state only, or in relation to the constellation of the EU.

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