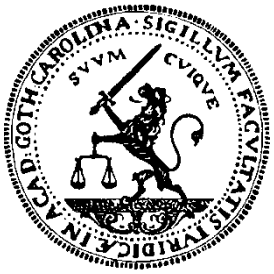


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# Access to Asylum in the EU
## Externalizing Borders and Shifting Responsibility

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

Supervisor: Eleni Karageorgiou

Semester of graduation: Period 1 Autumn Semester 2020

## Abstract

The purpose of this thesis is to research the access to asylum within the EU and how this is regulated in the EU legal system. At the center are the European Courts and their interpretation of the law concerning access to asylum. The thesis examines various stages in which refugees may access asylum and how this increasingly made more difficult by the EU and its Member States. For this reason, the research question is as follows: *How is the access to asylum regulated by EU law and how is it ensured to be followed in practice by Member States and interpreted by the European Courts?* In order to answer this question, the material researched has primarily been EU law such as directives and regulations, as well as case law from the CJEU and ECtHR. There is also secondary sources such as literature from researchers and scholars. The conclusions reached are that the EU continuously externalizes its own borders and shifting responsibility to both its own Member States, where Mediterranean States are taking the heaviest burden, but also to third countries through special agreements and arrangements. This trend has become more significant in the years following the 2015 so-called refugee crisis, as now the judiciaries are ruling more restrictively in migration cases than before. This has resulted in systematically eliminating the few legal ways for people to access asylum, such as visas, and leaving them no choice but to attempt the dangerous crossings of deserts and seas to enter Europe irregularly.

## Sammanfattning

Syftet med detta examensarbete är att forska kring tillgång till asyl inom EU och hur detta regleras inom EU-rätten. Vid kärnan återfinns de europeiska domstolarna och deras tolkningar av rätten gällande tillgång till asyl. Uppsatsen undersöker de olika stadierna där flyktingar kan få tillgång till asyl och hur detta har alltmer försvårats av EU och dess medlemsstater. Av denna anledning är forskningsfrågan som följer: *Hur är tillgången till asyl reglerad inom EU-rätten och hur säkerställs medlemsstaternas efterlevnad i praktiken samt tolkas av de europeiska domstolarna?* För att besvara denna fråga är det undersökta materialet främst EU-rätt som direktiv och förordningar, och även praxis från EU-domstolen och Europadomstolen. Det finns även sekundära källor som litteratur och doktrin. Slutsatserna som nåddes är att EU kontinuerligt externaliserar dess egna gränser och förflyttar ansvar till båda de egna medlemsstaterna men även tredjeländer med särskilda avtal och arrangemang. Den här trenden har blivit mycket mer tydlig på senare år efter den så kallade flyktingkrisen 2015, när nu även domstolsväsendet dömer mycket mer restriktivt i migrationsmål än innan. Detta har resulterat i en systematisk eliminering de få lagliga sätten för folk att få tillgång till asyl, som t.ex. visum, vilket lämnar dem utan andra alternativ än att försöka sig på den farliga resan genom öknar och hav för att komma in i Europa olagligt.

# List of Abbreviations

AG – Advocate General

APD – Asylum Procedures Directive

CEAS – Common European Asylum System

CFR – Charter of Fundamental Rights of the European Union

CJEU – Court of Justice of the European Union

CoE – Council of Europe

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

EEC – European Economic Community

EU – European Union

ILO(s) – Immigration Liaison Officers

ISIS – Islamic State of Iraq and Syria

NGO(s) – Non-Governmental Organizations

QD – Qualification Directive

SIC – Schengen Implementation Convention

TEU – Treaty on European Union

TFEU – Treaty on the Functioning of the European Union

UK – United Kingdom

UN – United Nations

UNHCR – United Nations High Commissioner for Refugees

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# 1. Introduction

## 1.1. Background

In an ever more globalized world where the migration of individuals between countries becomes ever more common, there are problems and attempted solutions that arise to combat such problems. Whether it is about temporary migrants or seasonal workers, to people fleeing their homes because of war or natural disasters, conflicts will emerge as to how to deal with migration. While there are of course legal systems and structures in places to facilitate and achieve a just and fair outcome for everyone, these systems often fall short of satisfactory. One of the more recent and relevant examples is the 2015 so-called "refugee crisis" which affected Europe, among other places, politically if nothing else. How Europe has handled incoming refugees and asylum seekers both before and after 2015 is an interesting subject for discussion, and it is a subject that has raised many political and legal questions as to how Europe should proceed. Many European Union (EU) Member States, such as Spain for instance,[1] reject so called "illegal immigration" and maintain that going through the proper channels should be enough to ensure that those in truly need of international protection are granted it. But how readily available is this access to asylum to refugees and others in need of protection? What rules and laws are in place to ensure asylum to those who need it, and how does it work in practice when one applies for asylum? This also raises further questions such as does the EU asylum system meet the standards set by international law, especially when engaging in practices through which access is denied for asylum seekers before even reaching EU territory. One may consider measures taken in the Mediterranean or deals made with North African states to limit the arrival of incoming refugees. For instance, the Malta Declaration[2] which focuses on measures to actively stem the flow of migrants coming from Libya to Italy and the EU, or Operation Sophia which trains Libyan Coast Guard.[3] Frontex, the European Coast Guard that actively works to intercept migrants and return them as far as possible is another example.[4] All these are measures taken by the EU to reduce the number of incoming refugees.[5] There are more examples of such measures taken by the EU, in particular

[1] ND and NT v. Spain, para. 126.
[2] Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route.
[3] EUNAVFOR MED Operation Sophia: Mission
[4] Costello, p. 235.
[5] Chetail, p. 589.

in relation to commercial third parties such as airlines or other companies. For instance, one may mention carrier sanctions in which airlines are penalized financially if they bring people without proper documentation or visas into Europe.[6] There are also for example immigration liaison officers (ILOs) which are officers deployed by mainly Member States to third countries in order to combat and prevent so-called illegal migration by coordinating and maintaining contact with authorities of those third countries.[7] These types of measures taken by Member States will not be examined further in the thesis, mainly due to time and space constraints, as the focus should be on the EU itself. Another issue to consider is how refugees and asylum seekers have the possibility to apply for protection in a desired Member State, or how refugees are distributed within the EU, especially in relation to how external measures to prevent refugees from ever arriving in Europe. Keeping the vast majority of refugees in border states becomes problematic not only for the states in question, but also for the individuals and their rights. The question of refugee and asylum law in Europe furthermore becomes one of the most important and hotly debated issues, even as the European Commission recently proposed to scrap the Dublin regulation. This is one of the fundamental documents of the European asylum system and relevant for the access to asylum in that the process and decision of an application can vary immensely depending on which Member State is responsible. Considering the deficiencies of Dublin where both the rights of refugees are in jeopardy and places an unproportionate burden on Mediterranean Member States,[8] it is unsurprising that the Commission wishes to come up with something that works better for everyone, at least on paper. Such a process would of course take years to fulfill, but it is stark reminder that this is an issue which is in constant change.

Considering all these different measures to in one way or another interfere with the access to asylum, it is important to define what is meant with the access to asylum as it can mean different things depending on what is discussed. For the purposes of this thesis, access to asylum will mean partly access to territory, as only after reaching European territory a person may seek protection and start an asylum procedure, at the very least for the vast majority of people as the rules stand today. But it must also be understood as the access to effective asylum procedure which can theoretically be achieved extraterritorially, although the actual possibilities of this are to be examined. In short, access to asylum within the meaning of this

[6] Art.4 Carrier Sanction Directive.
[7] Ibid.
[8] Chetail, p. 595.

thesis will mean access to territory or to effective asylum procedure whether it is gained inside EU borders or not.

## 1.2. Purpose and Research Question

With all these issues in mind, there is much and more to discuss regarding the asylum system posed by the EU, both from a legal theoretical perspective but also to how it is enforced and followed in practice. However, because this is such a massive and broad field, limitations will have to be made. Though it would be interesting to research all of the aspects to asylum in the EU, the work undertaken would be too vast and unruly for the nature of this thesis. The purpose of this thesis will therefore be to investigate and research access to asylum in the EU, how it is interpreted by the European Courts, i.e. the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). This thesis will not look into interpretation and regulation by individual Member States, insofar as it is mentioned by the Courts in certain cases. It will also be important to investigate how relevant and important case law is compatible, not only regarding different courts to each other, but also to determine consistencies in their own rulings. All of this research will be important in order to answer the research question of this thesis:

- *How is the access to asylum regulated by EU law and how is it ensured to be followed in practice by Member States and interpreted by the European Courts?*

## 2. Methodology and material

For this thesis the methodology used will be legal dogmatics where the aim is to reveal the dogma of law[9], or differently put, describe the legal situation in the field as it stands currently. Using the applicable law as a basis, one may evaluate it to further analyze, identify gaps and inconsistencies, and draw conclusions regarding the discussed topic.

The material used of this essay will consist of legislation on the access to asylum, almost exclusively primary and secondary EU legislation, such as the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union (CFR), as well as the European Convention on Human Rights (ECHR) as that is area of research. The primary material used and analyzed will be case law from both the Court of Justice of the EU as well as the European Court of Human Rights. The data gathered from these cases will be the bulk of the thesis and most analysis relating back to the research question will mainly derive from this research. Examination of primary and secondary legislation will be partly to serve the purpose of thesis, but also for background and context for the cases. Finally, there will also be a wide variety of literature and doctrine from various authors and researchers in the area. These include, but are not limited to, Cathryn Costello, researcher and professor at the University of Oxford, Violeta Moreno-Lax, professor at Queen Mary University of London, Moritz Baumgärtel, professor at Utrecht University, and Vincent Chetail, professor at the Graduate Institute at Geneva. The research and literature made by these scholars will guiding and provide useful insights and perspectives on certain cases, provisions or circumstances that are relevant to the thesis.

### 2.1. Outline

This thesis will be divided into two major parts, the results where the findings are presented, and the discussion where the results are analyzed and processed. The results section will be initiated with background on the Common European Asylum System (CEAS) and access to asylum from both an internal and external perspective. In the internal part the relevant legislation will be presented; this includes primary sources such as the TFEU and individual directives that are relevant for topic at hand. This will be followed by the case law, which is the bulk of the findings. For this, the cases have been divided into topics, namely cases

[9] Petrov and Zyryanov, p. 968.

regarding visas or the access to asylum outside of the EU, cases regarding the sea and external borders, cases regarding safe third countries or detention at the borders, and cases regarding the Dublin Regulation or redistribution of asylum seekers. The discussion section will begin with discussing the problems and deficiencies of the CEAS, and then continue to analyze the case law presented. The case law analysis will follow the same structure in which the case law was first presented and analyze the material with these different sections in mind.

# 3. CEAS and access to asylum

## 3.1. Internal dimension

To fully understand the CEAS in its current form, one must first understand how it developed. The idea of a Common European Asylum System can be traced back to when the ideas of a borderless Europe first emerged.[10] Before that, the individual states were bound by their international obligations regarding asylum and refugees, such as the 1951 Refugee Convention and the European Convention on Human Rights.[11] In order to realize the plans of a European area where citizens could travel freely without borders, the issue of asylum had to be addressed in order to fulfill and comply with international asylum law. Initially, the EU, or more specifically the predecessor organization, did not regulate or even reference immigration, let alone asylum.[12] The European Economic Community (EEC) treaty, which established the first version of what would evolve into the EU of today, made no such mention, and the CJEU at the time reaffirmed that the issue of asylum and refugees was to be handled domestically and in accordance with the Refugee Convention, but not a subject matter for the community.[13] However, in order to fully realize the idea of a borderless Europe, intergovernmental cooperation on the issue of asylum was considered inevitable. In 1985, several of the Member States signed the Schengen Agreement, whose purpose was to remove all internal borders and to strengthen the common external borders. This led to the Schengen Implementation Convention (SIC) signed in 1990 which would regulate this vision practically.[14] In regard to asylum, one main issue was regulated namely the movement of asylum seekers within the common territory. This included so-called "asylum-shopping", wherein an asylum applicant would seek asylum in several Member States at once in order to increase the chances of a granted asylum application, but also establishing common rules for third-country nationals in all Member States.[15]

At around the same time, the Member States also signed the first Dublin Convention which determined the state responsible for examining asylum applications lodged in a Member State. This, together with the Treaty of Maastricht in 1993 and the introduction of the Third Pillar, incorporated the issue of asylum fully into community law and put it under the jurisdiction of

[10] Moreno-Lax, p. 13.
[11] Cherubini, p. 130.
[12] Ibid, p. 129.
[13] Ibid, p. 131.
[14] Arts. 2-3, Schengen Implementation Convention
[15] Cherubini, p. 136.

the Union.[16] There was later an update to the Dublin Convention with the Dublin Regulation (Dublin II), introduced in 2003. This was due to a question of responsibility under EU competence that the Convention was changed into a Regulation, making it directly applicable to all EU Member States and Schengen associated states. The final big changes to EU asylum law were made with yet another update to the Dublin Regulation (Dublin III), which came into force in 2013, and of course with the Treaty of Lisbon in 2009 which dramatically changed the EU in many aspects, most notably eliminating the Third Pillar with the new TFEU, as well as making the CFR into primary law and granting the CJEU wider jurisdiction.[17]

A common system of asylum law in the EU was developed out of the need to consolidate a borderless union while still adhering to international refugee law. While there are many rules that are meant to guarantee the rights of asylum seekers, this is not always followed practically as later chapters will demonstrate below. However, as far as what the rules and regulations are "on paper", access to asylum is ensured by the commitment of the EU to "fully respect human rights, the protection of persons in need of international protection and principle of non-refoulement", according to art. 78 TFEU. These are also expressed as general principles of EU law. Such general principles are derived from various different sources, primarily the Member States' domestic constitutions and their obligations to international law.[18] They are not necessarily enshrined or listed in any legislative document such as the EU treaties although many are, such as the principle of non-refoulement in all CEAS documents (e.g. art. 21 of the Qualification Directive (QD)). The ECHR is a primary source for such general principles and the CJEU does on occasion mention them (preamble to CFR and art. 52(3)) and thus lends them credence and authority.[19] Below are the most relevant and important legal instruments in relation to the access to asylum, and this is essentially how EU asylum law is composed now, with some minor additions and changes.

### 3.2. The European Convention on Human Rights

The ECHR is an important document that, while it does not explicitly mention the right to asylum, it enshrines the principle of non-refoulement with particularly art. 3 (prohibition of torture). The Court has also continuously ruled in asylum cases and is thus an authoritative

[16] Ibid, p. 136–138.
[17] Ibid, p. 159.
[18] Moreno-Lax, p. 218.
[19] Ibid.

source of law regarding asylum in Europe. As for art. 3, it works similarly to the Refugee Convention in that it does not actually recognize a right to asylum explicitly, but rather prevents a state from sending an asylum seeker to a country where they risk persecution.[20] This practically means that a person must be accepted to an asylum procedure in order for the state to follow their obligations deriving from the ECHR and the Refugee Convention. The ECHR is however not as clear and coherent in its formulation, as the provision does not mention asylum or refugees at all. Because the provision is merely formulated as "No one shall be subject to torture or to inhuman or degrading treatment or punishment", the Court has had to be more creative in their rulings regarding asylum.[21] This is how a principle of non-refoulement has been derived from art. 3. As for actual case law of the ECtHR, this will be examined in the section on case law.

### 3.3. The Lisbon Treaty

To begin with, the TFEU states in art. 78 that there must be a common asylum policy applicable throughout the Union, which has corresponding implementing measures. Here, it is further stated that this common policy must be in accordance with the Refugee Convention. It is also with this provision that the possibility for establishing an instrument to determine which Member State should be responsible for processing an asylum application (art. 78(2)(e)), which is what the Dublin Regulation essentially is. This could potentially be contrary to the Refugee Convention, as it allows a certain state to evade their obligation to examine an asylum application without adhering to the Refugee Convention.[22]

While this provision mainly serves to harmonize a common asylum policy and how to implement such a policy, it does not declare or establish any specific rights, other than declaring to be in accordance with the Refugee Convention which does include rights. Instead, the right to asylum is enshrined in art. 18 of the CFR, which again only refers to the Refugee Convention, and reaffirms the principle of non-refoulement in art. 19(2). It is worth noting, however, that the Refugee Convention does not regulate the access to asylum, nor does it guarantee the right to asylum to a particular state.

[20] Cherubini, p. 103.
[21] Ibid.
[22] Cherubini, p. 172.

### 3.4. Qualification Directive

Other than those more constitutional provisions, the most significant piece of EU legislation regarding the access to asylum is the Qualification Directive Recast.The purpose of the QD is to "ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection" as well as to "ensure that a minimum level of benefits is available for these persons in all Member States", according to recital (12) of the preamble. The directive is divided into sections, with definitions in the beginning, assessment of applications for international protections in chapter II, followed by individual chapters for what qualifications there are for being a refugee and for subsidiary protection. The QD therefore clearly defines what is what is not a refugee in the eyes of the EU as well as determining what rights come with a refugee status. As Costello argues, the QD indisputably creates a subjective right to be granted asylum.[23] As of yet, the CJEU has not expanded or drawn on the implications of a right to asylum, although as will be examined below, AG Maduro did reflect upon this in his opinion in the *Elgafaji* case. For that reason, although an actual right to asylum is not universally accepted, it can be considered an implication until the Court interprets the directive in that perspective.[24] So far, the only thing derived from it is the principle of non-refoulement, as seen in *NS and ME* discussed in section 4.4.2. Arts. 9-10 determines what acts of persecution as well as reasons for persecution are valid to use in order to grant refugee status, while arts. 11-12 determine reasons for cessation and exclusion of refugee status. When accessing asylum, these are the first hurdles one must cross in order for a successful application. Moreover, perhaps one of the most important provisions of the QD in terms of access to asylum is as mentioned briefly art. 21 which expresses the principle of non-refoulement.

### 3.5. Asylum Procedure Directive

Another of the key instruments for asylum in the EU is the Asylum Procedure Directive (APD) which seeks to establish commons procedures for granting and withdrawing international protection as seen in the QD, according to art. 1. In this directive, there are some rights and guarantees, such as the right to have one's application processed and examined (art. 6), to receive necessary information and counselling (art. 8), and the right to remain in a Member State while the application is being processed (art. 9). There are then more

[23] Costello, p. 250.
[24] Ibid.

procedural rights and guarantees, such as right to an interview, right to information in a language one understands, and right to legal assistance and representation. These are rules that are meant to not only harmonize the procedural policies, but also to ensure that each applicant has their rights observed in order to reach a fair and balanced decision. While a lot of the directive aims to guarantee rights of the applicant, it also expresses certain obligations on the applicant such as cooperation with the domestic authorities (art. 13), as well as regulating more intrusive procedures such as medical examinations (art. 18). Moreover, the principle of non-refoulement is again enshrined in this directive with art. 38.

### 3.6. Dublin Regulation

The third key instrument regarding the access to asylum is the Dublin Regulation. The purpose of the Dublin Regulation is to establish criteria for determining which Member State is responsible for processing and examining an application for international protection. The regulation first lays down some rights and guarantees, such as the right to information (art. 4), and then proceeds to establish a hierarchy of criteria for determining which state is responsible. This hierarchy is designed where family members have high priority, especially minors, and then visas or residence permits. What this entails practically is that if an applicant is not a minor, or has family members in a certain state, or has a visa or residence permit in a certain state, the Member State in which the applicant first crossed irregularly into, is the Member State which is responsible for examining the application (art. 13). This is also the case if the applicant first enters the Union through an airport or transit zone, according to art. 15. The later part of the regulation mainly deals with practical issues such as procedural rules, take charge and take back requests etc. This results, practically, in the fact that border states, and especially states with a Mediterranean coast, become unproportionally burdened with asylum applications and people seeking international protection. This is of course because most refugees and asylum seekers enter Europe through dangerous boat journeys across the sea from the North Africa and from Turkey. Not only does this have arguably unfair implications for the Member States, but it also has some unfair implications for the applicants.[25] Even though there are all these directives and regulations to ensure that procedures and rules are harmonized, there is vast differences practically in how asylum applications are handled throughout the Union.[26] Some states are efficient and follow the EU

[25] Chetail, p. 596–597.
[26] Costello, p. 257.

rules, while others have less than satisfactory results. Leaving a majority of applications with Mediterranean and border states also reduces those countries' efficiency and accuracy because of the high strain created. Recognition of refugee status varies greatly, in particular regarding applicants from Iraq and Syria.[27] Though this particular issue will be discussed more in depth further on, it is worth noting what issues the Regulation cause and how it complicates the right of access to asylum in practice. As it is only concerned with redistributing or returning asylum seekers to other Member States, it might seem as if it is not relevant to the access to asylum, because at this stage the asylum seeker has reached Europe and has accessed asylum – it is merely a question of which Member State should review this application. However, as will be seen subsequent cases (*MSS v. Belgium and Greece, NS and ME*), sometimes returning someone to a certain Member State can entail refoulement if for whatever reason that State has insufficient resources in place to satisfactory provide for an effective asylum procedure and everything that comes with that such as acceptable living condition etc. Taking that one step further, because of Dublin a few Member States in the Mediterranean have to deal with the majority of applications which strains their systems and resources and that can lead to living conditions that are incompatible with the principle of non-refoulement.

In order to fully understand some of the cases below (in particular *Tarakhel v.* Switzerland, discussed in section 4.4.3.), one may mention the Eurodac Regulation. Adjacent to the Dublin Regulation there is Eurodac, which regulates the Eurodac database that keeps fingerprints of everyone over 14 years that has ever applied for asylum in any of the Member States.[28] This is in service of properly executing the Dublin rules of first country entered.

### 3.7. Schengen Visa Code

The Visa Code is the regulation intended to establish procedures and conditions for issuing visas for transit or intended stays (art. 1(1)). The regulation naturally deals mostly with rules of issuing of visas, duration of stays and more practical provisions regarding visas in general, but what is relevant for this thesis is the possibility to apply for visas with limited territorial validity (art. 25) and visas issued at external borders (arts. 35 and 36). Visas with limited territorial validity mean that the visa is only valid in the one Member State that issued it, as opposed to the entire EU which standard visas are. These are issued when a Member State considers it necessary on humanitarian grounds, reasons of national interest or international

[27] Ibid.
[28] Cherubini, p. 151.

obligations. This means on paper that it is one way for potential asylum seekers to enter EU territory legally and then being able to begin an asylum procedure.

On the other hand, there are visas issued at external borders (art. 35). As a general rule, visas must be issued beforehand, prior to entry into EU territory. However, this exception allows for visas to be applied for and issued at the border, assuming certain criteria are met, *inter alia* that the person has not been in any position to apply beforehand and there are unforeseeable and imperative reasons for entry, and that the person's return to the country of origin, residence or transit country can be guaranteed. This is harder venue for potential asylum seekers to use as the criteria for ascertaining return often is not possible, which of course is why someone would apply for asylum in the first place. Art. 36 regards seafarers in transit at external borders and is mainly intended for people working as seafarers on ships that are merely visiting or stopping temporarily. Thus, this is article is not applicable for asylum seekers.

### 3.8. External dimension

The regulation of asylum is however not done only through internal legislation and managed by the EU solely. Much of the measures taken to regulate and in particular stem the flow of migrants is through deals and agreements with third countries. What is relevant for this thesis is such agreements that deal with third countries that essentially become tasked with preventing and containing potential asylum seekers from leaving their territory and entering EU territory.[29] These countries are for the most part border countries to the EU and North African countries from where a vast number of refugees depart in order to cross the Mediterranean. As Moreno-Lax explains it, this is a part of a grander extraterritorialization of EU borders and border controls.[30] This takes form in two ways; the extraterritorialization of checks that are physically located in pre-border areas outside EU territory, and delegating control to private actors and foreign authorities stationed in third countries.[31] These measures include *inter alia* visa requirements (as examined above), carrier sanctions, immigration liaison officers, pre-border interdiction, and Frontex operations. Out of these, only measures that have become the subject of the Courts' scrutiny such as interdictions at sea and visas will be further examined, excluding carrier sanctions and immigration liaison officers. This extraterritorialization of border began in the 1990's when migration started being approached

[29] Moreno-Lax, p. 39.
[30] Ibid.
[31] Ibid.

from a security perspective. EU neighboring countries became "key players"[32] in maintaining EU security interests and this ring of allies soon expanded to beyond the EU's immediate vicinity. This was when arrangements and agreements with third countries that entailed financial or humanitarian aid in exchange for border management and readmission policies first started to emerge, at least from the EU's side.[33] These are the type of arrangements that are still in place today, where countries such as Libya, Tunisia and Morocco enter agreements with either the EU as an entity or individual Member States that benefit the most from the extraterritorialization, i.e. border states such as Italy and Spain. An example of such an agreement can be seen with the EU-Turkey statement following the 2015 crisis which will be examined in the next section.

### 3.9. The 2015 crisis and intensification of externalization

The "crisis" colloquially refers to the period in primarily 2015 when an unusual large number people arrived in Europe, mostly refugees seeking protection. The most common nationalities were Syrian, Afghan and Iraqi and were to a large extent a result of the Syrian civil war and the emergence of Daesh (ISIS) in the region.[34] Though the influx of people was in 2015, the European Commission did not declare the crisis to be at an end until March 2019. The majority of people arriving came to Greece and Italy after long and dangerous journeys crossing the Mediterranean and deserts.[35] As a result of this, an immense amount of people died trying to make the journey, drowning in rafts where hundreds of people were crammed in.[36] It was undeniably the period with the most displaced people in the world since World War II,[37] but whether Europe actually took the bulk of those people is contested and while the systems in place were overloaded in some parts of Europe, other parts did very little to assist. In fact, some commentators argue with the premise that the EU was overwhelmed. The number of asylum applications to EU Member States (1,2 million) in 2015, if all would have been granted, would amount to 0,2% of the EU's entire population.[38] Furthermore, 1,2 million refugees is comparatively not that much in relation to how much other countries host, with 2,5 million in Turkey, 1,6 million in Pakistan and 1,1 million in Lebanon (which does amount to

[32] Ibid, p. 40.
[33] Ibid.
[34] BBC - Migrant crisis: Migration to Europe explained in seven charts.
[35] Ibid.
[36] UNCHR Global Trends – Forced Displacement in 2014.
[37] Ibid.
[38] Chetail, p. 585.

a quarter of the entire population).[39] In fact, 94% of all Syrian refugees were hosted in just five countries (Turkey, Lebanon, Jordan, Iraq and Egypt).[40] That number alone is over 5,2 million people based on the United Nations High Commissioner for Refugees' (UNHCR) estimation of displaced Syrian people outside of Syria, not taking into account refugees from other places. Compare that to the 1,2 million total number of asylum seekers of all nationalities divided (admittedly unfairly and unproportionate) among 28 countries and it is easy to see the skepticism as to whether Europe was truly at capacity.

Regardless, what this led to in Europe was a substantial shift in the public perception and discourse concerning refugees, in large thanks to the framing of the issue as a security and public order problem. An already rising right-wing populism in many parts of Europe was boosted even further and there was constant talk of a systemic collapse due to the high number of refugees, something that empirically is just not proven. The change in politics reached the Parliament of the EU and then by extension the European Commission, which affected the law and decision-making process in the region. Examining recent cases from the CJEU as well as the ECtHR shows that there has been a more profound shift in the approach taken to migration and asylum cases since the crisis began, with gradually more restrictive rulings. This will be examined in depth further on in the thesis.

A great example of this shift that takes shape in the political sphere but also greatly affects the legal sphere is the arrangement between the EU and Turkey. In March 2016 the EU and Turkey issued an agreement known as the EU-Turkey statement. The agreement holds that all migrants arriving on the Greek islands from Turkey will be immediately returned (forcibly if necessary), the number of Syrian refugees admitted to the EU from Turkey is equivalent to the number returned to Turkey from Greece, financial support for refugees in Turkey, visa freedom for Turkish citizens in the EU, and a restarted dialogue on Turkish accession to the EU.[41]

This deal has been heavily criticized by scholars and non-governmental organizations (NGOs).[42] For one, it cannot be considered to be in accordance with either European or international law on safe third countries as Turkey cannot be considered as such for asylum seekers.[43] Another criticism is that this agreement was done without legal support. It was concluded without complying with the constitutional requirements set forth in the TFEU. It

[39] Ibid.
[40] Ibid.
[41] EU-Turkey statement, 18 March 2016.
[42] Spijkerboer, p. 221.
[43] Ibid.

had not been sent to approval to the European Parliament beforehand and there was no possibility to consult the CJEU either.[44] There was also a high level of unclarity as to what the statement actually was. Was it merely guidelines the two parties should try to aspire to more akin to a political agreement, or was it to be considered a legally binding international treaty with all the legal effects that come with that? In the years since it was issued, it has mostly been treated as treaty although it is important to emphasize the ambiguousness of it.

There was a case regarding the statement in the General Court of the CJEU, lodged by a number of applicants who sought to annul the agreement after they had arrived in Greece shortly after the statement came into force and were thus returned to Turkey. Due to the very nature of judgment, in that the Court does not really answer anything at all, it will be shortly covered here instead of getting an own section below. The Court does not even summarize the grounds on which the applicants sought to annul the agreement, but it can be assumed to be constitutional objections as well as claims of international and human rights law violations.[45] As to the judgment itself, simply put, the Court dismisses the case as they claim not to have jurisdiction on the matter.[46] This is argued because the agreement was concluded by Turkey and the European Council (i.e. the heads of state of every Member State). At the moment of the statement's conclusion, the Court claims that they were acting as the heads of state each Member State respectively in an individual order, and not as the European Council. As they were not at that particular moment constituting the European Council, it is not an EU matter and the CJEU has no jurisdiction.[47]

This reasoning is questionable at best, but it does serve to emphasize a trend seen in recent years in the CJEU to shift responsibility away from the EU in matters of asylum and migration, a fact that will be discussed more thoroughly and highlighted when examining case law from the CJEU as well as the ECtHR.

[44] Ibid.
[45] Ibid.
[46] EU-Turkey statement judgment, para. 44.
[47] Ibid.

# 4. Case law

As can be seen above, the CEAS and the access to asylum is regulated through various legal instruments from both EU institutions and the ECHR. This is the foundation of the access to asylum and grants many possibilities for a potential asylum seeker to achieve their goals. However, another important legal source is of course the European Courts. The Courts interpret the legislation both to make certain unclear provisions more unambiguous, both also to definitely determine how certain rules should be followed or if a certain Member State has followed something incorrectly. This is one of the most crucial aspects of the research and in order to answer the research question. For this chapter, the case law reviewed will be divided into four main categories, namely visa cases, interception at sea and external borders, safe third countries and "at the border", and Dublin cases and relocation within EU territory.

## 4.1. Cases regarding visas

### 4.1.1. MN and Others v. Belgium and X and X

This case concerned a family of Syrian nationals applying for visas on humanitarian grounds at the Belgian consulate in Beirut, Lebanon. The Belgian migration office rejected their applications not only once but twice after they were prompted to suspend the execution of the decisions due to risk of an art. 3 breach. Several applications for judicial review were dismissed by the Belgian authorities and after the Belgian court of appeal overturned a favorable decision from the first instance, they applicants turned to the ECtHR.[48] The applicants had argued that the Belgian state had jurisdiction based on the fact that visa-related consular functions are a form of public power that engages the state's jurisdiction.[49] The Court rejected this argumentation, stating that the applicants merely entered the consulate to hand in the applications and no more. By simply entering the premises of the consulate and filing an application there has been no jurisdictional link established. According to the Court, that line of reasoning would enable the Convention to have near universal jurisdiction and application, with Member States having unlimited obligations everywhere and towards everyone essentially, regardless of where an individual is located.[50]

[48] MN and Others v. Belgium, paras. 9–10.
[49] Ibid, paras. 74–75.
[50] Ibid, para. 126.

Parallels can be drawn to the CJEU case *X and X* which had essentially the same circumstances, i.e. a Syrian family applying for visas in the Belgian consulate in Beirut, Lebanon.[51] This was done with the intention of entering Belgium legally and going through the "proper" channels for asylum seeking. The case concerned the application of art. 25 of the EU Schengen Visa Code (issuing of a visa with limited territorial validity). Here the outcome of the Court's ruling was also unfavorable towards the applicants, stating that they applied for visas with the intention of applying for asylum once in Belgium and that in such instances it falls outside of the scope of the Visa Code and EU law, and is a matter for national law.[52] While the cases regarded different legal provisions, they still ultimately served to determine, or not determine, the obligations of Member States to accept visas that presumably will be used for lodging applications for international protection. What this does is severely limit the ways for potential asylum seekers to use legal means of lodging applications,[53] or preventing access to such "legal venues" as the Court expressed it in *ND and NT v. Spain*. In that case, the Court had entertained embassies and consulates as a possibility to such legal venues, something that clearly was not the case. Moreover, *MN and Others* places a requirement of "de facto control" and "physical power"[54] over third country nationals in order for jurisdiction to be triggered. While most commentators agree that the Court's argumentation is sound and legally motivated, the political and practical aspect of it cannot be ignored.[55] Baumgärtel argues that it "quashes the best hope that European human rights law can deliver safe pathways for asylum seekers".[56] Practically, "legal venues" that are also safe and does not require migrants to risk their lives undertaking dangerous journeys seem to be merely theoretical and undefined as of yet.[57]

Furthermore, the Court does not appear to consider humanitarian visas at all, more specifically art. 25 (visas with limited territorial validity) in conjunction with art. 35 (visas applied for at the external border). It would at a first glance appear as this is exactly the kind of situation in which those provisions are applicable and even made for, but it remains largely unconsidered by the Court. Certainly, this could not fall outside of scope for EU law and left to be decided by domestic law, but without any consideration by the Court it is difficult to say. This case in particularly interesting as it deals with asylum seekers going through "legal

[51] X and X, paras. 19–20.
[52] Ibid, para. 44.
[53] Stoyanova.
[54] Ibid.
[55] Ibid.
[56] Baumgärtel (2020).
[57] Ibid.

means" to seek protection, which is something the EU insists is what people should do instead of irregularly crossing into Europe. This ruling by the Court effectively shifts the responsibility from the EU to the Member States, and it should not be controversial to say that very few Member States would go to such lengths to ensure asylum if they are not actively required to do so.

The outcome of both these cases, however, is the same for people seeking asylum and attempting to do so through "legal means" and sends a confused message as to what the EU or the ECtHR actually expects from asylum seekers.

## 4.2. Cases regarding sea and external borders

### 4.2.1. Hirsi Jamaa and Others v. Italy

In this instance, there were a group of around 200 migrants who attempted to cross the Mediterranean from Libya with the intended destination of Italy. However, on the way they were intercepted by Italian coastguard, placed on Italian military ships, and returned to Libya.[58] The Court found that Italy had jurisdiction in this case as the ships sailed under Italian flags. The main question of interest in this case was the breach of art. 3 as well as art. 4 of Protocol No. 4 (prohibition of collective expulsion). It was well known that the conditions in Libya, and particularly in the capital Tripoli where the migrants were returned, there was a high risk of being subjected to treatment prohibited by art. 3, if not only because of the horrendous conditions migrants suffer there which would be contrary to the principle of non-refoulement.[59] There was furthermore a high risk of chain-refoulement to countries such as Somalia and Eritrea where ill-treatment would almost be but guaranteed. In addition to this issue, there was also the question of collective expulsion which was particularly interesting as it was the first time art. 4 of Protocol 4 was tried in a case regarding extra-national territory. Indeed, as the migrants were intercepted and returned before entering Italian territory it could be argued that no breach of the Convention had occurred in this instance. The Court however did find a breach in this sense, arguing that as Italy had jurisdiction as previously established, the responsibility that followed entailed that collective expulsion had occurred.[60] In

[58] Hirsi Jamaa and Others v. Italy, para. 9-13.
[59] Ibid, para. 136.
[60] Ibid, para. 186.

conclusion, the Court ruled favorably for the applicants in the most important regards, but as can be seen in the case below there is not always cohesion in the Court's rulings.

### 4.2.2. Khlaifia and Others v. Italy

This case concerned three nationals from Tunisia who set out on a makeshift raft across the Mediterranean with the intended destination of Italy. They were intercepted by Italian coastguard who took them to a first reception center in Lampedusa (an Italian island closer to the Tunisian coast than to the Italian). The conditions in this center were deplorable and under constant police surveillance, and after an uprising and demonstrations they were flown to Palermo in Sicily. There, all the migrants were kept on ships docked on the harbor, also under reproachable living conditions, and eventually sent back to Tunisia, based on a bilateral agreement between the two countries.[61] This case also concerned art. 5 and the deprivation of liberty which shall not be touched upon here, nor the violation of art. 3, i.e. the living conditions at the center in Lampedusa and the ships in Palermo. The relevant issue here instead is art. 4 of Protocol No. 4, as the applicants argued that they all received the same return decision without consideration for their individual cases. In this issue, the Court found that there had been no violation of the Convention. The Court first starts off by declaring that similar decisions against asylum seekers does not necessarily constitute collective expulsion.[62] Furthermore, the Court argued that the applicants had had opportunities to raise their concern about being sent back to Tunisia, emphasizing here that art. 4 of Protocol 4 does not guarantee the right to an individual interview. And while the Court concedes that the expulsion decisions were all drafted similarly and rather standardized, it could be explained by the fact that none of the applicants had valid travel documents or spoke up against returning to Tunisia.[63] This ruling is quite interesting as it appears to be directly contrary to the ruling in *Hirsi Jamaa* which has essentially the same exact circumstances (with the difference that there were readmission agreements between Italy and Libya present in the latter case), i.e. a group of migrants being intercepted by Italian coastguard and subsequently returned to their point of origin, with the difference being that in *Khlaifia* the migrants actually made it to the territory of a Member State and were arguably treated worse. Again, a temporal aspect could be considered with *Hirsi Jamaa* being decided upon in 2012 and *Khlaifia* being decided upon in 2016.

[61] Khlaifia and Others v. Italy, paras. 11-17.
[62] Ibid, para. 254.
[63] Ibid, para. 263.

### 4.2.3. ND and NT v. Spain

This case regards two applicants from Mali and the Ivory Coast, respectively, who together with 600 other migrants attempted to cross the border to Spain from Morocco at the Melilla enclave. They got stuck on an inner fence which was on the Spanish side and had to be helped down by Spanish police. They were then immediately escorted back to Morocco without any procedure.[64] The applicants claimed a breach of art. 4 of Protocol No 4 to the Convention (prohibition of collective expulsion of aliens). A chamber ruled in the applicants' favor, but the Grand Chamber declared that there had been no violation. The Court argued that when there are enough arrangements for legal entry to secure the right to request international protection in a genuine and effective manner, States may refuse entry to aliens, including potential asylum seekers, who have crossed the border.[65] Furthermore, the Court agreed with Spain in that they had provided several possible means of seeking international protection and that these legal venues were readily available. The applicants did moreover not have any reasons not to use one of these legal venues.[66]

This case does admittedly confirm the Court's stance on jurisdiction as seen in *Hirsi Jamaa and Others v. Italy* where a group of 200 migrants attempted to cross the Mediterranean from Libya with the intended destination of Italy. However, *ND and NT* differs greatly in the crucial area of responsibility and burden as it also places an unreasonably high burden on the migrants by stating that there is no breach of the ECHR if the applicants have behaved "culpable" as is the case here. While Spain may have legal venues for migrants to use in order to apply for protection, these become inconsequential when the Moroccan authorities are actively preventing access to checkpoints and official border crossings.[67] The migrants are then essentially forced to resort to "culpable conduct". In some ways, this in direct conflict with the ruling in *Hirsi Jamaa* as in both these cases there were instances of migrants attempting to reach European territory through what would be considered "illegal" means but coming to two different conclusions. An aspect to consider is the timing of the two cases. *Hirsi Jamaa* was decided upon in 2012 whereas *ND and NT* is quite recent from 2020. Certainly, one can consider the dramatic change in public attitude and politics towards

[64] ND and NT v. Spain, paras. 24–26.
[65] Ibid, para. 201.
[66] Ibid, para. 218.
[67] Markard.

migration, with the crisis happening in between as well. This is further highlighted in the following case to be examined.

## 4.3. Cases regarding safe third countries

### 4.3.1. Amuur v. France

In this case, four Somali nationals arrived in France by plane after fleeing Somalia and were held at the airport while they applied for asylum. They were denied and returned to Syria where they had come from.[68] The case dealt with art. 5 of the ECHR, which is the right to liberty and security, and the Court indeed found a violation of that article. Art. 5 might not directly have much to do with the access to asylum, but in this sense it very relevant as how an asylum seeker might reach Europe and the access to territory. Depending on how airport transit zones are treated, different arguments can be made for when someone is on a country's territory. If a person is held in confinement without any real chance of actually entering the country and with the only possibility of being sent back, then the access to asylum becomes virtually non-existent, particularly in Member States further north and without external borders.

While in this case the confinement was found to be contrary to France's obligations as the applicants were under constant surveillance and with no access to legal or social assistance, such confinement in airport transit zones is not inherently contrary to the Convention, if the necessary safeguards and precautions are taken.[69] The Court also rejected France's argument that there was no restriction of liberty as they were free to leave the country whenever, because there was no real place they could go where they would receive the same level of protection. The right to leave would then be purely theoretical.[70] Finally, they Court ruled that by holding the applicants in the French airport, they were subject to French law. While Contracting States have the undeniable right to control aliens' entry and residency in their territory, it must also be done within the provisions of the ECHR.[71] The Court furthermore went even further and ascertained the existence of a "right to gain effective access to the procedure for determining refugee status".[72] Moreover, there appears to be a conflict here

[68] Amuur v. France, paras. 7-8.
[69] Ibid, para. 43.
[70] Ibid, para. 48.
[71] Moreno-Lax, p. 360.
[72] Moreno-Lax, p. 361.

with the CJEU who ruled in *Airport Transit Visas* that airport transits did not constitute a border crossing into a state's territory.[73] However, it is worth noting that while both cases are from the same time period (1996), the CJEU case was subject to the older pillar system where migration was not regulated on Union level to the same extent. The different approaches by the two Courts are therefore, as Costello expresses it, of little significance.[74]

### 4.3.2. Ilias and Ahmed v. Hungary

This case concerned two Bangladeshi nationals who entered the Röszke transit zone in Hungary by first travelling through Greece, North Macedonia, and Serbia. Here, they immediately applied for asylum and were held in detention for 23 days. Their applications were rejected on the grounds that Serbia was considered a "safe country" according to a Hungarian Government Decree.[75] This case mainly considered the issue of unlawful detention as the applicants argued that they had been deprived of liberty. Although this might not directly seem to be relevant to the access to asylum, this part of the case is still worth examining. The Court found that there was no forced detention as the applicants were free to return to Serbia whenever they wanted due to readmission agreements between the countries, but it did not at all consider what a return to Serbia would actually entail. The question whether Serbia is in fact a safe third country is not clear cut and not explicitly decided upon by the Court in this case, with for instance the CJEU determining that it is not in the *FMS* case discussed below. Putting that question aside, i.e. if Serbia has the necessary reception and procedural capabilities, the question of chain-refoulement still remains. That means that assuming that Serbia is safe becomes irrelevant if the applicants would just be returned to the next country, in this case North Macedonia, and so on. This whole aspect of the case in regard to the unlawful detention and deprivation of liberty is not at all considered by the Court, and if it had been then *Ilias and Ahmed* would have held even more importance in relation to access to asylum as Member States would have had to consider unlawful detentions and how that could entail refoulement if handled incorrectly. Ultimately the Court does consider the issue of refoulement to Serbia and the risk of chain-refoulement to Greece, however just not in relation to the main issue of the case. The applicants argued that the mere fact that Serbia was on a government list of "safe countries" was not appropriate and could not be deemed enough

[73] Airport Transit Visas, para. 32.
[74] Costello, p. 250.
[75] Ilias and Ahmed v. Hungary, paras. 15-19.

to reject their asylum applications.[76] This was simply not enough to guarantee their protection against a real risk of inhuman and degrading treatment. In regard to this issue, the Court ruled favorably for the applicants. They found that it is the responsibility of a Member State to assess the risk of ill-treatment, which includes an *ex officio* up-to-date assessment a country.[77] While keeping a list of "safe countries" is not necessarily contrary to the Convention, such a list must be accompanied with an up-to-date analysis of the relevant conditions in that country in order to make a qualified and correct decision when removing an asylum seeker. In this instance, the Hungarian authorities had not provided any such documents that supported the claim that Serbia was in fact a "safe country".[78] With *Ilias and Ahmed* there is a clear marking by the Court to ensure that asylum can be ensured in a safe country and thereby protecting the applicants' right of access to territory.

### 4.3.3. FMS

This case can be said to be the CJEU's counterpart to *Ilias and Ahmed.* The case is a joined case, concerning a married couple from Afghanistan and a man and his minor son from Iran who came to the Röszke transit zone in Hungary and applied for asylum there.[79] The applicants had as in *Ilias and Amhed* arrived in Hungary from Serbia, and the Hungarian authorities therefore wanted to return them to Serbia as they considered it a safe third country, which is why the asylum applications had been rejected. The Serbian authorities however would not readmit the applicants as they claimed that they had entered Hungary lawfully and were thus excluded from the readmission agreement between the two countries.[80] Instead, the Hungarian authorities decided to return the applicants to Afghanistan and Iran respectively. The Court found that Hungarian asylum law, in particular the law concerning safe transit countries, does not contain a ban on refoulement or in any way specify what adequate protection actually means. The Court furthermore found that mere transit through a country does not establish a connection between the applicant and the third country concerned, at least not any connection that would make it reasonable for the applicant to be returned to that third country.[81] There is moreover no path for individual scrutiny of the applicant in relation to the safety of the third country. Therefore, the Court found that Hungarian asylum law was

[76] Ibid, para. 159.
[77] Ibid, para. 134.
[78] Ibid, para. 161.
[79] FMS, paras. 48–51.
[80] Ibid, para. 55.
[81] Ibid, para. 157.

incompatible with art. 33 of the APD (concerning inadmissible applications), which was the main provision contested in this case (at least for this aspect of the case).[82] The Court also disagreed with Hungary's argument that the changing of the return destination was merely implementing the return decision, and that changing the destination in fact entailed a completely new decision to which the applicant's had the right to effective remedy.[83] The issue of non-refoulement must also be considered, a state cannot just decide to return a person to a safe third country and then change that destination to the country of origin – the very same country the person is seeking protection from.

This case is interesting in that the CJEU actively highlights the deficiencies of a Member State's asylum law and essentially acts to protect the applicants' right to access to asylum, even though this case is very recent (decided upon in 2020). Migration cases in especially the CJEU have tended to rule unfavorably towards the applicants seeking protection in recent years, as mentioned previously, especially after the 2015 crisis.

#### 4.3.4. Elgafaji

This case regarded two Iraqi nationals, Mr. and Mrs. Elgafaji, who applied for temporary residence permits in the Netherlands after receiving threats following an uncle who was killed by militia. The Dutch immigration authorities rejected the application, claiming that the applicants had not been able to prove "real risk of serious and individual threat" in accordance with art. 15(c) of the QD. After appeals from both parties, the case was referred to the CJEU for preliminary ruling.[84] The Court ruled favorably for the applicants, stating that art. 15(c) covers a more general risk of harm as opposed to art. 15(b) which essentially reiterates art. 3 of the ECHR.[85] There must be a general threat to a civilian's life or person, caused by the indiscriminate violence in that area, such as a warzone or armed conflict. There is rather not any specific threat aimed at the applicant in question, but a more general threat.[86] The applicant risks his life by simply being in the affected territory. The Court further argues that the more an applicant is able to show that he is specifically affected by the circumstances personally, the lower level of indiscriminate violence is required for him to be eligible for subsidiary protection.[87] Ultimately the Court concludes that the existence of a serious and

[82] Ibid, para. 165.
[83] Ibid, para. 127.
[84] Elgafaji, paras. 17–21.
[85] Ibid, para. 43.
[86] Ibid.
[87] Ibid.

individual threat to the life or person is not subject to the condition that the applicant most produce evidence of a specific threat. The existence of such a threat can furthermore be determined by the level of indiscriminate violence going on in an armed conflict – which should be assessed by the competent national authorities.[88]

It is also relevant to mention the opinion of the Advocate General Maduro in this case. The ruling by the Grand Chamber largely follows Maduro's opinion which is more detailed. He makes explicit what the Court merely made implicit regarding the standard of proof and how much an asylum seeker really must provide in order for the criteria to be met.[89] Furthermore, AG Maduro argues that the QD "pursues the objective of developing a fundamental right to asylum" which he means derives from general principles of EU law.[90] This is among the first mentions ever of there ever being a right to asylum, in Europe or elsewhere. The Court itself does not consider this point, nor has it or the ECtHR done so in subsequent years, but it is an extremely important point that would have far-reaching implications should it one day be decided upon.

This case is at first glance favorable for asylum seekers trying to escape indiscriminate violence. In this particular case, the Dutch authorities simply found that the levels of indiscriminate violence were not high enough to fall within the scope, and the application was ultimately rejected.[91] Similarly, the same argument was made by the Dutch authorities in another case where they found that the conditions in Mogadishu, Somalia were not severe enough for the criteria of the provision to be fulfilled.[92] In terms of the bigger picture, *Elgafaji* did not have large practical implications. Statistics show that the number of granted applications was not at all increased in reality in EU Member States, and cases based on indiscriminate violence had very low acceptance rates.[93] This prompted the UNHCR to conclude that the provision remained an "empty shell", and when the QD was recast some years later, the Commission deemed in unnecessary to include any amendments to the provision.[94] Ultimately, the case can be regarded as theoretically significant, but practically unremarkable due to the little actual change it produced. In terms of access to asylum it is relevant as not only the first major asylum case ever ruled on by the CJEU, but more

[88] Ibid.
[89] AG Opinion Elgafaji, para. 41.
[90] Ibid, para. 21.
[91] Baumgärtel (2019), p. 20.
[92] Ibid.
[93] Ibid, p. 22–23.
[94] Ibid.

importantly, it shows when asylum can be achieved and how far the principle of non-refoulement extends, in this case concerning indiscriminate violence.

## 4.4. Cases regarding the Dublin Regulation

### 4.4.1. MSS v. Belgium and Greece

This case regarded an Afghan asylum seeker who first entered Greece and then made his way to Belgium. In accordance with the Dublin rules, Belgium transferred him back to Greece where he was held in detention under reprehensible conditions before living in the street without any support.[95] The Court found that there had been a violation on Greece's part of art. 3 due to the unacceptable living conditions and detention conditions, as well as a violation of art. 13 (right to effective remedy) in conjunction with art. 3 due to the shortcomings in the Greek asylum procedure.[96] Belgium was also found to be in breach of art. 3 by transferring the applicant as they should have known that his rights could not be ensured in Greece, and specified that execution of the Dublin Regulation must be done with the purpose and objective of the Convention in mind and if those cannot be guaranteed, application of Dublin must be reconsidered.[97] Even though there is not an express right to asylum or even to seek asylum in the Convention text, by ruling that Greece had breached art. 3 and 13 the Court established the right for asylum seekers such as MSS to have their application processed and enjoying acceptable living conditions in the meantime to be protected by the Convention.[98] This case is also a great example of when access to territory does not automatically equal access to asylum, as the applicant were in EU territory (Greece) but could not be said to have obtained adequate protection there. For a real, effective chance at access to asylum the applicant would have had to been able to remain in Belgium or any other Member State that could support it. It also established an obligation for Member State to reconsider the Dublin Regulation if another Member State is thought to not be able to guarantee the applicant's rights, in their ruling towards Belgium.[99] In this sense, both the ECtHR and the CJEU are in agreement over the importance of fundamental rights in relation to the Dublin Regulation, as *MSS* is quite in line with the *NS* and *ME* cases.

[95] MSS v. Belgium and Greece, paras. 43-47.
[96] Ibid, para. 321.
[97] Ibid, para. 340.
[98] Moreno-Lax, p. 363.
[99] Moreno-Lax, p. 364.

### 4.4.2. NS and ME

These two joined cases regard the concept of non-refoulement within the Dublin system. In *NS*, there was an Afghan national who came to the UK after travelling through Greece and applied for asylum there. The UK issued a transfer decision to Greece, but the applicant argued that this would be contrary to the principle of non-refoulement as the conditions for asylum seekers in Greece at the time were not considered adequate. In *ME* the circumstances are essentially the same, but it regards five applicants from Afghanistan, Iran and Algeria who came to Ireland.[100] The Court first noted that Member States can have confidence in each other that fundamental rights, including such rights based on the Refugee Convention and the ECHR, are being observed. However, it is not inconceivable that an asylum system may experience major challenges and operational problems, which would leave transferred applicants to be treated in a manner incompatible with their fundamental rights.[101] Ultimately, the Court found that a conclusive presumption that all Member States observe all the fundamental rights of the Union is precluded by EU law. Paradoxically, complying with the Dublin Regulation in this instance would be contrary to the very aims of the Regulation.[102] Member States must therefore in such circumstances find ways to comply with the Dublin Regulation while still adhering to the fundamental rights of the EU, either by finding another Member State to transfer to based on any other of the criteria, or examining the application themselves.[103]

### 4.4.3. Tarakhel v. Switzerland

A family of Afghan nationals entered Italy where they were subjected to Eurodac identification procedure after supplying false identities. They were then transferred to a reception facility for asylum seekers, which they left without permission and travelled to Austria. There they were again subjected to Eurodac procedure and subsequently returned to Italy. The applicants later travelled to Switzerland where they lodged applications for asylum. The applications were dismissed as in accordance with the Dublin Regulation Italy was the responsible state for examining asylum applications. The Swiss authorities decided for removal and return to Italy, which the applicants contested and eventually brought before the

[100] NS and ME, paras. 34-36.
[101] Ibid, para. 80.
[102] Ibid, para. 91.
[103] Ibid, para. 96.

ECtHR.[104] The Court found that there had not been a violation of art. 3 by returning the applicants to Italy in this case, but stressed that if the Swiss authorities did not require guarantees from Italy that accommodation would be adequate and that they would be able to remain together as a family, Switzerland would have been in violation of the Convention.[105] This is again stressing the responsibility of a returning State to ensure that the asylum seekers rights are observed by the receiving State.[106] Furthermore, in this instance the situation at the time in Italy was not considered to be as bad as in Greece was in *MSS*, which is why Switzerland was not in violation. This was, however, a fact that three of the judges of the Grand Chamber did not agree with, it must be noted.[107] Nevertheless, in the sense of ensuring that the rights of asylum seekers are adhered to *Tarakhel* entailed a victory even though the threshold of "systemic deficiencies" discussed earlier in *MSS* as well as in *NS and ME* by the CJEU was put into question.[108] As a consequence, statistics show that subsequent requests for return to Italy from Switzerland all were made with guarantees of the living conditions and accommodation would live up to required standards.[109]

#### 4.4.4. Jafari

In this case, there were two Afghan sisters and their children who crossed into Croatia from Serbia and were then transported by Croatian authorities to Slovenia and from there they made it to Austria.[110] The Austrian authorities requested that Croatia take over the applicants on the basis that they had crossed irregularly into the EU from there. In the appeal, the applicants argued that they had been admitted to Croatia, Slovenia, and Austria in accordance with art. 5(4)(c) of the EU Schengen Visa Code.[111] The Austrian Court on the other hand argued that since there had not been any visas issued by any of the Member States involved, their crossing into the EU would be considered "irregular", before referring questions to the CJEU.[112] The Court in turn found that the definition of "visa" in the Dublin Regulation was well established and could not be changed by other provisions or by an unusually high number of refugees. The fact that a Member State tolerates entry into their territory in order for the migrant to cross into another Member State cannot be considered to amount to a

[104] Tarakhel v. Switzerland, paras. 9–16.
[105] Ibid, para. 122.
[106] Baumgärtel, p. 64.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Jafari, paras. 29–30.
[111] Ibid, para. 35.
[112] Ibid, para. 33.

visa.[113] Furthermore, the same circumstances does not take away the fact that the border was crossed irregularly even though their entry was tolerated. This is clear example of the Dublin Regulation being used to deny access to territory for asylum seekers. While it is true that the access to asylum itself has been guaranteed by letting Croatia take over the applications, the effectiveness of that asylum comes into question as well as the rights of the applicants by denying them the access to the territory they first applied to.

[113] Ibid, para. 53.

## 5. Relevance for the future development of the CEAS

The issue of migration and asylum is an ever fluid one and considering the political climate is bound to change significantly soon enough. Whether that is for good or bad, or rather who it benefits the most, is not necessarily certain but there are indicators as to where the future is headed. Earlier this year the EU Commission has presented proposals for reforms to the EU migration legal system with Commission President von der Leyen claiming to abolish the Dublin Regulation, for instance. However, as it stands now, the proposal for a replacement, namely the Asylum and Migration Management Regulation, is essentially just a renaming and keeps all the provisions from the Dublin Regulation intact.[114] In terms of access to asylum, the EU is aiming to establish more deals with third countries, akin to the one with Turkey.[115] This is part of what can be described as furthering the externalization of EU's borders, by finding ways to keep irregular migrants from even reaching EU territory and then creating legal ways for asylum seekers to enter regularly.[116] The second part of that plan is highly debatable as to how that is working out as can be seen from recent rulings from the CJEU discussed above. Another problem with this is that arrangements made between the EU and in particular North African states are made behind closed doors with a severe lack of transparency.[117] Such arrangements often change quickly depending on particular situations or developments in the region with little to no insight for the public. The gist of such deals are however generally the same, substantial financial and personnel assistance to the third countries in return for restricting the influx of people attempting to leave for Europe.[118]

The future of asylum in the EU is therefore looking to continue in a stricter and more limiting direction. It can be argued that it is good that the EU is making more to create new legal ways to access asylum in which they do not have to be detained in massive detention centers, which often has deplorable living conditions, on islands in the Mediterranean which does infringe on other human rights. However, some argue that these measures are not nearly enough and while these are positive developments, the main instrument for controlling the arrival of asylum seekers is antagonistic restrictions and hard border controls.[119]

[114] Proposal for Asylum and Migration Management Regulation.
[115] Zoomers and van Noorloos.
[116] Ibid.
[117] Ibid.
[118] Ibid.
[119] Ibid.

Others such as Chetail argue that following the path of preventing irregular border crossings and creating legal ways does more harm than good. As has been mentioned previously, stricter rules do very little to deter migrants from travelling to Europe. The only thing it manages to do is to reroute refugees to unknown and unsafe routes in order to seek protection.[120] This ultimately benefits no one, and only hurts an already vulnerable group even more. Furthermore, while the EU might claim to offer legal pathways for seeking asylum, it can be deduced from the cases studied above that that is not quite the case, at least on some occasions as there are no binding mechanisms for such cases. The EU policy on asylum has, according to some scholars, been for several years and probably for the foreseeable future about shifting responsibility to others both outside of Europe but inside as well. Not only does the EU do everything it can to prevent asylum seekers from reaching EU territory and letting the outside world deal with it, but through the Dublin Regulation it also shifts responsibility within the EU where border states and in particular Mediterranean states are forced to take the bulk of refugees since only very few Member States try to receive people unless they absolutely have to.[121]

The future of access to asylum is thus not looking too bright, from a human rights perspective at least. While the EU might speak about doing more and have a rhetoric that claims to change the current system, in practice very little is done to remedy this in either the legislative or the judicial branch. At least for the foreseeable future, and while the current political climate regarding migration continues to persist, it would appear asylum seekers will have to continue with unsafe journeys in order to reach safety and protection.

[120] Ibid.
[121] Chetail, p. 595.

# 6. Discussion

## 6.1. Problems and deficiencies with the CEAS regarding access to asylum

As one can see from some of the cases presented, accessing asylum in the EU is not all that simple and is in fact being made more difficult by some Member States and third countries, as well as the Court of Justice, whether intentionally or not. The conversation of an increased influx of migrants has become more apparent and political in recent years following the 2015 refugee crisis. One may see a clear difference politically and legally in how the subject is approached between before and after the so-called crisis, a term which in itself is debatable.[122] Certainly, there have been an increased number of asylum applications since 2015 (that year having more than double the number of 2014), but to the point of a systemic collapse in Europe is to exaggerate it immensely.[123] Most of the world's total number of refugees and displaced people are in Middle Eastern and African countries and 94% of Syrian refugees (which is where the majority of people came from following the crisis, due to the ongoing civil war there) are in directly neighboring countries (Turkey, Jordan, Iraq, Lebanon and Egypt).[124] The EU legal system tries to fulfill the bare minimum of Member States' international obligations on a legislative and judicial level, but practically even that is often denied to asylum seekers. For these reasons, the idea of a "crisis" regarding migration in Europe is challenged by some commentators and scholars; even former UN Secretary General Ban-Ki Moon has declared that "is not a crisis of numbers; it is a crisis of solidarity."[125] For the vast majority of European countries there is no practical or physical problem to receive and accommodate the numbers of refugees that are incoming. Admittedly, for some border States in the Mediterranean, namely Greece, Italy and Spain, there has been issues with the efficiency and fairness of asylum procedures, and because they are the entry point for most migrants seeking protection in Europe, their systems and structures for receiving people have been overwhelmed at times. As the case law has demonstrated, most of the cases are against those countries, and the unfairness of the heavy burden placed on them has further made them seek out bilateral agreements with third countries. This is of course not alleviated with EU procedure and law, most notably the Dublin Regulation, which used correctly or incorrectly

[122] Chetail, p. 585.
[123] Ibid.
[124] Ibid.
[125] Ibid.

by the other Member States, results in an extensive amount of people being returned to those Mediterranean Member States.[126]

Nevertheless, shortcomings and problems with the reception of asylum seekers who have already entered the EU set aside, the most significant and consequential issue for people aspiring to seek protection in Europe is not policy within EU territory itself, but perhaps rather policy the EU promotes and enforces towards third countries, in particular other Mediterranean states and North African countries. According to Chetail, one of the most important strategies adopted by the EU for decades has been to shift protection obligations to third countries in order to purposefully avoid its own obligation under international law and human rights law.[127] While this strategy has always been around, it has grown more prominent and aggressive in later years following the crisis. In order to legally, or regularly, enter the EU, one must have a short-term visa to any Member State – a visa which as seen in *MN and Others v. Belgium* and *X and X* is not easy to procure. This idea is further reinforced by the fact that the EU allows for the waiver of visas to some countries, mostly small island nations in the Caribbean and the Pacific, as well as larger countries such as wealthier and stabler nations in the Middle East, but not from countries where most refugees originate from.[128] Other than bilateral agreements between two countries, such as the one between Italy and Tunisia for instance, there is cooperation with third countries on a Union level through Frontex.[129] While there are at the moment arrangements with 17 countries, some of the most important ones from which refugees depart in hopes of reaching Europe (including, Egypt, Libya and Morocco) are still under "negotiation".[130] This results in negligence and refusing to embark on rescue operations in the Mediterranean to help boats and rafts originating from such countries which leads to the severely high number of deaths at sea.[131] And if there is a rescue operation, it often results in the swift return of the people to their point of origin in North Africa, regularly without even stopping at EU territory for processing asylum applications or even health controls. Another notable example is the previously mentioned EU-Turkey statement which stated that all irregular migrants arriving on the Greek islands from Turkey would be returned there. This deal is also based om the implicit premise that Turkey is considered a safe third country in order for the principle of non-refoulement to be

[126] Chetail, p. 586.
[127] Ibid.
[128] Chetail, p. 588.
[129] Trevisanut, p. 230.
[130] Ibid.
[131] Chetail, p. 589.

adhered. However, this comes with a lesser known yet substantial caveat; namely that Turkey has ratified the Refugee Convention and the 1967 Protocol with the considerable restriction that only Europeans are eligible for refugee status.[132] Such a monumental constraint on the possibility to seek protection in Turkey if one is not European makes this assumption that Turkey is a safe third country quite incredulous. This notion has been repeatedly criticized by scholars, NGOs and the Parliamentary Assembly of the Council of Europe.[133] The path to reach Europe through the relative safety of land thus becomes merely theoretical if not downright unreal, further pushing refugees to try the journey by sea to disastrous results.

It is apparent that the EU tries to shovel as much of their responsibilities and obligation under international law to other third countries by simply making it more difficult for people to seek protection. The problem is, however, that just because something is not easily accessible or even illegal (as crossing into Europe without a visa is), does not mean that people will not seek it if it is a matter of life and death. The dangerous journeys across the Mediterranean that result in thousands of deaths every year[134] will continue. The EU is not entirely idle in this matter, as can be seen by the Frontex initiative for example. However, the focus and aim of such operations is not to save people but rather preventing people from entering EU territory.[135] While they are under the guise of "rescue operations", they are more often than not nothing less than refoulement procedures which actively puts many people in danger by returning them to countries where they may suffer persecution, torture or any other unacceptable ill-treatment.[136] The principle of non-refoulement is for the most part agreed upon to be applicable and binding even on the high seas, something that can be derived from the ECtHR's ruling in *Hirsi Jamaa.* This idea is further substantiated by various declarations and resolutions, state practice and scholarly opinion.[137] This extraterritorial obligation to adhere to the principle of non-refoulement is applicable to EU as an entity as well.[138]

There is therefore, to summarize, an effort by the EU to shift responsibilities towards people seeking protection to other third countries by making deals and agreements as well as by intercepting and returning those that do attempt the journey without proper procedure. These deals and solutions undertaken are not always compatible with international as can be seen with the EU-Turkey deal that deems Turkey a safe third country even though it cannot be

[132] Chetail, p. 591.
[133] Chetail, p. 592.
[134] Papastravidis, p. 236.
[135] Ibid.
[136] Papastravidis, p. 237.
[137] Papastravidis, p. 243.
[138] Papastravidis, p. 250.

considered as such for the vast majority of asylum seekers from a legal perspective. The "legal" or regular venues and options for people to seek asylum are greatly diminished and at times even made impossible to achieve, while simultaneously penalizing and impeding those that are left with no other choice than to attempt and irregular crossing.

## 6.2. Case law analysis

The CEAS is not without flaws and through many different means and parts of the EU access to asylum is attempted to be kept inaccessible to the people who need it. There are measures taken at several levels of the asylum process, not only when a person has reached Europe and should be protected by the principle of non-refoulement, but outside Europe as well, attempting to keep people from entering EU territory and shifting responsibility to third parties, including other countries and private actors. As can be seen from the chapters above the CJEU and the ECtHR rule quite differently and sometimes contradictory to both each other and themselves. A change in attitude and policy is especially noticeable in recent years following the crisis, something that mirrors European society overall in many ways.

In the subsequent sections, the information and research found will be analyzed and discussed in order to try to answer the original research question and reach a conclusion. The analysis will be divided into different sections correlating to the respective sections above. Initially, we shall discuss the "first path to asylum", i.e. applying for a visa and/or visiting a Member State's embassy or consulate outside of EU territory.

### 6.2.1. Visa cases

The EU, both the political bodies and the CJEU, claim to propone the path to asylum to be taken through legal measures in order to stop illegal immigration, to discourage people from attempting dangerous journeys across the Mediterranean, and to prevent a massive influx of people arriving in only a few Member States such as Greece and Italy. This is because it results in those countries' systems being overwhelmed which in turn leads to worse conditions not only for those countries and the citizens there, but for the people being put in detention centers and transit zones with less than efficient asylum processes. However, it is not as simple as that. Case law on this topic suggests that when trying to proceed through the legal venues that supposedly exists, the possibilities will still be denied, and responsibility will shift elsewhere. Both Courts have examples of this in *MN and Other v. Belgium*, *X and X* and

*Jafari*. Though the cases concerned different legal issues and legislation, they amounted to the same conclusion which is to allow the Member States full discretion in issuing visas. The result of this is that it ultimately prevents asylum seekers from using visas as means of getting legally to the EU and applying for asylum there, which again is what the EU claims to promote. *MN and Others* and *X and X* even had the same basic circumstances. The CJEU in *X and X* found that applying for visas in accordance with the EU Schengen Visa Code for the purpose of applying for asylum when admitted to EU territory was outside of the scope of the Visa Code and it was entirely a matter for domestic law to decide. The ECtHR had a different, more universally applicable approach, even if the outcome is the same. While the applicants in *MN and Others* claim that they were under the jurisdiction of Belgium since they entered the consulate and submitted their asylum applications, the Court disagreed with this line of argumentation stating that such a jurisdictional link has not been established. Simply walking into a consulate and submitting an application could be considered enough to establish jurisdiction or the practical result would be that any country anywhere (at least that is a member of the CoE and subject to the ECHR) would be responsible for anyone who walked into a consulate or embassy to submit an asylum application. Practically this would open a floodgate in which asylum seekers would overrun European embassies and consulates which also in turn would overrun the Member States' systems themselves by having to process so many applications. While there is some merit to this line of reasoning, i.e. it is considerably easier to reach an embassy or consulate in neighboring and more stable country than the one being fled from such as Lebanon or Jordan than to try to cross an entire ocean. And as mentioned previously, according to the UNCHR's estimations the vast majority of Syrian refugees (but also from other countries) are already hosted in other Middle Eastern and North African countries meaning it would not take much for a large wave of people attempting to reach European embassies. However, one must at the same time consider the position in which that leaves refugees. By barring them from attempting legal and considerably safer options, they are left with no other alternative than to try to reach Greece, Italy, or Spain. This might be beneficial to Northern and Western EU Member States, but it burdens Mediterranean and border States even further. Just because a safe, legal way to achieve something is taken away does not mean that people will stop from trying to achieve it. All it does is essentially forcing people to risk their lives and safety trying to achieve it illegally and the result is ultimately the same – refugees reach Europe to seek protection. The only difference is that the manner in which this is realized only serves to endanger more people's lives. One may furthermore consider how this affects the EU as an organization and its

legitimacy as an entity based on solidarity that respects human rights. One cannot claim to promote and defend human rights and at the same time restricting the possibility of achieving those human rights and shifting responsibility to others.

### 6.2.2. External border cases

This leads into the next category of cases, namely cases concerning external borders, both over land and sea. Here there are a group of interesting cases regarding refugees attempting to reach EU territory through various means. *Hirsi Jamaa and Others v. Italy* and *Khlaifia and Others v. Italy* are similar and both concern groups of refugees attempting to reach Italy by crossing the Mediterranean from Libya and Tunisia, respectively. The ECtHR ruled very differently though, however. In *Hirsi Jamaa* the refugees never technically reached Italian territory but were intercepted at sea and returned swiftly to Libya without stopping. The Court found that Italy had jurisdiction nonetheless as the ship that picked them up was Italian and acted as the Italian authorities had requested. The Court therefore concluded that there had been a breach of art. 4 of Protocol No. 4 (i.e. prohibition on collective expulsion) and thus ruled favorably for the applicants. In *Khlaifia* on the other hand, it was not at all as favorably. Here the applicants were transported to Italian territory so there was never really a question of jurisdiction, but instead of collective expulsion as well. The Court argues that similar decisions that are similarly written or that can even appear to be standardized does not automatically constitute collective expulsion, and that in this particular case each individual case were virtually the same in that they did not have any valid identification or travel documents, and no one spoke up against being returned to Tunisia. The Court tries to strengthen their argument by stating that nowhere in the Convention text does it require, nor can it be derived from that people should have the right to an individual interview, so either way Italy did not do anything unlawful. But without an opportunity for the applicants to express themselves or even just have a discussion with an official, how are they to object against being returned to Tunisia? Talking to a guard or a worker on site does not seem to have been very helpful, unless the officials responsible were made aware of the situation. Without an individual interview or some other sort of communication between the applicants and the people responsible, how would they be able to object to being returned? Even if one accepts the Court's argumentation in that there was no collective expulsion, there is still the issue of non-refoulement or at the very least the risk of chain-refoulement from Tunisia, which is essentially not considered at all in this case.

On the other hand, there is *ND and NT v. Spain*, which is different as it concerned two people, who together with around 600 others, climbed the fences in order to enter the Melilla exclave at the Northern tip of Morocco which is Spanish territory. They got stuck on the inner fences, were helped and taken down by Spanish law enforcement and swiftly returned to Morocco without possibility or consideration to an asylum process. The Court agreed with the Spanish government in that Spain offered several legal venues for reaching Spain and applying for asylum, and that Member States have the right to fight and prevent illegal immigration. The applicants' claims that there had been a breach of the Convention in that there had been collective expulsion, but the Court disregarded this. In that sense, there are more similarities to *Hirsi Jamaa* in that there are asylum seekers who were intercepted on their way to EU territory and immediately returned without any say in the matter or any opportunity to apply for asylum. In neither case were they taken to a reception or detention center as in *Khlaifia*, and at least in that case the applicants received a written decision that they were going to be returned, suggesting that there had been some sort of process behind it at the very least. No such considerations were taken here, yet as opposed to *Hirsi Jamaa*, the Court found no breach of the Convention in relation to collective expulsion. As mentioned previously, an important thing to consider when examining the relationship between these cases is the temporal aspect. *Hirsi Jamaa* was decided upon in 2012, *Khlaifia* in 2016 and *ND and NT* as recent as 2020. One must also keep in mind that the time of when the applications were first submitted to the ECtHR was between 3-5 years (2009, 2012 and 2015, respectively) before the Court actually heard and decided upon the cases. The political climate and attitude towards refugees has changed quite drastically between 2009 and today. The crisis and unusually high number of refugees that came to Europe fueled an already rising right-wing populism and in some EU Member States there were (and sill are) nothing short of right-wing extremist parties that came into power. This shift in public opinion is not solely reflected in politics but can be seen in the judiciaries as well, much in part due to legitimacy of the courts being at stake, as some Member States perhaps would not follow judgments that were too favorable towards refugees. While these changes are not as overt or significant for the CJEU and the ECtHR as some of the domestic judiciaries, these cases show that the ECtHR is going in a different direction than a mere ten years ago. The decisions found in *Khlaifia* and *ND and NT* seem outright contradictory to *Hirsi Jamaa* and it is not hard to imagine that if *Hirsi Jamaa* had been decided upon just a few years later, the outcome could have been very different. Surely, it is reductive and incorrect to say that all these unfavorable rulings (to the applicants) are solely because of everyone in the EU suddenly wanting to limit or forbid

immigration all together, including the people that comprise the EU institutions, but it is an interesting aspect to consider. While it is undoubtedly *a* reason for the change in the way cases are approached, it cannot be said to be the only one. It is also worth noting that while it may appear that every newer case is unfavorable towards refugees, there are still some that seek to protect their rights, such as *FMS*.

It is further interesting to compare *ND and NT* to some of the visa cases, in particular *MN and Others* that was also ruled on by the ECtHR. In *ND and NT*, the Court argues that there are plenty of legal venues offered in order to access asylum and that travelling to Europe illegally is no excuse when there are better possibilities offered. Admittedly, more or less storming the border in Melilla is not the ideal way to reach Europe and certainly that can be quite problematic. However, it becomes a very confused message from the Court when it at the same time rules against legal measures attempted by refugees, such as applying for visas. It creates an impossible situation for potential asylum seekers when in practice there is no "right way" to apply for asylum legally. What is constructed is a system where a person gets stuck in a position of "damned if you do, damned if you do not", because there is no real viable way to apply for asylum in actuality that also is considered legal.

### 6.2.3. Safe third country cases

The next set of cases and aspect to the access to asylum are the ones relating to the return to safe third countries, or cases where the applicants have made it to Europe but are kept in transit zones or detention centers and/or returned. One of the most notable of these cases is *MSS v. Belgium and Greece*, even though it mainly ties into the Dublin Regulation. It is interesting as the Court considered that the concept of a safe third country could not always be automatically assumed to be another EU Member State, as Greece in this case did not have the means or possibilities to offer the necessary protection at the time. As the applicant was returned to Greece on the basis of Dublin, it made it quite clear that the Dublin rules are not absolute and if fundamental human rights cannot be adhered or guaranteed then other solution must be found by the requesting state (in this case Belgium), in the Dublin Regulation or elsewhere. This set a very important precedent, not only for the concept of safe third countries in relation to Dublin, but also for what a safe third country actually is and what should be expected from such.

Another case that also sought to protect asylum seeker's rights was *Amuur v. France*, which although it is an older case is still worth mentioning. Although the main issues of that case concerned the right to liberty and detention at transit zones in airports, which is not the

focus of this thesis, it is still relevant in terms of the "right to gain effective access to the procedure for determining refugee status", as the Court expressed it. The issue of jurisdiction was contested as France argued that the transit zone at the airport was not under French jurisdiction. The Court disagreed and stated that by holding the applicants at the airport, they were subject to French law, meaning they had the right to apply for asylum. It is important to note the distinction the Court made in that there was a right for the applicants to apply for asylum and thus starting the procedure in order to determine refugee status, but not a right to asylum or refugee status in and of itself. Nevertheless, it is still a very important and significant right to establish as it ensures that if someone does manage to reach a Member State through an airport they have the right to apply for asylum and receive a fair procedure (as well as not being kept in such detention that would be contrary to the Convention while the procedure is ongoing, as the case also determined).

Furthermore, there are the two similar cases of *Ilias and Ahmed v. Hungary* and *FMS* which both concerned being detained at the Röszke transit zone in Hungary and being returned to what the Hungarian authorities claimed to be a safe third country. There are however some slight differences between the cases. In *Ilias and Ahmed* Hungary sought to return the applicants to Serbia from which they had entered Hungary, based solely on the fact that Serbia was considered a safe third country based on some government-approved list. This list did not however meet the requirements for what is needed to determine whether a country is safe or not. There was no investigation or up-to-date assessment on whether Serbia was in fact a safe country, and neither was is it made in reference to the applicants' particular situation. It is very important as it determines that a Member State cannot just throw around the phrase "safe third country" as an excuse to send back refugees, but there must be some actual concrete data to back up this statement. This further aims to reinforce the principle of non-refoulement and ensure that the right to access territory as means to access asylum is protected.

*FMS*, on the other hand, differs in that Hungary wished to return the applicants to Serbia as well and issued a decision stating as much, but Serbia rejected the request as the applicants had entered Hungary legally which made the bilateral agreement between the two countries inapplicable as it fell outside the scope of that agreement. The Hungarian authorities simply changed the country of destination in the return decisions to the applicants' countries of origin, Afghanistan and Iran, respectively. This is absurdly enough the very same countries they were escaping from and sought protection from, which part of the reason why the CJEU also ruled against Hungary in this case. Moreover, the Court found Hungary's asylum law to

be deeply flawed and inadequate to live up to standards set by EU law and in particular the APD. It was also very clear that the decision to return the applicants to Afghanistan and Iran were two completely new decisions. A State cannot just change the destination country as means of "implementation", which was what Hungary claimed. There was also no consideration taken to the individual case and whether a person would actually be protected in a country based on their reason for protection, even though that country is considered safe. This is reiterating the same point the ECtHR made in *Ilias and Ahmed*, showing some unity between the two entities. Additionally, simply crossing a country in transit does not establish enough of a link to that country that would warrant a return there. This point is very important to consider as it would appear that the Court explicitly precludes returns to a transit country (that are outside of the Dublin system, of course). The implications of this are significant as it would mean that anyone travelling through the Balkan states that are not EU members would be exempt from any possible return once they have arrived at an EU Member State. While this might seem to be a positive development, and it certainly is in many ways, it appears at a first glance to be directly contradictory to policies of the EU-Turkey Statement. Many of the refugees coming from Turkey do not seek protection there, but merely wish to transit Turkey in order to reach Europe. Yet the EU has apparently done the same as Hungary, only on a larger scale by automatically labelling Turkey as a safe third country without any real research or assessment to back that up and returns everyone arriving in Greece without any consideration to the individual cases or circumstances that might be relevant when returning someone to Turkey. In some ways it is quite hypocritical, both in how Turkey is deemed a safe third country without any consideration, as well as stating that merely travelling through a country does not establish enough of a connection to return someone yet doing it anyway. Of course, it could be argued that the European Council (which made the deal with Turkey) and the CJEU are different entities with different agendas, but it must be considered that the EU-Turkey statement did come up for annulment at the Court. This was however promptly dismissed, claiming that the Court had no jurisdiction as the agreement was not made by the EU but the leaders of the Member States separately. This argument is quite frankly not very sound and offers little credibility. If the Court had actually examined the merits of the case and ruled on the legality of the agreement perhaps there would have been an entirely different outcome, but as it stands now it seems like an easy way out in order to avoid any further conflict, both internal and external. One may also consider whether this agreement would constitute collective expulsion, but unfortunately there is no case law from ECtHR regarding this particular issue as of now. One can however speculate based on similar cases. In both

*Khlaifia* and *ND and NT* the Court found that there had been no collective expulsion. If the people returned to Turkey would receive any formal decision it would certainly not be considered collective expulsion as in *Khlaifia*, but even if there were not any decisions issued the Court would likely go in line with the reasoning of *ND and NT*, claiming that there are plenty of legal venues for the refugees to take. Especially considering that part of the agreement states that the number of Syrian refugees returned to Turkey is to be the same as the number admitted to the EU. With all these things in mind, the ECtHR would likely not find any breach of the Convention, at least in relation to collective expulsion and non-refoulement.

### 6.2.4. Dublin cases

The fourth category of cases are those concerning to the Dublin Regulation, or cases concerning the access to asylum when a Member State has been reached but still being returned to another Member State. *Tarakhel v. Switzerland* shows that the right to access to asylum can still be adhered even if the applicants were returned to another Member State. If the rights of the applicants could be guaranteed, as well as being able to stay together as a family, then there would be no breach of the Convention. However, such guarantees must be made for each return. Although there was some debate on whether Italy could actually be considered a safe country with the necessary systems and facilities in place, it was still considered to be satisfactory.

In *NS and ME* the Court found that while a Member State can generally assume that fundamental rights are being observed in other Member States, it must still be ensured that that is in fact the case. As the Court touched upon in *MSS*, the Dublin Regulation (or any other EU law for that matter) must comply with fundamental human rights. In this case, there would be a conflict withing the Dublin Regulation itself as enacting and enforcing the rules of the Regulation would contrary the very aims and purposes of that Regulation. It is important to note, therefore, that the provisions of Dublin are not absolute, and workarounds must be made if the fundamental rights cannot be guaranteed. As it relates to the access to asylum, *NS and ME* establishes that in order to access effective asylum one's fundamental rights must also be adhered, and it cannot be assumed that every EU Member State automatically ensures it. In this sense, the provisions of the Dublin Regulation can be directly counter-effective to ensuring the access to asylum as it then cannot guarantee fundamental rights at the same time.

# 7. Conclusion

As can be seen, access to asylum covers several different instances, as asylum can be obtained through various different means. These include extraterritorial options outside of the EU or at the border if one has managed to reach it. And even when EU territory has been reached and the principle of non-refoulement should theoretically be applicable, access to asylum is still not ensured in some instances through the Dublin Regulation and agreements with third countries. Unquestionably, there are deficiencies with the CEAS with regards to access to asylum which does not just disadvantage the asylum seekers themselves, but also some Member States. While most Member State, particularly in Northern and Western Europe, benefit greatly from the systems in place, it is at the expense of a few other Member States. The system is also self-serving. By pointing to the Member States that had to take the bulk of incoming refugees as collapsing under weight of migration (and admittedly Greece and Italy in particular were at the height of the crisis overwhelmed, resulting in unsatisfactory or downright deplorable conditions and asylum procedures for refugees), the other Member States can use it as an excuse to further enhance and extend the policies of the CEAS to prevent as many people as possible from coming to their countries. Either through further expanding agreements with third countries or joint maritime operations in the Mediterranean with for instance Frontex, or by ensuring that the Dublin regime stays in place so that the people that do make it to Europe are kept at the border to largest possible extent. This does not mean that there is a sinister plot prevent all refugees from seeking protection in Europe, but it is quite clear that the instruments in place that regulate the access to asylum, and in recent years also the Courts, do work mostly favorably for Northern, Western, and even some of the Eastern Member States. As mentioned previously, it is essentially only Germany and Sweden that accept more asylum applications than they are legally obliged to. And, at least in Sweden, this has still come under great criticism and much of the public discourse has turned negatively with many people wanting to severely limit and decrease the number of refugees accepted.

To relate it back to the research question, namely how the access to asylum is regulated by EU law and how it is followed in practice by both the Member States and the Courts, one can see that there are practices used to circumvent an already unsatisfactory and inefficient system, at least from a human rights perspective. The CEAS that is in place serves to, on paper and in accordance with the norms and principles enshrined in EU law, provide

international protection for those who need it, all in accordance with international refugee law and the Refugee Convention. This includes the principle of non-refoulement. However, as in the Refugee Convention, there is no obligation to admit to territory anywhere in EU law. As EU Member States cannot legally return people to places where they risk danger to life or persecution, instead both the EU as a whole and individual Member States take various measures to prevent people from ever arriving on EU territory; physically closing borders, deals with third countries to make them prevent refugees leaving in return for economic assistance, operations in the Mediterranean to police the high seas, as well as other measures not examined in depth here such as carrier sanctions. None of this is directly contrary to international law per se, although the legality of some of these individual measures can certainly be debated such as coastguard returning people at sea as in *Hirsi Jamaa* where it was considered in violation of the ECHR, yet subsequent similar cases are not, or perhaps some agreements such as the EU-Turkey statement which raises some questions on non-refoulement. Furthermore, there are issues regarding the access to asylum when people have made it to Europe and should be protected. Individual Member States have been known to try to return people anyway under the guise of safe third countries or illegal entry. In particular regarding the problem of "illegal entry", both the legislative and judicial institutions of the EU claim to reject it in favor of legal venues (a rephrasing of the argument "there is no problem if they come here legally"). However, such legal options are taken away as well as both the CJEU and the ECtHR reject the option of applying for visas to enter Europe to then begin an asylum procedure, even as the only "legal" way to enter the EU as a third country national is with a visa. Not even with the visa varieties for humanitarian reasons, which one would assume is exactly what their purpose is for, does the possibility obtain visas extend to refugees. To reiterate previously stated points, this leaves no other option or prospect for a person to seek protection in Europe other than through irregular means.

While the access to asylum should be made possible by EU law and is through legislation viable, practices both on Union level and national level seek to reduce this possibility as much as possible. The Courts in particular seem to have changed direction as well, perhaps to follow public opinion, resulting in a more restrictive interpretation of the law. Ultimately, what this entails in practice is that the human rights of refugees and asylum seekers are deprioritized in favor of the convenience of the majority of Member States as well as keeping the public sated. The judiciaries are also affected by this as their legitimacy is at stake if they were to consistently rule favorably towards refugees, which could potentially result in Member States not following the judgments. This shift has been ongoing for some time

politically and the externalization of borders is nothing new, but the 2015 crisis has arguably further escalated this trend and notably extended it to the Courts. As for the future, major change in this attitude does not seem to be on the table. The Dublin rules that serve to unfairly divide the burden of incoming refugees appears to persevere, albeit under a different name. The externalization of borders and shifting of responsibility furthermore also appears to continue. However, perhaps an ever so slightly light can glimpsed as right-wing populism ceases its rampant advances which would lead to a shift in public opinion. With this, perhaps the Courts will once more start to rule with less concern for worry of public perception and more focus on maintaining and cultivating the law they are tasked with interpreting.

## 8. Table of Cases

**Court of Justice of the European Union**

Airport Transit Visas, C-170/96, ECLI:EU:C:1998:219

Elgafaji, C-465/07, ECLI:EU:C:2009:94

AG Maduro Opinion on Elgafaji, ECLI:EU:C:2008:479

EU-Turkey Statement, T-192/16, ECLI:EU:T:2017:128

FMS, Joined Cases C-924/19 PPU and C-925/19 PPU, ECLI:EU:C:2020:367

Jafari, C-646/16, ECLI:EU:C:2017:586

NS and ME, Joined Cases C-411/10 and C-493/10, ECLI:EU:C:2011:865

X and X, C-638/16 PPU, ECLI:EU:C:2017:173

**European Court of Human Rights**

Amuur v. France, Application no 19776/92

Ilias and Ahmed v. Hungary, Application No. 47287/15

Hirsi Jamaa and Others v. Italy, Application No. 27765/09

Khlaifia and Others v. Italy, Application No. 16483/12

MN and Others v. Belgium, Application no. 3599/18

MSS v. Belgium and Greece, Application No. 30696/09

ND and NT v. Spain, Application Nos. 8675/15 and 8697/15

Tarakhel v. Switzerland, Application No. 29217/12

# 9. Table of Legislation

**International law**

Convention and Protocol Relating to the Status of Refugees (1951)

European Convention of Human Rights (1950)

**EU Law**

Asylum Procedures Directive – Directive 2013/32/EU

Carrier Sanctions Directive – Directive 2001/51/EC

Charter of Fundamental Rights of the European Union (2009)

Consolidated Version of the Treaty on European Union (2009)

Consolidated Version of the Treaty on the Functioning of the European Union (2009)

Dublin Regulation – Regulation No 604/2013

EU-Turkey Statement (2016)

Malta Declaration by the members of the European Council on the external aspects of migration: addressing the Central Mediterranean route (2017)

Qualification Directive – Directive 2011/95/EU

Schengen Implementation Convention (1985)

Schengen Visa Code – Regulation (EC) No 810/2009

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