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Fortress Europe

A discussion of EU border policy post 2015, in light of the 1951 Refugee Convention

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Contents

Summary

The year of 2021 marks the 70th anniversary of the 1951 Refugee Convention, under the Convention refugees are entitled to several basic survival and dignity rights and any person that is a refugee in the eyes of international law is entitled to claim the rights within the Convention in any of the 150 state parties, including EU Member States. However, as the issue of migration within the EU has become an even more contentious subject since 2015, with domestic policies' increased focus on minimizing the inflow of irregular migrants (including potential refugee seekers), seemingly EU policies and the responsibilities deriving from the Refugee Convention has become increasingly misaligned. This essay aims to discuss the relationship between the EU legislation and state practice concerning asylum and access to asylum procedures, and the border management in light of the Refugee Convention to evaluate how the first complies with the responsibilities in the second.

Firstly, the legislation on asylum and border management within the EU is discussed in relation to the Convention. Secondly, some EU and Member State practice on border management as well as the suggestions in the New Pact on Asylum and Integration is reflected upon. To summarize the findings of this essay, EU provisions often meet the standards of international obligations but there is still a wide margin of appreciation as well as exceptions. As a result, state practice differ and domestic policies sometimes derogate from the common standards set. In effect several practices that run contrary to the Refugee Convention happen within the EU, such as summary pushbacks and detention of asylum seekers. Further, that so many initiatives and practices are focused on preventing refugees from reaching European jurisdiction indicates that they do not live up to the responsibilities deriving from a good faith understanding of the Convention, which entails real and accessible paths to seek asylum.

Sammanfattning

År 2021 infaller 70års jubiléet av 1951 års flyktingkonvention – en historisk överenskommelse och garant för mänskliga rättigheter som ger människor som riskerar att utsättas för förföljelse i sitt hemland rätten att söka skydd i en annan stat. Genom flyktingkonventionen får flyktingar rätt till flertalet rättigheter och alla personer som uppfyller flyktingdefinitionen har rätt att söka skydd i någon av de 150 stater som anslutit sig till konventionen, inkluderat EU:s medlemsländer. Detta är dock inte helt okontroversiellt i praktiken, migration har inom EU blivit ett alltmer kontroversiellt och debatterat ämne och flertalet regleringar är sedan 2015 inriktat på att minimera antalet irreguljära migranter (inbegripet potentiella skyddsökande flyktingar). Denna uppsats syftar till att diskutera EU:s lagstiftning inom asyl, migration och gränskontroll i ljuset av FN:s flyktingkonvention för att analysera hur den första förhåller sig till skyldigheterna i konventionen. Vidare undersöks hur EU:s och några medlemsländers gränskontroll och system för asylmottagande ser ut i praktiken.

För att summera uppsatsens slutsatser konstateras det att EU:s lagstiftning kring asyl, asylmottagande och gränskontroll är detaljerade och ofta lever upp till internationella obligationer. På grund av att det finns statligt tolkningsutrymme och möjlighet till undantag från dessa regler kan dock stater avvika från standarden och det finns därför stora skillnader mellan olika staters förhållningsätt. I praktiken sker det flertalet olika överträdelser av bestämmelserna i flyktingkonventionen inom EU såsom ”pushbacks”. Dessutom är många av EU:s och dess medlemsländers initiativ inriktade på att förhindra att flyktingar når europeiskt territorium vilket pekar på att de inte lever upp till en ”good faith” tolkning av flyktingkonvention – att bereda rimlig och laglig möjlighet för flyktingar att faktiskt kunna söka asyl.

Abbreviations

UN	United Nations
UNHCR	The office of the United Nations High Commissioner for Refugees
UDHR	Universal Declaration of Human rights
The Refugee Convention	1951 Convention Relating to the Status of Refugees (the Convention)
VCLT	Vienna Convention on the Law of Treaties
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
CJEU	Court of Justice of the European Union
CEAS	Common European Asylum System
The Pact	The New Pact on Asylum and Integration
RD	Returns directive
APD	Asylum procedures directive
Dublin	Dublin regulation
RCD	Receptions conditions directive
SCB	Schengen border code
ECRE	European Council on Refugees and Exiles
AIDA	Asylum information database
HRW	Human Rights Watch
Amnesty	Amnesty international

1 Introduction

1.1 Background

1.1.1 The Poland-Belarus border crisis

During the autumn 2021 a crisis was yet again brewing at an EU external border. Tensions rose between Poland and Belarus as their border became the hotspot for the most recent migrant crisis that a EU Member State and the EU was facing. Migrants from the Middle East were irregularly crossing the border in large numbers and the Polish government responded by reinforcing their border with thousands of troops.[1] This trapped migrants in the area since the Belarussian border guards kept pushing the migrants towards the border from their side. The crisis escalated as Belarus kept allowing for more migrants to travel through Belarus to reach the EU border, resulting in a standoff along the razor wire fence with the migrants stuck in between.[2] The Polish government refused to let the migrants into their territory as they, with support from the EU, claimed the influx to be part of President Lukashenko's hybrid warfare as a response to the sanctions imposed by the EU earlier that year.[3] Western officials claimed that the Belarussian President was allowing asylum seekers by the thousands into the country to later funnel them westwards towards Poland and the EU.[4] Poland's response included deploying 20,000 border police to the area, firing water cannons and tear gas at the people trapped at the border, reinforcing the fencing and by declaring a state of emergency making the area a no-go zone for journalists and aid workers.[5]

Poland's militarized response failed to consider the individuals caught in the conflict that might have needed international protection. Regardless of the

[1] the Guardian (2021), NY Times 2021.
[2] Woolard Catherine (2021). `Editorial: Geopolitics and Death in a Field´.[ECRE].
[3] the Guardian (2021), BBC 2021.
[4] Woolard Catherine (2021). `Editorial: Geopolitics and Death in a Field´.[ECRE].
[5] the Guardian (2021), BBC 2021.

background to this kind of situation, international and EU law applies, including the right to claim asylum. At the border there were reports of multiple breaches of EU and international law occurring such as summary removals, collective expulsions, pushbacks, and denial of access to asylum procedures.[6] The humanitarian situation also continued to worsen as the weather got colder. By October 1st 2021 six people, including one child, died because of exhaustion, hypothermia or other medical conditions. [7]

The Polish government insisted that they simply protected the country and the EU from migrants weaponized by Belarus. Deputy Interior Minister Maciej Wąsik said in a statement that "We use all legal means to protect the border. Our methods do not differ from those used by Lithuania, Latvia or other countries."[8] However, the International Organization for Migration and UNHCR said in a joint statement that they "call for immediate access to those affected […] While States have the sovereign right to manage their borders, this is not incompatible with the respect for human rights including the right to seek asylum. Pushbacks endanger lives and are illegal under international law".[9]

1.1.2 EU border policy in the light of the Refugee Convention

2021 marks the 70th anniversary of the 1951 Refugee Convention, a landmark international human rights treaty that allowed people in risk of persecution to "vote with their feet"[10] and seek security elsewhere. Foster and Hathaway describe it as what may be the world's most important human rights treaty, used by millions of people all over the globe each year. Any person that is a refugee in the eyes of international law is entitled to claim the rights within the convention in any of the 150 State parties.[11] The 1951

[6] Woolard Catherine (2021). `Editorial: Geopolitics and Death in a Field´.[ECRE].
[7] Woolard Catherine (2021). `Editorial: Geopolitics and Death in a Field´.[ECRE].
[8] Politico 2021.
[9] IOM and UNHCR (2021) Press release 21st September 2021, Geneva.`IOM and UNHCR Shocked and Dismayed by Deaths Near Belarus-Poland Border´[IOM]
[10] J Hathaway and M Foster (2014), p.1.
[11] J Hathaway and M Foster (2014), p.1,2.

Refugee Convention and its 1967 protocol displays a universal code for the treatment of refugees fleeing their homes as a result of persecution, serious human rights violations, violent conflict or other forms of serious harm. Under the Convention, refugees are entitled to several basic survival and dignity rights, to documentation of their status as well as access to national courts for the enforcement of their rights. Some of its core principles are non-discrimination, non-refoulment, non-penalization for illegal entry or stay and acquisition of enjoyment of rights over time.[12] Principles laid out to assure, in line with what is stated in the Convention´s preamble to be one of its main purposes, refugees the widest possible exercise of their rights.[13]

One of the root causes of the Poland-Belarus escalation, which would involve not only Poland but EU sanctions, a strong condemnation from NATO and members of the UN Security Council before it de-escalated, arguably is the fear of migration which has loomed over EU politics since the 2015 so-called refugee crisis and the measures set on minimizing migration increasingly used since. The dogma of deterrence has seemingly dominated migration policies, including the deployment of illegal pushback practices at external borders as seen in the Poland-Belarus standoff.[14] Under international law refugees are allowed to arrive of their own initiative, are not to be punished for unlawful presence or arrival and ought to be protected for the duration of risk in their home state. Refugee status is not something granted by states, it is rather an international status states must recognize.[15] According to international law a person is defined as a refugee within the meaning of the Refugee Convention as soon as the criteria contained in the definition is fulfilled, notwithstanding whether this is officialised by a state granting refugee status or not.[16] Since a person is categorized as a refugee based on their circumstances states are bound by the duty of non-refoulement, codified in Art. 33, as soon as they come

[12] UNHCR (2019) p.1
[13] UNHCR (2019) p.1; J Hathaway (2021) p. 94.
[14] the Guardian (2021).
[15] J Hathaway and M Foster (2014) p. 1.
[16] J Hathaway and M Foster (2014) p. 1.

under a state's jurisdiction to not expose the refugee to the risk of being persecuted for a convention reason. Therefore, the only way to obey this duty is to admit the refugee until the claim is properly examined.

As the current public discourse and political climate in Europe is set on minimizing the influx of refugees this clash between international refugee law and the right to seek asylum and domestic political agendas as seen in the Poland-Belarus crisis causes what Gammeltoft-Hansen and Hathaway describe as "a schizophrenic attitude towards international refugee law" [17] characterized by the use of non-entrée[18] policies.
Even though the EU and its Member States remain formally engaged with the Refugee Convention and support the right to seek asylum, their policies and actions of late indicate how non-entrée policies are indeed the dominant political imperative. One can see this demonstrated in Lithuania and Latvia where there has been an increase in attempts to illegally cross the border and they now plan to build fences along the border to Belarus to stop these irregular entries. [19] In Greece a 27 km long fence of steel towards the Turkish border has just been built and 1200 new border guards have been deployed to meet the assumed wave of migrants from Afghanistan.[20] Amnesty has reported on pushbacks at the external borders of Greece, Bosnia and Herzegovina, Croatia, Serbia, France, Italy, Malta, Spain and Cyprus.[21]

[17] Determined to remain formally engaged with refugee law and yet unwavering in their commitment to avoid assuming their fair share of practical responsibilities under that regime, wealthier countries have embraced the politics of non-entrée, comprising efforts to keep refugees away from their territories but without formally resigning from treaty obligations. See Gammeltoft-Hansen and Hathaway (2015) p 236, p 241.
[18] The term non-entrée was first employed in an article from 1992 by James Hathaway, The Emerging Politics of Non-Entrée, 91 refugees (40). It can generally be described as a policy of not allowing refugees to arrive, or at least make it as difficult as possible, and by so not allowing them into the States jurisdiction and thus avoiding having to deal with the entitlements to the core rights such as non-refoulement the Refugee convention would grant them.
[19] BBC 2021.
[20] DN 2021.
[21] Amnesty Greece (2021) p. 10.

Initiated by the EU-Turkey Statement in March 2016, which has been criticised to ignore human rights standards and being questionable from an international law point of view, a precedent was set for paying other countries to take care of the EU's external border. Similar arrangements can be found along the EU's other border regions. Since 2016 the EU has intensified efforts to prevent boat departures from Libya.[22] In Niger the EU funded forces EUCAP Sahel, initially in the region to fight terrorism, in 2015 got their mandate broadened to also fight human smuggling.[23] The EU also cooperates with Morocco to manage borders, and *"*Morocco has long been an essential partner of the European Union, with which we share borders and aspirations".*[24]*

Migrant flows and how to handle irregular movement of people is a controversial subject on the political agenda within the EU. After the so-called migration crisis in 2015 the EU and its Members States efforts have been focused on keeping refugees and irregular migrant influx to a minimum to appease the public. This has created an increasingly tense situation of the EU and its Member States trying to balance their efforts to prevent irregular entry and to defend member states' border sovereignty in a fashion that complies with the demands of international law concerning the right to seek asylum and respecting human rights.

1.2 Purpose, research question and limitations

The purpose of this essay is to examine the EU border policy and practice, the externalization policies increasingly being the focus of EU migration policies post 2015 in relation to the Refugee Convention and its principles to evaluate whether the EU system lives up to the Refugee Convention's

[22] The EU is providing support to the Libyan Coast Guard to enable it to intercept migrants and asylum seekers at sea after which they take them back to Libya, often with the risk to face arbitrary detention See HRW (2019) p. 3.
[23] Roxwall och Persson (2019) p.19.
[24] European Commission. Press release 20 December 2019, Brussels, `The EU is boosting its support to Morocco with new programmes worth €389 million` [European Commission]

responsibilities. The focus will be EU common border management and access to asylum: the regulation, policies and the proposal for future reform as presented in the New Pact for Asylum and Integration (the Pact). The thesis will also look at recent Member State practice, in particular the situation at EU external land borders: Poland, Croatia, Greece and Spain and the pattern of externalization of border control. Rather than going into in-depth legal and practical detail of these practices the primary purpose is to provide an overview picture of the strategies employed and discuss what this means in terms of refugee rights and access to seek asylum within the EU. Secondly, the purpose is to reflect upon what this suggests for the relevance of the Refugee Convention today. This paper will aim to answer the question: To what extent does border management in the EU interfere with the right to seek asylum and as such undermine the letter and spirit of the Refugee Convention.

The essay is guided by these sub-questions:

1. What are the relevant EU provisions on border management and access to asylum and how do they relate to the Refugee Convention?
2. How does the practice of some Member States having EU external borders look like and to what extent can one argue that the EU border policy as seen in Member States' practice and what is envisioned in the Pact have commonalities with the concept of "non-entrée"?
3. To what extent does the EU migration policies in practice post 2015 and the proposals in the 2019 New Pact on Migration comply with the responsibilities deriving from the Refugee Convention and especially the principle of non-refoulement and non-penalization of illegal entry?
4. What does this suggest for the relevance of the Refugee Convention today?

1.3 Method, limitations and material

1.3.1 Method

The essay and research question will be considered and analysed from a human rights perspective and aims to assess the provisions from a refugee rights and human rights approach. The essay will mainly be a work of legal-dogmatic method, researching the current positive law as laid down in unwritten and written European and International rules, principles, concept, doctrine and case law. This is to define both what EU regulations on asylum and border control entails, but also what responsibilities the Refugee Conventions carries and how these relate to one another. The method has been chosen since the essay's purpose is to investigate the relationship between the Refugee Convention and recent EU legislation and Member States practice and policy on asylum and border management. The legal-dogmatic method aims to reconstruct or seek the solution to a legal problem by applicating current legislation and its sources. This is done by consulting and analysing the law, jurisprudence, the travaux prepartoires and legal doctrine. The positive law is described and discussed, its own sources are used as a basis to study, describe, explain and analyse any conflicting underlying values or principles.[25] This method is suitable because the essay's main purpose is to investigate the legal situation of a specific issue purpose, to investigate, display and critically discuss the current legal situation. Further, as the thesis also seeks to consider these issues holistically and from a human rights approach, after the EU law and Refugee Convention and their relationship has been explained the findings will be discussed more generally from a refugee rights and human rights perspective, exploring underlying tensions and causes, the historical context and what this suggests for the future.

The EU legal regime is characterized by being a legal system in two layers: one common European legal system and 27 national legal system. The

[25] Kleineman (2018) s. 21.

unions common goals as presented in TEU Art. 3 is inter alia to promote peace, its values and the well-being of its peoples, the establishment of an internal market and offer its citizens an area of freedom, security and justice without internal frontiers […]. The common European system adopts legislation which Member States must incorporate into their domestic systems.[26] The use of Union competences is further governed by the principles of subsidiarity[27], and proportionality[28]. The effect that EU legislation shall have on Member States is further governed by a set of principles deriving from the European Court of Justice (CJEU) and their caselaw. The CJEU has found that EU legislation can have direct effect and then it should be prior to Member States legislation.[29]

A treaty is defined in the Vienna Convention of the Law of Treaties (VCLT) Art. 2.1. as an international agreement between states in written form and governed by international law. Once a treaty has entered into force it is binding to its state parties, the most fundamental principle of treaty law is pacta sunt servanda codified in Art. 26 of the VCLT that parties to a treaty must honour their obligations and perform them in good faith.[30] As a result states cannot invoke its national law as a justification for its failure to perform a treaty. Since treaties originates from negotiations and compromises between contradictory claims they often result in rights and obligations in both general and abstract terms. This results in ambiguity and interpreting a treaty is a critical "operation that conditions its very application in the real world".[31] This interpretation is guided by VCLT Art. 31 which stipulates that a treaty shall be interpreted in `good faith´ in accordance with the ordinary meaning, the context for the purpose of the

[26] The principle of sincere cooperation found in Art. 4.3 TEU creates responsibilities for Member States to be loyal to the EU legislation. However, Art. 5 TEU states that this is only within the areas that Member States has agreed to cooperate
[27] If not under the Unions exclusive competence the union shall only act if the objectives of the proposed action cannot be sufficiently achieved by the Member States.
[28] Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.
[29] CJEU 26/62 Van Gend en Loos.
[30] Chetail (2012) p. 65.
[31] Chetail (2012) p. 71.

interpretation shall comprise the text, including preamble and annexes but also any other agreement relating to the treaty. Intention of the parties, text of the treaty and purpose of the treaty should all be considered when interpreting. Art. 32 gives that the preparatory works may be used as a supplementary means of interpretation. The principle of evolutive interpretation is a well-established method used in human rights and refugee law, according to this principle treaties must be interpreted as living developments of international law.[32]

1.3.2 Limitations

The focus of this essay will be the issue of access to seek asylum: EU legislation in the light of the Refugee Convention, border management of countries with EU external borders, and finally externalization of border control. Frontex operations and sea border situations will not be discussed due to limitations in scope of this essay even though they are part of the issue and remains important. The focus will be on land borders and Member State practice and how these are controlled or not by EU regulations. As such, important cases affecting these from the CJEU or the ECtHR will be discussed but not addressed in further detail.

1.3.3 Material

The aim of this essay is to join the topics of the Refugee Conventions core responsibilities, deterrence policies and EU migration cooperation together and give an introduction and overview of the issue at its present state. For information, background and analysis on the Refugee Convention and its principles research from scholars specialized in refugee law such as Hathaway, Godwin-Gill, McAdam and Gammeltoft-Hansen but also material from the UNHCR[33] have been used. For information and background and analysis on EU migration law the works of scholars such as Peers, Chetail, Velutti, Costello and De Vries and Azoulai have been

[32] Chetail (2012) p. 73.
[33] While the UNHCR has the "duty of supervising the application of the provisions of [the Refugee] Convention," as stated by the Convention Art. 35 the agency has no authority to mandate any binding documents on the interpretation of the Convention.

consulted. The Pact has been used as an indicator to where EU policies might be heading, both the Pact itself and various scholars assessment of it has been used to do this. To assess the practice of some countries and look at the effect of the EU legislation various human rights bodies and refugee rights bodies reports have been used such as: AIDA, Amnesty, ECRE, UNHCR and HRW. For the analysis and the wider discussion, which aims to consider these issues holistically and look into underlying causes and tensions, the article *Non-Entrée Non-Refoulement in a World of Cooperative Deterrence* by Thomas Gammeltoft-Hansen and James C Hathaway as well as the *The EU Pact on Migration and Asylum in light of the United Nations Global Compact on Refugees* edited by Sergio Carrera and Andrew Geddes has been inspirational.

1.4 Disposition

The essay commences with a section exploring the background and main provisions of EU refugee law and legislation on border management. This section also contains a presentation of the Refugee Convention and its principles and how they relate to the EU law. Principles and legislation on asylum, border management and liberty are further discussed in relation to the Refugee Convention. Secondly, this essay looks at some recent state practice in terms of border management and access to asylum procedures, this is also compared to the suggestions in the New Pact. Next, there is a discussion of what the policy of non-entrée means and if there is evidence to that EU policies bears similarities to this.
In the subsequent discussion the findings are further reflected upon together with some broadening perspectives and insights from additional sources. The discussion is wider in that it reflects on the reasons behind these measures but also the effects of these rules and policies. This with the aim to holistically answer the sub-questions relating to how EU policies comply with the responsibilities in the Convention and what EU Member State practice might suggest for the continued relevance of the Convention. Lastly, the conclusions that the thesis have found are presented.

2 European migration law and its relationship to the 1951 Refugee Convention

This chapter will present the background and main provisions of EU migration law and legislation on border management and discuss its relationship to the Refugee Convention. Principles and legislation on asylum, border management and liberty will be explained and discussed in relation to the Refugee Convention.

2.1 Asylum

2.1.1 Introduction to the background and main principles

The legal duty of EU Member States to offer protection to refugees can be found in a combination of refugee, human rights and humanitarian law. Art. 78 TFEU gives that the Union shall found a common policy on asylum (CEAS) which must be in accordance with the Refugee Convention and other relevant Treaties. As the Refugee Convention and the 1967 protocol has been ratified by all Member States they are also a source of general principle of EU law.[34]

2.1.2 The Refugee Convention

The 1951 Refugee Convention[35] is grounded in Art. 14 of the UDHR from 1948 which recognizes the right of persons to seek asylum from persecution in other countries. The Convention was adopted in 1951 but entered into force on 22 April 1954. There has only been one amendment, the 1967 Protocol, which removed the geographic and temporal limits of the 1951 Convention. The Convention has since been supplemented by refugee and subsidiary protection regimes in several regions together with the

[34] Velutti (2014) p. 12.
[35] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

progressive development of international human rights law.[36] The Convention's Preamble firstly refers to the UDHR and the principle that humans shall enjoy fundamental rights and freedoms without discrimination.[37] Secondly, how the UN on various occasions has manifested its profound concern for refugees and claiming that they shall be able to exercise their fundamental rights and freedoms to the largest extent possible.[38] Thirdly, how the grant of asylum may place unduly heavy burdens on some countries and that it therefore is essential to cooperate to find a satisfactory solution. Furthermore, it also states that they wish that all states recognizing the social and humanitarian problem of refugees will do everything they can to prevent this problem from being a source of tension between states.[39] Hathaway and Foster argues that a sound understanding of the context affirms the human rights orientation of the Refugee Convention, indicated by that the Preamble references this and secondly the evolving of international human rights law into a body of law applicable between State parties.[40] In addition, they claim that the contexts affirm the duty to interpret refugee law in a way that allows it to evolve to evolve so as to meet contemporary protection imperatives.[41]

The Convention holds several fundamental principles, most notably non-discrimination, non-penalization and non-refoulement. The Convention also sets some basic minimum standards for the treatment of refugees, such as access to courts.[42] The importance and enduring relevance of the Convention and the Protocol is recognized widely. In 2001 State parties issued a declaration reaffirming their commitment to the Convention and the 1967 Protocol. In this declaration they recognised that the core principle of non-refoulement is embedded in international customary law. [43]

[36] UNHCR (2010) p. 2.
[37] Refugee Convention Preamble paragraph 2.
[38] Preamble paragraph 2.
[39] Preamble paragraph 4.
[40] J Hathaway and M Foster (2014) p. 9.
[41] J Hathaway and M Foster (2014) p. 9.
[42] UNHCR (2010) p. 3.
[43] Declaration of States parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Ministerial Meeting of States Parties, Geneva, Switzerland, 12-13 December 2001, UN Doc. HCR/MMSP/2001/09, 16 January 2002.

2.1.3 EU primary law

Apart from Art. 78 TFEU discussed above, Art. 67.1 TFEU states that the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal system of Member States. Art. 67.2 continues that it shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. The EU Charter Art. 1 asserts that human dignity is inviolable and that it must be respected and protected. Thus, both the TFEU and the EU Charter gives primacy to freedom, security and justice as well as respect for fundamental rights, human dignity and fairness towards third country nationals. The respect for human dignity is further strengthened by the prohibition of torture and inhumane treatment found in EU Charter Art. 4 and ECHR Art. 3.
Art. 80 TFEU gives that the policies of the Union and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility between Member States.

The EU Charter Art. 18 makes explicit reference to the Refugee Convention and its protocol and reads 'The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union´. Velutti writes of how there are different views on TFEU Art. 78 and Art. 18 of the EU Charter. Some see it as if the combination of these two goes beyond a mere recognition of the existence of the right to asylum and of its respect. It now weighs on the EU and its Member States as a true positive obligation implied by the need to guarantee the right to asylum.[44] The opposing view is that Art. 18 of the EU Charter cannot be interpreted as meaning that it produces a direct effect and that it creates individual rights which national courts must protect, as the

[44] Velutti (2014) p. 28.

provision does not ensure a clear and unconditional right but rather its implementation is made conditional to the adoption of EU secondary legislation. Chetail argue that the article is of modest reach as it just reasserts the Convention, it is also surprising that the article omits mentioning other human rights treaties despite their vital importance for reinforcing and supplementing the Convention.[45]

Other important safeguards for refugees concern procedural safeguards such as the right to an effective remedy and access to national courts. Art. 13 of the ECHR gives that everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. This is mirrored by the EU Charter Art. 47 which asserts everyone´s right to an effective remedy and to a fair trial. EU Charter Art. 41, right to good administration, further gives that every person has the right to have their affairs handled impartially, fairly and within reasonable time by the institutions and bodies of the Union.

2.2 Non-refoulement

Art. 78 TFEU requires that all of CEAS, ranging from secondary legislation to EU's Agencies, shall comply with the principle of non-refoulement.

2.2.1 The Refugee Convention

Non-refoulement is described as the core principle of the Refugee Convention by UNHCR and a cornerstone of international refugee protection.[46] It is further considered to be part of customary international law.[47] Non-refoulement asserts that refugees shall not be returned to a country where they face serious threats to their life or freedom. The principle is found in the Conventions Art. 33.[48]

[45] Chetail (2016) p. 2.
[46] UNHCR (2007) pt. 5.
[47] UNHCR (2007) pt. 5, pt. 15. That non-refoulement is embedded in customary international law was also recognized by the state parties when they reaffirmed their commitment to the 1951 Convention and the 1967 protocol in 2001.
[48] Article 33 prohibition of expulsion or return ("refoulement") 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of

The idea that a state should not return persons to other states is quite new, only during the early and mid-19th century did the ideas around the concept of asylum and principles of non-extradition of political offenders start to concretize.[49] In the original drafts of the Convention the explicit prohibition of non-refoulement was only for those who had legally entered. In the end the provision addressing non-refoulement and non-return to the risk of persecution were joined into one single provision that was to be applicable to all refugees. Hathaway comments on this conceptual shift suggesting that; "This decision to protect all refugees from the risk of refoulement is clearly of huge importance to most contemporary refugees, since they have generally not been authorized to travel to, much less to reside in, the state from which they request protection"[50]. Godwin-Gill and McAdam argue that apart from certain situations of exception, such as the exception of those convicted of violent crime in Art. 3.2, the drafters of the Convention clearly intended refugees would not be returned, either to their country of origin or to other countries in which they would be at risk.[51]

The protection in Art. 33 applies to any person who is a refugee under the Convention and who does not fall under any of the exclusion provisions.[52] Because of that a person is a refugee under the Convention as soon as they fulfil the criteria and that refugee status determination is of declaratory nature, the principle does not only apply to recognized refugees but also to those seeking to have their status declared such as asylum seekers as those seeking refuge or with a presumptive or prima facie claim to refugee status are entitled to the protection. In its conclusion no. 6 (1977) the UNHCR executive committee stressed "reaffirming the fundamental importance of

territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

[49] Goodwin-Gill and McAdam (2021) p. 256.

[50] J. Hathaway (2021) p. 342.

[51] Goodwin-Gill and McAdam (2021) p. 244.

[52] Article 1D-1F of the 1951 Convention.

the principle of non-refoulement …. Irrespective of whether or not individuals have been formally recognized as refugees".[53]
As states are obliged to implement their international legal obligations effectively and in good faith, the principle of non-refoulement in Art. 33 gives that the duty to protect refugees arises as soon as the individual or group concerned satisfies the criteria for refugee status set out in the Convention and comes within the states´ territory or jurisdiction. Principles of general international law provides that states may be held responsible both directly through acts or omissions of government officials and agents or indirectly if domestic legal and administrative systems fail to live up to international standards.[54]

This prohibition is applicable to any form of forcible removal, deportation, expulsion, and non-admittance at the border in some instances.[55] This is backed up by for instance the wording of the article. Paul Weiss comments that the words 'in any manner whatsoever' would seem to indicate that the provision applies to non-admittance at the frontier and to extradition.[56]
The principle of non-refoulement applies no matter the number of refugees that arrive, situations of so-called mass influx does not alleviate states from their responsibilities. This has also been affirmed in successive Executive Committee Conclusions, the 2018 Global Compact on Refugees and by UNHCR.[57]
Godwin-Gill and McAdam writes that while the duty of non-refoulement does not entail a right for refugees to be granted asylum in a particular state it does require states to ensure that the actions they adopt does not result in that refugees directly or indirectly are sent to a place where their life or freedom would be in danger because for a reason connected to a Convention ground.[58] They continue by stating in order to give effect to this, states will

[53] Non-Refoulement No. 6 (XXVIII) – 1977 Executive Committee 28th session.
[54] Goodwin-Gill and McAdam (2021) p. 308.
[55] UNHCR (2007) pt. 7; Weiss Paul comment Article 33.
[56] Weiss Paul comment on Article 33.
[57] Goodwin-Gill and McAdam (2021) p. 287.
[58] Goodwin-Gill and McAdam (2021) p. 307.

be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures.[59]

A ´good faith´[60] understanding of the duty of non-refoulement requires states to provide reasonable access and opportunity for a protection claim to be made.[61] The duty requires states to refrain from turning back refugees in any manner whatsoever, and the consequence of exposing the refugee to the risk of being persecuted is the determinant rather than how this action takes place.[62] The duty of non-refoulement would be breached by, for instance, actions of government officials which are intended to force refugees back to their country of origin such as formal policies authorizing force to deny entry to refugees, actions taken by a state´s agents at borders whether or not part of an official policy or not or even if states encourage private persons to drive refugees away. [63] Actions such as closing borders, either to deny access or to shut down routes taken by asylum seekers, and erection of walls or razor-wire fences that would have the same effect could engage the prohibition of refoulement.

2.2.2. EU primary law

Velutti argues that the obligation in Art. 78 TFEU on non-refoulement is even stronger than the one in the Refugee Convention, as it makes any act that prevents access to European territories and that denies access to the necessary protection is prohibited.[64] In her view Art. 78 does not only protect refugees from being sent back to their country of origin where their lives or freedoms could be threatened but also not allowing them to gain the necessary protection.[65] The protection against refoulement is further strengthened by the EU Charter Art. 19, paragraph 1 has the same meaning and scope as the Art. 4 of the Protocol 4 of the ECHR concerning collective

[59] Goodwin-Gill and McAdam (2021) p. 307.
[60] This interpretation is guided by VCLT art. 31 which stipulates that a treaty shall be interpreted in `good faith´ in accordance with the ordinary meaning, the context for the purpose of the interpretation shall comprise the text, including preamble and annexes but also any other agreement relating to the treaty. Intention of the parties, text of the treaty and purpose of the treaty should all be considered when interpreting.
[61] J. Hathaway (2021) p. 359.
[62] J. Hathaway (2021) p. 359.
[63] J. Hathaway (2021) p. 358.
[64] Velutti (2014) p. 19.
[65] Velutti (2014) p. 19.

expulsions. Every decision should be based on a specific examination and that no measure should be allowed to expel any person of a particular nationality.[66]

Non- refoulement under ECHR Art. 3 is absolute, in contrast to the obligation under the Refugee Convention which exempt those convicted of serious crimes. The ECtHR has been consistent in that the protection against removal under Art. 3 is absolute and not subject to derogation because of national security concerns. [67] That Art. 3 ECHR is wider than the Refugee Conventions Art. 33 can be illustrated by the case of *Ahmed vs Austria* where the applicant had been excluded from refugee status due to his criminal convictions but was granted protection from removal under Art. 3 ECHR.[68] Art. 4 of Protocol 4 to the ECHR specifically prohibits the collective expulsion of aliens.

The protection against non-refoulement is further supported by the explicit mentioning of non-refoulement in EU directives on asylum. [69]. The Asylum Procedures Directive Art. 6 provides that whenever an application for international protection is made (including at the border) access to an asylum procedure is to be granted, and according to Art. 46 applicants should have access to an effective remedy with suspensive effect against a decision rejecting their protection claims. The Schengen border Code Art. 3 states that border control should be carried out without prejudice to the rights of refugees and third country nationals requesting international protection. The EU Return Directive Art. 5 requires Member States to consider the non-refoulement principle throughout all the different stages of the return procedure.

[66] Velutti (2014) p. 29.
[67] Costello (2015) p. 180.
[68] Ahmed v Austria (1996).
[69] Asylum Procedures Directive (Directive 2005/85/EC), the Temporary Protection Directive (Directive 2001/55/EC)123 and the Returns Directive (Directive 2008/115/EC).

2.3 Common European Asylum System

2.3.1 Background

In 1991, a programme for harmonization of legislative, policy and judicial procedure was agreed upon, The Tampere Conclusions, which included the creation of a common European asylum system and a common asylum procedure.[70] The future CEAS should include a clear system for deciding the state responsible for examining an application for asylum, a common standard for a fair and efficient procedure and reception conditions and rules on the recognition of refugee status.[71] Velluti means that there are various reasons as to why the Member States created CEAS, but that they above all had a conviction that a well-functioning CEAS would contribute to improve the image of EU internationally, especially on the protection of human rights.[72] CEAS was also believed to reduce secondary movement of asylum seekers across EU and reduce costs in this area. [73]

Firstly, the legislation package consists of the Qualifications Directive (QD)[74], based on the Refugee Convention, which defines when people are entitled to refugee status, subsidiary protection and what rights they have. Secondly there is the Dublin III Regulation[75], which details how responsibility for the asylum seeker is to be divided amongst Member States. The state where the asylum seeker first is registered is to grant refugee status. Thirdly, the Eurodac regulation, facilitating and enabling the Dublin system by setting up a database of fingerprints and data of asylum seekers and people crossing borders without authorization.[76] Fourthly, the Asylum Procedure Directive (APD)[77] sets the procedural rules around asylum application, such the right to appeal and personal interviews. Fifth, there is the Receptions Conditions Directive (RCD)[78] that regulates the

[70] Chetail (2016) p. 11.
[71] Velutti (2014) p. 14.
[72] Velutti (2014) p. 14.
[73] Velutti (2014) p. 14.
[74] Directive 2011/95/EU (Recast Qualification Directive).
[75] Regulation No. 604/2013 (Recast Dublin Regulation).
[76] Regulation (EU) No. 603/2013 (Recast Eurodac Regulation).
[77] Directive 2013/32/EU (Recast Asylum Procedures Directive).
[78] Directive 2013/33/ (Recast Reception Conditions Directive).

standards on the living conditions on those seeking asylum, housing, detention, welfare. Lastly, there is the Asylum agency regulation which sets up and governs the EU agency to support Member States processing asylum applications (EASO)[79].

Not formally part of CEAS but rather the rules that govern border management (and thus access to seek asylum) and returns procedures and therefore relevant to mention for this thesis. Firstly, border control is mainly governed by the Schengen Borders Code (SBC)[80], which sets the rules on crossing external borders and in what circumstances Schengen states can reinstate controls on internal borders. Secondly, irregular migration is governed by the Returns Directive (RD)[81]. Further, visas are governed by the Visa Code and the Visa list Regulation.[82] The Frontex Regulation that gives mandate and sets the rules for setting up an EU border agency to assist Member States.[83]

During the second phase of the CEAS the Commission reviewed the existing asylum legislation and created various recast proposals, they aimed to shift the legislation to more mandatory obligations, take away the opt-out clauses and create a full-harmonization of both standards and procedures.[84] This was not achieved, and optional harmonization is available in all the recasts. Velutti argues that despite the change in legislative competence and procedures introduced by the Lisbon Treaty this has not ensured more effective harmonization or better compliance with obligations under international human rights law and refugee law, the difficulties of strong and diverse national interests have remained and is reflected by the difficulty of adopting most Recast proposals.[85]

[79] Peers (2020) `First analysis of EU´s new asylum proposal´[EU migration law blog]
[80] Regulation (EU) 2016/399 (Schengen Borders Code)
[81] Directive 2008/115/EC
[82] Peers (2020) `First analysis of EU´s new asylum proposal´[EU migration law blog]
[83] Peers (2020) `First analysis of EU´s new asylum proposal´[EU migration law blog]
[84] Velutti (2014) p. 20.
[85] Velutti (2014) p. 20.

2.3.2 CEAS and the Refugee Convention

The recast asylum directives all stress that "establishing a Common European Asylum System [must be] based on the full and inclusive application of the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967 […], thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution." [86]

The APD Art. 3 states that it applies to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and to the withdrawal of international protection. Art. 6 states that whenever an application for international protection is made (including at the border), access to an asylum procedure is to be granted. Member States shall according to Art. 6.2 ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible. However, Member States may require that applications for international protection be lodged in person and/or at a designated place according to Art. 6.3. The APD further includes a mandatory personal interview of asylum-seekers and other related safeguards[87] an adequate training for the authority in charge of examining asylum applications,[88] more detailed guarantees for vulnerable persons including unaccompanied children[89], explicit access of UNHCR to applicants at the border[90]; and the suspensive effect of appeals.[91]

More compromising from a refugee rights perspective are the possibilities to accelerate the asylum procedure found in Art. 31.8 APD.[92] Chetail notes

[86] Recital 3 of the Recast Asylum Procedures Directive, of the Recast Qualification Directive, of the Recast Reception Conditions Directive, and of the Recast Dublin Regulation.
[87] Art. 14, 15, 16 and 17 of the Recast Asylum Procedures Directive.
[88] Art. 4.3 of the Recast Asylum Procedures Directive.
[89] Art. 24 and 25 of the Recast Asylum Procedures Directive.
[90] Art. 29 of the Recast Asylum Procedures Directive
[91] Art. 46 of the Recast Asylum Procedures Directive
[92] For example if the applicant is from a so called safe country of origin; or if the applicant has given false information; or if the applicant has entered the territory unlawfully

that the risk of violating international law is much more insidious regarding accelerated asylum procedures.[93] That the grounds for acceleration was decreased to 10 from 15 was an improvement, but as they are still formulated in broad terms it leaves a considerable margin of appreciation to Member States. Chetail further argues that because of this subjectivity accelerated procedures risks being the norm rather than the exception. [94]

The possibility to declare an application inadmissible because of the safe third country (STC) notion in APD Art. 36-39 is further compromising. There is one safeguard provision, that applicants must be allowed to rebut the presumption that their claims are unfounded Art. 37. There is no explicit basis for a safe third country rule within the Refugee Convention, the policy could be argued to be a way to evade responsibility as it shifts the need to provide protection back to countries in which the applicant has travelled through rather than the Member State having to provide protection. The safe third country notion has historically been used as basis in readmission agreements which in some cases have raised serious refoulement concerns.[95] This is also something that is open to Member State discretion as Art. 36.2 APD gives that Member States can create further rules for the application of the safe country of origin concept in their national legislation. The STC rule within the Union law explicitly disqualifies all citizens of Member States from recognition as refugees. [96]

The system of super STC, including most neighbouring countries to the EU such as Russia, Turkey, Belarus, Ukraine, result in that those potentially fleeing these countries may be denied access to the EU. [97] The provision requires only that these so-called safe states have ratified relevant refugee and human rights instruments and have in place an asylum procedure. Costello notes that even though these countries have adopted asylum laws

[93] Chetail (2016) p. 33.
[94] Chetail (2016) p. 33.
[95] For instance the Greece –Turkey agreement. See Costello (2015) p. 252, 253
[96] APD Art. 2.g "refugees means third-country nationals or a stateless person who fulfils the requirements of Article 2.d of Directive 2011/95/EU".
[97] APD Art. 39.2.

they only implement them in limited fashion and in effect cannot provide access to a proper procedure. Furthermore, that it is difficult to argue any generalized assumption of safety in relation to these countries.[98]

The APD Art. 43 allows for a simplified procedure that Member States may apply at the border. It allows them to set up procedure to decide on the admissibility or substance of an application for international protection at the border or a transit zone. [99] Border procedures enable Member States to, in well-defined circumstances, carry out the examination of the application prior to the decision to let a person entry the country's territory as the CJEU clarified in its ruling FMS.[100] The decision should be taken within reasonable time and if it has not been taken within four weeks the applicant should be allowed entry into the territory of the Member State.[101] If there is a situation of many individuals seeking asylum these procedures may also be applied at the places people are accommodated in proximity to the border or transit zone. [102] ECRE argues that border procedures raise long-standing concerns regarding protection of fundamental rights, in particular the principle of non-refoulement, the rights of the child, the right to an effective remedy and the right to liberty.[103] EASO has found that border procedures have a considerably lower recognition rate compared to regular procedures. In 2019 the recognition rate in border procedures was merely of seven percent whilst the overall EU recognition rate was 33 percent. [104]

[98] Costello (2015) p. 255.
[99] ECRE (2021) p. 18.
[100] CJEU FMS and others, C-924/19 PPU, C-925/19 PPU.
[101] Art. 43.2.
[102] APD art 43.3.
[103] ECRE (2021) p. 43.
[104] EASO (2020) p. 8.

Border procedures under the Art. 43 APD are used in several EU Member States[105]. As it allows for assessment prior to that the person is allowed entrance it is often combined with some sort of deprivation of liberty[106].

The Dublin regulation also could be argued to be questionable from an international law perspective as its underlying principle still relies on the assumption that Member States are considered as safe countries for third-country nationals. This assumption of equal protection was challenged by the ECtHR. Its Grand Chamber has recalled in *MSS v Belgium and Greece* that the Dublin Regulation does not absolve Member States from their duty to assess the risk of refoulement by the State in charge of examining the asylum request.[107]

2.4 The right to liberty

The right to liberty is duly protected under international human rights law; it is found in Art. 5 of the ECHR and as well as Art. 6 of the EU Charter. Detention can be allowed, but arbitrary or unlawful detention is not, and thus international and European law has several obligations to follow when deploying deprivation of liberty. It should be lawful, the legal ground should also be precise, clear and predictable to avoid any arbitrariness[108]. Detainees should have access to procedural safeguards, information about the reasons

[105] Border asylum procedure under Art. 43 of the APD is used and applicable in Austria, Belgium, Croatia, Czechia, France, Germany, Greece, Italy, Latvia, the Netherlands, Portugal, Romania, Slovenia and Spain. Austria and Germany apply it only to applications for international protection submitted at airports. Greece has a "regular" border procedure for applications made in transit zones of airports or ports and an "exceptional" border procedure applied on the five eastern Aegean islands (the hotspots). See ECRE (2021) p. 22.
[106] According to ECRE's research in all countries assessed (France, Germany, Greece, Hungary, Italy, Portugal and Spain) all applicants undergoing border procedure are subject to either officially recognised detention or de facto detention at the border. ECRE uses the non-legal term "de facto detention" to refer to practices whereby persons are held in closed centres, not allowed exit at will unless they agree to leave the country, yet the country does not acknowledge that such practice amounts to a deprivation of liberty. More broadly, "de facto detention" refers to practices whereby persons are deprived of their liberty in the absence of a detention order. Their confinement is not classified as detention under domestic law and their only possibility of release is by leaving to another country. Further, concerned persons do not have access to procedural guarantees or opportunity to seek judicial review of their detention. See ECRE (2021) p. 23, 24.
[107] ECtHR, MSS v Belgium and Greece (n 114) paras 342, 358 and 359.
[108] Art. 5 ECHR; Art. 6 EU Charter.

for their detention and access to judicial review [109] and States should ensure that the conditions of detention do not violate the prohibition of ill-treatment[110]. UNHCR notes that the right to seek asylum, including the non-penalisation for irregular entry or stay, combined with the rights to liberty and security of person and freedom of movement mean that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.[111]

2.4.1 The Refugee Convention

Art. 26 Freedom of movement provides that each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable generally in the same circumstances. This provision does not apply to those seeking asylum or migrants in general but only those lawfully residing. The drafters of the Refugee Convention were, however, firmly committed to the view that when lawfully within the territory of a state refugees should only be subject to the same restrictions that govern the freedom of movement of other non-citizens.[112] Thus, the right of refugees to freedom of movement alike the standards of other non-citizens can only be constrained by the circumstances in Art. 3.2; during the early days of a mass influx or while investigating the identity of a person seeking refuge or if this person is possibly a risk to national security. When status is regularized all refugee-specific constraints must end.[113]

Refugees that flee commonly have not had time or the opportunity to use existing immigration facilities and apply for visas but must resort to use more unofficial routes and means of traveling and even false documents. The Refugee Convention and its principle of non-penalization of illegal entry found in Art. 31 acknowledges this.[114] Just as an examination on the

[109] Art. 5.2 and 5.4 of the ECHR.
[110] Art. 3 of the ECHR.
[111] UNHCR (2012) pt. 12-14.
[112]J. Hathaway (2021) p. 868.
[113] J. Hathaway (2021) p. 873.
[114]Article 31 Refugees unlawfully in the Country of Refuge

merits on someone's claim to international protection is the only way to be sure that the obligation for non-refoulement is observed, it is only after an individual's claim to refugee status has been examined that a state can exercise jurisdiction. This without risking breaching international obligations and the obligation to not penalize illegal entry found in Art. 33 of the Refugee Convention.[115] Godwin-Gill argues that even though the article is expressed in terms of the refugee it would be "devoid of all effect unless it also extended, at least over a certain time, to asylum seekers".[116] Therefore, to ensure that Art. 31 is implemented effectively clear legislative or administrative action is required to ensure that proceedings contrary to this are not begun and penalties are not imposed.

The article does not, similarly to Art. 33, require that refugees are permitted to remain indefinitely. Its paragraph 2 also allows for that states may impose 'necessary' restrictions on movement if necessary, and administrative detention is allowed, because of special situations such as a large influx.[117] It is also allowed to detain a person if necessary to investigate circumstances or obtain information, but detention solely as a detention for illegal entry where entry was justified is prohibited. "Penalties" are not defined, but the drafters suggest that measures such as prosecution, fines and imprisonment are included[118]. "Good cause" is generally understood to be fulfilled by being a refugee with a well-founded fear of persecution.[119] Godwin-Gill describes how the proposal to exempt illegally entering refugees from penalties was first included in the draft convention prepared by the 1950 Ad

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

[115] Godwin-Gill (2001) pt. 2.
[116] Godwin-Gill (2001) pt. 27.
[117] Godwin-Gill (2001) pt. 30.
[118] Goodwin-Gill and McAdam (2021) p. 276.
[119] Godwin-Gill (2001) pt. 35.

hoc Committee on Statelessness and Related Problems. The draft article suggested that "the High Contracting Parties undertake not to impose penalties, on account of their illegal entry or residence, on refugees who enter or are present in their territory without prior or legal authorization, and who present themselves without delay to the authorities and show good cause for their illegal entry".[120] It was commented during the meeting how a refugee, whose departure is usually a flight, is rarely in position to comply with the requirements for legal entry.[121]

2.4.2 CEAS

The SBC is silent on detention, however it provides that border guards should ensure that the person refused entry should not enter the territory SBC art 14.4 which according to ECRE implies detention or restriction on the persons freedom of movement.[122]

As already touched upon, the border asylum procedure in APD Art. 43 often result in some sort of deprivation of liberty or detention. Member States use a range of euphemisms to describe the regime and places used in the border context. In France asylum applicants at the border are said to be "held in a waiting zone", in Spain "held in a dedicated facility" and subject to a "restriction of movement" in Greece.[123] ECRE has found that this could be a "de facto" detention where the persons do not receive a detention order explaining the reasons behind it and are given no possibility to judicial review and appeal. Furthermore, even if it is formally recognized as a detention, it still often lacks procedural safeguards and fails to comply with the requirements of individual assessment.[124]

The Returns directive (RD) regulates detention, which is allowed under Art. 15 of the RD unless other sufficient but less coercive measures can be applied effectively, and Member States may only keep a third country national under detention in order to prepare the return or carry out the

[120] Godwin-Gill (2001) pt. 5.
[121] Godwin-Gill (2001) pt. 5
[122] ECRE (2021) p. 15.
[123] ECRE (2021) p. 24.
[124] ECRE (2021) p. 25.

removal process. Reasons to do this is if there is a risk of absconding or the third country national delays the process or avoids it. The RD also provides some positive procedural safeguards: that the decision should be ordered in writing, detention should be subject to judicial review, it details the maximum period and basic rules about the conditions of detention Art. 15, Art. 16.[125]

For those who have been allowed entry and whose application is under evaluation the Reception conditions directive (RCD) applies.
The RCD allows states to restrict applicants' freedom of movement in two ways. Art. 7.1 provides states the right to restrict asylum seekers freedom of movement to an assigned area. This provision lacks several procedural safeguards set by international law, such as the demand for legitimate grounds and necessity for achieving these objectives.
ECRE argues that Art. 7.1 allows for restriction on freedom of movement going beyond the legitimate limits of this measure set out in the international human rights instruments and the Refugee Convention.[126]
Under Art. 7.2 of the RCD states may decide on the residence for the applicant, this is to be because of "a reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of the person's asylum application". Here ECRE points out that the justification based on the swift processing or effective monitoring of the asylum application have no connection to the legitimate grounds for restriction on residence under international law. Neither of these restrictive measures need to be proportionality tested which is also a requirement under international law. [127]

According to Art. 8.2 of the RCD Member States are not allowed to detain a person for the sole reason that they seek international protection, which complies with the obligations in the Refugee Convention. Detention may

[125] ECRE (2021) p. 16.
[126] ECRE (2021) p. 19.
[127] ECRE (2021) p. 18.

only be used based on an individual assessment of each case and only if other less coercive alternatives cannot be applied effectively. Art. 8.3 lists the six permissible grounds for detention,[128] of which only the one to verify a person's identity has ground in the Refugee Convention. There are some additional positive procedural safeguards: detention should be ordered in writing and state the factual and legal reasons for detention, if detention is ordered by administrative authorities, it should be subject to a speedy judicial review[129]. In sum, even if it meets international standards EU legislation allows for quite extensive uses of detention of asylum seekers, for instance Art. 8.3.3 enable grounds for detention during border procedures.

3 Border management

Migration and the circulation of people are inherent to the structure of the EU. Its composition and existence to some extent depends on the flow of people and goods crossing borders and a lot of regulations address how to simplify this. TFEU Art. 2.3 states that "[t]he Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". Already here one can discern the distinction and inner struggle that is present within the EU migration system because of this area of freedom, the distinction between citizens and persons, which in turn lead to a distinction between regular and irregular migration. One migration which is desired and pushed for, whereas the other undesired paired with eager attempts to fight it. [130] Fighting irregular migration is a common aim for the Union, whereas legal migration is seen

[128] 1) To determine or verify the person's identity, 2) To determine the elements on which the is based if they could not be obtained otherwise, in particular when there is a risk of absconding, 3) To decide, during a procedure, on the applicant's right to enter the territory, 4) When the person is placed in pre-removal detention and they are making an application merely to delay return, 5) When protection of national security or public order so requires, or 6) under the Dublin Regulation.
[129] Art 9 RCD.
[130] Azoulai and de Vries (2014) p.1.

as an asset for EU in terms of alleviating the impact from an aging population and diminishing workforce. This has led to a structure very much organized around the distinction between legal and illegal migration.[131] Even if this dichotomy is endorsed by European institutions as well as Member States the distinction is not unproblematic.[132] As pointed out by Azoulai and De Vries the conditions of illegality and the ability to receive legal migrants vary depending on the national legal framework of each Member resulting in that the distinction between legal and illegal is not very clear. [133]

The internal market is to be an area without internal frontiers in which the free movement of goods and persons is ensured.[134] Art. 20 of the SBC states that internal borders may be crossed at any time without border check of persons. To ensure that nationals of Members States could move freely there had to be a complete abolition of internal controls of all persons. Therefore, to protect Member States and the whole of EU from undesirable foreigners from non-member countries entering via another Member State, community measures at the external borders became necessary.[135] Chetail discusses CEAS purpose as a flanking measure to EU integration to compensate for the abolition of internal borders and the way this diverts attention to the external borders of the Union. Control over borders, asylum and the fight against criminality have been put on equal footing. This background represents a unique feature of the EU policy on asylum and migration and is a key characteristic to understand its progresses and limits for establishing a truly common system. [136] Gilbert points to another reason why there is tension within the system suggesting that "the EU's approach of joining asylum with migration is fundamentally flawed, regardless of how long they

[131] Azoulai and de Vries (2014) p. 4.
[132] Azoulai and de Vries (2014) p. 4.
[133] Azoulai and de Vries (2014) p. 4.
[134] Article 26 TFEU.
[135] Azoulai and de Vries (2014) p. 2.
[136] Chetail (2016) p. 4.

have persisted with it. Asylum is about protection and immigration is about controlling borders." [137]

The SBC sets the rules for borders checks, border surveillance and the entry conditions that third country nationals should fulfil to be allowed to enter the Schengen Area[138]. There are available derogations from these rules in Art. 6.5 and one of those groups are third country nationals whose entry could be authorized on humanitarian grounds or international obligations such as refugees seeking asylum. This is further strengthened by Art. 4 which states that when applying SBC Member States must comply with general EU law, including the EU Charter, relevant international law such as the Refugee Convention and obligations related to international protections such as non-refoulement. Further, Art. 14 gives that any third country national that does not fulfil the conditions under Art 6.1 or 6.5 should be refused entry, this refusal should be without prejudice to the application of the right to asylum and international protection. Art. 14. 2 details how the refusal procedure should be conducted, entry may only be refused by a substantiated decision stating the precise reason for the denial. Art. 14.3 gives those persons that that are refused entry should have the right to appeal, and appeal should be conducted under national law.

The return of those refused entry is regulated by the RD. The directive applies to third country nationals staying irregularly in the territory of a Member State.[139] This term "Irregular stay" is connected to the Art. 6 SBC and means that the person no longer fulfils the conditions of entry, stay or residence in a Member State.[140] The directive has various safeguards which follow international law: the decision should be issued in writing, give factual and legal reasons and information about legal remedies[141] , the person should also have access to effective remedy to appeal to a competent

[137] Gilbert (2021) p. 39.
[138] SBC art 6.1.
[139] RD Art. 2.1.
[140] RD Art. 3.2.
[141] RD Art. 12.

judicial authority, this authority should also have the right to suspend the enforcement. [142]

However, the RD Art. 2.2 also allows States to not apply the directive in two situations at the border context. Firstly, in situations of third country nationals that are subject to a refusal of entry in accordance with Art. 14 of the SBC. Thus, persons refused entry at the border crossing points may be subject to refusal under the less regulated process rather than the more comprehensive returns procedure under the RD.
Secondly, Member States may also not apply the RD to persons "who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State."[143]. This situation covers persons who have been intercepted or apprehended by competent authorities at the irregular crossing or near that border after it has been crossed as, according to the CJEU, this exemption should be interpreted narrowly, and the apprehension must be in connection with the irregular crossing.[144] Most Member States with external land borders make use of this exception[145]. There are some safeguards[146] and Member States should respect the principle of non-refoulement. ECRE´s analysis is that it can be expected that national return or refusal of entry procedures offer less protection than the procedures regulated under the Returns Directive. [147]

[142] RD Art. 13.
[143] Returns Directive art 2.2.a.
[144] CJEU, Sélina Affum v. Préfet Du Pas-de-Calais, Procureur Général de La Cour d'appel de Douai, C-47/15, 7, June 2016, para. 72.
[145] Countries known to use this is Bulgaria, Greece, France, Hungary, Latvia, Poland, Spain and others whereas countries like Slovenia or Finland does not use this see ECRE (2021) p.17.
[146] Under Art. 4.4, Member States should ensure that their treatment and level of protection are no less favourable than as set out in Art. 8.4 and 8.5 (limitations on use of coercive measures), Art. 9.2.a (postponement of removal), Art. 14.1.b and d (emergency health care and taking into account needs of vulnerable persons), and Art. 16 and 17 (detention conditions).
[147] ECRE (2021) p. 17.

4 Summary

Most of the EU regulations on asylum complies with the responsibilities in the Refugee Convention and other international law standards. There are some provisions that raises concerns such as the continued possibility of member state discretion, the safe third country rules and possibilities to accelerate procedures. Overall, even if EU primary and secondary law often refers to international standards and the principle of non-refoulement EU secondary legislation also has provisions that works to push the responsibility for providing protection somewhere else such as the safe third country rules.

Further, within the EU system there is a clear link between procedures carried out at the border and deprivation or restriction on liberty forming a set of rules that makes it hard to enter the EU come under Member States jurisdiction. Under the EU secondary legislation detention may be used when entry is refused under SBC, to prevent unauthorized entry of asylum applicants under the RCD or pending removal under RD. There are multiple legal regimes that apply which makes the situation unclear, and according to ECRE the border context is less transparent than the in-country one due to its remoteness and difficulty of access of civil society or media organisations.[148] ECRE report that in practice the framework of these procedures allow states to use a so-called legal fiction of non-entry, claiming that the person has not formally entered the territory as long as the entry was not allowed. [149][150]

Further it is worth to note that CEAS does not cover either the issue of access to protection nor extraterritorial activities and border management (and thus access to protection) has a separate set of regulations. This makes the legal framework fragmentized, also these regulations are focused on border security rather than refugee rights.

[148] ECRE (2021) p. 20.

[149] According to them countries that rely on this construct include Austria, Belgium, France, Germany, Greece, Hungary, Italy, Netherlands, Portugal, Romania and Spain. On the other hand, Bulgaria, Croatia, Cyprus, Ireland, Malta, Poland, Slovenia and Sweden do not use it. See ECRE (2021) p. 21.

3 Some cases of EU border management and the Pact

This chapter will look at the policy and practice of some Member States[151] regarding asylum seekers and border control. Firstly, there will be an introduction of the changes seen since the 2015 refugee crisis. Then there will be a section discussing border procedures in some Member States, followed by one looking into the aspects of externalization and various non-entrée policies at play. Throughout the new suggestions of the New Pact on Asylum and Integration (The Pact) will be considered to see how they relate to this.

3.1 The 2015 Refugee crisis and the Pact

The 2015 refugee crisis could also be viewed as a policy crisis. Around 1.5 million irregular migrants may have entered the EU in 2015, compared to 508 million inhabitants of the European Union. However, the EU was unable to respond effectively to the arrival of hundreds of thousands of people in Greece and Italy. As a result, the system collapsed. Den Heijner, Rijpma and Spijkerboer note how the disorderly movements of refugees within the EU put Schengen in jeopardy and questioned both the ability and willingness of the Member States to meet their obligations towards refugees.[152]

Looking at state practice a lot of focus has since 2015 been on decreasing the number of people accessing Europe to exercise their right to seek protection. ECRE reported in 2017 that a lot of the measures that was framed as a response to an emergency and extraordinary situation, that it was necessary to compromise fundamental rights to control huge influxes,

[151] These Member States have been chosen considering mostly their geographical position as an EU external border (see ANNEX for map) but also due to recent developments.
[152] Den Heijner, Rijpma and Spijkerboer (2016) p. 607.

did not go away as the amount of asylum seekers decreased but became, and still very much is, the new normal.[153] As examples of this they point to national initiatives such as border restrictions, push backs, automatic use of detention and removal of rights but also regional initiatives as the closed Balkan route, the EU-Turkey Statement, other migration deals with states outside Europe such as the Joint Way Forward for Afghanistan, the Valetta process for Africa and the new deal with Libya.[154]

The Pact published on 23 September 2020[155] was an initiative from the Commission and part of the process to try to give new energy to the negotiating and recasting of the asylum directives.[156] One of the objectives of the Pact is promoting and reinforcing mutual trust and asylum policies that are acceptable to all EU Member States.[157]

3.2 Border management and access to asylum procedures

3.2.1 Greece

Due to its geographical position, being part of the so called "Eastern Mediterranean route", Greece has been the primary receiving country for hundreds of thousands of refugees and migrants travelling towards Europe for years. This situation was also the main focus of the construction and implementation of the EU-Turkey Statement from March 2016, where Greece played a key role in its aim to returning irregular arrivals from the Greek Aegan islands to Turkey. [158] Greece also implemented a policy of mass containment of persons arriving, often in inadequate and overcrowded camps such as in Moria. The special border procedure focused on "fast

[153] Woolard Catherine (2017). `Weekly Editorial: European refugee response – emergency measures or new normal?´[ECRE]
[154] Woolard Catherine (2017). `Weekly Editorial: European refugee response – emergency measures or new normal?´[ECRE]
[155] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions on a New Pact on Migration and Asylum COM/2020/609 final.
[156] Peers (2020) `First analysis of EU´s new asylum proposal´[EU migrationlaw blog].
[157] The Pact (2020) p. 2.
[158] Amnesty Greece (2021) p. 12.

tracking" the asylum procedure and which offers fewer guarantees is connected to the implementation of the EU-Turkey Statement and is for instance applied at the five Eastern Aegan islands. Although the fast-track border procedure was initially introduced as an exceptional and temporary procedure, it has become the rule for a significant number of applications lodged in Greece.[159]

Amnesty suggest that this was further accompanied of a gradual but steady degradation of migration policies starting in 2019. The borders were increasingly militarized, and surveillance, deterrent infrastructure and law enforcement staff all had increased by 2020.[160] Alongside this the reports of unlawful techniques to deny entry also increased, ranging from violence by border force officers, to outright push backs.[161] After the July 2019 elections the new government announced a more punitive approach to asylum with a view to reduce the numbers of people arriving, increase the number of returns to Turkey and strengthen border control measures.[162]
In November 2019 Greece adopted a new law on asylum which was criticised by national and international human rights bodies as an attempt to lower protection standards and create unwarranted procedural and substantive hurdles for people seeking international protection.[163] In May 2020, the law was further amended and criticised for further weakening basic guarantees for persons in need of protection and for introducing a set of provisions that can lead to arbitrary detention of asylum seekers and third country nationals.[164] For instance the law introduced extensive provisions on the detention of asylum seekers and lowered safeguard guarantees. The new law included a possibility of detaining asylum seekers who had been at liberty when they applied for international protection on the basis of an extensive list of grounds[165] justifying detention measures against asylum

[159] AIDA Country report: Greece (2021) p. 9.
[160] Amnesty Greece (2021) p. 10.
[161] Amnesty Greece (2021) p. 10.
[162] AIDA Country report: Greece (2021) p. 19.
[163] AIDA Country report: Greece (2020) p. 19.
[164] AIDA Country report: Greece (2020) p. 19.
[165] For instance (1) in order to determine or verify his or her identity or nationality or origin; (2) in order to determine those elements on which the application for international

applicants. The maximum time of detention was also prolonged to 18 months.[166]

Greece has been called out for years by international and national human rights bodies for its continued practice of pushbacks[167]. In a report from 2021 Amnesty goes as far as calling pushbacks Greece's "de facto policy", their research took place predominantly on the situation in March and November 2020 after Turkey first had opened their borders and Greece as a response to the large influx of people violently turned them back. [168] Their findings point to the fact that Greek authorities continue to use pushbacks at land and sea to thwart the rights of people on the move. They also state that the violations documented bears similarities with patterns of abuse documented by Amnesty International in the past "[s]tartling similarities emerge with regard to the abusive and violent techniques used to summarily expel people, including beatings, excessive use of force and other forms of prohibited treatment, arbitrary detention, lack of access to information or remedies, lack of registration, and confiscation of personal property".[169] Amnesty also noted that "Greece is, regrettably, not alone in the use of pushbacks and violence to protect its borders. With EU policies failing to deliver relocation or safe and legal routes, borders and their protection have

protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant; (3) when there is a risk of national security or public order; (4) in order to decide, in the context of a procedure, on the applicant's right to enter the territory. Further see AIDA Country report: Greece (2021) p. 195.

[166] Detention of an asylum seeker can be imposed for an initial period up to 50 days and it may be successively prolonged up a maximum time period of 18 months. Furthermore, the detention period in view of removal (return/deportation etc) is not calculated in the total time, and thus the total detention period of a third country national within the migration context may reach 36 months (18 months while the asylum procedure + 18 months in view of removal). See AIDA Country report: Greece (2021) p. 196.

[167] ´Pushbacks` describe the, often violent, practice of refusal of entry at the border as well as expulsions of individuals from a state territory without an assessment of their personal protection need. Pushback practices represent a major threat to the fundamental rights and rule of law standards established under EU primary and secondary legislation, most notably the prohibition of refoulement and the right to seek asylum see Stefan Marco and Roberto Cortinovis (2021) p. 180.

[168] In Amnesty´s report they document 21 incidents where interviewees states that they were returned summarily to Turkey in larger groups of eight to over 170 people that took place from April to December 2020. Amnesty International estimates that the 21 incidents likely affected over 1,000 people in total. Amnesty Greece (2021) p.13).

[169] Amnesty Greece (2021) p. 12.

become a cornerstone of migration and asylum policy across countries in and the periphery of Europe". [170]

3.2.2 Spain

In Spain, in the enclaves of Ceuta and Melilla, there has been several reports of refusal of entry, refoulement, collective expulsions and pushbacks. AIDA argues that there are significant obstacles in accessing the asylum procedure at Spanish borders, as a result of border controls exercised by the Moroccan police on the Moroccan side of the border and as a result increasing numbers of migrants try to enter irregularly by climbing the fences to exit Morocco and get into Spanish territory.[171] Further AIDA argues that the governments data which indicates that no asylum application was made at Ceuta's border checkpoint and that persons from sub-Saharan countries are underrepresented shows the impossibility to use the official asylum procedure at the Spanish border. [172] After the renovations of the Ceuta and Melilla fences that started in 2019, done to remove the steel wire, different organisations reported that the height of the fences were increased by 30 per cent.[173] Migrants continuously try to jump the fences to reach Spain, however many are stopped and returned over the border. AIDA has reported how one person died after trying to jump the fence. [174]

In Spain persons undergoing an asylum procedure are not detained. However, people who apply for asylum after being detained either in detention centres for foreigners (CIE)[175] or in prisons remain detained pending decision on admission into the asylum procedure.[176] If the applicant is detained an urgent procedure will be applied, which halves the time limits for a decision. AIDA argues that the quality of the asylum procedure is

[170] Amnesty also has documented incident of pushbacks and other border practices that prevents access to asylum in countries including Bosnia and Herzegovina, Croatia, Serbia, France, Italy, Malta, Spain and Cyprus. See Amnesty Greece (2021) p. 10.
[171] AIDA Country report: Spain (2020) p. 21.
[172] AIDA Country report: Spain (2020) p. 21.
[173] AIDA Country report: Spain (2020) p. 22.
[174] AIDA Country report: Spain (2020) p. 22.
[175] Centros de Internamiento de Extranjeros.
[176] AIDA country report: Spain (2020) p. 115.

lowered, especially regarding access to information and legal counselling as communication is made difficult. The urgent procedure also hinder access to appeals once the application is rejected and a subsequent order of removal is applied.[177] Additionally, asylum seekers can be detained if their international protection needs are not identified or if they are denied access to the a asylum procedure.[178] Asylum seekers may also be "de facto" detained in "areas of rejection at borders"[179] at international airports and ports until a decision is taken on their right to enter the territory, for up to a maximum of eight days.[180]

The situation at the border and the occurrence of pushbacks worsened after 2015 when Spain introduced an amendment to its Aliens act that allowed for rejection at borders third-country nationals that are found crossing the border illegally.[181] The amendment, introduced by the adoption of the "Law on the protection of citizen security" includes a specific regulation within the Aliens Act concerning the "Special regime of Ceuta and Melilla".[182] When a person is found within Spanish border territory, the land between the Moroccan and Spanish border included, they are taken outside the Spanish border through existing passages and doors controlled by border guards. [183] AIDA reports that the amendment aimed at legalising the pushbacks practiced in Ceuta and Melilla to Morocco, and that it has been criticised for ignoring human rights and international law obligations towards asylum seekers and refugees by several European and international organisations especially regarding the fact that people are not able to request asylum, and that the law mostly affects groups in vulnerable situation.[184] These summary expulsions are also done despite the knowledge of that

[177] AIDA country report: Spain (2020) p. 115.
[178] AIDA reports how 16 Moroccan activists which fled their country of origin and explicitly expressed their intention to apply for international protection was detained despite this in an CIE upon arrival in Spain. Only four were able to access the asylum procedure within first week of arrival See AIDA country report: Spain (2020) p. 116.
[179] Salas de Inadmisión de fronteras.
[180] AIDA Country report: Spain (2020) p. 116.
[181] AIDA Country report: Spain (2020) p. 23.
[182] AIDA Country report: Spain (2020) p. 23.
[183] AIDA Country report: Spain (2020) p. 23.
[184] AIDA Country report: Spain (2020) p. 23.

Morocco is a country where migrants rights are violated systematically.[185] These circumstances make Spain one of the European countries with the highest numbers of refusal of entry at the border.[186] In N.D. and N.T. against Spain[187] the Grand Chamber of the ECtHR ruled in favour of Spain, that Art. 4 of the Protocol to the Convention is not applicable to this case since it was the applicants themselves who placed themselves in an illegal situation by not using the means of access established by law, such as applying for asylum at an embassy or border post.[188]

3.2.3 Croatia

There are allegations of pushbacks, violent assaults by the Croatian police and that those seeking protection are instead turned back into Bosnia and Herzegovina.[189] In 2020 the Danish Refugee Council (DRC) and UNHCR Serbia found evidence that 18,400 persons have been refused access to the territory[190], including vulnerable groups such as children. These incidents have also in many cases raised concerns over the level of violence and the use of force by national law enforcement authorities.[191]

The case also shows how EU, despite its commitment to various international obligations and its own set of legislation and rights that denounce these practices, fails to hold Croatia accountable and be consistent in its responses towards pushbacks. In December 2018, after an intervention by some Members of the European Parliament, the Current Commissioner for Migration addressed the issue and said that Croatia must police external borders "in full compliance with the Charter of Fundamental Rights of the European Union and relevant international law related to access to

[185] Barbero Iker and Ana López-Salap (2021) p. 92.
[186] AIDA Country report: Spain (2020) p. 23.
[187] Two African boys who were intercepted trying to jump the border fence in Melilla and were immediately returned to Morocco without any procedure for expulsion or opportunity to apply for asylum.
[188] N.D. and N.T. v. Spain 8675/15 and 8697/15 Judgment 13.2.2020 [GC].
[189] Amnesty Croatia (2019) p. 23.
[190] This refers to 16,425 pushbacks from Croatia to Bosnia and Herzegovina (BiH) according to DRC and 1,975 pushbacks from Croatia to Serbia according to UNHCR Serbia.
[191] AIDA country report: Croatia (2020) p.14.

international protection, including the 1951 Geneva Convention, in particular the principle of non-refoulement,"[192]. In December 2018, the Commissioner also confirmed that it had asked Croatia to address the reports of pushbacks and violence.[193]

At the same time EU allocated funds to assist Croatia and improve its border security.[194] Massimo Moratti, Director of Research for Amnesty International's Europe Office comments "to understand where the priorities of European governments lie, one only needs to follow the money. Their financial contribution towards humanitarian assistance is dwarfed by the funds they provide for border security which includes equipping Croatian border police and even paying their salaries."[195]
On one hand, Croatia was being called out because of alleged mistreatment of incoming migrants, while on the other hand, it was expected to protect EU external border.[196]

In Croatia detention is possible during all types of procedure of international protection if the conditions described by the law is met. In practice however, most applicants for international protection are not detained but are accommodated in open centres. Detention of applicants are mostly used in situations where they request international protection after having been issued with a deportation order and situations where they left or attempted to leave Croatia before the completion of the procedure for international protection.[197] Domestic legislation gives that detention may be ordered for

[192] Amnesty Croatia (2019) p. 22.
[193]Amnesty Croatia (2019) p. 22.
[194] In December 2018 the Commission announced an additional assistance of EUR 6.8 million earmarked for the strengthening of border management at the EU's external border bringing the overall emergency funding to strengthen border surveillance and management allocated to Croatia to over EUR 23 million. Apart from this Croatia was already allocated 108 million Euro under the Asylum Migration and Integration Fund (AMIF) and Internal Security Fund for 2014 -2020. See Amnesty Croatia (2019) p. 22.
[195] Amnesty (2019) `Croatia: EU complicit in violence and abuse by police against refugees and migrants´. [Amnesty International].
[196] As an example, during a meeting Merkel congratulated Croatia on its successful border security in September 2018 whereas in December, after others had criticized it, the EU raised concerns. See Amnesty Croatia (2019) p. 22.
[197] AIDA Country report: Croatia (2019) p. 97.

four reasons if it is established by individual assessment that other measures would not achieve the purpose of restriction of freedom of movement.[198] AIDA reports that in practice detention is not used systematically, for instance most applicants do not possess any identity documents but up to now this has rarely been used as a ground to restrict their freedom of movement.[199]

3.2.4 Poland

Already before the Belarus-Polish crisis there were concerns about the access to the asylum procedure in Poland. AIDA finds in its that access to the Polish territory remains a matter of concern, noting ”[b]order monitoring activities and recent reports confirm the existence of grave systemic irregularities and illegal practices at borders, hindering the access to the asylum procedure”. [200] On 23 July 2020, the European Court of Human Rights concluded in *M.K. and Others v. Poland* that the Polish authorities had failed to review the applicants' requests for international protection and were responsible for collective expulsions, thereby exposing the applicants to a serious risk of chain-refoulement in violation of the ECHR.[201] The Court also found that this case was an example of a wider state practice of refusing entry to foreigners coming from Belarus.[202] Noteworthy Poland justified its conduct with a “we must protect Schengen argument”, emphasising the Polish-Belarussian border as an external border of the EU, whose legislation demands certain conduct in terms of border protection and prevention of illegal migration.[203] This was rebutted by the Court which pointed out how the EU law clearly embraces the principle of non-refoulement and providing asylum seekers effective access to a proper

[198] 1. To establish the facts and circumstances of the application which cannot be determined without limitation on freedom of movement, in particular where there is a risk of absconding; 2. To establish and verify identity or nationality; 3. To protect national security or public order; or 4. To prevent abuse of procedure.
[199] AIDA Country report: Croatia (2019) p. 97.
[200] AIDA Country report: Poland (2020) p. 11.
[201] M.K. and Others v Poland (ECtHR 23 July 2020).
[202] M.K. and Others v Poland para. 208.
[203] M.K. and Others v Poland para. 156, 157, 158.

procedure.[204] Despite the ECtHR judgment the Polish government still denies the existence of unlawful practices at the border.[205] Poland has also proposed a set of legislative changes that could be incompatible with both EU and international law. They include provisions that people may be removed from Poland even after they apply for international protection, there are also provisions that allow the state to leave aside without examination applications for international protection made immediately after an unauthorised border crossing.[206]

In Poland detention is possible in law and in practice in all asylum procedures, especially in transfer under the Dublin Regulation and in the case of illegal crossing of the border. AIDA reports that there are concerns that detention is not used as a measure of last resort and is often prolonged automatically, but the ratio between the number of asylum applicants and the number of detainees[207] indicate that there is no systematic detention of asylum seekers as such. Asylum cases of applicants placed in detention are prioritised, but it does not mean that they are examined more quickly when the cases are complex according to Polish officials. However, in practice asylum seekers have only 3-7 days to present additional evidence in their case before an asylum decision is made.[208]

3.2.5 The Pact

In the Pact with its focus on screening, detention, fast tracking and swift returns these more problematic EU practices risk increasing. In addition, it formally inserts the legal fiction of non-entry into EU legislation, which until now has been a policy choice of Member States.[209] The revised

[204] M.K. and Others v Poland para. 181.
[205] AIDA Country report: Poland (2020) p 11.
[206] Woolard Catherine (2021). `Editorial: Geopolitics and Death in a Field´.[ECRE]
[207] As of 31 December 2020 out of the 248 persons detained there were 125 asylum seekers. A total of 2,803 persons applied for asylum in Poland in 2020. See AIDA Country report: Poland (2020) p. 75.
[208] AIDA Country report: Poland (2020) p. 75.
[209] ECRE (2021) p. 38.

proposal[210] start with a proposal for a mandatory screening of asylum seekers at the border.[211] ECRE notes that this covers the persons typically apprehended or presenting themselves at the border without fulfilling entry conditions under the SBC.[212] During this procedure these non-EU citizens are not allowed to enter the territory of a Member State, unless it becomes clear that they meet the conditions of entry. [213] The screening procedure might prove problematic from a refugee rights perspective as it resembles the hotspot procedure implemented at Greek and Italian hotspots, in particular mirroring the reception and identification procedure in Greece, and the procedures and functioning of hotspots have been dysfunctional in many respects.[214]

The Screening Regulation gives three main outcomes of the screening procedure; asylum, return, and refusal of entry procedure Art.14. The asylum procedure may be carried out at the border if the applicant does not fulfil the conditions for entry under the SBC and one of nine acceleration grounds apply. In three of these circumstances[215], the border asylum procedure becomes mandatory Art. 41.3.[216] Mirroring the Screening procedure, Art. 41.6 provides that applicants subject to the border procedure should not be authorised to enter the territory of the Member State. The proposal for mandatory border procedures in the Pact raise concerns

[210] Screening regulation European Commission, Proposal for a Regulation of the European Parliament and of the Council Introducing a Screening of Third Country Nationals at the External Borders and Amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, COM(2020) 612, 23 September 2020.

[211] The screening would apply to all non-EU citizens (1) crossing an external border without authorisation, (2) who apply for asylum while being checked at the border if they are not meeting the conditions of legal entry under SBC and (3) those who are disembarked after a search and rescue situation. The Regulation also provides for the screening within the territory, which Member States will be obligated to apply to persons found within their territory where there is no indication that they have crossed an external border in an authorised manner (Art. 5).

[212] ECRE (2021) p. 39.

[213] Peers (2020) `First analysis of EU´s new asylum proposal´[EU migrationlaw blog]

[214] ECRE (2021) p.39.

[215] Member states must apply the border procedure (1) if the asylum seeker has used false documents, (2) is perceived as a threat to national security or (3) falls within the new grounds for fast tracking cases, namely that the person comes from a country with a lower refugee recognition rate than 20%.

[216] There are exceptions to the rule on border procedure if the asylum seeker is an unaccompanied minor, or children under 12 unless they are a supposed national security risk. There are also exceptions if the asylum seeker is vulnerable, detention conditions is not guaranteed, or the application is not inadmissible or cannot be fast-tracked.

regarding the protection of fundamental rights, particularly the principle of non-refoulement and the right to an effective remedy and right to liberty as border procedures have been found to less secure for the individual than in-country procedures. ECRE is noting that the proposed border asylum procedure under the APR would entrench deficit practices, as it would involve accelerated examination of asylum claims, a shorter time period to appeal and narrower scope of suspensive effect of appeal. Further ECRE argues that "[b]y rendering border procedures mandatory […] the APR would make those deficient procedures standard in the EU, while in-country procedures would become the exception."[217]

To speed up the expulsion process for unsuccessful applications, the proposal on general fast-tracking entails that a rejection of an asylum application would also have an expulsion decision incorporated. The appeals to these expulsion decisions would then be subject to the same rules on appeals as asylum decisions.[218] Accelerated procedures pose a greater risk for the individual and offer fewer procedural safeguards.
Carrera suggests that the proposed policies also can be expected to encourage de-territorialization and Member States unlawfully reframing some parts of their borders as "non-territory" to escape accountability and liability as the proposed screening procedure crucially also gives that pending the results the person is presumed not to have legally entered Member States' territory.[219]

In Art. 7 of the new screening regulation from the Pact there is a proposal to create a new "Independent Mechanism for monitoring fundamental rights" which aims at ensuring compliance with EU and international law during the pre-entry screening process including violations of access to asylum and noncompliance with non-refoulement. However, the proposal limits the monitoring mechanism to the pre-entry screening process only, the

[217] ECRE (2021) p. 43.
[218] Peers (2020) `First analysis of EU´s new asylum proposal´ [EU migrationlaw blog]
[219] Carrera (2021) p.7.

mechanism would neither cover the whole range of border surveillance operations and border management activities that are performed by Member States. Because of this limited scope Marco Stefan and Roberto Cortinovis argues that the effectiveness of this mechanism is doubtful "[a]s underlined by the Greek case, such practices are characterized by a high level of informality: they are designed to escape public scrutiny and performed in remote areas which are often not accessible to independent monitors". [220]

3.3 Externalization and the Pact

As introduced earlier non-entrée can be described as a policy of not allowing refugees to arrive, make it as difficult as possible, and by so not allowing them into the states jurisdiction and thus avoiding having to deal with the entitlements of the Refugee Convention exemplified by, but not restricted to, non-refoulement and non-penalization of illegal entry.

Gammeltoft-Hansen and Hathaway argues "[w]hereas refugee law is predicated on the duty of non-refoulement, the politics of non-entrée is based on a commitment to ensuring that refugees shall not be allowed to arrive. Over the last three decades, even as powerful states routinely affirmed their commitment to refugee law, they have worked assiduously to design and implement non-entrée policies that seek to keep most refugees from accessing their jurisdiction" [221] The EU adopted a visa control policy which requires Member States to impose visas on nationals from over 100 countries including several refugee producing countries such as Afghanistan, Iraq and Syria.[222] To impose visa requirements on nationals from refugee-producing countries is a classic tool of non-entrée. Visas not being offered for seeking asylum joint with carrier sanctions towards transportation companies that transported anyone without a valid visa made this a key part in migration control. [223]

[220] Stefan Marco and Roberto Cortinovis (2021) p. 184.
[221] Gammeltoft-Hansen and Hathaway (2015) p. 241.
[222] J. Hathaway (2021) p. 330.
[223] J. Hathaway (2021) p. 330.

Another non-entrée tactic is to use formal excision policies and declare parts of their own territory to be outside their jurisdiction. State´s declare parts of their airports, islands, borders or coastline to be an "transit zone" or "international zone", where their legal domestic or international obligations does not apply.[224] By declaring that the international zone is not under the jurisdiction of the country governments claim that they can neglect any refugee or human rights obligations and be at liberty to act as they see fit. [225] In *Amuur* the European Court of Human rights concluded that "despite its name, the international zone does not have extraterritorial status[226]" in response to France attempt to proclaim the Orly airport an international zone where duties did not apply.

Using different methods to deter or stop refugees, so called pushbacks, can occur both at sea and on land. This is a non-entrée policy where Courts have explicitly referenced the duty of non-refoulement when discussing it. In the case of *Hirsi* the Grand Chamber of the ECtHR unanimously determined that pushbacks at high sea breach regional non-refoulement regulations.[227]

The more modern approaches to non-entrée are instead based on international cooperation and the deterrence instead occurs in the refugees´ home states or transit countries.[228] Gammeltoft-Hansen and Hathaway describes how both sticks (withholding development assistance) and carrots (Visa facilitation, trade agreements) may be provided for states of origin or transit willing to assist in deterrence of outward migration. According to them EU has been especially active in this approach, states under observation to join the EU are often required to meet detailed migration control standards and they have also sought to negotiate agreements with

[224] J. Hathaway (2021) p. 336.
[225] Gammeltoft-Hansen and Hathaway (2015) p. 245.
[226] Amuur v. France (ECtHR, 1996) note 523, 609.
[227] Hirsi Jamaa and Others v Italy (ECtHR, 23 February 2012).
[228] Gammeltoft-Hansen and Hathaway (2015) p. 249.

key eastern European and Mediterranean states to combat irregular migration.[229]

The concept of a safe third country[230] is another example of this. Various types of readmission agreements, formal or ad hoc, facilitate returns that are often summary of third-country nationals to states through which they have transited often without due regard for the rights obligations or track records in the receiving countries.[231] The EU's arrangement with Turkey in 2016 is an example of this, the EU have also made deals with several African States. Apart from this, Member States such as Italy and Spain have formed separate agreements. [232] Compatibility of international and European refugee law and human rights standards under the EU-Turkey Statement was widely questioned and criticized by academia and civil society.[233] Turkey's lack of respect of human rights in practice, such as the harsh conditions of detention and the risk of refoulement, made it questionable that they could be argued to be considered a safe third country.[234]

Another mode of cooperation is financial support. Providing partner states with direct financial incentives and funding packages to take on migration control. This could also consist of direct provision of equipment, machinery, and training to the authorities of the cooperating country. As an example Italy and other EU countries have provided Libya with border control equipment, European-funded security companies have provided document scanners and security equipment to aid immigration control along the border between Russia and Ukraine.[235] Spain donated 108 vehicles and computer equipment worth EUR 3.2 million in 2018 to Morocco, and between 2019 and 2020 Morocco received 30 million euros from Spain to improve and

[229] Gammeltoft-Hansen and Hathaway (2015) p. 251.
[230] That a person claiming refugee status may be sent to some other country seen as able and willing to protect refugees.
[231] J. Hathaway (2021) p. 332.
[232] Gammeltoft-Hansen and Hathaway (2015) p. 250.
[233] Liguori (2019) p. 60, 64.
[234] Liguori (2019) p. 60.
[235] Gammeltoft-Hansen and Hathaway (2015) p. 252.

upgrade the fleet of vehicles to reinforce its border control and thus repress irregular migratory flows towards Europe. [236]

The EU's and Italy's migration cooperation with Libya with the aim to stop departures at sea is another example of where the EU contributes to putting individuals at risk and in dire conditions. Already the 2012 ECtHR *Hirsi* judgment indirectly attested to serious human rights violations in Libya vis-à-vis migrants. However, the risk of abuse of migrants in Libya has become increasingly worse due to the deterioration of the political situation after the fall of Gaddafi in 2011.[237] Since 2016, the EU has intensified efforts to prevent boat departures from Libya. The EU is providing support to the Libyan Coast Guard to enable it to intercept migrants and asylum seekers at sea. The intercepted persons are taken back to Libya where they risk arbitrary detention. HRW has found evidence of inhuman and degrading conditions and the risk of torture, sexual violence, extortion, and forced labour.[238] [239]

Liguori writes how the EU over the last decade have used a variety of strategies of externalizing border control, from visa requirements, carrier sanctions, extra territorial border patrols to safe third country procedures.[240] She also argues that a shift can be seen from the 2015 migration crisis and how indeed there has been a systematic recourse to this practice resulting in multiple arrangements with third countries, inaugurated by the EU-Turkey Statement in 2016, since followed by several deals with African

[236] Barbero Iker and Ana López-Sala (2021) p. 95.
[237] Liguori (2019) p. 14.
[238] HRW (2019) p. 3.
[239] Financial aid to Libya is designated to both to increase the capacity of Libya's border control and to address problems in Libya's detention regime for migrants. The EU has allocated €266 million from the EU Emergency Trust Fund for Africa for migration related programs in Libya, and an additional €20 million through bilateral assistance. HRW (2019) p. 21. In February 2017, Italy signed a Memorandum of Understanding with the GNA on migration control. Italy has since delivered four patrol boats pursuant to a 2008 agreement and, in August 2018, the Italian parliament voted in favor of a government decree to donate 12 patrol boats to the Libyan Coast Guard, along with €1,370,000 for maintenance of the vessels and training of Coast Guard personnel. HRW (2019) p. 23.
[240] Liguori (2019) p. 51.

countries.[241] The Pact continues this trend as it relies heavily on international cooperation instruments focused on externalization and places migration management at the centre of the EU´s external relations. The Pact describes how these instruments will take shape as migration partnerships, non-legally binding arrangements or deals with non-EU countries in the same fashion as the Turkey-EU statement or third country readmission arrangements like the one with Ethiopia or Ghana.[242] Carrera argues that these often come together with crisis-led funding instruments and give clear priority to expulsions, border management, countering human smuggling and the programs to facilitate returns and readmissions. In his opinion the Pact continues with the long-standing EU policy position that readmission must be an indispensable element of international partnerships, despite the many legal and practical challenges characterising the implementation of EU Readmission Agreements. [243]

4 Summary

Member States fail to respect some of the core provisions deriving from the Refugee Convention, as exemplified by the occurrence of pushbacks, despite the many references to the Refugee Convention and especially the prohibition of non-refoulement in EU primary and secondary legislations. Further, looking at the developments and focus of EU and Member States policy it seems clear how various strategies that could all fall within the "non-entrée" concept have been and continues to be used. This will be discussed in more detail in the coming discussion.

[241] Liguori (2019) p. 51.
[242] The Pact p. 16,17.
[243] Carrera (2021) p. 14.

4 Discussion

4.1 EU Legislation, state practice, the Pact and the Refugee Convention

Despite the many references to the Refugee Convention, and especially the prohibition of non-refoulement, in EU primary and secondary legislations Member States repeatedly fail to respect these. As detailed in the previous section, there are reports of alleged pushbacks from several countries with EU external borders. Seemingly there are issues giving effect to the EU law on domestic systems, resulting in inadequate access to procedures because of poor receptions conditions at borders or points of entry, ill-treatment of those trying to enter and outright pushbacks.

When there are allegations of non-refoulement and unlawful pushbacks the EU is neither fast nor strong enough in its responses to be able to claim with any merit that they defend the principle of non-refoulement. Woolard suggests that even if there is some truth to the argument that the situation would be worse without EU presence and therefore EU should not condition its presence, Poland´s recent refusal of a Frontex operation during the crisis with Belarus points to that EU can be a constraining factor. But also that there needs to be a better balance, "if the EU agencies are just witnesses to violations or, worse, if EU support contributes to consolidation of legal changes incompatible with EU law, it makes a mockery of the EU. To condition EU support on respect for EU law seems quite a basic condition".[244] Furthermore, there is an uneasy tension between on the one hand condemning pushbacks and stating that non-refoulement needs to be respected, and on the other hand putting a pressure on Member States with external borders to defend those, allocating resources to this and congratulating when this is done well (often when borders are completely shut off) as in the Croatian example.

[244] Woolard Catherine (2021). `Editorial: Geopolitics and Death in a Field´.[ECRE].

Rather than the problem being the rules and regulations much points to the issue lying in the governance and structure of EU cooperation on asylum and border policies and how it continues to give too much discretion to Member States. Den Heijer, Rijpma and Spijkerboer describes how the Schengen project has proceeded on a basis of mutual recognition and minimum harmonization. The implementation of the EU's policies is fully in the hands of the Member States.[245] Moreover, any EU intervention in the field of asylum and border control requires the consent of the host Member State. This form of cooperation is vulnerable as it allows for disparities between Member States, and as the common goals needs effective cooperation of Member States and a belief in a common aim. In the field of asylum national interests are often perceived, and because of how the regulations are structured allowed to, run contrary to the Unions aims.[246]

Velutti writes in her evaluation of CEAS and its recasts that the creation has instead of bettering the rights of asylum seekers led to an erosion of refugee rights, despite its aim of bettering the standard and the international image of EU with CEAS. Even though there have been institutional changes in the EU the asylum policy making has not been fully communitarized and there are diversity between Member States that has enabled the development of securitized asylum policies. She suggests that "[d]espite officially proclaimed commitments to the protection of asylum-seekers, the harmonization of asylum policies has lowered protection standards in many Member States."[247] The Recasts did detail common standards in a more precise way than the precedents, but Member States could still adopt more favourable standards, referral to domestic legislation was still a main feature and exceptions and optional clauses were kept which weaken the standards set and make it difficult to find true harmonization.[248] Den Heijer, Rijpma and Spijkerboer argues that the design of CEAS encourages disobedient and

[245] Den Heijer, Rijpma and Spijkerboer (2016) p. 624.
[246] Den Heijer, Rijpma and Spijkerboer (2016) p. 624.
[247] Velutti (2014) p. 20.
[248] Chetail (2016) p. 28.

competitive behaviour on the part of Member States. [249] The system could in their meaning only work if it contained means to coerce them to comply, the problem is not that there are no judicial enforcement mechanisms, but that there is often no interest in activating them.[250] The European Commission is responsible for ensuring EU law and correct application of EU rules by the Member States but it has only on rare occasions launched infringement procedures in the area of asylum law.

That the Pact holds provisions which allows states to continue with these more deficit practices that in some instances risks infringing refugee rights raises further concerns, especially as Member States already have some issues with respecting the prohibition of non-refoulement and the right to liberty. As argued by Amnesty´s Massimo Moratti when commenting on the situation in Croatia, where the money and funds go is perhaps more telling than what is stated in terms of respecting fundamental rights on the merits of the system. On the one hand the EU condemns states that does not respect fundamental principles, one the other hand it is the EU that stress that those with an external border need to manage it and protect the EU and the access to the common market and the union repeatedly.

As seen in the preceding discussion on Europe´s border management detention or some sort of deprivation of liberty is often the norm in the asylum procedure, and increasingly so in the suggestion for the New Pact. Costello writes "[t]he right to liberty is ubiquitous in human rights instruments, in essence protecting all individuals from arbitrary arrest and detention. It should go without saying that deprivations of liberty require the strongest possible justification. Yet, in practice, immigration detention is increasingly routine, even automatic, across Europe." [251] Asylum seekers are often targeted for detention, the detention is often justified on that those

[249] Den Heijer, Rijpma and Spijkerboer (2016) p. 612.
[250] Den Heijer, Rijpma and Spijkerboer (2016) p. 614.
[251] Costello (2012) p. 258.

migrants detained are irregular, either by entering in a State´s territory without authorization or staying after they have been told to leave. [252] Detention may be used, even the Refugee Convention allows for it in certain situations, but it needs justification and to be based on legal safeguards which is lacking in many Member States. The practices of detention and restriction on freedom of movement in the border context risk being exacerbated as the Pact lays down procedures that are to be carried out at the external border which all include the possibility to detain individuals. Procedures that will be mandatory in some, quite broad, circumstances. How detention continues to be a cornerstone of the EU border management and often imposed on those seeking asylum in various stages of the process without proper safeguards shows how the Refugee Conventions principle of non-penalization of illegal entry and the spirit and understanding behind that provision has been somewhat forgotten within the EU system.

Expedited expulsions, hot returns, accelerated determination procedures, and expansive uses of detention are all examples of unlawful actions and policies that are practice if not the norm for some Member States in their migration and border management. Actions and policies that are to some extent made into acceptable EU policies with the Pact. Carrera points to how the Pact because of this could give Member States that use these types of containment policies, which are incompatible with existing EU law on asylum and migration, the EU charter and international law and has faced sharp criticism from regional and international human rights agencies, a sense of supranational legitimacy to their national policies. This could further enable them to trump effective access to justice and violate the right to seek asylum and the prohibition of collective expulsions in the EU.[253] The overall message of the Pact together with the fact that full harmonization of the directives was removed and opt-out clauses kept indicates how the EU follows the lead from its Member States rather than providing regulations that holds them accountable. Even if more flagrant

[252] Costello (2012) p. 259.
[253] Carrera (2021) p. 4.

breaches are criticised the fact that the non-entry is seemingly the guiding principle for a lot of EU policy on migration is further compromising. CEAS seemingly resulting in less respect for human rights and not the guarantor of it that the aim initially was.

Before any evaluation of the asylum system becomes necessary it must be possible to access that system. To comply with the Refugee Convention in any effective manner should necessarily entail having a system of providing international protection which is deemed accessible. Even if the principle of non-refoulement is respected it could be considered a low benchmark if that is the highest praise the system can achieve in terms of refugee rights. As discussed before in this paper, a "good faith" understanding of the principle of non-refoulment and indeed the entire Refugee Convention entails that states should give reasonable access to territory and asylum. Since the dogma within EU and its Member States is rather focused on the opposite, to prevent access and outsource migration control, this raise further concerns to how the EU can live up to its responsibilities.

Chetail notes that as long as considerations of migration control will prevail over the need for protection, the CEAS will be unable to provide a comprehensive regime of refugee protection. He suggests that "[t]he new asylum legislation does not address the crucial issue of access to the territory, which is primarily governed by the EU legislation governing border control and irregular migration".[254] He argues that CEAS can be compared to a legal puzzle in which the different pieces are on the table but have to be assembled in a coherent and effective manner, while other important pieces are still missing.[255] One of these omitting pieces is in his view the extraterritorial scope of the CEAS. The recast instruments explicitly apply to any persons in the territory of the member state (including at the border, in the territorial waters or in transit zones), however the new asylum legislation does not provide a similar provision regarding its

[254] Chetail (2016) p. 37.
[255] Chetail (2016) p. 36.

extraterritorial scop.[256] This is a weak spot, especially considering that EU migration control measures are increasingly taken place externally.

Closing the border entirely, non-admittance at the border, fortified fences and extra-territorial monitoring of the borders, to deter and complicate entrance and keep persons out of EU jurisdiction. Tendencies and policies that hinder and to an unreasonable extent puts barriers in the way of refugees seeking asylum could be a breach of non-refoulement, but it is also at odds with the spirit and purpose of the Convention, to provide protection for those in need in a spirit of solidarity. Looking at the developments and focus of EU and Member States policy it seems clear how various strategies that could all fall within the "non-entrée" concept have been and continues to be used. From the start of Visa schemes and carrier sanctions in the 1980s, to partnering with third countries for border control and readmission programs until today with more legal constructions of non-entry to European soil. The EU continues to strengthen their common borders and externalize them, whereas the access to asylum on European is seemingly a secondary concern. As border control and migration has been intertwined with the asylum system since the beginning within the EU the policies that has been set out to minimize irregular migration has also inevitably affected the right and access to seek asylum. This is a trend that is furthered by the Pact and its deployment of "non-entry" during the proposed screening procedures and strong focus on that EU should partner with other countries outside EU jurisdiction rather than work on providing legal pathways to asylum.

For individuals, the tighter border controls and externalization of borders could result in not getting the rights they in international law would be entitled to as they never reach the jurisdiction of EU Member States. Tightening external borders also risk worsening humanitarian crises at the external borders (as seen in Poland-Belarus and previously in Greece-

[256] Hirsi Jamaa and Others v Italy (ECtHR, 23 February 2012) para 180.

Turkey). To the extent that tightened borders do succeed in keeping people out, the result is often that many get stuck in limbo. Unable to return to their country of origin and stuck in countries in the EU's neighbourhood which themselves are not in the position to provide for a minimum of assistance.[257] Even if these people are not in direct need of international protection, it does not mean that they are completely devoid of rights, and without them reaching an adequate system of checking their status there is no way to know if they were in need of international protection or not.

4.2 The Continued relevance of the Convention

Over the past 30 years the lack of legal access to asylum for refugees has emerged as one of the most prominent topics in refugee studies, with some authors even predicting the end of the right to seek asylum in the Global North. [258] What does these tendencies - this deterrence paradigm in traditional asylum countries, in which a broad array of measures prevent asylum seekers accessing the territory or asylum procedures of destination states", [259] - suggest for the relevance of the Refugee Convention?

Refugees fleeing dangerous situations and risk of persecution first and foremost need secure entry into a territory in which they are sheltered from the risk of being persecuted. As Hathaway puts it this "fundamental concern must somehow be reconciled to the fact that nearly all of the earth´s territory is controlled or claimed by governments which, to a greater or lesser extent, restrict access by non-citizens". [260] Velutti argues that key to a true understanding of the nature of problems concerning asylum law and policies are their strong connection to the ideas of the nation state, state sovereignty and state territory and borders and how they still play a central and determining role in how Member States adopt their measures. [261] Along this notion, Costello points to how the idea of human rights as "universal" sits

[257] Den Heijer, Rijpma and Spijkerboer (2016) p. 616.
[258] Feith Tan (2021) p. 73.
[259] Feith Tan (2021) p. 73.
[260] J. Hathaway (2021) p. 313.
[261] Velutti (2014) p. 5.

uneasy with the statist border control that dominates the immigration discourse and law, which tends to equate sovereignty and unfettered state discretion. "The statist assumption seems out of place in an age of human rights and increasing transnational economic and social interpenetration. Yet, in the migration context, it remains stubbornly ingrained." [262]

Within the EU this statist assumption influences state practice, legal doctrine and even case law. As previously discussed one of the shortcomings of the CEAS is that it does not address access to territory, border management is a separate set of rules which do not take account of refugee rights to the same extent. The objectives of states to defend their borders seemingly is the primary concerns whereas refugee rights come second. The ECtHR consistently begins its reasoning in migration-related judgments declaring that "as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory".[263] A construction of international law that prioritises the right of states to control migration over human rights. However, Spijkerboer points to that this is necessarily not adopted in the rest of the world, "there exists a distinctly African normative framework that includes international legal norms, which sees migration control as requiring justification, whereas the European normative perspective a priori assumes its legitimacy as being inherent in state sovereignty" [264] So, the statist assumption that is seen as so central within an European context is not necessarily understood to overrule refugee rights and human rights in other regional legal systems, and perhaps, if the EU should live up to its declarations of promoting and standing for human rights, should not be within the EU either.

International refugee law have historically developed thanks to regional and national implementation and various national and regional courts´ decisions

[262] Costello (2012) p. 261.
[263] See for instance; Hirsi Jamaa and Others v Italy (ECtHR, 23 February 2012) note 131.
[264] Spijkerboer (2021) p. 66.

as well as international human rights law.[265] As to how much emphasize should be placed on state practice to discern the relevance of the Convention today Hathaway and Foster notes that there is a "conceptual disjuncture in relying on state practice to interpret a human rights treaty the very purpose of which is to constrain state practice for the benefit of human beings."[266] The Refugee Convention is in their meaning part of the group of "lawmaking treaties" in which states have no interests of their own except a common interest in those high principles being the raison d'etre behind the convention, as such in the matter of interpreting the validity of the convention should be placed outside the will of the Contracting parties.[267]

Gammeltoft- Hansen and Hathaway suggests that the continued evolving of international law in areas of jurisdiction, shared responsibility, and liability for aiding or assisting, are likely to restrain many if not all of the new forms of non-entrée which states have used to evade responsibility. They argue that "[t]he fact that jurisdiction, and hence liability, is now understood to flow not just from territory, but also from authority over individuals in areas beyond a state's jurisdiction and indeed from the exercise of public powers abroad, has dramatically expanded the scope of accountability for core refugee law and related human rights obligations". [268]
UNHCR similarly claims that an interpretation that restricts the scope of application within the territory of a State party "would not only be contrary to the terms of the provision as well as the object and purpose of the treaty under interpretation, but it would also be inconsistent with relevant rules of international human rights law. […] a State is bound by its obligation […] wherever it exercises effective jurisdiction"[269]. Similar to non-refoulement obligations under international human rights law, the decisive criterion is not whether such persons are on the State's territory, but rather, whether they come within the effective control and authority of that State.[270] The

[265] Hathaway and Foster (2014) p. 5.
[266] Hathaway and Foster (2014) p. 12.
[267] Hathaway and Foster (2014) p. 12.
[268] Gammeltoft-Hansen and Hathaway (2015) p. 283.
[269] UNHCR (2007) pt. 43.
[270] UNHCR (2007) pt. 43.

principle of evolutive interpretation also affirms that a sound interpretation of the context, aim and purpose of the Refugee Convention should lead to a judicial development which hinders these types of practices.

4.3 Cooperation and responsibility sharing

The United Nations Global Compact on Refugees (GCR) from 2018 is an attempt to embrace all aspects of forcible displacement across international borders in the 21st century. Two principal elements in it relate to burden- and responsibility-sharing and its focus on solutions. [271]
Already the Preamble of the The Refugee Convention calls for international co-operation to find a satisfactory solution of a problem which might "place unduly burdens on certain countries" and which "the United Nations has recognized the international scope and nature" of.[272]

Going back to the historical setting this is explained by the context of the Refugee Convention. In the aftermath of the Second World War the international community again had to handle the refugee crisis in Europe. The war had caused death, destruction, and millions of refugees in need of a new safe home to an extent never seen before. The international community made efforts to repatriate the European refugees but as the date of termination for the mandate of IRO[273] neared it became clear that not all Second world war refugees could be repatriated or resettled, also there was a need for a strategy to deal with the increasing refugee flow from the Communist states. For the Europeans it was also important to consolidate the commitment of other states to share some of the European refugee burden and the flow of people from Eastern and Central Europe. [274]
Another incentive to reach an international agreement on rights of refugees was state self-interest and a return to pre-depression tradition. Already here States where aware that it was important to ensure that the arrival and

[271] Gilbert (2021) p. 37.
[272] Refugee Convention Preamble Para 4.
[273] Between 1947 and 1951 the International Refugee Organization (IRO) relocated more than 1 million Europeans to the Americas, South Africa, Israel and Oceania. See Hathaway (2021) p. 27.
[274] J. Hathaway (2021) p. 28.

presence of refugees would not become source of societal unrest and destabilization.[275] Further, the crisis after the Russian revolution[276] had shown that to have no solution for these persons led to societal unrest for the receiver state and for regions at large - thus it was in States´ self-interest to find solutions to these problem to ensure peaceful domestic as well as international circumstances were kept. This is also noted in the Preamble as it urges that States recognizing the social and humanitarian problem of refugees will do everything they can to prevent this problem from being a source of tension between States.

Both the GCR and the new EU Pact have roots in the 2015 so-called European refugee crisis but show different aspirations surrounding migration. The affirmation of the GCR in December 2018 demonstrated a powerful commitment to refugee protection and cooperation in refugee responses by the international community.[277] In Europe however, there was a limited uptake of the GCR in the EU and the limitations of the new Pact do not go unnoticed elsewhere in the world.[278] Gilbert argues that "[t]he Pact on Migration and Asylum has once again missed the opportunity to put the EU at the forefront of resolving the global displacement crisis. It focuses on internal EU concerns and aims at pushing the problem away, often with a

[275] [275] J. Hathaway (2021) p. 28.
[276] Following the end of the First World War, around 2 million Russians, Armenians and others were forced to flee their countries. This coincided with the reinstation of visas and passports following the war and the emergence of more modern systems of societal organization. Most aliens law bilateral agreements were based on a condition of reciprocity, the citizens of one state were only entitled to benefits in the cooperating state if their own state ensured rights of the other states citizens in return. As the 1.5 million Russian refugees were de-nationalized by the new regime and with no documentation refugees were turned away at the borders or hindered from work and other services. This resulted in large groups of desperate people, that did not "fit" within the traditional categories in the international system. States agreed that it was in their mutual self-interest to try to include refugees within the group of protected aliens, as pointed out by Hathaway "to have decided otherwise would have exposed them to the continuing social chaos of unauthorized and desperate foreigners in their midst". If refugee arrival was seen to be sanctioned by the state, the admission of them would not be as legally destabilizing. See Hathaway (2021) p.19-21.
[277] Easton-Calabria (2021) p. 125.
[278] Easton-Calabria (2021) p. 127.

cynical reference to how that will protect so many from the dangers they might face in trying to reach Europe."[279]

Easton-Calabria argues that the EU and Member States policy might cause a problematic ripple effect, other countries notice the patterns of border restrictions and disinterest in taking on the GCR commitments. This could cause fatigue in hosting countries[280] and an associated disinterest or disillusionment with the GCR process if GCR commitments are not realized.[281] Instead, the most important contribution the EU could make to implement and uphold the GCR is to expand legal and safe routes to the EU, however recent practices of EU migration management risks becoming a means to offer substitutes to asylum through dangerous third country arrangements rather than truly creating access to it."[282]

The EU and its Member States play a significant role in the global protection regime. The focus on funding elsewhere, third country partnerships and restrictive access to asylum in Europe runs contrary to the Conventions underlying principle of equal responsibility and burden sharing for a truly international problem. It also risks disheartening those states that today does take on the proportionally larger burden for displaced people as seen in the response to the limited uptake of the GCR. This could in turn risk the system of international protection in its entirety, most desperately the individuals in need of protection but also in the longer run the peace and stability within the Global north. As the 2015 refugee crisis showed the EU has little to no margins to handle if truly encountered with the flow of refugees and displaced people that are bound to continue to migrate towards a better life if not the root causes are solved.

[279] Gilbert (2021) p. 44.
[280] UNHCR data show that of the 79.5 million displaced persons of concern to UNHCR (about 20.4 million refugees and 4.2 million asylum seekers) 74 % live in neighbouring countries to those they have fled, 80% of the displaced persons of concern to UNCHR live in states with acute food insecurity. Of the top five hosting states only Germany is in the global north. See Easton-Calabria (2021) p.130.
[281] Easton-Calabria (2021) p. 127.
[282] Easton-Calabria (2021) p.130.

EUs border management and the CEAS is seemingly a “source of tension between states”, at odds with the spirit and purpose of the Refugee Convention. It creates tension within the EU between Member States as the structure creates unfair burdens and as countries domestic policies are allowed to create situations that runs contrary to refugee and human rights. It makes the EU vulnerable in how it relies on partnering with countries with questionable human rights records which do not hesitate to use migrants as pawns for their own interests, most recently seen in the Poland-Belarus situation but also regarding Greece-Turkey in 2019. It creates tension between the EU and the international community as the EU is rightfully called out for promoting human rights elsewhere but allowing these things to happen in its own neighbourhood, and even deteriorating situations in other states as they in the name of migrant control fund and support illiberal regimes. In a way the workings to avoid the responsibilities of the Refugee Convention and reduce the commitment to it to a minimum show why it is still so very important. The drafters of the Convention already from the beginning embraced the problem of refugees and migration flows as the truly international one it was and showed an understanding for that international cooperation and solidarity was needed to find satisfactory solutions and decrease the tensions that otherwise would come.

5 Conclusion

To conclude the finding of this essay, EU provisions on border management and access to asylum are detailed and often meet the standards of international obligations but as there is still a wide margin of appreciation as well as exceptions. As a result, Member State practice differs, and domestic policies sometimes derogate from the common standards set. In effect a lot of practices that run contrary to the Refugee Convention happen within the EU, such as pushbacks and detention of asylum seekers. Particularly in those states that due to their geographical position are exposed to larger flows of migrants and potential asylum seekers.

Secondly, there is arguably a lot of commonalities between the concept of "non-entrée" and EU border policy as seen in Member States practice and what is envisioned in the Pact. This is indicated by for example the use of fiction of "non-entry" as seen in some domestic legislations and now in the new Pact. Further, the continued reliance on third country partnerships and economic funding to partner states which neighbours EU also points to this. Overall, the structure with several principles which turns responsibility to another country in terms of providing protection such as the different safe third country rules are variations of this.

Thirdly, these policies in practice point to that there are some aspects that clearly do not comply with the responsibilities deriving from the Refugee Convention (such as the continued occurrence of pushbacks), whereas there are other aspects that perhaps although does not explicitly breach the Convention does not comply with a `good faith´ understanding of it.

Recent EU Member State practice can both point to the continued relevance of the Refugee Convention, despite its 70-year anniversary states still do not understand their core commitments to it and therefore it is crucial to remind them of what they have agreed to follow. But also, the continued breaching of core commitments does make one question whether it does have an impact on state practice today. On the other hand, as reminded by Foster and

Hathaway, how much credit should states´ behaviour be given in terms of interpretating a treaty created to constrain state practices.
In sum, the findings of this essay suggests that border management in the EU interfere with the right to seek asylum and as such undermine the letter and spirit of the Refugee Convention. At the very least EU and Member States policies do not comply with a good faith understanding of it in terms of providing adequate access and opportunity to seek asylum but are rather focused on the opposite, keeping potential asylum seekers outside EU jurisdiction.

The Refugee Convention was to a large extent a product of its time. Constructed to solve the refugee crisis in Europe after the Second world war and in the spirit of human rights and legal limits to what states can do to its own citizens after the atrocities of the war. Coming just after the 1948 UDHR it joined both the idea of sanctity of human life and the international community's responsibility to provide protection if this was not respected by the home state. Further, the more political incentive that refugee and migrant flows needed to be regulated and taken care of in a spirit of solidarity to ensure international peace and prosperity and not create tension between states. Considering the situation at the Poland-Belarus border, in the light of the overall development in terms of refugee rights within the EU, it seems almost too symbolic that the area associated with the original refugee crisis that the 1951 Refugee Convention was set up to solve is currently the epicentre of the latest border and refugee crisis that European states and the EU must face. It shows how the patterns and countries concerned have perhaps changed since the Conventions inception, but the issues and questions remain the same. The policy turns within EU after 2015 and the current crisis being a worst example scenario of this, a treaty initially made to create solidarity and solve a European crisis is now instead ignored and made obsolete by the same countries. It could both point to the continued relevance of the Convention, this is exactly why it is still needed, but also to the fact that perhaps its relevance has decreased in the eyes of states in the Global North.

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VCLT Vienna Convention on the Law of Treaties

ECHR European Convention of Human Rights

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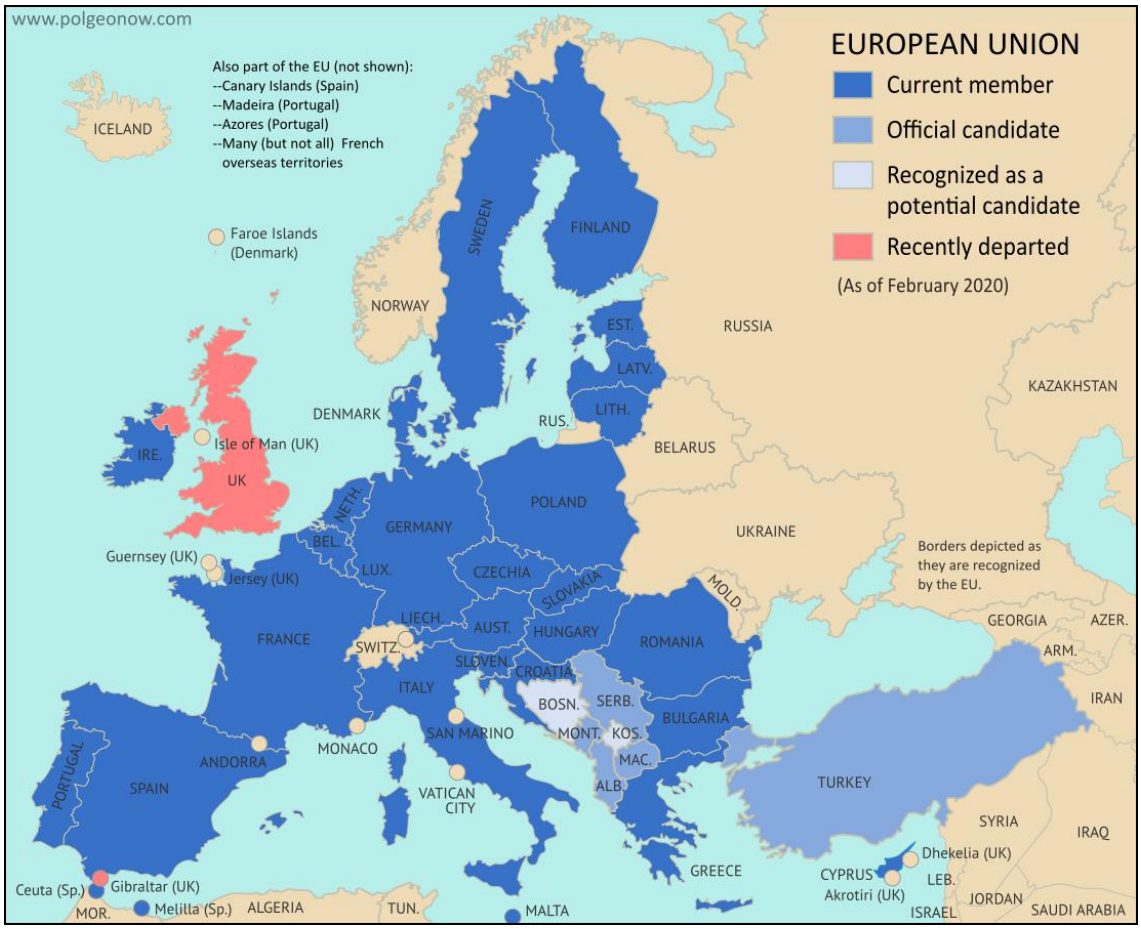

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