Refugee and asylum law in a time of crisis

How the right to seek asylum in the EU is being affected by the current European refugee crisis

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# Table of contents

1 INTRODUCTION ........................................................................................................... 1

1.1 Research question .................................................................................................. 3
1.2 Theory .................................................................................................................. 4

2 METHODOLOGY ...................................................................................................... 7

2.1 Terminology/side notes .......................................................................................... 10

3 EU LAW AND THE RIGHT TO SEEK ASYLUM .................................................... 11

3.1 International Human Rights Law ......................................................................... 11
3.2 Europe as a region .................................................................................................. 14
3.3 European Union asylum law ................................................................................ 16
    3.3.1 Schengen system ............................................................................................. 16
    3.3.2 Dublin system ................................................................................................ 18
    3.3.3 Steps towards a Common European Asylum System ................................... 21
    3.3.4 How the CEAS works in theory and practice .................................................. 26

4 CURRENT MEASURES IN PLACE AND THE CONSEQUENCES FOR
THE RIGHT TO SEEK ASYLUM ............................................................................... 27

4.1 Border Control ....................................................................................................... 27
    4.1.1 Raising of fences and border closures ............................................................ 28
    4.1.2 Border controls and modification of Schengen .............................................. 32
4.2 Returning/sending back asylum seekers ............................................................... 35
4.3 EU measures .......................................................................................................... 40
    4.3.1 New EU Border Force .................................................................................. 40
    4.3.2 Replacement of Dublin ................................................................................ 41
    4.3.3 EU/Turkey Deal ............................................................................................ 41

5 ANALYSIS AND CONCLUSION .......................................................................... 44

5.1 Implications for the right to seek asylum in the EU ............................................. 45
5.2 Concluding remarks .............................................................................................. 51

6 TABLE OF REFERENCE ......................................................................................... 55
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1 Introduction

Migration to Europe, whether for economic reasons or to seek asylum has long been occurring. The Second World War saw the largest refugee crisis in history, which predominantly affected European countries, and resulted in the drafting of the 1951 Refugee Convention to ensure that there were international legal safeguards in place to protect the rights of those forced to flee their home countries. Just over 70 years later, the world is now witnessing the largest refugee crisis since WW2, with the same fundamental legal safeguards in place, however a very different political climate and atmosphere.

The five year long Syrian civil war\(^1\) has resulted in 11 million Syrians being forced to flee from their homes. 4.5 million have fled from Syria, with the majority seeking protection in Syria’s neighbouring countries, namely Jordan, Lebanon and Turkey. 10% of those who have left Syria, alongside others who have fled from other war-torn countries like Iraq and Afghanistan, have tried to reach Europe to find safety, sparking a regional wide refugee crisis.\(^2\)

2014 saw a total of 552,055 applications for asylum lodged in Europe\(^3\), a number which more than doubled in 2015, with 1,213,718 asylum applications lodged. Of these, 357,665 were Syrian, 177,395 were Afghan, and 117,937 were Iraqi in just the last quarter of 2015, showing huge increases over the space of one year.\(^4\)

The majority of those attempting to reach Europe are doing so by paying smugglers to take them by boat to Greece from Turkey. There were just over 1 million arrivals by sea in 2015, however due to the dangerous route and unstable boats used by smugglers, the International Organisation for Migration stated that 3,771 people died trying to cross the Mediterranean in 2015.\(^5\)

\(^1\) In March 2011, pro-democracy protests and calls for the resignation of President Assad erupted in Syria. By 2012, the situation had escalated into a civil war, with the country split between government forces and different rebel brigades, including Shia Muslims, Sunni Muslims, and the jihadist group IS.
\(^2\) BBC News 11/5/16 ‘Syria: The story of the conflict’
\(^3\) Frontex (2015), FRAN Quarterly, Quarter 1 January-March 2015
\(^4\) Frontex (2015), FRAN Quarterly, Quarter 4 October-December 2015
\(^5\) IOM 1/05/16, ‘IOM Counts 3,771 Migrant fatalities in Mediterranean in 2015’
Once arrived in Greece, the majority of asylum seekers have been trying to reach Germany, Sweden and other Northern EU States, travelling along what is called the Western Balkan route which includes the FYR Macedonia, Serbia, Hungary, Croatia, Slovenia, and Austria.

Despite initial positive responses by EU States to welcome asylum seekers into their countries\(^6\), the massive increase in numbers arriving in Greece by boat from Turkey in 2015 sparked a wide range of measures being introduced in an attempt to stem the flow of migration to the EU.

Beginning in September 2015, a number of the Balkan States began erecting fences and increased controls at their borders, resulting in backlogs and asylum seekers finding new routes to reach the North.\(^7\)

On the 13\(^{th}\) November, terrorist attacks occurred in Paris, with at least two of the attackers being found to have entered Europe through Greece on false passports and posing as refugees. In the immediate aftermath of the attacks, a number of countries put in place temporary border controls.\(^8\) By the beginning of 2016, however, pressure from the over a million asylum seekers that arrived in the EU in 2015, saw Northern EU States such as Sweden, Norway and Denmark derogating form their obligations under the Schengen Convention and re-imposing controls on the internal borders of the EU.\(^9\) An increasing number of States began to reinstate the internal borders of the EU, effectively dismantling the Schengen area, there was an increase in the numbers of refugees being sent back/returned by the northern States, and countries along the Balkan route continued to increase controls on their borders. This resulted in increased pressure on Greece where refugees were becoming stranded.

Alongside these individual State measures, the EU proposed a number of schemes between September 2015 and March 2016, including a new EU border force to better patrol

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\(^6\) In September 2013, both Sweden and Germany announced plans for the resettlement of Syrian refugees, with Sweden also announcing that they will grant permanent residency to Syrian refugees.

\(^7\) Jamie Merrill, The Independent 29/10/15 ‘This is not human… we are not animals’

\(^8\) Alistair Dawber, The Independent 15/11/15 ‘Europe’s border policy faces fresh scrutiny’

\(^9\) BBC News 4/1/16 ‘Migrant crisis: Sweden border checks come into force’
the external borders of the EU\textsuperscript{10}, a proposal to modify the Dublin Regulation, potentially incorporating a distribution key\textsuperscript{11}, and most notably the establishment of the EU/Turkey deal. The main aim of the deal was for Turkey to help stem the flow of asylum seekers coming to the EU in exchange for monetary help and a renewed push for Turkey’s EU membership.\textsuperscript{12} By 2016, however, a new and controversial aspect was added to the EU/Turkey deal whereby Greece and the EU would return all ‘irregular migrants’ that arrive in Greece to Turkey and for every Syrian returned, a genuine Syrian refugee in Turkey would be resettled in the EU.\textsuperscript{13}

1.1 Research question

The right to seek asylum was first introduced in the Universal Declaration of Human Rights and further codified into international law in the 1951 Convention Relating to the Status of Refugees. Despite further regional treaties for the protection of the rights of refugees being written since 1951, the main legal apparatus in place still stems from the 1951 Convention, written 65 years ago. The current refugee crisis has been described as the largest since the Second World War, which sparked the drafting of the original Refugee Convention. Questions are therefore raised as to how the right to seek asylum functions today, 65 years after it was codified into international law.

Different States respond in different ways to times of extreme political pressure, and the ways in which they respond can have a profound impact on human rights in the respective States. The number of measures that have been put in place throughout the EU during the asylum seeker influx can be seen as one of the ways a State or regional body may respond. It is worth noting, however, that this time of ‘exceptional pressure’ for the EU consists of one million asylum seekers entering the EU in 2015. While this is a large number, Syria’s neighbouring countries are currently hosting a number of asylum seekers that far exceeds those that have made it to the EU. Turkey alone is hosting two million Syrian refu-

\textsuperscript{10} BBC News 15/12/15 ‘Migrant crisis: EU launches new border force plan’

\textsuperscript{11} Nikolaj Nielsen, EUobserver 15/1/16 ‘EU asylum law to include ‘distribution key’’

\textsuperscript{12} Leo Cendrowicz, The Independent 30/11/15 ‘EU funding to stop migrants’

\textsuperscript{13} BBC News 8/3/16 ‘Migrant crisis: UN legal concerns over EU-Turkey plan’
gees and Lebanon and Jordan are hosting a combined 1.7 million. In addition, while the current crisis is considered as the largest refugee crisis since the Second World War, in terms of actual numbers, after WW2 there were 11 million refugees in Europe, eleven times more than the current ‘crisis’.

The current situation in the EU has resulted in a number of mixed responses by EU Member States and a variety of measures employed in order to stem the flow of refugees to the EU. This paper is therefore interested in answering the question:

What are the implications of the current measures for the right to seek asylum in the EU?

The research question includes three sub-questions:

1. How did the right to seek asylum function in the EU before the crisis?
2. Which measures were put in place as an immediate response to the crisis?
3. How can they be understood and what are their implications for the right to seek asylum in the EU?

In order to answer the research question and sub-questions a number of methods will be used, alongside theoretical viewpoints in order to fully examine and explain the situation. I will now provide a brief overview of the theoretical standpoints that will be used throughout the paper.

1.2 Theory

The theory that will be used is based on three themes that have been witnessed during the crisis: the refugee as between sovereignty and international law, the politicisation and securitisation of migration/asylum, and extraterritorial migration control. Each theory shall now be summarised in turn and shall be used throughout the rest of the paper in order to examine the situation.

According to Thomas Gammeltoft-Hansen, ‘the nexus between the refugee and migration control has arguably always been a point of confrontation between sovereign rights

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14 Amnesty International 3/2/16 ‘Syria’s refugee crisis in numbers’
15 International Organisation for Migration, ‘IOM History’
and international law’.\textsuperscript{16} The principle of State sovereignty entails those of territorial supremacy and self-preservation\textsuperscript{17} whereby a State is free to decide who may enter and remain on their territory, however the refugee and their rights encompassed in international refugee and human rights law places constraints on a State’s ability to exercise this freedom to choose.\textsuperscript{18} Refugee law therefore becomes an ‘exception to the general rule that sovereign states are free to decide who crosses their borders’.\textsuperscript{19} As a result, refugees become an anomaly in a world where rights are given to those subject to a State but refugees themselves belong to no State.\textsuperscript{20}

Refugees emerge due to a State’s unwillingness/inability to offer them protection\textsuperscript{21} and are, according to Emma Haddad, a side effect of separate sovereign States i.e. sovereign states have created them by failing to offer them substantive protection from persecution.\textsuperscript{22} In recent years, refugees have increasingly become caught up in and associated with mixed flows of irregular migrants\textsuperscript{23}, which has resulted in growing concern internationally over illegal migration\textsuperscript{24}. Despite the fact that refugees are not illegal migrants, there has been a general response by States of increasing the number of procedural and physical deterrence mechanisms to restrict refugees’ access to their territories\textsuperscript{25}. Overall, Haddad regards refugees as being shunned both domestically and internationally.\textsuperscript{26}

With regards to the politicisation and securitisation of migration/asylum, the increase in smugglers, globalisation of refugee flows, and the increased avoidance of traditional border controls has resulted in a tightening of national asylum systems and an increase in border controls.\textsuperscript{27} The main aim of these different measures is to ‘physically or legally

\textsuperscript{16} Gammeltoft-Hansen (2011) pg.11
\textsuperscript{17} Goodwin-Gill and McAdam (2007) pg.1
\textsuperscript{18} Casella Colombeau (2015) pg.1, Goudappel and Raulus (2011) pg.1
\textsuperscript{19} Dauvergne (2008) pg.62
\textsuperscript{20} Gammeltoft-Hansen (2011) pg.12
\textsuperscript{21} Ibid pg.12-13
\textsuperscript{22} Haddad (2003) pg.297
\textsuperscript{23} Gammeltoft-Hanse (2011) pg.14
\textsuperscript{24} Dauvergne pg.50
\textsuperscript{25} Gammeltoft-Hansen (2014) pg.575
\textsuperscript{26} Haddad pg.311
\textsuperscript{27} Gammeltoft-Hansen (2014) pg.576
[prevent] refugees from reaching the territory of asylum states’. In addition, as Huysmans points out, in Western European States, migration is ‘increasingly presented as a danger to public order, cultural identity, and domestic and labour market stability’. For Huysmans, ‘immigrants, asylum seekers and refugees are framed as a security problem’ which in turn justifies deterrence measures by States to ensure that refugees do not have access to their territories.

As a response to growing asylum claims and fear over illegal immigration, extraterritorial migration control has also been increasing in recent years. According to Gammeltoft-Hansen the increasing use of ‘offshored’ and ‘outsourced’ migration control, such as cooperation with third countries, the use of private companies, intercepting sea vessels etc., can be seen as part of the globalisation process, moving away from simply protecting national sovereign borders. However, due to this new trend of extraterritorial migration control there is concern that the 1951 Convention Relating to the Status of Refugees does not adequately guarantee the rights of asylum seekers beyond the territorial boundaries of States. For example, the treaty provisions of the 1951 Convention which are based on the refugee being present in the territory or at the border of the State in question becomes redundant if migration control is practiced extraterritorially. For Gammeltoft-Hansen, the use of extraterritorial control measures is becoming fashionable because ‘states believe that by delegating authority and moving beyond their territory they are able to release themselves – de facto or de jure – from some of the constraints otherwise imposed by international law’. Rene Bruin echoes Gammeltoft-Hansen’s concern, regarding States as increasingly trying to prevent the applicability of the non-refoulement principle by preventing asylum seekers from reaching their territory or leaving their country in the first place. Border closures, controls, patrolling of waters and visa requirements are among some of the measures that have been used. Dauvergne further states that these measures began with individual States but have evolved now into States working together and establishing common efforts to stop

28 Gammeltoft-Hansen (2014) pg.577
29 Huysmans (2000) pg.752
30 Gammeltoft-Hansen (2011) pg.2
31 Ibid pg.3
32 Ibid pg.7-8
people entering their territories – a phenomenon which needs more legal clarity on its legitimacy.\(^{33}\)

Both Gammeltoft-Hansen and Rene Bruin acknowledge that the legitimacy of extraterritorial migration control measures must be assessed through an understanding of the meaning of jurisdiction, the reach of the principle of non-refoulement, and European asylum law.\(^{34}\) The European Court of Human Rights has attempted to address these legal issues with regards to extraterritorial migration control through expanding State jurisdiction under the European Convention on Human Rights. Mainly the Court has sought to export ‘the border to places and instances where the state exercises enforcement action’.\(^{35}\)

2 Methodology

The overall aim of this paper is to map the measures that have been used in order to analyse the consequences of these for the right to seek asylum in the EU. In order to do so a number of research methods have been employed.

My research question was split into three sub-questions in order to more comprehensively answer the main research question. Different research methods have been employed in order to answer each sub-question. The use of different methods, both legal and non-legal mean that this paper is not purely legal, but rather part of empirical legal scholarship or socio-legal studies involving ‘studying law in the broader social and political context with the use of a range of other methods taken from disciplines in the social sciences and humanities’.\(^{36}\) This approach stems from the ‘importance of understanding the gap between ‘law in books’ and ‘law in action’, and the operation of law in society’.\(^{37}\)

The first sub-question related to how the right to seek asylum functioned in the EU before the crisis. This question is primarily concerned with the law regarding the right to seek asylum in the EU. Therefore, the main treaties regarding the right to seek asylum were examined, including the Universal Declaration of Human Rights, the 1951 Convention Relat-

\(^{33}\) Rene Bruin (2011) pg.22-23
\(^{34}\) Gammeltoft-Hansen (2011) pg.107, Rene Bruin pg.25-26
\(^{35}\) Mitsilegas (2012) pg.44
\(^{36}\) McConville and Hong Chui (2007) pg.5
\(^{37}\) Ibid
ing to the Status of Refugees, the Convention Against Torture, the European Convention on Human Rights, as well as relevant EU legal documents, including: the EU Charter of Fundamental Rights, Schengen Convention, Dublin Regulations, Qualification Directive, Temporary Protection Directive, Reception Conditions Directive, Asylum Procedures Directive, and Return Directive. Alongside an analysis of the relevant treaties, case law from both the European Court of Human Rights and the EU Court of Justice regarding the right to seek asylum was also examined in order to provide an overview of how the right to seek asylum functions in practice as well as in written law. Sources were chosen due to relevance to refugee law and asylum cases. As the ECHR contains no right to seek asylum, the cases chosen focussed on substantive rights such as the right to life, prohibition of torture, cruel, inhuman or degrading treatment, right to privacy and family life, right to an effective remedy etc. which related to cases of those who were seeking asylum.

In order to answer the second research question on the measures put in place during the crisis and the consequences of these for the right to seek asylum, an analysis of the situation through the use of media sources was used. Due to the high profile of the crisis in European press, there have been innumerable newspaper articles written about this issue, therefore prompting the need for limitations when it came to choosing the news sources, the research time frame, and the geographical area that was to be focussed on.

To ensure that a number of sources were used in order to avoid bias, three news sources were chosen: BBC world news, the EU observer, and The Independent. All three news sources write without a specific political orientation and were therefore chosen to give a more objective overview of the situation. In general, however, political bias was not a major problem as the articles were reporting on practical and political measures during the crisis and I did not include comments, editorials and opinion pieces, but solely journalistic reports. My research on the newspapers can be regarded as a content analysis study, focussing on two major international news sources and one national newspaper on its reporting of international news in order to provide a concrete overview of the situation.  

38 Boyd-Barrett (2012) pg.342
Overall, 126 news articles were selected over the period of September 2015 to March 2016 to be analysed. Articles were selected with regards to their relevance to the refugee crisis and once selected they were codified according to certain criteria relating to their content. These criteria included the timeframe that my research focussed on, the countries that were most involved in the crisis, and if the article referenced specific measures that a State/the EU had enacted. This approach enabled me to scale down the vast number of news articles written about the crisis to ensure that I had relevant information to answer my research question within the timeframe that I had. The approach did have limitations however, for example only using three different news sources severely limited the scope of my research, as well as only using news sources in English. However, as the main aim of the research was to be able to have a concrete overview of the situation and the measures that were being put in place in order to analyse the effects of these for the right to seek asylum in the EU, the approach I used enabled me to have this overview using a method that allowed for the relevant information to be collected in the timeframe that I was given.

With regards to the timeframe, I restricted my research period to September 2015 through to March 2016. According to statistics from Frontex’s quarterly reports, this period saw 405,413 asylum applications and 978,338 so-called illegal border crossings highlighting the massive increase in numbers during that particular period and that is was a time of exceptional pressure. In addition, September 2015 was the time when the first border fence was constructed along the Hungarian border with Serbia and can be considered the beginning of the large number of measures that were put in place during the crisis.

In addition, the countries focussed on were those along the Western Balkans route, Germany, and Scandinavian countries including Denmark, Sweden and Norway. These countries were chosen due to the Western Balkan route seeing the majority of refugees during the crisis. Frontex also found that in the fourth quarter of 2015, 466,783 asylum seekers entered the EU via the Western Balkan route. Northern European countries such as Germa-

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39 A full list of the articles is included in the bibliography.
40 January-May 2016
41 Boyd-Barrett pg.335
42 Frontex (2015), FRAN Quarterly, Quarter 4 October-December 2015
43 Including Greece, FYR Macedonia, Serbia, Hungary, Croatia, Slovenia, and Austria
ny, Denmark, Sweden and Norway were also selected as they represented the countries which received the largest numbers of asylum applications over the research period.\textsuperscript{44} Turkey was also included due to the majority of refugees coming to Europe began their journey across the Mediterranean in Turkey. My research was therefore focused on a few countries which allowed me to comprehensively examine the situation in these countries in the time frame that I was given. While not being an extensive list of countries, choosing those countries along the Western Balkan route allowed me to be more intensive in my research.\textsuperscript{45}

The third sub-question on the implications of these measures involved using all the relevant legal and news sources already found, along with the theoretical standpoints mentioned in the introduction, in order to successfully analyse the impact of these measures on the right to seek asylum in the EU, and to answer my main research question overall.

The paper will be structured around the three sub-questions, with each main section referring to each question respectively. The methods employed aim to answer the research question of the implications for the right to seek asylum through deciphering ‘the workings of legal, social and cultural processes’.\textsuperscript{46}

2.1 Terminology/side notes

As already stated in the introduction, despite the current situation being described as the largest refugee crisis since the Second World War, the actual numbers are in no way comparable. Despite this, the term ‘crisis’ will be used throughout this paper as it has been perceived as a crisis by the EU and Member States alongside the idea that something exceptional is happening.

For clarification purposes, this paper will make references to the situation in Syria, however, due to word constraints, the main causes of the crisis will not be discussed in detail. The main focus will be on what is happening in the EU and the consequences of this for the right to seek asylum. In addition, the focus of this paper is on the right to seek asy-

\textsuperscript{44} Eurostat 3/3/16 ‘Asylum quarterly report’
\textsuperscript{45} Landman (2009) pg.33
\textsuperscript{46} McConville and Hong Chui pg.6
The main focus will be on EU countries along the Western Balkan route and the Scandinavian countries. The paper will include some analysis of non-EU countries, such as Turkey, Macedonia, and Norway, however this will be due to their importance and links to the crisis. Furthermore, throughout the crisis, different terminology has been used for those coming to Europe, ranging from migrants, irregular migrants, asylum seekers, and refugees. For clarification, when referring to those arriving in Europe, the term ‘asylum seekers’ will be used unless at specific times another term has been used when quoting or if the specific circumstance warrants a different term.

3 EU Law and how the right to seek asylum functions

In order to examine and assess how the right to seek asylum will be and has already been affected due to the current refugee crisis in Europe, it is prudent to discuss how the right to seek asylum functions in both international and regional law. This section will examine the right to seek asylum, firstly through international refugee and human rights law, and then secondly through regional European human rights and EU law.

3.1 International Human Rights Law

The original right to seek asylum can be found in Article 14 of the Universal Declaration of Human Rights (UDHR), written in 1948. The UDHR was the first human rights document written in the post-WW2 era and is regarded as the cornerstone of the international human rights legal system. The article states as follows: ‘Everyone has the right to seek and to enjoy in other countries asylum from persecution’.

The 1951 Convention relating to the status of refugees (1951 Convention) was the first international legally binding document explicitly related to the right to seek asylum. It was written in the years following WW2, when there was a need for a legally binding in-

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47 Statistics show that the majority of those arriving are from Syria, Afghanistan, and Iraq: all of these countries are experiencing some form of conflict and the majority of those from these countries are entitled to refugee status and can therefore be regarded as asylum seekers.

48 Universal Declaration of Human Rights (1948) Art. 14 (1)
ternational document that would protect and promote the rights of refugees. Refugee law can be considered to be a part of international human rights law, and has benefitted greatly from bolstering obligations using notions from general human rights law. However, distinctions remain in that refugee law deals ‘solely with the relationship between the state and the subjects of another state’. 49

Within the Convention, it lays out the criteria that must be met for an asylum seeker to be considered a refugee. Article 1A(2) states that a refugee is someone who:

‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country’. 50

The Convention was followed by the 1967 Protocol which removed the geographic limitation found in the 1951 Convention which stated that the Convention applied to those who were refugees ‘as a result of events occurring before 1 January 1951’. 51 Owing to its status as lex specialis, it is regarded as the key international instrument relating to asylum. 52

The 1951 Convention does not include a right to asylum; however it provides safeguards so that States cannot simply reject/remove someone from their territory who is genuinely in need of protection, in the form of the principle of non-refoulement. Codified in Article 33, it states that ‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’. The principle of non-refoulement was described by the drafting committee of the Convention as ‘an exceptional limitation of the sovereign right of states to turn back aliens to the frontiers of their country of origin’ 53 and is often regarded as the cornerstone of refugee law, in that it is the starting point for all asylum claims and opens up the way for

49 Gammeltoft-Hansen (2011) pg.25-26
50 1951 Convention relating to the status of refugees Art. 1 A (2)
51 1967 Protocol relating to the status of refugees Art.1 (2)
52 Mole and Meredith (2010) pg.9
53 Gammeltoft-Hansen (2011) pg.14
the other rights in the Convention to be claimed.\footnote{Gammeltoft-Hansen (2011) pg.44} The constraints that the non-refoulement principle places on a State’s right to exercise its sovereignty has caused many tensions since the introduction of the 1951 Convention and has resulted in States creating a number of ways to avoid the principle of non-refoulement. States have restricted access to their territories and their borders through the building of fences, they have used sea vessels to intercept asylum seekers at sea before reaching their own territorial waters, and have outsourced their migration control to other countries.\footnote{Gammeltoft-Hansen (2014) pg.577} Perhaps the most dynamic of measures to circumvent the principle of non-refoulement requirement has been the use of designating other countries ‘safe’ so that asylum seekers can be returned without even having their claims assessed at all. Case law from human rights courts, however, have often found these measures to be in violation of the principle of non-refoulement, as they do not provide for the proper safeguards to ensure that someone is not returned to an area where they could face persecution.\footnote{See: Sharifi and others v. Greece and Italy (2009), F.H. v. Greece (2014), M.S.S. v. Belgium and Greece (2011)} All of the measures mentioned above have been employed in the current crisis affecting Europe and will be examined more closely in section 4.

Further international human rights law regarding asylum can be found in the 1984 Convention Against Torture (CAT). Article 3 states that ‘No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture’. Therefore, regarding human rights law, it is illegal to return someone seeking asylum to a country where they would be at risk of torture, cruel, inhuman, or degrading treatment or punishment. The 1951 Convention places limitations on the principle of non-refoulement in Article 33(2) for those who 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 judgement of a particularly serious crime, constitutes a danger to the community of that country’, therefore making the principle of non-refoulement under the 1951 Convention not an absolute right. However, Article 3 of CAT includes no such limitations, and due to its nature as a norm of \textit{jus}
cogens and international customary law, works to prevent refoulement in any circumstances whereby the person in question could be subjected to the risk of torture, cruel, inhuman, or degrading treatment or punishment.\textsuperscript{57} In addition, the prohibition of torture as an absolute right can also be found in Article 7 ICCPR and Article 3 ECHR, therefore showing that despite the limitation placed on the principle of non-refoulement in the 1951 Convention, a State may still not expel a person who is at risk of facing harm under international human rights law.

\subsection{Europe as a region}

Europe itself has a long history of people seeking international protection; however, since the end of the Cold War and the greater freedom of movement that this accompanied, European States have been finding it increasingly difficult to commit to their obligations under international and regional law.\textsuperscript{58} The increase in smugglers, the globalisation of refugee flows, and the increased avoidance of traditional border controls has resulted in a tightening of national asylum systems and an increase in border controls.\textsuperscript{59} States have consistently been tightening their regulations and procedures in order to deter asylum seekers from coming to Europe, and a number of southern Mediterranean States have used ‘push backs’ to manage the arrivals of migrants by intercepting them at sea.\textsuperscript{60} In addition, under international law, States are responsible for examining asylum claims made in their territory or jurisdiction, however European States in particular, will deny an asylum seeker access to national protection determination processes if they could have ‘obtained effective protection elsewhere’. States justify this practice on the basis that ‘an individual genuinely fleeing persecution would seek asylum in the first non-persecuting State, and that any ‘secondary’ movement is therefore for migration, rather than protection purposes’.\textsuperscript{61}

The European legal regime concerning the right to seek asylum comprises of the 1951 Convention relating to the status of refugees and its 1967 Protocol, the Law of the

\begin{itemize}
\item \textsuperscript{57} Duffy (2015) pg. 530
\item \textsuperscript{58} Mole and Meredith pg.12-13, Gammeltoft-Hansen (2014) pg.576
\item \textsuperscript{59} Gammeltoft-Hansen (2014) pg.576
\item \textsuperscript{60} Mole and Meredith pg.103
\item \textsuperscript{61} Goodwin-Gill and McAdam (2007) pg.392
\end{itemize}
European Union, the 1984 Convention Against Torture, and the 1950 European Convention on Human Rights.\textsuperscript{62} The 1951 Convention has more recently been performed in the European context through the ECHR in particular, and other general human rights instruments. The 1951 Convention remains effective and essential, however, in providing additional benefits to people who are trying to claim asylum, due to its nature of \textit{lex specialis} and the fact that the ECHR contains no right to seek asylum.\textsuperscript{63}

Despite the wide range of legal instruments that the EU has produced on asylum, there are still many individuals who fall outside of the scope of these, but are covered by the ECHR which is less limited and protects everyone in theory without distinction.\textsuperscript{64} Despite the ECHR not containing a right to seek asylum, the Court can, and has used, provisions contained within the ECHR that will help protect the procedural rights of asylum seekers. For example, Article 3 on the prohibition of torture, which is the article that has primarily been used by the Court, has been used to ensure that no one will be returned to a country where this right could be violated or to ensure that the treatment asylum seekers receive during the processing of their application does not violate this provision.\textsuperscript{65} Article 5 on the right to liberty and security has been used with regards to conditions under which an asylum seeker may be placed in detention. Article 13 on the right to an effective remedy has been used often by the Court in conjunction with Article 3 to ensure that if an asylum seekers rights have been violated they will have the right to seek an effective remedy for this. In addition, Protocol 4 to the ECHR, contains the prohibition of the collective expulsion of aliens in Article 4 which has been used by the Court a number of times.\textsuperscript{66}

The Court’s case law has also established that ‘Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens’. However, The

\textsuperscript{62} Mole and Meredith pg.7
\textsuperscript{63} Ibid pg.11
\textsuperscript{64} Ibid pg.8
\textsuperscript{65} See: Sharifi and others v. Greece and Italy (229), M.S.S. v. Belgium and Greece (2011)
\textsuperscript{66} See: Sharifi and others v. Greece and Italy (2009), Becker v. Denmark (1975)
Court also noted that States must comply with other international obligations such as the right to life, prohibition of torture, right to a fair trial etc.\(^{67}\)

### 3.3 European Union asylum law

European Union law regulates asylum-related issues in 28 Member States, and was established in the aftermath of the Second World War. The original aim of the EU was to foster economic cooperation, and has since evolved into an organisation that spans a number of policy areas. The EU is based on the rule of law and it is founded entirely on treaties which have been democratically agreed by Member States.\(^{68}\)

The relevant asylum law of the EU consists of the Schengen and Dublin Conventions, as well as a number of different Regulations and Directives. Each of the main EU asylum legal instruments will be examined in turn in order to provide a concrete overview of the EU asylum system and the right to seek asylum within it.

The Charter of Fundamental Rights of the European Union, adopted in 2000, states in Article 18 that: ‘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’, thus incorporating the 1951 Convention into the EU’s own law. Despite stating a right to asylum, the article still limits it to a procedural right to applyseek asylum, rather than a substantive right to obtain it.\(^{69}\)

#### 3.3.1 Schengen system

The EU’s Schengen system dates back to 1985 with the Schengen Agreement and has been updated and revised since then to encompass more countries and more procedures. Key rules of the Schengen framework include the removal of checks on persons at the internal borders, a common set of rules applying to people crossing the external borders of the EU Member States, the harmonisation of conditions of entry and of the rules on visas, enhanced police cooperation, and the establishment and development of the Schengen


\(^{68}\) European Union, 'The EU in brief'

\(^{69}\) Goodwin-Gill and McAdam pg.367-8
Information System (SIS). The Schengen Information System represents a method to balance both freedom and security by cooperation and coordination between police and judicial authorities of Member States. There are now 26 Signatory countries to the Schengen acquis including Austria, Belgium, Czech Republic, Estonia, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Liechtenstein, Luxembourg, Malta, Norway, Portugal, Poland, Slovenia, Slovakia, Spain, Sweden, Switzerland and The Netherlands.

In 2006, the Schengen Borders Code was introduced to improve the legislative part of Schengen by setting out specific rules on border control. Due to the fact that the establishment of the Schengen area was a bold move by Member States as it required them to relinquish some of their sovereign powers i.e. the right to control who enters and leaves their territory, the Schengen Borders Code has now integrated immigration and asylum ‘into a policy framework that defines and regulates security issues arising from the abolition of internal border control’.\(^70\) According to Huysmans, the relinquishment of sovereignty to the EU system has caused concern over the security implications of free movement between Member States and the issues that arise with regards to immigration and asylum and has resulted in a ‘securitization of migration in the EU’.\(^71\) The Schengen Borders Code can be regarded as part of this ‘securitization’ as it sets out rules to ensure that there can be free movement without damaging the sovereignty of individual nations.

The Code applies to anyone crossing the external borders of all EU countries, except the UK and Ireland, and the internal borders of the Schengen area. The rules specify that external borders can only be crossed at official border crossing points and during fixed opening hours.\(^72\) When crossing, EU citizens must undergo a minimum check, whereas non-EU citizens are subject to thorough checks.\(^73\) Certain conditions must be met for non-EU citizens to gain entry, including having a valid travel document, a valid visa, a purpose for travelling, no alert for refusing entry under SIS, and must not be considered a ‘threat to

\(^{70}\) Huysmans pg.753  
\(^{71}\) Ibid pg.758  
\(^{72}\) Regulation (EC) No 562/2006 Art. 4 (1)  
\(^{73}\) Ibid Art. 7 (3)
public policy, international security, public health or the international relations of any of the Member States’. If the conditions are not met then the person can be refused entry, unless special provisions, such as humanitarian reasons, apply. In addition, under the coordination of Frontex, EU countries must assist each other with the effective application of border controls.

With regards to internal borders, the Code states that any person, irrespective of nationality, may cross internal borders at any point without checks being carried out. However, if there is a ‘serious threat to public policy or internal security’ then these countries may exceptionally reintroduce controls at its internal borders for no more than 30 days or for the foreseeable duration of the serious threat. The Code notes, however, that this type of action must be seen as a last resort.

Regarding the current crisis in Europe, a number of internal Schengen countries have used Article 20 to reintroduce temporary controls on their borders and are now considering extending these controls for two years. The provision on exceptionally reintroducing controls at the internal borders highlights the interplay between State’s conforming to the EU system whilst still wishing to retain a level of sovereign decision making with regards to who may enter or leave their territory.

### 3.3.2 Dublin system

After the establishment of the Schengen system and the abolishment of internal borders, there was a fear that asylum seekers would be able to ‘travel freely around the area of free movement’ which would be a threat to the system. The Dublin system was therefore established as part of a series of complementary measures to safeguard the abolition of internal borders and ensure that illegal immigration would still be controlled. The main aim of the Dublin Regulation is to ‘identify a single responsible State and to require it to

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74 Regulation (EC) No 562/2006 Art. 5  
76 Regulation (EC) No 562/2006 Art. 14-16  
77 Ibid Art. 20  
78 Ibid Art. 23  
79 Morgades-Gil (2015) pg.434  
80 Morena-Lax (2012) pg.2
determine the asylum claim, thereby reducing the likelihood of multiple successive applications by asylum seekers, and eliminating asylum seekers ‘in orbit’. In addition, the Regulation aims to ensure that each claim gets a fair examination in whichever Member State it is lodged. However, this is based on the assumption that if asylum laws and practices are based on the same common standards in all EU States then all asylum seekers would enjoy similar levels of protection in whichever EU State they claim asylum. Sadly, in reality this is not the case.

The operation of the Dublin system is facilitated by different mechanisms, such as the EURODAC regulation which collates and compares the fingerprints of asylum seekers in order to establish which Member State is responsible for that person, and DubliNet, which is a network for secure electronic data transmission. Responsibility is determined according to a hierarchy of criteria, including the presence of family members, possession of a valid residence document or visa, and the first Member State entered irregularly. Normally, the State where the asylum seeker first entered the EU is the responsible State, resulting in a disproportionate burden on the southern EU States.

Dublin III replaced Dublin II in 2013 and has aimed to improve on the latter by clarifying the rights of asylum seekers and obligations of States, covering the protection of minors and dependents in more depth, and including an early warning system. However, the responsibility criteria have remained the same and the system continues to be based on the assumption that all EU Member States’ asylum systems are equal.

The Regulation also includes discretionary clauses such as the sovereignty clause and the humanitarian clause. The sovereignty clause allows for States to examine any application for asylum presented to them if they should so choose, while the humanitarian clause allows for a state to accept any application on humanitarian or cultural grounds. Due

81 Goodwin-Gill and McAdam pg.401
82 UNHCR ‘The Dublin Regulation’
83 Morgades-Gill pg.435
84 Goodwin-Gill and McAdam pg.401
85 UNHCR ‘The Dublin Regulation’
86 Morgades-Gil pg.436
to their nature of being discretionary, however, there is no actual obligation on a state to use these in certain circumstances.\footnote{Moreno-Lax pg.6}

It was not until 2011 when the ECtHR revisited its jurisprudence on the Dublin transfers and re-established the ‘refutability \textit{in concreto} of the presumption of safety underpinning the Dublin regime’. M.S.S. v. Belgium and Greece concerned an Afghan asylum seeker who had fled Kabul and entered the EU through Greece, and subsequently travelled to Belgium where he applied for asylum. As per the Dublin rules, Belgium transferred him back to Greece where he experienced inadequate detention facilities and ended up living on the streets with no material support. The Court found Greece to be in violation of Article 3 ECHR due to the degrading detention and living conditions that the applicant endured, and in violation of Article 13 taken in conjunction with Article 3. With regards to the Dublin Regulation, the Court stated that ‘when applying the Dublin Regulation, States must make sure that the intermediary country’s asylum procedure affords sufficient guarantees to avoid removal without an evaluation of a risk of \textit{refoulement}’.\footnote{Ibid pg.25} In addition, the Court found Belgium to be in violation of Article 3 for both direct and indirect refoulement. Overall, the case highlighted that the Dublin system of first country of arrival cannot simply be reliable enough to forego a close and rigorous examination of each individual case. Furthermore, the Court found that the ‘activation of the sovereignty clause was mandatory’ in cases like this ‘in which the transfer of asylum seekers to an EU member state would place them at serious risk of treatment contrary to Article 3 of the ECHR’.\footnote{Morgades-Gil pg.439}

Problems with the Dublin system include a failure by States to implement the regulation properly, applicants being denied access to an asylum procedure in the responsible State, and denial of access to an effective opportunity to appeal a transfer/deportation decision etc. It must be noted also, that a State is not absolved of its responsibilities under international law, with regards to the principle of non-refoulement, if it legally transfers a person to another State to have their asylum application processed, but this State then re-
foules the individual to a situation of persecution or ill-treatment. Furthermore, a 2008 evaluation by the European Parliament stated that if the system is not harmonised then it will continue to be unfair to both asylum seekers and certain Member States, due to the system putting increased pressure on the external border regions. Despite the introduction of Dublin III in 2013, with the crisis and situation today, the problems within the system remain glaringly obvious.

3.3.3 Steps towards a Common European Asylum System

The EU has sought to create a Common European Asylum System (CEAS) based on the 1951 Convention and Protocol with the main aim of Member States applying common criteria for establishing those that need international protection.

The 2011 Qualification Directive incorporates and interprets the 1951 Convention and provides legally binding criteria for the identification of refugees. It also provides for subsidiary protection, and establishes a legal entitlement to significant substantive and procedural benefits for those who fall within its ambit. Its main aim is to ‘ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection and… to ensure that a minimum level of benefits is available for those persons in all Member States’. It can be regarded as one of the most important instruments of the EU asylum regime and an ambitious attempt to combine refugee law and human rights law.

The Qualification Directive was the first binding regional agreement concerning the determination of ‘complementary protection’ needs and ‘prohibits Member States from returning individuals to the death penalty or execution; to torture or inhuman or degrading treatment or punishment in the applicant’s country of origin; or to a ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate vio-

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90 Goodwin-Gill and McAdam pg.402
91 UNHCR ‘The Dublin Regulation’
92 Goodwin-Gill and McAdam pg.60
93 Ibid pg.40, Mole and Meredith pg.241
94 Directive 2011/95/EU Preamble (12)
95 Goodwin-Gill and McAdam pg.41
96 ‘Complementary protection’ concerns a ‘States’ protection obligations arising from international legal instruments and custom that complement – or supplement – the 1951 Convention’.
lence in situations of international or internal armed conflict’” (emphasis added).\textsuperscript{97} The last point is of particular importance with regards to the current situation in Europe, as the majority of refugees are coming from Syria which is now in its fifth year of conflict. However, in the 2007 Elgafaji v. The Netherlands case, the court found that Article 15(c) of the Qualification Directive is ‘only applicable in extraordinary cases in which the degree of indiscriminate violence characterising the armed conflict reaches such a high level that substantial grounds are shown for believing that a civilian would, solely on account of presence, face a real risk of being subject to a serious threat’.\textsuperscript{98} This therefore sets a high threshold and limits those that would qualify for such protection. One can argue, however, that due to the current situation in Syria, those fleeing would be entitled to refugee status, and if not, should be entitled to complementary protection within the meaning of Article 15(c). A drawback of the Directive, however, involves the limitation to ‘third country nationals’, therefore only applying to those that are non-EU citizens.\textsuperscript{99}

The 2001 Temporary Protection Directive establishes a mechanism that can be triggered during a mass influx of asylum seekers, and lays down the minimum standards for dealing with such an influx.\textsuperscript{100} In general, ‘temporary protection’ with regards to asylum law refers to the ‘exceptional, emergency, time-bound response of granting protection to a mass influx of asylum seekers fleeing armed conflict, endemic violence, or a serious risk of systematic or generalized violation of human rights’. For Europe, however, despite EU law recognising that national asylum systems being unable to deal with a mass influx of asylum seekers is a common feature of these influxes, it is not a prerequisite for temporary protection. The Directive grants a status of a ‘middle ground’ between an asylum seeker and a Convention refugee by providing an entitlement to housing, social welfare, some medical care, and access to education, and promoting a balancing of efforts between EU Member

\textsuperscript{97} Qualifications for subsidiary protection found in Directive 2011/95/EU Art. 15  
\textsuperscript{98} Elgafaji v. The Netherlands (2007)  
\textsuperscript{99} Goodwin-Gill and McAdam pg.61  
\textsuperscript{100} Ibid pg.40
States. In addition, the Directive does not take effect unless the Council of the EU designates a particular flow as constituting a ‘mass influx’, and has thus far, never been used.\textsuperscript{101}

Despite never having been used, the Temporary Protection Directive is important as it shows an ambitious response to a large-scale influx of asylum seekers. However, due to the current situation in Europe, whereby the crisis is now the largest witnessed since the Second World War, the question of why this Directive has not been used is therefore raised. The situation today fulfils all of the criteria for the Directive to be triggered i.e. we are witnessing a ‘mass influx of asylum seekers’ who are ‘fleeing armed conflict, endemic violence, or a serious risk of systematic or generalized violation of human rights’, with particular regards to those who are coming from Syria, Iraq, and Afghanistan. It would seem that the lack of use of this Directive can be found in a lack of political will on the part of Member States and issues surrounding national sovereignty. By triggering this Directive, the Council of the EU would be greatly infringing on the sovereignty of Member States and their right to control who enters and leaves their territory. In addition, at the beginning of the crisis, the EU attempted to establish a compulsory burden sharing scheme between Member States to deal with the influx of refugees. The scheme was met with large resistance, however, forcing the EU to change the scheme from compulsory to voluntary, and almost a year since the establishment of this, the scheme has clearly failed.\textsuperscript{102} Despite efforts by the EU to facilitate burden sharing, the question still remains as to why, when there is a legally binding document available that would make burden sharing compulsory, they have not used it and instead have focussed on voluntary measures which have largely failed.

In addition, three EU Directives are of particular importance for the CEAS, including: the Reception Conditions Directive, Asylum Procedures Directive, and Return Directive.

The 2013 Reception Conditions Directive requires Member States to provide basic support needs to asylum seekers whilst awaiting the determination of their claims and spec-

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\textsuperscript{101} Goodwin-Gill and McAdam pg.342-3
\textsuperscript{102} Nikolaj Nielsen, EUobserver 15/1/16 ‘EU asylum law to include ‘distribution key’’
\end{flushright}
ifies the conditions surrounding the determination of detaining an applicant or not.\textsuperscript{103} This requires the provision of a “dignified standard of living and comparable living conditions in all member states”. The Directive covers issues such as the right to information and documentation, the provision of accommodation and financial support, access to employment, and freedom of movement. In addition, it covers the special treatment of vulnerable categories of people i.e. minors, unaccompanied children, and survivors of torture etc.\textsuperscript{104} The aim of the Directive is to harmonise the reception conditions for applicants in order to limit the secondary movement of asylum seekers through the EU.\textsuperscript{105} The newest version of this Directive written in 2013, replaced the one from 2003 by extending its scope to cover those who apply for subsidiary protection as well as asylum seekers.\textsuperscript{106}

The 2013 Asylum Procedures Directive aims to ‘further develop the standards and procedures in Member States for granting and withdrawing international protection’,\textsuperscript{107} and is linked to and compliments the 2011 Qualification Directive. It includes provisions for those who wish to make an asylum application at transit zones or border crossings, that they shall be given the information to enable them to do so\textsuperscript{108}, and provides for the extradition of an applicant to a third country so long as such extradition would not result in the violation of the non-refoulement principle, whether direct or indirect.\textsuperscript{109} The Procedures Directive was part of the first phase of CEAS under the Amsterdam Treaty, and established a ‘harmonized approach by EU Member States to the minimum procedural standards for granting and withdrawing refugee status’. In addition, it was the first multinational instrument containing rules on the application of a safe third country, a safe country of origin, and country of first asylum.\textsuperscript{110}

Article 10 lays out the requirements for examining applications and ensures that the determining authority must first assess if the applicant is entitled to refugee status, and if

\textsuperscript{103} Directive 2013/33/EU Art.8-11  
\textsuperscript{104} Ibid Chapter IV  
\textsuperscript{105} Ibid Preamble (12)  
\textsuperscript{106} Ibid (13)  
\textsuperscript{107} Directive 2013/32/EU Preamble (12)  
\textsuperscript{108} Ibid Art. 8  
\textsuperscript{109} Ibid Art. 9 (3)  
\textsuperscript{110} Goodwin-Gill and McAdam pg.396-7
not, if they would qualify for subsidiary protection. Articles 35-39 deal with the concepts of ‘first country of asylum’, ‘safe country of origin’, ‘safe third country’ and ‘European safe third country’. The articles lay down the standards for considering another country ‘safe’. For example, Article 38 states that the safe third country concept can be applied only if the applicants life and liberty would not be threatened on account of race, religion, nationality, membership of a particular social group or political opinion, if there would be no risk of serious harm, the principle of non-refoulement would be respected, the prohibition on torture, cruel, inhuman or degrading treatment would be respected, and the applicant would have the possibility to request refugee status in the third country. It has been criticised as a means to deny asylum seekers access to asylum procedures and to facilitate their transfer to countries outside of the EU.\textsuperscript{111}

Finally, the 2008 Return Directive aims to set out common standards and procedures in the Member States for returning irregularly staying third country nationals, as long as the measures are in accordance with international refugee and human rights law, most especially with regards to the principle of non-refoulement.\textsuperscript{112} The Directive works in accordance with the Schengen Borders Code for those applicants who have not fulfilled the conditions of entry specified within the Code.\textsuperscript{113} Three places are specified as to where someone may be returned to, including the persons’ country of origin, a transit country, or another third country.\textsuperscript{114} The Directive also lays out the conditions for both voluntary or forced return, highlighting that ‘coercive measures’ may be used so long as they are ‘as a last resort’, ‘proportionate’, and do not ‘exceed reasonable force’.\textsuperscript{115} The most controversial aspect of this Directive, however, has been it fixing a maximum period of detention at 18 months (an increase from 6 months).\textsuperscript{116} The Return Directive is the most accepted directive by EU countries, most likely due to its nature of being about the returning of irregular third country nationals, and can be regarded as the directive which instead of infringing

\begin{thebibliography}{9}
\bibitem{111} Mole and Meredith pg.242
\bibitem{112} Directive 2008/115/EC Art. 1
\bibitem{113} Ibid Preamble (25)
\bibitem{114} Ibid Art. 3 (3)
\bibitem{115} Ibid Art. 7 and 8 (4)
\bibitem{116} Ibid Art. 15 (5) and (6).
\end{thebibliography}
on the States’ sovereignty, it in fact hands them back some of their sovereign decision-making powers.

3.3.4 How the CEAS works in theory and practice

In theory, the Common European Asylum System aims to incorporate the 1951 Refugee Convention and international human rights law into the EU asylum law system. Through a number of different Directives, the CEAS comprises a vast regime which aims to harmonise all aspects of the asylum application procedure in all EU States. Both the Schengen and Dublin systems aim to facilitate an EU where there is freedom of movement between all internal countries, while also safeguarding States’ rights to control asylum through establishing mechanisms in order to determine which country is responsible for a particular asylum seeker. Overall, the CEAS’ main aim is to ensure that an asylum seeker would have the freedom to exercise their right to seek asylum within the EU and would be able to receive the same standards and procedures in whichever EU State their application would be processed.

In practice, however, there are a number of issues within the CEAS that impede its ability to ensure that an asylum seeker can freely and effectively exercise their right to seek asylum. For example, the Dublin regime, although meant to help determine fairly which Member State is responsible for an asylum application, puts more pressure on the southern States and less pressure on the northern States due to the first country of arrival rule. Due to the geography, southern European States are more likely to be the first country of arrival as they are closest to the areas where refugees are more likely to arrive from i.e. the Middle East and North Africa. In addition, despite the aim of CEAS, not all country’s asylum systems function identically which causes problems with regards to Dublin and the removal of asylum seekers to their first country of arrival. For example, the number of cases that have highlighted the deficiencies in the Greek asylum system and the violation of asylum seekers’ rights that have occurred by other EU States sending them back to Greece. This also comprises issues over the principle of non-refoulement and the sovereignty clause, as well as issues with the Return Directive and categories of ‘safe third countries’.

Overall, the aim of CEAS was to harmonise asylum procedures in all EU Member States by incorporating international refugee and human rights law with EU law. In reality,
however, there are a number of holes in the system which have become more and more obvious with the current refugee crisis in Europe. The next section will go on to analyse these deficiencies and the consequences that they are having for the right to seek asylum in the EU today.

4 Current measures in place and the consequences for the right to seek asylum

This section aims to provide an outline of the various measures EU States and the EU itself have taken throughout the refugee crisis, from September 2015 to March 2016. The focus will be on the consequences of these measures for the right to seek asylum in the EU. Each aspect of the crisis from September 2015 to March 2016 has been grouped into similar measures and will be assessed in turn with regards to the consequences for the right to seek asylum in the EU, beginning with unilateral border control measures by EU Member States, the practice of returning/sending back asylum seekers, and finally EU-wide measures.

4.1 Border control

Between September and March the responses to the massive influx of refugees by the countries along the Balkan route have been mixed but have followed a general trend. In the beginning, Balkan countries, mainly Hungary, responded with the raising of fences around their borders and increasing border controls in order to restrict asylum seekers’ access to their territories. The end of 2015 and the beginning of 2016 saw the introduction of localised country-specific border controls, which has gradually resulted in a regional-wide modification of the Schengen system in order for countries to control their borders. By the end of my research period, the situation seemed to have come full circle, with border closures and a fence being erected along the Greece/Macedonia border leaving thousands of asylum seekers stranded in Greece. Each phase shall be examined in turn as to what has happened and the consequences of this for the right to seek asylum.
4.1.1 Raising of fences and border closures

On the 5th September 2015, the first border fence was built by Hungary along their border with Serbia. Hungary was one of the first countries to state that they did not want refugees for a number of reasons, mainly focussing on the idea that refugees would ‘threaten Europe’s Christian culture’. The fence along their border with Serbia was seen as a symbol of Hungary’s hostility towards outsiders and fits in with Huysmans’ theory on the ‘securitization of migration’. Hungary’s response fits with Huysmans’ observations on cultural security and migration, whereby the presence of asylum seekers and immigrants raises the issue of cultural identity and of belonging. It raises questions of whether the presence of refugees may change the national cultural homogeneity, which in the case of Hungary is seen as their ‘Christian identity’ as the majority of refugees entering Europe were Muslim. Huysmans emphasises the different ‘discourses representing migration as a cultural challenge to social and political integration’ becoming an ‘important source for mobilizing security rhetoric and institutions’ which can be seen exactly as what Hungary was doing near the beginning of the crisis. In addition, Hungary claimed that the fence was compliant with EU regulations - Hungary is part of Schengen and one of the external border countries and therefore does have an obligation according to the Schengen Borders Code to control the external borders of the Schengen area. However, closing off their border altogether was not included as one of those measures, Article 13 provides for the refusal of entry with regards to each individual case but not on a collective scale. Despite the ECtHR ruling in the case of Tomic v. the UK, that States have the right to control the entry, residence and expulsion of aliens, this does not cover the possibility of a State entirely closing off their borders as this would hinder an asylum seeker’s right to seek asylum.

Hungary’s border closure with Serbia resulted in a dramatic increase in the numbers of asylum seekers travelling through Croatia. As a response, Croatia closed its borders on the 18th September 2015. The Croatian Prime Minister stated that Croatia ‘cannot register

117 Leo Cendrowicz, The Independent 5/9/15 ‘Viktator’ displays his customary brutish bluster’
118 Huysmans pg.762
and accommodate these people any longer. They will get food, water and medical help, and then they can move on. The European Union must know that Croatia will not become a migrant ‘hotspot’. We have hearts, but we also have heads’. Croatia is not yet a member of the Schengen area and is therefore not bound by the Schengen Convention and Schengen Borders Code, however it is party to the EU and the ECHR so is obligated under these legal regimes and must respect the human rights of those in its territory. Therefore, their provision of food, water and medical help would have been in line with their human rights obligations. Their response to the influx being too large for them to register and accommodate the asylum seekers, however, fits in with Huysmans’ theme of welfare, security and migration: due to the EU having experienced a number of economic recessions and increased unemployment in recent years, it has resulted in immigrants and asylum seekers being seen as rivals in society to national citizens, alongside the idea that the EU should first and foremost provide benefits and welfare for its own people. The Croatian Prime Minister’s quote saying ‘we have hearts, but we have heads’ resonates with this part of Huysmans’ theory well. However, it must be noted that Huysmans is Dutch and was writing from this viewpoint. The standard of living between The Netherlands and Croatia is different and the presence of a mass influx of asylum seekers was likely to put more pressure on Croatia and could therefore be seen as more of a real economic challenge, rather than simply being a political issue, thus justifying the government’s response to some extent.

On the 16th October, Hungary announced that it was sealing its border with Croatia and by the 19th October, thousands of asylum seekers were stranded at the borders in the Balkans due to the increasing number of border closures. Slovenia had decided to restrict the numbers allowed into the country to 2,500 a day, as a response to Austria cutting the numbers allowed into their territory, which overall resulted in thousands being stranded in Croatia. Along the Croatian/Slovenian border, lines of police and barriers blocked the way into Slovenia, and the UNHCR estimated that more than 10,000 asylum seekers were

120 Tony Paterson, The Independent 19/9/15 ‘Europe’s leaders ‘confident’ of deal next week to take 120,000 refugees’
121 Huysmans pg.767
122 Ibid pg.769
123 BBC News 16/10/15 ‘Migrant crisis: EU backs Turkey action plan’
also stranded in Serbia and barred from entering Croatia. Ten days later on the 29th October, there were more border closures between Slovenia and Austria, highlighting a domino effect of border closures in the Balkans region. Two weeks later, on the 12th November, Slovenia announced that it was building a razor wire border fence.

The overall consequences of the border fences and closures in the Balkans region between September and November 2015, first and foremost concern the limiting of routes available for asylum seekers, ultimately resulting in the prevention of them being able to exercise their right to seek asylum. In Huysmans’ work, he was talking principally about western European States, however his theory is now relevant with regards to the Balkans and southern European States. For Huysmans, migration is ‘increasingly presented as a danger to public order, cultural identity, and domestic and labour market stability’ all of which can be seen to have been used by the Balkan States, most especially Hungary. Emma Haddad highlighted that refugees have the potential to ‘bring alien doctrines that were seen as seditious and potentially rebellious towards local interests and identities’, a sentiment that has been echoed by Hungary and Croatia in the beginning months of the crisis. Furthermore, the border closures of States in response to the mass influx of refugees can be regarded as States exercising their claim to sovereignty and right to control their borders, seen by Haddad as a way for States to ‘continue to impede the implementation of any successful policy with regard to finding refugees a safe haven’.

The prevention of access to a State’s territory also raises issues under the principle of non-refoulement, as to whether a State refusing entry to its territory could result in a violation of the principle. There has long been a discussion as to whether the principle applies extra-territorially, or applies only when an asylum seeker is physically on the territory of a State. The countries that have been closing their borders could be argued to be restricting access to their territory so that their international obligations under the principle of non-

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124 BBC News 19/10/15 ‘Migrant crisis: Thousands stranded at Balkan borders’
125 Jamie Merrill, The Independent 29/10/15 ‘This is not human… we are not animals’
126 Lorne Cook, The Independent 12/11/15 ‘Take refugees back, EU urges African leaders’
127 Huysmans pg.752
128 Haddad pg.308
129 Ibid pg.320
refoulement do not apply. Gammeltoft-Hansen argues that ‘the traditional assumption that states remain free to exercise sovereign powers within, and only within, their own territory’ is being challenged and has in turn prompted questions on ‘how to organise sovereign responsibilities relating to national and international human rights obligations’.\textsuperscript{130} For Gammeltoft-Hansen, territory under international law, serves as the ‘expression of national sovereignty’\textsuperscript{131}, and the fences being built by Hungary and Slovenia are very symbolic of this notion. Immigration and asylum can be regarded as an example of how sovereignty is waning as a result of globalisation (i.e. international and regional law superseding the national laws and rights of States), and States can be regarded as trying to reclaim this sovereignty, and the most symbolic form of this can be seen through the building of fences along a country’s border.\textsuperscript{132} However, as highlighted by Wendy Brown, the building of fences and walls does little in effect to stop migration. For Brown, the use of building fences and walls is to settle anxieties over migration through the use of visual effects\textsuperscript{133} - giving the illusion that a State still has control over its borders and sovereignty through the very symbolic image of a border fence. In addition, Brown highlights how ‘walls often compound the problems they putatively address’, for example they make migration more difficult and expensive which increases one-directional migration. Secondly, walls help to create a more sophisticated smuggling economy, and thirdly, ‘border intensifications and responses to them render the border zone itself an increasingly violent space’.\textsuperscript{134}

Overall, these border controls and fences increase the likelihood of asylum seekers using different, illegal, and potentially dangerous routes to gain access to Europe, resulting in an increase in the profit found in human smuggling and the opening up of new migratory routes.\textsuperscript{135} This in turn can result in a violation of a number of human rights, including but not limited to, the right to life, prohibition of torture, cruel, inhuman or degrading treatment, right to liberty and security, and right to an effective remedy.

\textsuperscript{130} Gammeltoft-Hansen (2011) pg.17
\textsuperscript{131} Ibid pg.21
\textsuperscript{132} Brown (2010) pg.109
\textsuperscript{133} Ibid
\textsuperscript{134} Ibid pg.112
\textsuperscript{135} Gammeltoft-Hansen (2011) pg.18
4.1.2 Border controls and modification of Schengen

At the beginning of 2016, different reasons and pressures can be seen to have resulted in an increase in border controls. The northern States such as Sweden, Denmark and Germany were beginning to realise the huge number of asylum seekers that had entered their territories during 2015 and the pressure that this was putting on their countries. Therefore border controls were seen as necessary to limit and control the numbers that would arrive in 2016.\(^{136}\)

In the first week of January, Norway stated that refugees coming from other Schengen areas without visas would be turned back\(^ {137}\), and on the 4\(^{th}\) January, Sweden introduced identity checks for travellers from Denmark in order to reduce the numbers of asylum seekers arriving.\(^ {138}\) The checks were to be made on all travellers crossing the Oresund Bridge that links Denmark to Sweden, by either train, bus or ferry services. If travellers did not have the necessary documents, then they would be refused entry. Sweden had secured a temporary exemption from the Schengen Agreement in order to impose the border controls, and the Swedish infrastructure minister had stated that the new rules would be changed if there was a dramatic fall in the number of asylum seekers entering.\(^ {139}\) As a response to Sweden’s new border controls, Denmark tightened its controls on its border with Germany on the 4\(^{th}\) January as well. The Danish Prime Minister stated that it was not a ‘happy moment’ but that Denmark ‘must respond’ to Sweden’s restrictions. The integration minister for Denmark stated that the controls would initially focus on the southern border with Germany but could be extended to all of Denmark’s borders, referencing that the measures taken by Sweden had resulted in Denmark being ‘faced with a serious risk to public order and internal security because a very large number of illegal immigrants may be stranded in the Copenhagen area’.\(^ {140}\)

\(^{136}\) Despite a reduction in the numbers arriving in Europe during the winter months, there was still no end in sight to those arriving and fear that even more would begin to arrive as the weather improved.

\(^{137}\) BBC News 4/1/16 ‘Denmark responds to Swedish border checks with own controls’

\(^{138}\) Sweden had received more than 150,000 asylum applications in 2015.

\(^{139}\) BBC News 4/1/16 ‘Migrant crisis: Sweden border checks come into force’

\(^{140}\) BBC News 4/1/16 ‘Denmark responds to Swedish border checks with own controls’
Within the first couple of weeks of January, it was clear that the beginning of a domino effect with regards to the introduction of border controls was occurring, starting with the Scandinavian countries in the north. EU states began re-imposing temporary border controls one after the other, as provided for under Article 23 of the Schengen Borders Code. The article provides for the reintroduction of internal border controls ‘where there is a serious threat to public policy or internal security’ for a ‘limited period of no more than 30 days or for the foreseeable duration of the serious threat if its duration exceeds the period of 30 days’.

Nearing the end of January, Austria, which had received around 90,000 asylum applications in 2015, announced that it had decided to decrease the amount of applications it would accept in 2016, aiming to reduce the number to around 37,500. Serbia then responded by stating that they would limit the migrant passage through the country to those seeking asylum in Austria or Germany only.

Further south, after heavy fighting in Aleppo in Syria, at the beginning of February, tens of thousands of Syrians fled to the Turkish border, resulting in Turkey activating an emergency protocol allowing for the rapid processing of refugees. However, on the 8th February, it was reported that 35,000 Syrians were being refused entry at the Turkish border, receiving strong condemnation from Europe.

The head of the European Commission called for a summit on migration near the end of January after restrictions were introduced by Austria and Serbia over fears that the Schengen system could collapse as a result of the temporary border controls. France, which had re-introduced controls on its borders after the Paris attacks in November 2015, had since extended the controls by another three months and were set to expire on the 26th February. The French Prime Minister had stressed before the summit that Europe needed to

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141 Regulation (EC) No 562/2006 Art.23
142 BBC News 20/1/16 ‘Migrant crisis: Austria to slash asylum claims’
143 BBC News 5/2/16 ‘Syria civil war: Up to 70,000 refugees head to Turkey, says PM’
144 BBC News 8/2/16 ‘Syria refugee camps set up as Turkey limits entries’
145 BBC News 20/1/16 ‘Migrant crisis: Austria to slash asylum claims’
take urgent action to control its borders, stating that ‘if Europe is not capable of protecting its own borders, it’s the very idea of Europe that will be questioned’.  

During the summit, held in Amsterdam on the 25th January, several States requested prolonging their temporary border controls for as long as two years, as a response to the asylum seekers still arriving in Greece and heading north. Both Germany and Austria’s temporary border controls were set to end in May 2016, but under Article 26 of the Schengen Borders Code they could get EU permission to extend the controls until 2018. By this point, Germany, France, Austria, Denmark, Norway and Sweden, who are all part of Schengen, had put in place temporary border controls. In addition, Macedonia, although not a member of Schengen, had also put in place temporary border controls whereby they were only letting through migrants with Greek registration papers saying that their final destination was Germany or Austria.

By the end of February, Greece was on the brink of chaos due to the restrictions and temporary border controls introduced further north, resulting in the stranding of thousands of asylum seekers in Greece. Macedonia, in addition, had also drastically reduced the numbers of refugees it was allowing through its borders and had begun construction on a border fence, ultimately resulting in even further backlogs in Greece.

As a result of these measures, the number of routes for asylum seekers was increasingly becoming closed off, while the numbers of asylum seekers arriving in Europe continued. This increased lack of access to countries was making it increasingly difficult for asylum seekers to exercise their right to seek asylum. In addition, the trend of countries putting limits on the number of asylum applications they would process in 2016 raises questions on the legality of these measures. As has been asserted in Tomic v. the UK, each State has the right to control the entry, residence and expulsion of aliens, but under the 1951 Convention and Article 18 of the EU Charter of Fundamental Rights, a State must offer protection to those who are genuine refugees. Placing limits on the numbers of genu-

146 BBC News 22/1/16 ‘Migrant crisis: EU at grave risk, warns France PM Valls’
147 BBC News 25/1/16 ‘Migrant crisis: EU seeks more controls for Schengen borders’
148 BBC News 29/2/16 ‘Migrant crisis: Greece needs EU help to avoid chaos, says Merkel’
149 Continuing fighting and air strikes in Syria were producing more and more refugees.
ine refugees a country will accept raises the question of whether, then, such a State would expel those who are in genuine need of protection.

Overall, all of the measures up to this point (i.e. starting in the Balkans with the closure of borders and building of fences, followed by the vast numbers of asylum seekers reaching northern Europe and border controls being introduced) had culminated in increased pressure on the Schengen system, with countries trying to protect their internal borders and regain control over them. As a result, the Schengen system was being dismantled, with countries using their sovereignty to opt out of what they had agreed and an integral part of the EU system. The idea that countries would give up some of their sovereign powers for the Schengen system was no longer seen as acceptable, as the mass influx of asylum seekers was regarded as a risk to the internal security of Member States and therefore free movement between the internal borders was no longer feasible from a security perspective. The use of Articles 23-26 of the Schengen Borders Code was a way for States to legally take back some of their sovereign power and protect their borders. For asylum seekers, however, these measures only resulted in adding to the number of barriers in place for them, and their ability to exercise their right to seek asylum was being more and more restricted. In addition, the closing off of borders in the more northern States along the Balkan route resulted in increased pressure on the more southern countries, as it was becoming more difficult for asylum seekers to claim asylum up north, resulting in bottlenecks, most especially in Greece. Therefore, the entire premise of the Schengen and Dublin system, to allow free movement while still ensuring that there is a responsible State for each asylum seeker, was starting to be dismantled.

4.2 Returning/sending back asylum seekers

Beginning at the end of 2015 and continuing into the beginning of 2016, EU States began implementing policies of returning or sending back asylum seekers that had reached their territories. Although these measures had been allegedly occurring in Turkey, the majority had been implemented by Scandinavian and northern European States. These measures raise serious issues with regards to the principle of non-refoulement, which will be discussed alongside the developments.
Near the end of December 2015, Amnesty International (AI) and other aid organisations reported that Turkey had been rounding up Syrian migrants and sending them to detention centres. According to AI, this process resulted in some Syrians being returned to Syria against their will. Turkey denied the allegations and claimed that they were only detaining Syrians that were involved in crime.\textsuperscript{150} Although outside of the EU, due to the EU/Turkey deal (which will be discussed at length in the following section) if Turkey was returning Syrians to Syria, an active warzone, then they would have been in violation of the principle of non-refoulement.

Heading into 2016, the German Chancellor proposed changes to make it easier to deport asylum seekers who commit crimes. The proposal involved tightening the law on denying the right to asylum for those who have committed crimes and would allow those on probation to be deported as well. The UN Special Representative for Migration stated that the move seems ‘entirely appropriate’ due to the New Year’s Eve attacks in Germany that had been perpetrated by some migrants.\textsuperscript{151} Despite this, the move still raises issues with regards to the principle of non-refoulement. Even though under refugee law\textsuperscript{152} the principle of non-refoulement contains a limitation with regards to those who have committed serious crimes, human rights law contains no such limitation, therefore, even if the person in question has committed a crime, they still may not be deported if there is a risk that would face persecution or harm on being returned.

In addition to the new law on deportation, since the beginning of January, Germany had been sending back an increasing number of asylum seekers to Austria each day, according to Austrian police. Many of those sent back had no documents or did not want to apply for asylum in Germany, preferring Scandinavian countries instead. The majority sent back to Austria were not Syrians, as they were usually granted asylum, but mainly migrants from Afghanistan, Algeria and Morocco. The daily numbers returned rose from 60 in December 2015, to 200 at the start of January 2016.\textsuperscript{153}

\begin{flushright}
\textsuperscript{150} Melih Aslan, The Independent 29/12/15 ‘Syrian refugees ‘forcibly returned’, claims Amnesty’
\textsuperscript{151} BBC News 9/1/16 ‘Cologne attacks: Merkel proposes tougher migrant laws’
\textsuperscript{152} 1951 Convention
\textsuperscript{153} BBC News 11/1/16 ‘EU migrant crisis: Germany sends migrants back to Austria’
\end{flushright}
By mid-January, it was reported that ‘at every border along the refugee trail, through Macedonia, Serbia, Croatia, Slovenia, Austria, Germany, Denmark and Sweden, the welcome is cooling, the checks are getting tougher and people are being turned back’. There were particular problems at the Greece/Macedonia border where for asylum seekers to be able to cross they needed the correct documents, and if not, they would be sent back to Athens. Young men, in particular, were facing more scrutiny. Only those fleeing from Afghanistan, Iraq, and Syria were supposed to be allowed through, while others began trying to cross the border with forged documents, or doing so using illegal methods. With regards to Greece, they were not keeping a record of the numbers that were being turned back at the Northern border, and had no policy and little capacity to deal with those who were trying to cross the border illegally. In addition, Turkey was once again accused of illegally detaining and returning refugees to Syria, which is illegal under both Turkish and international law, with regards to the principle of non-refoulement. Once again, this would have implications for Europe and the EU/Turkey deal, with Amnesty International stating that ‘the EU needs to wake up to the fact that on its own borders, international law is being broken on a regular basis… and the EU needs to wake up to the fact that its gatekeeper in Turkey is violating the rights of refugees in detaining them secretly and arbitrarily – and returning them to Syria’.

In the second half of January, the German government expanded their list of ‘safe countries of origin’ to include the West Balkan countries such as Albania, Bosnia-Herzegovina, Kosovo, Macedonia, Montenegro, and Serbia. In addition, the government was preparing to list Algeria and Morocco as ‘safe countries of origin’. Both these measures gave the German government ‘firmer legal grounds for deporting migrants from these countries’. The German government also announced that they would consider halting developing aid to North African countries if they were unwilling to take back failed asylum seekers, stating that ‘Germany is ready to help with development, but only if the govern-

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154 Damian Grammaticas, BBC News 15/1/16 ‘Migrants feel chill as Europe tightens frontier checks’
155 Ibid
156 Mark Lowen, BBC News 15/1/16 ‘Turkey ‘acting illegally’ over Syria refugees deportations’
157 There was a rise in asylum seekers from these two countries in December 2015 with most of the claims from here being rejected.
ments are ready to take back citizens who have no grounds for asylum in Germany’. 158 Furthermore, on the 28th January, Germany’s coalition parties decided to tighten asylum rules in a bid to adapt policy to the continued influx of migrants and increasing public opposition to the open-door refugee policy. The restrictions included rules on family reunification and making it easier to deport non-refugees. In order to implement the latter, Germany further extended its list of ‘safe countries of origin’ to include Tunisia as well, and to create reception centres for migrants coming from these ‘safe countries of origin’ in order to speed up the asylum process. 159

Likewise, Norway also commenced a new scheme of returning asylum seekers back to Russia, as they had deemed it as a ‘safe country’, and had already stated in November 2015 that they would immediately deport people who had arrived from a country that they deem ‘safe’. The decision to begin deporting asylum seekers to Russia was condemned by both human rights groups and the UNHCR, claiming that Russia should not be considered a ‘safe third country’. 160

The concept of ‘safe country of origin’, ‘safe third country’ and ‘European safe third country’ is enshrined in the 2013 Asylum Procedures Directive in Article 35-39 which lays out the standards for when another country can be considered ‘safe’ i.e. there must be no risk of the applicants life and liberty being threatened on account of race, religion, nationality, membership of a particular social group or political opinion. If there is a risk of serious harm then the principle of non-refoulement must be respected. However, there is a serious risk if a country decides to implement these measures on a collective basis. For example, Germany deeming Algeria as ‘safe’ and sending all asylum seekers from there back. Each application must be assessed on an individual basis; otherwise it could risk violating the principle of non-refoulement as well as the prohibition on the collective expulsion of aliens. 161 In Sharifi and others v. Greece and Italy, the ECtHR found that Italy had indirectly

158 BBC News 18/1/16 ‘Germany targets North African migrants in crackdown’
159 Eric Maurice, EUobserver 29/1/16 ‘Germany tightens asylum rules’
160 BBC News 19/1/16 ‘Migrant crisis: Norway begins deportations to Russia’
161 Article 4 Protocol 4 to the European Convention on Human Rights. In Becker v. Denmark, the Court found that the collective expulsion of aliens’ means ‘any measure of the competent authority compelling
refouled 35 individuals to Afghanistan by returning them to Greece, and had collectively expelled the applicants, resulting in a violation of Article 3 ECHR and Article 4 of Protocol 4 to the ECHR by Italy. In addition, when referring to the Dublin Regulation, the Court held that an individual assessment must be taken before sending applicants back to the first country of arrival, instead of the Italian practice of ‘expelling en masse’. Most notably, the Court also found, and stressed, that such practices could not be excused because of ‘migratory pressure’.

Furthermore, by the end of January, Sweden had announced that they may reject up to 80,000 migrants in 2016, with the Interior Minister stating that they were preparing to deport them using charter aircrafts.

Overall, the practice of returning/sending back asylum seekers can be seen as a response to the exceptionally high numbers of asylum seekers that the northern countries on the Balkans route received in 2015, and were now looking for ways to reduce that number in 2016. The German government was also facing a backlash from the public due to the New Year’s Eve attacks and the number of asylum seekers that arrived in 2015, and the measures introduced in the beginning of 2016 could represent the pressure that was on the German Chancellor and her government to reduce the numbers of asylum seekers, both arriving and being allowed to remain. The consequences of these measures, however, increased the pressure on the countries further south on the Balkan route, resulting in bottlenecks in Greece, adding to the domino effect, and the number of asylum seekers in orbit. With particular regards to Greece, sending asylum seekers back only served to create a backlog in Greece, and taking into consideration the high number of Court judgements deeming Greece as not a sufficiently ‘safe’ country to return asylum seekers to, this may result in the violation of the principle of non-refoulement by the northern EU States.

aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group’.

162 Sharifi and others v. Greece and Italy (2009)

163 BBC News 28/1/16 ‘EU migrant crisis: Sweden may reject 80,000 asylum claims’ and Eszter Zalan, EU-observer 28/1/16 ‘Sweden to expel up to 80,000 rejected asylum seekers’

Regarding the asylum seekers, these measures have decreased their chances of being able to exercise their right to seek asylum, while violating their other rights, such as the principle of non-refoulement, right to life, and the prohibition on torture, cruel, inhuman or degrading treatment.

4.3 EU measures

The first two sections have focussed on specific, unilateral measures, which have all collectively affected the right to seek asylum in Europe. This section will now focus on EU-wide measures that have come into place throughout the crisis, focussing first on the proposed new EU border force, the replacement of the Dublin Regulation, and the EU/Turkey deal.

4.3.1 New EU Border Force

EU leaders met on the 17th December 2015 to discuss border controls and terrorism in light of the Paris attacks and the fact that two of the attackers entered Europe posing as refugees. The discussion centred on the role of Frontex and its drawbacks, such as the fact that it works to enforce EU-wide border controls but is under the command and control of the authorities in the host country. Since the crisis began, there had been increased land and sea patrols on the Greek islands near Turkey in order to properly identify and register more migrants, however, in 2015, only one in five migrants coming ashore had been intercepted by border guards. During the meeting, a new EU border force was proposed by the European Commission that would have a mandate to intervene whenever national authorities fail to safeguard the EU’s external borders. It would have a stronger mandate than Frontex, however, some governments saw the proposed powers as violating national sovereignty.\(^\text{165}\) The proposed border force was intended for deployment later in 2016.\(^\text{166}\)

\(^{165}\) BBC News 15/12/15 ‘Migrant crisis: EU launches new border force plan’
\(^{166}\) Mark Urban, BBC News 13/1/16 ‘Battle lines drawn over migrant crossings’
4.3.2 Replacement of Dublin

The European Commission announced on the 14th January that they will propose to replace the Dublin Regulation for a fourth time\(^{167}\). The revamp would be based on a distribution key system which would allocate asylum applicants to Member States ‘quasi-automatically’, and the first country of arrival rule currently in the Dublin Regulation would likely be removed. In addition, it is unsure as to whether the new system would be voluntary or binding- the relocation plan that was proposed in May 2015, at the beginning of the crisis, was originally meant to be binding but was met with resistance and was changed to voluntary, and has ultimately now failed\(^{168}\). There is speculation that the scheme will aim to shift the refugee burden from southern EU States to the northern ones. The Refugee Council\(^{169}\) stated that the Dublin system ‘has never been fit for purpose and is inherently unfair on Europe’s border nations’ and that there is a need for a more equitable system\(^{170}\). The proposal to change the Dublin system can be seen as a response to the lack of coordination between Member States during the crisis, and the obviousness that the Dublin system, and most importantly, the first country of arrival rule, was not working\(^{171}\).

4.3.3 EU/Turkey Deal

Back in mid-October 2015, the EU decided to back an action plan with Turkey in the hope that it would ease the flow of migrants travelling to Greece\(^{172}\). By the end of November, EU leaders had agreed on their deal with Turkey. The deal proposed included €3bn to be given to Turkey and a pledge to restart Turkey’s membership bid to the EU in exchange for Turkey helping to hold back refugees trying to travel to Europe. The overall aim of the deal was to be part of the key strategy to manage the refugee crisis, with the

\(^{167}\) Dublin III was introduced in 2013, just three years previously.
\(^{168}\) Nikolaj Nielsen, EUobserver 15/1/16 ‘EU asylum law to include ‘distribution key’’
\(^{169}\) A UK based NGO.
\(^{170}\) BBC News 20/1/16 ‘Cameron faces refugee ‘burden’ battle as EU draws up new scheme’
\(^{171}\) In April 2016, the European Commission proposed two potential changes to the Dublin system: 1. To amend the first-country rule with a ‘corrective fairness mechanism’ to help struggling countries or 2. To remove the first-country rule completely and implement a redistribution system. See: BBC News 6/4/16 ‘Migrant crisis: European Commission proposes asylum reforms’.
\(^{172}\) BBC News 16/10/15 ‘Migrant crisis: EU backs Turkey action plan’
President of the EU Council stating that it was not about getting someone outside the EU to guard Europe’s borders but to help stem the flow of those coming into the EU. However, following the allegations by Amnesty International in mid-December that Turkey was illegally deporting Syrian refugees to Syria, there was a concern that European nations could risk being ‘complicit’ in these illegal deportations due to the EU/Turkey deal. The principle of non-refoulement has been interpreted through case law to highlight that a country may be complicit if they return someone to a country who then returns them to an area where they may face harm and/or persecution, known as chain refoulement or indirect refoulement. The most notable of these cases was M.S.S. v. Belgium and Greece, whereby Belgium was found to be in violation of Article 3 of the ECHR for returning an applicant to Greece where he was subjected to insufficient detention and living conditions and at risk of being returned to Afghanistan. Despite the criticism and allegations made by Amnesty International, Turkey ‘categorically’ denied the allegations of forced returns.

By the beginning of February 2016, the €3bn funding to Turkey to help them cope with the numbers of Syrian refugees was approved by the EU. The EU’s executive was to contribute €1bn and the 28 Member States would contribute the rest. However, despite the deal being agreed in November, there was little evidence to show that Turkey had been successfully stemming the flow of refugees thus far. One month later, however, after a summit in Brussels on the 7th March, EU leaders agreed upon another and more controversial aspect of the EU/Turkey deal. The new plan would involve all migrants arriving in Greece from Turkey being immediately returned, and for every Syrian sent back, a genuine Syrian refugee in Turkey would be resettled in the EU. The new plan came as a response to more and more countries along the Balkans route putting in place restrictions for migrants, the most recent of which was Slovenia, which added restrictions so that only those seeking asylum in the country or arriving for humanitarian reasons would be allowed entry. Serbia

173 Leo Cendrowicz, The Independent 30/11/15 ‘EU funding to stop migrants’
174 Laura Pitel, The Independent 16/12/15 ‘EU ‘could be linked to illegal deportation’’
175 M.S.S. v. Belgium and Greece
176 BBC News 3/2/16 ‘Migrant crisis: EU approves 3bn-euro fund for Turkey’
then responded to Slovenia’s restrictions by announcing its own. Effectively, these new restrictions meant that the route from Greece to Western Europe was ‘shutting down’.

There were, however, major problems and concerns with this new proposal. Both UNHCR and Amnesty International condemned the move saying it was ‘not consistent with European law’ and was a ‘death blow to the right to seek asylum’. EU countries believed the deal to be consistent with international and regional law by designating Turkey as a ‘safe third country’; however a decision such as this must be taken with regard to each individual case of potential return. A third country may be considered ‘safe’ for one particular person due to their specific circumstances, however, that same country might not be considered ‘safe’ for another person. By collectively returning all irregular migrants to Turkey, the EU risks violating the principle of non-refoulement and the prohibition of the collective expulsion of aliens found in the Article 4 of Protocol 4 to the ECHR. In addition, Turkey is not a full member of the 1951 Convention which raises further legal questions. Despite these legal and moral concerns, Donald Tusk, the European Council President, insisted that the new plan had a made a ‘breakthrough’ in dealing with the crisis, and Turkish Prime Minister, Ahmet Davutoglu, stated that Turkey had taken a ‘game-changing’ decision in discouraging illegal migration.

Overall, these measures highlight how the EU has been trying to establish a collective mechanism for dealing with the crisis. Both the EU border force and the EU/Turkey deal can be seen as responses to the mass influx and trying to stem the flow of refugees arriving in Europe. The proposed change to the Dublin Regulation, however, highlights the acceptance by the EU that the current system is not working as it should be, and has resulted in an exacerbation of the negative consequences of this crisis. The modification proposed could potentially help asylum seekers exercise their right to seek asylum and make the system fairer in Europe, by reducing the pressure on southern and external border countries, and distribute asylum seekers more evenly. The outcome of this proposal remains to be seen however, and is likely to be met with large resistance from the northern States.

177 BBC News 8/3/16 ‘Migrant crisis: UN legal concerns over EU-Turkey plan’
178 Ibid
In addition, the EU/Turkey deal is likely to further restrict the possibilities for an asylum seeker to exercise their right to seek asylum in the EU. The deal increases the likelihood of Europe violating the principle of non-refoulement through chain refoulement, and increasing the chances of asylum seekers rights being violated if they are sent back to persecution. Furthermore, as stated by Gammeltoft-Hansen, closing off routes to asylum seekers often results in them using different and more dangerous routes to get away from the harm and persecution they are facing.\textsuperscript{179}

5 Analysis and Conclusion

Thus far, this paper has examined the current international and EU law regarding asylum and how the right to seek asylum functions in the EU. In addition, the principle measures that have been employed by States and collectively by the EU throughout September 2015 to March 2016 and the effect that these have had on asylum seekers have been examined. This section will now analyse these measures as to how they can be understood and what their implications are for the right to seek asylum in the EU.

Firstly, it must be noted that the measures that have been discussed in this paper are not new. For many years the employment of measures to deter or prevent an asylum seeker from wanting or being able to claim asylum in the territory of a State have been used.\textsuperscript{180} Gammeltoft-Hansen has highlighted how there has been an increase in the tightening of national asylum systems and border controls since the end of the cold war as a response to increased flows of refugees and migrants.\textsuperscript{181} The use of visa regimes, increased controls on borders, building fences, sending back asylum seekers, and designating other countries as ‘safe’ are all measures that have been used again and again across the globe. The specific interest of this paper with regards to the measures that have been employed in the EU throughout the research period is the sheer number of measures that have been used together and in competition with each other in such a relatively short space of time. In the past, measures have been used on a country-to-country basis, however, at this time, we have

\textsuperscript{179} Gammeltoft-Hansen (2011) pg.18
\textsuperscript{181} Gammeltoft-Hansen (2011) pg.15
witnessed measures being used by individual States to protect themselves from the influx of refugees while simultaneously creating a domino effect of measures as other States wish to protect themselves from the effects of the influx and the measures neighbouring States have put in place. Furthermore, this increased reliance on deterrence and prevention measures has culminated in the entire region working together to put into place a deal which effectively designates Turkey as a ‘safe third country’ for the entire EU. Due to this unprecedented use of deterrence and prevention measures by the EU during the research period, it is of utmost importance to analyse the effects and consequences that these have had and are likely to have in the near future for the right to seek asylum in the EU.

5.1 Implications for the right to seek asylum in the EU

First and foremost, the closing off of borders and building fences by a number of States, most especially in the Balkans region, has resulted in the limiting of routes and avenues for asylum seekers to claim asylum or reach a country where their request to seek asylum might actually be granted. At the beginning of the crisis when the majority of the States en-route to Germany and Sweden were overlooking the Dublin Regulation and allowing asylum seekers free passage through their territories, asylum seekers were actually granted more freedom of choice as to where they wanted to seek asylum in Europe. This freedom of choice is normally restricted under the EU’s Dublin rules whereby the first country of arrival is normally the country where an asylum seeker must seek asylum, however the relaxing of this requirement from the Dublin Regulation served, at the beginning, as a positive for asylum seekers. However, as the numbers increased and more and more countries along the route began to close off their borders and increase controls, this freedom of choice was almost entirely removed and asylum seeker’s access to any country’s asylum procedure began to be more and more restricted.

Refugee law protects asylum seekers from simply being turned away at the border by the principle of non-refoulement182, whereby an assessment of the harm that an asylum

182 Article 33 (1) 1951 Convention relating to the status of refugees
seeker could potentially face if turned back must be assessed before doing so.183 Rene Bruin has argued that it is now commonly accepted that Article 33 of the 1951 Convention is applicable to anyone seeking protection at the border, highlighting that the ECtHR has clearly judged that ‘there is a right not to be refouled if one presents himself at the border’.184 Furthermore, Article 3 of the Asylum Procedures Directive obliges EU Member States to ‘accept applications for asylum made on the territory, including at the border or in transit zones of the Member States’, as well as Article 3(1) of the Dublin Regulation which obliges Member States to examine the application of any third-country national who applies for asylum at the border or in their territory.185 In addition, Article 4 of Protocol 4 to the ECHR on the prohibition of the collective expulsion of aliens ‘requires individual examination of each decision of expulsion. The sending back of a person to his country of origin without guaranteeing access to a fair procedure is clearly in violation with international refugee and asylum law’.186 With the construction of border fences and increased controls, however, asylum seekers during the research period were increasingly denied access to the border for these principles to be respected. As stated by Emma Haddad, ‘the refugee depends on exclusion, and exclusion depends on well-defined borders’187 – as the border controls increased, and the internal borders abolished by the Schengen Agreement became reinstated, borders began to once again become more and more defined and asylum seekers became more and more excluded.

Following on from the increased border controls and fences, a number of States along the refugee route began imposing limits on the numbers of asylum seekers that would be accepted for 2016. This further complicated asylum seekers’ right to seek asylum by raising the question of whether an asylum seeker’s right to seek asylum would automatically be rejected once the yearly quota had been reached. If so, there is no information as to what would happen to those ‘excess’ asylum seekers- would the borders of the country in question be sealed and all further asylum seekers automatically rejected? How would the prin-

183 Gammeltoft-Hansen (2011) pg.18
185 Article 3 Directive 2013/32/EU and Article 3 (1) REGULATION (EU) No 604/2013
186 Rene Bruin pg.30
187 Haddad pg.302
picle of non-refoulement be respected? How would an asylum seeker effectively be able to exercise their right to seek asylum in reality? Unfortunately it will remain to be seen by the end of 2016 as to the outcome of the quotas some EU States have imposed for this year. However, it is evident that if once the quota has been reached no more asylum seekers will be accepted, then there is a high chance that genuine asylum seekers will not be able to exercise their right to seek asylum and may face being returned to harm or persecution, which will be in violation of the principle of non-refoulement.

Alongside the ability for asylum seekers to exercise their right to seek asylum in the EU becoming more and more restricted, the measures that have been put in place have also had consequences for asylum seekers’ other human rights. With the restriction of access to the more northern States on the refugee trail in the beginning of 2016, a domino effect whereby countries one-by-one imposed border control measures to stem the flow of asylum seekers into their country at the risk of them being stranded there resulted in increased pressure on the more southern States along the route, culminating in thousands stranded in Greece at the Macedonia border. The conditions which asylum seekers were stranded in were characterised by a lack of shelter, food, medical care and warm clothing, alongside Greece’s bad track record for the detention facilities of asylum seekers\(^\text{188}\), resulted in a risk of inhuman and degrading treatment for those stranded in Greece, in violation of Article 3 ECHR. In addition, those asylum seekers that were being rejected by countries such as Germany, Sweden, Austria etc. and being refused entry or sent back were at risk of being sent back to harm and/or persecution violating even more rights such as the right to life, prohibition of torture, right to liberty, the principle of non-refoulement, and prohibition of the collective expulsion of aliens. Furthermore, newly proposed family reunification laws in Denmark and Germany are at risk of violating Article 8 ECHR on the right to respect for private and family life. Finally, the designation of ‘safe third countries’, mainly by Germany, was at risk of violating the principle of non-refoulement and violating asylum seekers’ right to life, liberty, and freedom from torture, cruel, inhuman or degrading treatment, and

\(^{188}\) Cases i.e. M.S.S. v. Belgium and Greece
potentially their right to seek asylum if sent to a country where they could not effectively exercise this right.

With regards to the EU/Turkey deal a number of issues must be examined. Firstly, Turkey has now been designated by the EU as a ‘safe third country’, however for a country to be accepted under international law as ‘safe’ certain conditions must be met. For example, any asylum seekers sent there must have access to protection, the State must be a party to the 1951 Convention, and there must be protection against refoulement.\textsuperscript{189} Turkey has ratified the 1951 Convention and the 1967 Protocol, however they have retained a geographical limitation so that non-European refugees are exempted.\textsuperscript{190} The majority of asylum seekers coming to the EU, and therefore being sent back to Turkey, are from Syria, Afghanistan, and Iraq, therefore Turkey is not bound by the Convention to give these persons access to protection. Furthermore, there is no guarantee that Turkey can guarantee the rights of those being sent back, however one must raise the question of whether their rights could be guaranteed in Greece given the case law available.\textsuperscript{191} Most worrying however are the reports from Amnesty International on deportations of asylum seekers from Turkey to Syria which is in violation of the principle of non-refoulement. By sending asylum seekers back from Greece/the EU to Turkey where they could be at risk of refoulement risks Greece/the EU being complicit in indirect or chain refoulement.

The use of designating a third country as ‘safe’ is an example of how States attempt to use offshore migration control in order to relieve themselves of their responsibility under international human rights and refugee law. Gammeltoft-Hansen has highlighted, however, that the simple fact that a new agreement/deal has been enacted in order to shift jurisdiction or require that ‘intercepted persons are handed over to the territorial state does not affect Convention liability’.\textsuperscript{192} In other words, simply by the EU handing over responsibility for asylum seekers to Turkey because the agreement has been signed does not dissolve the EU or Greece of their commitments under international human rights and refugee law, most

\begin{flushleft}
\textsuperscript{189} Articles 35-39 Asylum Procedures Directive  \\
\textsuperscript{190} Carrera and Guild 10/3/16 ‘EU-Turkey plan for handling refugees is fraught with legal and procedural challenges’  \\
\textsuperscript{192} Gammeltoft-Hansen (2011) pg.139
\end{flushleft}
importantly respecting the principle of non-refoulement. Gammeltoft-Hansen continues by stating:

‘While the involvement or complete outsourcing of migration control to the authorities of another state may weaken claims for extraterritorial jurisdiction, it does not mean, however, that responsibility is simply shifted… As a general principle of international law a state may thus be held internationally responsible for the act of another state if it ‘aids or assists’ these acts, ‘directs or controls’ them, or ‘coerces’ another state into committing them’. 193

In addition, the legality of designating Turkey as a ‘safe third country’ is challenged due to the ECtHR having filed multiple judgements against Turkey for violations of Article 3 on the prohibition of torture, cruel, inhuman or degrading punishment. 194

With regards to the EU/Turkey deal specifically there is confusion as to who could be held responsible if a violation of human rights or refugee law occurs. It would most likely be the sending state, therefore if Turkey is returning Syrian asylum seekers back to Syria they can be held responsible for violating the principle of non-refoulement. Greece could also be held responsible under indirect/chain refoulement as they are the State sending asylum seekers to Turkey. The deal itself, however, has been drawn up and is being orchestrated by the EU; therefore the EU should be the responsible body if any violations occur. However, as a regional body the EU is not party to any human rights or refugee law treaties and therefore there are no mechanisms in place to hold them responsible. If, one day, the EU accedes to the European Convention of Human Rights they could potentially be held responsible by the Court. As of today, however, it is most likely that either Turkey or Greece would be found responsible if any violations occur. This challenge of determining the legal responsibility of States is not unique to the EU/Turkey deal but has been discussed previously with regards to the EU and Frontex. 195

Secondly, the resettlement plan whereby for every Syrian sent back to Turkey a genuine Syrian refugee will be resettled in an EU country raises some political challenges. For the.

193 Gammeltoft-Hansen (2011) pg.140
194 Carrera and Guild (10/3/16)
195 Mitsilegas pg.41
resettlement plan to work, all other EU Member States must agree to the deal to ensure that the one for one offer will work in practice, and risks violating the principle of non-discrimination based on country of origin found in Article 3 of the 1951 Convention.\textsuperscript{196}

Furthermore, it is commonly known that when one migratory route becomes closed off then smugglers will find new routes and alternative methods to facilitate the migration of people. People will always attempt to reach somewhere where they feel safe and have the possibility to live their life in a dignified and free manner and for smugglers the increase in border controls only increase the prices that can be demanded for smuggling, therefore increasing the profit that can be made.\textsuperscript{197}

The deal does offer some positives in that it represents a commitment by the EU and Member States to a more substantive resettlement scheme and a commitment to boost the protection capacity in Turkey, improve Turkey’s reception conditions, increase access to education for refugees, and open up their labour market to Turkey. However, if the deal risks violating the principle of non-refoulement and asylum seekers being sent back to areas where they could face harm or persecution, the negatives seemingly outweigh the positives. In the words of Rene Bruin, writing in 2011, ‘sending persons fleeing persecution back to countries outside the EU that have not made commitments to protect refugees is not the solution’.\textsuperscript{198}

On a more positive note, the proposed changes to the Dublin system could result in a fairer asylum system within the EU. As we have seen in section 3, the current system is biased towards a more unfair burden being place on the Southern and external EU States due to the first country of arrival rule. The proposed changes could mean that States will have to take their fair share of asylum seekers and external States and those with less capacity will have less pressure put on their asylum systems. This would also mean that asylum seekers would be less likely to need to take dangerous routes and methods in an attempt to reach the northern and internal EU States, therefore giving them more protection and safeguards. The success of this proposal remains to be seen, however, and it is likely

\textsuperscript{196} Carrera and Guild (10/3/16) \\
\textsuperscript{197} Gammeltoft-Hansen (2011) pg.18 \\
\textsuperscript{198} Rene Bruin pg.42
that there will be large resistance from some EU States. It is also unsure as to whether a distribution key would be compulsory or voluntary- if voluntary, the success of the proposal seems even slimmer with regards to the failure of the voluntary resettlement scheme proposed by the EU in 2015.199

5.2 Concluding remarks

This paper has aimed to answer the question, ‘what are the implications of the current measures for the right to seek asylum in the EU?’ In order to do so, each sub-question has been answered in turn through sections 3, 4 and 5.200

Overall, the majority of the measures that have been employed by EU Member States and the EU itself are preventing asylum seekers from exercising their right to seek asylum within the EU. The EU has been working towards building a harmonised common European asylum system where anyone in need of protection will be able to obtain it to the same standard in any EU State they seek asylum in. Even before the crisis, the reality of this did not match the dream, but with all of the new measures that have been imposed during my research period, it is becoming increasingly difficult for asylum seekers to gain access to EU territory, let alone exercise their right to seek asylum. As Haddad points out, ‘exclusive sovereign claims of states continue to impede the implementation of any successful policy with regard to finding refugees a safe haven’.201 Avenues for asylum seekers to access Member State’s territories have been cut off, free movement within the Schengen regime is being restricted, and asylum seekers who have managed to reach EU territory are now being sent back to Turkey, all effectively resulting in an inability for asylum seekers to exercise their right to seek asylum in the EU.

It is also prudent to note that while this is the largest refugee crisis Europe has witnessed since the Second World War, around one million people entered the EU in 2015 seeking asylum, compared to 11 million refugees that were in Europe during the aftermath

199 Nikolaj Nielsen, EUobserver 15/1/16 ‘EU asylum law to include ‘distribution key’’
200 1. How did the right to seek asylum function in the EU before the crisis? 2. What are the current measures in place and the consequences of these? 3. What are both the positive and negative sides of these measures (implications)?
201 Haddad pg.320
of WW2. Over 60 years ago European countries rallied together to help those who had fled from war and conflict that had engulfed the continent, now in 2015 and the beginning of 2016, EU countries have been imposing measures which have effectively cut off the ability for asylum seekers to gain protection in the EU. Also noteworthy are the statistics that show Turkey alone has received over 2 million refugees from Syria over the five year conflict, while other neighbouring countries such as Lebanon and Jordan have a combined 1.7 million refugees. The EU and Member States have the capacity to deal with this so-called ‘crisis’, yet they are turning to a country which has already taken its fair share of refugees to prevent asylum seekers coming into the EU. On a hopeful note, the resettlement plan of the EU/Turkey deal offers some sense of EU countries wanting to offer protection to some asylum seekers, albeit a limited number. In addition, if the proposed changes to the Dublin Regulation do take effect, and the numbers of asylum seekers will be shared evenly among Member States, then hopefully in the future we will see a fairer and more equitable refugee regime in the EU that offers protection to those who need it while not putting the majority of the burden on the external countries.

The EU and its Member States have perceived the current asylum seeker influx as a crisis and therefore their actions over the research period can be seen as a response to this perceived crisis. However, under the idea of the rule of law, that the sovereign or the State is limited by law and therefore when ‘government officials wish to change the law, they are not entirely free to change it in any way they desire’, their power to restrict the law is itself restricted in legal terms. What, then, is the protocol when a State perceives itself to be in a time of crisis? Nowadays most legal limits on the State are bills of rights or human rights declarations, however, human rights declarations contain limitations within them therefore ‘allowing rights to be overcome if strict necessity or weighty justification is demonstrated’. The EU Member States are still bound by both international human rights

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202 International Organisation for Migration, ‘IOM History’
203 Amnesty International 3/2/16 ‘Syria’s refugee crisis in numbers’
204 Tamanaha (2004) pg.114
205 Ibid pg.115
206 Tamanaha pg.119
and asylum law, therefore instead of changing the law or derogating from it completely, the States and the EU are redefining it and pushing it to the limits as to what they are allowed to do to prevent and deter asylum seekers from entering their territories.

The EU itself can be seen as stretching the rule of law in terms of their deal with Turkey to restrict the flow of asylum seekers and effectively designating Turkey as a ‘safe third country’. In the future, however, it will remain to be seen as to how the European Court of Human Rights will play its role in protecting the rule of law by potentially limiting what the EU is seeking to achieve at the moment. If cases are taken to the Court, i.e. with regards to the prohibition of refoulement, Article 3 on the prohibition of torture, cruel, inhuman and degrading treatment, Article 13 on the right to an effective remedy etc., the Court may attempt to rectify the potential mistakes that the EU may currently be making if their policies are in violation of certain human rights. For example, the Court could use Article 39 of the ECHR to issue an injunction against a sending State so that the State cannot expel or remove an individual until the Court has had a chance to consider the potential violation. Until that time, however, asylum seekers who are being denied entry into the EU to seek asylum and are being forcibly returned to Turkey, do not have an effective mechanism to prevent violations at the moment. In the words of Bonnie Honig, ‘the current focus on the question of what we are legitimately allowed to do in response to emergency, while important, tends to privilege the moment of decision and obscure its also important aftermath. It tends to focus attention on the moment of emergency and not on the afterlife of survival’.

Writing in 1997, Cecil Kpenou highlighted how measures by European States may have jointly contributed to a decrease in asylum applications, but that it is only a short term response and cannot be regarded as an adequate response to ‘either the global crisis in population movements or to Europe’s own refugee problems in the longer term’. For Kpenou, in order to effectively reduce the numbers of refugees and asylum seekers an ac-

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207 Carrera and Guild (10/3/16)
208 Honig pg.9
209 Kpenou (1997) pg.89
tive policy is needed by ‘addressing the root causes of migratory movements, assisting democratic and economic development and promoting human rights and civil society’. 210

For now, ‘the refugee is both a product of, and remains closely embedded in, a complex interplay between state prerogatives and human rights, and politics and law’. 211 Refugees and asylum seekers continue to be seen and treated as a burden where refugee rights and a State’s sovereign right to control who enters and remains on their territory becomes a point of confrontation 212, a confrontation which is becoming increasingly obvious in the current EU asylum crisis.

210 Kpenou pg.94
211 Gammeltoft-Hansen (2011) pg.11
212 Ibid
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